

# Evolving Federalisms

The intergovernmental balance of  
power in America and Europe

Maxwell European Union Center  
Campbell Public Affairs Institute  
The Maxwell School of Syracuse University



# **EVOLVING FEDERALISMS:**

## **THE INTERGOVERNMENTAL BALANCE OF POWER IN AMERICA AND EUROPE**



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# PREFACE

Federal political systems are inevitably dynamic entities. The balance of power between central institutions and states evolves as new policies (or new versions of old policies) are allocated between the levels of government. This is true in well-established federal systems — such as in the United States — and in nascent systems, such as the European Union.

The papers in this book address the dynamics of federalism on either side of the Atlantic, tracing and comparing the intergovernmental balance of power in the United States and the European Union over time. They are structured around three issue-areas which have strongly affected these dynamics in both arenas: welfare and social policies, market regulation, and the role of law and the courts.

These commentaries were prepared for a symposium held at the Maxwell School of Citizenship and Public Affairs on April 11, 2003. The symposium was a project of the Maxwell European Union Center and the Campbell Public Affairs Institute.

Located within the Maxwell School of Syracuse University, the Maxwell European Union Center is one of fifteen centers in the United States funded by the European Commission. It examines major issues in transatlantic relations and governance in the new Europe.

The Campbell Public Affairs Institute is a research center within the Maxwell School whose aim is to promote better understanding of contemporary challenges in democratic governance.

The Institute is named in honor of Alan K. Campbell, dean of the Maxwell School from 1969 to 1976. "Scotty" Campbell had a distinguished career in academia, state and federal government, and the private sector. Through its work, the Institute honors his lifelong commitment to effective government, full and equal citizen participation, and incisive, policy-relevant research.

The plan for this symposium was developed by Professor Craig

Parsons, Director of the Maxwell European Union Center. Credit is due to Professor Parsons for his effort in bringing together such an impressive group of scholars for the symposium, and in collecting their papers for this book.

We are also grateful to the contributors for their commitment to this project. The success of the symposium is largely due to the skill and effort of Bethany Walawender, Assistant Director of the Campbell Institute, and Kelley Coleman, the Institute's Office Coordinator. Production of this book was led by Bethany Walawender with the help of our editorial assistants Alyssa Colonna and Marco Castillo.

We also wish to thank the Citizenship and Governance SPIRE Committee, a Committee of the Academic Plan of Syracuse University, which provided support for the symposium and this book.

We appreciate your comments on this book. Our email address is [info@campbellinstitute.org](mailto:info@campbellinstitute.org). An electronic version of this book can also be downloaded from the Campbell Institute's website, <http://www.campbellinstitute.org>.

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# INTRODUCTION

Craig Parsons

Comparative federalism is a hot topic at the outset of the 21st century. Articles and volumes comparing the United States and the European Union (EU) in particular are proliferating rapidly. The main reason for this surge in interest lies on the European side of the Atlantic, where increasing delegations of national power to the EU in the 1990s made "federalism" a relevant category. "Call it what you will," The Economist wrote of the EU as early as 1991, "By any other name it is federal government." The EU's "Convention on the Future of Europe" in 2002-2003-modeled rhetorically on the American Constitutional Convention-has precipitated a further torrent of comparative US-EU references by both politicians and academics.

Interest in federalism in the US has been steadier; the subject has long been the bread and butter of American political science. But the erratic "states' rights" agenda of the Rehnquist Supreme Court, and especially the high-profile conflict around Bush v. Gore, have also inspired a burst of writings on federalism in recent years.

This little book, then, is part of a wave of scholarship on comparative federalism in the US and the EU. Its immediate areas of focus are fairly standard for the subject: the chapters address two of the policy areas that have most impacted the evolution of federalisms-market regulation and social policies-plus the institutional channel that occupies a privileged place in practically all studies of multi-level governments-the courts.

The novelty of the volume within this growing literature, however, lies in two aspects of its format. First, despite the comparative inspiration of the project, we invited our contributors to address these topics either in the US or in the EU, rather than both at once. This choice was motivated by our perception that comparative US-EU scholarship often tries to do too much, and ends up with too little. Scholars with deep expert-

ise on both sides of the Atlantic are few and far between. Even given such expertise, fitting the intricacies of two messy polities into one chapter is a tremendous challenge. Much work in comparative federalism thus seems forced to general characterizations that obscure the very complexities that make the subject interesting. In order to provide the best foundations for comparative discussions, we decided to commission parallel but distinct studies of each of these polities.

The same goal of seeking unusually clear, direct, and deep discussions of political trends motivated the second novelty in format: to free our contributors from normal academic standards for notes and citations. They were asked to step back and write in as unencumbered a way as possible about major trends in federalism over time. We hoped this would liberate them at least partly from the typical paying-of-respects to arcane debates, making for more accessible and thoughtful analyses. We were not disappointed (although Shep Melnick could not resist supporting his accessible and thoughtful analysis with 98 notes anyway).

By drawing on deep expertise in the two polities and freeing our experts to write in a particularly direct way, we think we have provided an unusually clear set of building-blocks for a discussion of comparative federalism. The cost of these choices, of course, is that the essays themselves do not directly draw out many comparative lessons. To help open the discussion we mean to encourage, the rest of this introduction will briefly highlight four comparative points.

First, a running theme in these essays is that the early development of federalism in both the US and the EU centered on economic activity and market-building, but that the federalism of economic activity is fairly distinct from federalism in other areas. As Dan Kelemen and Robert Geyer note in the EU context, while economic integration has "spilled over" in a few ways to not-strictly-economic policy coordination (in environmental policies, some social policies, or more recently in crime and immigration, for example), this dynamic does not seem to apply to broader issues of identity or unified political participation. Nor does EU economic integration seem to have generated any real momentum toward two major elements of a serious federal state: unified external representation and major fiscal policies. Even in the US, which of course has created a unified national polity and state, economic regulation continues to have its own relationship to federalism. Melnick notes

that federal economic regulation has largely escaped the Rehnquist Supreme Court's attempts to limit federal control over the state. In both polities economic regulation has exhibited a relatively centralizing federalism, but other issue areas operate by their own dynamics.

Second, there are also interesting US-EU parallels within the federal logic of market regulation. Robertson argues that the early United States effectively limited debate over socio-economic policies to a narrow argument between free markets and business, excluding wider discussion of other social agendas. While these broader debates took place at the national level in European countries, the EU level looks much more similar to the American experience. Implicit in the Geyer and Kelemen chapters is that the construction of European social policies, or "spillover" from market-building policies in this more political direction, has been constrained by the initial core definition of the EU as a project to enhance economic efficiency. Europeans on the political left have often complained that the EU arena is designed (intentionally or not) to privilege economic interests and rhetoric and exclude broader considerations. This parallel to the US is not surprising historically: the early European Communities were conceived at the peak of US economic dominance, and their advocates referred frequently to the US as an inspiration. But there is also some historical irony here: the narrow, market-building logic of federalism that the Europeans partly imitated after 1950 was that of 19th century America. Europeans adopted a federal-market frame in the same decades that the United States altered that frame with more federal legislation, spending, and jurisprudence on social programs and broader rights.

Third, these essays emphasize that despite the much greater breadth of US federalism—extending far beyond the EU's largely economic-regulatory responsibilities—the workings of intergovernmental administrative relations in the two polities are more similar than most analyses suggest. The EU has been described as a fairly unique "regulatory state," exerted power by defining regulations but depending on national administrations to implement almost all EU activities. Yet Peterson and Melnick point out that today's US federal government often has the same relationship with state and local governments. Federal employment has remained static since 1950, at around 3 million, while state and local administrations expanded from 5 million to 17 million workers. State and local spending is now almost equal to federal spending. While the

US federal government's capacity for direct action can hardly be compared to the tiny EU bureaucracy, Washington nonetheless often shares Brussels' fundamental problem: most administrative resources and personnel are located at the subfederal level, and the center is severely limited in its ability to directly compel action from lower levels. The substantial US federal budget is obviously a major difference in these situations, since it means that Washington can offer fiscal incentives to get states to follow its lead. But in legal terms, interestingly, Brussels is the relatively more powerful actor in many areas-enjoying more legal authority to require national action than Washington does vis-à-vis its states.

A final parallel to note is the emphasis here on how federalism issues cross-cut and complicate substantive policy positions. Peterson and Melnick suggest that both for political actors and for judges, views of the appropriate federal balance of power do not simply reduce to centralization of policies they want to strengthen and decentralization of policies they want to weaken. Such substantive-policy calculations are obfuscated by issues like actors' changing bases of power (favoring venues where they are preponderant), and by ideological views of federalism itself. The same is clearly true in the EU context. The European Court of Justice, for example, has aggrandized its power (and by extension that of EU overall) fairly steadily. If this agenda looked for several decades like a free-market crusade, it was probably just as much an opportunistic use of the available treaty provisions in the name of Europeanism. As the embryonic social policy develops, and especially if the forthcoming European "constitution" enshrines the currently-hortatory Charter of Fundamental Rights, we can expect an increasingly complex intermixing of institutional and substantive-policy agendas in EU jurisprudence and legislation.

In normative terms, critics and proponents of federalism (or of particular federalisms on either side of the Atlantic) will both find grist for their mills here. Goldstein emphasizes the "democratic deficit" that many see as the result of the increasingly large, complex, supermajoritarian European institutions. The larger and more heterogeneous the EU gets, she notes, the more likely legislation and treaties will be vague compromises, effectively empowering non-majoritarian courts and bureaucrats to make policy. The US politics described by Melnick, Peterson and Robertson display these same dynamics. Yet such curbs on majority

decision-making were just what James Madison saw as the goal of federalism, of course. These chapters make no attempt to resolve these normative debates about federalism. But by providing unusually clear, direct accounts of trends in these two complex federations, they help normative debates to proceed in a more informed way.



# EU SOCIAL POLICY, EURO-FEDERALISM, AND COMPLEXITY THEORY

Robert Geyer  
University of Liverpool

As an American who is married to a Norwegian and teaches European Union (EU)<sup>1</sup> politics and policy at an English university to British students, I think I am well positioned to understand the particular micro-level importance, meso-level irrelevance, and macro-level value of EU social policy. At a micro-level, EU social policy can be very important for a particular individual or group. Training programmes for the unemployed in deprived regions, educational opportunities for young people, legal redress for gender discrimination and work opportunities for the disabled are all micro benefits of EU social policy. As a beneficiary of these policies, being a spouse of an European Economic Area national, (my Norwegian wife) I have an EU right to live and work in the UK, I know these micro-benefits in detail. The problem is these benefits are dwarfed by national and local policies, are widely and unevenly distributed and even where they are concentrated, in deprived regions for example, the benefits do not translate into pro-European sentiments. At a meso-level, where national policies are formulated and decided, EU social policy plays at best a passive and interactive role. With a negligible budget and bureaucracy (20-30 hard working people in EU Employment and Social Affairs Directorate) and minimal political will behind them, EU social policy has a very limited capacity to enforce its will upon and direct national level social policies. The real benefit of EU social policy lies at the macro-level.

How is this possible if its local and national impacts are so weak?

Because EU social policy, like EU integration in general, encourages peaceful and continual interaction between separate regional units (the memberstates) that promotes multi-level comparisons, learning, and adaptation. The endpoint of these interactions, as Andrew Shonefield wrote in the early 1970s, is “a journey to an unknown destination”. But it is a journey that has led Western Europe away from the horrors of the first half of the 20th century (two world wars bracketing a period of vicious economic mercantilism) and towards one of its longest periods of peace and economic growth. Obviously, EU social policy is not solely responsible for creating this success. However, it is another link in the chain of interdependent connections that binds and constrains the antagonistic impulses within Europe and at the same time encourages and promotes healthy complex interactions that will enable it to prosper and evolve in the future.

For the theorist of federalism, this is not a particularly new or surprising conclusion. They always saw the balancing of regional and central powers as a core concept in the evolution of a successful state and society. What is new, and is something that I will discuss at the end of this paper, is that there is now an emerging scientific foundation to federalism called complexity science that strengthens the traditional “common sense” of federalism. From this perspective, the weakness and unevenness of EU social policy is actually an indication of its reasonableness, not its failure.

## HOW DID EU SOCIAL POLICY DEVELOP?

EU social policy has always been the ugly stepsister of economic policy.<sup>2</sup> It grew out of the political/military bargains embedded in the European Coal and Steel Community (1950) and European Economic Community (1957) and need to assuage the fears of sceptical workers and trade unions. Its secondary position was clearly indicated by its weak foundations in the Treaties of Paris and Rome. These treaties emphasized the need to protect and improve health, safety, living and working conditions, promote basic labor rights and early forms of Euro-corporatism and, as stated in Article 119 of the Treaty of Rome, encourage “equal pay for equal work” between men and women.

Due to the uneven development of the European Economic Community (EEC) in the 1960s, it was not until the early 1970s that significant European social policy proposals were made. Designed as a social counterbalance to the early proposals for a European Monetary Union (EMU), the 1974-76 Social Action Programme laid down three broad areas for policy action: the “attainment of full and better employment”, “improvement of living and working conditions”, and “increased involvement of management and labor” and specified 35 proposals for action. Despite good intentions, these early proposals never made much progress in the 1970s and early 1980s. The EMU was crushed by the oil shocks and massive currency fluctuations of the 1970s, while European Community (EC) membership changes and quarrels inhibited further integration.

In all three areas of the Social Action Programme developments were limited not only by the international situation, but by the internal structure and dynamics of the EC itself. The general strategy of policy “harmonization” undercut the ability of the EC to reach any agreements on social policy issues. The institutional weakness of the European Parliament (not even directly elected until 1979) and the Economic and Social Committee meant that social actors, such as the European trade unions and socialist parties, were less capable of promoting social policies at the European level. The power of the Council<sup>3</sup> and the requirement of unanimous voting on all major social policy questions clearly limited their development. Finally, with the rise of Margaret Thatcher in Britain in 1979, all EC social policy initiatives had to pass the barrier of militant free market ideology.

Given these weaknesses it is no surprise that when European integration revived with the 1985 White Paper and 1986 Single European Act (SEA) social policy was kept to a minimum. Qualified majority voting (QMV) procedures in the Council, which were essential for creating the single European market, were only established for health and safety issues. All other social policies could only be passed with a unanimous vote.

Despite these limitations, the SEA did lay the foundation for late 1980s “Social Dimension”. Comprised of the Social Charter (a listing of twelve areas of fundamental social rights) and subsequent Social Action Programme (SAP), the Social Dimension performed a delicate balancing act between general support for the internal market project and spe-

cific proposals for curbing the excesses of the common market. The Charter was approved as a “solemn declaration” (opposed by the UK) and the battle over social policy shifted to the particular elements of the 1989 SAP. A key Commission strategy at the time was to try and use the QMV status of health and safety issues under Article 118a as a Trojan horse for a wide array of other policies. During this period, social policy made significant legislative gains due to the efforts of the activist Delors Commission, the growth of European level interest group activity, and the final acceptance of European integration by the West European left.

Despite grand plans and substantial effort, the late 1980s and early 1990s produced rather limited results in European social policy. Most of the legislative elements of the Social Dimension were rejected, put on hold, or watered down. However, with the creation of the 1991 Maastricht Treaty and revival of the European Monetary Union (EMU) Jacques Delors brought social and regional policy back onto the agenda. Regional policy was expanded and social policy was given a fresh impetus through a number of institutional changes: the expansion European Parliament powers, creation of QMV in new areas of social policy, promotion of the “social dialogue” between capital and labor, and creation of a new form of social policy initiative by agreement between EU capital and EU labor. This seemingly clear advance for EU social policy was complicated by the unique procedural device of the British “opt-out” clause. This mechanism, which allowed Britain to “opt-out” of future qualified majority approved social policies, removed a major source (British opposition) of Council resistance to many EU social policies, but also greatly complicated both the legal foundation and implementation of new EU social policies since they could not legally or financially affect the UK.

In the mid-1990s social policy progress remained slow, but support for it continued to build. The Maastricht treaty, after various delays, was finally ratified in 1993. In 1994, three wealthy pro-social policy memberstates, Austria, Finland, and Sweden, voted to join the EU. Social policy NGOs continued to develop at the European level. Most importantly, in May 1997 the arch opponent of EU social policy, the British Conservative Party, was decisively defeated by the labor Party, which immediately promised to end the British social policy “opt-out”.

During the debates preceding the 1997 Amsterdam treaty revisions, social policy was completely overshadowed by concerns with EMU, integrating new East European members and the new section in the treaty dealing with employment policy. Despite this lack of attention, the treaty did give a clear commitment for the EU to address a variety of forms of discrimination in Article 13. However, the treaty refrained from making substantial spending commitments to new social policy areas and dropped measures for improving the position of the elderly and disabled from Article 137.

The subsequent Commission publication on social policy, *Social Action Programme 1998-2000*, clearly took a more consolidating approach to social policy development. The document focused on just three main areas (jobs, skills and mobility, the changing world of work, and an inclusive society) and contained the usual array of social policy proposals, but framed many of them in the new light of employment policy. With the integration of the employment section into the Amsterdam treaty and the subsequent creation of the employment policy guidelines, the social policy supporters saw an opportunity for justifying and expanding social policies through their linkage to employment creation.

## EU SOCIAL POLICY TODAY

Since the end of the 1990s, five main developments have dominated the European social agenda: the European Employment Strategy, the 2001-2006 European Social Agenda, the growth of new policy methods, the extension of EU social policy to new Central and Eastern European member-states, and the creation of a fundamental charter of social rights and the EU “constitutional convention” process.

The European Employment Strategy, which emerged out of the 1997 Amsterdam treaty (Title VIII, Articles 125-130), was a spillover from the success of European Monetary Union. It was an attempt by pro-employment actors and key member-states to raise the profile of employment issues through the development of a coordinated employment strategy. This strategy had four main priorities: improving employability, development of entrepreneurship, encouraging adaptability, and reinforcing equal opportunities and was based on indirect cooperation and the open method of coordination as laid out in the

Luxembourg Process. Subsequent Council meetings clarified and promoted the strategy, particularly the Lisbon 2000 meeting.

The *Social Policy Agenda* was the first major document of the new Employment and Social Affairs Commissioner, Anna Diamantopoulou. In line with the emphasis on employment and the economic importance of social issues, it stressed that the “guiding principle of the new Social Policy Agenda will be to strengthen the role of *social policy as a productive factor*.”<sup>4</sup> It went on to outline 34 new proposals under the headings of job creation, working environment, promoting a knowledge based economy, free movement, social protection, combating poverty and exclusion, gender equality, fundamental rights, combating discrimination, promoting quality in industrial relations and dealing with enlargement issues. The document promoted the adoption of 20 pieces of pending legislation, but did not specify any radically new proposals for particular legislation.

Equally important, both the Employment Strategy and Social Policy Agenda recognized and encouraged the development of two new and related means of social policy development: *mainstreaming* and the *open method of coordination*. In the European context, mainstreaming emerged out of the activities of gender activists who were attempting to surmount the limitations of EU social policy by bringing gender issues into the mainstream of general EU policy making. In a context of few new legislative developments and constrained budgets, mainstreaming offered gender activists a number of opportunities for expanding gender policy-making, strengthening gender NGOs, influencing the agenda-setting process, and raising awareness of gender issues. By the end of the 1990s, mainstreaming EU gender policy had become a successful strategy and brought gender issues increasingly into the core of EU policy making. This success encouraged other social policy actors to duplicate this strategy. By 1998 most major EU social policy NGOs had mainstreaming strategies and in the Social Policy Agenda, the Commission stated that “the use of mainstreaming as a tool will be strengthened and further developed.”<sup>5</sup>

The Open Method of Coordination (OMC) grew out of the development of the Employment Guidelines process created at the Luxembourg summit. It involved a number of policy strategies, the most important of which was benchmarking (although mainstreaming is often included as

an OMC strategy). Benchmarking involved a move away from strategies of harmonization and central decision-making and towards:

A ‘post-regulatory’ approach to governance, in which there is a preference for procedures or general standards with wide margins for variation, rather than detailed and non-flexible (legally binding) rules.<sup>6</sup>

Both mainstreaming and OMC gave EU social policy supporters new tactics for promoting and developing EU social policy and for strengthening European social policy actors and supporters.

The forthcoming expansion of EU membership to Central and Eastern Europe (CEE) has raised a number of fears and challenges for EU social policy. Current EU members with extensive and universalistic social policy regimes are worried about increased competitive pressure on their own regimes from low wage and regulation regimes in the applicant states. Other poorer member-states, which currently receive significant EU regional funds, are concerned that the new applicants will significantly reduce their regional allocations from the EU. Other countries with agricultural sectors that are heavily dependent on the EU Common Agriculture Policy (CAP) fear the negative impact on their farmers as the low-wage CEE agricultural sectors are integrated into the CAP. On the other side, the CEE applicants are apprehensive about competitive pressures from the EU driving down living standards, drawing away their most skilled workers and capital, and overwhelming their agricultural sectors. How these fears and concerns are assuaged and overcome in a context of strong budgetary constraints will be a central challenge to the EU for the foreseeable future and clearly impact on the social situation in the EU.

Lastly, for some time EU social policy actors have been attempting to embed social issues and policies in the fundamental EU legal framework through the use of “charters” of social rights. In the late 1980s, Jacques Delors proposed a European social charter (modeled on the 1961 Social Charter of the Council of Europe). It made various social commitments and guarantees, but only passed in a non-binding form. In the late 1990s, a new Charter of Fundamental Rights was promoted by the Commission, European trade unions and social NGOs and was

again approved in a non-binding form. The current shape of this strategy is the “convention” process that is, in theory, working on a true constitution with some form of bill of rights for the EU. It is a lengthy and convoluted process and is unlikely to lead to a radical constitutional transformation. Nevertheless, if social issues are entrenched in the basic EU treaties/constitution, then one would expect a noticeable increase in the opportunities for further social policy development.

Overall, despite all of this frantic activity, one is still struck by the relative weakness of EU social policy. It has seen significant developments and is pursuing a number of innovative policy strategies. However, the impact of the EU in many of these new policy areas is noticeably limited by the small EU bureaucracy, minimal budget for social policies, resistance from member-states and the very diversity of member-state social policy regimes. Moreover, EU social policy actors have been innovative because they were in such a weak position that they had no other choice. They had to link into health and safety policy in the late 1980s and employment policy in the late 1990s and create new policy strategies (mainstreaming and OMC) because their own power base and traditional strategies were so limited.

## EUROPEAN INTEGRATION THEORY AND EU SOCIAL POLICY

European integration theory has always been heavily indebted to federalist thinking, but has seldom been able to use the “F” (federalism) word, particularly after the British joined the EC in the early 1970s, for fear of antagonizing national interests. In the early years of the European integration federalist theory was openly discussed as a strategy for moving beyond the carnage of nationalist aggression during WWII. However, as the more grandiose ambitions of the early federalists faded with the growing limitations of the Council of Europe, the more pragmatic and functional approach of the European Coal and Steel Community (ECSC) seemed to demonstrate an incremental path towards a peaceful federal future. With the transformation of the ECSC into the European Economic Community, theorists argued that the EEC’s functional integration had developed a powerful logic of “spillover” whereby the benefits of integration in one area would spillover into another area, for example from economic to social issues and policies. Hence, over time

spillover would peacefully lead to some form of fully federal Europe. The reassertion of national interests by France in the 1960s and the general stagnation of European integration in the 1970s and early 1980s spoiled the functionalist dreams and profoundly reasserted the position and role of the member-states. However, with the revival of the EU in the late 1980s and 1990s, theorists began to recognize the multi-faceted and multi-level nature of the integration process.

These “multi-level governance” (MLG) theorists tried to move away from unitary and historically static interpretations of EU policy dynamics and argue that the EU was not dominated by intergovernmental or supranational dynamics, but exhibited aspects of each in varying degrees at different times and policy arenas. For MLG theorists, the EU is composed of “overlapping competencies of among multiple levels of governments and the interaction of political actors across those levels.”<sup>7</sup> In essence, for MLG theory, each policy area and memberstate have their own distinctive and interactive relationship to the EU and this relationship varies over time and by policy area. Moreover, different European, national and regional actors learn from and adapt to each other over time as well. This learning could lead to policy convergence, but it is not a simple linear process and often leads to unintended results and consequences due to the distinctive nature of the national policy arenas. As Maria Green Cowles and Thomas Risse concluded in their recent study of Europeanization:

Europeanization does not result in the homogenization of domestic structures. Member states face varying degrees of adaptation pressures to the “regulatory patchwork” of EU rules and regulations. Different factors restrain or facilitate their adaptation to these Europeanization pressures. Yet, the transformation of domestic structures takes place all the same, oftentimes in rather fundamental ways.<sup>8</sup>

From this perspective, there is nothing particularly new about the current challenges confronting EU social policy or the growth of new methods of coordination, mainstreaming, etc. They are a result of the continual and variable evolution of the European integration framework.

In general, multi-level governance theory is not dissimilar from the general theoretical concepts of Anthony Giddens’ “third way” politics, par-

ticularly in terms of their emphasis on the complexity and openness of the evolution of policies. Moreover, I would argue very strongly that they are very good descriptions of the EU policy process. However, are they really scientific theories in the traditional sense? They are not very parsimonious, admitting as they do that many other factors are at play in EU policy development. They do not explain causality very well, seeing multiple influences on particular outcomes. They are not predictive, emphasizing historical openness. Moreover, they do not lead to universal rules; each case having its own dynamics.

If multi-level governance theory is a good description, but poor theory in a traditional sense, what should the student/researcher/policy actor do to begin to recognize and understand the open, multi-level and complex nature of the EU-member-state policy process?

There are two linked answers to this question: a continual process of description-oriented comparative policy research and complexity theory. Due to the complexity and evolving nature of the EU-member-state-local social policy relationship, a continuous effort will need to be made to explore the particular aspects of the interaction of international, national, and sub-national dynamics. This work is currently being done in a variety of research settings and is the “bread and butter” of a number of university departments, governmental agencies, and independent research organizations. However, the trick is to try to bring together as many descriptive strands as possible. In the case of social policy interaction, researchers should try to interweave the processes of policy learning at the EU level with increasing influence of sub-national actors in the national arena while at the same time keeping an eye on the dynamics of other policy arenas and social policy dynamics in other member-states. This is a very difficult job, but provides academics and policy actors with the “real-life” descriptive research upon which to base their teaching and actions.

## EUROPEAN INTEGRATION AND COMPLEXITY THEORY

Linked to these pragmatic tactics, European integration theory should embrace complexity theory. Complexity theory,<sup>9</sup> which emerged out of the physical sciences in the mid-20th century and has increasingly

spilled over into the social sciences at the end of the 20th century, offers a new paradigmatic framework for re-conceptualizing the so-called problem of complexity. Traditional science was based strongly on an orderly and linear Newtonian vision of the world in which cause led to effect, the parts of any system created the whole, and reductionism, determinism and predictability were the pinnacle of intellectual achievement. In essence, the universe was a giant mechanical clock and given the fundamental laws of the clock, one could know both the past and the future. Much of the industrial revolution was based on Newtonian theory and modern universities legitimated and institutionalized this paradigmatic framework through the orderly division of sciences and vertical departmentalization of distinctive academic “fields”.

Undoubtedly, this vision had a profound impact on the social sciences. Desperate to mirror the success and prestige of their natural science colleagues, many social scientists absorbed the Newtonian framework and postulated that humanity was or should be fundamentally orderly. From the orderly foundations of self-interested and rational “economic man” in neo-classical economics and rational actor in voting behavior in political science to the linear and deterministic theories of historical development in Marxism and modernization theory, much of the work of 20th century social scientists was driven by the desire to either ignore or eliminate human complexity. Arguably, this drive for order led to some of the most grotesque horrors of the 20th century, ranging from the nightmare of Soviet collectivization and fascist racial purification programs to the more recent results of IMF/World Bank “structural adjustment” policy on numerous third World countries. All of these visions wrapped themselves in the cloak of order and justified their outrages by their conviction of the scientific certainty of their means. Since they were scientific and orderly and could see the inevitable or appropriate end, then all means were justified.

Ironically, just as the social sciences were most fervently embracing the paradigm of order, the natural sciences were beginning to experience a Kuhnian paradigm shift away from order and towards complexity. Beginning in the more esoteric worlds of advanced mathematics and quantum physics, the work of Nobel laureates such as Albert Einstein, Erwin Schrödinger, and Werner Heisenberg demonstrated that some parts of the physical world were orderly, gravity for example, while other parts were inherently relative or disorderly, the fundamental

nature of light and quantum mechanics. Order and mechanical laws were no longer universal, but interacted with disorderly phenomena to create an evolving physical universe.

Once this breach was made in the Newtonian paradigm, all sorts of phenomena that were previously ignored or explained away began to reassert their importance. These new “complex systems,” such as the motion of a heated liquid in a contained space, the dynamics of the weather, or the evolution of a species, were now seen as being just as important to the basic functioning of the natural world as orderly phenomena. In this new complexity world, there are orderly, complex, and disorderly phenomena and all three of these elements exist and interact with each other. From this perspective, causality becomes partial causality, reductionism explains only part of the process, and determinism and predictability are reduced to variable probabilities. By the end of the 20th century, a complexity perspective had been embraced by virtually every branch of the natural sciences.

For the social sciences it has only been in the last two decades of the 20th century that complexity began to make a substantial impact. This is not to say that there were never any challenges to the Newtonian framework in the social sciences. Immanuel Kant in the 18th century attacked the mechanistic view of mankind. Sigmund Freud and Max Weber in the late 19th and early 20th centuries argued that humans and their institutions were not necessarily orderly or rational. In the 1960s, the famous Austrian economist F. A. Hayek argued that: “in the field of complex phenomena the term ‘law’ as well as the concepts of cause and effect are not applicable.”<sup>10</sup> By the 1970s, the influential French postmodernist philosopher Jean-Francois Lyotard, in *The Postmodern Condition: A Report on Knowledge*, was arguing for an end to all order based “grand narratives” of Western society. Consequently, from the 1970s onwards as social scientists continually failed to capture the ‘laws’ of society and economic interaction and were continually frustrated over their inability to do so, they began to significantly question the Newtonian framework that underpinned political thinking on the left and right.

Out of this emerged the extremely diverse but significant challenge of (disorderly) post-modern social science. The postmodernist position stands in direct contrast to the traditional orderly (modernist) social sci-

ence position. Arguing against universal notions of truth, objectivity, reason, and “grand narratives,” they see the human world as contingent, diverse, indeterminate, and relativistic. As such, postmodernists have tended to support a strong “anti-naturalist” positions, seeing the study of society and humans as something entirely distinct from the study of nature and the physical world, while traditional Newtonian social science views the human world from a naturalist standpoint, emulating the natural sciences.

The complexity perspective acts like a bridge between these two opposing naturalist/anti-naturalist poles. In complexity, the physical and human worlds contain phenomena that are orderly, complex, and disorderly. All three of these types of phenomena exist and interact with each other. Moreover, within this range of phenomena exist complex systems that have numerous interacting units, generally relying on simple rules yet evolving in multiple directions. Hence, from a traditional Newtonian perspective, the EU and its policy process is an annoyingly incoherent and chaotic structure that must be ordered (made more or less federal, for example) if it is ever going to be effective and legitimate. From a postmodernist perspective, the EU is merely one of a wide possibility of narratives and does not represent a fundamental ordering of the European political system. On the other hand, from a complexity perspective, if the EU is seen as an adaptive complex system rather than an inherently orderly or disorderly one, then the open, evolving, and uncertain nature of European integration is an indication of its healthy and “normal” development. It is both a fundamental framework for peace, prosperity and security and an uncertain journey to an unknown destination.

## COMPLEXITY THEORY AND FEDERALISM

As discussed in the beginning of the chapter, I would suspect that many federalist theorists have been working in some form of complexity framework for some time. Fundamentally, all complexity does is re-link federalist common sense with the evolving world of the natural sciences. This may be greeted by a shrug of the shoulders, but I would argue that this potential linkage is much more profound than it may appear at first sight. First, there are a huge array of concepts and ideas in the complexity sciences (attractors, emergence, dissipative systems,

etc.) that I cannot begin to explore in this chapter but which would be extremely relevant to understanding a whole range of phenomena, including federalism, in political science. This work is just beginning and, I would argue, is a major new arena in the social sciences in general. Second, complexity allows social scientists and federal theorists to go beyond the stale and increasingly out-of-date debate between Newtonian naturalists and post-modern anti-naturalists. That debate, based on an 18th/19th century conception of the natural sciences, is dead since the natural sciences have not stood still but moved into a complexity paradigm. It is about time for the social sciences to do the same.

At a more day-to-day level, it is essential for those living under federal systems (Americans, Germans, Swiss, etc.) to understand just how difficult it is for those individuals living under unified systems (particularly the British<sup>11</sup>) to come to grips with federalism. Every year I confront a new wave of British students, steeped in the orderly “Westminster model” of central power and control, who struggle to understand the inherently messy, uncertain, and evolving nature of the EU and Britain’s relationship to it. “How can such a mess work?” “Who is in charge?” “Where is it going?” As an American, I am used to the normal mess of a federal structure. Thus, it is easy for me to see the historical parallels of European integration with the evolution of US federalism. This is not to say that the EU is following a similar pattern to the US; it certainly is not. However, particular problems and policies, EMU and EU social policy for example, resonate with US examples, the creation of the US currency and formation of US welfare state, from the 19th and 20th centuries. From this position, complexity theory could act as a bridge between centralist and federalist traditions.

## THE IMPACT AND FUTURE OF EU SOCIAL POLICY

Obviously, a detailed assessment of the impact and future development of EU social policy is a monumental task and would depend on where you looked and how you interpreted your findings. However, one can draw some general conclusions. As discussed in the introduction, at the micro-level, EU social policy will continue to have a small and variable impact on different local constituencies throughout the EU. For example, EU labor policy will continue to provide a legal floor and policy

initiatives in the UK that a Conservative or labor government would almost never have promoted. On the other hand, for the more advanced Swedish labor policy system, EU labor policy is irrelevant. A similar UK-Swedish division can be seen in gender policy. These particularistic dynamics will vary over time and have some impact on local situations, but only a minor impact on larger national dynamics.

At the meso-level, with the increasing emphasis on strategies of mainstreaming and open method of coordination, EU social policy will continue to function as an elite learning and interacting facility. National and European political and economic elites are constantly being encouraged to learn and adapt from other national elites and systems. This process will not lead to a unified EU social regime, but foster increased national debates and dialogue over the shape, size, and development of national regimes. The specific outcome of these debates and interactions can be traced, but the exact input or involvement of EU social policy in the outcome is virtually unknowable. However, from a complexity perspective these particular outcomes are secondary in relation to the process of increased dynamic learning and interaction. Increasing local/regional/national input and interaction and increasing the learning and interaction of policy elites should lead to healthy and continually evolving national social policy regimes that will be capable of adapting to the challenges of globalization, Europeanization, or whatever new “ization” emerges in the near future.

Finally and most importantly, at the macro-level EU social policy will continue to play a role in the creation of a fundamental framework for peaceful and institutionalized interaction and integration between member-states. I have briefly discussed five areas of primary concern for EU social policy actors. The final outcome of these challenges and processes is still unknown. Nevertheless, by merely creating and maintaining a stable institutionalized framework for European interaction, the EU and its social policy have substantially enhanced the ability of the EU to prosper and evolve in a progressive direction. Writing this, a US parallel immediately comes to mind. Imagine if the American Civil War had led to a division of the United States. Imagine if these “countries” continued to be antagonistic towards each other. The likely outcome of this conflict would have been a greatly weakened and much less prosperous “dis-United States”. In essence, the unpredictable but fundamental benefit of the Civil War was the creation of a long and continuing period of



internal US unity and peace. From this perspective, particular policy outcomes pale in significance. Hence, the real value of EU social policy is that it helps to maintain and cement the fundamental peace within the EU. The particular EU, national, and local outcomes of the policy, though important in local and academic terms, are secondary to the more fundamental development of regional peace.

## NOTES

<sup>1</sup> The EU has gone through a number of institutional and name changes. From 1950-57 the primary institution was the European Coal and Steel Community. 1957-69 it was the European Economic Community. From 1969-1992 it became the European Community(ies). Finally, in 1992 it became the European Union.

<sup>2</sup> This review of EU social policy draws extensively on Geyer 2000 and Geyer 2003.

<sup>3</sup> There are four main EU institutions, all of which have evolved significantly over the past 50 years. They are the Council (the primary decision-making body, composed of member-state representatives), Parliament (the representative body with increasing decision-making powers), Commission (the bureaucracy) and Court.

<sup>4</sup> European Commission, *Social Policy Agenda*, Brussels: EC, 2000, p. 7.

<sup>5</sup> Ibid., p. 15.

<sup>6</sup> C. De La Porte, P. Pochet and G. Room, "Social Benchmarking, Policy Making and New Governance in the EU," *Journal of European Social Policy*, 2001, p. 302.

<sup>7</sup> G. Marks, F. Nielsen, L. Ray and J. Salk, "Competencies, Cracks and Conflicts: Regional Mobilization" in the European Union' in Marks, G., F. Scharpf, P. Schmitter and W. Streeck (eds.) *Governance in the European Union*, London: Sage, 1996. p. 41.

<sup>8</sup> M. Cowles, M. G. and T. Risse, "Transforming Europe: Conclusions" in Cowles, M. G., J. Caporaso and T. Risse *Transforming Europe: Europeanization and Domestic Change*, Ithaca: Cornell University Press, 2001. p. 236.

<sup>9</sup> D. Byrne, *Complexity Theory and the Social Sciences: An Introduction*, London: Routledge, 1998. See also R. Geyer, "Britain in the European Union" in N. Ellison and C. Pierson (eds.) *New Developments in British Social Policy*, Palgrave: London, 2003. See also R. Geyer, and S. Rihani "The Death of Order and Dawn of Complexity: 21st Century Economics," *Politics and Society*, manuscript.2004.

<sup>10</sup> F. A. Hayek, *Studies in Philosophy, Politics and Economics*, Chicago: University of Chicago Press, 1967.

<sup>11</sup> Bill Bryson, the famous travel writer, facetiously argued in his bestselling book, *Notes from a Small Island*, that the British were so orderly that they would have been much better communists than the Russians, "Please understand I'm not saying that Britain would have been a happier, better place under Communism, merely that the British would have done it properly" (p.69).

# THE CHANGING POLITICS OF FEDERALISM

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## THE CHANGING POLITICS OF FEDERALISM

Hobbes insisted there could be but one sovereign. If divided in twain, either one would kill the other, or both would fall to a third. The American founders nonetheless divided political authority between the nation and the state, creating potentially dual sovereigns instead of one. James Madison, in the *Federalist Papers*, argued that such division of power could enhance liberty by reducing the chance of majority tyranny. That may be, but the struggle for power between state and nation has been as persistent as Hobbes expected, leading not only to a civil war but continuous political conflict ever since.

Federalism has in fact been a principled component of party politics for centuries. The issue divided the Federalists from the Jeffersonians, the 19th Century Republicans from the Democrats, and New Deal Democrats from conservative Republicans during the depression and Great Society eras. One side stood for a strong national government, the other defended the rights of states and localities.

But just how principled has this debate over federalism really been? After all, the Federalists, the party of the nation, invoked the dual sovereignty principle when Jeffersonians captured control of the national government. A century or more later, Republicans relinquished their allegiance to national institutions when it appeared corporate interests could

be better protected under a states rights flag. Meanwhile, Democrats gave up on state rights in order to regulate the economy and create the welfare state. In short, parties are less committed to a particular conception of federalism than they are to the regional and group interests upon which their political success depends.

Even today, partisan ties to traditional understandings of federalism are at risk. Democrats are rediscovering the blessings of state and local control, giving them a Jeffersonian coloration once bleached from their flag. At the same time, Republicans are rediscovering some of the reasons Hamilton wanted a strong national government.

## NOT JUST SECURITY POLICY OR ELECTION DISPUTES

In making this claim, I wish to go beyond the obvious ways in which the George W. Bush Administration has asserted the power of the national government in the months following 9/11. Any newspaper reader understands that Homeland Security requires a strong national government, the Republican Administration is prepared to finance intergovernmental grants designed to enhance the nation's security, and, on this matter, state and local governments must take their cue from national authorities. Some Democrats may protest on one point or other, but the parties don't really disagree. Nor do I wish to explore the contradictions that emerged during the *Bush v. Gore* legal fracas, entertaining as these were. To political scientists who enjoy the heat of political controversy more than any particular outcome, what was more titillating? Republicans insisting that the laws of the State of Florida, and the decisions of state courts, must be subordinated to ancient federal statutes and obscure passages of the Constitution never before interpreted? Or Democratic claims that the Supreme Court had no authority to interfere with a state's right to determine the outcome of its own elections? Each side had to betray—or at least badly contort—its traditional federalist rhetoric for an immediate partisan purpose that seemed vastly more important.

If this were my only point, the task would be an easy one. When faced with exceptional events, both political parties will put to one side their federalist values, whatever they may be. Such momentary lapses from party principles are all too easily understood. More challenging is to

discern the cause of a deeper partisan shift, one in which Democrats have regularly defended state autonomy, while Republicans repeatedly assert national authority. These new propensities are hardly complete and do not apply in all contexts. But the trend is perceptible enough to deserve reflection and commentary. Let me begin by examining one tip of a particularly large iceberg, then turn to some of the other ice fields that bear close watch, and, finally, consider what some of the sources of the global change might be.

## EDUCATION POLICY

Education policy, once the sole responsibility of state and local governments, provides a most compelling instance of the new politics of American federalism. For the first hundred years of American education, elementary and secondary schools were under the control of state and local governments, with scarcely any federal role at all. But as baby boomers were skipping into the nation's schoolyards in the years following the close of World War II, public support for federal aid grew. As part of their broader agenda of increased federal engagement, many Democrats gave full support to the idea. Meanwhile, Republicans, opposed to the expansion of the national government, said federal aid would inevitably lead to unwanted federal control. As a result of this opposition, together with issues involving parochial aid and school desegregation, Democrats were unable to push federal aid through the legislative labyrinth. Only after Sputnik was interpreted as a sign that Americans could not compete in math and science did Republican opposition soften and the National Defense Education Act was passed. Even under this law, only token monies were appropriated. The law itself was carefully written to ensure that all control over funds and curriculum remained entirely within the hands of state and local governments.

In 1964, the election of Lyndon Johnson and an overwhelming Democratic Congress broke the legislative logjam that had stalemated broader school aid ventures. Federal monies appropriated under the Elementary and Secondary Education Act of 1965 were now to be used to provide compensatory education for the disadvantaged. A few years later, a companion piece of legislation provided funding for the education of the disabled. These federal aid programs also gave the federal

government new bargaining chips that helped persuade southern school systems to desegregate. In short, Democratic leaders opened the school door to significantly increased federal involvement.

School assistance programs continued to grow during the Nixon and Ford Administrations, but the energy behind that growth came not from the White House but from a large, activist Democratic Congress. Federal aid grew to as much as 11 percent of total school spending. But despite growing support for federal aid programs, the role of the national government became an increasingly partisan issue, when Jimmy Carter embraced the demand by teacher unions that a separate Department of Education be created. Republicans complained that forming such an agency would only lead to federal “thought control.” For this reason, Ronald Reagan cut education expenditure and promised to dismantle the Department of Education upon his assumption to office in 1981. Only hardnosed Democratic opposition saved the Department from abolition during the initial two years of the Reagan era.

Yet it was during the Reagan years that the partisan transformation began. The signal event, perhaps, was the issuance of a report, *A Nation at Risk*, issued by the National Commission on Educational Excellence, appointed by Reagan’s Secretary of Education, Terrence Bell. Initially, the Reagan Administration had no idea of what was happening to itself—and to the Republican party. Significantly, the report was written by a “national” not a “presidential” commission. The White House did not want to give education undue attention at a time it was trying to abolish the Department overseeing it.

But even though the commission had less than presidential status, it captured public attention. “A rising tide of mediocrity” in education threatened the nation’s well-being, the report intoned. Student test scores were falling, the United States was trailing its competitors abroad, too little time was being spent in school, and the time spent was being devoted to other than academic subject matter. “Bachelor living,” not algebra, was the subject matter of choice.

*A Nation at Risk* urged schools, teachers, parents, and students to reform themselves. A flurry of additional reports, prepared by private organizations, reinforced its message. The media gave the topic extensive coverage; governors, both actual and wannabee, embraced its agenda,

and even the White House decided education could become a Republican issue. When Terrence Bell stepped down, the president appointed the outspoken Texas educator, William Bennett, to the education bully pulpit. He proposed that the compensatory education program be turned into school vouchers for poor children. The Republican party began a crusade for quality, standards, and excellence from which it has never swerved. Both Presidents Bush 41 and Bush 43 championed the issue, calling for goals, accountability, and parental choice.

Democrats stared in wonderment at this broad daylight theft of an issue they regarded as their own. Many Democratic governors of the neo-liberal variety, of which Bill Clinton was the most prominent, accepted the need for reform but said the changes would cost money. Even though the president opposed school vouchers, the most sweeping of the proposed reforms, he helped secure passage of legislation that promoted public-school choice, charter schools, standards, and a certain measure of accountability. But the Clinton Administration’s reform commitment was more symbolic than real. Help for charter schools remained skimpy and the administration did little to impose accountability on recalcitrant state governments. It was left to a few high-visibility governors to push the “*Nation at Risk*” agenda. The most notable results were obtained in Texas, where Governor George W. Bush took credit for a well-developed accountability plan introduced earlier at the behest of none other than the future presidential candidate, Ross Perot.

So when George W. Bush came to Washington, he had a well-defined education agenda in mind. Long gone was any thought of abolishing the Department of Education. On the contrary, he oversaw the enactment of No Child Left Behind (NCLB), the most significant piece of federal education legislation since Lyndon Johnson’s compensatory education bill. It required the testing annually of all students in grades 3-8, with another test administered in high school as well. All schools had to demonstrate annual progress on these tests. Schools who do not make progress must give parents a choice of school elsewhere in their district. Repeated failure will lead to school reconstitution. Eventually, all students must be above average. Never before had state and local governments been subject to such a harsh set of federally-imposed educational regulations. The party of local control had become the party of federal mandate.

Meanwhile, the Democratic party became the Me-Too party. Democrats on Capitol Hill voted in large numbers for the new legislation but said that they did so mainly because it would increase federal funding substantially. Their enthusiasm for federal mandates was noticeably more cautious. They stripped the Bush Administration proposals of their school-voucher provisions, softened the accountability provisions by delaying their implementation, and made sure that school choice opportunities were as limited as possible. Within months after the passage of the law, Democrats criticized the Bush Administration for its draconian efforts to impose restrictions on state and local governments. The party of federal mandates had become the party of state and local control.

## OTHER SOCIAL POLICIES

If NCLB is the visible tip of an education iceberg sailing off in a new direction, it's by no means the only chunk of ice exhibiting strange movements. When the welfare state was first initiated, many of its benefits became readily apparent, while the immediate costs were trivial. Only many years later would workers become eligible for their social security and other benefits. But by the 1980s, federal expenditures for domestic purposes had grown to 15 percent of GNP, as a function of rising benefits, new entitlements, and the ever increasing longevity of the population. The politics of the welfare state changed from growth to retrenchment. As political scientist Paul Pierson has pointed out, retrenchment requires centralized power. Gradually, Republicans and Democrats came to this realization as well. The consequence was that the debate over intergovernmental grants, welfare policy, and Medicaid took a new turn.

### Categorical vs. Block Grants

The nature of the intergovernmental grant system was once at the very heart of the partisan dispute over federalism. Democrats wanted categorical grants that contained well-defined restrictions on the way in which federal dollars could be spent; Republicans wanted to give lower tiers of government maximum flexibility by handing over blocks of money that could be spent at local discretion. Nixon went so far as to propose a revenue-sharing scheme, in which the federal government

collected the taxes, while states and localities spent the dough. The Reagan revolution of 1981 included many a transformation of a categorical program into a block grant. As late as 1995, Newt Gingrich and his fellow Republicans enacted a law forbidding any new unfunded federal mandates. (At the time, few recognized that the law was absolutely meaningless, because any new federal mandate would, by its very passage, supercede this alleged ban. And, in fact, Congress did not hesitate to enact many a new mandate in subsequent years.)

Despite all the rhetoric about unfunded mandates, Republican fondness for block grants cooled noticeably—even in the waning years of the Reagan Administration. After all, why should Congress just give away its tax dollars to undependable lower tiers of government? As a result the amount in real dollars spent via block grants was hardly any larger in 1998 than it had been in 1967. Meanwhile, categorical spending escalated from \$60 billion in 1967 to \$250 billion in 1998. Block grants have virtually disappeared from the federalism discourse.

### Welfare policy

For decades, Democratically controlled committees of Congress, together with activist federal judges, imposed on the states new rules and regulations that expanded Aid to Families with Dependent Children (AFDC). To no avail, Republicans asked that these rules be relaxed, so that states could experiment with more effective ways of serving low-income families trapped in poverty by a welfare system that was supposed to help them. For decades, the two parties fought over the issue along well-defined lines. Democrats favored federal control, Republicans favored greater state discretion.

When the neo-liberal Clinton Administration called for “the end of welfare as we know it,” welfare politics took off in a new direction. Congress, now controlled by the Republican party, insisted that any welfare reform bill impose on the states strict work requirements and sharp limitations on the number of years an individual could remain on welfare. Democrats fought the passage of these harsh restrictions on state and local governments, suggesting instead that states be given waivers that would allow them to experiment with alternatives. In the case of the passage of Temporary Aid to Needy Families (TANF), Republicans won most of the main points. Democrats, however, backed

by a threatened presidential veto, ensured that many states were able to win waivers from the law (under a state waiver provision that, ironically, had been backed by Republicans a decade earlier). In 2003, Republicans are seeking to impose even more stringent conditions on the states. Thus far, Senate Democrats have been able to block any such changes, but with the capture of both the Senate and the House by a Republican majority, even more national control over welfare policy may be asserted.

### Medicaid

Of all the intergovernmental grant programs, Medicaid is by far the largest. For decades, its growth was driven by expanded coverage and liberal court interpretations of family eligibility. At the time that TANF was passed, Republicans sought to alter the Medicaid program by converting it to a fixed block grant, capping its size so that federal obligations could be clearly ascertained in order to meet deficit reduction targets. However, Medicaid issues became intertwined with the debate over Medicare, and no major changes in federal policy have occurred. Still, Republicans were successful—over some Democratic opposition—in imposing on states a requirement that state taxes not be levied on Medicaid services, a practice some states used to augment their own budgets. Once again, the politics of retrenchment required the Republican party to act as the party of nation, the Democrats, as the defender of state prerogatives.

## SOURCES OF THE NEW FEDERALISM

Partisan views of federalism change with shifts in the interests of groups with which the parties are aligned. These mutations are not radical realignments that occur in any single election. Party-group relationships are too complex and too deeply embedded to be revised overnight. But shifts can be significant, even when evolutionary, as the restructuring of the parties during the period leading up to the New Deal demonstrates.

### The New Deal shift

Through the 19th Century, Democrats were the states-rights party. Even

Woodrow Wilson, as a young man, argued against educating southern blacks with federal dollars for fear of trampling on the rights of states and localities. It took decades for the Democratic party to shift away from such high principles. Yet Democrats gradually began to have a greater political stake in the cities of the North, with their immigrant, working-class voters. Redefining the party's position on federalism was carried out cautiously, over the resistance of important party loyalists. Even at the apex of Franklin Delano Roosevelt's political power, James McReynolds, a Democratic justice on the Supreme Court appointed by Woodrow Wilson, formed part of the conservative coalition that resisted federal expansion. Social security legislation had to be written cautiously, with plenty of attention to state prerogatives, both to survive southern Democratic support and Supreme Court scrutiny. Southern Democrats formed a coalition with Republicans to resist the court-packing plan Roosevelt thought necessary for achieving his new federally driven objectives. So disenchanted was the southern wing of the Democratic party that in 1948 it broke with the national party, running Strom Thurmond as the states'-rights candidate against Harry Truman. Truman's own appointee to the Supreme Court, Chief Justice Fred Vinson, himself a southerner, remained reluctant to overturn *Plessy v. Ferguson*, leaving that task to his successor, the Republican Earl Warren.

For Republicans, it was easier to become the states-rights party. Among Republican presidents, only Abraham Lincoln himself and, much later, Theodore Roosevelt and, perhaps, William Taft, aggressively used national power to achieve their ends. When liberal Republican Robert La Follette became a progressive and Democrat Al Smith conceded the rural, Protestant vote to the opposition, stand-pat Republicans, such as Coolidge and Landon, rose to the top of the Republican party. Still, enough of the Lincoln tradition remained that no less a Republican than Earl Warren could author the opinion in *Brown v. Board of Education*, the most important assertion of federal power in the Twentieth Century. Nor should we forget that Blackmun, the author of *Roe v. Wade*, was also a Republican appointee. Yet these were the exceptions, no more than proofs that major shifts are always glacial, erratic, and imperfect.

### The Modern Shift

But what in the modern era has the potential to shift partisan allegiances

once again? Why does the Republican party flirt with strong assertions of national power, while Democrats hanker for more local control? Four factors seem most important: decline of an activist judiciary, growing power of the Republican party in national politics, growing disenchantment with the welfare state, and a restructured state and local politics.

### *Judicial politics*

From New Deal to Great Society, the federal judiciary did much of the heavy lifting on behalf of the liberal causes that Democrats espoused. Admittedly, the courts were not so much imposing their own will as serving as the instrument of the dominant political party. Yet it is striking just how much the growth in federal power owed to a supportive judiciary. Whether it involved the regulation of commerce, school desegregation, reapportionment, abortion rights, equal treatment of women, or other liberal objectives, an activist federal judiciary was an essential tool that Democrats could only applaud—and Republicans disparage.

The high watermark of judicial activism was reached during the Warren court. Both the Burger and Rehnquist courts shifted in a more conservative direction. Not every Nixon, Ford, Reagan and Bush appointee faithfully followed Republican doctrine, Blackmun, Stevens and Souter providing outstanding examples to the contrary. Nor were the most crucial of the Warren court decisions overturned. But gradually the federal courts began acting as a brake on social change, not its engine. *De jure* segregation remained unconstitutional, but *de facto* segregation was not. Affirmative action was acceptable, but only if quotas were not imposed. Abortion could not be outlawed, but many restrictions could be imposed. Women had equal rights, but gays did not. More often than not, the search for new constitutional rights was put on hold.

These changes in the federal judiciary have affected partisan thinking. If the federal courts are a conservative force, what, then, is the Democratic point in extolling federal power? Perhaps it is better, as in Florida, to put one's faith in state courts, which at least in Democratic bailiwicks will render the activist decisions many party loyalists desire. And why should Republicans oppose the exercise of federal judicial

power, when it might be used to keep in check runaway state officials?

### *The Republican rise to national power*

The conservative shift within the federal courts owes much to Republican control of the executive branch of government during a majority of the period since 1968. The same fact has gradually shaped party thinking about federalism.

It is too simple to say that parties like that level of government that they happen, at any particular moment, to control. But if a party has little opportunity to win a particular bastion of power, they are unlikely to search for its virtues. Thus, when Republicans found themselves unable to capture undivided control of Congress for any more than four years out of over sixty between 1933 and 1968, and when control of the executive branch was in the hands of Democrats for all but eight of these same years, Republican had few strictly political incentives to support the expansion of federal power. For Democrats, the shoe was, of course, altogether on the other foot.

But as the solid South became solidly Republican instead of solidly Democratic, Republicans only had to come close to parity elsewhere to capture national power, giving them an increasing advantage in both presidential and congressional elections. Without a southerner leading the ticket, Democrats have only a distant chance of capturing the White House. And after decades in the wilderness, Republicans have controlled the House of Representatives continuously for the past ten years, they have a fighting chance to win a majority in the Senate in almost every election, and the presidency is constantly within their grasp. Just as Democrats could win unified control of the federal government under Roosevelt and Johnson, so the Republicans see this opportunity at hand in the early decades of the 21st Century. For the winners, it's hard not to become more interested in federal power; for the losers, it's easy to rediscover the value of state and local control.

### *The welfare state*

Along with these partisan changes have come changes in the role that the welfare state plays in American political life. Between 1933 and 1980, the main question was its rate of expansion. Social security ben-

efits increased in size and breadth, Medicare and Medicaid programs were added on, a potpourri of other anti-poverty measures were enacted, and the cost of federally funded domestic policies grew from less than one percent of GNP to over 15 percent of GNP. But with the election of Ronald Reagan, the politics of the welfare state shifted from growth to retrenchment. Though costs continued to escalate, as more Americans lived longer in their years of retirement, some social security benefits were cut or eliminated, Medicare and Medicaid regulations were tightened so as to slow growth in costs, welfare was reformed, and new entitlements became virtually impossible to enact. Federal reform no longer meant finding new ways to serve the putatively needy but innovative ideas for keeping costs under control. Much of the cost-control involved imposing restrictions on state welfare and Medicaid programs.

In education, public attention was shifting from quantity to quality. For most of the twentieth century, the main issue in American education had been the accommodation of those who wanted to continue on in school for ever longer periods of time. The United States outpaced other industrial nations in the date by which universal elementary school education was realized, the percentages of students completing secondary school, and the percentage of the population entering the higher educational system. But with the publication of *A Nation at Risk*, sheer quantity was no longer enough. How much were students learning in school? What systems were in place that ensured that effective teaching and learning was actually happening as a consequence of all the public expenditure? Reform no longer meant more; it meant better. This required federal strings as well as federal dollars.

#### *Changing state and local government*

Both as the result of judicial activism and the maturation of the welfare state, the bases of power in state and local politics were altered. Most notably, these governments were no longer conservative bastions. In 1961, the Supreme Court required states to reapportion their state legislatures so that all legislators—in both the upper and lower chambers—would represent roughly equal numbers of residents. The 1966 voting rights legislation gave minority voters access to southern politics, forcing candidates to find more balanced platforms upon which to campaign. Meanwhile, investigative journalists, modern-day muckrakers as

it were, swept court rings and machine-style politicians from office. Professionalization and modernization became the order of the day. Economic elites had to compete with a wide variety of new interests that had their own access to decision makers. As just one sign of this transformation, growth in state and local government expenditure from their own fiscal resources grew almost as fast as federal domestic expenditure. In 1995 state and local spending was 15 percent of GNP, hardly less than the 16 percent being spent by the national government. Which level of government was the more liberal, which the more conservative, was more a matter of opinion, less a matter of fact.

As state and local government grew, so did the size of its workforce. Remarkably, the civilian federal workforce grew hardly at all, numbering less than 3 million workers both in 1951 and, fifty years later, in 2001. Meanwhile, the size of the state work force expanded from one million to 5 million, and local workers skyrocketed fourfold from 4 million to 12 million. The federal government may be coming up with a few more dollars, but the state and local governments are doing most of the work.

The upper echelons of this work force became entrenched civil servants, professionally loyal to their programs, capable of mobilizing political support for their perpetuation. These state and local professionals became advocates for causes in which they believed and developed strong ties to groups dependent on the largess they distributed. Moreover, these civil servants held their office by right. Now that machine politicians had been all but kicked out of office, professional loyalties were substituted for partisan ones. For those who opposed the retrenchment of the welfare state, state and local government became a new point of resistance. The professionals committed to its perpetuation were not even subject to the federal Hatch Act, which has effectively kept federal—but not state and local—employees out of active politics.

#### *Public sector unionism*

For years, laws against public sector strikes had prevented these civil servants from exercising the crudest form of political power, the power to withhold their services. When Governor Calvin Coolidge was asked to respond to the Boston police strike of 1918, he won widespread pub-



lic backing when he declared “there is no right to strike against the public safety by anybody, anywhere, any time.” So popular was his stance, it propelled him from a little known governor into the vice-presidency and, ultimately, the White House. For decades to come, public-sector unionists were at risk if they went on strike. Statutory law, backed by strong court enforcement, declared such actions contrary to the public interest, strictly illegal, and subject to criminal punishment.

Beginning in the sixties and seventies, public-sector strikes became more acceptable—and public sector unions more powerful. Nothing is more dramatic than the change in the American union movement from a predominantly blue-collar, working class, industry-based set of organizations to one in which public-sector, white-collar professionals play an increasingly powerful role. In a global economy, where foreign competition makes its presence felt during every contract negotiation, blue-collar unionism is losing ground, both in numbers and economic and political clout. Private sector union membership peaked at about 38 percent of the private labor sector in 1952. By 2002, it had fallen to 8.5 percent. Meanwhile, public sector union membership grew rapidly. If one classifies as unions only those organizations that have—or aspire to having—collective bargaining rights, the percentage of public-sector employees unionized jumped from about 12 to 14 percent in the 1960s to around 40 percent in the mid-1970s, where it has since remained. Most of these public-sector workers are hired by state and local governments. Were it not for this one growth sector in American unionism, critical components of the Democratic party’s financial base would have been reduced to little more than trial lawyers and Hollywood stars.

It is not only their economic power that gives public-sector unions special clout. Just as important is the key role they play in state and local politics. By far the most important of the public-sector unions are two teacher organizations, the National Education Association and the American Federation of Teachers. During the early 1970s, they conducted successful strikes in numerous cities, opening the floodgate to collective bargaining rights across the country. Since then, teacher unions have amassed, by means of union dues and so-called voluntary contributions, extraordinary sums for use in elections at all levels of government. In addition, teachers, spread as they are across the political landscape, located in every political constituency, trained in the arts of writing and speaking, are effective campaign workers and able policy advocates.

Ever since the days of Jimmy Carter’s endorsement of a national Department of Education, unions have committed all but a small fraction of these resources to the service of Democratic party candidates.

Significantly, teacher unions have more influence in state and local politics than at the national level. When the *Nation at Risk* report was issued, substantive government response came at the state and local levels, simply because schools had always been a responsibility of the lower tiers of government. Even during the Carter years, the federal government never paid for more than 11 percent of the total cost of public education. Thus, when an educational crisis was identified, teacher unions were well positioned to shape government response to their needs. School expenditures rose dramatically, teacher salaries rose, and class size fell. But the main reforms recommended by the *Nation at Risk* report were never implemented. The school year became shorter, not longer. So did the school day. Students did less homework. And student performance remained virtually stagnant for the next two decades. State and local government acted as a break on change, not a catalyst for experimentation. Republicans were forced to rethink their view of federalism.

In Washington, teacher unions are challenged by a network of think tanks, cause organizations, and policy professionals who articulate the reform agenda spawned by *A Nation at Risk*. In state and local politics, unions seldom face as well-defined an opposition. In Washington, presidents are able to use their rhetorical powers to control the political agenda. Interest groups must work within the constraints the agenda setter creates. At the state and local level, these same issues become matters of implementation, something that well-organized insiders can control. The greater the control at the lower tiers of government, the more obstacles education reformers encounter.

What’s true in education applies more generally. Public-sector unionism carries greater weight in state and local elections than in national ones, simply because, at the local level, elections are low visibility, with few voters and obfuscated issues. As V. O. Key noted long ago, it is in such contexts that the well organized have the most clout. According to some estimates, public sector employees out-vote the ordinary citizen in local politics by a ratio of anywhere between 2:1 to 6:1.

Nationally, public-sector unions must make their demands in open daylight and argue against the claims made by other interests. The large number of other voters swamps the significance of federal employees, who, after all, amount to little more than 1 percent of the federal electorate.

Consider the fate of the Homeland Security bill. The president called for the elimination of many of the traditional civil service prerogatives that federal workers enjoy. In language reminiscent of Calvin Coolidge's, he claimed that national security was too important to let worker's rights stand in the way. The Democratic party leadership in the Senate, prodded by their public-sector union allies, fought the president bitterly, preventing passage of the law prior to the 2002 congressional elections. As a consequence, the issue dominated the closing days of the fall election campaign. Afterwards, Republicans felt the issue won for them control of the Senate. Democrats apparently agreed with this assessment, for they quickly acquiesced to presidential demands in the aftermath of election. In short, public-sector unionism simply does not have the same clout in Washington as it has in state houses and city streets.

## CONCLUSIONS

Nothing in this analysis should leave the reader convinced that Republicans will in short order become aggressive Hamiltonians. Especially within the judiciary, one should expect a sentimental attachment to past Republican federalism clichés. The quaint revival of a faded version of dual sovereignty theory by a bare majority of Supreme Court justices, all of them Republican appointees, is particularly out of step with the times. But one should not give too much weight to the Rehnquist court's rediscovery of dual sovereignty. Thus far, the Supreme Court decisions in which the concept has been invoked have been of minor significance. According to these decisions, Congress cannot order states to dispose of their low-level radioactive waste and cannot regulate the use of guns on school grounds. Disabled Americans cannot use federal law as the basis for a suit against state governments. These are interesting, even novel, interpretations of the Constitution. But until something more substantial is forbidden in the name of dual sovereignty, not much should be made of these cases. Admittedly, Sandra Day O'Connor, once a former state judge and now a pivotal

member of Supreme Court, has a strong interest in the subject, but it remains to be seen whether the remainder of the court will retain that interest, once she leaves the Court.

Politically, the pressures for a resurgent Hamiltonianism within the Republican party seem stronger than ever. A security agenda requires a strong national government. Containing the welfare state will require the exercise of national control. State professionals can be expected to resist the new reform agenda to which many Republicans are committed. Public-sector unionism, one of the most powerful sources of resistance to Republican objectives, is more entrenched locally than nationally. Inasmuch as Republicans control all the power centers of the national government, they have little reason to trumpet the rights of states, many of which remain in Democratic hands.

Conversely, the Democratic party must find solace in the gubernatorial chairs it holds and the state legislators it has elected. For now, it is fighting a rearguard action, one as well fought in the hinterland as in the capitol city. The street level bureaucrat is now, more than ever, a major source of their political strength.

One should not expect either party to give up nominal commitment to the ideals they have each long expressed. But neither should one expect either party to act assiduously to protect them. Party interests have changed. So must their principles. We call attention to this fact not to lament it but to underline the durability—and value—of American federalism. Institutions need to have strengths beyond the interests of particular groups and parties. As Madison pointed out, federalism safeguards liberty by protecting minorities. Its place in the American political system needs to be more deeply embedded than in the faith system of any one particular party. At the same time, Hobbes view of sovereignty cannot be gainsaid. Without a strong sovereign, a nation is endangered. The United States needs to search for the appropriate balance as much today as it has in centuries past. Shifts in partisan attachments may be one way of finding it.

# SOCIAL POLICY AND FEDERALISM

## A COMMENT

Suzanne Mettler

The Geyer and Peterson papers on social policy emphasize the dynamism and flexibility of federalism—showing that the institutions that structure intergovernmental relations can be arranged and rearranged over and over, and that strategies long utilized by one party can be seized upon and reformulated for contrary purposes by their erstwhile opponent. Reading the papers side by side presents all sorts of interesting questions. If we could answer them, we would understand much more about the extent to which differences in governance between the United States and Europe result from institutional differences as opposed to other factors. I will mention, first, some questions that pertain to political development, and, second, the political economy of federalism. Then, third, I will dwell a bit more extensively on matters of citizenship.

First, these papers made me wonder how the *sequencing of political development—in this case stages in intergovernmental relations—matters for policy outcomes*. Scholars of welfare state development have long puzzled over the difference it made that in the United States, widespread suffrage (at least for white men) preceded the development of government bureaucracies, whereas in European nations, bureaucracies came before democracy. Now we might ask whether it matters if union or federation precedes the development of welfare states, as in the United States, or follows it, as in Europe. Of course, the analogy is too simple, since the European Union is composed of some member-states featuring federalism, such as Germany, as well as more purely national states. It is quite fascinating, however, to consider the contrast in new

developments at the level of union: in Europe, “gender mainstreaming” is in fashion, as reformers seek to bring issues about gender equity already highlighted in some member-states to the attention of the E.U.; meanwhile, in the United States, national policymakers discuss initiatives to promote marriage among low-income women on welfare, as well as stricter time limits and work requirements. Some might write these differences off as the byproduct of cultural distinctions, but I suspect that this answer is too simple. There is much to be investigated here about the interplay between institutional dynamics and patterns of political development, as well as, perhaps, the permeability of institutions to the influence of organizations.

Second, how does the *political economy* of federalism in the United States compare to that of the European Union? What incentives and restraints do each set of arrangements offer to legislatures, businesses, and citizen beneficiaries of social policies? The answer to this is key for helping us to understand whether we should expect a “race to the top,” or a “race to the bottom.” As David Brian Robertson has taught us, the American founding established the world’s largest free trade zone, given how little ability the individual states have had historically to keep business within their borders. This set into motion the forces of interstate economic competition, making states disinclined to be generous in social policy given that they do not want to impose high taxes and regulations that might prompt business to move elsewhere. Furthermore, as Paul Peterson showed in *The Price of Federalism*, redistributive policies are performed best by national government, given its greater taxing ability and more progressive tax structure, plus the greater capacity to limit in-migration of labor and outward flows of capital.

Given that the European Union is a union of nations, rather than a federation of states, how will these structures work? I am posing empirical questions here: do E.U. members retain greater economic autonomy than do states in American federalism? Robert Geyer seems to anticipate that E.U. relations will make social policy in the United Kingdom become a little more like that of Sweden’s. This expectation contrasts sharply to those of most students of U.S. federalism, who suggest that federalism, in most of its guises, moderates the inclinations of more liberal states. Indeed, this appeared to be the case in my own evaluation of optional eligibility rules states adopted under the new welfare, or

Temporary Assistance to Needy Families (TANF): programs in the Northeastern states gravitated slightly toward the more restrictive and punitive policy styles utilized in states like Texas and Mississippi, rather than the reverse. Careful attention to the political economic structures of each type of federalism seems essential for understanding whether we should anticipate a race toward the top or a race toward the bottom. We might also ask how the globalization of economic forces affects these dynamics of federalism, given its implications for the permeability of national borders.

Finally, I would like to suggest that *what we most need to understand about social policies administered amidst federalism is the impact they have for citizenship*. As citizenship is, fundamentally, a relation between individuals and government, federalism introduces all sorts of complexities into governance. Presumably, the federalism has implications for the breadth and shape of the polity and citizens’ status within it, for the content of citizens’ rights and obligations, their opportunities for political action, political attitudes, and ultimately, their participation in politics. I will discuss only a couple of these now.

## STATUS, RIGHTS, OBLIGATIONS

In the New Deal welfare state, citizens who worked less than full-time and who were employed in “intrastate” occupations were included in social programs administered primarily by the individual states, albeit through grant-in-aid programs that offered incentives to states to develop programs and put up matching dollars. Meanwhile, other citizens—those with long-term work records, especially, came to be included in nationally administered policies. The former—mostly women, and men of color—were subject, initially, to discretion at the hands of state-level administrators, and rules and procedures that varied with political geography, while those fortunate enough to qualify for nationally administered programs gained rights, guaranteed to them and administered through standardized, routinized procedures. Then, in the 1960s and 1970s, even the state-level programs came to approximate entitlements, as court decisions and additional policies reined in the hands of the states.

I agree with Paul Peterson that the Republicans have now adopted the

strategies previously used by the Democrats inasmuch as they now employ strong, indeed activist national government policies. It is difficult to comprehend this, because it goes against what we have observed for so many decades! It is not as simple, though, as the Democrats and Republicans only switching strategies: rather, I think the current approach combines a variety of approaches and constitutes a genuinely new kind of governance. First, both TANF and current proposals for restructuring several other social policies (Medicaid, housing subsidies, unemployment insurance and others) combine a striking set of features, thus constituting a sort of Jekyll and Hyde or janus-faced appearance. They do include more powerful federal rules than previous social policies that involved the states—requiring states to abide by certain work requirements or time limits or to get schools performing at certain levels, or lose their funds—and, simultaneously, they give the states *more discretion* than they have known in a very long time.

Under TANF, for instance, states decide whether or not they wish to extend benefits to immigrants, whether or not they will deny benefits to families in which children are not immunized, whether or not they will be even more strict than required to be by federal mandates for time limits and work requirements, and so forth. Second, the federal government now presents social policies less as inducements and more as threats to the states: the old approach of carrots has been replaced by sticks. The message is, “Do it, or else you’ll get no help from us.” Of course, even if states are inclined to be more liberal than the federal mandates require, the fiscal crisis in the states today is an enormous deterrent. Third, such rules are not longer geared toward promoting more extensive programs, as they have been for decades, but rather, to withdraw funding unless certain outcomes are achieved. The No Child Left Behind Policy boosts federal funding at the outset, but if schools fail to improve their scores, they will lose their funds; if states fail to meet targets for work requirements under TANF, they also jeopardize their funds. If this is state-building, it is state-building with a vengeance; it is more accurate to say that such policies will do more to facilitate retrenchment than to improve outcomes. Also, in terms of policy design, both if these policies proceed on confident grounds, as if policymakers know, clearly, the precise strategy that will improve the lives of poor families or struggling schools. The strategy is: test better, or else; go to work, or else. Most

scholars know that the difficulties faced by our most vulnerable citizens are far more complex, and will take much more long-term effort and the willingness of federal government *to stay* involved in people’s lives, rather than to depart, when the going gets tough.

This leads me to a point about the substance of this new, harsh federalism: these strategies are not leveled against citizens generally, but rather against poor citizens in particular, and amidst a climate of growing income inequality. It is poor citizens who depend on the targeted programs that are either the subject of the policies in question—as in the case of TANF and Medicaid—or who are likely to be most affected by the stringent features of policies, as in the case of the No Child Left Behind Act. Poorer citizens have long had to rely on state or joint federal-state policies, typically with less generous funding than national level programs. In fact, for most such programs, the real value of funding has been dropping since the early 1970s, even as the wages of males at lower tiers of the income strata have fallen in value. Ironically, the new policies boost funding, and so, at first blush, they appear to be improvements. Yet, policy is not made up of resources alone, but also of rules and procedures that both structure the allocation of those resources and convey important messages to citizens. Under the new programs, citizens are subject to even more restrictive and punitive rules than in the mid-twentieth century—constant testing for students or compliance with work rules for low-income parents. Given the stigma attached to such programs and the indignity associated with qualifying for them, it is little wonder—as Urban Institute studies find—that welfare is currently underutilized by those who qualify for it, and in many states, hard core poverty has increased since the creation of the new law. More advantaged citizens continue to be included in national programs where they endure no such indignities. No one has proposed that we subject those mostly upper-middle-class and wealthy Americans who benefit from the home mortgage income tax deduction, or numerous other tax deductions, to marriage counseling or drug testing. As in the past, our policies offer rights to more advantaged citizens, and impose obligations—heavy ones—on the least advantaged citizens among us. These differences, this division of labor, is structure by federalism, as it has been at other points in our past; the difference now is that federal government is promoting, or rather, demanding, the restrictiveness and punitive inclinations of the states.

The E.U. comparison seems interesting, given that universal—rather than targeted—programs are the norm at the level of the member states. Robert Geyer suggests that the E.U. policies address needs left out of such programs, offering a very different dynamic indeed.

## ATTITUDES

Robert Geyer tells us that E.U. benefits do not translate into pro-European sentiments. This is intriguing and it would be helpful to understand these dynamics. Arguably, in the United States national government gets little credit for many of its redistributive policies, and this seems to be the case especially when national government's role is obscured: whether by the hidden nature of tax expenditures, the private administration of programs such as higher education grants and loans, or the decentralized nature of many social programs. Traditionally, highly visible, direct social programs in European nations have been credited with fostering social solidarity and the inclusion of the various groups of citizens, as noted by T.H. Marshall and Gosta Esping Anderson. If E.U. policies fail to have the same effects among Europeans, perhaps it will help us to understand better the long-frustrating record of policy initiatives under American federalism.

As we discuss federalism, we must keep in mind the ways that such arrangements affect the rights and obligations and structure of citizenship. Federalism in the United States, as I see it, has, in the past, allowed for a kind of persistence of feudalism, with poor citizens subject to what may be harsh state-level rule. Just as the remnants of this system began to fade, we are reinvigorating it once again, this time via harsh federal rules applied to the states, pushing them back to such governance. However we interpret its consequences in the U.S. and the E.U., federalism has vast implications for the nature and well-being of democracy.

# THE SINGLE MARKET AND EU FEDERALISM

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## INTRODUCTION

For over four decades, the single market — sometimes referred to as the “common market” or the “internal market” — has served as the Archimedean point from which proponents of Euro-federalism have pressed for deeper European integration. Ever since the Treaty of Rome established the member states’ commitment to the free movement of goods, persons, services, and capital (the “four freedoms”), the single market has remained both the central focus of the European Union’s (EU) activities and a vital stimulus and springboard for its expansion into new policy areas (I use the term EU to refer to both the contemporary European Community, EC, and its previous incarnations, the European Union and the European Economic Community, EEC). The underlying causal logic by which the single market program has helped motivate shifts in authority from the member states to the EU level is a logic common to federal systems. Once a group of states has committed itself to the establishment of a single market, linked processes of negative integration and positive integration predictably ensue. In essence, this is a process of deregulation at the state level coupled with (or followed by) a process of reregulation at the federal level.

First, the establishment of a single market in which goods, services, capital, and persons can move freely requires *negative integration*: the elimination of a wide variety of “barriers” to free movement between states and the elimination of other distortions to competition between states in the single market. Such barriers and distortions extend far beyond the most obvious tariff barriers to include a wide variety of reg-

ulatory non-tariff barriers in areas ranging from transportation policy to product safety standards to environmental standards, and may include various public subsidy schemes that distort competition. The goal of such negative integration is both to create a common playing field for commerce by removing barriers to free movement and to level that playing field by eliminating discriminatory practices. Negative integration is necessarily a heavily judicialized process, as courts will provide the primary fora in which federal officials or private parties seek to invalidate state laws or practices that impede free movement or distort competition in the single market.

It is extremely unlikely, however, that the process of market integration will end with negative integration. Rather, deregulation at the state level will generate political demands for *positive integration*: the establishment of common policies at the federal level. This can occur in two ways, the first more direct, the second less so. First, when federal courts strike down state laws or practices that violate single market principles, they may threaten states pursuit of non-market policy goals such as protection of the environment, worker or consumer safety. The social consequences of dismantling such popular programs in the name of the single market are likely to be politically unacceptable to many states, unless such deregulation is coupled with reregulation at the federal level to protect these non-market policy goals.

The second way in which deregulation can spark demands for reregulation is less direct. The elimination of barriers to free movement in one issue area may generate problems in tangentially related areas. For instance, the easing of border controls in the name of free movement of persons and goods in the single market will increase opportunities for cross-border crime. Thus, the operation of the single market will increase incentives for establishing a federal (EU) role in policing. Similarly, increases in cross-border economic activity will inevitably lead to an increase in cross-border civil disputes. The proliferation of such disputes will place a burden on national judicial systems and increase incentives the harmonization of judicial procedures. Through such direct and indirect links, an initial commitment to the establishment of a single market creates functional pressures and political incentives for the involvement of the federal government in a wide variety of policies flanking the single market.

The single market has played a vital role in underpinning the dramatic transfer of authority from the member states to the EU level that has occurred since the EU's founding. The linked processes of negative and positive integration have encouraged the extension of the EU's authority into a wide range of regulatory domains including competition policy, utilities regulation (i.e. telecommunications, electricity, and transportation), financial services, environmental policy, consumer protection policy and, to a limited extent, social policy. The elimination of restrictions on capital movements undermined member-state monetary policies and so increased incentives for centralizing control of monetary policy. The loosening of border controls and the increase in cross-border movements so integral to the construction of the single market have provided a stimulus to enhanced cooperation on a range of immigration, judicial, and policing issues grouped together under the label of "Justice and Home Affairs."

While the impact of the single market to date is indisputable, its capacity to serve as a foundation for further federalization is nonetheless limited in crucial respects. The next major steps that the EU must take if it is to develop into a more fully-fledged federal state have little connection with the single market. The EU continues to lack fundamental attributes of state power. Above all, as illustrated so forcefully in divisions over the war in Iraq, the EU lacks a functioning common security and defence policy. Second, the EU's fiscal capacities remain extremely weak. The EU's fiscal resources are capped at 1.27 per cent of GDP, and its distributive and redistributive policies are of marginal significance as a result. Functional and political pressures generated by the operation of the single market will never be sufficient to prompt a major transfer of the power of the sword or the purse to Brussels. Finally, the single market will do little to create "European citizens" who share a common identity and a common set of political rights. The single market has been crucial to the establishment of a variety of European rights, but these remain a limited set of economic rights — rights for individuals as workers, consumers or sellers. The commitment to completing the single market will not serve as a rationale for the creation of a more complete set of political rights (or duties for that matter) that would give substance to the hollow concept of European citizenship proclaimed in the Maastricht Treaty. Finally, the increase in transnational interaction that accompanies the operation of the single market seems to have done little to spark the spread of a sense of shared European identity.



Undoubtedly, the single market will continue to provide a basis for the extension of the EU's authority. However, an EU federalism based on this market rationale is and will remain a limited form of federalism, essentially a regulatory and economic federalism. The establishment of a common defence policy, a significant fiscal policy and a full set of political rights for European citizens could occur only as the result of new political commitments at the highest levels of government, with little direct or indirect linkage to the single market. Whether such commitments will emerge in the wake of the ongoing Convention on the Future of Europe remains to be seen.

This paper explores the impact of the single market on the development of EU federalism. In the first section, I examine the range of policy areas in which the single market has generated direct pressures for the transfer of authority to the EU level. In the second section, I turn to areas where the impact of the single market on the transfer of authority to Brussels has been more indirect and tenuous. In the third section, I turn to policy areas in which the single market has provided little or no leverage for advocates of a more far-reaching federalization of the EU.

## THE DIRECT LINK: FROM FREE MARKET TO REGULATED MARKET

In the first decade after the creation of the EEC, the European Commission focused on the elimination of national tariffs and quotas. As tariffs were eliminated, the importance of non-tariff barriers (NTBs) as impediments to the single market became apparent. Moreover, after national governments were prevented from shielding their industries against foreign competition with tariffs and quotas, they increasingly applied NTBs as a disguised form of protectionism. The erection of new NTBs threatened to reverse the progress toward the establishment of a single market made through the elimination of tariffs. European firms responded to the proliferation of national NTBs by bringing an increasing number of cases to the European Court of Justice (ECJ) challenging national restrictions on the free movement of goods and services. The Commission, too, increased its use of the infringement procedure in an effort to dismantle national NTBs. However, by itself, this process of negative integration could not "complete" the single market. Member states could erect new NTBs as quickly as the ECJ could elim-

inate them, and in any event, a single market based exclusively on deregulation at the national level was politically unacceptable. Many of the national regulations that distorted competitive conditions were designed to protect "non-market values", such as health and safety, that were of increasing concern to voting publics across Europe.

Some neo-liberals would have preferred to see a single market in which the EU, more specifically the ECJ, would have removed direct impediments to trade but allowed differences in national regulatory systems that distorted competitive conditions to remain in place. From the neo-liberal perspective, states that imposed higher costs on economic operators would then have been punished by market forces as their firms either lost market share or simply relocated to states with more business-friendly policies. However, advocates of the social market economy feared that such regulatory competition would lead to a destructive race-to-the-bottom in social and environmental regulation. EU officials and the vast majority of member-state governments realized that the elimination of regulations at the national level would only be politically acceptable if it was coupled with the establishment of harmonized standards to protect "non-market values" at the EU level.

From the outset, the process of eliminating national barriers to trade was coupled with an effort to establish harmonized Community standards. However, initially, the high legislative threshold for passage of EU directives impeded progress on harmonization. New directives had to win unanimous approval in the Council of Ministers. At best, negotiations to achieve unanimity on detailed technical standards were extremely protracted. Very often, securing unanimity proved impossible. As a result, only 270 directives were adopted between 1969 and 1985.

In the early 1980s, with the European economy in recession, Commission officials and a number of member-state governments argued that bold efforts to accelerate the completion of the internal market could stimulate growth. Advocates of this *relance* of the single market called for the adoption of a "new approach" to harmonization, based on mutual recognition of national standards wherever possible, coupled with minimal harmonization of "essential requirements" where necessary. This new approach was at the core of the "1992 programme", a commitment to completing the single market by 1992, which Jacques

Delors announced when he took over as Commission President in January 1985. The principle of mutual recognition, which the Commission borrowed from an ECJ doctrine established in the celebrated *Cassis de Dijon* ruling, demanded that in most circumstances member states accept into their domestic markets products approved for sale in any other member state. However, mutual recognition of standards would not extend to national laws that aimed to protect the health of humans, animals and plants; therefore, Community-wide harmonization of minimum essential health and safety requirements would still be necessary.

If the harmonization of standards integral to the 1992 program was to succeed, EU decision-making procedures had to be sped up. At the December 1985 Intergovernmental Conference (IGC), the member-states agreed to a new decision making procedure that would apply to harmonization measures concerning the single market. The new decision-making procedure, labeled the Cooperation Procedure, had two salient features. First, in order to overcome the gridlock that had prevented harmonization under the unanimity rule, the member states agreed to introduce qualified majority voting (QMV) for most harmonization measures concerning the single market. Second, in order to increase the democratic legitimacy of the harmonization measures that would be established as part of the single market program, the Cooperation Procedure significantly increased the power of the European Parliament (EP) in EU decision-making. The Cooperation Procedure gave the EP the power to amend or reject Commission proposals for single market measures by an absolute majority vote. When coupled with qualified majority voting in the Council, this procedure gave the EP “conditional agenda setting” power. If the Parliament introduced amendments that were acceptable to a qualified majority of the member-states, these were likely to be adopted. This procedure would transform the EP from a powerless talk-shop whose proposals were routinely deposited in the circular file of Council meeting rooms into a powerful legislative actor. These changes in decision-making rules, together with a package of approximately 280 measures addressing physical, technical and fiscal barriers, constituted the core of the Single European Act (SEA) that the member-states signed in 1986.

Since the adoption of the SEA, the single market program has continued to serve as vital stimulus for the expansion of the EU into new issue

areas. EU secondary legislation relating to the single market has led to the deregulation and reregulation of a number of economic sectors including telecommunications, financial services, air transport and electricity. The body of EU environmental regulation has expanded dramatically since the initiation of the 1992 project, and today encompasses all of the major areas of environmental policy addressed by national governments, ranging from pollution prevention, to nature protection, to waste disposal. The EU has replaced the member states as the primary locus of standard setting on food, drug and other product safety regulations. EU social regulations establish common standards in a wide range of areas including equal treatment of the sexes, workplace safety, collective bargaining, works councils, parental leave, rights to strike and worker protections in the event of termination.

More generally, a shared commitment to the single market program has persuaded the more Euro-skeptic member states to agree to increases in the use of qualified majority voting and in the legislative power of the EP. After introducing the cooperation procedure in the SEA, the member-states went on to expand the use of qualified majority voting and to introduce new decision-making procedures that elevated the role of the EP in the Maastricht and Amsterdam Treaties (the codecision procedure and Codecision II, respectively). As was the case with the cooperation procedure in the SEA, the codecision procedure was initially applied predominantly to single market measures. As was also the case with the cooperation procedure, the codecision procedure was designed to ensure that decision-making regarding measures necessary for the “completion” of the single market would be both efficient and democratically legitimate. Majority voting helped ensure efficiency, and granting power to the EP helped deflect criticisms that the EU’s growing legislative powers suffered from a “democratic deficit”.

Member-states wary of laying the foundation for greater EU federalism significantly underestimated the impact of these single market focused decision-making procedures. Indeed, Margaret Thatcher has subsequently conceded that she views her support for the SEA as a mistake that seriously undermined British sovereignty. While the Thatcher government and other Euro-skeptics had anticipated that the new Cooperation Procedure would apply in a quite limited set of policy areas, proponents of deeper integration were able to gradually expand the application of the procedure. The borderline between measures nec-

essary for the completion of the single market and measures focused primarily on other policy areas such as environmental or social policy is murky. The European Commission routinely justified proposals for new social and environmental policies as part of the single market program in order to broaden the application of its preferred legislative procedures (first the cooperation procedure and later codecision). Where the Commission's broad application of these procedures was challenged, the ECJ reliably supported the Commission's choice of legislative procedures.

The single market has served as the thin wedge that helped open the door for some of the EU's most profound institutional reforms. By allowing for qualified majority voting on single market measures, the member states took a major step toward surrendering national sovereignty over economic regulation. After the member-states sought to legitimize their single market program by empowering the EP to play a greater role in the legislative process, it became difficult for them to block the extension of the EP's legislative powers to related issue areas. Reforms of EU decision-making procedures designed to support the single market program laid the foundation for a widespread transformation of the EU's legislative process from one based primarily on an intergovernmental model demanding unanimous agreement in the Council of Ministers to one resembling a federal model with bicameralism (with the Council and EP having nearly equal status) and majority voting in both chambers.

## THE INDIRECT LINK: SPILLOVERS FROM THE SINGLE MARKET

In addition to the EU's economic and social regulations most directly connected with the construction of the single market, the growth of EU authority in a number of other policy areas has been motivated, at least indirectly, by the functioning of the single market. Many of these issues, including policing, immigration policies and judicial cooperation, were grouped together under the umbrella of the Justice and Home Affairs pillar of the Maastricht Treaty. In all of these areas, the easing of border controls so integral to the construction of the single market challenged existing national arrangements in policy areas that ostensibly

had little to do with the single market.

The spillover from the single market to the development of common policing provides a first illustration of these dynamics. As the EU opened up borders in an effort to stimulate commercial activity, it also increased opportunities for cross-border criminal activity. The removal of barriers to movement for capital facilitates money laundering. The removal of barriers to movement for goods facilitates smuggling and drug trafficking. The removal of barriers to movement of persons facilitates illegal immigration and trafficking in persons (e.g. for the sex trade). Governments are affected by one another's policies as lax policing in one member state will generate "negative externalities" for their neighbors. Governments recognized these risks, and took early steps to promote cooperation on policing, first through the Trevi framework and later through the Justice and Home Affairs Pillar of the Maastricht Treaty. The most concrete manifestation of this commitment was the establishment of EUROPOL (the European Police Office), which came into operation in 1998. Arguably, EUROPOL is developing into a nascent FBI for Europe, supporting cross-border investigations, investigating specific cases and tracking data on crime. Voters across Europe shared the perception that the opening of borders was exposing them to heightened risks. Euro-barometer polls from the mid-1990s indicate that voters viewed the development of common crime-fighting policies as a high priority for the EU. With the EU's borders becoming ever more porous and the heightened attention to combating international terrorism post- 9/11, it seems likely that the EU's role in policing will expand in the years to come. Governments will have to balance their reluctance about the surrender of sovereignty that such developments entail against the risks posed by international terrorism and crime. The fact that the long-standing opposition of some member states to the establishment of a European arrest warrant was overcome very quickly in the aftermath of 9/11 suggests that this calculus may be changing.

The motivations for development of common immigration and asylum policies at the EU level parallel those in the case of policing. In short, the dismantling of the EU's internal borders has pressured the member states to develop common policies for controlling their external borders. In important respects, it is impossible for member governments to maintain independent immigration policies in the context of the internal market. When a member-state permits a person to cross its borders, that

person can then move freely across the EU. If a member-state grants an immigrant citizenship, that person has the right to live and work in any EU member state. Therefore, an EU member-state's border controls are only as strict and its immigration policy only as restrictive as the most lax member-state. Confronted with this interdependence, EU governments have agreed to a wide variety of common border control and immigration policies, ranging from standardizing procedures on border checks and rules on visas to harmonizing minimum standards for treatment of asylum seekers and refugees. With Title IV of the Amsterdam Treaty, the member-states brought immigration and asylum policy into the first pillar of the EU — the section directly related to economic issues and the internal market. The Commission has continued to emphasize the economic rationale linking common immigration policies to the single market. In its 2000 Communication on European migration policy, the Commission emphasized that coordination of national policies was necessary in order to reduce black market employment, to prevent economic exploitation of migrants, and to address shortages of workers in some industries.

## THE WEAKEST LINKS: LIMITS OF MARKET-BASED FEDERALISM

Finally, we can turn to a third set of policies for which the single market has provided little or no stimulus to federalization. Common security and defence policy is the most significant of these areas. The single market programme has encouraged the development of a significant EU role in the foreign economic policy of its member states. Because the EU maintains common external tariffs, the Commission now represents the EU as a whole in trade negotiations and disputes in the WTO. Also, in some areas of international negotiation concerning global commons issues (i.e. environmental protection), the EU now negotiates as a single actor. However, on matters of security and defence, foreign policy remains firmly in national hands. Some progress has been made in the development of a European security and defence policy with, for instance, the Franco-British incorporation of the Western European Union (WEU) defence treaty into the EU framework, with the creation of the Eurocorps, and with steps to establish a Rapid Reaction Force. However, as the recent divisions over the war in Iraq have demonstrated so forcefully, cooperation in this area remains limited. The EU, or

some subset of EU member-states, may well develop a common foreign policy (including a common defence) in the coming years. Whether or not this occurs, however, will have little to do with the single market. The single market creates few functional or political incentives for shifting control of defence policy to the EU level. Proponents of deeper integration will never succeed in peddling the notion that a common defence policy is a necessary corollary to a single market. Rather, the decision to “federalize” control of defence in the EU will only occur as a result of a convergence of views among member state governments on broad questions of geopolitics, above all questions concerning the trans-Atlantic alliance and the relationship between NATO and any autonomous European defence policy.

Second, the ongoing commitment of member-state governments to completing the internal market provides only very weak incentives to expand the EU's fiscal capacity. The single market program has had an impact on EU spending programs in that the EU's “cohesion programmes” for social and regional spending have been justified as means to compensate for dislocations caused by the single market. The Single European Act coupled its call for a renewed drive to complete the single market with a new commitment to “economic and social cohesion,” Euro-speak for spending policies designed to promote development in the EU's poorest regions. The linkage between the single market and spending programs was most obvious in the case of the Cohesion Fund established in the Maastricht Treaty. The EU's poorest member-states—Greece, Portugal, Spain and Ireland—argued that they would be adversely affected by the opening of their markets, and demanded and won compensation from the EU in the form of a new “Cohesion Fund” targeted specifically at promoting development in these four countries.

While the significance of the EU's structural and cohesion funds has increased over time, the EU's overall fiscal capacity remains extremely weak. EU spending on the structural and cohesion funds has increased from under five per cent of the EU budget in the mid 1970s to over 30 per cent today; however, the EU's overall budget remains extremely small by comparison to that of any modern state. EU spending is capped at 1.27 per cent of the collective GDP of the member-states, whereas most member-state governments have budgets totaling between 30 and 50 per cent of GDP. There is no indication that the EU's

budget will increase significantly in the short or medium term. EU budgetary policy remains subject to unanimous decision-making in the Council, and many national governments oppose an expansion of the EU's fiscal powers. The EU's lack of fiscal resources severely restricts the potential for its involvement in a wide range of policy areas in which federal governments are typically active, such as social welfare, defense and infrastructure development.

Beyond its limitations as an engine for federalization of particular policy areas, the single market is very limited in its ability to create one of the fundamental attributes of any true European Federation: European citizens who share some common identity and some catalog of rights and duties. As to the question of the development of a shared sense of European identity, Jean Monnet may have been correct when he suggested that "Europe," as a set of institutions and policies, had to be built before "Europeans" could be created. However, it remains clear that, to date, the development of EU institutions and policies has made little headway in awakening a sense of shared identity among citizens of EU member-states. Despite the dramatic increase in the scope of the EU's authority, much of it built on the foundation of the single market program, Eurobarometer data on European identity reveals no long-term increase in European identity among EU citizens over the past three decades.

Turning to the question of citizenship and citizens' rights, the Maastricht Treaty announced the dawn of European citizenship in bald terms, providing that, "Citizenship in the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union." However, neither Maastricht nor subsequent Treaty revisions at Amsterdam and Nice backed the notion of European citizenship with a significant catalog of EU citizen's rights. The economic and regulatory federalism constructed on the basis of the single market has not created fully-fledged European citizens. Rather, it has created what one can term "market citizens" who enjoy a set of Treaty based economic rights built around the four freedoms (free movement of labor, products, services and capital). Treaty provisions and secondary legislation have extended the economic rights of Europeans beyond these four freedoms to include a variety of rights for property owners, consumers, migrant workers, shareholders and other economic actors. EU law on equal treatment of the sexes in the workplace has expanded considerably over the past three decades. More recently, the Racial Equality Directive and the Equal Treatment Framework Directive have expanded the notion of equal treatment in the workplace from women to other vulnerable groups such as racial and ethnic

minorities and the disabled.

The EU has built an impressive catalog of economic rights on the basis of the single market. However, the introduction of a full set of political rights cannot be justified in the name of the single market. To date, member-states have rejected the formal incorporation of the Charter of Fundamental Rights, with its full set of political rights, into the EU Treaties. Recent discussions at the Convention on the Future of the EU indicate that the Convention will recommend the formal incorporation of the Charter into the constitution it will draft. However, as was the case with common defense or control of fiscal policy, the decision to establish a full set of political rights for EU citizens will not hinge on direct or indirect exigencies of the single market program.

## CONCLUSION

It would be difficult to overstate the significance of the single market for the development of EU federalism. The single market has provided the basis for the EU's most important institutional reforms — the introduction of qualified majority voting and the elevation of the status of the European Parliament. The single market has provided the basis for the construction of the most fundamental principles of Community law. For instance, the ECJ justified the principle of the supremacy of Community law (in *Costa v. ENEL*) on the grounds that variations in the executive force of Community law across member-states would violate the principle of non-discrimination (Article 7 EEC) in the context of the single market. As detailed above, the single market's deregulatory agenda has sparked a parallel reregulation at the European level, leading the EU to adopt common policies in a wide range of areas. Similarly, the removal of border controls has generated a series of negative externalities that created incentives for member-states to adopt common policies in areas such as policing and immigration policy. Finally, the benefits of the single market have helped win support of Europeans for the EU. Both for citizens of EU member-states and for those of candidate countries, the single market remains the EU's greatest draw. The single market has been vital to the construction of the system of regulatory federalism operating in the EU today. However, the member -states' shared commitment to the single market cannot provide the basis for the transformation of the EU into a more fully-fledged federal system, with more of the accoutrements of statehood, such as a common defense, a significant fiscal capacity, and a citizenry with some sense of common identity.

# AMERICAN FEDERALISM AND THE POLITICS OF REGULATION

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American regulation seems very puzzling. American business enjoys more autonomy than business in comparable nations, yet American governments regulate business in a more adversarial and contentious way than governments abroad. What accounts for the strange coexistence of business power and confrontational business-government relations? The conventional wisdom about American state regulation — that the states tend to race to the bottom of regulatory laxity rather than diligence — is even more puzzling. Evidently, the bottom never is reached. Indeed, the national government's regulatory approach often has drawn upon innovations initially developed in the states. If the states tend to compete to bottom so relentlessly, why do *any* of the states do any regulating at *all*, why do all the states do some regulating, and why do *some* states take on such corporate heavyweights as tobacco companies and Microsoft?

An institutional narrative of American policy development can explain much about these apparent puzzles. The Constitution allowed the states to keep most of the tools of economic management, but withheld from the states the tools of economic sovereignty, such as fiscal policy, monetary policy, and external trade management. Without the tools of economic sovereignty, American states have been severely limited in their ability to conceal, shift, or compensate business for the costs of regulation by using tariffs, currency manipulation, and other policies that externalize costs or extract rents from abroad. Politics requires that

each state engage in regulation because home businesses and broader populations sometimes demand protective regulation, and politicians benefit from responding to these demands. State regulations differ because state officials use policy to locate politically advantageous ways to balance democracy and development calibrated to the culture, institutions, political economy and immediate political opportunities unique to each different state. The states' lack of the tools of economic sovereignty, however, has inhibited the costs that any state is willing to impose on enterprises within its borders.

Because states regulated the American economy from the outset, opponents of national commercial interests coalesced around states' rights and restrictions on corporate conduct instead of the expansion of national economic power. The antebellum Democratic Party, a loose coalition of geographically scattered adversaries of national commercial interests, laid the foundation for this American approach to regulation. Its leaders could unite most expediently around a program of protecting state politicians' regulatory powers by limiting the scope of national economic conflict. When expanding enterprises eluded the grasp of state regulation after the Civil War, the Democrats and Republican allies in peripheral states again struggled to make the nationalizing economy safe for state politics. These reformers aimed to deprive large enterprises of the economic weapons that were undermining the states' regulatory influence, and they sought national powers necessary to cut corporate power down to state size by enforcing market discipline and neutralizing corporate redistribution within the nation. This antitrust strategy institutionalized government confrontation with corporate autonomy. But it also framed the debate over corporate power as a contest between business and markets, ensuring a set of policy alternatives generally favorable to business. The unevenly enforced antitrust strategy did not hamper the comparative advantages of the large corporation. In fact, state regulation promoted large corporations.

The national government lacked the authority to supplant state economic management until long after the large corporation became the American economy's distinguishing feature. After it initially flirted with corporatism, the New Deal generally supported rather than supplanted state regulatory authority, extending federal regulation according to the blueprint laid down by Democratic progenitors. Regulation expanded from the 1940s to the 1970s as post-material definitions of

risk and rights expanded. Subsequently, the loss of confidence in government and economic globalization have undermined state regulatory control, squeezing state regulation into new fields. All these developments have evolved according to fundamental rules that have endured since 1787.

## THE CONSTITUTION OF AMERICAN REGULATION

When the American colonies divorced from Britain, each reinvented itself as a self-governing republic. Each state assumed powers to levy taxes and tariffs, to issue public securities, to charter banks and other private entities, to circulate paper money, to grant bounties and tax abatements, and to regulate safety, vices, and the electoral franchise. State political leaders learned to calibrate these policy tools to create distinct political orders. State politicians dynamically balanced the conflicting demands of democracy, order, economic stability, and economic development in over a dozen different ways, each tailored to a nascent polity with distinct comparative economic advantages. Independence, war, and depression compelled state officials to master the use of these tools with increasing skill and dexterity by 1787, when the states sent some of their shrewdest political leaders to Philadelphia to reconstitute American national policy-making.

As state politicians who were deeply invested in their own state's politics, the Constitution's framers fully understood that politics and economic regulation are inseparable and sometimes indistinguishable. A given set of economic policies could accommodate, pacify, divide, and selectively mobilize the mass of voters whose political influence was as indispensable as it was volatile. At the same time, as upwardly mobile elites themselves, the delegates sympathized with demands of their more privileged constituents for economic stability and the cultivation of state wealth. Sent to represent distinct, diverse, and loosely interdependent political economies, the delegates sought to defend the state policy prerogatives and political orders that had benefited their careers, their homes, their allies, and their prosperity. Most delegates sought to rectify the Confederation government's inability to provide specific public goods (national defense and internal order, international commercial treaties, and national revenue) and to block other states from producing negative externalities or acting as free riders by circulating

paper money, restricting interstate commerce, and evading financial obligations to the Confederation. The delegates' central problem, then, was to provide the national public goods they desired while inhibiting national public goods that would endanger the vital interests of their states.

James Madison and his fellow Virginians forced the issue of state economic authority to the center of the Convention's agenda. Virginia's plan proposed virtually to nationalize economic management, establishing Congressional authority "to legislate in all cases to which the separate States are incompetent" and to veto any remaining state law "contravening in the opinion of the National Legislature the articles of Union." The plan proposed national power to lay tariffs, to impose direct taxes, and to control intrastate as well as interstate commerce (and, if Madison had his way, corporate charters). Virginia's proposal to eviscerate hard won and politically potent state regulatory powers mobilized veteran politicians such as Connecticut's Roger Sherman. These delegates defended state economic prerogatives against Madison's vision. Sherman and his allies countered Virginia's plan by proposing much more restricted national authority to provide specified public goods and to retain equal state representation in Congress. Equal representation, they expected, would impede the use of national power to disadvantage their states.

Compromises produced a Constitution that gave the national government the tools of economic sovereignty and gave the states the tools of economic management. States would regulate their comparative economic advantages such as land and labor, most notably slavery, but states could not use tariffs, interstate trade restrictions, and other sovereign economic powers to the disadvantage of economic interests in other states. The national government was authorized to use certain enumerated tools of economic sovereignty such as trade restrictions and tariffs, but was not authorized to interfere in the domestic regulation of economic assets (with the exception of nationally held lands). Most of the economic tools delegated to the national government, such as monetary policy, credit, and direct taxes (required to be uniform across the country) were macroeconomic tools too clumsy for microeconomic management. The Constitution deliberately left indefinite the boundary between state and national economic authority, between state and national public goods. It vested the resolution of this ambiguity in the national political process.

The Constitution created a new national policy-making process, in turn, deliberately designed to resist the geographical redistribution of economic advantage. This policy process aimed to facilitate majority coalitions that would produce national public goods the delegates generally believed necessary (national defense, sound money) while deterring majority coalitions that would produce national policies they believed harmful to state political economies (such as paper money and the discriminatory economic regulations recently enacted by some states). The Convention provided for the separate policy influence of the House, the Senate, the presidency, and the courts to impede policy cooperation among these institutions. The resulting process imposed high transaction costs on national policy by requiring extraordinary aggregation of interests and concerted effort, thus making it difficult for national political coalitions to use the process to extract states' wealth (e.g., ban slavery) and advantage themselves at others' expense.

The U.S. Constitution, then, left most economic regulation to the states, but denied them many of the tools used by national governments to facilitate redistribution and restrict business behavior. State regulation's effects would be relatively immediate, evident, and unmitigated by compensation for the regulated. Fiscal illusion would be much more difficult for the American states than for national governments. The demands of economic development more strongly influence regulation in the American states than in nation-states. State policy-makers have had relentless reminders of the economic impact of the way they regulate people and natural resources, and have very strong incentives to view workers and the environment primarily as economic assets. The Constitution imposes high costs on state policies that were perceived to put the state's enterprises at a competitive disadvantage with enterprises elsewhere. This logic has tended to work against regulations that inhibited economic growth, unfortunately for slaves, women, children, factory workers, and the environment. Less obviously, it sometimes has encouraged state policies that nurtured small, disaggregated economic interests, such as community banks, small retailers, and certain professions.

Democracy in each state has offset these competitive pressures and has made some measure of protection against unfettered markets politically expedient everywhere. States have regulated their economies to the extent to which there exists:



- (1) substantial mobilization of (or on behalf of) the economically vulnerable,
- (2) substantial demands from home businesses for regulations to reduce costs, uncertainty, and threats to autonomy,
- (3) cultures that resist the free play of free markets, and
- (4) previously institutionalized policy commitments.

By underwriting state's authority to use regulation to manage state politics, in turn, the Constitution profoundly affected the development of American national politics.

## STATE REGULATION FROM THE FOUNDING TO THE CIVIL WAR

State and local governments regulated America's markets actively in the early republic. Protection against fire and other pervasive dangers required public regulation of buildings, their contents, and other forms of private property. States promulgated many rules about products, packaging, urban markets, roadways, riverways, and ports. Many states implemented usury laws that limited interest rates charged to borrowers. The states regulated traveling salesmen and noxious trades, as well as gambling, liquor, bawdy houses, and other vices. State licenses and corporate charters conveyed conditional privileges to major economic actors. States licensed tavern keepers, auctioneers, carriages, and ferries as virtual agents of the state. States granted special charters to corporate bodies expected to serve public interests: banks, insurance companies, canal, turnpike and bridge companies, and harbor and turnpike facilities. After 1800, states expanded these individual regulatory charters to a growing universe of transportation, utility, and financial corporations. State laws governed labor, marriage, family, property, coverture, and inheritance. States tailored their laws to the cultures and dynamic political economies of the different and diverging regions. For example, while Connecticut in 1819 required manufacturers to teach child-employees reading, writing, and arithmetic, and Massachusetts in 1842 limited children's workday to ten hours, Southern states were tightening the control of the slave workforce by, among other things, prohibiting literacy education for slaves.

National politics underwrote the states' control of public policy. Alexander Hamilton and other Federalists promoted national guidance of American commercial development and championed an expansive concept of national economic power. Opponents of such commercial nationalism, notably Thomas Jefferson and Andrew Jackson, used the states' economic policy independence to unify this opposition. For these Democrats, defense of "state's rights" could unite diverse, far-flung and self-governing agricultural constituencies in opposition to the centralizing commercial pretensions of the Federalists without directly threatening the distinct political orders constructed in each state. States' rights appealed to agricultural and small producer interests and permitted a coalition across states with different political economies and at different points of development. Jefferson's allies learned the coalition-building potency of states' rights when they united to oppose Federalist national bankruptcy standards, a proposal that jeopardized the diverse state bankruptcy laws fine-tuned to the unique political balance in each state. By eliminating the Second Bank of the United States, Jackson's reconstituted Democratic party eliminated national oversight of banks and allowed the states to regulate banks to suit the political exigencies of local politics and economic development. The Democratic Party's positive returns from this platform put it on an economic policy path that would last until the New Deal. Roger Taney's tragic decision in *Dred Scott* tried to preserve this Jacksonian regulatory formula long after the transcendent force of the slavery issue mocked the original. As the U.S. approached the revolutionary changes of industrialization and market integration, state control of economic regulation was deeply ingrained in national politics.

## STATES AGAINST THE NATIONALIZING ECONOMY IN THE GILDED AGE AND PROGRESSIVE ERA

Expanding markets, far-reaching technologies, and powerful corporate behemoths placed vital economic sectors beyond the grasp of state law in the Gilded Age and Progressive eras. Railroads posed the first challenge to state regulatory autonomy. Armed with billions of dollars of capital, physically vast networks and seemingly boundless political influence, the large railroads set discriminatory rates, collaborated to fix prices, and cross-subsidized their operations (charging high rates for local transport to compete for long distance trunk lines). These prac-

tices imposed disproportionate costs on particular merchants, farmers, and other constituents of state politicians accustomed to substantial regulatory sovereignty. Politicians in the Midwest reacted first. Four states moved to regulate railroad pricing in the early 1870s. Illinois and Minnesota invented commissions to limit the rates that railroads could impose on their constituents. In effect, these state railroad commissions sought to disarm railroads of interstate economic power and reduce them to another state constituent whose demands for profit could be balanced against the economic demands of other state constituents. The sheer scope of the railroads' economic power, the inventiveness of railroad entrepreneurs and lawyers, and the Supreme Court's 1886 decision in the *Wabash* case made this strategy largely futile. This state incapacity posed particular problems for the Midwestern, Southern, and Western states on the periphery of the nation's manufacturing core.

As the states' regulatory power drained away, these states' Congressional representatives demanded national action to defend their constituencies. The economic value and power of the railroads made it impossible to destroy them, as Andrew Jackson had destroyed the Bank. Instead, Congressional representatives from the periphery set about to limit the scope of economic conflict by neutralizing the economic weapons that railroads had used to exploit their constituents. These representatives insisted on national rules to prevent railroads from redistributing costs and benefits without regard to state boundaries. Texas Representative John Reagan's proposals to ban railroad pooling and cross-subsidies seemed to work at economic cross-purposes, in that the pooling ban promoted competition and the cross-subsidy ban impeded it. These proposals, however, were *politically* logical, because they sought to use market discipline selectively to protect their constituents without surrendering their states' economic policy prerogatives. Trying to reconcile the irresistible force of the railroads and the nearly immovable object of state regulatory autonomy, Congress created an Interstate Commerce Commission and, in collaboration with the courts, gave the ICC the warrant to confront and challenge the pricing behavior of the world's most powerful private enterprises. National confrontation over market power, instead of public ownership or government collaboration with cartels, thus followed logically from the Constitution's distribution of the economic authority and representation. The battle over national railroad regulation was framed as a conflict between business prerogatives and free markets, narrowing the range of debate over business-

government relationships.

The Constitution made it eminently logical to extend the regulation of corporate conduct to all the notorious trusts, producing antitrust policy and the large corporation almost simultaneously. America's labor shortages and huge consumer market uniquely favored the creation of enterprises on the scale of Standard Oil and U.S. Steel, companies that were larger than comparable enterprises abroad. State laws, not merely size, enabled these corporations to exercise incomparable market power. Like European firms, American firms sought to manage competition through price and production agreements. Unlike European counterparts, though, American firms could not use government to enforce such agreements. States had no authority to protect colluding employers from predatory competitors outside the state's jurisdiction, and the national government had no regulatory authority beyond interstate commerce. Courts struck down state efforts to use tax and regulatory power to protect their home businesses and constituents. State officials struggled to find the authority to bring trusts under control. Twenty-one states had enacted constitutional or statutory prohibitions on trusts by 1890. As in the case of the railroads, only federal law could reach some of the interstate trust practices that fell between the cracks of the many state laws. In 1890, Congress passed the Sherman Antitrust Act, declaring illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states ...". Senator John Sherman explained that the trusts, based in some remote city, "regulate and control the sale and transportation of all the products of many States, discontinuing one at their will, some running at half time, others pressed at their full capacity, fixing the price at pleasure ...". The antitrust bill, he explained, would arm the federal courts so "that they may cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." While other countries tacitly or explicitly condoned cartels, then, the United States was trying to outlaw the very behaviors that made cartels attractive to business.

While the U.S. was making itself the pioneer of antitrust policy, though, state regulatory diversity was encouraging the growth of corporations that became more powerful than the trusts. Since the Sherman Anti-trust Act had conceded that states controlled corporate law, any state could

create a legal shelter for these enterprises. A “trust” could transform itself from an illegal combination into a single, legal corporation by seeking a state corporate charter. If the state charter allowed the firm such latitude, a state-chartered corporation could legally absorb competitors through mergers and control production and prices even more effectively than a trust. New Jersey immediately took advantage of this opportunity by relaxing its corporate regulations, positioning itself as a magnet for large corporations seeking to maximize their market power and legal autonomy. Corporate lawyers such as Elihu Root urged companies to incorporate under New Jersey law. After the Supreme Court validated states’ control over corporations and the economy recovered from 1893 depression, corporate consolidation rapidly accelerated. 1100 large corporations incorporated in New Jersey during the great merger movement of the turn of the century. New Jersey’s corporate and economic gains, in turn, brought pressure in other states to follow its lead by relaxing their corporate laws as well. In this way, the evolving logic of the Constitution had prompted both confrontational national law and state regulatory laxity, and the large corporation became the distinguishing feature of the American economy after 1900. Delaware subsequently relaxed its corporate laws, imposing low fees and minimizing state interference with corporate decision-making. Today, more than half a million U.S. and offshore corporations, including half the Fortune 500 industrial firms, have Delaware charters. Delaware’s Court of Chancery is the world’s most important commercial court.

This expedient regulatory approach was further elaborated in the early 1900s. Republican President Theodore Roosevelt explicitly advocated a more European attitude to big business and sought executive discretion to manage business-government relations. Roosevelt’s proposals failed because they lacked the political support of business advocates in his own party. Instead, the Democratic sweep in the 1912 elections aligned government behind the regulatory program of the nation’s economic periphery. Woodrow Wilson’s New Freedom produced the Clayton Antitrust Act and the Federal Trade Commission, initiatives that elaborated the national strategy of policing corporate conduct. The FTC, like the Pure Food and Drug and other laws, also aimed to protect consumers from interstate business predators. Rather than nationalize the government’s advantages with the corporation, Wilson’s New Freedom attempted to neutralize corporate advantages by enforcing market discipline. For the Democrats, this market discipline implied

the preservation of decentralized economic power, an expedient political glue that held together an anti-corporate coalition in economically diverse states.

## STATE REGULATORY REGIMES ON THE EVE OF THE GREAT DEPRESSION

While national officials tried to cope with large enterprises, Progressive-era states steadily occupied the field of financial, energy, and labor regulation. States regulated capital in a way that served in-state interests and aimed to keep private finance dispersed and manageable. The states generally prohibited banks from establishing branches, fragmenting the conduct of banking to the community level. State-chartered banks outnumbered national banks by two to one (though they had only one third of the deposits of the national banks), and state legislatures kept capital requirements for state banks generally lower than the requirements for national banks deliberately to induce new banks to secure state charters. The plains states shored up the decentralized banking system by implementing deposit insurance in the early 1900s, fueling growth of small, economically vulnerable banks in states most susceptible to agricultural depression. The states exercised complete regulatory jurisdiction over insurance. Many states either encouraged or required insurance companies to reinvest within the state those assets acquired from state policyholders. Texas’s 1907 “Robertson law,” for example, offered lower tax rates to insurance companies that reinvested seventy-five percent of their reserves in the state of Texas. Nearly all the states enacted “blue sky” laws between 1911 and 1931, establishing state regulation of stock and other securities offerings inside the state. “Blue sky” laws permitted state regulators to prohibit the sale of certain securities, thereby serving the interests of both state consumers and the small banks and securities firms in each state. Six states even passed anti-chain store legislation between 1929 and 1931 to prevent the incursion of out-of-state chains on the state economic interests.

Similarly, states regulated their natural resources to balance state economic and constituent interests. West Virginia’s policy-makers actively helped to thwart unionization of the state’s mines, effectively putting the state’s authority in the service of the bituminous coal industry’s national cost advantages. Texas, with large deposits of oil, expanded the

jurisdiction of its railroad commission to include this vital fuel. When the massive 1930 East Texas oil strike caused overproduction and price collapse, the Texas Railroad Commission received the power to stabilize prices by prorating oil, that is, by setting production limits for each well. The Commission's prorating rules aimed to benefit the many Texans who derived oil royalties from individual wells rather than the giant, out-of-state oil firms. This power virtually to control oil prices made the Texas Railroad Commission one of the most powerful regulatory commissions in the post-1945 world and a model for OPEC. Between 1907 and 1914, most states created public utility commissions (PUCs) to regulate electricity, gas, telephones, and urban rail transit. These PUCs weighed consumer and utility company interests, balancing rates, customer service, and corporate profits by monitoring and regulating the continuous flow of quasi-public services. PUCs sometimes could broker corporatist-style deals. During a 1919 Chicago streetcar strike, for example, the Illinois commission granted workers a higher wage and permitted the lines to charge higher fares to cover the costs. By the 1920s, however, such interstate holding companies as Samuel Insull's Midwest Utilities increasingly were eluding state control.

With jurisdiction over most of the nation's workplaces, state policymakers inherited the politically explosive problem of balancing labor protections against employer autonomy. The presence of reformer and labor demands for labor regulation made some laws politically irresistible. But while states did not race to the bottom, none rose to the level of effective labor regulation being implemented in Europe or Australasia. Across the states, fears that protective labor laws would harm state prosperity pervaded policy debate. Opponents of labor regulation invoked these fears to defeat or eviscerate factory inspection laws, laws limiting the work day to eight hours, the regulation of convict labor (sometimes contracted out to business), laws requiring one day's rest in seven, the regulation of child labor, and minimum wage laws. State labor regulations became widely disparate. New York implemented extensive workplace regulations after the Triangle Factory disaster in 1911, but many states lagged far behind New York and invested little effort in regulating factories. By 1902, Massachusetts, New York, Connecticut, Illinois, and Indiana had legally limited work to children aged fourteen, a limit comparable to that in Britain and Germany; but effective child labor regulation was resisted in many

states, particularly in the southeast where states sought to protect the national comparative advantage that low-wage child labor gave their textile industry. Virtually all the states had some restrictions on women's working hours by the mid-1920s, but seventeen states permitted women to work in excess of 54 hours a week and six states had no regulation of women's hours at all. Several states enacted minimum wage laws, but no state's law limited employer wage decisions as did Britain, Australia, or New Zealand. In many cases, states that enacted factory regulations provided little enforcement, in effect, allowing legislators to claim credit for responding to demands for labor protections without actually imposing costs on employers. This gap between legislation and enforcement has proved an enduring temptation for state policy-makers.

The Adamson Act of 1916 provides an instructive example of the way the U.S. government could naturally gravitate toward more European solutions for economic problems when it had the authority to do so. With a healthy economy and a presidential election looming in the late summer of 1916, the railroad brotherhoods demanded the eight hour day. President Wilson proposed that Congress establish the eight hour day by law for the brotherhoods and allow the ICC to increase railroad rates to compensate the railroads. The Adamson Act of 1916 established the first legal eight hour day for male workers in the private sector, and the only such national regulation until the New Deal. In effect, the Adamson Act constituted a reluctant corporatist agreement that logrolled worker protections and higher industry rents. Initially, the New Deal sought to expand such arrangements nationally.

## THE NEW DEAL AND THE REGULATION OF THE ECONOMY

Confronting unprecedented economic disaster and receptive business leadership, the New Deal moved to stabilize economic sectors by authorizing industries to regulate themselves. The National Industrial Recovery Act sanctioned national cartel arrangements in over 500 industries, from coal and steel to umbrellas to licorice. Explicitly defending "the domain of state power," a unanimous Supreme Court struck down the NIRA as an unwarranted interference with state regulatory prerogatives.

The collapse of national corporatism pushed the New Deal back toward the New Freedom's formula, setting limits on business conduct while underwriting state regulatory prerogatives in key economic domains. The Public Utility Holding Company Act, the most direct descendant of the New Freedom, broke apart the large interstate utility holding companies, enabling states to regulate electricity and natural gas more effectively. The Connally Hot Oil Act underwrote the oil states' control of oil production by prohibiting interstate transport of oil produced in violation of state prorating quotas. This law permitted Texas, Oklahoma, and Louisiana to coordinate oil production and stabilize prices to benefit home industry. The 1935 Motor Carriers Act extended federal regulations from railroads to trucks and buses, but mandated the preservation of state regulation of motor vehicles to the maximum extent possible. This arrangement allowed southern states to preserve the legal segregation of races in public transport. The Federal Communications Commission established national control over interstate and international telephone and telegraph transmission, but left intrastate phone regulation to the states. A federal Civil Aeronautics Board regulated most of the airline industry, though it remained possible for states to regulate intrastate airline service (as California later did). The Robinson-Patman Act banned large retailers and chain stores from extracting price concessions and using price discrimination against small businesses and suppliers. The repeal of Prohibition essentially returned alcohol regulation to the states; eighteen states assumed direct responsibility for selling alcohol. By the late 1930s, the Justice Department under the direction of Thurman Arnold revived antitrust prosecution, policing industrial structure and corporate restrictions on price and market entry.

Even when the New Deal regulated banks and securities, where the failures were most obvious and the frauds most spectacular, it left room for state regulation while it policed the scope of economic conflict. The Glass-Steagall Act forced commercial and investment banks to separate. Commercial banks were prohibited from underwriting securities, except for those issued by state and local governments. Building on the state "blue sky" laws, the national government's Securities and Exchange Commission supervised securities and the stock exchanges. National deposit insurance indemnified depositors. The Federal Reserve Board gained new power over macroeconomic monetary policy, and the national government extended federal charters to savings and loans. At the same time, many financial institutions remained under state super-

vision. Federal law underwrote state financial regulation by subjecting national banks to the different rate ceilings imposed by the various states. States continued to regulate the insurance industry.

The New Deal subtly extended the New Freedom's political formula to the workplace by policing labor markets while leaving substantial discretion to the states. The National Labor Relations Act of 1935 created a decentralized and litigious system of labor relations. The National Labor Relations Board, a quasi-judicial forum, has regulated procedures for union recognition and bargaining. The NLRA decentralizes labor conflict as much as it protects unionization because it limits collective bargaining to the plant, craft or employer instead of expanding the scope of conflict to the industry as a whole. Republicans artfully used federalism further to restrict employer-union conflict in 1947, when amendments permitted states to prohibit the union shop (that is, workplaces that require union membership as a condition of employment). All the former Confederate States (twenty-two states in all) have enacted right to work laws; in Texas and Florida, the two largest "right-to-work" states, union density declined faster than the national average between the 1950s and the 1980s. The Fair Labor Standards Act set fixed national minimum standards for hours and wages without undermining unions' control over higher levels or state control over aspects of the labor market vital to their political economies. By excluding domestic and farm workers, the FLSA effectively excluded large numbers of female and African-American workers from protection and delegated their governance to the states. Eleven states now mandate a minimum wage higher than the federal wage; seven states, mostly in the south, have no minimum wage law, and three have minimum wages lower than the federal wage.

## EXPANDING THE REGULATION OF RISK IN THE POST-WAR GENERATION

Expanding conceptions of risk and rights during the prosperous post-World War II generation increased demands for regulation of discrimination, environmental hazards, and consumer deception. In every case, state regulations initially grappled with these concerns. New York's pioneering 1945 anti-discrimination law covered employment, housing, credit, public accommodations and public schools. When Congress

passed the Civil Rights Act in 1964, virtually all African-Americans outside the south lived in states with fair employment laws. California passed the first state air pollution law in 1947, and again most states had enacted such legislation by 1963. Loopholes and enforcement problems plagued these state laws. Pennsylvania's law provided that state clean air measures not "unreasonably obstruct the attraction, development, and expansion of business, industry and commerce in the Commonwealth." Three leading auto manufacturing states, Michigan, Wisconsin, and Missouri, lacked any air pollution laws at all.

The environmental regulations subsequently enacted by Washington recognized that the states already occupied the field. Initial federal laws, such as the Water Pollution Control Act (1948) and Clean Air Act (1955), provided only federal research and technical assistance to the states. Conditional grants-in-aid followed in the 1960s although, with the support of auto manufacturers, the federal government assumed regulatory control over auto emissions to preempt a variety of state rules. By the end of the 1960s and 1970s, lax state enforcement irritated national policy-makers, contributing to several exceptionally stringent environment laws. But even the Clean Air Act of 1970, usually viewed as an exemplar of national command and control regulation, depended on State Implementation Plans (SIPs) to guide the regulation of power plants, factories, and other stationary air polluters. These SIPs, which in theory would require polluters to make specific and potentially costly changes, made state officials potential adversaries of urban drivers and powerful state industries. Many states initially issued exacting SIPs, only to relax enforcement and ultimately requirements, in turn inviting environmentalists to sue state officials to enforce the law. State officials sympathetic to environmental protections sometimes found themselves compelled publicly to oppose federal pollution requirements while they privately hoped that federal officials would compel them to enforce strict requirements. By 1977, intense constituency pressures forced Congress to retreat from some stringent environmental mandates. Clean Air Act amendments eased pollution regulations along with the power of the federal Environmental Protection Agency, while state governors received more power to suspend any unpopular transportation controls that required gasoline rationing, parking controls, or limited access to cities. Some of the command and control regulations that have been enacted since the mid-1970s, such as smoke-stack scrubbers or ethanol requirements, reflect the influence of Congressional constituencies that stand to gain from these mandates.

## DEREGULATION AND NATIONALIZATION SINCE THE 1970S

Economic change and deregulation since the 1970s have undermined the states' economic regulatory authority more thoroughly than the national laws of the 1930s, the 1960s and the early 1970s. Satellites and electronics transformed the financial industry in the 1970s, and, fueled by the impact of stagflation, pressures mounted to loosen financial regulations. States responded to these pressures before the federal government. In the late 1960s, Texas relaxed savings and loan regulations and allowed thrifts to invest in more speculative real estate ventures. In the 1970s, Massachusetts approved a Worcester bank's innovative NOW account, a device for evading national rules prohibiting banks from issuing interest-bearing checking accounts. By the late 1970s, when inflation squeezed thrift institutions brimming with commitments to long-term, low interest home loans, state and federal regulators allowed thrifts to enter new but riskier loan markets. States began to reduce or eliminate prohibitions on branch banking and eased other financial rules. A 1978 U.S. Supreme Court decision made it impossible for states to prevent out of state credit card companies from soliciting business within their state, causing a repeat of the 1890s interstate race of regulatory laxity. South Dakota and Delaware deregulated interest rates and other banking rules. South Dakota lured Citicorp to Sioux Falls, where the firm established a national credit card center. Major banks then pressured other state legislatures to relax interest rate ceilings. When the Maryland legislature rejected this pressure, Maryland's four largest banks moved their credit card operations to Delaware. Interstate competitive pressures effectively had resulted in a deregulated market for credit cards by 1982; today, lending institutions in Delaware hold forty-three percent of total credit card loans made by insured depository institutions.

Federal deregulation has left the states less room to regulate in traditional areas. Transportation deregulation barred states from managing "rates, routes and service" of motor and air carriers, requiring states to permit, for example, large, double-bottom tractor-trailers to travel through the state. The Gramm-Leach-Bliley Act of 1999 repealed the Glass-Steagall Act and preempted state regulators from prohibiting any of the banking activities allowed by federal law. By breaking down barriers between financial activities, this law in effect has pressured states

to relax regulations on insurance companies. The securities industry lobbied to include a provision in the Public Company Accounting Reform and Investor Protection Act of 2002, passed in the wake of the Enron scandal, to preempt the states from investigating the securities industry.

Federal deregulation initiatives have put great pressure on the states' power to regulate electricity and telecommunications, two areas of state responsibility protected by the New Deal. Federal deregulation of electrical transmission facilitated the creation of a national market for wholesale electricity, stimulating economic competition among the power companies. Pressured by this competition and lured by the hope of reducing consumer costs, a large majority of the states in the mid-1990s considered deregulating the retail sale of electricity. More than a dozen states deregulated electrical utilities; California, for example, permitted customers to choose their electric service providers at the beginning of 1998. The subsequent and widely publicized energy crisis in California slowed electricity deregulation, though the Bush administration's 2001 energy plan supported the extension of the national electricity market. The Telecommunications Act of 1996 required state regulatory commissions to admit new entrants into local telephone services. A fractured FCC in 2003 narrowly permitted states to retain authority over local phone services despite the notable opposition of FCC chair Michael Powell.

## CONTINUITY IN THE MAINSPRINGS OF AMERICAN REGULATION

Though American state regulatory powers have changed since 1787, state policy-makers still have the means and motive to use regulation to advantage their constituents and political standing. State Attorneys General, who are among the nation's most upwardly mobile elected politicians, have been especially active in pressing for populist and post-material regulation of the way out-of-state firms affect in-state constituents. State Attorneys General have pursued antitrust actions against Microsoft, pharmaceutical manufacturers, and recorded music distributors. The antitrust lawsuit against Microsoft was joined by the Attorneys General of twenty states, including major software and Internet centers California and Massachusetts (but notably not the

Attorney General of Washington state, Microsoft's corporate home).

Politics and economics still mix indistinguishably in state business regulations. Most states have enacted statutes that protect in-state firms from hostile takeovers by out of state enterprises. Ohio and Pennsylvania, two states with the strictest anti-takeover laws, impose obstacles to purchasing large blocks of stock in firms with state charters. Thirty-two states have also enacted "stakeholder" laws since 1983, allowing corporate managers to consider the effects that corporate decisions would have on employees, suppliers, customers and other stakeholders. Twenty-two states have laws that try to protect smaller businesses by prohibiting the sale of goods below cost. States have tried to protect state debtors and consumers by negotiating agreements with Kmart and other merchandisers who close stores.

State politicians use regulation as extensively as ever to protect their consumers, minorities, and the environment. All the state Attorneys General have petitioned the Federal Trade Commission not to preempt states from establishing and maintaining "do not call directories," politically popular programs aimed to prevent unwanted sales calls. All the states have automobile "lemon laws" that permit the return of a defective automobile; seventeen states even have "pet lemon laws" that require stores to refund the purchase price or replace a puppy with congenital or hereditary defects. States are grappling with predatory mortgage lending and payday loans, issues that particularly exploit minority communities. They continue to regulate employment discrimination, access for the disabled, highway safety, drugs, alcohol, cigarettes, and a variety of real or colorfully imagined vices. State Attorneys General initiated the lawsuits against the four largest tobacco companies aimed at recovering costs of treating smoking-related illnesses, a settlement projected to provide the states with more than \$200 billion over the next quarter century.

Environmental policy exemplifies the way states regulate to balance democracy and development today. States issue ninety percent of all environmental permits and undertake three quarters of all environmental enforcement actions. Environmental protection has broad based but shallow public support, while the costs of specific environmental regulations often are narrow and potentially deep. It is small wonder then, that some states pioneer environmental laws while many states neglect

environmental enforcement. Oregon, Washington, New Jersey, Minnesota, Maine, Massachusetts, and Vermont are developing integrated and proactive environmental regulations that address popular concerns and simplify decisions for in-state businesses. By early 2002, a majority of the states had statutes or executive orders aimed to reducing the emission of greenhouse gases that contribute to global warming. At the same time, state environmental regulation remains notoriously uneven. Violations, deadlines, and required tests frequently are ignored. Eleven years after the enactment of the Clean Air Act of 1990, only South Dakota had completed the initial permit process for the Title V permit program. Nearly three quarters of factories and refineries in Ohio violate the Clean Water Act, and a third violate the Clean Air Act. States resist environmental regulations that might cause disinvestment or force the state to accept other states' negative externalities.

Nothing better illustrates the political logic of contemporary state regulation — and the enduring logic of the Constitution — than the national battle over the disposal of nuclear waste. A 1985 federal law gave states responsibility for disposing of the low-level radioactive waste produced by hospitals, universities, nuclear power plants, and manufacturing operations in their states. States were encouraged to form compacts that would allow them to identify and open new, carefully designed disposal facilities. States immediately gamed the law to minimize the chance that they would be compelled to open a nuclear waste dump. Texas created a compact limited to itself and distant Maine and Vermont. South Carolina, already the location of the nation's largest low-level nuclear waste dump, created a compact limited to itself, New Jersey and Connecticut. North Carolina and Nebraska have been sued for refusing to open waste disposal sites, as they previously agreed to do. No state has permitted the completion of a new low-level nuclear waste disposal facility since the Act was passed. Meanwhile, state representation in Congress has considerably slowed the resolution of the problem of disposing of high-level nuclear waste, such as fuel rods from nuclear power plants. The resolution of this primordial political battle was delayed by Congressional representatives who sought to block the site from their state. Despite Nevada's bitter opposition, Yucca Mountain, Nevada, finally was designated as the national site for this waste. Now members of Congress from states on transportation routes to Nevada are opposing the movement of this high-level nuclear waste through their constituencies.

## THE ENDURING CONSTITUTION OF REGULATORY FEDERALISM

The Constitution's framers profoundly shaped the development of American policy by protecting their states' policy autonomy. Since 1789, American states have used their substantial regulatory powers to make dynamic politics that balance popular demands and economic interests in economically, culturally, and politically diverse jurisdictions. American political development since 1789 has taken this logic in unexpected but not wholly surprising directions. As economic power industrialized and nationalized, disparate opponents of national commercial interests coalesced around proposals that partially disarmed big business without surrendering state policy authority to Washington. By trial and error, the New Freedom and the New Deal elaborated on national regulations that circumscribed business conduct while preserving much of the states' power to adapt regulation to their politics. Deregulation and technology have undermined state economic regulation in the last quarter century. Inventive state regulators and their national representatives, however, still use regulation to serve constituents and still resist the adverse redistribution of economic costs.

This institutional narrative helps explain the two puzzles of American regulation with which this essay began. The states never had the incentive simply to race to the bottom. Regulation is too politically valuable to constituents, including in-state enterprises that benefit from state-legislated economic advantage. The short-term imperatives of economic development, though, are much more immediate and inescapable for state policy-makers than for national counterparts because the states lack the tools of economic sovereignty. State policy-makers feel much more pressure than national policy-makers to balance democracy and development in development's favor. The demands of short-term prosperity and a positive business climate therefore inhibit state intrusions on employer prerogatives. Confrontational regulation naturally followed from nationalized political responses to these frustrating state and national government incapacities. The regulatory structure that allowed business unusually broad autonomy also motivated politicians to lash out against specific uses of that autonomy, particularly corporate conduct that disadvantaged their constituents. Strict regulatory laws, however, do not ensure strict enforcement of those laws. Indeed, as tools for balancing constituencies, the combination of strict regulatory



statutes and selective enforcement has enormous political utility for policy-makers. One need not question the idealism of regulation's proponents to suggest that rigorous laws against environmental wrongdoing respond to the broad but shallow support for environmental protection, while selective exemption from the costs of these laws provides a material benefit for individual businesses.

This institutional narrative also explains a deeper puzzle about American economic development. In a nation so democratic, demands for protection against the creative destruction of capitalism should have been direct, powerful, and influential. Yet, as Douglass North showed, the nation's laws have been exceptionally conducive to investment and capitalist development. How could democracy and capital accumulation coexist so easily? This history of American regulation helps explain how demands for protection against capitalism could be decentralized, tailored to individual constituencies, and restrained by state politicians who incur high political costs when they impose high economic costs on their business constituents. State regulation also can provide insight into the other side of North's story, the exceptional exposure of Americans who are disadvantaged politically or economically — children, industrial workers, unpopular and disrespected minorities, and women — to the vagaries of the market. Government's ability to create sustained, effective protections of such populations depends in part on government's ability to mask, offset, or shift the costs of protection. A government with the tools of both economic sovereignty and economic management can use them fully to protect the vulnerable. Because the American governments with the authority to protect such populations largely lacked the tools of economic sovereignty until the New Deal, the U.S. welfare state lagged behind comparable nations. To the extent that states retain control over the protection of these politically and economically vulnerable populations, that protection is demonstrably incomplete. Determined and effective political leaders bear much of the credit for those protections that do exist.

What lessons can foreign observers borrow from the American experience? The lessons of state regulatory *policy* are of limited use because of the unique constitution of American regulatory development. But the lessons of state regulatory *politics* are invaluable. Politicians use their policy prerogatives to make politics. Political goals always are necessary and sometimes are sufficient for enacting and enforcing regula-

tions. The American case provides a natural experiment for examining how regulatory politics works when policy-makers face unusual exposure to market exigencies. Commercial nationalism in America, whether personified by Alexander Hamilton, Nicholas Biddle, E.H. Harriman, John D. Rockefeller, Samuel Insull, or Bill Gates, generates political opposition. American regulatory federalism makes it easiest for that opposition to coalesce around the selective disarmament of economic power and the defense of markets. American regulatory politics, as a result, has tended to pit proponents of business against proponents of markets — quite a satisfactory choice of alternatives for private enterprise, but quite a limited choice for proponents of inclusive and equitable public protections.

# THE SINGLE MARKET AND INTEGRATION:

## A COMMENT ON DANIEL KELEMEN'S PAPER

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Both the Robertson and the Kelemen papers base their arguments on historical narratives, an observation that warms the cockles of my heart as a historian. But what distinguishes the discipline of history from the social sciences is less its interest in the past than its fascination with the contingency of things: hence the uneasiness of historians with predictive theory. It is the unpredictable contingency of things, never more evident than at present, that makes me take issue with parts of Daniel Kelemen's paper.

I am, let me emphasise, in full agreement with his fundamental argument, in the first place that opening up the single market has been the primary motor of EU integration, and secondly, that the single market including the single currency cannot propel EU integration much farther.

But—and it is here that we part company—I can see nothing inevitable about the linkages between development of the single market and EU integration. I would argue, to the contrary, that the development of the single market can exacerbate divisions among the member-states. The process of EU integration is, moreover, vulnerable to exogenous shocks—the contingency of things.

Two examples may serve to illustrate how developments in the single

market can bring out the divided interests of the member-states. The first example involves immigration, the second the enlargement of the EU. In the logic beloved by economists, the integration of the European market should have induced the member-states to agree upon an immigration and asylum policy for the EU as a whole in order to meet their common need for employable labour and the same time to address the plight of oppressed peoples elsewhere in the world without exacerbating unemployment at home. But in fact the member-states of the EU have been remarkably slow to reach agreement on this subject. They have been held back by popular resistance to alien immigration when it appears to exacerbate unemployment at home. Regional integration of the market arouses domestic fears. A common EU policy on immigration could not, furthermore, except with great difficulty deal with two dimensions of the problem that set the member-states against each other and overwhelm their best efforts: the insistent preference that many immigrants show for one or more of the member-states over others, and the tide of illegal immigration.

Meanwhile the eastward enlargement of the European Union has not been a pretty process. It may have been promoted among the existing and prospective member-states primarily by enlargement of their market. But the negotiations toward this end have brought out their conflicting self-interests. Of more enduring gravity, the decision to increase the number of states in the EU from fifteen to twenty-three before reaching agreement on the constitutional reforms needed to cope with this expansion places the cohesion of the union in jeopardy.

Speaking of the constitution, let me insert another note here. Emphasis on the logic of the single market leads the paper under discussion into another illusion. The paper discerns a transformation of the EU's legislative process into a set of federal, bicameral institutions with two houses of nearly equal status: the Commission and the Parliament. This bears little resemblance to the institutional hierarchy that actually exists in Belgium, where the European Parliament sits unquestionably at the bottom and the Commission has struggled unsuccessfully over the past few years for parity with the Council.

To return to my critique of the supposedly irresistible momentum with which the single market promotes EU integration, I wish finally to argue that it makes no allowance for exogenous shocks. Hitherto the

integration of the European Union has been promoted by and indeed was initially based upon such shocks, from the centuries of warfare particularly between France and Germany that gave rise to the Coal and Steel Community, through the Cold War that induced the United States to promote the EEC as a barrier to further Soviet expansion, to 9/11 which did if anything more than the Single European Act to improve the coordination of policing and intelligence in the EU.

But the divisive potential of exogenous shocks has never been more powerfully demonstrated than over the Iraqi war, which has shaken the European Union to its foundations. It made a mockery of the Common Foreign and Security Policy which the current constitutional convention aimed to enhance. President Chirac's patronising condemnation of the prospective member-states that sided with the US in the conflict with Iraq chilled the process of enlargement. The determination with which current and prospective members of the EU lined themselves up for and against the war provided many reminders of the divided alliances that bedevilled Europe through earlier generations, shattering its peace.

# THE EUROPEAN COURT OF JUSTICE AND EURO-FEDERALISM

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## INTRODUCTION: ON EUROFEDERALISM

The story is told that negotiators for the Maastricht Treaty settled on the phrase “an ever closer union” to describe the goal toward which the European Union was to be a new stage because, although most of the negotiators favored the alternative, “a new stage in the process leading gradually to a Union with a federal goal,” the British refused to be party to any document containing the dreaded F word. Thus, I am grateful to the organizers of this conference for having provided me with an E word instead, “eurofederalism,” to characterize the European Union. That term actually performs admirably at synthesizing the common perceptions that, on the one hand, the EU is *sui generis*, not exactly duplicated by any of its “federal” predecessors, and, at the same time, that it certainly exhibits core federal traits: A group of independent states have federated together into a united formation, a union, where many governmental functions are retained by the member-states, and yet many have shifted to the central, or federal level. Terms like “postnational polity” or “postmodern federation” have cropped up for it as well, but eurofederalism is as good a term as any.

The EU is far more integrated than any existing international or inter-governmental organization, and yet weaker at the center in important respects than polities one views as full federations, say Switzerland or Canada. Still, it has the core elements of a federation, *viz.*, central gov-

erning bodies with authority to tell member-states what to do (and make it stick) in some fields but not in others. After all, no two federated polities are entirely alike, and the EU shares many a salient trait with other federations: Switzerland, for instance, like the EU, uses cantonal (i.e. member-state) governments to implement federal policies; Canada (more or less) permits the right of secession, as the EU very likely would if the situation were to arise. Moreover, the European Union — however decentralized it may look compared to what one thinks of as “nation-states” that take federal forms — has by now accumulated more than a few powers at its center. In one recent count by John Donahue and Mark Pollack, central authorities of the EU (as compared to those of the member-states) now dominate the policy process over all of the following subjects: movement of goods and services, agriculture, capital flows, movement of people/workers, control over money and credit, foreign exchange/ loans, macroeconomic policy, justice regulations and property rights, foreign economic and military assistance, diplomacy and IGO membership, and foreign commercial negotiations. At the EU level also now lies partial (although not predominant) authority (where before there was none) to regulate all of the following additional topics: transportation, energy, communications, environment, regional development, competition, industry, revenue/taxation, working conditions, health, social welfare, education and research, labor-management relations, citizenship, political participation rights, policing and public order, and defense.

Thanks to the genius of Publius, that word *federalist* has come to mean both itself and its opposite. When one speaks of the Federalist Society, one speaks of a group committed to retaining power in the member-states of the American union, of checking power at the center. Yet the germinal document, *The Federalist Papers*, was setting forth arguments for creating a new and powerful central, or *federal* government. Brits who oppose federalism do so as opposition to the centralization of power in a European superstate. Contemporary Americans who *favor* federalism similarly wish to reduce or check the power of the central national government. Given these contrary meanings of the word, I will treat eurofederalism for the moment as being about the growth of central or federal power at the European level, and will address the role of the European Court of Justice in that growth. In the final section of this paper I will address some of the political consequences of the growth both of federal power in Europe and of judicial and bureaucratic power

there, and offer a suggestion, in the spirit of the ongoing constitutional convention for the European Union.

## THE GROWTH OF EUROFEDERALISM AND THE ECJ ROLE IN IT

In 1951, France, Germany, Italy and the Benelux nations formed the European Coal and Steel Community (ECSC), which came into being in July 1952, as part of a general burst of interest in the formation of intergovernmental organizations that followed on the heels of WWII (which included formation of the UN, the OEEC [forerunner of the OECD minus the U.S. and Canada], the Benelux union, NATO, and the Council of Europe [which issued the European Convention on Human Rights]). The ECSC had a High Authority as its executive arm, empowered to issue decisions binding on the member-states, and a Council of Ministers to make policy that could check the High Authority, voting on the basis of unanimity, qualified (i.e. super-) majority, or simple majority, depending on the issue. It also had a consultative Assembly, with members appointed by the national parliaments, and it had a Court of Justice to settle conflicts between the organs of the community or between any two member-states, or between a community organ and a member state. This Court of Justice, whose justices at first were notably member-state-friendly, kept a very low profile for many years. In 1957 the same states formed two additional associations, the Euratom Community, for encouraging the development of atomic energy, and the European Economic Community, for developing a common market. These two communities also adopted the European Court of Justice, and set up institutions parallel to the Council of Ministers and the High Authority, the latter called Commissions. These began to function by 1958. In 1965 the separate Commissions and Councils merged into one each for the three European Communities, which then went by the colloquial name “European Community” (hereafter EC). (During this period, intergovernmental organizations continued to blossom in Europe; the Western European Union defense pact of the ECSC six plus the UK formed in 1954, and the European Free Trade Area [EFTA] in 1960 comprised of Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the UK.)

Meanwhile, the European Court of Justice began to launch the EC from

ordinary IGO into seriously federal formation, starting in 1963. In the case *Van Gend en Loos v. Netherlands* (1963), which presented a narrow and technical question of import duties on certain chemicals, the court issued a ruling of enormous doctrinal import: Provisions of the Treaty took direct effect and created legal rights of individuals which were enforceable by private actions taken to member state courts. This ruling essentially overrode the laws of all those member state countries that required specific national implementing legislation before treaties took the force of domestic law. The Court justified its action with the statement:

The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member-states but also their nationals.

The next year the Court handed down *Costa v. ENEL*, in which Mr. Costa urged that the nationalization of electricity in Italy violated the EEC Treaty. This challenge involved domestic policy far more momentous than chemical import duties, but the Court stood by its position: not only did the treaty rules take direct effect, but also the treaty provisions overrode national law to the contrary, even if the national law were adopted subsequent to the treaty. And in 1970 (the *Handelsgesellschaft* case) the ECJ extended treaty supremacy, as well as that of EC-level legislation, even over constitutional provisions of member-states, a position it reiterated in 1978 (*Simmenthal II*). Moreover, not only treaty provisions and regulations, but even directives—i.e. goal-setting statements from the Council, which goals are to be implemented in ways chosen by the Member-state—of a certain kind (those which are both precise and unconditional) are supreme over member state law and create direct effects with respect to persons' rights against their state (*Van Duyn*, 1974).

These decisions, although they did not exceed the limits of plausibility as readings of the EEC Treaty, did come as a surprise to many commentators and are widely viewed to have been unanticipated by the authors of the treaty. The Treaty had provisions allowing the ECJ to check Euro-level institutions for *ultra vires* actions and provisions authorizing the European Commission to charge member-states with violations of the treaty, or member-states to charge each other. In the early decades these were hardly used. Instead, Art.177 (now renumbered to Art. 234), a

provision from which treaty authors had not expected a great deal, proved the primary engine of federalizing activity by the ECJ. This article said that, when a question of how to interpret a piece of Eurolaw is raised, member-state courts could, and courts of final appeal must, apply to the ECJ for a "preliminary reference" that would provide the authoritative meaning of the EC law. References to the ECJ under this article between 1958 and 1969 numbered 97. In the five year period following this decade of judicial innovation, 1970-4, the total jumped to 311. It more than doubled in the next five years, and continued to grow steadily, reaching 1065 for 1990-94 and 1039 in the three and a half years from 1995 to mid-1998 (data collected by Alec Stone Sweet and Thomas Brunell).

Emboldened by the doctrines of direct effect and supremacy, and backed by numerous specific ECJ interpretations of Eurolaw, member-state judges began in the sixties and seventies to exercise judicial review powers that had not previously been accorded to them under domestic law. Handed this ball by the ECJ, they took it and ran (some sooner than others, but all by the end of the eighties), becoming the vehicle by which member-state legal systems were brought into line with the EEC treaty. Even on such nationally sensitive topics as travel from Ireland to get abortions or access of foreign nationals to compete for government- provided scholarships, member-state judges stood up against their own state's restrictions, in order to honor Euro-law. And late twentieth century Europe being a society where commitment to the rule of law was well-entrenched, these judicial rulings stuck.

While the ECJ was crossing new frontiers on the legal front, and thereby attracting more and more litigation, the policy-making body expected to be dominant, the Council of Ministers, was dragged to a virtual standstill by Charles de Gaulle in 1965 who basically staged a walkout for six months. Intense diplomacy produced what came to be known as the Luxemburg Compromise, in which each side declared its position (France's being that each member state should be allowed a veto power) and neither officially conceded. From then until the Single European Act, which took effect in 1987, each state did exercise an effective veto power, and almost nothing was produced by the Council of Ministers. The thrust of the Single European Act was to allow the Council of Ministers to adopt regulations on a variety of specified topics by "qualified majority voting," which set up a system that accords each state

votes roughly in proportion to population size, and requires slightly more than 2/3 of the total to enact measures.

This combination of events had turned the EEC treaty into a federation-style constitution (a fact by now openly acknowledged by judges in Europe) and had shifted the weight of policy-making before 1987 onto the shoulders of the ECJ and the Commission. (The Commission's job was to suggest measures for adoption to the Council of Ministers and to implement the legislation that did get adopted. Measures from both the Council and the Commission are considered "regulations," but the former are broader in sweep while the latter tend to be much more narrow, technical, administrative, and numerous. The Commission consists of several thousand technocrats, headed by twenty Commissioners, appointed by the member-states.) With the Council rendered practically impotent, the Court would find principles in the Treaty, and then the Commission would issue regulations to implement the principle. (There also was a European Parliament, at first merely consultative and appointed by member state parliaments, but directly elected beginning in 1979.) Meanwhile, the EC in this federalized format was attracting new members. The UK, Denmark and Ireland joined in 1973; Greece, Spain, and Portugal in the eighties; and Austria, Finland and Sweden in 1995.

By the late nineteen eighties, not only had policy-making momentum been given back to the Council of Ministers, but also, as the Court's decisions striking down various member-state policies mounted up, political concern with the Court's dominance along with fear of further federalization appears to have taken hold, to a degree. As is normal in a large political body (by now the EU has a population of 350 million) one can observe signals in conflicting directions, and these conflicts apply both to the federal judiciary and to federal strength in general.

On top of its other assertive moves, the Court had turned itself into the enforcement arm of the EC, by according itself authority in 1991 (*Francovich* case) to impose on states damages liability for failing properly to implement directives. In the Maastricht Treaty, which was signed in 1992 and took effect in 1993, this judicial power to impose economic sanctions was ratified and formalized in the treaty. On the other hand, the jurisdiction of the ECJ for the first time was restricted, as detailed below.

In addition, other federal aspects of the union were strengthened in a number of respects:

(1) the power of a majority of the states to bind a minority of them was increased, in that qualified majority rule was extended to additional topics.

(2) The strictly economic goals of the EC were supplemented by additional concerns—the European Community became part of a broader entity, the European Union, comprised of three "pillars": the (economically oriented) EC, the Common Foreign and Security Policy, and Justice/Home Affairs.

(3) Within the first pillar, EC citizenship was created for all citizens of the member-states, with the right of every citizen to vote in local elections (irrespective of nationality) and in European Parliament elections in the place of residence. The directly elected Parliament was given power of co-decision over legislation, such that now it had to be accepted by both the Council and the Parliament to become Eurolaw. This change could be read as weakening the center, in that it added another veto point for central legislation, but, on the other hand, it gave a genuine role in policy-making to the federation-wide popular majority, a development of potentially great weight. The areas of EC legislative authority were extended in the first pillar, to include more aspects of the environment, consumer and worker safety, health, transportation, and education. Economic and monetary union (EMU) planning was adopted, along with appointment of a central bank to administer it. Jurisdiction of the ECJ was restricted to this pillar.

It is unremarkable that judges would be kept out of decisions on foreign and security policy (Pillar Two); the U.S. Supreme Court ostentatiously defers to the "political branches" on these quintessentially policy questions. In democracies, one prefers to have elected officials deciding on questions of war and peace, and judges are not known for their expertise on security questions. But Justice/Home Affairs, which dealt with matters of cross-border crime and immigration, would seem to have a strong need for judges sooner or later. So the exclusion of the EU judiciary from Pillar Three was puzzling, and should probably be read as an expression of distrust of Euro-judges.

There were three other salient developments in Maastricht, from the point of view of federalism. One was the adoption of what is called in Europe “variable geometry.” The EU members decided that it would henceforth be permissible for some members to go ahead with further tightening of the union while others remained outside those new portions. So the UK and Denmark stayed out of the EMU (and in the follow-up Amsterdam Treaty, the UK and Ireland stayed out of the open-borders area known as Schengen, with Denmark partially restricting its participation). There had been previous regional agreements within the EU, such as the Benelux accords, but this was the first time that variable geometry became an explicit part of the treaty arrangements.

Secondly, the treaty formally announced “subsidiarity” as one of its guiding principles. This is simply the principle that as much as feasible, the governmental level for policymaking would be “devolved” downward to the member-state (or perhaps, implicitly, even more locally). A policy issue such that “the objectives can be sufficiently achieved by the member-state” is to be handled by member-state institutions; and, only if needed for effective policy, would the decision be placed in the hands of supranational authorities. A similar principle, according to the American *Federalist Papers*, guided the U.S. constitutional convention: only powers thought to be more effectively handled at the federal level were given to the federal government (but all such “necessary and proper” powers were given.). And just as the U.S. Constitution combined the expansive “necessary and proper” clause with the confining Tenth Amendment, so the 1993 Treaty Establishing the European Community (TEC) that came out of Maastricht added to such phrases as “an ever closer union,” the rule that the Community act “within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.” Sheerly unnecessary accumulation of power at the center is not part of the plan.

Thirdly, the Maastricht Treaty for the first time formalized into the treaties a set of functions for the European Council (first formed in 1974), which had been playing a role of increasing importance since the early eighties. The European Council consisted of a meeting of all the heads of state (or their surrogates), and it had been taking place two or three times per year. The Maastricht Treaty assigned to this Council the responsibility of general guidance of the EU, specific duties with

respect to the EMU, and a special set of responsibilities under the CFSP. These roles were to be reaffirmed in the follow-up Amsterdam Treaty. The European Council also nominates the President of the Commission and the president of the European Central Bank.

In the Amsterdam Treaty, signed in October 1997 and effective in May of 1999, the EU furthered federalized in a number of respects:

- (1) Added to the EC arsenal of appropriate topics for action was a social policy chapter, dealing with such matters as working conditions, policies toward unemployment, parental leave, and protections for children, adolescents, and pregnant women;
- (2) the QMV method was extended to yet more topics in the first and second pillars;
- (3) a number of topics under the heading of visas, immigration, and asylum moved from Pillar Three to Pillar One, which put them into ECJ jurisdiction;
- (4) moreover, ECJ jurisdiction was extended to certain aspects of Pillar Three, but with a variety of detailed restrictions, including a specific prohibition against ruling on the behavior of law enforcement personnel of member-states or on their measures adopted to safeguard internal security, and including the rule that preliminary references under this pillar will be issued only to those member-states that declare they want this practice;
- (5) under Pillar Two, for the first time the EU anticipates combined “combat forces,” albeit in the context of humanitarian missions such as crisis management and peacekeeping;
- (6) a diplomatic personality is also acquired under Pillar Two, with the President of the Council (a position that rotates after six months) empowered to negotiate for the EU foreign security agreements with outside countries, and with approval to be by unanimous Council of Ministers decision (agreements with outside countries that relate to goods, service, and intellectual property are negotiated by the Commission and also require unanimous Council approval);
- (7) co-decision by the European Parliament became the rule for virtually every legislative act from the Council of Ministers—as



noted above, this can be thought to cut both ways from a federalism perspective;

(8) the Parliament was also strengthened by receiving power to approve the European Council's nominee for Commission President. This President was also strengthened in that the other nineteen Commissioners nominated by member state governments must have his/her approval, and s/he is formally authorized to give political guidance to the Commission.

Although summary of Maastricht and Amsterdam is risky with two documents this complex, it appears that the past decade (albeit in a kind of two-steps-forward-one step-back fashion) has brought a serious strengthening to central decision-making bodies of the EU, both in the sense of expanding their purview and in the sense of facilitating prompt action by restricting the reach of the unanimity rule. On the other hand (in the one-step-back vein), Amsterdam, in keeping with the spirit of the Maastricht introduction of variable geometry, further entrenched the idea by providing for flexibility to be applied to any new measures of closer cooperation desired by a majority; by providing for certain instances where individual states could block the taking of a QMV vote and kick it up to the European Council for a unanimous decision, and also for allowing "constructive abstention" in the foreign security pillar, whereby a state could abstain formally and thereby not be bound but still allow an "EU" decision to be made. There is, moreover, a certain irony in the fact that one year after shielding member state police behavior from the purview of the ECJ, the EU Parliament, Council, and Commission formally proclaimed at Nice on Dec. 7, 2000, the EU Charter of Fundamental Rights. It is difficult to predict how this odd pairing of impulses will eventually evolve as concrete policy. At the moment a convention is at work drafting a constitution for the EU, a proposal that only a decade ago could make no headway at all. The EU plans to add eight new members for Central/Eastern Europe plus Malta and Cyprus in 2004 or 2005. Whether this enormous leap in size (from 350 million to 500 million) and in diversity of political culture will cause more centralization or less is anybody's guess. Clearly eurofederalism is a moving target.

## THE ROLE OF THE ECJ, EUROFEDERALISM, AND THE DEMOCRACY DEFICIT

A chronic complaint about the EU has been its democracy deficit. This is a complicated matter in a federation. Every federation by definition disempowers the majority in the smaller, more local unit by empowering the majority of the larger unit. E.g., if a federated Europe has power to ban the development of nuclear energy on the grounds of environmental threat, then the democratic majority in, say, France, has lost the ability to have its way on this subject. If that is all someone means by the charge of "democracy deficit," then that person has simply identified herself as an anti-federalist, not necessarily any more pro-democracy than the next guy.

On the other hand, there are certain institutional tendencies in the EU that should give serious pause to friends of democracy, and they do relate to why the ECJ managed to wield as much power as it did. I detail them below and then offer a critique of one of the Euro-reforms that is in the air, and suggest one of my own.

### A. Institutional Logic #1: Electoral Districts and Societal Heterogeneity

Anyone who has studied courts for any length of time figures out pretty quickly that the power to "apply" a legal text to a concrete situation amounts to a partial power to re-write that text. If the text is very precise and if the legislature is small and cohesive, such that it could quickly decide to revise the text in order to override judicial choices, the judges' "rewriting" power is then tightly constrained. On the other hand, the less cohesive the legislature, the more powerful the judge, because it will be hard for the legislature to agree on a new version of the law. If legislatures are elected in geographic districts, an absence of cohesiveness is built into the situation: The legislator has to appeal to the home constituency to retain office, but has to appeal to legislative colleagues (each of whom has their own home constituency) to build a legislative coalition.

This satisfying of two masters is generally accomplished by fudging, by making the law vague rather than precise, so that different claims, depending on the audience, can be made about the same law. Thus, we

Americans, for instance, are saddled with a Congress that passes laws of great vagueness, which then get handed off to bureaucrats and judges, who have to develop the concrete rules for applying these vagaries to real-life situations. The bureaucrats and judges are unelected, and therefore unaccountable to home constituencies, so they have a wide range of freedom to adopt unpopular specific policies. These court decisions and bureaucratic regulations then remain “the law” unless a new legislative majority can be mobilized to overrule them. The more veto points new legislation must pass, the harder this is. In the U.S. there is not only the veto point of each legislative chamber, but also there is the president. So even if we did not have constitution-based judicial review and supermajoritarian rules for the Senate and for constitutional amendment, we would still have powerful courts and powerful bureaucrats.

Likewise, the EU, even if it did not run by the supermajoritarian QMV system, and the even more supermajoritarian treaty-amendment system, would still have powerful courts and powerful bureaucrats due to the heterogeneity of the community represented in the Council of Ministers and the Parliament, and therefore the heterogeneity of the electoral “districts” represented therein. They would face at least as strong a temptation as the U.S. Congress members do to claim credit back home for what they accomplished and to make the legislation vague enough to mobilize a majority of first Council and then Parliament members facing the same centrifugal electoral pressures from countries that have a wide array of policy preferences. And to override any European Court or Commission interpretive decision that from their point of view “got it wrong,” they would have to re-mobilize just as heterogeneous a coalition, but this time over specific, rather than vague, rectifying language. This being difficult, a democracy deficit (in the sense of the adoption of policies that outrun majority preferences) is quite predictable.

#### **B. Institutional Logic #2: Constitutions, Treaties, and Supermajoritarianism**

Courts that exercise a power of judicial review based on treaties, which perforce can be altered only by unanimous choice of those who wish to sign the new treaty, are obviously even harder for elected decision-makers to correct if the judges “get it wrong” interpretively. The same goes for judicial review based on constitutions that are designed to be difficult to amend. In the U.S., for instance, thirteen single houses of the

ninety-nine legislative chambers in the fifty states are enough to block a constitutional amendment (one state has a unicameral legislature; 38 states are needed for ratification). Talk about frequency of veto points for an override! In the EU, even the move toward majoritarianism with QMV still leaves the “qualified majority” very difficult to mobilize—one third of the votes is enough to block new legislation in the Council of Ministers. So any ECJ interpretation or European Commission regulation interpreting legislation in a way displeasing to the Council will remain the law as long as at least one third of the Council still favors it. There is of course the option of appointing new bureaucratic or judicial personnel eventually, who *might* revise the law, but as a mechanism of democratic control, this is woefully indirect and blunt. In addition, these supermajoritarian devices for ratification create powerful incentives to make constitutions and treaties more vague because there are that many more constituencies who have to be pleased in order to get them adopted. And the more vague they are, the more power gets handed to the wielders of judicial review.

#### **C. Political Logic #1: Maturation of Eurofederalism**

A number of observers have noted that the democracy deficit presents a more intense problem now that the single market has been put into place. When the basic need was to remove self-preferring legislation that distorted the free flow of goods and service, a relative simplicity of normative direction obtained. Now that the old legislative underbrush has been cleared away, EU consensus sees a need for Europe-wide regulations to provide for such matters as environmental protections, consumer safety, worker safety, and so on. This combination obviously requires a need to balance interests, in other words, a need for policy choices – just the kind of policy choices we in western liberal democracies generally prefer to put in the hands of elected representatives who can be held accountable to voters, if the voters are dissatisfied or change their mind. This amounts to saying that Europe could live with the democracy deficit when the EC was less mature and therefore had a more single-minded purpose. But now more democratic institutions are needed. This fact explains the move to co-decision and the strengthening of the European Parliament. But given these logics, these moves are not likely to suffice.

#### **D. Political Logic #2: Ten New States**

With the ten new states on schedule to be admitted in 2004-5, or when-

ever in the near future they actually do enter the EU, both cultural heterogeneity, even in the sense of adding languages outside the Latin and Germanic family, and heterogeneity of political tradition will compound the dilemma of institutional logic #1. Weaker in economic resources, their policy needs differ from those of current members. Moreover, they lack a deeply embedded rule of law tradition, so are likely to present more chronic compliance problems. Grateful for economic assistance, they may not mind the democratic deficit of the EU, but the disparity of policy inclination between the new and the older membership in the Union is likely to render mobilization of legislative majorities more difficult than ever, again pushing decision-making into the hands of the ECJ and the bureaucrats, at a time in EU development when effective power should be going toward officials who are responsible to an electorate.

This leads me to proposals for reform.

## CONCLUSION: ONE BAD IDEA WHOSE TIME HAS COME, AND A MODEST PROPOSAL

One reads a good deal these days of “new governance” modes in the EU. Designed to cope with the democracy deficit, these new modes essentially involve lots of conversations, ad hoc assemblages, working groups, committees that blend member-state officials with selected scientific experts and/or with selected persons who come from various social sectors (such as organized labor or management) and/or with persons who are self-selected by virtue of leadership of NGOs (or interest groups, as one used to call them). The idea is to get a variety of points of view out on the table for the Commission to take into account, although in fact a good deal of real decision-making seems to be getting done by these ad-hoc, self-appointed forces.

NGOs, granted, make a certain sense when one is trying to figure out how to benefit a Third World country that, despite perhaps a charade of “free and fair elections,” one may suspect is run by thugs and thieves. In such a situation, to insist on democratic accountability for all the spokespersons with whom one deals may be unwise. But if we are talking about many of the strongest liberal democracies in the world, now federated together, it seems we ought to be demanding more than the

new governance.

We know enough about the systematic impact of interest group lobbying in the U.S. to know that it skews decisions in certain ways. As E.E.Schattschneider taught long ago, “The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.” The chattering classes may have a lot to say and opinions aplenty, but they may not be good representatives of the unorganized, the less educated and the less affluent.

What could help the democracy deficit in the EU, I modestly propose, would be the development of transnational, federation-wide political parties, because these could help form responsive majority coalitions of some degree of policy coherence. And only if that can be done, can European majorities, *qua* majorities, get some effective voice to balance the Eurojudges and Eurobureaucrats. The Council of Ministers membership is elected or appointed by elected persons, but since the ministers all hold their primary office as member-state ministers (i.e., in member-state cabinets), they obviously are responsive mainly to home-state political forces. In the Euro-Parliamentary elections, candidates run as members of national parties and the issues to which voters are attentive are basically the ones that divide the parties domestically. Moreover, there is relatively little interest in these elections because of the perceived impotence of the Euro-Parliament. (This may change somewhat with co-decision.) The U.S. has national parties, which are after all, campaigning organizations, basically because we have Presidential elections. The Presidency is the only nation-wide electoral contest. Around it, our national parties formed. And participation in national presidential elections, paltry as it is, is most Americans’ main positive act of civic participation. It is no panacea, but it does produce a modicum of citizen identification and involvement with national issues.

The EU Amsterdam Treaty already has strengthened the President of the Commission, giving him/her an explicit role of leadership, as well as enhanced legitimacy (in that s/he gets Parliamentary approval), and some authority over the question of which Commissioners (named by their home states) get to serve with him/her. I ask: Would it be an outrageously large next step to structure the forthcoming EU Constitution so as to make this role directly elective, federation-wide? The advantages of electoral parties over decision-making by lobbyists— whether

the latter are called NGOs, social partners, working groups, or what-have-you—is that lobbyists cannot be held accountable, whereas persons elected through party efforts can be voted out. With a federation-wide elected leader in a position of some policy clout, it is quite plausible that the Parliament too might coalesce a bit more in a party direction based on Europe-relevant issues, especially since the Parliamentary parties would presumably select the nominees for Commission President. With a Parliament better able to form majority coalitions, at least a bit of power could be taken back from bureaucrats and judges, so that the strongholds of western democracy could perhaps fill in just enough of the democracy deficit to enable this new eurofederalism thing to keep on muddling along toward its “ever closer Union.”

# DEREGULATING THE STATES:

## FEDERALISM IN THE REHNQUIST COURT

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In providing for a stronger central government, therefore, the Framers explicitly chose a constitution that confers upon Congress the power to regulate individuals, not states. . . . We have always understood that even when Congress has the authority under the Constitution to pass laws regulating or prohibiting certain actions, it lacks the power directly to command the States to require or prohibit that action.

*Justice O'Connor, New York v. US, 1992*

For over a decade now, five members of the United States Supreme Court have been engaged in an effort to restrict the power of the national government and to increase the autonomy of the states. Since 1991, when the appointment of Clarence Thomas gave the “Federalist Five” a majority on the Court, it has struck down in whole or in part a dozen federal statutes on the grounds that they violate constitutional principles of federalism.<sup>1</sup> In the preceding fifty years the Supreme Court had struck down only one congressional enactment on federalism grounds, and that controversial decision, *Usery v. National League of Cities*, was itself reversed within a few years.<sup>2</sup> For the first time since the constitutional revolution of 1937, the Court has limited Congress’s power under the Commerce Clause.<sup>3</sup> The Supreme Court has significantly curtailed

the federal judiciary's supervision of criminal proceedings in state court and the treatment of those confined to state prisons.<sup>4</sup> It has limited the federal government's authority to "commandeer" states' administrative apparatus.<sup>5</sup> In a series of decisions announced between 1996 and 2002, the Court has brought state sovereign immunity under the Eleventh Amendment back from the dead.<sup>6</sup> And in a variety of contexts it has refused to impose federal mandates on state governments unless Congress has provided a "clear statement" of its intent.<sup>7</sup>

Something's happening here; but what it is ain't exactly clear. The same Court that has used the Tenth Amendment to prohibit federal commandeering of state officials and reinvigorated state sovereign immunity has also upheld *Roe v. Wade* and *Miranda v. Arizona*,<sup>8</sup> limited the states' authority to use affirmative action,<sup>9</sup> imposed restrictions on state and local zoning practices,<sup>10</sup> prohibited state governments from boycotting the products of certain foreign countries<sup>11</sup>, and preempted some forms of state regulation of tobacco.<sup>12</sup> It is not unusual to find the Federalist Five voting against the states while the more liberal justices defend state authority. The law reviews are filled with articles on doctrinal developments in isolated areas of federalism—the reach of congressional power under the commerce clause, commandeering, preemption, the dormant commerce clause, habeas corpus, abstention, pendant jurisdiction, the Eleventh Amendment, the scope of §1983—but studies that examine the broad sweep of the Court's federalism decisions are few and far between.<sup>13</sup>

One reason it is so difficult to generalize about the Court's federalism jurisprudence is the sheer breadth of judicial doctrines on federalism. By my very rough calculations, between one half and two thirds of the full opinions handed down by the Supreme Court each term involve some sort of federalism issue. Often the doctrines announced by the Court are convoluted, with exception piled on exception. (Eleventh Amendment case law is a prominent example of this.) Sometimes the Court employs a balancing test than offers few hints about how the Court will decide the next case. (Consider the Court's rulings on the dormant commerce clause and preemption.) I am tempted to say that each sub-field of federalism jurisprudence is incoherent, but each is incoherent in its own special way. Further complicating matters is the fact that the current Court is obviously internally divided. In many cases the Federalist Five (Rehnquist, Scalia, Thomas, O'Connor, and

Kennedy) square off against the National Four (Stevens, Souter, Breyer, and Ginsburg). But it is not unusual for Kennedy, O'Connor, or both to switch sides—most famously when they struck down state abortion rules in *Planned Parenthood v. Casey*.<sup>14</sup> At times it seems that understanding the Supreme Court's federalism jurisprudence requires psychoanalysis of Sandra Day O'Connor and Anthony Kennedy.

For cynics, Democrats, and political scientists (which probably sweeps in most participants at this conference), the absence of coherent federalism doctrine will come as no surprise. After all, isn't the lesson of *Bush v. Gore*<sup>15</sup> that conservatives on the court will endorse federalism when it serves their purposes and abandon it when it does not? They defer to state legislatures, city councils, and state courts when those bodies institute school vouchers, ignore antidiscrimination rules, and execute minors, but they quickly switch gears—jettisoning both judicial restraint and their dedication to federalism—when states take aggressive steps to protect the environment, regulate HMOs, boycott repressive foreign regimes, or restrict advertising by tobacco companies. No mystery here! The Court follows the election returns, which on occasion follow the commands of the Court.

Certainly the ideologies of the justices matter. One of the assumptions underlying this paper is that the Court's new federalism rests more on the Federalist Five's assessment of current patterns of intergovernmental relations than on their reading of the intent of the Framers. But it is not true that the agenda of the Federalist Five is identical to that of George W. Bush, Tom Delay, or Jerry Falwell. Even the primary proponents of the "attitudinal model" of Supreme Court decisionmaking tacitly concede that narrow partisanship and conventional ideological divisions are not very helpful in explaining many federalism decisions.<sup>16</sup>

Consider three important recent cases in which the Court's conservatives found themselves at odds with both liberals on the Court and conservatives in Congress:

- In *City of Boerne v. Flores*,<sup>17</sup> Justices Kennedy, Rehnquist, Scalia, and Thomas joined with Justices Stevens and Ginsburg to strike down the Religious Freedom Restoration Act (RFRA), an act of Congress dear to the heart of many religious conservatives.

RFRA itself was an effort to overturn a 1990 opinion written by Justice Scalia that curtailed judicial exemptions from otherwise valid state and federal laws.<sup>18</sup> The religious right was outraged by both opinions.<sup>19</sup>

•In two 1997 Eleventh Amendment cases, the Court ruled that private businesses could not recover damages from a state agency that had violated federal patent and trademark laws—despite the fact that the Florida state government was running a business that directly competed with the businesses that held the patents and trademarks.<sup>20</sup> In a strange role reversal, Justice Scalia argued that the Due Process clause of the Fourteenth Amendment did not give Congress power to protect the property rights of corporations; Justice Steven’s dissent claimed that property should be considered one of the fundamental rights protected by the Amendment. Giving state agencies blatantly unfair advantages in their competition with private companies is hardly a policy favored by most free-market Republicans. Charles Fried, Ronald Reagan’s Solicitor General, described the decisions as “truly bizarre.”<sup>21</sup>

•In 1996 the Court handed down what one might call “the other Gore case,” *BMW v. Gore*.<sup>22</sup> An Alabama doctor who had purchased a new BMW discovered that the dealer had repainted part of the car. He sued for damages, and a local jury awarded him \$4 million. The State Supreme Court found this a bit excessive for a defective paint job, and reduced the award to a mere \$2 million. For the first time ever the U.S. Supreme Court found a state court award excessive under the Due Process clause of the Fourteenth Amendment. This was one small step in the direction of tort reform as defined by Republicans in Congress and their business allies. In recent years few issues have been as partisan as tort reform. Republican efforts to place federal limits on state tort law have routinely been defeated by the Democrats. Plaintiffs’ attorneys have become a key source of funding for Democrats, especially in the South. Yet in the Supreme Court the votes for tort reform came from Justices Stevens, Breyer, Souter, O’Connor and Kennedy. The three most stalwart supporters of federalism, Scalia, Thomas, and Rehnquist, joined with Justice Ginsburg in dissent. Tort law, they insisted, was a concern of the states, not the federal government—and certainly not the federal courts acting unilaterally.

I do not mean to deny that the Federalist Five often pursue policies that can readily be described as conservative. My point is simply that their conservatism and their understanding of federalism differ in important ways from those of Republicans in Congress and the White House. Conservatives on the Court will sometimes support state authority even when it conflicts with conservative policies; conversely the Court’s liberal faction will sometimes support national authority even when it conflicts with liberal policies. Partisanship as conventionally understood simply does not provide an adequate roadmap to the federalism jurisprudence of the Supreme Court.

## THE CENTRAL ISSUES

To get a better handle on the federalism debate within the federal judiciary, it is useful to start with what is not at the heart of the controversy. First, very few of the cases before Supreme Court involve the constitutional authority of the federal government to regulate the activity of private citizens. To be sure, in two well-known cases, *U.S. v. Lopez* and *US v. Morrison*,<sup>23</sup> the Court limited congressional power under the commerce clause for the first time since 1937. In both instances the federal legislation regulated matters traditionally under state control. The Court did not even get to the question of whether the Gun-Free School Zones Act and the Violence Against Women Act involved interstate commerce; they found that they did not involve any form of “commerce.” No other acts of Congress have been invalidated on these grounds, and it seems unlikely that many federal laws will fail to pass the relatively lenient tests laid out in *Lopez* and *Morrison*. Both acts struck down by the court, it should be noted, were primarily symbolic measures. The Gun-Free School Zones Act was a particularly transparent effort to demonstrate that members of Congress support education and oppose gun violence. The Court may exert somewhat more influence by adopting narrow interpretations of federal laws that approach the outer limits of congressional authority. This strategy of requiring Congress to take a “sober second look” at some extensions of federal power not only avoids open conflict between coequal branches of government, but allows liberals and conservatives on the bench at times to find common ground.<sup>24</sup> The bottom line is that the Court has placed very few constitutional restrictions on Congress’s power to regulate private conduct, to tax private citizens, and to spend for the “public wel-

fare.” The New Deal and most of the Great Society are perfectly safe.

Second, the Supreme Court does not seem much concerned with the issue so important in the early Republic and the contemporary European Union: state-erected barriers to trade. Dormant commerce clause cases have been relatively rare, and they continue to follow the meandering path laid out in the 1940s.<sup>25</sup> Justices Scalia, Rehnquist, and Thomas, whom one might think would be free-trade enthusiasts, have argued that the Court should simply abandon its dormant commerce clause jurisprudence.<sup>26</sup> At times the Court’s conservatives have been somewhat less inclined than its liberals to allow the states to supplement federal regulatory programs. But it is difficult to detect any clear patterns either in voting patterns or in the Court’s overall direction in preemption cases.<sup>27</sup>

What, then, is at the heart of the federalism “revival” or “revolution”? One key feature of the Court’s controversial federalism decisions is that they almost always involve *federal regulation of state and local governments and officials*. To use a horribly technocratic term, they are about intergovernmental relations. For example, in *Printz v. US* the Court ruled that state and local law enforcement officials could not be required to help the federal government enforce the Brady Handgun Violence Protection Act. The federal government could do the job by itself or it could offer the states incentives for participating. But it could not “commandeer” state and local officials.<sup>28</sup> In *Seminole Tribe v. Florida*<sup>29</sup> the Court held that the governor of Florida could not be compelled to enter into “good faith negotiations” with Indian tribes over casino gambling compacts. In *Alden v. Maine*<sup>30</sup> the Federalist Five ruled that state courts could not be required to hear federal Fair Labor Standards Act suits brought against the state government. As different as these cases are, in each instance the issue is whether the federal government can regulate subnational governments, not private citizens.

Second, for reasons that are by no means readily apparent, many of the Court’s recent federalism decisions involve questions about the *jurisdiction of the federal courts*. The Eleventh Amendment, the constitutional provision at the heart of the most controversial of those rulings, is nothing more than a limitation on the types of cases federal courts can hear: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or

Subject of any Foreign State.” Other important decisions have restricted the right of private citizens to sue state and local officials under 42 USC §1983, part of a Reconstruction era statute that was given new life by the Supreme Court in the 1960s.<sup>31</sup> The Court has also become reluctant to recognize private rights of action against state and local officials.<sup>32</sup> Paradoxically, the Court has engaged in considerable judicial activism—striking down federal statutes and overturning precedents—in order to reduce the jurisdiction of the federal courts.<sup>33</sup>

These two issues—federal regulation of subnational governments and the jurisdiction of federal courts—are closely linked. That is because private lawsuits currently constitute the most important method for interpreting and enforcing federal regulation of state and local governments. To the extent the Court reduces the jurisdiction of the federal courts it reduces federal control over subnational governments.

In some instances the Court has limited private parties’ opportunities to file suits alleging violations of constitutional rights. For example, both in its own habeas corpus jurisprudence and in its interpretation of federal legislation passed in 1996, the Court has restricted prisoners’ suits involving claims of defective criminal procedures or cruel and unusual punishment. It has also limited so-called *Bivens* actions for damages against federal law enforcement officials. Far more important, though, is the way the Court has restricted *statutory* claims against subnational governments, e.g., those alleging violation of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Americans with Disabilities Act, the Social Security Act, the Individuals with Disabilities Education Act, and the Age Discrimination in Employment Act.

Neither political scientists nor legal scholars have paid nearly enough attention to either the importance of private suits for enforcing these federal mandates or the extent to which judicial enforcement of statutory requirements lies at the heart of the Supreme Court’s new federalism. The political science literature contains extensive discussion of the new forms of federal regulation of subnational governments that emerged in the 1960s and 1970s, but has ignored the legal complexities of enforcing these rules. Conversely, legal scholars familiar with the nuts and bolts of federal court litigation (this usually means those who teach courses on Federal Courts, not Constitutional Law) have paid little sys-



tematic attention to the transformation of federal rules governing state and local officials. Moreover, so much attention has been lavished on the most controversial constitutional rulings (such as *Lopez* and *Morrison*) that the significance of seemingly mundane statutory cases has been overlooked. As Justice Breyer wrote in a 2001 opinion, “[I]n today’s world, filled with legal complexity, the true test of federalism principles may lie not in the occasional constitutional effort to trim Congress’s commerce power at its edges or to protect a State’s treasury from a private damage action, but rather in the many statutory cases where courts interpret the mass of traditional doctrine that is the ordinary diet of the law.”<sup>34</sup> The remainder of this paper attempts to describe the various streams—political and legal, constitutional and statutory—that flow into the broad river of the Supreme Court’s new (and still evolving) doctrines on federal regulation of subnational governments.

## FEDERAL RULES AND JUDICIAL ENFORCEMENT

Before 1964 Congress and the executive branch rarely issued rules regulating the behavior of state and local officials. About the only exception was the conditions attached to the grants-in-aid programs that proliferated during the New Deal. Yet even these were relatively few in number and weakly enforced. Congress was reluctant to impose many restrictions on the states. Federal administrators’ ability to enforce legislative conditions was hampered by the fact that the sanction for non-compliance—the funding cut-off—was both politically dangerous and administratively cumbersome. Few federal administrators wanted to kill state programs in order to improve them.<sup>35</sup>

This changed dramatically in the mid-1960s. New federal regulation of the states started with civil rights, but spread rapidly to a wide variety of other areas as liberal Democrats gained control of the House and the Senate. The best work on the growth of federal regulation of state and local governments was done by the now-defunct Advisory Commission on Intergovernmental Relations (ACIR). The ACIR traced the sudden growth of four types of federal rules:

- (1) direct orders, which “mandate state or local action under the threat of criminal or civil penalties,” e.g. non-discrimination rules for state and local employment and regulations on disposal of

municipal waste;

- (2) cross-cutting requirements, conditions that “apply to all or many federal assistance programs,” e.g. Title VI, which prohibits racial discrimination in all programs receiving federal assistance, and Title IX, which prohibits gender discrimination in all education programs receiving federal assistance;

- (3) cross-over sanctions, which “threaten the termination or reduction of aid provided under one or more specified programs unless the requirements of another program are satisfied,” e.g. withholding of highway funds to states failing to implement air pollution controls; and

- (4) partial preemption, which “establishes federal standards, but delegates administration to states if they accept standards equivalent to the national ones,” e.g. nationally mandated strip-mining rules.<sup>36</sup>

The figures in Appendix 1, taken from ACIR reports issued in 1984 and 1993, trace the growth of each form of regulation. Virtually non-existent before 1960s, these four forms of intergovernmental regulation grew quickly in the 1960s, 1970s, and 1980s. Appendix 2 provides a list of some of the most important regulatory laws enacted from 1964 to 1990. Those familiar with the case load of federal appellate courts will recognize these statutes as major sources of litigation. Some, it should be noted, are also responses to previous court rulings.

As dramatic as the growth of these new forms of intergovernmental regulation have been, the ACIR’s compilations do not include the multiplicity of “strings” that apply to individual programs. I am not aware of any quantitative measures of this change, but anyone familiar with federal education, welfare, transportation, health care, or environmental programs will readily attest to the increasing number, specificity, and enforceability of the strings produced by Congress and federal administrators. James Q. Wilson has noted that the legislation governing one major joint federal-state program, highway construction, grew from 28 pages in 1956 to 293 pages in 1991. The 1956 Federal Aid Highway Act imposed few restrictions on either state governments or federal administrators. The Intermodal Surface Transportation Efficiency Act of 1991, in contrast, not only provided money for highway construction and mass transit, but:

mandated that the secretary of transportation relieve congestion, improve air quality, preserve historic sites, encourage the use of auto seatbelts and motorcycle helmets, control erosion and storm water runoff, monitor traffic and collect data on speeding, reduce drunk driving, require environmental impact studies, control outdoor advertising, develop standards for high-occupancy vehicles, require metropolitan area and statewide planning, use recycled rubber in making asphalt, set aside 10 percent of construction moneys for small business owned by disadvantaged individuals, define women as disadvantaged individuals, buy iron and steel from U.S. suppliers, establish new rules for renting equipment, give preferential employment to native Americans if a highway is to be built near a reservation, and control the use of calcium magnesium acetate in performing seismic retrofits on bridges.<sup>37</sup>

Almost all of these commands to federal administrators must be translated into federal regulations aimed at those state and local officials who do most of the work designing, building, and patrolling highways and running mass transit systems. The well-known and often lamented tendency of the post-1970 Congress to “micromanage” federal programs inevitably also means federal “micromanagement” of state and local programs as well. Not surprisingly, the cost of complying with these various forms of federal regulation have gone up significantly. During the high-deficit 1980s, federal financial assistance to the states shrank as federal mandates grew.<sup>38</sup>

The rapid expansion of federal regulation of subnational governments helps explain a feature of contemporary government that might otherwise seem paradoxical: while the reach of the federal government has grown enormously since the mid-1960s, federal civilian employment has fallen. The workforce of state and local governments, in contrast, has grown by leaps and bounds, reaching 15 million by 1991—4.5 times as large as the federal workforce.<sup>39</sup> State and local governments provide almost all the “street-level bureaucrats” who carry out programs established—and partially funded—by the national government. Public school teachers, police, welfare administrators, highway and environmental engineers, health and safety inspectors, public health officials—all are employed by subnational governments but subject to a wide variety of federal rules.

It is one thing to establish legal mandates and grant conditions, quite another to enforce them. How do federal officials ensure that their state and local counterparts follow this multiplicity of rules and spend federal funds properly? An important feature of American government is that federal officials cannot issue direct commands to state and local administrators. They cannot hire, fire, or reassign the thousands of “street-level bureaucrats” on whom they rely so heavily. Of course, the federal government can use money to encourage programs it likes and to starve those it would like to scale back. Federal administrators can also try to develop close ties with like-thinking professionals in state and local governments. As useful as all these tools can be for establishing the general direction of policy, they are not designed to ensure that each and every federal rule is followed or, more importantly, that each potential beneficiary receives the treatment promised by federal law.

In many instances federal officials have the authority to cut off funding to state and local programs that fail to comply with federal law. This sanction lies behind “cross-cutting” and “cross-over” rules as well as the ordinary conditions on grants-in-aid. But from long experience we know that federal administrators are reluctant to impose such sanctions. In the early years of a program federal administrators might be able to use the threat of fiscal sanctions to achieve major policy change, but over time the effectiveness of such threats fades. Moreover, most conditional spending laws require “substantial” non-compliance before funds can be terminated. Similar problems plague federal regulatory programs administered by the states: the penalty for failure to follow federal rules is usually a federal take-over of enforcement; but the federal government seldom has the resources, expertise, or political will to displace state regulators.<sup>40</sup> Cross-cutting regulations present an additional problem: the federal officials charged with enforcing the cross-cutting rules are not the ones charged with supervising the programs in question. Administrators in, say, the Department of Transportation, will be reluctant to reduce transportation funding to enforce rules announced by the Department of Justice.<sup>41</sup>

Another potential enforcement tool—one that is both more focused and more credible—is a lawsuit brought by the United States against state and local governments. Federal *administrators* may not be able to issue direct orders to state and local officials, but federal *judges* most definitely can. And frequently do. As city councilors in Yonkers, New York

learned a few years ago, public officials who ignore federal court injunctions can be held in contempt of court, fined, and even imprisoned. Hamilton's famous claim that the judiciary "has no influence over the sword or the purse"<sup>42</sup> ignores a key feature of American federalism: federal judges can use their injunctive sword—backed by an army of federal administrators and, ultimately, the guns of US Marshals—to control the purse strings of state and local governments. As state and local officials know (but political science professors are for some reason loathe to admit), federal judges routinely issue such orders, and state and local officials routinely obey them.

The federal courts have long recognized the authority of the United States to file suit against either private parties or subnational governments to enforce the terms of federal laws. Private parties may need statutory authority to file federal court suits, but the national government does not.<sup>43</sup> Nor does the Eleventh Amendment's limitation on suits against state governments apply to the US. Federal judges have power to issue commands to state officials; federal administrators have both the authority to initiate litigation and the capacity to monitor compliance. The combination would thus appear to constitute a highly effective compliance mechanism.

Yet outside school desegregation and voting rights the United States government does not often go to court to insist that subnational governments comply with federal mandates. Perhaps this is because such litigation normally must go through the Department of Justice, which is both risk-averse and perpetually short-handed. Perhaps federal administrators worry about disrupting relations with their state counterparts. Perhaps political executives worry about the political fallout of such a visibly adversarial stance. Or perhaps it is simply easier to let private parties take the initiative—and the political heat. In a 1999 case Justice Kennedy complained about the Justice Department's enthusiasm for handing these sensitive intergovernmental matters over to private litigants:

The Solicitor General of the United States has appeared before this Court . . . and asserted that the federal interest in compensating the States' employees for alleged violations of federal law is so compelling that the sovereign State of Maine must be stripped of its immunity and subject to suits in its own courts by its own

employees. Yet despite specific statutory authorization . . . the United States apparently found the same interests insufficient to justify sending even a single attorney to Maine to prosecute this litigation.<sup>44</sup>

One of the messages the Supreme Court has been sending to federal administrators in recent years is that if they want to assert federal authority, they need to accept political responsibility for their actions.

Thus we arrive at the enforcement mechanism that has become ubiquitous since the 1960s: private suits against subnational governments for failure to comply with federal statutes and administrative rules. Private rights of action have the advantage of offering those with the greatest stake in government decisions and the most knowledge of the circumstances—for example, welfare recipients denied benefits, students subjected to sexual harassment, or employees who were the victims of racial discrimination—the opportunity to lodge a complaint, demand compliance, and receive financial compensation. But such private actions against state and local officials are not without their drawbacks. Since complete enforcement is seldom either possible or desirable, private rights of action give private parties the power to set public priorities. In criminal law we rely entirely on public prosecutors to decide which cases are worth pursuing. We do not want the enforcement of criminal law to depend on the litigiousness or vindictiveness of private parties. Public prosecutors are politically accountable in the way that private parties are not. Private rights of action also make enforcement of federal requirements highly decentralized and unpredictable. The extent of compliance will vary from state to state and even from city to city, depending on the inclination of judges and the resources and litigiousness of interest groups.

In thinking about judicial enforcement of federal mandates, it is important to keep in mind that *enforcing* a law or regulation is inextricably linked with *interpreting* that law or regulation. This means that private rights of action often give federal judges the opportunity to determine the *content* of federal mandates. Many federal requirements are inherently ambiguous: What does it mean to "discriminate" on the basis of race, gender, or disability? What constitutes "available" income, "reasonable and adequate" reimbursement, or an "appropriate" education? Some judges will defer to federal administrators' interpretation of these

terms. Some will defer to the interpretation offered by state officials. Some will do neither. Some judges will look only at the text of the federal statute, others at its legislative history or general purpose. Some will favor broad interpretations of statutory entitlements, others will be hesitant to increase financial burdens on subnational governments. Most of the time this discretion will be exercised not by the Supreme Court but by district and circuit court judges. Over the past 40 years the federal courts have used private rights of action to build up what is in effect a vast and at times disorderly common law—based partly on federal statutes, partly on administrative rules, and partly on case law—regulating state and local officials.

## JURISDICTIONAL EXPANSION...

Before 1960 private suits to force state and local officials to comply with federal statutes and federal administrative rules were extremely rare. Only a handful of cases involving federal grants ever reached court, and in almost every instance plaintiffs went away empty-handed.<sup>45</sup> Federal courts are not courts of general jurisdiction. That means that they cannot hear cases that have not “been entrusted to them by a jurisdictional grant by Congress.”<sup>46</sup> Legislation establishing grant programs seldom explicitly authorized private suits against state or local governments. A few cases—less than 300 in total—had been brought against state officials under 42 USC §1983, which authorizes damage suits against those acting “under color of state law.” Almost all of these involved alleged denial of constitutional rights. Judges generally refused to find “implied” private rights of action in federal statutes. In other words, no explicit authorization, no jurisdiction for statutory claims.

All this changed very suddenly between 1961 and 1964. The Supreme Court’s 1961 decision in *Monroe v. Pape*<sup>47</sup> expanded the federal courts’ jurisdiction under §1983. *J.I. Case v. Borak*<sup>48</sup> allowed judges to read “implied” private rights of action into federal statutes so long as such litigation seemed to serve the general purpose of the legislation. Another 1964 decision made it easier for courts to skirt the Eleventh Amendment by claiming that a state had consented to be sued.<sup>49</sup> More important than the precise holdings of these cases was the general attitude of the Warren Court about jurisdictional issues: to be blunt, most

of the justices didn’t really care about them. For example, in the pivotal AFDC case *King v. Smith*<sup>50</sup>, the Court imposed unprecedented requirements on state AFDC programs without ever explaining why it had jurisdiction. The Court ignored the issue for over a decade—until it decided that in fact it did *not* have jurisdiction over most AFDC cases.<sup>51</sup> Judge Henry Friendly, one of the federal judiciary’s leading expert on jurisdictional matters, later described the Court’s position as “inexplicable.”<sup>52</sup> Eventually (to make a very long story mercifully short) the Supreme Court expanded its interpretation of §1983 to cover almost all statutory claims against state and local officials.<sup>53</sup> These rulings provided post-hoc justification for what most federal courts had been doing for a decade and a half.

The Supreme Court and almost all lower courts also assumed—again without explanation—that the proper remedy for violation of a condition attached to a federal grant was an injunction requiring the state to amend its policy, rather than termination of federal funding. This meant that these conditions became binding rules unless the state took the initiative to refuse federal money. Freed from the onus of having to enforce their rules, federal administrators wrote increasingly elaborate regulations governing the use of federal funds.

The new judicial rules on enforcement of federal requirements emerged just as Congress was multiplying the number of federal rules. The first wave of legislation came before anyone had any idea what the courts were doing. By the early 1970s, though, it was clear to state and local officials, federal administrators, advocacy groups, and attentive members of Congress that most of the new laws and concomitant administrative rules would now be enforceable in court. The transformation was hard to ignore. Excluding cases filed by prisoners, the number of §1983 cases rose to 13,000 per year in 1977, almost 25,000 per year in 1982, and over 32,000 in 1994.<sup>54</sup>

Despite years of Republican appointments to the Supreme Court, by 1990 there remained few barriers to judicial enforcement of federal mandates or conditions. The Court had announced that it would no longer attempt to protect the integrity or traditional authority of state governments—this was up to the “political process.”<sup>55</sup> State sovereign immunity was virtually a dead letter.<sup>56</sup> A combination of Supreme Court decisions and congressional action made §1983 available to

almost anyone claiming that state or local officials had violated federal laws or regulations.<sup>57</sup> Federal judges regularly used their injunctive power to enforce very broad interpretations of federal statutes. Occasionally Justices Rehnquist, O'Connor, Powell, and Burger (as well as Scalia, who replaced the Chief Justice in 1986) would pick up a fifth vote to limit enforcement of such federal mandates.<sup>58</sup> But usually they were outvoted.<sup>59</sup>

### ... AND CONTRACTION

Placed against this backdrop, the pattern of recent Supreme Court decisions becomes easier to understand. The Federalist Five want to reduce federal control of subnational governments. One way to do this is to define those “core state functions,” “indisputable attributes of state sovereignty,” and “historic powers” that are so central to both federalism and republican government that they cannot be invaded by the federal government. For example, the Court has refused to allow Congress to dictate how state legislatures must write laws on disposal of nuclear waste. The federal government can offer incentives or it can take on the job of regulating this waste itself. But it cannot tell states what legislation they must pass.<sup>60</sup> The Court has implied (but not explicitly held) that Congress cannot override state laws establishing the tenure of state judges.<sup>61</sup> Nor can Congress “commandeer” state officials to implement new federal laws.<sup>62</sup> But the Court has had great difficulty defining these constitutionally protected core activities, and has been understandably reluctant to establish clear constitutional limits on the power of the national government.

Instead the Court has discovered a variety of ways to keep private suits against subnational governments out of court altogether. Sometimes the Court has employed constitutional arguments, usually the Eleventh Amendment. Sometimes it has used statutory interpretation, especially to narrow the scope of §1983. Sometimes it has simply announced new judicial rules, for example, on limited immunity for public officials.<sup>63</sup> Behind all these rulings lies a strategy that Michael Greve has described as one of “noncooperation”: “The expansion of sovereign immunity partakes of a larger trend toward an increased judicial reluctance to cooperate with Congress in dismantling state and local autonomy.”<sup>64</sup>

Seldom does the Court totally preclude judicial enforcement of federal mandates. If Congress expresses its intent unambiguously, then the Court will look more favorably on judicial enforcement. If the Department of Justice, the EEOC, or another federal agency has the time and the guts to file suit, then the federal courts will not invoke sovereign immunity. But when Congress has whispered rather than shouted its intent to regulate the states and when the executive branch has sat on its hands, the courts (to use yet another metaphor) will remain on the sidelines. To put the matter another way, the Court has significantly raised the political cost of imposing federal requirements on state and local governments.

A quick look at two cases will illustrate the Court's strategy. The first, *Kimel v. Florida Board of Regents*,<sup>65</sup> is one of the Court's controversial recent Eleventh Amendment cases. The second, *Blessing v. Freestone*,<sup>66</sup> is a little known §1983 case decided in 1997.

Like many important Supreme Court decisions on federalism, *Kimel* involved state employment practices.<sup>67</sup> A college professor at a state college sought damages under the Age Discrimination in Employment Act (ADEA), which had been extended to state employees in 1974. By a 5-4 vote the Court held that despite explicit authorization from Congress, state sovereign immunity recognized by the Eleventh Amendment barred the federal judiciary from hearing private ADEA damage suits against state governments. Congress could not abrogate the states' immunity because the ADEA and the 1974 amendments had been passed under the Commerce Clause, not §5 of the Fourteenth Amendment. Because the Fourteenth Amendment implicitly amends the Eleventh Amendment, legislation within the scope of §5 is not constrained by state sovereign immunity. Congress's authority to regulate state action under §5, the Court held, does not encompass the ADEA because age discrimination is not a violation of the Fourteenth Amendment's Equal Protection or Due Process clauses. In other words, since the Court has never found age discrimination unconstitutional, Congress does not have authority to authorize private damage suits for age discrimination in state employment.

If this seems rather convoluted, consider the consequences of the decision. First, the Court substantially undercut enforcement of most federal regulation of state employment practices. This represents a substan-

tial blow to the position the Court took in *Garcia v. San Antonio Municipal Transit Authority*. The Court has held that the Eleventh Amendment also prevents state employees from pursuing such federal claims in state court.<sup>68</sup> Rather than explicitly overturn *Garcia*, the Rehnquist Court has whittled it down to virtually nothing.<sup>69</sup>

Second, the Court left in place all existing mechanisms for enforcing federal rules against two other forms of discrimination, those based on race and gender. That is because the Court has held that racial and gender discrimination violate the Equal Protection clause. The Court's interpretation of the Eleventh and Fourteenth Amendments thus gives it considerable discretion to decide which federal rules are enforceable through private actions and which are not. Two years after *Kimel* the Court ruled that discrimination on the basis of disability, like discrimination on the basis of age, is not a violation of the Fourteenth Amendment. Chief Justice Rehnquist explained that

Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a *pattern of discrimination by the States which violates the Fourteenth Amendment*, and the remedy imposed by Congress must be *congruent and proportional to the targeted violation*.<sup>70</sup>

If the Court had made it easier for states to escape punishment for engaging in racial discrimination, it would quickly have been accused of undermining the seminal case in modern constitutional law, *Brown v. Board of Education*. This, no doubt, would have mobilized civil rights groups against the Court (as was the case when the Court raised the barriers to similar suits against private employers<sup>71</sup>) and seriously undermined the Court's legitimacy. The ability to distinguish claims of racial and gender discrimination from other forms of regulation of the states is crucial to the political success of the Court's project.

Third, the Court did not leave those subject to age discrimination without any remedies. In *Kimel* Justice O'Connor noted that "State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State in the Union."<sup>72</sup> Her opinion also implied that if Congress had established a clear pattern of unreasonable and systematic discrimination, the Court

might have viewed things differently. Taking an unusually nasty swipe at Congress, O'Connor wrote, "Our examination of the ADEA's legislative record confirms that Congress's 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem."<sup>73</sup> In both *Kimel* and *Garrett* she invited Congress to demonstrate the extent and severity of the discrimination it sought to prohibit. In addition, the federal government remains free to file ADEA suits against the states, as it had occasionally done in the past.<sup>74</sup> In *Garrett* Justices Kennedy and O'Connor note that "what is involved is only the question whether the States can be subjected to liability in suits brought not by the Federal Government . . . but by private persons."<sup>75</sup>

The second case, *Blessing v. Freestone*, involved enforcement of conditions attached to Title IV-D of the Social Security Act, which provides federal funding for state child support programs. Title IV-D specifies the services that all participating states must provide, and establishes deadlines for passing through to needy families the child support payments collected by the state from absent parents. The statute allows federal administrators to reduce funding to states that fail to meet federal standards, but does not explicitly authorize private suits against the states.

In *Blessing* several families claimed that the state of Arizona had denied them services and child support payments mandated by Title IV-D. Everyone (including the federal Department of Health and Human Services) agreed that Arizona had done a miserable job complying with federal requirements. The Ninth Circuit ruled that beneficiaries could sue the state under §1983 in order to bring it into "substantial compliance" with federal law. But the Supreme Court disagreed. Writing for a unanimous court, Justice O'Connor explained that "in order to seek redress through §1983" a plaintiff "must assert the violation of a federal right, not merely the violation of a federal law."<sup>76</sup> The plaintiff not only must identify the "particular statutory provision" that "gives rise to a federal right," but must also convince the court that Congress had intended to single out particular beneficiaries for assistance rather than to provide collective benefits to a broad sector of the population. Moreover, the plaintiff must demonstrate that the statutory right "is not so 'vague and amorphous' that its enforcement would strain judicial competence." The statute "must *unambiguously* impose a *binding* obligation on the States" by couching the right "in mandatory, rather than

precatory, terms.” Meeting all these tests produces “only a rebuttable presumption that the right is enforceable under §1983.” A judicial remedy is foreclosed if Congress had expressly forbidden recourse to §1983 or, more importantly, if Congress had created “a comprehensive enforcement scheme that is incompatible with individual entitlements under §1983.”<sup>77</sup>

Not surprisingly, the plaintiffs in *Blessing* could not surmount these numerous hurdles. According to the Court,

[T]he requirement that a state operate its child support program in ‘substantial compliance’ with title IV-D was not intended to benefit individual children and custodial parents, and therefore it does not constitute a federal right. Far from crafting an individual entitlement to services, the standard is simply a yardstick for the Secretary to measure the systemwide performance of a State’s Title IV-D program. Thus, the Secretary must look to the aggregate services provided the State, not to whether the needs of any particular persons have been satisfied.<sup>78</sup>

The Court did not foreclose the possibility that some parts of Title IV-D might create rights enforceable through §1983, which probably explains why this was a unanimous opinion. But *Blessing* shows how reluctant the Court has become to discover individual entitlements in grant-in-aid programs.

*Blessing* was just one of many recent cases to narrow the scope of statutory rights protected by §1983. For example, in a 1992 case, *Suter v. Artist M*<sup>79</sup>, the Court refused to enforce a provision of the Adoption Assistance Act that required participating states to make “reasonable efforts . . . to prevent or eliminate the need for removal of the child from his home and to make it possible for the child to return to his home.” This language, Chief Justice Rehnquist claimed,

does not unambiguously confer an enforceable right upon the Act’s beneficiaries. The term ‘reasonable efforts’ in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner previously discussed.<sup>80</sup>

Justice Blackmun objected that the Court had in effect “inverted its established presumption that a private remedy is available under §1983 unless Congress has affirmatively withdrawn [it].”<sup>81</sup> According to Blackmun, the Court had “contravened 22 years of precedent,” “changing the rules of the game without offering even minimal justification.”<sup>82</sup> In a similar decision handed down last summer, Chief Justice Rehnquist stated that “if Congress wishes to create new rights enforceable under §1983, it must do so in clear and unambiguous terms.”<sup>83</sup> Justice Stevens’ dissenting opinion correctly noted that by placing the “burden of showing an intent to create a private remedy on §1983 plaintiffs,” the Court had “eroded—if not eviscerated—the long-established principle of presumptive enforceability of rights under §1983.”<sup>84</sup> One might question whether precedents announced abruptly in the 1970s are “long-established,” but Justice Stevens is clearly right in his description of the change.

## THE POLITICS OF THE SUPREME COURT’S NEW FEDERALISM

Earlier in this paper I argued that the agenda of the Federalist Five was not political in the simplistic sense that it corresponded to the platform of the Republican Party or the voting patterns of members of the House Republican caucus. Yet the doctrines of the Court’s emerging new federalism are “political” in at least three respects.

First, taken together, these doctrines represents a significantly modified version of the “political safeguards of federalism” argument originally formulated by Herbert Wechsler and endorsed by the Court in 1985. According to Justice Blackmun’s majority opinion in *Garcia*, “The principal means chosen by the Framers to ensure the role of the states in the federal system lies in the structure of the Federal Government itself.”<sup>85</sup> Since the states are so well represented in the legislative process, the federal courts need show no special solicitude for them; the judiciary can simply stand aside and let the political process work. One could make a strong argument that the Court embraced the “political safeguards of federalism” soon after these safeguards disappeared.<sup>86</sup> Whether or not one believes that the states are adequately represented in the contemporary congressional process, it remains indisputable that the “political safeguards of federalism” position does not really call for

judicial passivity. Rather it calls for extensive judicial participation on behalf of those seeking to enforce federal rules against state and local governments. The *Garcia* case, after all, was itself a suit by employees of the San Antonio mass transit authority seeking money damages from their employer.

When judges hear these enforcement cases, difficult federalism issues once again rear their ugly head. Seldom is the meaning of key statutes and regulations crystal clear. How broad a reading of the federal statute should the court adopt? How much deference should judges accord to federal administrators? How broadly should they interpret the remedies available to federal judges? The answers courts give to these questions significantly influences the balance of power not only between levels of government, but among the branches of government as well.

In the period stretching roughly from 1965-1985 the federal courts adopted an expansive interpretation of federal statutes, of the authority of federal administrators, and of the powers of federal judges. In some instances they went far beyond any plausible interpretation of the words of federal statutes and the expectations of members of Congress.<sup>87</sup> As the deputy general council of HEW explained in 1970, intervention by the courts “permitted a sort of four-sided game of leapfrog,” in which each set of federal actors could impose new restrictions on the states. “If for some reason the federal administrators were inhibited in the development of new rules—perhaps because of the disapproving views of members of an appropriations committee—the courts could assume the lead in developing new legal requirements.” At the same time, federal administrators could embed a judicially developed policy in their rule book “perhaps even embellishing it a bit.” Reform “could thus proceed in an ever-ascending spiral with no single participant in the process having the capacity to block progressive development.”<sup>88</sup> To put it bluntly, behind the deferential rhetoric of the “political safeguards of federalism” lay a concerted subconstitutional attack on the policies and autonomy of subnational governments.

In the 1990s the Court began to establish a new set of presumptions about federal regulation of state and local governments: ambiguity would be resolved in favor of state autonomy; the closer federal regulation came to traditional state functions and prerogatives, the clearer the statute must be.<sup>89</sup> These new presumptions can easily be justified in

terms of the “political safeguards of federalism.” In order for the political safeguards to work, state and local governments must be given adequate notice of the consequences of proposed legislation. Judges and administrators should not discover expensive or restrictive mandates in vague legislation and then tell state and local officials, “Don’t complain, you had your chance in the legislative process.” In short, because federal judges play such a key role in the enforcement of federal mandates, they inevitably lay down many of the rules of the game that establish the contours of the “political safeguards of federalism.” In the 1960s and 1970s the courts established new rules that increased federal control. In recent years they have revised these rules to raise the political cost of imposing federal mandates.

The Court decisions discussed in this paper are political in a second sense as well: they prudently seek to strengthen the states without attacking either the New Deal or the civil rights revolution. Despite all the hoopla about the possible implications of *Lopez* and *Morrison*, the court has placed virtually no limits on Congress’s ability to regulate economic activity or to use its spending power to encourage certain types of state activities and discourage others. The regulatory practices the Court has attacked did not arise until nearly thirty years after FDR launched the New Deal. Similarly, the Court has explicitly (and cleverly) excluded from its sovereign immunity restrictions all disputes involving racial and gender discrimination. This helps explain why these decisions have generated little political opposition despite the anguish they have provoked among law professors. Moreover, the Court has allowed aggrieved constituencies several means of redress. For example, state employees’ unions can work to convince state legislatures to waive sovereign immunity in FLSA and ADEA cases. Or they could ask the federal government to file suit on their behalf. Strong political coalitions will be able to get around the barriers erected by the Court. This gives them little reason to attack the Court directly.

Finally, the Court has frequently justified its federalism rulings by arguing that it is increasing the political accountability of government at all levels. “When the Federal Government asserts authority over a State’s most fundamental political processes,” Justice Kennedy claimed in *Alden v. Maine*, “it strikes at the heart of the political accountability so essential to our liberty and republican form of government.” In particular,



A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process.<sup>90</sup>

In a 1982 dissent Justice O'Connor argued that the federal government should not be allowed to tell state public utilities commissions which issues they must consider:

Local citizens hold their utility commissions accountable for the choices they make. Citizens, moreover, understand that legislative authority usually includes the power to decide which ideas to debate, as well as which policies to adopt. Congressional compulsion of state agencies, unlike pre-emption [i.e. a full federal take over of the policy arena] blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs. . . . [Citizens] cannot learn the lessons of self-government if their local efforts are devoted to reviewing proposals formulated by a faraway national legislature. If we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems.<sup>91</sup>

Sounding themes familiar to political scientists, the Federalist Five have also pointed out ways in which federal commands can disguise the costs of government programs. For example, in *Printz* Justice Scalia wrote,

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.<sup>92</sup>

If the Feds should not be able to pass the buck to the states, Justice O'Connor argued in another case, neither should state officials be able

to pass the buck to the Feds:

[T]he facts of this case raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. Most citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes. As a result, while it would be well within the authority of either federal or state officials to choose where the disposal sites will be, it is likely to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location. If a federal official is faced with the alternatives of choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision. If a state official is faced with the same set of alternatives—choosing a location or having Congress direct the choice of a location—the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. The interests of public officials thus may not coincide with the Constitution's intergovernmental allocation of authority.<sup>93</sup>

Justices O'Connor and Scalia clearly understand what Kent Weaver has termed "blame avoidance."<sup>94</sup> They are against it.

In dissenting opinions Justices Stevens and Breyer have noted that the Court's solicitude for the states might end up enlarging the federal bureaucracy. As Justice Stevens wrote in *Printz*,

By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State's rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies. This is exactly the sort of thing that the early Federalists promised would not occur, in part as a result of the National Government's ability to rely on the magistracy of the states.<sup>95</sup>

In his *College Savings Bank* dissent Justice Breyer complained that the Court had "made it more difficult for Congress to decentralize governmental decisionmaking and to provide individual citizens, or local com-

munities, with a variety of enforcement powers.”<sup>96</sup> Justice O’Connor has responded that a somewhat larger federal bureaucracy is the price we must pay for accountability. When the federal government is forced to act on its own, it

makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But when the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decisions.<sup>97</sup>

Just as the Warren Court believed that the political process would not work properly if “discrete and insular minorities” were excluded from participation, the Federal Five seems to believe that the political process cannot work properly if politicians can engage in extensive blame- and cost-shifting.<sup>98</sup>

It is not my intent here to examine the validity of the Court’s arguments about participation and accountability or to evaluate the extent to which the Court has succeeded in promoting republican government. At this point, I would simply point out that the Court’s new federalism is based on political arguments, and that there is nothing wrong with this. The real question is, how good are these political arguments? How will the new rules of the game change political incentives, the shape of government programs, and the nature of political participation? These, I would suggest, are more interesting questions than why members of Congress objected to the *Chisholm* decision in 1793 or the inherent meaning of “under color of state law.” Rather than condemning judges for engaging in political analysis, we should help them do it well.

## NOTES

<sup>1</sup> Richard Fallon, “The ‘Conservative’ Path of the Rehnquist Court’s Federalism Decisions,” 69 *University of Chicago Law Review* 429 (2002) at 430; and Thomas Keck, “Activism and Restraint on the Rehnquist Court: Timing, Sequence, and Conjunction in Constitutional Development,” *Polity*, vol. 35 (Fall, 2002), p. 121, Appendix A. These articles do not include decisions of the October, 2001 or October, 2002 Terms.

<sup>2</sup> *Garcia v. San Antonio Metropolitan Transit Authority* 469 U.S. 529 (1985), overturning *National League of Cities v. Usery* 426 U.S. 833 (1976).

<sup>3</sup> *US v. Lopez*, 514 US 549 (1995) and *US v. Morrison*, 529 US 598 (2002). The Court has also limited Congressional power under §5 of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 US 507 (1997);, and the *Kimel* case discussed at length below.

<sup>4</sup> For example, *Teague v. Lane*, 489 US 288 (1989); *Coleman v. Thompson*, 501 US 72 (1991); *McKleskey v. Zant*, 499 US 467 (1991); *Felker v. Turpin*, 518 US 651 (1996); *Calderon v. Thompson*, 523 US 538 (1998); and *Miller v. French*, 530 US 327 (2000).

<sup>5</sup> *New York v. US*, 488 US 1041 (1992); and *Printz v. US*, 521 US 898 (1997).

<sup>6</sup> *Seminole Tribe of Florida v. Florida*, 517 US 44 (1996); *Idaho v. Coeur d’Alene Tribe*, 512 US 261 (1997); *Florida Prepaid Postsecondary Education Expenses Board v. College Savings Bank*, 527 US 627(1999); *College Savings Bank v. Florida Prepaid* 527 US 666 (1999); *Alden v. Maine*, 527 US 706 (1999); *Kimel v. Florida Board of Regents*, 528 US 62 (2000); *Board of Regents v. Garrett*, 531 US 356(2001); *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 US — (2002).

<sup>7</sup> E.g., *Gregory v. Ashcroft*, 501 US 452 (1991); *Dellmuth v. Muth*, 491 US 223 (1989); and *Welch v. Texas Highways and Public Transportation Department*, 483 US 468 (1987).

<sup>8</sup> *Planned Parenthood v. Casey* 505 U.S. 833 (1992); *Dickerson v. US* 530 U.S. 428 (2000).

<sup>9</sup> E.g., *Shaw v. Hunt* 519 U.S. 899 (1996); and *Richmond v. J.A. Croson Co.* 488 U.S. 69 (1989).

<sup>10</sup> E.g., *Lucas v. South Carolina Coastal Commission* 505 U.S. 1003 (1992); *Monterey v. Del Monte Dunes* 526 U.S. 687 (1999); *Palazzolo v. Rhode Island* 533 U.S. 606 (2001).

<sup>11</sup> *Crosby v. National Foreign Trade Council* 530 U.S. 363 (2000).

<sup>12</sup> *Lorillard Tobacco Co. v. Reilly* 533 U.S. 525 (2001).

<sup>13</sup> I have found the work of two scholars particularly helpful for understanding the broad patterns of the Court's federalism decisions. The first is Richard Fallon, particularly his two articles "The 'Conservative' Path of the Rehnquist Court's Federalism Decisions" (cited in note 1 above) and "The Ideologies of Federal Courts Law," 74 *Virginia Law Review* 1141 (1988). The second is Michael Greve, particularly *Real Federalism: Why It Matters, How It Could Happen* (AEI, 1999), his many AEI Federalism Outlook" essays, and "Against Cooperative Federalism," 70 *Mississippi Law Journal* 557 (2000).

<sup>14</sup> 505 U.S. 833 (1992). Other examples include *Stenberg v. Carhart* 530 U.S. 914 (2000) and *Romer v. Evans* 517 U.S. 620 (1996).

<sup>15</sup> 531 U.S. 98 (2000).

<sup>16</sup> Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revised* (Cambridge University Press, 2002), pp. 420-22.

<sup>17</sup> 521 U.S. 507 (1997).

<sup>18</sup> *Employment Division v. Smith* 494 U.S. 872 (1990). Justice O'Connor sided with the majority in *Smith* but not *City of Boerne*. The majority in *Smith* consisted of Scalia, Rehnquist, White, Stevens, Kennedy, and O'Connor. Blackmun, Brennan, and Marshall dissented.

<sup>19</sup> As were many conservative legal scholars. See John t. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* (University of California Press, 2002), ch. 1; and Michael McConnell, "Institutions and Interpretation: A Critique of *City of Boerne v. Flores*," 111 *Harvard Law Review* 153 (1997).

<sup>20</sup> *Florida Prepaid Postsecondary Education Expenses Board v. College Savings Bank*, 527 US 627(1999), and *College Savings Bank v. Florida Prepaid* 527 US 666 (1999).

<sup>21</sup> Cited in Noonan, *Narrowing the Nation's Powers*, p. 94. Noonan quotes many other critics of the Court's decisions as well.

<sup>22</sup> 517 U.S. 559 (1996).

<sup>23</sup> *US v. Lopez*, 514 US 549 (1995) and *US v. Morrison*, 529 US 598 (2002).

<sup>24</sup> E.g., *Solid Waste Agency v. US Army Corps of Engineers*, 531 US 159 (2001); and *Jones v. US*, 529 US 848 (2000). Justice Ginsburg's opinion for a unanimous Court in the latter adopted a very narrow interpretation of a federal arson statute. The vote in the former was 5-4.

<sup>25</sup> See Martin Redish and Shane Nugent, "The Dormant Commerce Clause and

the Constitutional Balance of Federalism," 1987 *Duke Law Journal* 569) and Julian Eule, "Laying the Dormant Commerce Clause to Rest," 91 *Yale Law Journal* 425 (1982).

<sup>26</sup> E.g. *Tyler Pipe Industries v. Washington State Dept. Of Revenue* 438 U.S. 232 (1987); *West Lynn Creamery v. Healy* 512 U.S. 186 (1994); and *Camp Newfound/Owatanna v. Harrison* 520 U.S. 565 (1997).

<sup>27</sup> In a particularly interesting 2000 case, *Greier v. American Honda Motor Co.* 529 U.S. 861, the Court held that federal auto safety standards preempted state tort law. The majority voting to limit state authority consisted of Breyer (the author of the majority opinion), Rehnquist, Scalia, O'Connor, and Kennedy. That left the unusual coalition of Stevens, Thomas, Ginsburg, and Souter in the minority. In a case decided last term, *City of Columbus v. Ours Garage*, the only justices to vote for federal preemption of a local ordinance were Scalia and O'Connor. 536 U.S. (Forthcoming).

<sup>28</sup> 521 U.S. 898 (1997).

<sup>29</sup> 517 U.S. 44 (1996).

<sup>30</sup> 527 U.S. 706 (1999).

<sup>31</sup> See cases cited in notes 47, 57,66, 80, and 84 below.

<sup>32</sup> See, e.g., *Alexander v. Sandoval* 532 U.S. 275 (2001).

<sup>33</sup> In order to emphasize the Court's broad political purposes and strategy, in this paper I have glossed over a very important legal issue: the distinction between prospective, injunctive relief and retrospective monetary damages. For decades the Supreme Court allowed injunctions against state and local officials, but not damage awards against unconsenting states. This was the uneasy and often troublesome compromise struck by the Court in *Ex Parte Young* 209 U.S. 123 (1908) and confirmed in *Edelman v. Jordon* 415 U.S. 651 (1974). This meant, for example, that federal judges could order states to increase future welfare benefits, but not to repay past benefits improperly withheld. Some of the Supreme Court's recent decisions have narrowed Congress's ability to abrogate sovereign immunity and thus to authorize money damages against the states. Others, though, have ignored the prospective-retrospective distinction. In *Seminole Tribe v. Florida* Chief Justice Rehnquist wrote, "Petitioner suggests that one consideration weighing in favor of finding the power to abrogate here is that the Act authorizes only prospective injunctive relief rather than retroactive monetary relief. But we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment. . . . The Eleventh Amendment does not exist solely in order to 'prevent federal court judgments that must be paid out of a State's treasury' . . . ; it also serves to avoid 'the indignity of subjecting a State to the

coercive process of judicial tribunals at the instance of private parties.” Statements such as this lead some legal scholars to believe that the majority is rethinking *Ex Parte Young*, the foundation of a great deal of federalism jurisprudence. How far the Court will go in this direction remains to be seen.

<sup>34</sup> *Engelhoff v. Engelhoff*, 532 U.S. 141 (2001) at 160-61, citations and poorly placed commas omitted. Richard Fallon, one of the most astute legal commentators on the subject, notes that the Supreme Court’s “pro-federalism majority has deployed a phalanx of sub-constitutional devices to protect legal governments, especially from private lawsuits for damages.” “Conservative Path,” at 438.

<sup>35</sup> See, for example, the discussion of the “Flemming Ruling,” in Melnick, *Between the Lines: Interpreting Welfare Rights* (Brookings, 1994), pp. 71-72.

<sup>36</sup> ACIR, *Regulatory Federalism: Policy, Process, Impact, and Reform* (ACIR, 1984), p. 8. Another ACIR report, *Federal Regulation of State and Local Government: The Mixed Record of the 1980s* (ACIR, 1993) extends the analysis of this work through 1990.

<sup>37</sup> “Can the Bureaucracy be Deregulated?” in John DiIulio, ed., *Deregulating the Public Service* (Brookings, 1994), p. 43. For a discussion of some of the ways these requirement affect local mass transit systems, see Mark Alan Hughes, “Mass Transit Agencies: Deregulating Where the Rubber Meets the Road?” in the same volume.

<sup>38</sup> ACIR, *Federal Regulation*, ch. 5; Timothy Conlan, *From New Federalism to Devolution: Twenty-Five Years of Intergovernmental Reform* (Brookings, 1998), chs. 10-11; David Walker, *The Rebirth of Federalism* (Chatham House, 2000), pp.151-56.

<sup>39</sup> James Fesler and Donald Kettl, *The Politics of the Administrative Process*, second edition (Chatham House, 1996), p. 138.

<sup>40</sup> Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Brookings, 1983), chs. 6 and 9.

<sup>41</sup> Robert Katzmman, *Institutional Disability: The Saga of Transportation Policy for the Disabled* (Brookings, 1986) ch. 3.

<sup>42</sup> Federalist #78.

<sup>43</sup> Charles Alan Wright, *Law of Federal Courts*, fifth edition (West, 1994), p. 126.

<sup>44</sup> *Alden v. Maine* 527 U.S. 706 (1999) at 759.

<sup>45</sup> Richard Coppalli, *Rights and Remedies Under Federal Grants* (BNA, 1979), pp. 1-11.

<sup>46</sup> Wright, *Law of Federal Courts*, p. 24

<sup>47</sup> 365 U.S. 167 (1961).

<sup>48</sup> 377 U.S. 426 (1964).

<sup>49</sup> *Parden v. Terminal Railway* 377 U.S. 184 (1964).

<sup>50</sup> 392 U.S. 309 (1968).

<sup>51</sup> *Chapman v. Houston Welfare Rights Organization* 441 U.S. 600 (1979). See Melnick, *Between the Lines*, 48-51 and 83-88.

<sup>52</sup> *Almenares v. Wyman* 453 F.2d 1075 (2nd Cir., 1971) at 1082.

<sup>53</sup> *Monnell v. New York City Department of Social Services* 436 U.S. 658 (1978); and *Maine v. Thiboutot* 448 U.S. 1 (1980).

<sup>54</sup> Wright, *Law of Federal Courts*, p. 132; Theodore Eisenberg, *Civil Rights Legislation: Cases and Materials* (Michie, 1981), p. 74.

<sup>55</sup> *Garcia v. SAMTA* 469 U.S. 528 (1985) at 551-55.

<sup>56</sup> *Pennsylvania v. Union Gas* 491 U.S. 1 (1989) .

<sup>57</sup> *Maine v. Thiboutot* 448 U.S. 1 (1980); *Monnell v. New York City Department of Social Services* 436 U.S. 658 (1978); *Owen v. City of Independence* 445 U.S. 622 (1980). Meanwhile Congress passed legislation reducing the “amount in controversy” hurdle for §1983 cases.

<sup>58</sup> For example, *Pennhurst State School and Hospital v. Halderman*, 465 US 89 (1984); *Smith v. Robinson*, 468 US 992 (1984); *Dellmuth v. Muth*; *Middlesex Co. Sewage Authority v. National Seaclammers Association*, 453 US 1 (1981); *California v. Sierra Club*, 451 US 287 (1981); *Pennhurst State School and Hospital v. Halderman* 451 U.S. 1 (1981); *Atascadero State Hospital v. Scanlon* 473 U.S. 234 (1985).

<sup>59</sup> In addition to the cases cited in notes 55-57 above, see *Hodel v. Virginia Surface and Mining Reclamation Association* 452 U.S. 264 (1981); *FERC v. Mississippi* 456 U.S. 742 (1982); *Wright v. Roanoke Redevelopment and Housing Authority*, 479 US 418 (1987); and *Wilder v. Virginia Hospital Association*, 496 US 498 (1990).

<sup>60</sup> *New York v. US* 505 U.S. 144 (1992).

<sup>61</sup> *Gregory v. Ashcroft* 501 U.S. 451 (1991).

<sup>62</sup> *Printz v. US*.

<sup>63</sup> See the cases cited in Fallon, “Conservative Path,” at notes 226, 230, 232.

<sup>64</sup> *Real Federalism*, p. 76.

<sup>65</sup> 528 U.S. 62 (2000).

<sup>66</sup> 520 U.S. 329 (1997).

<sup>67</sup> *Maryland v. Wirtz* 392 U.S. 183 (1968), *National League of Cities v. Usery*, and *Garcia* all involved the constitutionality of legislation applying the Federal Labor Standards Act to state employees. The Court had previously decided two other cases involving the 1974 extension of the ADEA to state employees. *EEOC v. Wyoming* 460 U.S. 226 (1983) and *Gregory v. Ashcroft*.

<sup>68</sup> *Alden v. Maine*.

<sup>69</sup> See John Yoo, “The Judicial Safeguards of Federalism,” 70 *Southern California Law Review* 1311 (1997) at 1338-58.

<sup>70</sup> *Board of Trustees v. Garrett* 531 U.S. 356 (2001) at 374.

<sup>71</sup> Melnick, *Between the Lines*, pp. 4-6.

<sup>72</sup> *Kimel* at 91.

<sup>73</sup> At 89.

<sup>74</sup> *EEOC v. Wyoming* 460 U.S. 226 (1983).

<sup>75</sup> *Garrett*, at 37.

<sup>76</sup> *Blessing*, at 340, emphasis in the original.

<sup>77</sup> At 341.

<sup>78</sup> At 343, emphasis in the original.

<sup>79</sup> 503 US 347 (1992).

<sup>80</sup> At 363.

<sup>81</sup> At 376, internal quotation marks omitted.

<sup>82</sup> At 377.

<sup>83</sup> *Gonzaga University v. Doe*, 536 US – (2002), slip opinion at 1. Later in the opinion he added, “if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.” At 11. In other words, creating new rights enforceable under §1983 changes the constitutional balance between the states and the federal government.

<sup>84</sup> *Gonzaga*, slip opinion at 11.

<sup>85</sup> At 550. Herbert Wechsler’s famous article is “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,” 54 *Columbia Law Review* 543 (1954).

<sup>86</sup> Martha Derthick, *Keeping the Compound Republic: Essays on American Federalism* (Brookings, 2000), ch. 4.

<sup>87</sup> Perhaps the most extreme example is the federal judiciary’s interpretation of AFDC. See Melnick, *Between the Lines*, pp. 83-102.

<sup>88</sup> St. John Barrett, “The New Role of the Courts in Developing Welfare Law,” 1970 *Duke Law Journal* 1, at 23. For examples, see Stephen Halpern, *On the Limits of the Law: The Ironic Legacy of Title VI of the Civil Rights Act* (Johns Hopkins, 1995); Gareth Davies, “The Great Society after Johnson: The Case of Bilingual Education,” *Journal of American History*, vol. 88, pp. 1419 (2002); and Melnick, *Between the Lines*, chs.7-8 (education for the handicapped).

<sup>89</sup> The best example of the latter point is *Gregory v. Ashcroft*.

<sup>90</sup> *Alden* at 750-51

<sup>91</sup> *FERC v. Mississippi* 456 U.S. 742 (1982).

<sup>92</sup> Printz at 930. Both Justice Scalia and Justice O’Connor cited law review articles by Deborah Jones Merritt that investigate these arguments about political accountability: “Three Faces of Federalism: Finding a Formula for the Future,” 47 *Vanderbilt Law Review* 1563 (1994) and “The Guarantee Clause and State Autonomy: Federalism for a Third Century,” 88 *Columbia Law Review* 1 (1988).

<sup>93</sup> *New York v. US* at 182-83.

<sup>94</sup> Kent Weaver, “The Politics of Blame Avoidance,” *Journal of Public Policy*, vol. 6, (1986), p. 371.

<sup>95</sup> *Printz* at 959.

<sup>96</sup> At 705.

<sup>97</sup> *New York v. US* at 168-69.

<sup>98</sup> The most forceful presentation of the argument that “cooperative federalism” undermines accountability is Greve, “Against Cooperative Federalism,” cited in note 13 above.

# **Evolving Federalisms:**

## **The intergovernmental balance of power in America and Europe**

Federal political systems are inevitably dynamic entities. The balance of power between central institutions and states evolves as new policies (or new versions of old policies) are allocated between the levels of government. This is true in well-established federal systems — such as in the United States — and in nascent systems, such as the European Union.

The papers in this book address the dynamics of federalism on either side of the Atlantic, tracing and comparing the intergovernmental balance of power in the United States and the European Union over time. They are structured around three issue-areas which have strongly affected these dynamics in both areanas: welfare and social policies, market regulation, and the role of law and the courts.

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Located within the Maxwell School of Syracuse University, the Maxwell European Union Center is one of fifteen centers in the United States funded by the European Commission. It examines major issues in transatlantic relations and governance in the new Europe.

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