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Featuring Articles From:

Controversial Decisions of the 1994-95 Supreme Court Term

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Economics of Federalism and the Proper Scope of the Federal Commerce Power, 31 SAN DIEGO L. REV. 555 (1994); Anne C. Dailey, *Federalism and Families*, 43 U. PA. L. REV. 1787 (1995). *See generally* Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993); Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207 (1994); Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 U. KAN. L. REV. 217 (1996).

9. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding on commerce power grounds provisions of the Civil Rights Act of 1964 that prohibit racial discrimination in the provision of public accommodations); Katzenbach v. McClung, 379 U.S. 294 (1964) (same).

10. *See, e.g.*, Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1494 n.18 (1994) ("Certainly the argument that Congress was given limited power is uncontroversial. This was, after all, one of the critical compromises that made the Constitution possible.").

11. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

12. *See* Burson v. Freeman, 504 U.S. 191, 227 (1992) (Stevens, J., dissenting) ("Ours is a Nation rich with traditions. Those traditions sometimes support, and sometimes are superseded by, constitutional rules.").

13. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 748 (1982) (tradition supports giving the President absolute immunity from damages liability predicated on the performance of official acts); Franklin v. Massachusetts, 505 U.S. 788, 801 (1992) (Scalia, J., concurring) (tradition supports the conclusion that the judiciary lacks the constitutional power to order the President to perform particular executive acts); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 632 (1952) (Douglas, J., concurring) ("[O]ur history and tradition rebel at the thought that the grant of military power [to the President] carries with it authority over civilian affairs.").

14. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (for government property to be considered a public forum for free speech purposes it must by long tradition be open to the public at large for assembly and speech); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the use of prayer to open legislative sessions on the basis of tradition).

15. *See, e.g.*, Missouri v. Jenkins, 115 S. Ct. 2038, 2070 (1995) ("We have long recognized that education is primarily a concern of local authorities. '[L]ocal autonomy of public school districts is a vital national tradition.'") (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977)).

16. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 123-24 (1989) ("'Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.'") (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

17. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 303 (1993) (the substantive component of the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental.") (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (Cardozo, J.)).

18. 18 U.S.C. § 248 (1994). Among other things, the statute prohibits the use of force or the threat of force to intimidate or interfere with any person because that person has been obtaining or providing reproductive health services. § 248(a)(1). FACE provides for civil and criminal penalties for violations of its prohibitions. *See* §§ (b), (c).

19. *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278 (1993) ("[T]he right to abortion has been described in our opinions as one element of a more general right of privacy . . . or of 14th amendment liberty . . . .") (citations omitted).

20. United States v. Wilson, 880 F. Supp. 621, 636 (E.D. Wis. 1995).

21. Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in part at 18 U.S.C. § 2261 (1994)). In pertinent part, the statute makes it a federal offense to travel across state lines to commit a crime of domestic violence or to cause someone else to cross state lines for that purpose. §§ 2261(a)(1), (2). The statute also makes it an offense to cross or cause the crossing of state lines in violation of a protective order. §§ 2262(a)(1), (2).

22. 18 U.S.C. § 228 (1994). The statute makes it a federal crime to "willfully fail[] to pay a past due support obligation with respect to a child who resides in another State." § (a).

23. 115 S. Ct. 1732 (1995).

24. *See, e.g.*, *In re* Burrus, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.").

25. *See, e.g.*, Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong., 1st Sess. (1995); Product Liability Fairness Act of 1995, S. 565, 104th Cong., 1st Sess. (1995).

26. *But see* 42 U.S.C. § 1983 (1988) (creating a tort cause of action for violations of federal rights occurring "under color of" state law).

27. *But see* Federal Tort Claims Act, 28 U.S.C. § 1346 (1994) (addressing the federal government's tort liability).

28. *See, e.g.*, Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (acknowledging "the States' traditional authority to provide tort remedies to their citizens").

Does Federalism Promote Liberty?

Tom Stacy

This essay is adapted from the debate series "Controversial Decisions of the 1994-95 Supreme Court Term: *United States v. Lopez*"

The question of whether state or national authority better promotes liberty . . . . turns on the meaning that one assigns to the heady concept of liberty.

Does federalism promote liberty? Some Justices and scholars say that it does, pointing to liberty as one of the values furthered by giving states exclusive authority over a wide array of matters.[1] Other scholars, pointing to the history of the civil rights movement, dismiss the notion that state authority promotes liberty as nothing more than a canard.[2]

This article outlines a framework for evaluating the competing claims about whether and how the allocation of authority between state and national governments promotes liberty. It begins with a critical assessment of the various structural mechanisms through which federalism has been said to advance the cause of liberty. It then turns to the varying meanings one might assign to the contested concept of liberty.

What emerges will disappoint jurists, scholars, or politicians who wish to trumpet the inherent superiority of either state or national authority. The question of whether state or national authority better promotes liberty has no clear, categorical answer. The answer turns on the meaning that one assigns to the heady concept of liberty and the relative importance of a variety of structural checks in advancing liberty, so defined. The formalistic line between state and national authority drawn in *United States v. Lopez*,[3] which precludes Congress from regulating "noncommercial" activities traditionally governed by state law, bears no real relationship to the considerations needed to answer these complex questions. Judges and scholars should give up the dubious and unanalyzed claim that judicially enforceable lines such as these promote liberty.

I. Mechanisms

Federalism has been said to promote liberty by enlarging the size of the polity, diffusing power among governmental entities, enabling citizens to shift power between the national and state governments, and allowing citizens to avoid oppressive laws by exiting the jurisdiction. This Part evaluates the role of these various structural mechanisms in promoting liberty. It shows that the frequently invoked idea that federalism promotes liberty by diffusing power has little meaningful content. In contrast, the mechanisms of enlarging the polity, power shifting, and exit do identify considerations that are relevant to an assessment of what mix of state and national authority best promotes liberty. The difficulty is that these considerations point in conflicting directions. To decide the relative weight each should receive, one must grapple with a battery of empirical questions whose answers are anything but clear.

A. Enlarging the Polity

In his famous *Federalist* Paper No. 10, James Madison

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argued that the national government would promote individual liberty by enlarging the size of the polity.[4] According to Madison, one of the greatest threats to liberty was the danger that permanent majorities at the state and local level would oppress minorities. Madison's ingenious solution to this problem of majoritarian "faction" in the States was to enlarge the size of the polity. Madison thought that factions that commanded a majority position in a given state would lose majority status in an enlarged, national polity. Lacking majority status in the national political process, such groups could only use the power of the national government by forging coalitions with other groups. The necessity of such coalition-building, Madison thought, would inhibit majoritarian oppression of minorities and help assure that government acted in the broad public interest.

In Madison's view, then, the primary institutional mechanism through which federalism promotes liberty favors national rather than state authority. After reading *Federalist* No. 10, one is left to puzzle over whether there is good justification for giving the States any independent authority whatever.

While interesting and important, Madison's argument falls well short of supporting an all-things-considered judgment that national authority promotes liberty better than state authority. Madison may well be correct that the size of the polity has something to do with the danger of minority oppression. The size of the polity, however, is not the only relevant factor.

Madison focuses only on the likelihood of oppression and disregards the magnitude of oppression. Simply because it affects a greater number of persons, an oppressive national law is more oppressive than a state law having identical terms. Even if Madison correctly thought that the enactment of oppressive laws is less likely on the national level, this lesser likelihood must be balanced against the greater magnitude of oppression accompanying an oppressive national law.[5] Because it ignores one of these conflicting tendencies, Madison's argument is incomplete and arguably reaches the wrong conclusion. In light of the Founders' decision to make the Bill of Rights applicable only to the national government,[6] their prevailing judgment evidently was that national authority is more dangerous to liberty.

In addition, Madison's argument overlooks the possibility that oppression may result from an organized minority faction. One of the lessons of modern political science is that minority factions, now known as interest groups, can exert disproportionate influence. Thus, an interest group need not account for a numerical majority of the populace to wield effective political power and oppress other interest groups. Effective political power not only may be possessed by a numerical minority (e.g., milk producers), such power also may be used to oppress a faction that accounts for a numerical majority (e.g., consumers). Madison's model, then, wrongly supposes that a group's status as a numerical majority or minority solely determines whether it possesses effective political power.[7] In reality, a group's possession of effective political power depends on many other factors. A group's status as a numerical majority or minority, which does depend on the size of the polity, is one relevant consideration. But it is far from the only one.

As this discussion makes clear, one must make a set of complex empirical judgments to assess the comparative danger that, on the state and national levels, factions possessing effective political power will use that power to oppress politically powerless factions. Professor Rapaczynski has argued that "the federal government may be a more likely subject of capture by a set of special minoritarian interests, precisely because the majority interest of the national constituency is so large, diffuse, and enormously difficult to organize."[8] The empirical evidence undercuts Professor Rapacynski's argument, indicating that special interest groups possess even more undue influence on the state level.[9] But, as the tension between Professor Rapaczynski's argument and the empirical evidence illustrates, the comparative danger that the powerful will oppress the powerless cannot be answered by armchair speculation. Given the complex factors that influence a group's possession or lack of effective political power, the issue requires collecting and analyzing data about how state and national political processes actually work.

B. Diffusing Power

It is frequently said that, like the separation of powers, federalism promotes liberty by diffusing power among governmental entities.[10] Yet this talk trades more on metaphor than on analysis. The separation of powers analogy is quite misleading. In addition, although almost always advanced to justify exclusive state authority, the "diffusion" of power into mutually exclusive realms of state and national authority would seem to eliminate rather than create checks against the arbitrary exercise of governmental power.

The separation of powers analogy, despite its ritualistic invocation, is inapt. The separation of powers promotes liberty primarily by preventing a single branch from acting without the formal concurrence of another branch. To take one example, the President's veto power generally precludes Congress from enacting legislation without the President's concurrence.[11] A requirement that two or more branches concur at least arguably promotes liberty by inhibiting governmental action and limiting government.

In contrast with the separation of powers, federalism does not require the concurrence of separate governmental entities as a prerequisite to governmental action. To the extent that federalism divides national and state authority into two mutually exclusive spheres, the analogy between the separation of powers and federalism collapses almost completely. To exercise its exclusive powers, one level of government never needs the other's

concurrence; it may act in the face of the other's express disapproval. The analogy between the separation of powers and federalism also does not hold to the extent that state and national governments share an area of concurrent authority. Instead of making the validity of national action depend on state approval, the Supremacy Clause means that in a realm of concurrent authority national action always prevails, even in the face of express state disapproval. Whether state and national authority is mutually exclusive or concurrent, federalism does not promote liberty in the same way as the separation of powers.

Lines of exclusive authority, such as those drawn in Lopez, prevent voters from shifting power to and from different levels of government.

Of course, the very existence of dual levels of government creates largely informal military and political checks against governmental overreaching. The Founders expected that if the national government became truly tyrannical, the electorate would vote it out of office.[12] By mobilizing and organizing political opposition, state government can play an informal role in the exercise of this electoral check.[13] The Founders further thought that, in the exceedingly unlikely event that this political check failed, state governments would be able to use their militias to mount effective military resistance to the national government.[14] The Founders thought that the national government also had a military check against tyranny on the part of state governments. They meant for the Republican Guaranty Clause to authorize the national government to use force against any state government attempting to dispense with popular elections.[15]

Still, these informal political and military checks are a far cry from the formal and regular checks established by the separation of powers. The military checks are designed as responses to and a deterrent against only the most extreme tyrannies. The role of state governments in spearheading electoral opposition to national representatives might promote liberty to some unknown degree. But this check surely differs in its operation from the formal and ubiquitous workings of the separation of powers.

Not only is the diffusion of power argument frequently confused by the unexamined separation of powers analogy, it is also abused by its citation in support of a realm of exclusive state power. The political and military checks discussed in the preceding paragraph require the existence of state governments, but they do not generally require a zone of exclusive state regulatory authority. State governments that share concurrent authority with the national government would also be able to exercise these informal checks.

In fact, a "diffusion" of authority into mutually exclusive state and national realms would seem to eliminate rather than create structural checks against arbitrary government. To the extent that their authority is mutually exclusive, state and national governments possess absolute power within their own exclusive domains. Confining absolute and unchecked power to a limited domain does nothing to promote liberty within that domain. Judicially enforced zones of exclusive authority would seem to inhibit liberty by preventing the electorate from checking oppressive use of power at one level by shifting authority to another level of government.

C. Power-Shifting

One important structural check against arbitrary government comes into play to the extent that the state and national governments possess concurrent authority. As the historian David Beer has recently explained, Madison thought that federalism would promote liberty by enabling the electorate to shift power from the States to the national government and vice versa.[16] If the national government became too oppressive, then the electorate could vote to transfer power away from the national government to the States. If the States became too oppressive, then the electorate could do the opposite.[17]

Power-shifting is not a mere theoretical possibility; it actually occurs in practice. As the 1994 congressional elections and the Great Society programs those elections might overhaul well illustrate, questions of federalism do play an important role in the national political debate. In the 1960s, with the enactment of the Great Society programs, voters acceded to a shift of power from the States to the national government in response to concerns that states were not adequately protecting the welfare of the poor and the elderly.[18] The 1994 congressional elections began a possible shift in the opposite direction. Devolution of power from the national government to the States was a prominent theme of the 1994 congressional elections and the Republican Congress that resulted.[19] Proponents of such power-shifting argue that national Great Society programs have not worked well and that states can address the problems more efficiently. The enactment of the Great Society programs and the 1994 congressional elections indicate that voters do take into account whether state or national authority works best and are able to shift power to and from levels of government accordingly.

It is important to note that power-shifting is incompatible with judicial lines that enforce zones of exclusive state or national authority. Lines of exclusive authority, such as those drawn in *Lopez*, prevent voters from shifting power to and from different levels of government.

D. Exiting the Jurisdiction

According to some modern theorists, state and local authority promotes liberty through the mechanism of "exit."[20] It is far easier, these theorists observe, for a person to move within the United States than from the United States to another nation. State and local authority thus better enables citizens to "vote with their feet," avoiding laws they find oppressive by choosing not to live in, or "exiting," a given community.

Of course, the willingness to relocate does and should depend on a number of factors, such as ties of friendship, family, and occupation. These ties limit the degree to which exit, as an empirical matter, promotes liberty. Given the harshness of a judgment that a person must either leave and forego such ties or be deemed to have "assumed the risk" of unliked laws, ties of family and occupation also limit the degree to which exit, as a normative matter, should be relied upon to promote liberty.[21]

E. Conclusion

With the exception of the misleading talk about the diffusion of power, the mechanisms discussed above do identify considerations that are relevant to an assessment of whether state or national authority better promotes liberty.

The difficulty is that each of these mechanisms is only one relevant factor and that each points in a different direction. Madison's enlarging the polity argument, which identifies one relevant consideration, favors a large realm of exclusive national authority. His power-shifting argument, which identifies yet another relevant consideration, requires concurrent authority, with voters having the ability to draw an ever-shifting line between state and national power. The phenomenon of exit, still another relevant consideration, favors exclusive state authority. In any given context, the relative significance of each of these mechanisms — and, hence, whether liberty is best promoted by exclusive national authority, concurrent state and national authority, or exclusive state authority — is far from obvious.

II. Definitions

In deciding the relative significance of the mechanisms discussed above and, more generally, which mix of state and national authority best promotes liberty, one must define the contested concept of liberty.

Under one common definition, the one to which Madison's enlarging the polity argument and the phenomenon of exit appeal, liberty consists of protecting powerless minorities from oppression at the hands of an overreaching majority.

In addition to the theoretical considerations discussed in Part I, history would also seem to be relevant to an assessment of the danger of such oppression on the state and national levels. The history of the Fourteenth Amendment and civil rights movement generally can be seen to demonstrate that states historically have done a poorer job of protecting at least racial minorities from majoritarian oppression.[22]

Liberty, however, can be defined in different terms, as referring not to a minority's freedom from majoritarian oppression but rather to a majority's freedom from governmental oppression or unresponsiveness. The idea here is that liberty can be thwarted by a government that fails to reflect and implement the preferences of a majority of its citizens. When preferences are diversely distributed among states, decentralizing authority does allow more preferences to be satisfied and, in this sense, reduces "oppression" of majorities within the States.[23] For example, if 80% of the populace of Missouri favors the death penalty while 80% of the populace of Massachusetts opposes it, more voter preferences can be satisfied if the decision whether to adopt the death penalty is made at the state rather than at the national level.

Finally, liberty can be defined in libertarian terms as general freedom from governmental regulation. It is widely recognized that states often compete for large taxpayers such as businesses by lowering levels of taxation and regulation. This deregulationist spiral is often called a "race to the bottom" because it can result in undesirably lax environmental and worker safety laws, for instance.[24] Given a libertarian view of liberty and concomitant hostility to regulation, however, the race to deregulate would seem to be a race to the top.[25]

These competing definitions further complicate the assessment of whether state or national authority better advances liberty. Most persons would probably agree that the first two conceptions each capture an important sense of liberty. They would want a political structure that both minimizes the danger that overreaching majorities will oppress minorities and maximizes the responsiveness of government to majority preferences.[26] The problem is that these different senses of liberty may point in conflicting directions. National authority may, as Madison thought, better minimize the danger that an overreaching and politically powerful faction will oppress a powerless minority. But state authority may increase government's responsiveness to voter preferences.

III. Conclusion

Reflection on federalism's contribution to liberty undermines the hard-boiled rhetoric too often heard in scholarly, judicial, and political circles. One must make difficult choices among competing conceptions of liberty and grapple with complex questions regarding the contemporary significance that mechanisms such as enlarging the polity, power shifting, and exit have in promoting the appropriate conception(s) of liberty. Those who confidently proclaim the inherent superiority of state or national authority never address, much less resolve, these complex normative and empirical questions.

Reflection on federalism's role in promoting liberty also tends to undermine the claim that the Court should enforce a domain of exclusive state regulatory authority. A libertarian might well conclude that, due to its tendency toward deregulation, exclusive state authority promotes liberty. The Court, however, has no warrant to enshrine such a sectarian notion of libertarian liberty into the Constitution. As Justice Holmes observed in his famous *Lochner* dissent, the Constitution does not enact libertarianism or any other economic theory.[27] Absent the constitutionalization of libertarianism, the conclusion that exclusive state authority always best promotes liberty can be justified only if the significance of exit necessarily trumps that of power-shifting and enlarging the polity or if the satisfaction of diverse majority preferences captures the only meaningful sense of liberty. It seems quite doubtful that these claims hold true in all or even most contexts. Whether they hold true in any given context depends on a complex set of questions that proponents of judicially enforceable zones of exclusive state authority have not even proposed, much less purported to answer. The doctrinal lines the Court drew this past term in *Lopez*, for instance, have nothing at all to do with the pertinent considerations.

Judicially enforceable zones of exclusive state authority perhaps can be supported by an appeal to constitutional text or history.[28] But those who defend such zones should abandon the unsupported and unanalyzed slogan that exclusive state authority promotes liberty.

Notes

1. *E.g.*, United States v. Lopez, 115 S. Ct. 1624, 1634, 1638 (1995) (Kennedy & O'Connor, JJ., concurring); Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1990); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 25 (1995).
2. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 250-54 (1980) ("[T]he assertion that federalism was meant to protect, or does in fact protect, individual constitutional freedoms akin to those conventionally so defined has no solid historical or logical basis."); D. Bruce La Pierre, *Political Accountability in the National Political Process — The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 629 (1985).
3. 115 S. Ct. at 1624, 1630-31, 1632, 1633. For a discussion of the intended scope of *Lopez*, see Deborah J. Merritt, *Commerce!*, 94 MICH L. REV. 674 (1995).
4. THE FEDERALIST NO. 10 (James Madison); *see also* THE FEDERALIST NO. 51, at 351-53 (James Madison) (Jacob E. Cooke ed., 1987) (restating argument).
5. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (reviewing RAOUL BERGER, THE FOUNDERS' DESIGN (1987)).
6. *See* Barron v. Mayor & City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
7. DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 79-81 (1995).
8. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 1985 SUP. CT. REV. 341, 386 (1986).
9. *See* La Pierre, *supra* note 2, at 626-27.
10. Madison first made the point in *Federalist* No. 51:

> In the compounded republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.

THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1987). For reiterations, see Gregory v. Ashcroft, 501 U.S. 452, 458 (1990) (in the same way that "separation and independence of the coordinate branches of government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); REDISH, *supra* note 1, at 25.
11. Other examples of such formal power-sharing include the Senate's role in confirming presidential appointments of executive officials, the Senate's role in approving treaties made by the President, the President's role in appointing and the Senate's role in confirming federal judges, and Congress's role in funding the activities of both the executive and judicial branches.
12. THE FEDERALIST NO. 45, at 311-12 (James Madison) (Jacob E. Cooke ed., 1987); THE FEDERALIST NO. 44, at 305 (James Madison) (Jacob E. Cooke ed., 1987); THE FEDERALIST NO. 57, at 384 (James Madison) (Jacob E. Cooke ed., 1987).
13. Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1499-1503 (1987).
14. *Id.* at 1496-1500.
15. THE FEDERALIST NO. 43, at 292-93 (James Madison) (Jacob E. Cooke ed., 1987).
16. THE FEDERALIST NO. 46 (James Madison); SAMUEL H. BEER, HOW TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 289-95 (1993).
17. *See also* THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1987):

> Power being almost always the rival of power, the general government will at all times stand ready to check usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

18. ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES, AND THE FEDERAL GOVERNMENT 92 (1992).
19. *See* William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 721 (1995) ("One of the central themes of the Republican's 'Contract with America' proposes that power should be returned to the states.").
20. *See* REDISH, *supra* note 1, at 25; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-20 (1956).
21. *See* ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970); DENNIS C. MUELLER, PUBLIC CHOICE 125-47 (1979).
22. *See* Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1325 (1994) ("Neither the accidents of American history nor the record of federal and unitary states . . . supports the argument that there is a causal connection that runs from federalism to freedom. (If there is any connection, it probably runs the other way.)").
23. *See* McConnell, *supra* note 5.
24. *E.g.*, United States v. Darby, 312 U.S. 100, 122 (1941); SHAPIRO, *supra* note 7, at 42-43.
25. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 76-77 (1991) (The libertarian scholar Richard Epstein "makes no bones about the fact that his support for federalism is directly linked with his rejection of government regulation.").
26. The two need not be incompatible. The enactment of a law favored by a majority does not, by definition, unjustifiably oppress a minority.
27. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.").
28. *But see* Tom Stacy, *What's Wrong with* Lopez, 44 U. KAN. L. REV. 243 (1996).