

# ROBERT NAGEL'S BLEAK VISION AND THE "IMPLOSION" OF AMERICAN FEDERALISM

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## INTRODUCTION

In recent years, academic commentary has been filled with discussions concerning the "revival" of federalism and the "revolution" wrought by recent Supreme Court decisions that have been characterized as safeguarding the rights of the states at the expense of federal power.<sup>1</sup>

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<sup>1</sup> See, e.g., Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995) ("The Supreme Court's recent decision in *United States v. Lopez* marks a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers." (footnote omitted)); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2181 (1998) ("The constitutional law of federalism-based constraints

Some commentators have welcomed these developments; others have not.<sup>2</sup> For the most part, however, all have agreed with the underlying factual premise — that there truly has been a revolution in the Court's jurisprudence regarding the constitutional relationship between the federal government and the states.

Given this consensus, Robert Nagel's recent book *The Implosion of American Federalism* comes as something of a shock. For Nagel's thesis is that there has been no such "revolution"; to the contrary, Nagel asserts that we are witnessing the rapid collapse of our federal system under the crush of powerful centralizing forces, which are only accelerating.<sup>3</sup> As

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on the federal government has risen phoenix-like from the ashes of post-New Deal enthusiasm for the exercise of national power."); Peter H. Schuck, *Introduction: Some Reflections on the Federalism Debate*, 14 YALE L. & POL'Y REV. 1, 2 (1996) ("Today, federalism is being reconstructed in all branches and at all levels of government through a variety of forms: statutes, administrative and judicial arrangements, court decisions, and new private sector responsibilities." (footnote omitted)); Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 461 (2002) ("Over the last decade, the Supreme Court's newfound willingness to enforce limits on congressional power has stimulated a resurgence of interest in federalism throughout the legal community."); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 477 (2001) ("For several years now, the Supreme Court has disquieted observers and commentators by reasserting the presence of constitutional limitations on national power resulting from the federal structure of the American political system."); see also ROBERT F. NAGEL, *THE IMPLICATION OF AMERICAN FEDERALISM* (2001) (describing the federalism debate).

<sup>2</sup> The nature of the federal structure established under the Constitution has been the subject of a wealth of academic commentary in recent years. See, e.g., MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* (1999); DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161 (1998); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996); Earl M. Maltz, *Justice Kennedy's Vision of Federalism*, 31 RUTGERS L.J. 761 (2000); Thomas B. McAfee, *Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion*, 1996 B.Y.U. L. REV. 351; Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

<sup>3</sup> NAGEL, *supra* note 1, at 167 ("The theme of this book has been that maintaining limits on the power of the national government depends upon certain intellectual and psychological resources and that these resources are now so diminished that there is little energy left to resist the heavy pull of the center."); see also Keith E. Whittington, *Dismantling the Modern State?: The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483, 483 (1998) ("For most of the twentieth century, the United States has moved toward increasing centralization of political power in the national government. Since the onset of the Great Depression, that centralization has been relatively rapid.").

such, Nagel's latest work stands as a powerful and profound challenge to the conventional academic wisdom.

This article examines the implications of Nagel's thesis. Part I reviews Nagel's discussion of the prevailing view that there has been a "revolution" in the Supreme Court's jurisprudence and a corresponding renewal of our federal system. Part II discusses Nagel's evidence that, in fact, we are experiencing an onward march toward complete centralization. Part III analyzes the potential effects of these powerful centralizing forces. While Professor Nagel argues that these forces can only lead to acts of repression by the national government, given the growth of the vast federal bureaucracy, another outcome is possible and perhaps even probable: The concomitant erosion of the nondelegation doctrine may in fact impede acts of repression, while at the same time ensuring a grossly ineffective, inefficient, bureaucratic, unaccountable, and corrupt governmental system. Finally, Part IV argues that it is not too late for the Court to implement bright-line legal rules that may prevent further erosion of the federal system. While Professor Nagel has all but given up on the prospect of the Court's implementing real constraints on the federal government's ever-expanding power under the Commerce Clause, he at the same time cites the Court's "anti-commandeering" line of decisions and the function of the states as sovereign entities as potential barriers to complete centralization.<sup>4</sup> Despite Professor Nagel's pessimism, given its recent decisions, one can envision the Court implementing real barriers to centralization. A proper interpretation of the Commerce Clause as a means of regulating state, and not individual, action, for example, may not only be consistent with the original understanding, but also prevent further federal usurpation of traditional state powers.

## I. THE CONSENSUS REGARDING SOCIAL FRAGMENTATION AND THE FEDERALISM "REVOLUTION"

To set the stage for his contention that we are experiencing a rapid centralization of governmental power that is inconsistent with our federal constitutional structure, Professor Nagel catalogues a number of ways in which our society is, on its face, becoming even more fragmented. He observes that "[t]he most visible and disturbing of these signs is the appearance of deep and apparently insoluble cultural and political conflicts."<sup>5</sup> Among these, Nagel cites the divide over abortion, homosexuality, and the role of religion in society, concluding that "[b]eneath the bland homogenization produced by modern commercial life . . . can be found a people sharply divided by class, religion, race,

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<sup>4</sup> NAGEL, *supra* note 1, at 35-38.

<sup>5</sup> *Id.* at 3.

ethnicity, and gender.”<sup>6</sup> According to Nagel, these realities have led to “signs of deep anxiety about disintegration” in the “writings of the contemporary constitutional law elite.”<sup>7</sup> Indeed, Professor Nagel identifies such anxiety as a driving factor behind the powerful forces that continue to press for greater centralization of governmental power.<sup>8</sup>

According to Professor Nagel, such concerns have also led to vigorous academic criticism of the Supreme Court’s recent federalism decisions. He notes that recent decisions such as *United States v. Lopez*,<sup>9</sup> in which the Court struck down the Gun-Free School Zones Act as exceeding congressional authority under the Commerce Clause, have been characterized by the legal elite as effecting a “revolution” in our federal system by vastly enlarging the power of the states at the expense of the federal government.<sup>10</sup> Underlying much of the criticism of these recent decisions, Professor Nagel asserts, is the concern that they will undermine the federal government’s ability to address the growing fragmentation within our increasingly diverse society. Many commentators view a strong national government as the only means by which such fragmentation can be addressed, and moreover, view it as a necessity in the Post-New Deal Era.<sup>11</sup> Indeed, even those scholars who agree with the outcome of these cases view them as effecting a significant change in both the Court’s prior jurisprudence and in the federal structure. Thus, while such commentators may view these decisions as more accurately representing the original understanding of our nation’s Constitution and may also view the greater decentralization of government power as a desirable outcome, they do not dispute that the effect of the Court’s recent decisions has been significant.

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<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 7 (citing as illustrative “the frightened criticisms of *National League of Cities v. Usery*, a 1976 case that in fact turned out to have little legal significance and to pose no danger to the power of the central government”).

<sup>8</sup> *Id.*

<sup>9</sup> 514 U.S. 549 (1995).

<sup>10</sup> NAGEL, *supra* note 1, at 8 (“Many . . . prominent journalists and scholars have reacted to recent federalism cases by openly worrying about the security of the New Deal and even Reconstruction.” (footnote omitted)). As Nagel observes, “many important legal scholars view the Supreme Court’s recent record on federalism with excitement, whether fearful or hopeful. They look at the [privacy] cases discussed in the last two chapters as ‘a dramatic antifederalist revival’ and as having ‘revolutionary’ potential . . . . Opinions differ, naturally, but in general the terms of the debate in the legal academy are defined by the language of alarm.” *Id.* at 49–50.

<sup>11</sup> See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 291 (2000) (“The specific limits of federal power envisaged by the Founders in 1789 are gone, and any effort to roll back federal power to what it meant at the Founding would be foolish as well as utterly impractical. Even the harshest critics of New Deal jurisprudence acknowledge that changes in society, culture, and the economy require a different kind of national authority today, both practically and as an interpretive matter.”).

## II. THE FACT OF CENTRALIZATION

Professor Nagel argues, in contrast to this conventional wisdom, that in fact centralization is advancing, not retreating.<sup>12</sup> Not only has the Court's record been mixed, but powerful forces outside the judiciary have led to even greater centralization. Moreover, as Professor Nagel observes, this centralization of governmental power is only increasing in rapidity.<sup>13</sup> In support of this contention, he cites several lines of evidence.

### A. THE COURT'S RECENT DECISIONS REGARDING STRUCTURAL PROVISIONS

First, Professor Nagel notes the significant erosion of the enumerated powers doctrine as powerful evidence of this trend: "Even taking into account the continuing vitality of the states and their political subdivisions, . . . it is simply no longer credible to believe that the national government is restricted to an enumerated set of powers. By degrees and for largely understandable reasons, the courts, the Congress, and the regulatory bureaucracies have gradually expanded the jurisdiction of the central government into all areas of life."<sup>14</sup>

This erosion would seem to be indisputable. Yet, academic commentators have pointed to recent decisions such as *Lopez* as slowing, if not reversing, this trend.<sup>15</sup> Professor Nagel maintains, however, that while decisions such as *Lopez* are often touted as initiating a revolution in federalism, the holding of the Court, which reaffirms the broad "substantial effects" test, demonstrates otherwise. By reaffirming that any activity that may "substantially affect" commerce is subject to congressional regulation pursuant to the Commerce Clause, the Court left broad latitude for the exercise of congressional authority. In sum, Professor

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<sup>12</sup> NAGEL, *supra* note 1, at 17 ("[W]hat a sober examination shows, I think, is that the idea of limited national power is not judicially enforceable. That is, despite the outcome in *Lopez*, the only effective constraints on national regulatory power are the ones that are already in decline.").

<sup>13</sup> *Id.* (observing that "with each increase in the scope of national regulation, the intellectual and psychological resistance to further increases diminishes").

<sup>14</sup> *Id.* at 16.

<sup>15</sup> In addition to *Lopez*, commentators often cite the following cases as instances in which the Court has taken a bold position regarding federalism: *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *New York v. United States*, 505 U.S. 144 (1992); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

Nagel concludes, “the *Lopez* decision is not potentially far-reaching because it authoritatively announces the ‘substantial effects’ test.”<sup>16</sup>

The problem with the substantial effects test, as Nagel sees it, is that, if “fully applied,” it “would devour the distinction between commercial and noncommercial activities in the same way that it would demolish the significance of the jurisdictional tie.”<sup>17</sup> For any activity, even if not essentially “commerce,” potentially could have an “effect” on interstate commerce. Thus, Nagel views *Lopez* as a case in which “the substantial effects test was only announced — and not applied” given that the conduct that Congress sought to regulate — carrying guns in schools — could have a “potential” effect on interstate commerce.<sup>18</sup>

In coming to this conclusion, Professor Nagel’s critique mirrors that of Justice Thomas, who in a powerful and widely-cited concurring opinion, argued that the Court should revisit its interpretation of the Commerce Clause to bring it in line with the Framers’ intent. As Justice Thomas observed, the Court’s “case law has drifted far from the original understanding of the Commerce Clause.”<sup>19</sup> Specifically, Justice Thomas maintained that the “substantial effects” test, “if taken to its logical extreme, would give Congress a ‘police power’ over all aspects of American life.”<sup>20</sup> This outcome, however, is inconsistent with the Framers’ acknowledged desire to preserve the police powers of the several states. Accordingly, Justice Thomas recommended that “[i]n an appropriate case,” the Court should “further reconsider [its] ‘substantial effects’ test with an eye toward constructing a standard that reflects the text and his-

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<sup>16</sup> NAGEL, *supra* note 1, at 19. See also *Lopez*, 514 U.S. at 559 (“We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”).

<sup>17</sup> NAGEL, *supra* note 1, at 20. Activity that has a “substantial effect” on interstate commerce is only one category of activity that Congress may regulate under the Court’s current Commerce Clause jurisprudence: “Congress may regulate the use of the channels of interstate commerce,” and “Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” *Lopez*, 514 U.S. at 558. See also *Morrison*, 529 U.S. at 608–09 (recognizing these same two categories). Thus, even if the “substantial effects” category were wholly abrogated, under the current framework, there would still remain certain areas in which congressional legislation would be recognized as appropriate.

<sup>18</sup> NAGEL, *supra* note 1, at 23. See also *id.* at 24 (“[T]he *Lopez* opinion employs logic that is incompatible with finding virtually any statute to be a valid exercise of the commerce power. *Lopez* is written this way because it is an effort to enforce a constitutional principle that is irreconcilably at odds with the principle that was validated in those other cases.”).

<sup>19</sup> 514 U.S. at 584 (Thomas, J., concurring).

<sup>20</sup> *Id.* Cf. Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 695 (1996) (observing that “the Commerce Clause has been a judicial whirligig that responds to shifting personal preferences as the Court’s personnel changes. Such shifts undermine the rule of law and foster suspicion that the Constitution is merely what the fluctuating majority of the Justices says it is . . . .” (footnote omitted)).

tory of the Commerce Clause without totally rejecting [the Court's] more recent Commerce Clause jurisprudence."<sup>21</sup>

Such sentiments occasionally have been echoed by a majority of the Court in subsequent decisions. For example, in *United States v. Morrison*, in which the Court struck down portions of the Violence Against Women Act as exceeding congressional Commerce Clause power, the majority observed that "the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded."<sup>22</sup> Nonetheless, the Court refrained from expressly abandoning the "substantial effects" test, leading Justice Thomas to reiterate his call for a more coherent and historically accurate formulation in a separate concurrence:

[T]he very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until the Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.<sup>23</sup>

Thus, while the prospect of a more coherent and faithful interpretation has been raised more than once, no such explicit revision in the Court's test has been forthcoming.

Based on his analysis of *Lopez* and other recent cases, Professor Nagel concludes that "the Court's record as a whole casts significant doubt on whether decentralization is highly valued by most members of the Court."<sup>24</sup> As evidence in support of this proposition, Nagel cites the fact that "[s]ince 1937, in only two cases has the Court found a federal statute to exceed the scope of the commerce power."<sup>25</sup> In contrast, "in just the past two decades at least thirteen cases have validated national

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<sup>21</sup> 514 U.S. at 585 (Thomas, J., concurring). See also *id.* at 599–600 ("Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further flaw that it appears to grant Congress a police power over the Nation.").

<sup>22</sup> *Morrison*, 529 U.S. at 615.

<sup>23</sup> *Id.* at 627 (Thomas, J., concurring).

<sup>24</sup> NAGEL, *supra* note 1, at 26.

<sup>25</sup> *Id.*

laws under the commerce clause.”<sup>26</sup> Thus, while “[t]he potent and continuing centralization of authority that began with the New Deal is historically recent and still controversial both intellectually and, to a degree, politically,”<sup>27</sup> according to Nagel, the Court has done little to overturn this erosion of the federal system.

Indeed, an extension of Professor Nagel’s analysis makes the situation appear even bleaker. Despite the Supreme Court’s rhetorical adherence to a strong federal system, it appears that the lower federal courts have thus far been reticent to apply the Court’s recent decisions.<sup>28</sup> This is not surprising given that the incentives for lower courts to take measures that further centralization are particularly powerful. Not only are judges sitting on the lower federal courts officials of the central government,<sup>29</sup> but also, unlike members of the Supreme Court, they are not the final judicial arbiters of constitutional questions. Thus, the incentives for the lower courts to strike down centralizing legislation on constitutional grounds are even weaker than those of the Supreme Court.

## B. THE COURT’S INDIVIDUAL RIGHTS DECISIONS

While the Court’s recent decisions concerning structural provisions such as the Commerce Clause are the most obvious barometer of the degree of judicial centralization, Professor Nagel does not stop with an analysis of the cases that are conventionally viewed as implicating “federalism” concerns. He further considers decisions by the Court touching upon social issues as evidencing a strong tendency toward centralization,

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<sup>26</sup> *Id.* Nagel further observes that “[i]n a few cases, the Tenth and Eleventh Amendments have been used to constrain Congress.” *Id.*

<sup>27</sup> *Id.* at 5.

<sup>28</sup> See, e.g., Michael C. Carroll & Paul R. Dehmel, Comment, *United States v. Lopez: Reevaluating Congressional Authority Under the Commerce Clause*, 69 ST. JOHN’S L. REV. 579, 608 (1995) (“While many commentators have recognized the importance of *Lopez*, the lower federal courts have been slow to follow suit.”); Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629, 1641 (2000) (“[T]he vast majority of lower court decisions since *Lopez* have distinguished the case and upheld federal statutes, although there are also some notable decisions following *Lopez* and indicating that some subjects are beyond the scope of the commerce power.” (footnotes omitted)); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 402 (noting the “appellate footdragging” following the *Lopez* decision). Cf. Lynn A. Baker, *The Revival of States’ Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL’Y 95, 100 (1998) (“[N]either *Lopez* nor *Printz* has thus far proven to be a decision of wide-ranging import, although both have affected the legal landscape in discernible, if arguably marginal, ways.”).

<sup>29</sup> See Calabresi, *supra* note 1, at 808 (observing that because “the Justices and judges of the U.S. federal courts are *national* officers in every possible sense of that term,” they are less likely to invalidate federal legislation and more likely to give “ferocious scrutiny of state laws and general deference to national ones” (emphasis in original)); see also Baker & Young, *supra* note 2, at 102 (“Professor Calabresi . . . argues — convincingly, in our view — that we are far more likely to see underenforcement of states’ rights from the federal courts than overly aggressive judicial review.”).



concluding that "the work product of the very institution so often seen as the defender of states' rights is actually an embodiment of cultural trends that are inimical to the federal system."<sup>30</sup> For example, Nagel points to abortion decisions such as *Roe v. Wade*<sup>31</sup> and *Planned Parenthood v. Casey*<sup>32</sup> as representing a "judicial monopolization of abortion policy" that has had a powerful centralizing effect by invalidating diverse regulations enacted by the various state governments.<sup>33</sup> Similarly, he cites the Court's recent decision in *Saenz v. Roe*,<sup>34</sup> striking down residency requirements imposed by the State of California on welfare recipients, as centralizing decisionmaking regarding welfare policies "to displace significant state policies on public welfare."<sup>35</sup> Finally, he lists the Court's controversial decision in *Bush v. Gore*,<sup>36</sup> overturning the Florida Supreme Court's decision approving the use of standardless manual recounts of ballots cast in the 2000 Presidential election, as "undermin[ing] significantly the long tradition of state control over state ballot-counting

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<sup>30</sup> NAGEL, *supra* note 1, at 13. Other commentators have similarly observed that even "conservative" justices have at times favored centralization in areas that touch upon social legislation:

The justices themselves no doubt had particularly strong opinions about the merits of the substantive decisions reached by the states on both affirmative action and gay rights. Thus, both *Croson* and *Romer* presented the type of situations in which Kennedy might have been inclined to subordinate his views on federalism to other considerations. Indeed, Justices Antonin Scalia and Clarence Thomas — the Supreme Court's strongest supporters of states' rights — have also been the most persistent critics of state affirmative action programs.

Maltz, *supra* note 2, at 766. See also Lino A. Graglia, *Revitalizing Democracy*, 24 HARV. J.L. & PUB. POL'Y 165, 171–72 (2000) ("The Court has decided for the entire nation issues literally of life and death, such as abortion and capital punishment, of sexual morality, such as contraception, pornography, and homosexuality, and of the public order such as vagrancy control and street demonstrations . . . . For some reason, we permit the most fundamental issues of social policy, issues that determine the nature of our society and quality of our civilization, to be decided for us by the Supreme Court." (footnotes omitted)).

<sup>31</sup> 410 U.S. 113 (1973).

<sup>32</sup> 505 U.S. 833 (1992).

<sup>33</sup> NAGEL, *supra* note 1, at 27.

<sup>34</sup> 526 U.S. 489 (1999).

<sup>35</sup> NAGEL, *supra* note 1, at 27.

<sup>36</sup> 531 U.S. 98 (2000). In a concurring opinion, Chief Justice Rehnquist (joined by Justices Scalia and Thomas) recognized the important federalism concerns implicated in *Bush v. Gore*. See *id.* at 112 ("In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law."). Nonetheless, he concluded that "[t]o attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II." *Id.* at 115. But see *id.* at 123 (Stevens, J., dissenting) ("When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion.").

standards and procedures.”<sup>37</sup> In all of these instances, as Professor Nagel observes, the “conservative” members of the Court, who are often viewed as advocating greater decentralization, were in the vanguard of strong centralization in areas involving traditional state authority.<sup>38</sup> Thus, Professor Nagel concludes that “[t]he Rehnquist Court consistently claims that its edicts take precedence over the integrity of local governmental institutions and are impervious to the expression of local political dissatisfaction.”<sup>39</sup>

Based on such decisions, Professor Nagel maintains that the Court’s record is at best “mixed,” with certain lines of cases evidencing the “rhetoric” of decentralization, while the majority evidence a complete absence of “devotion to decentralized decision making.”<sup>40</sup> Indeed, there are additional areas, which Professor Nagel addresses only in passing, where the Court has put in place rules allowing for greater centralization. One such area, and the subject of much recent academic commentary, is the federal government’s imposition of conditions on grants it makes to the states.<sup>41</sup> While Congress is not free to “commandeer” state govern-

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<sup>37</sup> NAGEL, *supra* note 1, at 27.

<sup>38</sup> *Id.* See also *id.* at 38 (“The brief examination of this record in Chapter 2 casts doubt on whether even conservative justices have much respect for the discretionary policy decisions made at the local level.”); *id.* at 41 (“On the Court today the ‘states’ rights’ position regarding federal judicial power, then, is much like O’Connor’s opinion in *New York*. The conservative justices indulge in protestations about the importance of local control, but their reasoning is vague and easily evaded.”).

<sup>39</sup> *Id.* at 42; see also *id.* at 45 (concluding that “the record of even a conservative Court includes many individual-rights cases that have limited state decisional autonomy on the basis of highly questionable interpretations of the Constitution”).

<sup>40</sup> *Id.* at 28 (“I recognize that there are many majority opinions containing rhetoric on the importance of judicial deference to state decision makers and that in a sizable number of cases claims of individual rights based on the national Constitution are defeated. My point here is only that the record as a whole is mixed enough to cast doubt on the idea that devotion to decentralized decision making is now an overriding value for most members of the Court.”).

<sup>41</sup> See, e.g., Lynn A. Baker, *Conditional Federal Spending Power After Lopez*, 95 COLUM. L. REV. 1911 (1995); Somin, *supra* note 1, at 499 (“Existing federal grant programs have created massive reliance interests in both state governments and private parties.”); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 828 (1998) (“At least one scholar has suggested that Congress’s use of its spending power to impose conditions on federal grants raises the . . . problems of political accountability and commandeering legislation.”); Levy, *supra* note 28, at 1657–58 (“Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.” (quoting *United States v. Zwick*, 199 F.3d 672, 687 (3d Cir. 1999))); Joshua D. Sarnoff, *Cooperative Federalism, The Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 206 (1997) (“A substantial academic dispute exists . . . regarding whether Congress may condition federal spending on state regulation of conduct otherwise beyond federal legislative power.”); see also NAGEL, *supra* note 1, at 62 (discussing Baker, *supra*).

ments through direct action,<sup>42</sup> under the Court's current decisions, it has largely remained free to extort what it wants from the states through its control over the dispensation of federal funds. As such, a number of commentators have urged the Court to bring its jurisprudence regarding federal grants under the Spending Clause in line with its more recent Commerce Clause decisions.<sup>43</sup> Yet, thus far, the Court has refrained from revisiting decisions allowing the central government to exercise considerable power over the states.

### 1. *Political and Cultural Forces*

Professor Nagel attributes such outcomes to a variety of forces. One is the tendency of the Court to augment its own power. It is not unusual, given human nature, that the Court views itself as the final arbiter of issues that are brought before it. Thus, the Court's "monopolization of abortion policy,"<sup>44</sup> as Professor Nagel terms it, is not surprising. Another force promoting centralization is the seduction of a uniform rule of decision and definitive resolution. As Nagel observes: "A rich account of the functions of the states in our constitutional system would not only undermine the Supreme Court's cherished role as the ultimate expositor of the Constitution but also contradict deep instincts that are natural outgrowths of judges' essential task of authoritative dispute resolution."<sup>45</sup>

This need for uniformity and "stability in legal norms" is, according to Nagel, also the basis for "our contemporary fixation on constitutional law and judicial review."<sup>46</sup> Yet, Professor Nagel questions this rationalization for increasingly centralized decisionmaking: "It is baffling how anyone who has lived through a significant part of the modern period of

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<sup>42</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 176 (1992) ("[T]he Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program, . . . an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution." (internal quotations omitted)); Levy, *supra* note 28, at 1641-42 ("[I]n *New York v. United States* and *Printz v. United States*, the Court held that Congress may not 'commandeer' state governments by compelling them to either legislate in accordance with federal mandates, as in *New York*, or execute federal statutes, as in *Printz*.").

<sup>43</sup> See, e.g., Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 195 (2001) ("Amid all the attention afforded the Court's recent federalism decisions, one important fact has gone largely unnoticed: The greatest threat to state autonomy is, and has long been, Congress's spending power." (footnote omitted)); Somin, *supra* note 1, at 499.

<sup>44</sup> NAGEL, *supra* note 1, at 27.

<sup>45</sup> *Id.* at 43. Professor Epstein similarly has observed that the expansion of congressional Commerce Clause powers during the New Deal Era resulted from "the dominant intellectual belief of the time that national problems required national responses." Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443 (1987).

<sup>46</sup> NAGEL, *supra* note 1, at 85.

tumultuous judicial creativity could treat the relative stability of judicial interpretations as self-evident.”<sup>47</sup> As he observes, “[t]he historical record demonstrates that the modern Supreme Court has repeatedly and dramatically changed the effective meaning of the Constitution.”<sup>48</sup> Thus, the factors leading to centralization have arguably exerted greater influence than is warranted.

Moreover, aside from these factors, there is an interplay between the Court’s jurisprudence and prevailing cultural forces. For example, Professor Nagel observes that “the legal academy,” which has evidenced a “strong nationalism rather than a robust federalism,” not only “trains the lawyers and judges who argue and decide constitutional disputes but also has significant impact on education more generally.”<sup>49</sup> Thus, “[t]here is . . . an influential movement in the academy and on the federal bench in favor of continuing the elimination of any remaining significant state authority.”<sup>50</sup> In contrast, Nagel says that “there is no antifederalist pro-

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<sup>47</sup> *Id.* at 92. Nagel provides support for his contention in the form of the following examples from recent decisions:

Recall, for example, how in a short span of time the Court first held that the federal control of the wages and hours of state employees did not violate state sovereignty, then that it did, then that Congress (not the Court) should enforce the principle of state sovereignty, and then that the Court should protect state sovereignty through the “no commandeering” rule. Or recall how in the *United States v. Lopez* decision the Court suddenly abandoned settled understandings about the scope of Congress’s power to regulate commerce. Or consider the Court’s lengthy record of discovering rights, like the right to abortion and the right to burn the American flag, that had never before been recognized as part of our Constitution and in many instances had been specifically denied in prior decisions of the Court. Despite this history of constant innovation and revision, scholars like Alexander and Schauer assume the relative stability of judicial interpretations or infer it from idealizations of judicial conduct.

*Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 49. See also William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL’Y 139, 149 (1998) (“It is true that political culture can serve as a restraint on federalization. Indeed, that restraint exemplified much of our nation’s history. The political culture, however, is rapidly changing, and there are numerous factors at work that suggest that the political culture can no longer be relied upon to serve as an effective check on an ever-expanding federal government. One of these changes we have already discussed — the growing sentiment that a matter is appropriate for federalization if it is important. But there are other factors at work as well.”); *id.* at 152 (“The political culture, in short, is becoming increasingly nationalized. For this reason, the claim that the political culture is able to restrain the expansion of federal law is not realistic. Indeed, as we have seen, the political culture serves only to increase the pressure for federalization.”). But see Schuck, *supra* note 1, at 5 (“The pressure to devolve power from the center to the periphery is a nearly universal phenomenon in contemporary society.”).

<sup>50</sup> NAGEL, *supra* note 1, at 51 (observing that the boldest strategy commentators use is to “turn the truth upside down by labeling as constitutionally radical even moderate or marginal reservations about the continuing trend toward centralization”).

gram equivalent to the radical nationalist position that dominates the case law and the academy and is taken for granted."<sup>51</sup>

Similarly, Professor Nagel cites what he perceives to be the Court's preoccupation with the potential for "social disintegration" as a motivating factor in its decisionmaking. He points principally to the language in *Casey* as "resonat[ing] with an unspoken fear, with a vision of catastrophe that is deeply rooted both in our history and in contemporary debate."<sup>52</sup> The decision, according to Nagel, shows that the Court's

underlying fear . . . is the political disintegration of the United States. . . . Because the justices perceived unfettered abortion regulation as threatening the nation's social fabric, they represented the Court's role, beginning in *Roe*, as having been to call "the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."<sup>53</sup>

Here, again, Professor Nagel offers an unconventional view. He claims that the centralization wrought by decisions such as *Roe* and *Casey* actually has *created* the "anxiety about nationhood" and "political stridency that eventually produced fears of a culture war" that the Court sought to avoid.<sup>54</sup> Thus, Professor Nagel sees social fragmentation as a result, instead of a cause, of the Court's jurisprudence.

However, in analyzing the prevailing forces influencing the distribution of governmental power, Professor Nagel does not stop with an

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<sup>51</sup> *Id.* at 57 ("[R]ecall that it is at least not entirely beyond the pale for nationalists on occasion to consider abolishing the states outright. An equivalent antifederalist discourse is imaginable. The corresponding antifederalist proposal would be to abolish the national government and return to the kind of confederation that preceded unification, an objective that occasional commentators like Linda Greenhouse actually impute to members of the Court. However, as far as I know, no one on the Court or in the academy even mentions, much less supports, any such idea.").

<sup>52</sup> *Id.* at 104.

<sup>53</sup> *Id.* at 105–07 (quoting *Casey*, 505 U.S. at 958). Nagel is highly critical of the *Casey* decision:

If for a moment we can drop the conventional frame that imparts a habitual sense of respectability to judicial opinions, we can see how *Planned Parenthood v. Casey* combines grandiosity and inaccuracy in a way that is not far different from the somber phoniness found in that apex of the culture of political celebrity, the presidential campaign film. Although these films, which for decades now have been central features of national political conventions, are self-serving melodramas, they are presented as documentaries. Accordingly, a simultaneously cynical and credulous public pays attention to them as important, if false, political communications.

*Id.* at 146 (citation omitted). Indeed, Nagel maintains that, "[p]sychologically, at least, it is only a short distance from the hysterical words of the Supreme Court in cases like *Planned Parenthood v. Casey* to oppression by executive action." *Id.* at 168–69.

<sup>54</sup> *Id.* at 109.

analysis of the role of the judicial system. Indeed, he maintains that even if the Court were functioning as a bulwark against increased centralization, its power would "recede into relative insignificance" when compared with prevailing cultural and political forces that serve on their own to promote centralization.<sup>55</sup> According to Professor Nagel, such forces have continued to drive a greater centralization of government power regardless of the Court's decisions.

Thus, Professor Nagel describes a system in which strong political and cultural forces continue to advance the process of centralization. While the Court's recent decisions are often described as a roadblock to further centralization, Professor Nagel notes that in many areas the Court has contributed to the erosion of the federal system. And, in the alternative, he argues that even if the Court were to stand as a strong defender of that system, its efforts would be eclipsed by the prevailing political and cultural trends.

## 2. *Remnants of the Federal System*

Nevertheless, Nagel does not paint a totally bleak picture. He identifies structural features that offer a potential barrier to complete centralization. First and foremost among these is the existence of states as separate sovereign entities. As Nagel observes, the Court has endeavored, at least in some small way, to protect that sovereign status: "[I]t remains true that states are generally (if dimly) perceived to have some degree of sovereign status. The Supreme Court has hesitantly embarked on a series of decisions designed to protect this status. These cases have some modest potential . . . to help sustain the federal system."<sup>56</sup> Nagel

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<sup>55</sup> *Id.* at 30 ("While we do have deeply held habits and beliefs about political practices at the state and local level, during this century many aspects of the culture have favored centralization."). Cf. Graglia, *supra* note 30, at 167 ("The most we can or should ask of the Court on the federalism issue is that it cease its pretend review and thus make clear that the responsibility for the growth of federal power lies solely with Congress."); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 924-25 (1999) ("Despite the Court's apparent nostalgia for a dramatically smaller national government, no judicially enforced federalism doctrine is going to undo the last quarter of the nation's history. And while cases like *New York*, *Lopez*, and *Printz* may on occasion stimulate important debate, such as the examination of federal criminal law that has followed *Lopez*, they will never have more than the most marginal relevance to the allocation decisions that matter most. Those who truly believe in the instrumental values of federalism should therefore focus not on persuading courts to undo congressional 'mistakes,' but rather on promoting wise institutional choice in the political process.").

<sup>56</sup> NAGEL, *supra* note 1, at 32. See also *Printz*, 521 U.S. at 918-19 ("Although the States surrendered many of their powers to the new Federal Government, they retained a 'residuary and inviolable sovereignty.'" (quoting THE FEDERALIST NO. 39 (Madison))); *New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991))); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("[T]he States retain substantial sovereign powers under our constitutional

points to *New York v. United States*,<sup>57</sup> in which the Court prohibited the federal government from "commandeering" the resources of the state governments by making them take title to hazardous waste or issue regulations according to instructions from Congress under the Low-Level Radioactive Waste Policy Act.<sup>58</sup> Other decisions in this line cited by Nagel are *Printz v. United States*<sup>59</sup> and *Alden v. Maine*,<sup>60</sup> in which the Court again emphasized the importance of the states as independent, sovereign entities.<sup>61</sup>

The very existence of the states as sovereign entities, according to Nagel, has powerful implications: "Although strong nationalists see states as anachronisms and favor a program of consolidation, state governments continue to exist and to exhibit important elements of sovereignty. They organize governance at the local level, they regulate the lives of their citizens, they participate in the amendment process, and so on."<sup>62</sup> As a result, states still play an active role in a number of areas. Moreover, through their interaction with the citizenry on a more day-to-day, intimate level, they more closely engender the loyalty of the people

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scheme, powers with which Congress does not readily interfere."); *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states."); Cf. Richard Briffault, "What About the 'Isms'?: Normative and Formal Concerns in Contemporary Federalism", 47 VAND. L. REV. 1303, 1322 (1994) ("[A]s Akhil Amar has urged, the role of federalism as a check on the national government may distinguish federalism from decentralization since, although most of the other values of federalism can be obtained by decentralization in which the local units are legally subordinate to the central government, the local units have to be legally autonomous in order to be able to protect the people against central government tyranny."); Calabresi, *supra* note 1, at 787 (noting "the value of the states in helping citizens resolve the serious collective action problems that must be overcome to halt national usurpation"); Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045, 1049 (1997) ("There can be no doubt that our original Constitution, which transferred important powers to the new federal government, also reflected a commitment to the preservation of substantial attributes of the sovereignty in the states."); Earl M. Maltz, *Sovereignty, Autonomy, and Conditional Spending*, 4 CHAP. L. REV. 107, 109 (2001) (observing that "[t]he rhetoric of state sovereignty has figured prominently in the federalism jurisprudence of the Rehnquist Court").

<sup>57</sup> 505 U.S. 144 (1992).

<sup>58</sup> NAGEL, *supra* note 1, at 35.

<sup>59</sup> 521 U.S. 898 (1997) (holding that Congress could not make state officers perform background checks on prospective handgun purchasers under the Brady Handgun Violence Prevention Act).

<sup>60</sup> 527 U.S. 706 (1999) (holding that Congress could not subject states to proceedings in state court under the Fair Labor Standards Act).

<sup>61</sup> NAGEL, *supra* note 1, at 38 ("In *Alden v. Maine*, decided in 1999, the Court declared that Congress could not require state courts to hear certain federal statutory claims naming the state itself as defendant. Justice Kennedy, writing for the majority, declared that Congress must treat states as 'joint participants in the governance of the Union rather than as 'mere provinces.' States, he said, must 'retain the dignity . . . of sovereignty.'" (quoting *Alden*, 527 U.S. at 715)).

<sup>62</sup> *Id.* at 59.

than the national government, which seems increasingly unresponsive to the people's concerns.

Yet, Professor Nagel notes that "[b]y its terms *New York* applies only to the unusual circumstance where a federal statute singles out state governments for special regulation."<sup>63</sup> Moreover, he points out that other decisions evidence the opposite trend.<sup>64</sup> And, most significantly, Nagel maintains that even where cases have upheld the value of federalism, their impact has been less apparent because "enforcement of the principle of federalism is stronger in cases where the values behind federalism are implicated more weakly."<sup>65</sup> Thus, for example, where the "national congressional policy at issue relates specifically to state institutions," the Court has more readily enforced federalist principles.<sup>66</sup> However, in other instances it has refrained from placing checks on burgeoning federal power.

Moreover, Professor Nagel observes that while the states' role as sovereign entities has to some extent been preserved, other structural barriers have been completely eroded. For example, "judicial interpretation" has been used to "create[ ] an enormously significant alternative to either of the Article V amendment methods."<sup>67</sup> In this way, the role of the states in defining our constitutional framework has been diminished. As a result, "[t]he sustained and aggressive use of this alternative has meant that much of the fundamental law has been established without participation by the states."<sup>68</sup>

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<sup>63</sup> *Id.* at 37.

<sup>64</sup> For example, Nagel observes that "in *Missouri v. Jenkins* the Court squarely held that a federal judge may order state officials to raise property taxes even in excess of what is authorized under state law." *Id.* at 40; *see also id.* at 42 ("The only clear message that emerges from the Court's recent desegregation decisions is that federal district judges should continue to supplant or 'disestablish' local institutions of government until full, 'good faith' compliance with every aspect of their decrees is achieved. This dogged commitment by a 'conservative' Court to the educational theories and reform mechanisms of an earlier era is, like the Court's refusal to overrule any landmark case establishing rights against state governments, a central puzzle of our time.").

<sup>65</sup> *Id.* at 44. Nagel also observes that the principles of federalism tend to be enforced in instances in which "states are unlikely to favor substantive policies that oppose the congressional policy. States, for example, are unlikely to favor either guns in schools or sexual harassment, and they are actually on record as supporting the federal Violence against Women Act [sic], so to this extent whatever national authority is implicated by the congressional policies is less undermined by judicial protection of state decisional autonomy." *Id.* at 46. *See also Baker & Young, supra* note 2, at 159 ("The current Court's most prominent federalism cases — *Lopez*, *Morrison*, *Printz*, *New York*, and *Seminole Tribe* — all have involved fairly minor federal regulatory efforts with mostly symbolic impact."); Whittington, *supra* note 1, at 513 ("The statutes that the Court reviewed in *Lopez* and *Morrison* are clearly of the position-taking type. By the time the Court struck down parts of these laws, legislators already had derived all the political mileage they were going to get from them.").

<sup>66</sup> NAGEL, *supra* note 1, at 46.

<sup>67</sup> *Id.* at 53.

<sup>68</sup> *Id.*



Similarly, constitutional amendment has effected further erosion by excluding "state institutions from control over or operation of national institutions."<sup>69</sup> The prime examples cited by Professor Nagel are the "exclusion of state legislatures from the selection of senators and the relocation of ultimate responsibility for electoral reapportionment decisions to the federal courts."<sup>70</sup> Thus, despite these safeguards, Professor Nagel amasses powerful evidence of continued erosion of the federal system.

### III. DOES THE EROSION OF THE FEDERAL SYSTEM INEVITABLY LEAD TO GOVERNMENT REPRESSION?

It is clear that Professor Nagel views this advancing centralization as a negative trend. The value of a strong decentralized system, Nagel maintains, was recognized at the outset of the federal union: "[I]t is quite clear that the Constitution was enacted partly in reliance on the argument that the preservation of broad regulatory power at the state and local level would ensure a sufficient supply of centrifugal political energy to maintain a national government of limited powers."<sup>71</sup>

Indeed, Professor Nagel urges active "resistance" to the impending "implosion" of the federal system, which he predicts inevitably will be

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (observing that "[h]ighly respected constitutional scholars also rail against the electoral college and, more important, want to eliminate the equal representation of each state in the Senate").

<sup>71</sup> *Id.* at 16; see also *id.* at 33 ("Despite the contradictions and imperfections in the Constitution's text . . . , it is as clear as such things can be that the framers' intention was to confine the national government to powers that were to be (as Madison put it) 'few and defined.'"); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1428 (1987) ("[A] healthy competition among limited governments for the hearts of the American People can protect popular sovereignty and spur a race to the high ground of constitutional remedies."); Calabresi, *supra* note 1, at 770 ("American federalism in the end is not a trivial matter or a quaint historical anachronism. American-style federalism is a thriving and vital institutional arrangement — partly planned by the Framers, partly the accident of history — and it prevents violence and war. It prevents religious warfare, it prevents secessionist warfare, and it prevents racial warfare." (emphasis omitted)); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1511 (1987) ("The argument for substantial state and local autonomy was powerful at the time of the founding, and remains so."). Cf. Somin, *supra* note 1, at 471 ("For the Founding Fathers and their generation, the main rationale for federalism was not diversity or competition (the most familiar modern arguments) but the role of the states as a bulwark against federal tyranny.").

In contrast, Nagel observes that in the realm of legal scholarship, "[i]t is not at all uncommon to see arguments to the effect that federalism serves no important values or that it is entirely obsolescent." NAGEL, *supra* note 1, at 57. See also McAfee, *supra* note 2, at 351 ("The enormous expansion of federal power in the twentieth century has powerfully reinforced our tendency to denigrate, if not to miss completely, the framers' belief that the limited powers scheme of our federal system was an important guarantor of popular rights."); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 909 (1994) (maintaining that in the case of federalism, "there is no normative principle involved that is worthy of protection").

accompanied by “repressive acts” on the part of the central government.<sup>72</sup> Such actions ultimately will be elicited to combat a perceived “breakdown” that will proceed not from “centrifugal forces pulling our government apart,” but rather from “American energy and exuberance gradually turn[ing] inward, consuming the understandings and practices that have maintained the political distance between governments — a distance that both depends upon and promotes confidence, realism, and moderation.”<sup>73</sup>

While Professor Nagel may very well be right that we are undergoing a dramatic centralization of power, this centralization need not result in systematic repression. Rather, recent events seem to suggest an alternative possibility: the evolution of a central government that is incapable of efficiently or effectively conducting the most basic governmental functions.<sup>74</sup> While it is true that the government has in certain instances

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<sup>72</sup> Nagel summarizes the argument as follows:

In short, the reason to regret the implosion of American federalism — and to resist this collapse, at least to the extent that resistance is feasible — ultimately has to do with the quality of our society. The personal and institutional energy that has long kept our political system from being absorbed into its center has also helped to anchor our dealings in some degree of moderation, maturity, and realism. Even the many and palpable benefits of national unity, therefore, may well depend on those centrifugal political and cultural forces that are in decline.

NAGEL, *supra* note 1, at 13. See also Briffault, *supra* note 56, at 1315 (cataloguing the “virtues of federalism,” including “participation, diversity, intergovernmental competition, political responsiveness, and innovation”).

<sup>73</sup> NAGEL, *supra* note 1, at 179.

<sup>74</sup> See, e.g., Bill Saporito et al., *Deporting the INS: Granting Visas for Terrorists After 9/11 Could Be the Last Gaffe for the Immigration Service*, TIME MAG., Mar. 25, 2002 (commenting that “the INS has proved itself to be an agency utterly incapable of carrying out the diverse missions” with which it is charged) (comments of Rep. Bob Barr); Joyce Howard Price, *Sessions Says Many Oppose Amnesty Plan*, WASH. TIMES, Mar. 24, 2002, at A1 (“The border is not under control. The INS . . . is completely incapable, at this point, of enforcing our very generous immigration laws . . .”) (comments of Sen. Jeff Sessions); Editorial, WASH. TIMES, June 10, 1999, at A20 (“The Border Patrol, at the direction of the Immigration and Naturalization Service (INS), has become a politicized agency unable to fulfill its vital mission . . . . The INS openly defied Congress when it refused to hire the necessary number of agents as required by law.”); Carolyn Lochhead, *Lawmakers Put INS Chief in Hot Seat / Uproar Over Easy Visas Could Lead to Overhaul*, S.F. CHRON., Mar. 19, 2002, at A1 (“[T]he INS does not know where most student visa entrants are living. Nor can the INS locate an estimated 314,000 illegal aliens who have been ordered deported but remain in the country.”); Massimo Calabresi & Romesh Ratnesar, *Can We Stop the Next Attack?*, TIME MAG., Mar. 11, 2002 (“Sources in the Pentagon, White House and Congress grumble that the CIA and the nation’s other intelligence bureaucracy were caught flat-footed by the Sept. 11 attack — ‘It was an abject intelligence failure,’ a White House aide says — and many still doubt that the U.S. intelligence community is capable of seeing the next one coming.”); Jerry Seper, *IRS Probed for Honoring Specious Claims: Costly Tax Scam Gave Credits for Slave Reparations*, WASH. TIMES, Apr. 16, 2002, at A6 (“A senior member of the Senate Finance Committee yesterday asked the Internal Revenue Service to explain how the IRS could have paid out more than \$30 million in 2000 and 2001 for nonexistent tax credits for slave reparations.”); Siobhan Gorman, *Rod Paige’s Learning Curve*, NAT’L J., June 30, 2001 (noting that “[i]n recent years, the Education Department has been unable to account for an estimated \$450 million of its funding”).

engaged in spasms of abuse,<sup>75</sup> these events to date appear to be uncoordinated and random. The reason for this pattern can be fairly easily discerned. The locus of centralization that Professor Nagel describes is not the effective national government that the Framers envisioned with a unitary executive capable of decisive action. Rather, the federal government has morphed into a giant and uncoordinated administrative behemoth with multiple and dispersed components that are subject to diverse special interest influences.<sup>76</sup> Each administrative entity is relatively unaccountable: neither the Executive nor the Legislature seems capable of keeping the bureaucracy in check or calling it to account. Thus, while power is being centralized, it is being “centralized” within a federal entity that is large, unwieldy, and dispersed — in sum, an entity that is wholly uncoordinated and rife with dysfunction. Given such circumstances, the drain of power away from the states and toward the federal government arguably may be mitigated by accompanying trends within the federal government.

This “decentralization” within the federal government will not resurrect the political energy that has been lost as powers are increasingly drained from the states — quite the opposite. The “decentralization” effected through the administrative state is vastly inferior to that established under our federal system.<sup>77</sup> For, as noted above, the unelected bureaucracy is largely unaccountable to the will of the people. Indeed, the rise of an unaccountable and ever more powerful federal bureaucracy may well explain citizens’ current disenchantment and disillusionment with the federal government.<sup>78</sup> As one commentator has observed, “fed-

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<sup>75</sup> Nagel identifies a couple of recent examples, noting:

Brutal overreactions, such as the decision of the Justice Department to deploy tanks around the compound of an armed religious cult or to unleash dozens of masked federal police in a midnight raid to retrieve a Cuban child from contentious relatives, are still rare and incompatible with our national self-image. But they may be telltale signs of a system collapsing inward.

NAGEL, *supra* note 1, at 169.

<sup>76</sup> See Calabresi, *supra* note 1, at 778 (“Centralized command and control decisionmaking is often economically inefficient beyond a certain point in all social organizations. This point holds true for the military, for corporations that contract out for many goods and services, and for government as well. Large, multilayered bureaucracies cannot process information successfully.”); McConnell, *supra* note 71, at 1502 (“[S]ome observers have suggested that the conditions of modern federal politics — especially the balkanized, issue-oriented conjunction of bureaucratic agencies and committee staffs — is especially susceptible to factional politics.”).

<sup>77</sup> Indeed, the erosion of separation of powers principles may further erode the superior decentralization found in the federal system: “the nondelegation doctrine not only furthers the separation of powers, but also safeguards federalism.” Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1374 (2001).

<sup>78</sup> See Schuck, *supra* note 1, at 3 n.7 (“According to a recent joint survey by the Washington Post, Harvard University, and the Kaiser Family Foundation, while in 1964 three in four Americans trusted the federal government all or most of the time, today only one in four

eralism is a decentralized decisionmaking system that is more responsive to local interests and preference, that can tailor programs to local conditions and needs, and that can provide innovation in creating new programs.”<sup>79</sup> The allocation of power in a centralized, and yet massive, governmental body consisting of unelected bureaucrats has arguably ensured that government will not respond to the will of the people, but rather to those political factions that have the incentive and the ability to exert influence upon a particular bureaucratic entity.

As in the federalism context, the Court has done little to stop this erosion of structural guarantees built into the Constitution.<sup>80</sup> Its recent decision in *Whitman v. American Trucking Associations, Inc.*<sup>81</sup> is a prime example. There, the Court squandered the opportunity to take a moderate step in the direction of putting some teeth back into the nondelegation doctrine. In *American Trucking*, the Court was asked to determine whether Congress had impermissibly delegated its legislative authority to the Environmental Protection Agency (EPA) under the Clean Air Act in violation of Article I, § 1 of the Constitution, which vests “[a]ll legislative Powers herein granted . . . in a Congress of the United States.” As the majority observed at the outset of its opinion, the constitutional text “permits no delegation of those powers.”<sup>82</sup> Nonetheless, the Court then proceeded to define the constraints on delegation so loosely as to be almost meaningless.

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does so.”); see also Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 563 (1994) (“Decentralized government . . . leads to a number of . . . valuable benefits, which can be classified under the headings of accountability and participation.”); Graglia, *supra* note 30, at 165 (“Government can be made more responsive to the popular will by keeping the policymaking unit closer to the people.”).

<sup>79</sup> Yoo, *supra* note 2, at 1403. See also Briffault, *supra* note 56, at 1344 (“The states are better positioned to function as political centers. They are more capable of responding to citizen demands and of taking effective action. The permanence of the states, the greater clarity of their borders, their enhanced capacity for political action, and their resulting greater involvement in law, policy, and governance make it more likely that people will see the states as focal points for political actions. Together, these factors increase the likelihood that people will focus on their state as one of their important political and cultural identifiers.”).

<sup>80</sup> See Clark, *supra* note 77, at 1374 (“In practice . . . the nondelegation doctrine arguably provides only minimal assurance that Congress will adhere to federal lawmaking procedures. The Supreme Court has invoked the nondelegation doctrine only twice in its history to invalidate statutory provisions that delegate lawmaking power to the executive branch, even though it has arguably had additional opportunities to apply the doctrine.” (footnote omitted)); *id.* at 1376 (observing that “[s]ince 1935, the Supreme Court has not invalidated any additional statutes under the nondelegation doctrine”). Cf. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000) (observing that “[i]t is often said that the nondelegation doctrine is dead” but at the same time arguing that “[i]t has been relocated rather than abandoned”).

<sup>81</sup> 531 U.S. 457 (2001).

<sup>82</sup> *Id.* at 472 (citing *Loving v. United States*, 517 U.S. 748 (1996)).

The test that was reaffirmed by the Court may be termed the “intelligible principle” test. The Court held that “when Congress confers decisionmaking authority upon agencies *Congress* must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’”<sup>83</sup> Thus, the Court refused to condemn what seems to be precluded by the text itself — the delegation of legislative power. Rather, the Court confirmed that Congress may in fact give away its power as long as it announces some sort of “intelligible principle” that will govern the use of that power. As the majority itself recognized, this formulation has presented no barrier at all given that the Court has “found the requisite ‘intelligible principle’ lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’”<sup>84</sup> Thus, as long as Congress stops short of giving some unelected bureaucrat the power to regulate the entire economy, according to the Court, Congress remains on solid constitutional ground.

Indeed, the concurring opinions in *American Trucking* merely underscore that under the Court’s current decisions there are in reality no limits on the ability of Congress to delegate its power. Justice Thomas, for example, observed that the “intelligible principle doctrine” does not “prevent all cessions of legislative power” and that there obviously are “cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislation.’”<sup>85</sup> Accordingly, Justice Thomas suggested that in some future case the Court might address “whether [its] delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”<sup>86</sup>

However, the statements by the other Justices in *American Trucking* indicate that the outcome of any such reexamination is likely to be disap-

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<sup>83</sup> *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The Court rejected the notion that an agency — and not Congress — is responsible for announcing the intelligible principle that shall govern its exercise of power:

The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise — that is to say, the prescription of the standard that Congress had omitted — would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency’s voluntary self-denial has no bearing upon the answer.

*Id.* at 473.

<sup>84</sup> *Id.* at 474.

<sup>85</sup> *Id.* at 487 (Thomas, J., concurring).

<sup>86</sup> *Id.*

pointing. In fact, Justices Stevens and Souter indicated in a separate opinion that in their view there essentially are no limits in the Constitution prohibiting the delegation of legislative power. As they noted, “we could pretend, as the Court does, that the authority delegated to the EPA is somehow not ‘legislative power,’” but “it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is ‘legislative power.’”<sup>87</sup> In other words, the Court should admit that its watered-down “nondelegation” doctrine is a sham.

Indeed, Justices Souter and Stevens expressly argued that there were no limits on the delegation of authority to be found in the constitutional text: “In Article I, the Framers vested ‘All legislative Powers’ in the Congress, Art. I, § 1, just as in Article II they vested the ‘executive Power’ in the President, Art. II, § 1. Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others.”<sup>88</sup> Thus, under this logic, Congress would be free to delegate all of its power to a single unelected individual — a modern-day Caesar or Nero — and there is nothing in the Constitution to prevent such abuse.<sup>89</sup>

Fortunately, perhaps, Congress has chosen instead to vest its power in a large and dispersed bureaucracy. Thus, the potential for a centralized tyranny and systematic repression has arguably been diminished. Nonetheless, the potential for ineffective, inefficient, unresponsive, and corrupt government has vastly increased.

In the final analysis, it is ironic that the failure to live up to one set of constitutional principles may save us from certain ill effects of our disregard for another. The erosion of the nondelegation doctrine and the “rise and rise”<sup>90</sup> of the administrative state may to some extent mitigate the erosion of the federal structure and derogation of the states. Nonetheless, detrimental effects of centralization are undoubtedly emerging.

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<sup>87</sup> *Id.* at 488 (Souter & Stevens, JJ., concurring in part and concurring in judgment). *Cf.* Clark, *supra* note 77, at 1431–33 (“[W]hen the Court rejects a nondelegation challenge, it necessarily concludes both that the statute in question lays down an ‘intelligible principle’ and that the agency’s implementation of the statute constitutes law execution rather than lawmaking . . . . In theory, treating the exercise of agency discretion as ‘execution’ rather than ‘lawmaking’ helps to resolve the most serious constitutional questions raised by the administrative state.”).

<sup>88</sup> 531 U.S. at 489.

<sup>89</sup> In fact, the “intelligible principle” doctrine would seem to allow such a delegation. Such a delegation would certainly evidence an “intelligible principle”: we would all understand that Congress was imposing tyranny — despite whatever objections to such a system we may voice.

<sup>90</sup> Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (“Faced with a choice between the administrative state and the Constitution, the architects of our modern government chose the administrative state, and their choice has stuck.”). *Cf.* Clark, *supra* note 77, at 1430 (“As numerous commentators have observed, the modern administrative state does not fit comfortably within the constitutional structure.”).

Instead of a powerful and malevolent Leviathan, we may find ourselves with a dysfunctional and ineffective amalgamation of pencil-pushing bureaucrats concerned only with their narrow bureaucratic environment and paralyzed into inaction by a variety of opposing special interest forces. For, while presidents may come and go, the bureaucracy remains and, during the modern period at least, continues to expand relentlessly. The ability to engage in coordinated and systematic repression may decrease, while, at a minimum, the potential for targeted abuses of power remains. Thus, the effects of centralization may be dependent upon the nature of the central government, and the consequences of centralization, while undoubtedly negative, may be difficult to predict.

#### IV. HISTORICALLY-BASED LIMITS ON FEDERAL AUTHORITY: THE COMMERCE CLAUSE AS A CHECK ON STATE ACTION

Despite Professor Nagel's dire predictions, however, the future may not be as bleak as it seems. Professor Nagel's pessimism concerning the Court's desire to enforce limits on federal government authority may not be completely warranted. It is at least conceivable that the Court may again revisit its Commerce Clause jurisprudence (and may even revisit its decisions regarding the permissibility of conditioning federal grants to the states). The problem with the Court's jurisprudence in the area of interstate commerce, for instance, is arguably a lack of historical memory.<sup>91</sup> While the Founders may have had a clear conception of the proper functions of federal and state governments in regulating commerce, that clear conception surely has been lost. Nonetheless, this does not mean that it cannot be recovered at least to some extent.

For example, many commentators evaluating the historical record agree that the Commerce Clause was enacted to provide a mechanism for Congress to prevent the states from erecting barriers to the flow of interstate trade — a significant problem under the Articles of Confederation.<sup>92</sup> When viewed in this light, the meaning of the Commerce Clause

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<sup>91</sup> While Professor Nagel aptly observes that federalism concerns are implicated in a wide variety of areas, as Earl Maltz has observed, "[f]or most of American history, debates over the structure of American federalism have focused in substantial measure on the interpretation of the Commerce Clause." Earl M. Maltz, *The Impact of the Constitutional Revolution of 1937 on the Dormant Commerce Clause — A Case Study in the Decline of State Autonomy*, 19 HARV. J.L. & PUB. POL'Y 121, 122 (1995). See also Levy, *supra* note 28, at 1631 ("As a practical matter, the commerce power has been the focal point of federalism analysis because most major federal regulation has been justified in terms of that power.").

<sup>92</sup> See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 133 (2001) ("Under the Articles of Confederation, the states had 'fettered, interrupted and narrowed' the flow of commerce from one state to another by protective legislation of all sorts. Apart from the need to negotiate treaties of commerce with other nations, the principal purpose for adopting a new Constitution was to deprive the states of the power to

becomes more apparent. For the Framers announced that Congress would have authority to regulate commerce “among” the states.<sup>93</sup> As Professor Epstein has argued forcefully, this wording indicates that the Framers did not intend to vest Congress with the authority to regulate activities occurring wholly within a single state.<sup>94</sup>

Yet the phrase may have a more subtle meaning, which emerges if we focus on slightly different terms. The plain language of the text does not give Congress the authority to regulate commerce “among individuals in the several states,” but rather commerce among “the states.” The wording suggests that Congress was to have authority to regulate the rules that were enacted by the *states* that impinged upon interstate commerce — not the conduct of individuals engaging in such commerce,

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interfere with productive exchanges.” (quoting THE FEDERALIST NO. 11 (Hamilton)); Berger, *supra* note 20, at 704; Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 20 (1999) (“The Framers of the Commerce Clause intended to authorize Congress to prevent states from pursuing protectionist economic policies and to promote national commerce, and the Constitution’s Ratifiers shared this understanding.”).

Raoul Berger has concluded, based on his review of the historical record, that “[t]he Founders’ all-but-exclusive concern was with exactions made by some states from their neighbors.” Berger, *supra* note 20, at 704. Berger cites in support of this contention a number of statements by Madison and Wilson:

Madison referred to the “regulation of trade between State and State,” and pointed up the Founders’ identification of “between” and “among” by speaking of the “injurious relations among the States (on each other).” . . . Madison said, “[I]t would be unjust to the States whose produce was exported by their neighbours, to leave it subject to be taxed by the latter.” Wilson “dwelt on the injustice and impolicy of leaving N[ew] Jersey[,] Connecticut &c any longer subject to the exactions of their commercial neighbors.”

*Id.* (quoting 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 306–07, 451–52 (rev. ed. 1966)). See also THE FEDERALIST NO. 7, at 30 (Hamilton) (Bantam 1982) (observing that conflict over “regulations of trade, by which particular States might endeavour to secure exclusive benefits to their own citizens . . . would naturally lead to outrages, and these to reprisals and war”); *id.* No. 6, at 26 (Hamilton) (observing that separation of the states would lead to “discord and hostility” arising from commercial disputes).

<sup>93</sup> U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

<sup>94</sup> Epstein, *supra* note 45, at 1454 (“The affirmative scope of the commerce power should be limited to those matters that today are governed by the dormant commerce clause: interstate transportation, navigation and sales, and the activities closely incident to them. All else should be left to the states.”); see also Berger, *supra* note 20, at 702 (“The focus on trade alone was not fortuitous; the Framers were fastidious in their choice of words. For them, ‘trade’ did not, for example, include agricultural production, which plainly was ‘local.’”); Lawson, *supra* note 90, at 1234 (“The Commerce Clause clearly leaves outside the national government’s jurisdiction such important matters as manufacturing (which is an activity distinct from commerce), the terms, formation, and execution of contracts that cover subjects other than the interstate shipment of goods, and commerce within a state’s boundaries.”).



much less conduct by individuals that may have an "effect" on interstate commerce.<sup>95</sup>

As James Madison underscored in describing the federal structure: "[T]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and internal order, improvement, and prosperity of the State."<sup>96</sup> Interpreting the Commerce Clause as giving Congress the authority to directly regulate the lives, liberties and property of the people would be inconsistent with this historical record.<sup>97</sup> Rather, the conduct that the Framers arguably intended to reach was solely that of the *states* in enacting legislation concerning commerce with sister states.

This reading of the clause is also consistent with the later interpretation offered by Chief Justice Marshall in *Gibbons v. Ogden*,<sup>98</sup> which is often cited as providing an extremely broad and latitudinarian construc-

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<sup>95</sup> One possible counterargument to this interpretation is that, even if Congress were limited to prescribing rules regulating state action, it would by necessity ultimately be regulating the conduct of individuals. For example, by barring the states from establishing tariffs for goods traveling from one state to another, Congress would be affecting individuals by determining whether they would have to pay the tax. While it is true that congressional regulation of the rules governing commerce among the states would impact individuals indirectly, nonetheless there still seems to be a distinction between such indirect effects and direct regulation of the conduct of individuals. Moreover, at a minimum, these observations suggest that the Court should carefully scrutinize legislation that is designed to directly regulate *conduct* by individuals as opposed to that which is designed to regulate the flow of goods and services among the various states.

<sup>96</sup> THE FEDERALIST NO. 45, at 236 (Madison) (Bantam 1982). See also NAGEL, *supra* note 1, at 54 (observing that one "element of a fully nationalized government, according to Madison, is the generalized authority to regulate the conduct of the people"). An often-cited letter from Madison to J.C. Cabell underscores that the Commerce Clause was viewed more as a check on state action than as an affirmative grant of legislative authority:

"[The phrase] 'among the several States' [used in the Commerce Clause] grew out of the abuses of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government."

Berger, *supra* note 20, at 705 (quoting Letter from James Madison to J.C. Cabell (Feb. 13, 1829), in 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (rev. ed. 1966)); LeBoeuf, *supra* note 78, at 605–06 (same).

<sup>97</sup> This is substantially the same conclusion reached by Jacques LeBoeuf, who has argued that this interpretation makes economic sense as well. See LeBoeuf, *supra* note 78, at 605 ("It is apparent from the framers' evident understanding of the problems under the Articles, from the language of the Randolph and Bedford plans, and from the statements made in the conventions, that the primary concern was the prohibition of certain types of state action and not an affirmative grant of power to Congress."). The foregoing analysis shows that, not only is this interpretation consistent with contemporaneous historical evidence, but it also flows from the plain language of the constitutional text.

<sup>98</sup> 22 U.S. (9 Wheat.) 1 (1824).

tion of the congressional commerce power.<sup>99</sup> In *Gibbons*, the court struck down a New York law granting an exclusive monopoly established by the legislature of New York that conflicted with congressional legislation and imposed an undue burden on interstate commerce.<sup>100</sup> As Professor Epstein has observed, "*Gibbons* itself laid down the distinction between the 'internal commerce' or 'interior traffic' of a state and commerce among the states."<sup>101</sup> This aspect of the *Gibbons* decision shows that, at a minimum, the clause was concerned with interstate, and not solely internal, affairs of the states.

However, there is another aspect of the decision, which supports the slightly different interpretation offered here. While Chief Justice Marshall defined the term "commerce" in fairly broad terms, the case before the Court involved legislation enacted by one state that burdened commerce among the states.<sup>102</sup> Thus, the particular application of the Commerce Clause in *Gibbons* is consistent with an interpretation that views the clause as a limit on state action. Moreover, the language used by Chief Justice Marshall in describing the commerce power also supports this interpretation. In defining the term "commerce," Chief Justice Marshall concluded that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse *between nations* and *parts of nations*, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."<sup>103</sup> Similarly, he observed that the phrase "commerce among the *States*" used in the clause "must of necessity be commerce with the States."<sup>104</sup> Thus, Chief Justice Marshall identified the term "commerce" as relating to interactions between *states*.

This interpretation, however, flies in the face of our modern understanding. The Commerce Clause has seamlessly morphed into a means of regulating the conduct of *individuals* even though it arguably was designed to impose a check on the *states*. Recent decisions by the Court have considered congressional legislation seeking to directly regulate in-

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<sup>99</sup> See *Lopez*, 514 U.S. at 594 (Thomas, J., concurring) ("[T]he Court has stated that *Gibbons* 'described the federal commerce power with a breadth never yet exceeded.'" (quoting *Wickard v. Filburn*, 317 U.S. 111 (1942))). It is important to note that the proper interpretation of the term "commerce" is logically distinct from the question of whether the Commerce Clause was designed to reach primarily individual or state action. The scope of the term "commerce" merely defines the range of state action intended to be regulated.

<sup>100</sup> 22 U.S. (9 Wheat.) at 196–238.

<sup>101</sup> Epstein, *supra* note 45, at 1411.

<sup>102</sup> See *Gibbons*, 22 U.S. (9 Wheat.) at 187–222; Epstein, *supra* note 45, at 1445 (observing that "*Gibbons v. Ogden* ensured free trade by overturning a state-granted legal monopoly").

<sup>103</sup> *Gibbons*, 22 U.S. (9 Wheat.) at 189–90 (emphasis added). See also *Lopez*, 514 U.S. at 552 (same).

<sup>104</sup> *Gibbons*, 22 U.S. (9 Wheat.) at 196 (emphasis added).

dividuals' ability to bear arms, criminal conduct against women, and other activities falling within the traditional authority of the states, arguably representing a significant departure from the original understanding.<sup>105</sup> While the Court in recent years has appeared more willing to invalidate such legislation as exceeding the scope of congressional authority, the Court's rationale has obviously been much different. Nonetheless, the possibility remains, despite Professor Nagel's pessimism, that the Court may over time take up Justice Thomas's challenge to abandon the "substantial effects" test in favor of a more historically accurate formulation. As the foregoing has shown, such a reformulated test would likely have the additional benefit of providing clearer guidance to Congress concerning the scope of its authority and would avoid the problem identified by Professor Nagel — the adherence to a test that is "announced" and yet "not applied."

### CONCLUSION

*The Implosion of American Federalism* stands as a powerful wake-up call. It presents a formidable body of evidence demonstrating that the accepted wisdom when it comes to our federal system is wrong. Professor Nagel puts forth a convincing case that, regardless of the perceived "revolution" in American federalism, recent Supreme Court decisions acknowledging the constitutional constraints on the authority of the federal government represent at best a mere speed bump on the road to complete centralization.

The effects of this centralization, however, are arguably more difficult to predict. While increased centralization may lead to acts of government repression as Professor Nagel contends, it may also result in a corrupt, inefficient, and wholly ineffective central government given that the erosion of the federal system in the United States has been accompanied by an even more significant failure to respect nondelegation principles and a concomitant expansion of an unelected federal bureaucracy.

Nonetheless, despite Professor Nagel's dire predictions, there seems to be room for a renewed effort to give full effect to the Framers' design and reinvigorate our federal system. However, as Professor Nagel's work clearly shows, any such renewal cannot come through the judiciary alone.<sup>106</sup> Rather, to be truly effective, there must at the same time be a

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<sup>105</sup> Cf. Berger, *supra* note 20, at 703 ("In sum, the Founders conceived of 'commerce' as 'trade,' the interchange of goods by one State with another. The ban on gun possession within one thousand feet of a school does not fit within that conception. It does not entail the shipment to or entry from of goods from one state to another." (emphasis added)).

<sup>106</sup> Cf. Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism?: The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1115 (1997) ("[I]f one believes that federalism interests are insufficiently protected, one should consider directing some efforts toward the adoption of new legislative procedures. The wisdom of such a diversified

renewal of the culture and political system — through efforts to educate both the citizenry and the political class concerning the benefits of federalism in preserving and enlarging freedom and liberty. Otherwise, as Professor Nagel observes, occasional pronouncements by the courts concerning such parchment barriers will “recede into relative insignificance.”<sup>107</sup>

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approach is apparent for a number of reasons. First, although the Supreme Court may be changing its approach, in the past, judicial review of federalism has been a rather insignificant hurdle for the national government to leap. . . . Second, regardless of the level or scope of judicial protection offered to states, advocates of states’ interests should move some of their federalism eggs to the basket of the national political process because many arguably intrusive laws will never be subject to judicial review.”). Professor Marshall argues, in contrast, that judicial action is the only alternative: “If the Court in *Lopez*, *Seminole Tribe*, *City of Boerne*, and *Printz* was sending a shot across the bow to remind the Congress to do its job, the result has been, as we have seen, that the warning has gone unheeded. The political pressures in favor of federalization are too strong and the restraints too weak. This leaves judicial intervention as the only other alternative, an alternative which presents its own constitutional debate.” Marshall, *supra* note 49, at 153.

<sup>107</sup> NAGEL, *supra* note 1, at 30.