



# Issues in GOVERNANCE STUDIES

Number 8

July 2007

## Rediscovering Federalism

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### EXECUTIVE SUMMARY

#### Recent Issues in Governance Studies

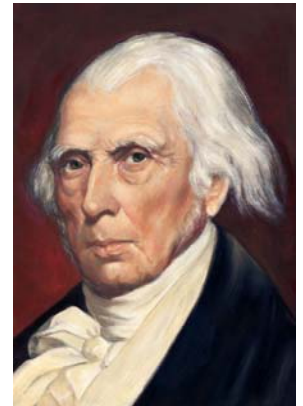
"How to Pay the Piper: It's Time to Call Different Tunes for Congressional and Judicial Salaries" (April 2007)

"Judicial Independence and Judicial Accountability in the 110th Congress and Beyond" (April 2007)

"Political Polarization: A Dispatch from the Scholarly Front Lines" (December 2006)

This paper stipulates that federalism can offer government a helpful division of labor. The essay argues that the central government in the United States has grown inordinately preoccupied with concerns better left to local authorities. The result is an overextended government, too often distracted from higher priorities. To restore some semblance of so-called "subsidiarity" – that is, a more suitable delineation of competences among levels of government – the essay takes up basic principles that ought to guide that quest. Finally, the paper advances several suggestions for how particular policy pursuits might be devolved.

Whatever else it is supposed to do, a federal system of government should offer policy-makers a division of labor.<sup>1</sup> Perhaps the first to fully appreciate that benefit was Alexis de Tocqueville. He admired the federated regime of the United States because, among other virtues, it enabled its central government to focus on primary public obligations ("a small number of objects," he stressed, "sufficiently prominent to attract its attention"), leaving what he called society's countless



Portrait of President James Madison

<sup>1</sup> To be sure, this is not the classic view of American federalism. "Shared functions" (the fabled "marble cake" as distinct from a "layer cake") are the hallmark of the U.S. system. "If you ask the question 'Who does what?' the answer is...that officials at all 'levels' do everything together," wrote Morton Grodzins in his famous book *The Federal System* (Chicago: Rand McNally, 1966), p. 8. In a similar vein, Elazar held that the American federal arrangement has been from its inception a cooperative "partnership." Daniel J. Elazar, *The American Partnership* (University of Chicago Press, 1962). My query is a normative one: not whether the "marble cake" (or "partnership") metaphor appropriately describes what American federalism actually *is*, but rather whether its main implication—officials at all levels doing everything—is desirable.

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“secondary affairs” to lower levels of administration.<sup>2</sup> Such a system, in other words, could help officials in Washington keep their priorities straight.

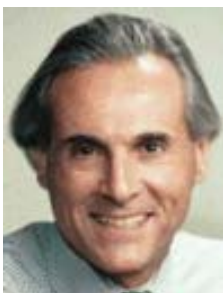
It is this potential advantage, above all others, that warrants renewed emphasis today. America’s national government has its hands full coping with its continental, indeed global, security responsibilities, and cannot keep expanding a domestic policy agenda that injudiciously dabbles in too many duties best consigned to local authorities. Indeed, in the habit of attempting to do a little of everything, rather than a few important things well, our overstretched government suffers a kind of attention deficit disorder. Although this state of overload and distraction obviously is not a *cause* of catastrophes such as the successful surprise attacks of September 11, 2001, the ferocity of the insurgency in Iraq, or the submersion of a historic American city inundated by a hurricane in 2005, it may render such tragedies harder to prevent or mitigate.

## When Washington Does It All

Let us glance at a small sample of local functions now monitored by federal agencies and courts. Federal law these days is effectively in the business of determining the minimum drinking age for motorists, setting the licensing standards for bus and truck drivers, judging the fitness tests for recruits of local police or fire departments, overseeing spillages from thousands of city storm sewers, requiring asbestos inspections in classrooms, enforcing child support payments, establishing quality standards for nursing homes, removing lead paint from housing units, replacing water coolers in school buildings, ordering sidewalk ramps on streets, deciding how long some unruly students in public schools can be suspended, purifying county water supplies, arresting carjackers, mandating special education programs for preschoolers, influencing how much a community has to pay its snowplow operators or transit workers, planning athletic facilities at state universities, telling localities in some states how to deploy firefighters at burning buildings, instructing passengers where to stand when riding municipal buses, and so on.<sup>3</sup>

Several of these illustrations may sound peculiar, but none is apocryphal. The directives for firefighters, for example, are among the many fastidious standards formulated by the Occupational Safety and Health Administration.<sup>4</sup> The micro-management of where to stand in buses is a Department of Transportation regulation conspicuously affixed at the front of every public bus.<sup>5</sup>

Preoccupations like these are baffling. Do they befit, in Abraham Lincoln’s



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<sup>2</sup> Alexis de Tocqueville, *Democracy in America*, vol. 1 (New York: Vintage Books, 1945), Chap. 16, p. 281.

(Brookings, 2002), especially pp. 21-23.

<sup>4</sup> According to the so-called “2-in, 2-out” procedure, at least two firefighters have to remain outside the site of an “interior structural fire” when two go inside. Standard Number 1910.134 (g) (4) (i) through (iii). OSHA, *Regulations (Standards 0 29 CFR): Standard Number 1910.134*.

<sup>5</sup> Motor Carrier Safety Administration, Federal Highway Administration, *Regulation no. 393.90*.

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A national government immersed in quotidian minutia is less likely to be mindful of larger challenges.

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phrase, “the majesty of the nation” and its government?<sup>6</sup> Why should a *national* cabinet department or regulatory bureaucracy be bothered with how “standees” ride local buses or how a town’s firefighters do their jobs? If municipal transit authorities or fire departments cannot be left to decide such particulars, what, if anything, are local governments for? Surely, most of the matters in question—putting out a fire, taking a bus ride, disciplining a troublemaker in school, removing hazards like asbestos or lead from a school or a house—rarely spill across jurisdictions and so do not justify intervention by a higher order of government.

Nor can a plausible case be made that central overseers are needed for each of these assignments because communities would otherwise “race to the bottom.”<sup>7</sup> How many states and localities, if left to their own devices, would practice fire prevention so ineptly that they require tutelage from a federally approved manual? Before Congress acted to rid the Republic of asbestos, the great majority of states already had programs to find and remove the potentially hazardous substance. Long before the U.S. Environmental Protection Agency promulgated expensive new rules to curb lead poisoning, state and municipal code enforcement departments were also working to eliminate this danger to the public health.

Why the paternalists in Washington cannot resist meddling in the routine tasks performed by state and local officials would require a lengthy treatise on bureaucratic behavior, congressional politics, and judicial activism. Suffice it to say that the propensity, whatever its source, poses a basic problem: A national government immersed in quotidian minutia is less likely to be mindful of larger challenges. In the legislative branch, something seems awry when the House of Representatives devotes, for example, almost as much time debating things like a bill to preserve the Pledge of Allegiance in local public schools and a bill to prevent the selling of horse meat, as was spent deliberating on legislation to overhaul the nation’s intelligence services. And famously emblematic of the executive’s misplacement, albeit accidental, was the president’s whereabouts on the morning of 9/11: When word reached him that United Airlines flight 175 had slammed into the World Trade Center, he was busy visiting a second-grade classroom in Sarasota, Florida.

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<sup>6</sup> Abraham Lincoln, “Address at Poughkeepsie, New York, February 19, 1861,” in John G. Nicolay and John Hay, eds., *Abraham Lincoln Complete Works: Vol. I* (New York: Century Company, 1920), p. 685.

<sup>7</sup> Perhaps the first to raise this specter was George Break in a book published by the Brookings Institution in 1967. Break feared what he called jurisdictional tax competition: “The trouble is that state and local governments have been engaged for some time in an increasingly active competition among themselves for new business. In such an environment government officials do not lightly propose increases in their own tax rates that go much beyond those prevailing in nearby states or in any area with similar natural attractions for industry... Active tax competition, in short, tends to produce either a generally low level of state-local tax effort or a state-local tax structure with strong regressive elements.” George F. Break, *Intergovernmental Fiscal Relations in the United States* (Brookings, 1967).

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For the more diffuse and desultory the federal government's undertakings, the less prepared it will be in meeting world-class challenges when they arise.

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## Back to First Principles

The sensible way to disencumber the federal government and sharpen its focus is to take federalism seriously – which is to say, desist from fussing with the management of local public schools, municipal staffing practices, sanitation standards, common criminal justice, and countless other chores customarily in the orbit of state and local governance. Engineering such a disengagement on a full scale, however, implies reopening a large and unsettled debate: What are the proper spheres of national and local authority?

Theorists and jurists of the American federal system since the founding have proven unable to draw a bright line, and I hardly intend to blaze one comprehensively here. Nonetheless, there ought to be some middle ground between obsolete conceptions of “dual federalism” or, alternatively, throwing up one’s hands and accepting the proposition that the garden-variety problems of local jurisdictions are all fair game for national micromanagement. Something like the European Union’s notion of “subsidiarity” – a presumed guide to who should do what – ought to be reexamined in the U.S. framework (even if, so far, the EU’s debates on the question often seem impenetrable).<sup>8</sup> For the more diffuse and desultory the federal government’s undertakings, the less prepared it will be in meeting world-class challenges when they arise.<sup>9</sup>

To begin to restore some semblance of order to the respective competences of the national and state governments, it helps to revisit the main arguments for central intervention.

At various points in history our sub-national governments have shown themselves ill-suited to four types of essential work: the provision of certain pure and costly public goods; the protection of basic rights; the ability to secure even a minimal social safety net for persons in need; and the remediation of various economic activities

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<sup>8</sup> The EU recognizes that what it calls subsidiarity is (in some sense) a desirable organizing principle. But regrettably, the concept continues to lack any operational clarity. On the vague application of the so-called subsidiarity principle to environmental regulation, for example, see R. Daniel Kelemen, *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond* (Cambridge, MA: Harvard University Press, 2004), p. 30. The European Council has developed “no consensus on the meaning of subsidiarity,” and the European Commission “never shapes the debate in a fundamental way.” Steven Van Hecke, “The Principle of Subsidiarity: Ten Years of Application in the European Union,” *Regional and Federal Studies*, vol. 13, no. 1 (Spring 2003), pp. 65, 71. Scholars have labored to comprehend what subsidiarity really signifies in Europe, with little success: “Subsidiarity,” write two observers, “seemed to offer a quasi-federal principle of distribution of competences without really invoking federalism and allowed the Member States and subnational units to criticize the Commission’s discretionary expansion without having to engage in detailed battles regarding what was and what was not supposed to be dealt with at the European level.” Kees van Kersbergen and Bertjan Verbeek, “Subsidiarity as a Principle of Governance in the European Union,” *Comparative European Politics*, 2 (2004), p. 151.

<sup>9</sup> For a full treatment of this theme, see Pietro S. Nivola, “Can the Government Be Serious?” in Henry J. Aaron, James M. Lindsay, and Pietro S. Nivola, eds., *Agenda for the Nation* (Brookings, 2003).

that spill harmfully from one jurisdiction to another.<sup>10</sup>

Had the original 13 colonies proven capable of providing for the common defense (the quintessential example of a pure and expensive public good), the Articles of Confederation might have had a longer shelf-life. Had southern states not enforced white supremacy well into the mid-twentieth century, there would have been less need for a federal Civil Rights Act in 1964. Had most states been able to rescue their impoverished citizens from the Great Depression, the New Deal would have seemed less urgent. If more states had had the wherewithal to correct on their own widespread environmental pollution, no national Clean Air Act or Clean Water Act would have been necessary.

As James Madison foresaw in *Federalist 10*, derelictions like these derived, in no small part, from the ability of entrenched interests to capture small polities: How could the schools of southern cities be desegregated when state governors barred the doors to black students? Will a one-company town crack down on a factory that happens to be a wide-ranging polluter but also the local economy's mainstay? Abuse, inertia and freeloading are the dark side of local control. A state whose contaminated air or water flows downstream to other states has little incentive to stop the spillover for their sake. Indeed states competing for business investment and taxable income might reciprocally "dumb down" essential health and safety standards.<sup>11</sup> And why be skeptical that states can suitably redistribute wealth? Because, in theory, generous jurisdictions can become welfare magnets, and if that occurs, neighboring jurisdictions may be tempted to lower their benefits below an acceptable minimum.<sup>12</sup>

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<sup>10</sup> There is no end of citations that could be supplied for these precepts, but for one very good and concise synthesis, see Edward M. Gramlich, "The Economics of Fiscal Federalism and its Reform," in Thomas R. Swartz and John E. Peck, eds., *The Changing Face of Fiscal Federalism* (New York: M. E. Sharpe, Inc., 1990), especially pp. 152-167. A fifth advantage of centralization is sometimes added to the list: possible economies of scale. I do not intend to treat this item separately, since, for the most part, it may be regarded as a variant of the public-goods and the externalities arguments.

<sup>11</sup> See, for instance, John H. Cumberland, "Interregional Pollution Spillovers and Consistency of Environmental Policy," in H. Siebert and others, eds., *Regional Environmental Policy: The Economic Issues* (New York: New York University Press, 1979), and "Efficiency and Equity in Interregional Environmental Management," *Review of Regional Studies*, vol. 10, no. 2 (1981). These early assessments have since been dramatically overtaken by events. Today, counter-intuitively, states are taking the lead on some of the most daunting environmental challenges—including climate change. Barry G. Rabe, *Statehouse and Greenhouse: The Emerging Politics of American Climate Change Policy* (Brookings, 2004).

<sup>12</sup> Note that the possible predicament that may arise in such situations is inefficiency, not only inequity. Society's general welfare may be adversely affected. Suppose, for example, that a number of states were to drastically curtail Medicaid benefits, creating a health care crisis for numerous people in parts of the country. The negative repercussions—for example, in lost workdays—could be felt far and wide, ultimately damaging the national economy. The basic policy dilemma is whether disparities in benefit levels among states pose net costs to society. The dilemma is by no means easy to resolve since society gains from state disparities if they can help discipline runaway social spending. John Holahan, Alan Weil, Joshua M. Weiner, "Federalism and

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So, when freeloaders enrich themselves at the expense of their neighbors, or interstate rivalries induce a collective stampede to the bottom, or mischievous local factions violate the fundamental freedoms of citizens, the solution seems plain: “extend the sphere” of governance, as Madison recommended, shifting power from the “smaller” polities to “the Union.”<sup>13</sup>

### Too Much of a Good Thing

Less plain, though, is why “the Union” should continually extend its sphere when these maladies have waned, or are being given strained interpretations, or often prove to be, if not bogus, less problematic than the cure—centralization.

Start with the worst pathology: civil rights abuses. No one in his right mind would doubt that by the mid-1960s redressing the wrongs done to African Americans was long overdue. But what began in 1964 as a long-awaited federal effort to secure equality of opportunity for an egregiously repressed minority gradually expanded into an extensive apparatus of centrally mandated protections and preferences for additional kinds of claimants. Something seems amiss with a body of federal law that ushers into the courts plaintiffs who complain that, say, enforcing a seat-belt ordinance intended for the protection of motorists discriminates against people with claustrophobia, or who complain that a strength test is discriminatory because it requires applicants for a local fire department to simulate the real world by carrying a heavy weight through an obstacle course.<sup>14</sup>

Put another way, whether every new group of “rights” seekers should have standing to demand remedies similar to those that African Americans clearly deserved is a good question. So is whether each remedy should continue to be dictated from the center. None of America’s states today, after all, resembles the antediluvian polities—ruled by reactionary governors, mal-apportioned legislatures, feeble bureaucracies, and passive courts—that could be found in parts of the country a half-century ago. In the twenty-first century, it is odd to cling to the assumption that only the feds know how to bring justice where justice is due.

Equally outmoded is the presumption that more of society’s safety net cannot be entrusted to the states. Dire warnings accompanied every stage of the welfare devolution process, yet the worst fears of its critics were not borne out. In the period immediately predating the landmark 1996 reform, states that availed themselves of federal waivers under the old Aid to Families with Dependent Children (AFDC) program did not slash benefits. On the contrary, the results were so reassuring that the Clinton administration

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Health Policy” in John Holahan, Alan Weil, and Joshua M. Weiner, eds., *Federalism and Health Policy* (Washington, DC: The Urban Institute Press, 2003), p. 6.

<sup>13</sup> James Madison, “Federalist 10,” in Pietro S. Nivola and David H. Rosenbloom, eds., *Classic Readings in American Politics*, 3<sup>rd</sup> ed. (St. Martin’s Press, 1999), p. 34.

<sup>14</sup> *Wall Street Journal*, June 22, 1995, p. A16 and Walter Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (Free Press, 1997), pp. 182-83.

agreed to convert AFDC to a block grant (renamed Temporary Assistance to Needy Families, or TANF). Then, with their added flexibility under TANF, many states actually moved to liberalize aspects of the benefit structure—for example, permitting welfare recipients who took a job to keep a larger part of their earnings.<sup>15</sup> (By the end of the 1990s, the typical “earnings disregard” had reached 50 percent. Some states even started allowing welfare recipients with jobs to keep all their earnings up to the poverty line.) Much the same pattern prevailed in the Medicaid program. Overwhelmingly, states have sought waivers to *expand*, not constrict, Medicaid coverage.

Only a naïf would suppose that state social policies are impervious to economic conditions. In lean times when revenues decline, state governments make adjustments. A study of 10 states by the General Accounting Office (GAO) in 2001, for instance, found that during a downturn, nine replaced state monies with federal TANF funds and shifted their own resources away from cash assistance to service-based assistance like child care.<sup>16</sup> Likewise, a widespread response of states to fiscal pressures accentuated by the capped block-granting of federal dollars for various functions in the 1980s was to redirect outlays for programs like energy assistance to other social services that were deemed more urgent.<sup>17</sup>

In general, though, these so-called supplantations were not balancing state budgets “on the backs of the poor.” The overall commitment of resources to low-income families in most of the states surveyed by the GAO either remained about the same or increased. And even when the Reagan Administration consolidated scores of categorical grant programs into a handful of block grants and then tightened their budgets, the states mostly managed to maintain services for the poor.<sup>18</sup> These humane outcomes have two basic explanations. First, state budget “crises” in the postmodern era are nothing like those our grandparents experienced, for the simple reason that the business cycle then was much more jagged than now. Second, contemporary state politics, with few exceptions, would deem unacceptable a reprise of callous indifference to the truly needy.

What about the problem of spillovers? Here, of course, environmental policy comes to mind. Certainly a forceful case could be (and was) made for national

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<sup>15</sup> Michigan, among other flagship states, even declined to establish any time limit on welfare eligibility. Carol S. Weissert, *Learning from Leaders: Welfare Reform Politics and Policy in Five Midwestern States* (Albany, NY: Rockefeller Institute Press, 2000), p. 12.

<sup>16</sup> General Accounting Office, *Welfare Reform: Challenges in Monitoring a Federal-State Fiscal Partnership* (GPO, August 2001).

<sup>17</sup> General Accounting Office, *Block Grants Brought Funding Changes and Adjustments to Program Priorities* (February 11, 1986), pp. 10-12.

<sup>18</sup> Richard P. Nathan and Fred C. Doolittle, *Reagan and the States* (Princeton, NJ: Princeton University Press, 1987), p. 7. Additional federal funding through the Emergency Jobs Appropriations bill did make it easier for states to replace federal cutbacks in various block-granted programs. But 10 of 14 states for which fiscal 1984 data were available spent more total funds on social services that year than they did in 1981, even before counting expenditures from the appropriations bill. See George E. Peterson and others, *The Reagan Block Grants: What Have We Learned* (Washington, DC: Urban Institute Press, 1986), pp. 13-15, 34-35.

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enforcement of the Clean Air Act in 1970, 1977, and again in 1990. Emissions that create smog and acid rain are not mere local vexations that dissipate before they reach a border. They often migrate far beyond.

However, the same cannot be said of every sort of environmental problem that has culminated in federal legislation. Impurities in drinking water are a case in point. A federal law strenuously regulates the water we drink, even though there are no major transboundary issues at stake. True, persons who might imbibe a particular place's water are not *always* just local residents (out-of-town visitors might drink from the town's well, too). But it is a stretch to justify a nationwide Safe Drinking Water Act on the basis of such reasoning. The supposed need for national regulation of tap water is a far cry from the unmistakable need for national regulation of wide-ranging airborne effluents.<sup>19</sup>

Whatever the conundrum it was intended to solve, nationalizing things like the regulation of drinking water has also created new problems. For example, the one-size-fits-all bias of central rules meant that localities everywhere had to examine their water supplies for contaminants that were not ubiquitous, and so posed possible risks only in specific locations. It made little sense for a municipality in Ohio, for example, to be required to test for pesticides used on pineapple plantations in Hawaii.<sup>20</sup>

## An Immodest Proposal

In light of such considerations, what might sensible subsidiarity look like in the U.S. context?

The remaining pages of this paper sketch changes in seven areas: health care, education, environmental protection, transportation, homeland security, civil rights regulation and law enforcement. But before proceeding, several disclaimers are in order. Naturally, for one, I can offer no guarantees that the policies in question would necessarily be better managed by the states than by the federal government. What can be plausibly conjectured (although still far from guaranteed) is that handing back to the states a greater measure of responsibility for the day-to-day exigencies of governance could enable federal officials to concentrate on other selected matters of importance, and to handle them more proficiently. Second, though some of the following suggestions may seem provocative, none pretend to be more than, so to say, architectural sketches—less a detailed blueprint than a free-hand drawing to help us start envisioning a modernized design. Last, admittedly, few, if any, can claim very promising political odds. I will leave

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<sup>19</sup> The tendency to invoke “externalities” to justify any and every kind of environmental regulation is well critiqued in Henry N. Butler and Jonathan R. Macey, “Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority,” in *Constructing a New Federalism* (New Haven, CT: Yale Law School, 1996), p. 30. “In reality, ‘externality’ is a slippery slope,” because as Butler and Macey observe, “virtually everything that anybody does is an externality when viewed from some perspective or other.”

<sup>20</sup> Reported in Thomas J. DiLorenzo, “Federal Regulations: Environmentalism’s Achilles Heel,” *USA Today Magazine*, vol. 123 (September 1994), p. 48.



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it to readers to decide for themselves whether that is a disqualification.

## Health Care

The long-standing premise that social programs such as welfare and health insurance are best centralized needs to be reconsidered. Great progress in economic stabilization, political transformations of state government, and the respectable performance of the states under the TANF law have all weakened the argument for centralization.

So has another fact: The federal government will not be able to sustain the impending demographically-induced bulge of the nation's extant welfare state without either imposing Draconian tax increases or sacrificing essentials, starting with national security.<sup>21</sup> The costs of Social Security, Medicare, and Medicaid are projected to corner most of the federal budget, and claim around a fifth of the gross domestic product by 2040.

This is not an acceptable prospect. The answer to these circumstances is not to keep loading budget-busting entitlement obligations on an undisciplined government in Washington but to lodge more social servicing in the states, whose governments have at least some institutional capacity for self-restraint.<sup>22</sup>

A natural point of departure, of course, is Medicaid, the federally co-sponsored health program that is smaller than Medicare but that also is ballooning and, unless further devolved, can only aggravate Washington's long-term fiscal overreach.<sup>23</sup> Currently, 50 percent to nearly 80 percent of Medicaid's expense are paid by the federal government, and its liabilities are open-ended.<sup>24</sup> With this sky-is-the-limit approach to matching state outlays, states lack adequate incentive to cut costs and innovate—for example, by buying services more cheaply, investing efficiently in information technology, reducing fraud, establishing different benefit packages for different populations, and encouraging people to buy private long-term care insurance.<sup>25</sup>

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<sup>21</sup> Joseph R. Antos and Alice M. Rivlin, "Rising Health Care Spending—Federal and National," in Alice M. Rivlin and Joseph R. Antos, eds., *Restoring Fiscal Sanity, 2007* (Brookings, 2007), pp. 14, 25.

<sup>22</sup> The key to this advantage is that the states are constitutionally required to balance their books. Naturally the states can be counted on to resist cutbacks in federal Medicaid funding, for example. But they also have been the source of many concrete proposals for reforming the program. See Robert Pear, "States Proposing Sweeping Change to Trim Medicaid," *New York Times*, May 9, 2005, pp. A1, A14.

<sup>23</sup> Medicaid now pays for health care services for 55 million people. The program's cost to the federal government is expected to rise from \$181.5 billion (in 2005) to \$384.4 billion over the next ten years. Alan R. Weil and Louis F. Rossiter, "The Role of Medicaid," in Rivlin and Antos, *Restoring Fiscal Sanity, 2007*, p. 107.

<sup>24</sup> Henry J. Aaron and Jack Meyer, "Health," in Alice M. Rivlin and Isabel V. Sawhill, eds., *Restoring Fiscal Sanity, 2005* (Brookings, 2005), p. 85.

<sup>25</sup> Contrary to popular belief, Medicaid does not serve primarily poor mothers and their dependent children, the original intent of the program. Other beneficiaries, principally the elderly, have come

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Three steps are in order. Congress has long lacked the stomach to convert Medicaid from a matching grant to a block grant. In fact, even under a Republican Congress and president, the government proved incapable of adopting even the mildest proposed reduction in the program's rate of spending growth.<sup>26</sup> Enacting this minimal reform is step one.<sup>27</sup>

Step two is to grant the states greater administrative leeway.<sup>28</sup> They should be able to impose higher co-payments and deductibles for Medicaid recipients with incomes well above the poverty line, or at least decide the array of services available to such beneficiaries. Among other things, states also need power to negotiate prescription drug prices and craft long-term care arrangements other than just expensive nursing homes.

Step three would be a large one: further enabling the states to address the plight of this country's millions of uninsured citizens. I will return to that component later.

## Education

At certain crossroads the national government helped bring about some unmistakable progress in public education in the United States. *Brown v. Board of Education*, for instance, was one such milestone. But the path of federal involvement in local education policy also has been strewn with unwanted consequences. Title I of the 1965 Elementary and Secondary Education Act started out as a grant program aimed at assisting economically depressed school districts, but soon wound up dispensing dollars to rich

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to absorb 70 percent of Medicaid spending. Medicaid pays for about half of all nursing home care. Aaron and Meyer, "Health," in Rivlin and Sawhill, *Restoring Fiscal Sanity*, 2005, p. 83.

<sup>26</sup> Interest groups, state officials, and members of Congress decried a proposed \$10 billion "cut" in Medicaid in one of the Bush administration's recent budgets, but the "cut," spread over five years, only amounted to a modest reduction in the rate of spending *growth*.

<sup>27</sup> Proponents of national management dislike the fact that Medicaid is co-administered and partially funded by the states, and hence confuses the lines of authority and accountability for expenditures. This is indeed a problem, but mainly because Medicaid, as presently constituted, is an entitlement with no cap. For a view favoring full federal assumption of Medicaid funding and regulation, see Jerry L. Mashaw and Dylan S. Calsyn, "Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain," in *Constructing a New Federalism: Jurisdictional Competition and Competence* (New Haven, CT: Yale Law School, 1996), p. 320.

<sup>28</sup> As with the post-1996 welfare-to-work regime—which beckons for increased state flexibility in order to better coordinate work-related services such as child care, job training, housing assistance, and food stamps—much health care governance is best left to the states, and they should be given more room to maneuver. On welfare policy, see Pietro S. Nivola, Isabel V. Sawhill, and Jennifer L. Noyes, "Waive of the Future? Federalism and the Next Phase of Welfare Reform," *Brookings Policy Brief*, no. 29 (March 2004). Health care is a locally delivered service. Local conditions differ in the extent of reliance on hospital inpatient care, the role of specialists as compared to primary care physicians, preferences for long-term care arrangements, and the degree to which managed care has penetrated the market. Holahan, Weil and Weiner, "Federalism and Health Policy," in Holahan, Weil and Weiner, *Federalism and Health Policy*, pp. 6, 19. It is hard to see how a standardized national program in a country so large could be tailored cost-effectively to so diverse a range of exigencies.

and poor alike.<sup>29</sup> The Individuals with Disabilities Education Act of 1975 (otherwise known as special education) began with the laudable notion of aiding the states to educate gravely handicapped students, but gradually enlarged the program's scope far beyond that group and in effect left state and local governments to foot an unaffordable bill.<sup>30</sup> In the marketplace for higher education, federal regulations and demand-side subsidies have contributed to rising costs of tuitions.

The latest project with checkered results is the No Child Left Behind (NCLB) law. Contrary to popular myth, the trouble with NCLB is not that it is an "unfunded mandate." Strictly speaking, it is neither a mandate nor unfunded.<sup>31</sup> Nor, surely, is it that the law strives to make schools more accountable for the enormous sums of money they spend every year. It also is quite plausible that, in at least some states, the advent of NCLB has helped accelerate average yearly gains in math and reading test scores. (A recent study found that in the 13 states with sufficient data to chart pre- and post-NCLB trends, nine showed greater improvements in test scores after the federal law was enacted than before.)<sup>32</sup> Rather, the question is whether the law creates some perverse incentives as states scramble to fulfill the law's overarching commandment of making all students "proficient" by a date certain: states and school districts with high standards for scholastic achievement may be tempted to lower the bar; states and districts with low standards fear that raising them could be asking for trouble.<sup>33</sup>

Some enthusiasts worry about this but contend that the solution is to impose more uniformity: that is, standardize nationwide the metric for what constitutes yearly academic progress.<sup>34</sup> But why assume that national standards would necessarily top the

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<sup>29</sup> See Joseph P. Viteritti, *Choosing Equality: School Choice, the Constitution, and Civil Society* (Brookings, 1999), pp. 35-36.

<sup>30</sup> For a full discussion, see Nivola, *Tense Commandments*, pp. 39-43, also R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (Brookings, 1994), chaps. 7 and 8.

<sup>31</sup> See Republican Policy Committee, U.S. Senate, "The 'No Child Left Behind Act': Neither Unfunded, Nor a Mandate," April 21, 2004; Committee on Education and the Workforce, U.S. House of Representatives, "Fact Sheet: No Child Left Behind Is Funded," October 7, 2004.

<sup>32</sup> Center on Education Policy, *Answering the Question that Matters Most: Has Student Achievement Increased Since No Child Left Behind?* (Center on Education Policy, June 2007), Chap. 1.

<sup>33</sup> See Paul E. Peterson and Frederick M. Hess, "Keeping an Eye on State Standards," *Education Next*, Summer 2006. Also, James E. Ryan, "The Perverse Incentives of the No Child Left Behind Act," *New York University Law Review*, vol. 79, no. 3 (2004); Sam Dillon, "States Are Relaxing Education Standards to Avoid Sanctions From Federal Law," *New York Times*, May 22, 2003, p. A25; Sam Dillon, "Thousands of Schools May Run Afoul of New Law," *New York Times*, February 16, 2003, p. 27. States such as Michigan and Virginia, with reputedly rigorous state standards, have feared being penalized by NCLB. The Republican-controlled Virginia House of Delegates voted 98-1 for a resolution calling on Congress to exempt the state. Virginia's "Standards of Learning" testing program in place since 1998 is considered one of the toughest in the nation. Jo Becker and Rosalind S. Helderman, "Va. Seeks to Leave Bush Law Behind," *Washington Post*, January 24, 2004, p. A1.

<sup>34</sup> For an early argument for the adoption of national standards, see Diane Ravitch, *National Standards in American Education* (Brookings, 1995).

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If the quandary for Congress is that it doesn't trust the states with federal money, it should hand them less, not regulate them more.

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current norm, especially in leading states?<sup>35</sup> Just as possibly, a national template would turn out to be a political compromise—better than the present standards of some states, but less rigorous than the serious efforts underway in others. And that, in turn, would blunt the very point of federalism.

Federalism is about *diversity*.<sup>36</sup> Inevitably a federal system generates differences; the institutions of some jurisdictions will excel, those in other jurisdictions may lag. These disparities can be awkward, even unfair. Still, over time the system's net benefits probably exceed those of the alternative—top-heavy regimentation. Lest we forget, it was an assortment of American states that established the first nearly universal access to public education, and that have repeatedly taken the lead in revamping it.<sup>37</sup> Dozens of the world's finest public universities are creatures of the U.S. states. Before Congress began deliberating the NCLB in early 2001, plenty of states were already investing in standards-based reform of elementary education. Whether the key to a high rate of return on those investments is central superintendence, for all its good intentions, remains doubtful.

Washington is not going to back out of the education-fixing business. The No Child Left Behind project, however, should seek to nurture, not discourage, diverse best-practices and permit them to flourish—much as the AFDC regime did after it began expanding the use of waivers.<sup>38</sup> To its credit, the Department of Education has shifted in precisely that direction over the past couple of years.<sup>39</sup> Fear of flexibility for the states, though, remains a recurrent theme in the NCLB debate, just as it was in the federal welfare program. If the quandary for Congress is that it doesn't trust the states with federal money, it should hand them less, not regulate them more. For the United States is, if anything, a country that spends spectacularly on education.<sup>40</sup>

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<sup>35</sup> The National Assessment of Education Progress (NAEP) tests are generally regarded as a the gold standard for proficiency testing. A Brookings study, however, questioned the rigor of NAEP math test items. See *The Brown Center Report on American Education: How Well Are American Students Learning?* (Brookings, 2004), pp. 9-17.

<sup>36</sup> One could go a step further and say that federalism is about inequality. Aaron Wildavsky, "Federalism Means Inequality," in David Schleicher and Brendon Swedlaw, eds., *Federalism and Political Culture* (New Brunswick, NJ: Transaction Publications, 1998).

<sup>37</sup> For a particularly compelling account, see Jon C. Teafor, *The Rise of the States: Evolution of American State Government* (Baltimore: John Hopkins University Press, 2002), pp. 174-187.

<sup>38</sup> Section 9401 of Title IX gives the Secretary of Education broad discretion to waive requirements of the law.

<sup>39</sup> See Martin R. West, "No Child Left Behind: How to Give It a Passing Grade," *Brookings Policy Brief*, no. 149 (December 2005).

<sup>40</sup> The most recent available data, for 2002, indicated that the United States was spending 67 percent more than the mean annual per pupil expenditure among OECD countries (based on purchasing power parity). U.S. spending per pupil was approximately on a level with Switzerland's, but 20 percent higher than Denmark and 17 percent more than Norway, the two next highest countries. OECD, *OECD Indicators 2005: Education at a Glance* (OECD, 2005), p. 172.

## Environmental Policy

While much pollution crosses boundaries and so cannot be handled by local governments operating solo, not every environmental challenge calls for a national template.<sup>41</sup> The solid waste landfills in Southwestern states such as Arizona, where there is little rain, ought not require the same stringent specifications as in, say, the Pacific Northwest. Let the states set their own standards. In all but rare circumstances, any added risks would only befall the residents of those jurisdictions alone, since leaking landfills seldom spill into adjacent states. “Similarly,” writes Paul R. Portney, a renowned environmental economist at the University of Arizona, “for all but a few biological contaminants in drinking water, the risks linked with higher concentration of most contaminants would be borne only by those who consume the affected water for a lifetime. Why, then, not allow the states, or perhaps even individual communities, to decide how stringently they wish to regulate their drinking water?”<sup>42</sup>

The U.S. Environmental Protection Agency has experimented with decentralized pollution-abatement programs over the past decade. Beginning in 1995, the agency launched a series of so-called Performance Partnership Agreements that permitted a number of states to develop customized plans for various kinds of pollution control. Still, federal policy has a long way to go before a rational division of tasks between national and local authorities takes shape. Again, logic suggests that the federal role in pollution control should be more pronounced for forms of pollution that cross borders and less overweening for those kinds that stay in place. Yet ironically, notes John D. Donahue of Harvard University, federal authority actually has been weaker under the Clean Air Act and the Clean Water Act than under, for instance, the Superfund law – this despite the fact the most toxic waste sites “are situated within a single state, and stay there.”<sup>43</sup>

## Transportation

As late as the mid-1950s, motor vehicles traversing many of America’s states would discover that their turnpikes abruptly stopped at the state line. To reach similar roads in a neighboring state, cars and trucks were often forced onto rudimentary byways that became hopelessly congested, dangerous, and detrimental to the flow of the nation’s commerce. The need for an integrated network of interstate highways was beyond dispute.

That was then. But this is now: Federal financing has since paved 46,483 miles of interstates – supplementing over 9,300 miles of other freeways and expressways, and

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<sup>41</sup> See in general Pietro S. Nivola and Jon A. Shields, *Managing Green Mandates: Local Rigors of U.S. Environmental Regulation* (AEI-Brookings Joint Center for Regulatory Studies, 2001).

<sup>42</sup> Paul R. Portney, “Environmental Policy in the Next Century,” in Henry J. Aaron and Robert D. Reischauer, eds., *Setting National Priorities: The 2000 Election and Beyond* (Brookings, 1999), p. 379.

<sup>43</sup> John D. Donahue, *Disunited States* (New York: Basic Books, 1997), p. 65.

some 3,910,000 miles of ordinary roads.

The case for pouring additional hundreds of billions of *federal* tax revenues into the transportation infrastructure *ad infinitum* is questionable. The federal government today has better uses for its taxpayers' money. To be sure, particular cities or states will continue to clamor for new roads, multi-billion dollar "big digs," and other infrastructure investments. They should mostly be told: from here on, if you want it, *you* pay for it.

One of the many peculiar American political institutions that have locked in the status quo is the federal highway trust fund. Fed by an earmarked excise tax on gasoline, the trust fund was originally intended to ensure completion of the interstate system but now subsidizes a lot of locally-focused transportation projects. This gift that keeps on giving is eccentric; no other advanced nation has hitched so much local road-building to so sacred a cash cow.<sup>44</sup> It is also anachronistic. At a time when the national tax system ought to collect more of its general-purpose revenue from taxing consumption rather than just people's earnings and savings, the federal gasoline tax ought to be, if anything, increased and its lucrative proceeds made available to the twenty-first century's other pressing priorities.<sup>45</sup>

Among these are the millions of Americans who lack any medical insurance.<sup>46</sup> The persistence of this gap is not only an embarrassment for a civilized society, but a drain on its resources. The uninsured tend to make heavy use of emergency rooms and, without adequate primary and preventive care, often require lengthy hospitalizations. This is an expensive way to treat these patients. Exactly how to get around it by extending coverage affordably, however, is anybody's guess. So, before "going national" with a solution, state governments should be empowered to explore a variety of options to see what, if anything, works.<sup>47</sup> To facilitate this process, gas-tax revenue could be deployed to help underwrite the states' endeavors. A higher gasoline tax also could be swapped for a lower payroll tax. Enjoying the smaller bite from their paychecks, uninsured wage-earners might be more inclined to buy coverage, and small employers might be more disposed to offer it.

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<sup>44</sup> See Pietro S. Nivola, *Laws of the Landscape: How Policies Shape Cities in Europe and America* (Brookings, 1999), p. 69.

<sup>45</sup> As a rule of thumb, each penny charged by the federal gasoline tax generates more than \$1 billion in revenue. Taxing gasoline is the efficient way to discourage unnecessary driving, dampen carbon emissions, and reduce problematic reliance on corporate average fuel economy regulations for autos. Pietro S. Nivola and Robert W. Crandall, *The Extra Mile: Rethinking Energy Policy for Automotive Transportation* (Brookings, 1995).

<sup>46</sup> A figure of 45 million tends to get bandied around in journalistic commentary on the subject, but that high number counts persons temporarily between jobs, young people leaving school and just entering the workforce, and so on. A precise estimate of the chronically or long-term uninsured is harder to come by, but it is almost certainly much lower—hence presenting a more manageable challenge.

<sup>47</sup> For an interesting proposal along these lines, see Henry J. Aaron and Stuart M. Butler, "How Federalism Could Spur Bipartisan Action on the Uninsured," *Health Affairs*, March 31, 2004.

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In the name of homeland security, a free-spending U.S. Congress has proven incapable of distinguishing between investments it should make and ones better left to the discretion of states, counties, cities, and private firms.

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## Homeland Security

The central government has no higher duty than to protect the nation's citizens from foreign aggressors. In the name of homeland security, however, a free-spending Congress has proven incapable of distinguishing between investments it should make and ones better left to the discretion of states, counties, cities and private firms. The budget for the Transportation Security Administration (TSA) now hovers around \$6 billion, which is slightly more than the Federal Bureau of Investigation's. What all this money buys is not always clear. For example, by simply installing, at relatively modest expense, bullet-proof doors on aircraft cockpits, the airlines—not the TSA's airport screeners—have probably done the most to prevent planes from being used again as guided missiles.

Nor has standing up a central Department of Homeland Security (DHS) worked wonders. This latest king-sized federal bureaucracy still reports to dozens of congressional committees and subcommittees, some of which see to it that millions of dollars get tossed hither and yon on bizarre security projects—like the docks for ferries that serve the resort island of Martha's Vineyard, and first-responder equipment for places such as the town of North Pole, Alaska, or the county of Grand Forks, North Dakota.<sup>48</sup>

That the federal government has a primary role to play in securing the homeland is not at issue. Only its resources and agencies can handle such far-flung functions as preemptive military action overseas, intelligence gathering and analysis, immigration and border patrolling, safeguarding the electronic infrastructure (against cyberterrorism or assaults on the electric grid), and countermeasures against nuclear, biological, or chemical threats. But as the former DHS Secretary Tom Ridge conceded, "you can't secure a country from inside the Beltway."<sup>49</sup> It is folly for federal policy-makers to try to field or finance a defense against every possible type of surprise attack, the myriad forms and whereabouts of which will never be predictable or preventable.<sup>50</sup>

Since most of the risks are likely to be localized, it is state and local jurisdictions, and the private sector, that have to take charge of dealing with most of their own unique vulnerabilities. The guiding principle should be: stakeholders pay.<sup>51</sup> Thus, the protection of facilities like bridges, buildings, tunnels and public transit in any given community, for instance, should not become a federally-sponsored operation. For if it does, a local moral hazard is sure to arise: Why assume responsibility for one's own safety if

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<sup>48</sup> Veronique de Rugy, "What Does Homeland Security Buy?" *AEI Working Paper*, October 29, 2004, p. 12.

<sup>49</sup> Quoted in David S. Broder, "Shaping Our Defense," *Washington Post*, January 30, 2005, p. A3.

<sup>50</sup> Richard A. Posner, *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (New York: Rowman and Littlefield, 2005), pp. 50, 97.

<sup>51</sup> Michael O'Hanlon and others, *Protecting the American Homeland: One Year On* (Brookings, 2002), p. 10.

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Washington labors to guard everything everywhere?

### Civil Rights

As a growing variety of interest groups have found it expedient to frame their needs or wants as rights, those groups have naturally turned to the central government. “Rights tend to be viewed as absolutes,” explains Robert A. Katzmann, and absolutes by definition brook little or no local variation.<sup>52</sup> Thus, the fulfillment of absolutes is sought from national authorities, not local ones. Also, because state laws had long been implicated in this country’s worst discriminatory practice—the centuries-old mistreatment of African Americans—we have grown accustomed to thinking of the national government as the arbiter for civil rights and protections of *every* kind.<sup>53</sup>

But this reflexive centralism is a mistake. Some of our newly minted rights issues would be better relegated to the states. Revisit, as one example, the dilemma of same-sex marriages. There is no nationwide consensus on whether such unions should be a basic right. Communities in different parts of the country hold differing views on the subject and are inclined to settle it in a variety of ways. Society still knows too little about the long-range implications of matrimony among gay couples. Instead of usurping their jurisdiction, why not let the states continue to do what they have always done in the field of marital law – test and decide its legitimate scope for themselves?<sup>54</sup> Efforts to clutter the nation’s policy agenda, let alone its Constitution, with all-or-nothing provisions governing matters of this sort are as unseemly as they are impractical.

Let us be clear about where the alternative to devolution can lead. It not only means that the federal courts may continue to invent new centrally-enforced rights (divined from “penumbras” of the Constitution) but that Congress, too, will be “handing out rights like land grants,” in Philip K. Howard’s words.<sup>55</sup> And that, in turn, can take the form of increasingly impulsive actions—like the congressional intrusion in the Terri Schiavo case. There, we may recall, Congress suddenly saw fit to take sides in a Florida

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<sup>52</sup> Robert A. Katzmann, *Institutional Disability: The Saga of Transportation Policy for the Disabled* (Brookings, 1986), p. 189.

<sup>53</sup> You’d never know much about it from listening only to Beltway advocacy groups, but in recent decades the trail for new anti-discrimination efforts has often been blazed by the states. As one of many examples, in 1985 it was the state of Montana that became the first place to implement legislation requiring prices and benefits for all forms of insurance to be the same for men and women. Martha Derthick, *Keeping the Compound Republic: Essays in American Federalism* (Brookings, 2001), p. 61.

<sup>54</sup> Michael S. Greve, “Same-Sex Marriage: Commit It to the States,” *AEI Federalist Outlook*, no. 20 (March 2004). Bob Barr, “Leave Marriage to the States,” *Washington Post*, August 21, 2003, p. A23.

<sup>55</sup> Philip K. Howard, *The Death of Common Sense: How Law Is Suffocating America* (Random House, 1994), p. 61.



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When the federal government is expected to “do it all,” state and local officials fall short of fulfilling their basic obligations.

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family dispute that had already featured years of litigation in state courts. The lawmakers conferred a novel federal right to further contest the judgments repeatedly rendered by the state’s judiciary.

### **Law Enforcement**

Acts of Congress arrogating traditional state police powers over the past dozen years have multiplied. Crimes involving such things as arson, auto theft, rape, spousal abuse and illegal possession of fire-arms had long fallen squarely within the ambit of state law. Now comes national legislation sweeping specific instances of these and other particular felonies into the federal criminal code. This trend ought to be reversed.

The Supreme Court has been, at best, an uneven conscientious objector. In 1995, five “friends of federalism” on the court—Chief Justice William H. Rehnquist and Justices Sandra Day O’Conner, Antonin Scalia, Anthony Kennedy and Clarence Thomas—struck down the Gun Free School Zone Act and, five years later, a central portion of the Violence Against Women Act.<sup>56</sup> Both these enactments had smacked of legislative grandstanding. Forty states had already outlawed bringing a gun within 1000 feet of a school. A federal Gun Free School Zone Act was largely superfluous. Likewise, in *United States v. Morrison*, the court recognized that Congress had overstretched the commerce clause and was duplicating the exertions of the states.<sup>57</sup>

Yet, on other occasions, some of the high court’s federalism “friends” parted company. In a clash over a state’s decision to permit use of marijuana for medical purposes, for instance, Scalia and Kennedy jumped ship; here, they perceived nothing wrong with brushing state sovereignty aside—never mind the fact that, as Justice O’Conner emphasized in her dissent, the “states’ core police powers have always included authority to define criminal law and to protect the health, safety and welfare of their citizens.”<sup>58</sup>

Federalizing ordinary state criminal law, to paraphrase Steven G. Calabresi of Northwestern University, transfers the toils of state prosecutors and courts to federal prosecutors and courts, and from state law enforcement officers to the FBI.<sup>59</sup> In an age when the feds are overburdened being the global policeman, this misalignment of tasks between the national and local governments seems especially ill-considered. Whatever the importance of busting medicinal marijuana users, deadbeat dads, wetlands trespassers, or bordellos in Louisiana, such activities are probably not the best way for

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<sup>56</sup> *United States v. Lopez* (1995) and *United States v. Morrison* (2000).

<sup>57</sup> The minority in *Lopez* and in *Morrison* applied a strained “substantial effects” interpretation of the commerce power. See Ann Althouse, “Inside the Federalism Cases: Concern About the Federal Courts,” *Annals of the American Academy of Political and Social Science*, vol. 574 (March 2001), pp. 137-138. Also, Pietro S. Nivola, “Last Rites for States’ Rights?” *Brookings Reform Watch*, no. 1 (June 2000), p. 13.

<sup>58</sup> *Gonzales v. Raich* (2005).

<sup>59</sup> Steven G. Calabresi, “Federalism and the Rehnquist Court: A Normative Defense,” *Annals of the American Academy of Political and Social Science*, vol. 574 (March 2001), p. 28.

**Governance Studies**

The Brookings Institution  
1775 Massachusetts Ave., NW  
Washington, DC 20036  
www.brookings.edu

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*federal* agents to spend their time.<sup>60</sup>

## Conclusion

Diverting too much of its limited attention to what de Tocqueville had termed “secondary affairs,” the U.S. government overextends itself. This proclivity courts inefficacy up and down the line.

When the federal government is expected to “do it all,” state and local officials fall short of fulfilling their basic obligations. That, in part, is what happened in the Hurricane Katrina debacle. The city of New Orleans and the state of Louisiana proved woefully ill-prepared for the storm, even though everyone knew one like it would eventually strike. Whatever the multiple explanations for their fatal error, part of the story almost certainly was excessive dependence on direction and deliverance by Uncle Sam. Meanwhile, relentlessly pressured to spread their resources, and unable to plan centrally for every possible disaster that might occur somewhere in this huge country, agencies at the national level faltered just as badly every step of the way in the flood prevention, the response, and the recovery.

Federalism, at least in its authentic form, is less a source of such disarray than a possible solution. A wider and less ambiguous scope of self-rule for the states would signal that, for most of what governance entails, the buck stops with them, and that Washington’s omnivorous policy process should quit biting off more than it can chew.

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<sup>60</sup> See “House of the Rising Farce,” *The Economist*, June 15, 2001, p. 30.