

THE REVIVAL OF STATES' RIGHTS: A PROGRESS REPORT AND A PROPOSAL

LYNN A. BAKER*

Writing for the Court in *Gregory v. Ashcroft*, Justice O'Connor observed that "[i]n the tension between federal and state power lies the promise of liberty."¹ For those of us who share Justice O'Connor's view that judicial affirmations of states' rights are guarantors of liberty rather than harbingers of slavery, the 1990s have been a time of cautious optimism. With its decisions in *New York v. United States*,² *United States v. Lopez*,³ *Seminole Tribe v. Florida*,⁴ *Printz v. United States*,⁵ and *City of Boerne v. Flores*⁶ the Court has signaled a willingness to resume its too-long-ignored duty to enforce the Constitution's protections for state autonomy.⁷

* Thomas Watt Gregory Professor, University of Texas School of Law. lbaker@mail.law.utexas.edu.

This is a lightly edited version of remarks prepared for the Seventeenth Annual National Federalist Society Symposium on "Reviving the Structural Constitution," held at New York University Law School, March 6-7, 1998. My thanks to the conference organizers and participants for a stimulating two days of intellectual exchange, and to Keith Stiverson and Jacqueline Watson for valuable research assistance.

1. 501 U.S. 452, 459 (1991) (emphasizing federalism concerns in holding that state constitution's mandatory retirement requirement for state judges does not violate the Age Discrimination in Employment Act of 1967).

2. 505 U.S. 144 (1992) (holding that the "take title" provision of the Low-Level Radioactive Waste Policy Act of 1985 exceeded Congress's enumerated powers and violated the Tenth Amendment).

3. 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeded congressional power under the Commerce Clause).

4. 517 U.S. 44 (1996) (holding that the Indian Commerce Clause does not grant Congress the power to abrogate a state's sovereign immunity even when Congress has indicated its clear intent to do so).

5. 117 S. Ct. 2365 (1997) (holding that the obligation on state law enforcement officers under the Brady Handgun Violence Prevention Act to conduct background checks on prospective handgun purchasers unconstitutionally required state officers to execute federal laws).

6. 117 S. Ct. 2157 (1997) (holding that Religious Freedom Restoration Act of 1993 exceeded Congress's enforcement powers under § 5 of the Fourteenth Amendment).

7. These protections include the Tenth Amendment, U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); the limited nature of Congress' Article I powers, including those granted by the Commerce Clause, U.S.

In my remarks today, I would like to offer both a brief progress report on the Court's seeming revival of states' rights and some suggestions for how the Court might proceed from here. In the interest of time, I shall restrict my comments to the Court's 1995 decision in *Lopez* and its 1997 decision in *Printz*.

I. FEDERALISM: A PROGRESS REPORT

The Court's decisions in *Printz* and, particularly, in *Lopez* were each initially greeted with substantial scholarly skepticism as to whether they would have any impact beyond the facts of the particular case. *Lopez*, for example, was described by some as no more than the essentially unimportant correction of a *sui generis* congressional oversight in enacting legislation under the Commerce Clause.⁸ Others were slightly more optimistic, suggesting that although *Lopez* might "turn out to be a flash in the pan," it might also "usher in a new age of constitutional restraint."⁹ But few scholars, if any, were willing to predict that *Lopez* had transformed the "Hey, you-can-do-whatever-you-feel-like Clause"¹⁰ into something even vaguely approaching a limited grant of congressional power.

Similarly, although one commentator has heralded *Printz* as a "blockbuster,"¹¹ others have given it more mixed reviews. One scholar who termed *Printz* "a major doctrinal development," has also described it as being "of very limited consequence at all levels of impact."¹² Another has asserted that *Printz*

CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce . . . among the several States . . ."), and by the Spending Clause, *id.* at cl. 1 (granting Congress the power "to pay the Debts and provide for the common Defence and general Welfare of the United States . . ."); and the limited nature of Congress' enforcement power under § 5 of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

8. See Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 767 (1996) (predicting that "[i]t is most unlikely . . . that the Court will be able to muster five votes to invalidate a commerce power measure when Congress does not commit the oversight that explains *Lopez*").

9. Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 167 (1996).

10. This is Judge Alex Kozinski's marvelous phrase. Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995) ("[O]ne wonder[s] why anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause.'").

11. John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 27 (1998).

12. Jesse H. Choper, *On the Difference in Importance between Supreme Court Doctrine and*

"embodies the Court's most emphatic acclamation of state sovereignty since the New Deal,"¹³ but has also observed that "some would characterize its immediate practical impact as relatively minor."¹⁴

Although federal appellate court judges have thus far offered little commentary on the import of *Printz*,¹⁵ they have expressed a wide range of views as to the likely long-term effects of *Lopez*. Some have pessimistically observed that the Court in *Lopez* "did not overrule a single Commerce Clause precedent, signal a decrease in congressional power under the Commerce Clause, or abandon the 'rational basis' test."¹⁶ Other federal judges, however, have described *Lopez* as a "landmark case"¹⁷ that "presages a return to the day when the Congress's interstate commerce authority had meaningful limits,"¹⁸ and as a "watershed" decision that shifted the outer boundary of the Commerce Clause.¹⁹ Still another has cautioned that "*Lopez* should not be treated as an aberration . . . simply because its newness makes unclear the contours of the boundaries the Supreme Court intends to impose on congressional power."²⁰

Nevertheless, these are only opinions and predictions. What

Actual Consequences: A Review of the Supreme Court's 1996-1997 Term, 19 CARDOZO L. REV. 2259, 2269 (1998).

13. Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 199.

14. *Id.* at 200.

15. Perhaps the most notable exception is the Tenth Circuit's observation in *State ex rel. Oklahoma Department of Public Safety v. United States*, 1998 WL 833627, *7 (Dec. 3, 1998, 10th Cir.), that

While we are cognizant of the Supreme Court's trend established by *New York* and *Printz* of striking down federal legislation which "commandeers" state legislative and administrative processes, the Court has yet to hold that a federal law, which directly regulates state activity and necessitates some state legislative or administrative action to achieve compliance, amounts to unconstitutional "commandeering."

See also *Travis v. Reno*, 12 F. Supp. 2d 921, 927 (W.D. Wisc. 1998) (contending that the *Printz* Court's holding "that a federal law that directs state officials to administer or enforce a federal regulatory scheme violates the Tenth Amendment . . . begs the question of identifying such laws").

16. *Bronzcala v. Virginia Polytechnic & State Univ.*, 132 F.3d 949, 969 (4th Cir. 1997), *reh'g en banc granted, opinion vacated* (Feb. 5, 1998).

17. *United States v. Wilson*, 73 F.3d 675, 691 (7th Cir. 1995) (Coffey, J., dissenting), *cert. denied*, 117 S. Ct. 47 (1996).

18. *United States v. Chesney*, 86 F.3d 564, 581 n.11 (6th Cir. 1996) (Batchelder, J., concurring), *cert. denied*, 117 S. Ct. 2470 (1997).

19. *United States v. Bishop*, 66 F.3d 569, 603 (3d Cir. 1995) (Becker, J., dissenting), *cert. denied*, 516 U.S. 1032 (1995).

20. *United States v. Wall*, 92 F.3d 1444, 1454-55 (6th Cir. 1996) (Boggs, C.J., concurring in part and dissenting in part), *cert. denied*, 117 S. Ct. 690 (1997).

impact have the Court's decisions in *Lopez* and *Printz* actually had to date? During the three years since the Court decided *Lopez*, a multitude of federal statutes, both criminal and civil, have been challenged on Commerce Clause grounds.²¹ For instance, federal district courts have invoked *Lopez* in invalidating the Child Support Recovery Act,²² the Violence Against Women Act ("VAWA"),²³ and the Freedom of Access to Clinic Entrances Act ("FACE").²⁴ In addition, one federal

21. A Westlaw search of the CTA and DCTR databases on December 6, 1998, using the search terms ["115 S.CT. 1624" "115 S. CT. 1624" & commerce & da(aft 4/26/1995)] revealed 397 federal court of appeals opinions and 150 published federal district court decisions.

One scholar recently observed that "[o]ver 40 federal laws have been challenged, invoking *Lopez* as the basis for the challenge." William Funk, *The Lopez Report*, 23 SUM ADMIN. & REG. L. NEWS 1, *14 (1998).

22. See *United States v. Mussari*, 894 F. Supp. 1360, 1366 (D.Ariz. 1995) ("There is no commercial intercourse involved in the collection of delinquent child support payments. If the collection of debt were sufficient to warrant federal criminal intervention, Congress would be able to legislate in virtually any area."), *rev'd*, 95 F.3d 787 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1567 (1997); *United States v. Schroeder*, 894 F. Supp. 360, 367 (D. Ariz. 1995) (using language identical to *Mussari*, 894 F. Supp. at 1366), *rev'd*, 95 F.3d 787 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1567 (1997); *United States v. Bailey*, 902 F. Supp. 727, 728 (W.D. Tex. 1995) ("Given the language and guidance of the *Lopez* majority, a reasonable inference can be made that the Supreme Court would also find constitutionally infirm Congress' attempt to regulate the family law relationship of Mr. and Ms. Bailey."), *rev'd*, 115 F.3d 1222 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 866 (1998); *United States v. Parker*, 911 F. Supp. 830, 834 (E.D. Pa. 1995) ("Congress had no rational basis to conclude that the willful failure to pay a child support obligation substantially affects commerce principally because that activity, in the words of Chief Justice Rehnquist, 'has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms.'") (citation omitted), *rev'd*, 108 F.3d 28 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 111 (1997).

23. See *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 793 (W.D. Va. 1996) ("The combination of the insignificance of the differences between the case at hand and *Lopez* and the significance of the similarities leads to the conclusion that Congress acted beyond its commerce power in enacting VAWA."), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *reh'g en banc granted, opinion vacated* (Feb. 5, 1998); *United States v. Wright*, 965 F. Supp. 1307, 1309 (D. Neb. 1997) (stating that VAWA "'is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms'" (citation omitted), *rev'd*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1376 (1998).

24. See *Hoffman v. Hunt*, 923 F. Supp. 791, 807 (W.D.N.C. 1996) ("The Court finds this case to be virtually identical to *Lopez*. The mere fact that Congress believes a problem is national in scope does not warrant ignoring the constitutional requirement that an activity must have a substantial effect on interstate commerce to justify the transformation of state law crimes into federal offenses in the absence of an independent constitutional basis for congressional authority."), *rev'd*, 126 F.3d 575 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1838 (1998); *United States v. Wilson*, 880 F. Supp. 621, 630 (E.D. Wis. 1995) (holding FACE unconstitutional under the Commerce Clause because "it does not regulate trivial activity that undermines a national commercial regulatory scheme, commercial activity that affects the right to travel interstate, or activity that employs violent means to achieve an economic purpose"), *rev'd*, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 47 (1996).

district court has invoked *Lopez* in overturning a specific conviction under the Hobbs Act,²⁵ and another has held that the imposition of CERCLA liability against a particular defendant would exceed Congress' post-*Lopez* power under the Commerce Clause.²⁶ Each of these decisions, however, has subsequently been reversed when appealed, and the Supreme Court has consistently declined to grant certiorari.²⁷

Today, the entire jurisprudential effect of the Court's decision in *Lopez* is embodied in three federal appellate court decisions.²⁸ In two of these cases, the relevant courts of appeals reversed specific convictions under the Federal Arson Statute on the ground that federal jurisdictional prerequisites under the Commerce Clause had not been met.²⁹ In the third case, the Court of Appeals for the Fourth Circuit concluded that a federal regulation promulgated under the Clean Water Act was not authorized by the Act as limited by the Commerce Clause.³⁰

25. See *United States v. Woodruff*, 941 F. Supp. 910, 913-14 (N.D. Cal. 1996) (holding that "the government's prosecution of this case under the Hobbs Act fails to respect the constitutional limits applicable to the Hobbs Act" because the government "has failed to show either that defendant's conduct had a substantial effect on interstate commerce or that defendant's activities were of a class of activities that, in the aggregate, would lead to a substantial effect on commerce"), *vacated*, 122 F.3d 1185 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 866 (1998).

26. See *United States v. Olin Corp.*, 927 F. Supp. 1502, 1532-33 (S.D. Ala. 1996) (holding both that CERCLA lacks the required "jurisdictional element which would ensure, through case-by-case inquiry, that the [statute] in question affects interstate commerce" and that "the activity in question has virtually no effect on interstate commerce") (citation omitted), *rev'd*, 107 F.3d 1506 (11th Cir. 1997).

27. See *supra* notes 21-26.

28. See *United States v. Pappadopoulos*, 64 F.3d 522, 528 (9th Cir. 1995) (reversing conviction under the Federal Arson Statute because "[w]here the sole source of the interstate commerce connection is the receipt by a private home of natural gas from a company that receives some of that gas from an out-of-state source, federal jurisdictional requirements have not been met"); *United States v. Denalli*, 73 F.3d 328, 329 (11th Cir. 1996) (holding that arson perpetrated against a neighbor's residence does not satisfy the jurisdictional prerequisite of the Federal Arson Statute), *amended on reh'g in part*, 90 F.3d 444 (11th Cir. 1996); *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) (invalidating 33 C.F.R. § 328.3(a)(3) (1993) because it "requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters") (emphasis added).

29. See *Pappadopoulos*, 64 F.3d at 528; *Denalli*, 73 F.3d at 329. As the Sixth Circuit observed, however, *Pappadopoulos* differs from *Lopez* "in that the statute in question expressly required an interstate nexus between the crime (arson) and the property. The court dismissed the argument that the mere receipt of out-of-state natural gas was enough to affect interstate commerce. The court did not invalidate the statute; it held that the prosecution did not prove the requisite jurisdictional element." *United States v. Wall*, 92 F.3d 1444, 1448 n.8 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 690 (1997).

30. See *Wilson*, 133 F.3d at 257.

The jurisprudential impact of *Printz* has also been limited thus far.³¹ Two federal district courts have held that the Driver's Privacy Protection Act of 1994 ("DPPA") falls within the prohibitions of *Printz* and, therefore, violates the Tenth Amendment.³² On appeal, however, one of these decisions was reversed,³³ and the other was affirmed on the ground that "Congress lacked the authority to enact the DPPA under either the Commerce Clause or Section 5 of the Fourteenth Amendment."³⁴ Finally, the Second Circuit has offered dictum that a CERCLA provision concerning the statute of limitations for certain claims brought under state law "appears to purport to change state law, and is therefore of questionable constitutionality" in light of *Printz*.³⁵

In brief, neither *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.³⁶

31. The case has not gone unnoticed by the lower federal courts, however. A Westlaw search of the CTA and DCTR databases on December 6, 1998, using the search terms ["117 S.Ct. 2365" "117 S. Ct. 2365" & DA(AFT 6/27/1997)], revealed 22 federal court of appeals opinions and 12 published federal district court decisions.

32. See *Oklahoma ex rel. Okla. Dep't of Pub. Safety v. United States*, 994 F. Supp. 1358, 1363 (W.D. Okla. 1997) (holding that, because the DPPA "requires State motor vehicle agencies to create and maintain systems to enforce the federal law of non-disclosure," the Act "falls squarely within the prohibitions of *Printz*"), *rev'd*, 1998 WL 83327 (10th Cir., Dec. 3, 1998); *Condon v. Reno*, 972 F. Supp. 977, 985 (D.S.C. 1997) ("In order to comply with Congress' directive, the States are forced by the threat of administrative penalty (and indirectly by civil and criminal sanction) to take measures to prohibit access by their citizens to the motor vehicle records. This command clearly runs afoul of the holdings of *New York* and *Printz*."), *aff'd*, 155 F.3d 453 (4th Cir. 1998).

33. In reversing the district court's decision, the Tenth Circuit observed that "[a]t this stage in Tenth Amendment jurisprudence, we find nothing that requires us to invalidate the DPPA." *Oklahoma ex rel. Okla. Dep't of Public Safety*, 1998 WL 833627, at *7.

34. *Condon*, 155 F.3d at 456.

35. *ABB Indus. Sys. v. Prime Tech., Inc.*, 120 F.3d 351, 360 n.5 (2d Cir. 1997) ("Under 42 U.S.C. § 9658, if a claim is brought under state law for property damages caused by hazardous chemicals and state law does not provide a discovery rule, the state statute of limitations cannot begin to run until the plaintiff knew or should have known that the damages were caused by hazardous chemicals [This] section appears to purport to change state law, and is therefore of questionable constitutionality.")

36. It is further interesting that in the six years since the Court decided *New York v. United States*, 505 U.S. 144 (1992), only nine federal district courts have invoked the decision as the basis for invalidating a federal statute. Two of these decisions, *Oklahoma ex rel. Oklahoma Department of Public Safety*, 994 F. Supp. at 1363, and *Condon*, 972 F. Supp. at 985, also relied on *Printz* in holding the DPPA invalid under the Tenth Amendment. Five decisions, which were rendered prior to *Printz*, struck down the Brady Act on the same grounds. See *Romero v. United States*, 883 F. Supp. 1076 (W.D. La. 1994); *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994), *aff'd in part, rev'd in part*, 78 F.3d 815 (2d Cir. 1996), *judgment vacated*, 117 S. Ct. 2501 (1997); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994), *aff'd in part, rev'd in part, dismissed in part*, 66 F.3d 1025 (9th Cir. 1995), *rev'd sub nom. Printz v. United States*, 117 S. Ct. 2365 (1997);

II. TWO SUGGESTIONS

If a majority of the Court truly intends *Lopez* and *Printz* to be part of a larger jurisprudential revival of states' rights, I would offer the relevant Justices two suggestions. First, even if *Lopez* and *Printz* thus far had been relied upon in the invalidation of significantly more federal legislation than is the case, the centerpiece of any revival of states' rights must be the reconsideration of the Court's 1987 decision in *South Dakota v. Dole*.³⁷ In *Dole*, the Court held that the Spending Clause³⁸ authorizes Congress to make conditional offers of federal funds to the states that, if accepted, would regulate the states in ways that Congress could not directly mandate.³⁹ Thus, with *Dole*, the Court offered Congress a seemingly easy end run around any restrictions the Constitution might be found to impose on its ability to regulate the states. Congress need merely attach its otherwise unconstitutional regulations to any one of the large sums of federal money that it regularly offers the states.⁴⁰ As

McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994), *aff'd sub nom.* Koog v. United States, 79 F.3d 452 (5th Cir. 1996), *cert. denied sub nom.* Gonzalez v. United States, 117 S.Ct. 2507 (1997); *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994), *aff'd in part, rev'd in part, dismissed in part sub nom.* Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), *rev'd*, 117 S.Ct. 2365 (1997). One decision, which was rendered prior to *Lopez*, held that the Gun-Free School Zones Act violated the Commerce Clause and cited *New York* as precedent. *See* *Printz v. United States v. Trigg*, 842 F. Supp. 450 (D. Kan. 1994). And one decision, which was rendered prior to *Seminole Tribe*, held that the Indian Gaming Regulatory Act violated the Tenth Amendment. *See* *Ponca Tribe v. Oklahoma*, 834 F. Supp. 1341 (W.D. Okla. 1992), *aff'd in part, rev'd in part*, 37 F.3d 1422 (10th Cir. 1994), *judgment vacated*, 517 U.S. 972 (1996).

Notwithstanding the modest jurisprudential impact of *New York* to date, a Westlaw search of the CTA and DCTR databases on December 6, 1998, using the search terms ["505 U.S. 144" "112 S.Ct. 2408" "112 S. CT. 2408" & DA(AFT 6/19/1992)], revealed 87 federal court of appeals opinions and 85 published federal district court opinions.

37. 483 U.S. 203 (1987).

38. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .")

39. In *Dole*, the Court sustained a federal statute that directed the Secretary of Transportation "to withhold a percentage of federal highway funds otherwise allocable from States 'in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.'" *Dole*, 483 U.S. at 205, quoting 23 U.S.C. § 158 (1982). The Court observed that "[h]ere, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages," and went on to hold the legislation "within constitutional bounds even if Congress may not regulate drinking ages directly." *Id.* at 206.

40. Since 1927, federal grants to states and localities increased more than 1,857 times, growing from \$116 million in 1927 to \$1,016 million in 1934, \$41,820 million in 1974, and \$215,446 million in 1994. *See* AMERICAN COUNCIL ON INTERGOVERNMENTAL RELATIONS, 2 SIGNIFICANT FEATURES OF FISCAL FEDERALISM: REVENUES AND EXPENDITURES 52 (1998) (tabl. 18). In addition, these federal grants have constituted a growing proportion of total state revenues, increasing from 1.5% in 1927, to 12.0% in

Hemingway might have observed, "the federal government is different from you and me (and the states)—it has more money."⁴¹

In an earlier article, I outlined at length how the *Lopez* and *Printz* majority might reinterpret the Spending Clause to work in tandem, rather than at odds, with the Commerce Clause.⁴² I suggested a new standard of review under which the Court would presume invalid that subset of offers of federal funds to the states which, if accepted, would regulate the states in ways that Congress could not directly mandate under its other Article I powers.⁴³ This presumption could be rebutted by a judicial finding that the offer constitutes what I have termed "reimbursement spending" rather than "regulatory spending" legislation.⁴⁴ Reimbursement spending legislation specifies the purpose for which the states are to spend the offered federal funds and simply reimburses the states, in whole or in part, for their expenditures for that purpose.⁴⁵ All other legislation that offers the states federal funds is "regulatory spending" legislation.⁴⁶

Is there any chance that the Court might reconsider *Dole*, whether or not it adopts my proposed standard of review? Again, I am cautiously optimistic. Only three members of the *Dole* majority are still sitting—Chief Justice Rehnquist and Justices Stevens and Scalia—and the possibility of change is, therefore, real.⁴⁷ Moreover, there is evidence that several of the sitting Justices are aware of the problem posed by *Dole*. Justice O'Connor dissented in *Dole*,⁴⁸ and Justice Kennedy has

1934, and 16.0% in 1994. *Id.* See also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552-53 & nn. 13-14 (1985) (describing the history of federal grants to states and localities).

41. Cf. ERNEST HEMINGWAY, *THE SNOWS OF KILIMANJARO* 23 (1936) ("The rich were dull and they drank too much . . . He remembered poor Julian and his romantic awe of them and how he had started a story once that began, 'The very rich are different from you and me.' And how someone had said to Julian, 'Yes, they have more money.'").

42. See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995).

43. See *id.* at 1962-78.

44. See *id.* at 1963.

45. See *id.*

46. See *id.* at 1916 n. 16, 1963.

47. Chief Justice Rehnquist and Justice Scalia were in the majority in both *Dole* and *Lopez*; Justice Stevens joined the majority in *Dole* but dissented in *Lopez*. Compare *Dole*, 483 U.S. 203 (1987) with *Lopez*, 514 U.S. 549 (1995).

48. See 483 U.S. at 212.

remarked publicly that conditional federal spending, rather than the Court's interpretation of the Commerce Clause, is the major states' rights issue facing the country today.⁴⁹ In addition, Justice Scalia observed in *Printz* that many federal statutes that "require the participation of state or local officials in implementing federal regulatory schemes" exist as "conditions upon the grant of federal funding [rather] than as mandates to the States."⁵⁰ He went on to observe both that the *Printz* Court would "not address these or other currently operative enactments that [were] not before [it]," and that there "will be time enough to do so if and when their validity is challenged in a proper case."⁵¹ Assuming Justice Thomas would vote to overturn *Dole*, Chief Justice Rehnquist remains the key—ironically, he authored both the majority opinion in *Lopez* and the majority opinion in *Dole* that threatens to render *Lopez* and the rest of the Court's states' rights revival moot.⁵²

My second suggestion is that if the *Lopez* and *Printz* majorities intend those decisions to be part of a larger jurisprudential revival of states' rights, they should cease to employ the sort of intensely historical analysis embodied by the majority decision in *Printz*.⁵³ Instead, the Court should adopt a more functionalist approach of the sort embraced by Chief Justice Rehnquist and Justice O'Connor in their dissent in *Garcia*,⁵⁴ and also presented in the *Printz* dissent.⁵⁵ At least in the federalism context, I believe there are good reasons why a functionalist analysis is superior to a purely historical originalism.

To begin, it is important to appreciate that a functionalist approach is not at all inconsistent with a respect for history and the Framers' intent. In the federalism context, for example, history tells us that the states' ratification of the federal

49. Justice Kennedy made this comment to the author on September 28, 1995, at a cocktail party in Tucson, Arizona, hosted by the University of Arizona College of Law.

50. *Printz*, 117 S. Ct. at 2376.

51. *Id.*

52. For one possible explanation for the apparent inconsistency in Chief Justice Rehnquist's concern for "states' rights," see Baker, *supra* note 42, at 1915 n.13.

53. See 117 S. Ct. 2365 (1997).

54. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557-79 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor).

55. 117 S.Ct. at 2386-2401 (Stevens, J., dissenting).

Constitution was predicated on the preservation of a sphere of autonomy for the states.⁵⁶ One might therefore logically conclude that the Framers intended the Commerce Clause, the Spending Clause, and the Tenth Amendment, for example, to serve as real constraints on the exercise of federal power rather than as meaningless rhetoric.

Just because one's analysis begins with this central, historical insight, however, it need not—indeed *should not*—continue in a relentlessly historical vein. The primary reason is that, at least in the area of states' rights, much constitutional history does not translate easily or well. Both the federal government and the states are today, for better or worse, vastly different entities than those that the Framers envisioned.⁵⁷ A significant portion of this change, I believe, can be traced to the constitutional amendments of 1913, particularly the Sixteenth Amendment's authorization of a direct federal income tax.⁵⁸ In addition, the nature and extent of "commerce . . . among the states" has obviously changed greatly since 1790.⁵⁹ Thus, I strongly concur in Justice Stevens's observation in his *Printz* dissent that it is sometimes possible to stay "far truer to the historical record by

56. See, e.g. *Garcia*, 469 U.S. at 568-70 (Powell, J., dissenting) ("In our federal system, the States have a major role that cannot be pre-empted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding of federalism. Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized."); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 664-65 (1993) ("The text of the Constitution and the ratification-era debates over its interpretation both seemed to confirm that the new federal government was a government with 'certain enumerated objects only,' not a purely national government with substantive jurisdiction over all matters 'so far as they are objects of lawful Government.' This understanding was confirmed by the proposal and rapid adoption of the Tenth Amendment. Even if a 'truism,' as it was later described, the Tenth Amendment would be a mockery or even a fraud if the set of 'powers . . . reserved to the states' were an empty set.") (citations omitted).

57. As just one example, consider Professor Mark Tushnet's observation that "the population of the entire state of New York in 1790" was only slightly larger than the population represented by "the so-called community school boards in New York City" in 1967. MARK V. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 42 n.64 (1988). See also, e.g., Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 857-83 (1979) (describing the decline of states' influence on the federal government and the historical evolution of federal intrusions on state interests).

58. U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

59. See, e.g., Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, and sources cited therein.

applying a functional approach."⁶⁰ And I would suggest that the Court employ a functionalist originalism rather than a purely historical originalism in future federalism opinions.

Consider, for example, how a functionalist majority opinion in *Printz* would have read. To begin, it would have offered at least two easy replies to the dissent's central functionalist argument, which simply went unacknowledged in the actual majority opinion. The dissent argued, relying on the central argument of the majority in *Garcia*,⁶¹ that there is no need for the courts to protect the states against the exercise of federal power, notwithstanding the text of the Constitution, because the state-based nature of representation in Congress ensures that the states are fully capable of protecting themselves within the federal political process.⁶²

In a functionalist reply, the majority might have observed, first, that the dissent's argument is at bottom no more logical than the analogous observation that because Congress is composed of individuals, our federal legislators can be counted on to protect individual rights within the political process, and no judicial review under most provisions of the Bill of Rights is therefore necessary.⁶³

Second, the *Printz* majority might have observed that the importance of states' rights does not lie simply in protecting the states against "federal" oppression. In addition—and, I believe, more importantly—the Constitution's federalism provisions can prevent a majority of states from harnessing the federal lawmaking power to oppress "outlier" or "minority" states.⁶⁴ When states' rights are understood in this way, one

60. *Printz*, 117 S. Ct. at 2392 (Stevens, J., dissenting).

61. See *Garcia*, 469 U.S. at 550-57.

62. See *Printz* 117 S. Ct. at 2394-96 (Stevens, J., dissenting).

63. Cf. *Garcia*, 469 U.S. at 565 n.8 (Powell, J., dissenting) ("One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted [by the *Garcia* majority] today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights.").

64. See Baker, *supra* note 42, at 1939-47. For a discussion of why diversity among the states is likely to increase aggregate social welfare, see *id.* at 1947-54. See also Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. STATE L. REV. 923 (1997) (arguing that those who applaud the Court's frequent unwillingness to protect state autonomy have the burden of justifying the increased federal redistribution in favor of small-population states that is highly likely to result); Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997) (demonstrating, *inter alia*, that the structure of representation in the Senate, taken alone, systematically

sees how appropriate it was that the Framers included the Tenth Amendment in the Bill of Rights, which is largely aimed at protecting minorities from majoritarian oppression.

From here, the majority in *Printz* could have gone on to offer functionalist replies to other questions, such as "What's so terrible about a little commandeering of state officers, anyway?"⁶⁵ Since my time today is nearly up, however, I will need to leave the remainder of the functionalist majority opinion to your own imagination.

III. CONCLUSION

In conclusion, it is my sincere hope that the Court's recent federalism decisions will prove to be part of a larger, successful project of restoring meaning to the Constitution's protections for state autonomy. To draw again upon the words of Justice O'Connor in *Gregory v. Ashcroft*:

One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised [in Federalist No. 28], but there is no doubt about the design. If this "double security" is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible.⁶⁶

and unjustifiably affords large-population states disproportionately little power, relative to their shares of the nation's population, to block federal homogenizing legislation that they consider disadvantageous).

65. For a particularly thoughtful discussion of this question, see Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1060-87 (1995).

66. 501 U.S. 452, 459 (1991).