FEDERALISM AS A REGIONAL ISSUE: "GET OUT! AND GIVE US MORE MONEY."

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I. INTRODUCTION

This paper has two discrete sections: the first comments on Ann Althouse's paper as part of the Federalism Conference held at the University of Arizona College of Law in March 1996. The second, a revised version of comments that I delivered at the conference, argues that federal jurisdiction scholars and commentators have not noticed that federalism is a regional issue.

II. ANN ALTHOUSE'S ENFORCING FEDERALISM AFTER *UNITED STATES V. LOPEZ*

Over the last decade, Ann Althouse has established herself as one of the most thoughtful and insightful commentators on federal jurisdiction and constitutional law.[1] This essay is but the latest example of her synthetic thinking. Despite what I consider to be the extremely strong qualities of her essay, I shall resist the temptation simply to sing her praises. Instead, I shall offer a few comments about particular aspects of her paper.

A serious occupational hazard besets constitutional law specialists. Once the Supreme Court releases an opinion, the temptation is overwhelming to parse the language, read the tea leaves, and then proclaim: "This opinion will change the course of the Republic." Thomas Reid Powell, the legendary Harvard law professor known for his sardonic wit, once described this phenomenon: "To a

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1. *See* Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993 (1994); Ann Althouse, *Time for the Federal Courts to Enforce the Guarantee Clause?—A Response to Professor Chemerinsky*, 65 U. COLO. L. REV. 881 (1994); Ann Althouse, *Who's to Blame for Law Reviews?*, 70 CHI.-KENT L. REV. 81 (1994); Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993); Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 LOY. L.A. L. REV. 757 (1992); Ann Althouse, *Beyond King Solomon's Harlots: Women in Evidence*, 65 S. CAL. L. REV. 1265 (1992); Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953 (1991); Ann Althouse, *Standing, in Fluffy Slippers*, 77 VA. L. REV. 1177 (1991); Ann Althouse, *Saying What Rights Are—In and Out of Context*, 1991 WIS. L. REV. 929 (1991); Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123 (1989); Ann Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of* Pennzoil v. Texaco, 63 N.Y.U. L. REV. 1051 (1988); Ann Althouse, *How to Build A Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987); and Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 FORDHAM L. REV. 234 (1983).

constitutional scholar, a stone wall looks like the Arc de Triomphe." Constitutional scholars do seem ready to attribute great significance to what other folk deem as relatively normal events. *United States v. Lopez*[2] is instructive. This decision has already generated an enormous body of commentary, including law review symposia in the *Michigan Law Review* and the *Texas Law Review*.[3] In addition, numerous independent articles on *Lopez*[4] exist.

Ann Althouse does not fall into the trap of proclaiming *Lopez* as ushering in the new millennium. Instead, she uses *Lopez* to reexamine the Supreme Court's attitude of judicial restraint concerning the Commerce Clause, and what she thinks is its unfortunate consequence for undermining state autonomy.[5] She very nicely sets the context of earlier controversial decisions, such as *Wickard v. Filburn*,[6] *McCulloch v. Maryland*,[7] and *Heart of Atlanta Motel v. United States*,[8] by suggesting that the context of those decisions goes a long way toward explaining the Court's substantive rulings. The national imperative brought about by the Great Depression and by the modern Civil Rights Movement led the Supreme Court to accept rather far-reaching claims of congressional authority under the Commerce Clause. Because the context of the decisions largely explains them, Althouse thinks it a mistake to assume that judicial restraint is appropriate as a matter of first principles. Instead, she criticizes what she calls "the false virtue of restraint."[9] She notes that even those Justices who conceive their role as apostles of judicial restraint break from that role when claims of individual rights come before the Court.[10] "Rare are the Justices who make judicial restraint the starting point for all legal analysis. In any event, such a position contravenes the basic duty of the judiciary 'to say what the law is.'"[11] However, her reference to Chief Justice John Marshall's aphorism in *Marbury v. Madison*[12] does not convince me that judicial restraint is therefore wrong. One can acknowledge the judiciary's power to engage in judicial review, under the theory of saying what the law is, without repudiating traditional canons of judicial restraint. Marshall's insistence that judicial review merely requires judges to "say what the law is"[13] assumes that the text of the Constitution yields a specific and readily agreed upon answer. But if, as in the area of the Commerce Clause, the text offers no such easy answer, the Supreme Court may fairly ask: what is the relevance of the Congress of the United States staking out a position on the issue?

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2. 115 S. Ct. 1624 (1995).
3. Symposium, *Reflections on* United States v. Lopez, 94 MICH. L. REV. 533 (1995); 74 TEX. L. REV. 695 (1996).
4. *See, e.g.*, Lynn Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995); Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125 (1996).
5. She finds as a theme in each of the separate opinions in *Lopez* the pragmatism of the various Justices.
6. 317 U.S. 111 (1942).
7. 17 U.S. 316 (1819).
8. 379 U.S. 241 (1964).
9. Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 812 (1996).
10. *Id.* at 812–13.
11. *Id.* at 813 (quoting Marbury v. Madison, 5 U.S. 137 (1803)).
12. 5 U.S. 137 (1803).
13. *Id.* at 177.

In the aftermath of *Lopez*, Congress amended the Gun-Free School Zones Act to add as a jurisdictional element that the prosecutor demonstrate that the gun "has moved in or otherwise affects interstate or foreign commerce."[14] Ann Althouse doubts that this addition of a jurisdictional element will alter the constitutionality of the Gun-Free School Zones Act. "It would clearly be inconsistent with the majority's conception of the Commerce Clause in *Lopez* for the jurisdictional device to work. The noncommercial quality of the behavior remains much the same as does the attempt to move into an area of local law enforcement traditionally left to the states."[15] If Althouse is correct about this point, then *Lopez* has dramatically changed the Commerce Clause landscape. However, I demur on this point. The addition of the jurisdictional element changes the theoretical basis on which to assess Congress' claim of commerce power authority. In *Lopez*, the Court found that Congress lacked constitutional authority because the activity was not one which "substantially affects interstate commerce."[16] But an entirely different Commerce Clause theory that has never been questioned is that Congress may restrict and regulate the movement of goods and activities that cross state lines. The movement of goods *in commerce* is an alternative constitutional doctrine that the Court has often used to justify Congress' exercise of power under the Commerce Clause.[17] This theory is more limited because proof of movement between two states must exist. I interpret *Lopez* to leave the *in commerce* theory unaffected. Chief Justice William Rehnquist's opinion observed that the *in commerce* theory was one of the three approaches that Congress might use in asserting power under the Commerce Clause,[18] but one that was as not applicable in *Lopez*.[19] He also noted that one of the problems with the Gun-Free School Zones Act was precisely its lack of such a triggering element such as the requirement of movement across state lines.[20] If Althouse is correct, then cases like *United States v. Bass* and *Scarborough v. United States* may be reversed in the future.[21] Her interpretation may also cast doubt on other congressional legislation that restricts interstate activity. Many federal crimes have an interstate movement component as the jurisdictional element that grounds federal criminal legislation.[22]

In the Gun-Free School Zones Act, she sees a Congress that acted in a politically popular fashion in total disregard of state sovereignty. "It is not surprising then, that the majority of the Court cast aside its longstanding restraint."[23] On this point, Althouse attributes greater significance to *Lopez* than I would. I do not read *Lopez* as casting aside theories of judicial restraint. Even in *Wickard*, the Court insisted that, when Congress regulates wholly

14. 141 CONG. REC. S7920 (daily ed. June 7, 1995) (statement of Sen. Kohl).
15. *See* Althouse, *supra* note 9, at 806 n.99.
16. United States v. Lopez, 115 S. Ct. 1624, 1631 (1995).
17. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964).
18. *See Lopez*, 115 S. Ct. at 1629.
19. *Id.* at 1630.
20. *Id.* at 1631.
21. United States v. Bass, 404 U.S. 336 (1971). Scarborough v. United States, 431 U.S. 563 (1977). In both these cases, the Supreme Court's decision on whether to enforce a federal statute criminalizing the possession of firearms hinged on whether the firearm had moved in interstate commerce.
22. *See, e.g.*, 18 U.S.C.A. § 1202(b) (West Supp. 1996) ("A person who transports, transmits, or transfers in interstate or foreign commerce any proceeds of a kidnapping....").
23. Althouse, *supra* note 9, at 813.

intrastate activities, those activities must have "a substantial economic effect" on interstate commerce.[24] *Wickard* is much criticized for allowing an overreaching Congress to tell an Ohio farmer how many acres of wheat he may grow for consumption on his own farm. Nonetheless, the twenty percent of the nation's wheat crop that consisted of home use was enough to fluctuate the national market.[25]

I understand *Lopez* in a more narrow fashion. The "substantial economic effect doctrine" has long been part of Commerce Clause jurisprudence. *Lopez* finally presented the Court with a set of facts that made the Court uneasy applying the *Wickard* test. *Lopez* involved a statute that exemplified an overreaching Congress. Mere possession of a gun near a school does not appear linked to interstate commerce. Indeed, the court below, the Fifth Circuit, ridiculed the Act's connection to interstate commerce by suggesting that the Act criminalized a person carrying any unloaded shotgun, in an unlocked pickup truck gun rack, while driving on a county road that at one turn happens to come within 950 feet of the boundary of the grounds of a one-room church kindergarten located on the other side of a river, even during the summer when the kindergarten is not in session.[26]

If there was ever a prime example of Congress exceeding its Commerce Clause authority, the Gun-Free School Zones Act was it. The Gun-Free School Zones Act required neither proof that a link existed between guns near schools and commerce nor, as a jurisdictional triggering mechanism, evidence that the particular gun had at some point traveled in interstate commerce.

In favor of this narrow interpretation, the *Lopez* majority opted to distinguish, not to repudiate, any of its Commerce Clause decisions since the New Deal, including *Wickard*. Thus, one could reasonably interpret *Lopez* as the direct consequence of Congress having failed to ground its Act in evidence that possession of a gun near a school had a substantial affect on interstate commerce. Two other reasons suggest that the decision may be a narrow one: first, four judges dissented; second, two concurring judges explicitly described the ruling as a narrow one.[27] Critical to the majority was the vote of Justice Anthony Kennedy, who wrote a concurring opinion joined by Justice Sandra Day O'Connor. Justice Kennedy visited the College of Law in fall 1995 and taught my class in Constitutional Law. He referred to *Lopez* and wondered whether it was an "isolated episode" or whether it signaled "a new jurisprudence." I wanted to say to him: "Justice Kennedy, that is a profound question. There are only two people in the entire United States who can answer that question. And you're one of them."

Althouse persuasively critiques the *Lopez* dissenters, particularly Justice David Souter. Merely because the Supreme Court in the early New Deal era, led by the Four Horsemen, greatly overreached in striking down important pieces of federal legislation does not justify, as Justice Souter would, upholding a sweeping claim of federal power in order to address a problem that the states are perfectly able to handle. Though Althouse concedes that *Lopez* may eventually become simply a blip on the screen—standing for the

24. Wickard v. Filburn, 317 U.S. 111, 125 (1942).
25. *Id.* at 127.
26. United States v. Lopez, 2 F.3d 1342, 1366 (5th Cir. 1993).
27. United States v. Lopez, 115 S. Ct. 1624, 1625, 1634 (1995).

commercial/noncommercial distinction and for the minimal but undefined role of the courts—she believes that now is the time "to think deeply about the value of federalism and the proper use of federal courts."[28] She perceptively notes that the New Deal Court's deference to Congress was a pragmatic response to a national problem warranting a national solution.[29] Today, the context is changed and so the Court's response ought not merely rubber-stamp New Deal era Commerce Clause theory.[30]

Althouse uses *Lopez* as an opportunity to think about why some matters require a uniform federal standard but others should remain subject to state control, and what consequence these choices have on the nature of federal courts. To Althouse, the need for federal legislation occurs when (1) there is a "national market or other system or organization that causes harm at a national level" or (2) "[w]hen moving from state to state is used as a way of inflicting harm."[31] For harm at the national level, Althouse easily concludes that the facts of *Wickard* qualify.[32] The trivial activity of the local farmer when multiplied nation-wide presented a situation requiring a national solution.[33] She contrasts gun violence in schools as essentially a local problem.[34] It may occur throughout the country, but violence "in one school in one state does not contribute to a violence problem at another school in another state."[35] Gun violence in school may be a national *problem* but that does not necessarily call for a national *solution*.[36] *Wickard v. Filburn* called for a national solution precisely because individual states lacked the capacity to act in concert.[37] In contrast, local initiative can satisfactorily and effectively address gun violence in schools.[38] Indeed, as the *Lopez* Court noted, many states had passed laws aimed at regulating guns in schools.[39] Althouse further asserts that not only was the national rule unnecessary, but also that the rule hindered local flexible initiatives. "[I]t merely interferes with nonconforming state policies."[40] On this point, I wish to quibble. Parallel federal criminal jurisdiction under the Gun-Free School Zones Act does not prevent states from enforcing their own criminal provisions.

Althouse also considers the Child Support Recovery Act of 1992[41] a target for constitutional challenge in the aftermath of *Lopez*.[42] Because parents who owe child support move from state to state, the legislative record indicated a need for federal legislation to enforce child support obligations.[43] Individual states lack the ability to deal with this problem precisely because the behavior

28. Althouse, *supra* note 9, at 814.
29. *Id.* at 813.
30. *Id.*
31. *Id.* at 818.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 818–19.
37. *Id.* at 819.
38. *Id.* at 819–20.
39. *Id.* at 819 (quoting United States v. Lopez, 115 S.Ct. 1624, 1641, (Kennedy, J., O'Connor, J., concurring)).
40. *Id.* at 820.
41. Pub. L. No. 102–521, 106 Stat. 3404 (1992) (codified at 18 U.S.C. § 228 (1993)).
42. Althouse, *supra* note 9 at 820–22.
43. *Id.* at 820–21.

involves more than a single jurisdiction.[44] Althouse uses the Child Support Recovery Act to criticize *Lopez's* commercial/noncommercial doctrine.[45] Precisely because several United States district courts have found the Child Support Recovery Act unconstitutional relying on the commercial/noncommercial dichotomy, she thinks *Lopez's* commercial/noncommercial doctrine must be jettisoned.[46] She also suggests that the activity is commercial or at least "economic" because it involves the payment of money.[47] Althouse is of two minds with respect to the Child Support Recovery Act. Because it applies to any situation in which the child lives in one state and the parent in another, the Act applies regardless of *why* the non-custodial parent moved away, or even if the interstate residency was created by the child moving with his or her custodial parent to a new state.[48] To focus the issue on an interstate problem, Althouse recommends amending the Act to apply only to situations in which the non-custodial parent leaves the state *after* that state has begun some sort of child support enforcement proceeding.[49] In the end, she concludes that Congress had Commerce Clause authority, because the problem presented a situation in which the states acting independently have been unable to correct the problem.[50] Although *Lopez* may end up being a not-very-momentous decision, Althouse uses the decision to serve for a call to reexamine the excessive number of federal statutes that unduly burden federal courts[51] and simultaneously undermine state autonomy.

Althouse offers a very level-headed approach to when and why federal legislation that trumps state legislation is warranted. She would justify federal legislation when inaction would either result in "harm at the national level" or allow lawbreakers to avoid justice by moving from state to state. I can imagine a conscientious member of Congress using these tests as an appropriate check on his or her own untrammeled power. Use of such tests would hopefully prevent enactment of a subsequent Gun-Free School Zones Act. However, I wonder if these tests are judicially manageable. Is it any less manipulative for judges to search for national harm or harm that occurs from interstate movement, than it would be to search for the distinction between "commercial" and "noncommercial" activities? Unless Althouse further refines her tests, they do not strike me as ones that can easily be applied by judges, if at all.

Lopez may prove determinative in another context. In my judgment, *Lopez* casts doubts on the constitutionality of the Violence Against Women Act.[52] Passed by Congress in 1994, the Act provides a civil cause of action for

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44. *Id.* at 821.
45. *Id.* at 821–22.
46. *Id.* at 821.
47. *Id.*
48. *Id.* at 822.
49. *Id.* at 822–23.
50. *Id.* at 823–24.
51. *See* articles *id.* at 814 n.136. Althouse adds her voice to a growing chorus of critics who argue that, in creating a new federal crime with trials obviously in federal court, Congress is placing an additional burden on an already stressed federal judiciary. *Id.* Althouse argues that statutes like the Gun-Free School Zones Act have a cumulative and adverse impact on federal courts. They make federal judges more like state judges which is an unfortunate development. *Id.* at 815.
52. Violence Against Women Act of 1994, Pub. L. No. 103–322, 108 Stat. 1902–55. Indeed, just as this article was going to press, a United States District Court held the Act

damages or injunctive relief against any person who commits a crime of violence motivated by gender. The Act is neither limited to activities under color of state law nor to actions having a connection to interstate commerce or movement. The Act authorizes a cause of action for gender-motivated acts of spousal abuse by an ex-spouse. The Act essentially converts acts of domestic violence, traditionally regulated by the state, into a federal cause of action. Particularly in light of the separate opinion by Justices Kennedy and O'Connor, this Act may be in real trouble. Just as in *Lopez*, acts of spousal abuse are not necessarily commercial in nature. It is also doubtful that gender-motivated acts of violence have a "substantial economic effect" on interstate commerce. One could reasonably argue that gender-motivated acts of violence are so voluminous in our society that the effect is to limit women's economic potential or even to deter travel and commercial activity.[53] However, this line of reasoning seems quite analogous to the government's attempted defense of the Gun-Free School Zones Act in *Lopez* and is likely to be equally unavailing.[54]

III. FEDERALISM AS A REGIONAL ISSUE

As I have argued elsewhere,[55] federal courts commentators pay no heed to historicism, concentrating instead on federal courts doctrine as though it existed apart from the historical context of Supreme Court decisions. Commentators equally ignore sectional differences in analyzing federalism. The failure to understand the regionalism inherent in federalism is manifest in an important recent article by Edward Rubin and Malcolm Feeley.[56] They argue that the concept of federalism has endured simply because it is part of our historical tradition. "In fact, federalism is America's neurosis.... We carry this system with us, like any neurosis, because it is part of our collective psychology...."[57] They dismiss federalism as achieving none of the beneficial goals that are often claimed for it and understand the only useful function of the states as "facilitating decentralization."[58] Rubin and Feeley find nothing particularly unique about either states or regions of the country. "There are no regions in our nation with a separate history or culture.... Most of our states, the alleged political communities that federalism would preserve, are mere administrative units, rectangular swatches of the prairie with nothing but their legal definitions to distinguish them from one another."[59] In short, Rubin and Feeley view federalism as an anachronism of the nineteenth century.

To historians weaned on Frederick Jackson Turner's frontier thesis and now familiar with the recent New Western History literature spawned by

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unconstitutional. Brzonkala v. Virginia Polytechnic State Univ., 1996 WL 431097 (W.D. Va. July 26, 1996).

53. Figures from 1994 show that, on the average in the United States, a woman was murdered every two days and a woman was beaten every 15 seconds as a result of domestic violence. 142 CONG. REC. S5556–02 (daily ed. May 23, 1996) (statement of Sen. Kennedy).

54. *See* United States v. Lopez, 115 S. Ct. 1624, 1632 (1995).

55. Robert J. Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869 (1994).

56. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

57. *Id.* at 908.

58. *Id.*

59. *Id.* at 944.

Donald Worster,[60] Patricia Limerick,[61] and Richard White,[62] these sentiments are nothing short of staggering. To understand the American experience in such monolithic terms strikes a discordant note with any professional historian. In 1893, Turner published his famous essay, *The Significance of the Frontier in American History*, which saw the European expansion westward across the United States as a social process that stripped away European culture as settlers encountered nature.[63] On this frontier, according to Turner, emerged the essential American individual, freed from his European past and dedicated to individualism, democracy and equality. For the better part of a century, his "frontier thesis" has been the accepted paradigm among American historians. The New Western historians have recently challenged Turner's hold on the historical imagination. These historians understand the West not as a process but as a place inhabited by people from a rich array of ethnic backgrounds. They recast the image of the rugged individualism of the white European male to reveal themes of success and failure, heroism and betrayal, economic development and labor exploitation. Given the sweep of American historiography, to reduce the West's rich, complex history to "rectangular swatches of the prairie" is remarkable indeed.

Federalism commentators envision a uniform relationship between the federal government and state governments, as well as between the federal government and individual citizens. These commentators never suggest that the states may vary in the character of their relationship with the federal government or that individual citizens may similarly experience the federal government in differing perspectives. This conventional viewpoint fails to account for state government and individuals in the American West.

As we near the end of the twentieth century, the federal government has a profoundly different relationship with states and individuals in the American West than it does with states and individuals in the rest of the country. These differences are deeply rooted in American history and remain a contemporary reality. In the American East in 1787, the thirteen original states had existed for up to 165 years as colonies. At the end of the eighteenth century, the federal government began to perform its roles and functions, taking into account that the colonies, now states, were the units of local government. The institutions of state government in the Midwest and East have performed myriad tasks generally understood as police power functions. In the West, the federal territorial governments undertook activities in the absence of another viable form of local government for most of the nineteenth century and in certain states into the twentieth century. Arizona did not even become a state until 1912, only eighty-four years ago. Shortly after Arizona celebrates its centennial as a state in 2012, Massachusetts and Virginia will prepare to commemorate their quad-centennial anniversaries.

The federal government determined the character and pace of economic development in the American West through federal policies and laws from the nineteenth century. To the extent that a western state's economy depended on

60. DONALD WORSTER, RIVERS OF EMPIRE (1985).
61. PATRICIA N. LIMERICK, THE LEGACY OF CONQUEST (1987).
62. RICHARD WHITE, IT'S YOUR MISFORTUNE AND NONE OF MY OWN (1991).
63. FREDERICK J. TURNER, THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY (Harold P. Simonson ed., 1963).

farming, ranching, mining, or logging, the federal government played an enormous role in the lives of individuals who were involved in these sectors. Westerners interacted with the federal government in a different manner and to a greater degree than individuals elsewhere in the country.

The nineteenth century saw the rise of a federal bureaucracy in the West that continues to have enormous power and influence as the turn of the twenty-first century approaches. Located principally in the Department of the Interior, agencies such as the Bureau of Indian Affairs, the Land Office, the U.S. Geological Survey, the Bureau of Reclamation, the Bureau of Land Management and the U.S. Park Service, and the Agriculture Department's U.S. Forest Service have had a profound impact on the relationship between individuals and the federal government. One has a sense of a federal presence that people in the Midwest or the East rarely experience. As the New Western historian Richard White has written: "The triumph of this managerial revolution put the West and the East in very different relations to the federal government. The federal presence was incomparably greater in the West...."[64]

One important dimension in developing the federal government's presence in the West was military action to conquer new territory, as in the war for Texas, the war with Mexico, and, perhaps more importantly, the later wars with the Indian tribes. The development of the American West came first from federal military action and then from other federal policies and laws. Consider transportation. The federal government first encouraged the development of stagecoach and pony express routes and then subsidized railroads to build a transcontinental railway.

In terms of settling the American West, two lessons should be remembered. First, the federal government had the dominant role in distributing lands and in transforming these lands from public to private property. The Homestead Act,[65] the Pacific Railroad Act,[66] and the Morrill Act[67] were the bedrock principles for federal land law in the mid-nineteenth century.[68] Each was fraught with fraud and encouraged speculation. Each was able to be evaded at will. Second, in terms of settling the land, early federal policies were thoroughly misguided efforts to impose on the American West a vision of agricultural units borrowed from the American Midwest. However, Westerners quickly realized that 160 acres, the size of the standard Midwestern farm, would not suffice in the West. In arid regions, 160 acres did not allow for viable farming units for individual families. In the Midwest, logging on a 160 acre tract generated worthwhile income. That cleared land then adequately supported the Midwestern farmer with agricultural foodstuffs. In the West, doling out 160 acre plots made little sense. Given the topography and aridity, both loggers and ranchers lacked a practical way to make an economic go of it on 160 acres. So, just like gold and silver miners, Westerners began simply to log and to graze the lands that belonged to the federal government.[69]

64. WHITE, *supra* note 62, at 392–93.
65. Homestead Act, ch. 75, 12 Stat. 392 (1862) (repealed 1976).
66. Pacific Railroad Act, ch. 120, 12 Stat. 489 (1862) (codified as amended at 43 U.S.C. §§ 942–943 (1995)).
67. Morrill Act, ch. 130, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C. §§ 301–305, 307, 308 (1992)).
68. WHITE, *supra* note 62, at 142.
69. *Id.* at 148.

Eventually, the federal government legitimized such illegal activities through the Homestead Act of 1862,[70] the Mining Act of 1872,[71] the Timber Culture Act of 1873,[72] and the Desert Land Act of 1877.[73]

In the nineteenth century, the federal government perceived its role in the West as facilitating the transfer of public lands and resources to private ownership. The first challenge to this policy came in 1878, when John Wesley Powell—Grand Canyon explorer and later head of the U.S. Geological Survey—issued *A Report on the Lands of the Arid Region of the United States*[74] challenging federal land policy. Powell argued against simply dividing federal land into individually-owned 160 acre parcels.[75] In the early twentieth century, the federal government embraced a new approach: lands would remain permanently in the ownership of the federal government and the government would assert control over its use and access.[76]

This policy shift has led to the federal government retaining title to vast public lands in the West. As the end of the twentieth century nears, the federal government owns so much land in each of the western states that it simply has a different relationship to those states and individuals in those states than it does with the states and individuals in the Midwest or the East. For a stark illustration of the role of the federal government as owner of land in the United States, consider the following table:

70. Homestead Act, ch. 75, 12 Stat. 392; *see also* WHITE, *supra* note 62, at 148.
71. Mining Act, ch. 152, 17 Stat. 91 (1872) (codified as amended at 30 U.S.C. § 22 (1995)); *see also* WHITE, *supra* note 62, at 148.
72. Timber Culture Act, ch. 277, 17 Stat. 605 (1873) (repealed 1891); *see also* WHITE, *supra* note 62, at 150.
73. Desert Land Act, ch. 107, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. §§ 321–329 (1995)); *see also* WHITE, *supra* note 62, at 151.
74. WALLACE STEGNER, BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST 211 (1954). DONALD J. PISANI, TO RECLAIM A DIVIDED WEST 143–57 (1992).
75. PISANI, *supra* note 74. WHITE, *supra* note 62, at 152–53.
76. WHITE, *supra* note 62, at 154.

Table 1: Geographic Area of States and Federally-Owned Lands

Region	Total Land Mass (1,000 acres)	Total Land Mass Owned by Federal Government (1,000 acres)	Total Land Mass Owned by Federal Government (Percent)
Northeast	104,699	2,247	2.1%
Midwest	482,870	23,438	4.9%
South	561,238	21,217	3.8%
West	1,122,535	602,901	53.7%

State	Total Land Mass (1,000 acres)	Total Land Mass Owned by Federal Government (1,000 acres)	Total Land Mass Owned by Federal Government (Percent)
Montana	93,271	26,143	28.0%
Washington	42,694	12,374	29.0%
New Mexico	77,766	25,729	33.1%
Colorado	66,486	24,069	36.2%
California	100,207	44,541	44.4%
Arizona	72,688	34,236	47.1%
Wyoming	62,343	30,416	48.8%
Oregon	61,599	32,289	52.4%
Utah	52,697	33,620	63.8%
Idaho	52,933	32,672	61.7%
Nevada	70,264	58,135	82.7%[77]

As this table suggests, the federal government owns from a low of 28% in Montana to high of 82.7% in Nevada of the land mass of every western state. This contrasts dramatically with the other regions of the country in which the

77. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993 (113th ed. 1993) tbl. 358, at 219.

percentage of federal ownership of the land ranges between 2.1% and 4.9%. People in the West can hardly think of their region simply as indiscriminate "rectangular patches of the prairie" when the western prairie is predominantly owned by the federal government.[78]

Western politicians often mouthed the rhetoric of hostility to the federal presence, but in reality they desired federal funding and programs. Consider the development of water resources. For-profit corporations and non-profit irrigation districts often failed in the nineteenth century. In the aftermath of such failures, agricultural interests turned to the federal government for support. The 1902 Reclamation Act, or Newlands Act,[79] established the Bureau of Reclamation and significantly contributed to changing the role of the federal government in the West.[80] The Act authorized the Bureau to develop irrigation projects throughout the West.

The U.S. Forest Service ironically was promoted by state interests to set aside forests in order to prevent lumbering and overgrazing that had environmentally adverse consequences for streamflows. These state interests argued that forest fires, and also lumbering and overgrazing would result in dramatically increased erosion, causing silt to accumulate in streams and rivers. The silt would have further dispersed the water and clogged irrigation ditches and streams. The role of the Forest Service in the West changed when U.S. Forest Service pioneer Gifford Pinchot, a shrewd politician, succeeded in seizing control over the U.S. National Forests. Under the "gospel of efficiency," Pinchot opposed both setting aside lands for simple preservation because he believed that "wilderness is waste" and giving away land for unsupervised development because, in the West, he believed that only planned development led to efficient development.[81] Preservationists, conservationists, and laissez-faire entrepeneurs all antagonized each other over land use. The competing federal bureaucracies that represented these interests, respectively, the National Park Service, Pinchot and the U.S. Forest Service, and the Department of the Interior fought the real battles in the developing West.[82]

A profound change in the role of the federal government in the West came during the 1930s.[83] The Civilian Conservation Corp., the Public Works Administration, and other New Deal agencies exemplified huge federal projects in the West.[84] A dominant federal presence naturally resulted from the creation of dams generating enormous hydroelectric power as well as facilitating the transportation and provision of water itself. In the 1930s, the Bureau of Reclamation became a major player with Boulder Dam, then Grand Coulee Dam, the Central Valley Project, and a host of other irrigation projects. The practices of the Bureau involved huge federal subsidies. Building dams for the sake of building dams became the mission of the Bureau of Reclamation. The original purpose of providing water to small farmers and ranchers receded

78. The West's mountainous topography also gives pause to Rubin and Feeley's prairie metaphor.
79. Newlands Act, ch. 1093, 32 Stat. 388 (1902) (codified as amended in scattered sections of 43 U.S.C.).
80. WHITE, *supra* note 62, at 406.
81. *Id.* at 409.
82. *Id.* at 412.
83. *See id.* at 475.
84. *Id.* at 472–73.

along the way. While the Department of Agriculture provided crop subsidies and payments to farmers *not* to grow certain crops, the Bureau of Reclamation built dams to allow these crops to be grown in areas of the country not naturally suited to their production. Economics did not drive public policy.

Quite simply, westerners have experienced and continue to experience the federal government in ways that are profoundly different than easterners. In the East, the federal government's presence comes mostly in the form of federal social programs, especially health, welfare, housing, education, retirement, social security, and pensions. These programs of course also exist in the West. In addition, in the West, the federal government owns so much of all western states that the economies of those states are intimately tied to federal land, water, and resource policies.

As a consequence, many westerners experience the federal government not only as taxpayers and beneficiaries of federal programs, but also as landlords and business partners. Farming, mining, ranching, and logging historically have been huge concerns in the West traditionally involving tremendous political power and often contributing substantial amounts to each state's economy. As a consequence, federal agencies' policies with respect to farming, ranching, mining and logging have profoundly impacted western states.

The West has recently become the most urbanized section of the country.[85] As a consequence, the traditional farming, mining, ranching, and logging sectors contribute relatively small percentages to most western states' economies.[86] Changing demographics have shifted the federalism struggle. Relatively new interests now challenge the land use policies of the traditional special interests. Today recreationalists, including rafters, hikers, campers, recreational vehicle owners, cyclists, climbers, and anglers, demand preservation and protection of federal lands traditionally exploited by the extractive industries.

The voices of recreationalists and environmentalists have impacted recent federalism battles. Consider the Utah Public Lands Management Act.[87] Despite United States Senators Robert Bennett and Orrin Hatch of Utah championing the bill, some western Republican colleagues in Congress failed to support the bill. Traditionally, western members of Congress have seen their political futures tied to the extractive industries. The question was how to allow for mining and logging to occur. Securing low grazing rates, federally subsidized water projects, and other such federal largesse was the role of western members of Congress. Bring home the bacon. Thus, not surprisingly, many of the most conservative western members of Congress were anathema to

85. UNITED STATES BUREAU OF THE CENSUS, *supra* note 77, tbl. 41, at 36.

86. In Arizona, for example, the percentage ranges between one percent and two percent. This decline in percentage is due to population increases and the explosive growth in other sectors of the economy. In absolute dollar figures, farming, ranching, mining, and logging represent large enterprises. For example, in California in 1991, farming contributed $18.8 billion in gross income to the state's economy. *See* UNITED STATES BUREAU OF THE CENSUS, *supra* note 77, tbl. 1113, at 661.

For Arizona, *see* Robert J. Glennon, *"Because That's Where the Water Is": Retiring Current Water Uses to Achieve the Safe-Yield Objective of the Arizona Groundwater Management Act*, 33 ARIZ. L. REV. 89, 102 & nn.71–74 (1991).

87. S. 884, 104th Cong., 1st Sess. (1995).

environmental organizations. Their political lives and livelihood depended on support from the mining, ranching, and logging industries. But now, the context is different. Recreationalists and environmentalists are present throughout the country. As a result, western members of Congress have interests other than the extractive industries to consider, and eastern members of Congress must concern themselves about preserving rural Utah's environment.[88]

At some point, the sharp divisions between fiscal conservatives and western members of Congress who expect the federal government to have an active role that accommodates economic development will become apparent. A collision will also occur between ideological conservatives who want to lessen the role of government and those politically driven to expect government largesse in terms of grazing fees, mining patents, logging permits, farm crop subsidies, subsidized hydroelectric energy, and massive federal water projects. At some point, the serious conflict between the espoused view of private property with its emphasis on limiting federal regulation of that property, on the one hand, and a view of private property that depends on and is inescapably linked to reaping huge profits from resources that are on lands that belong to the federal government will become apparent.

Those who rail against the welfare system as a process that enslaves not only individuals, but also multiple generations of families, must eventually confront the reality that in the American West the federal government has subsidized and made handsomely rich farming families in California's central valley, logging families in the Pacific Northwest, mining families and companies in Colorado, and ranching families in Arizona. The mythology of the American West stands for rugged individualism, self-reliance, and independence. The reality reveals economic activities undertaken at the encouragement and inducement of the federal government. The federal government continues to leave its imprint on the American West. Westerners scorn the federal government without pausing to appreciate how that government has shaped their lives and enriched their activities. In the words of Richard White: "The dependence on the federal government has been the central reality of western politics."[89] Just as the context of economic depression during the New Deal, or social justice during the Civil Rights Movement profoundly influenced our system of federalism, so too regional differences have shaped and will significantly shape federalism in the future. At the moment many westerners have a love/hate relationship with the federal government, which can be summed up as: "Get out! And give us more money."[90]

88. *See, e.g.*, 142 CONG. REC. S2907–16 (daily ed. Mar. 27, 1996) (for a discussion of the Utah Public Lands Management Act on the Senate floor).

89. WHITE, *supra* note 62, at 353.

90. WALLACE STEGNER, THE AMERICAN WEST AS LIVING SPACE 9 (1987).