The Supreme Court, Federalism, and Social Policy: The New Judicial Activism

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The Supreme Court is entering a new era, discarding long-standing legal doctrines to reshape the relationship between the states and the federal government. Paralleling trends in the legislative and executive branches of government, the Court is constructing its own version of devolution. Through a reinterpretation of the Commerce Clause of the Constitution, which is the anchor for many of our civil rights and social welfare laws, the Court has severely curtailed the power of the federal government to enact progressive legislation. This article provides an overview of this new judicial doctrine and discusses its implications for social welfare policy.

Much of what we do as social workers is mediated through the law, whether through the web of legislation that establishes social services programs or the equally important maze of laws designed to protect the rights of traditionally disenfranchised groups. While the legislative process is familiar terrain for many social workers, less familiar are the workings of the extremely powerful United States Supreme Court. The institution is of particular contemporary concern because recent Supreme Court rulings indicate a disturbing change in the Court's approach to federal civil rights and other legislation. This "radical experiment in judicial activism" (Kramer 2000, p. 290), based on an alternative vision of the proper relationship between the states and the national government, undermines some gains in the civil rights arena and casts doubt on the enactment of progressive federal legislation in the future.

Starting in the mid-1990s and accelerating during the Supreme Court's 1999 term, certain legal doctrines, thought discredited after a

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string of Supreme Court decisions upholding the New Deal legislation of the 1930s, have been resurrected by the Court to invalidate federal legislation designed to address social problems. Understanding this recent trend requires knowledge of often complex constitutional law. While equal protection and due process of law are terms familiar to social workers and others outside the legal profession, a clause in the Constitution that permits the federal government to regulate interstate commerce (the Commerce Clause) underlies many of the laws that protect civil rights and advance the public's welfare. A reinterpretation of the Commerce Clause is at the center of the Supreme Court's recent decisions.

A watershed case, *United States v. Morrison* (2000), illustrates this reinterpretation. In *Morrison*, the Supreme Court struck down a provision of the Violence against Women Act (1994; VAW Act), a federal law that provided an arsenal of remedies to address gender-based violence and that many considered an essential civil rights law for women. The case before the Court involved a young college student who had been gang-raped in her dormitory by fellow students and then verbally harassed and threatened. The newly enacted VAW Act provided a remedy for the victim that she did not have before: the right to file a civil suit for damages against her attackers in federal court. But the Court invalidated this remedy under the Commerce Clause. (Other provisions of the VAW Act providing for criminal penalties for acts of gender violence were not affected by this decision.)

The Court's recent seemingly technical interpretation of the Commerce Clause is in fact much more than that. While the Supreme Court may cloak its decisions in the language of law and precedent, *Morrison* and other recent decisions indicate a shift in some ways no less radical than if the Court had announced that it was overturning *Roe v. Wade* or another landmark decision. Although the focus of this article is the Commerce Clause, the Court has also begun reining in Congress under other parts of the Constitution, including the Tenth, Eleventh, and Fourteenth Amendments. Recent decisions have limited the ability of the federal government to enlist state officials to carry out federal policies or enforce or apply remedial laws, such as the Fair Labor Standards Act (1989) or the Age Discrimination in Employment Act (1967), to state governments.[1] While these cases follow a different line of constitutional doctrine, they indicate that the Supreme Court is following a consistent path toward a historical redefinition of the concept of federalism.

In sum, these decisions are reshaping the concept of federalism, the structure of American government whereby power is allocated among the national government, the states, and individual citizens. The Supreme Court is signaling its willingness to shift the locus of policy making away from the federal government by aggressively curtailing federal

power to legislate in certain areas. Since much progressive legislation has historically emanated from the federal level, and since the complexity of national life often requires national measures, this change has serious implications for social welfare policy.

The Supreme Court's reinterpretation of the Commerce Clause parallels changes occurring in other parts of the body politic where the concept of federalism is undergoing reinterpretation. Congress increasingly uses states rights arguments to grant discretion to state governments in matters traditionally decided at the federal level. The enactment of the Personal Responsibility and Work Opportunity Reconciliation Act in 1996, which gave the states unprecedented flexibility in administering public welfare programs for poor families, and the increasing reliance on block grants as a funding mechanism are examples of this trend, often referred to as devolution. In addition, the growing movement toward privatizing certain public functions, such as child welfare, prisons, and schools, indicates a desire to bypass government altogether in favor of permitting the private sector to exert more control over public policy (Gibelman and Demone 1998). For social workers and others in the policy arena these changes require new strategies and approaches for promoting social change.

Much has been written about devolution, privatization, and privatization's effect on social services delivery and public policy (see, e.g., Abramovitz 1986; Kamerman and Kahn 1989; Brilliant 1997; Gibelman and Demone 1998). Less attention has been paid to the role of the Supreme Court. This article addresses that gap by providing social workers with the knowledge necessary to enter the debate on the judiciary's equivalent of devolution—judicial federalism. First, I look at the historical and legal framework underlying federalism, including how the rules of federalism have been shaped by the Supreme Court through its interpretation of the Commerce Clause and other constitutional provisions. Next, I examine recent Supreme Court decisions that signal a fundamental change in federalism jurisprudence, with a particular emphasis on *Morrison* and the VAW Act. Whether the Supreme Court is the proper institution to reshape federalism will then be explored. Finally, I discuss the implications of these decisions.

Historical and Legal Framework

Built into the U.S. system of government and contained in the Constitution is the concept of federalism, which is characterized by a centralized federal government of limited powers existing alongside 50 autonomous state governments. Which level of government—state or federal—gets to do what is the central question of federalism (Chemerinsky 1994). The Constitution provides the framework for answering this question. Significantly, at its founding the federal government was

not granted the inherent right to promote the general welfare of its citizens; its actions must be anchored to a specific power granted to it in the Constitution (Nowak and Rotunda 1995). These powers, spelled out in the Constitution, include the powers to regulate commerce between the states; to tax and spend for the common defense and general welfare; to borrow money; to establish immigration, naturalization, bankruptcy, copyright, and patent laws; to coin money; to create a federal court system; to declare war; to enter into treaties; and to regulate armies and navies. Of these enumerated powers, the one that comes closest to granting the federal government a generalized power to promote the general welfare is the Commerce Clause, "because much of the activity that takes place within the country, and even within a single state, might be said to relate to economic issues and problems" (Nowak and Rotunda 1995, p. 131).[2]

The power of the states, on the other hand, is described differently. While the Constitution prohibits states from exercising certain powers, such as coining money, the Tenth Amendment provides that the state and the people are the repositories of all powers not delegated or prohibited in the Constitution. This reserve clause is designed to ensure the sovereignty of the states and to preserve individual rights (Nowak and Rotunda 1995).

The Constitution, however, provides only the broad strokes for determining the allocation of power. Politics provides the details, as Congress passes specific laws to effectuate its powers. The judicial system, in turn, decides whether Congress has constitutionally exceeded its authority; judicial decisions can result in either an expansion or diminution of the federal government's powers. For most of U.S. history, the Supreme Court has pursued a flexible and pragmatic approach to allocating power, expanding the federal government's power and, hence, its ability to respond to the complex problems confronting the nation (Merrill 1998; Kramer 2000). By broadly defining commerce and widening the scope of other constitutional provisions, the Court laid the foundation for a strong national government.

The seminal case to address the issue of the scope of federal powers was *McCulloch v. Maryland* in 1819. *McCulloch* concerned an attempt by the federal government to establish a national bank. The states perceived the establishment of a national bank that could operate within their respective jurisdictions as a threat to state sovereignty, and they mounted a challenge to the law on the basis that it exceeded constitutionally set limits on power.

The Supreme Court rejected the states' argument, finding a link between a national bank and several enumerated powers in the Constitution, including the power to lay and collect taxes, to borrow money, and to regulate commerce. Significantly, the Court did not require that the exact power being exercised, here establishing a bank, be explicitly

provided for in the Constitution. Relying on a clause in the Constitution that grants Congress the power "to make all laws which shall be necessary and proper for carrying into execution…its powers" (the Necessary and Proper Clause), the Court determined that Congress need only show that it is trying to effectuate important national goals connected to its enumerated powers when enacting legislation (U.S. Const. art. I, sec. 8).

The Supreme Court also interpreted the Commerce Clause broadly in these early cases. In the landmark case of *Gibbons v. Ogden* (1824), which involved a state's granting of monopoly rights to a private business, the Court upheld the power of the federal government to prevent individual states from granting monopolies, thus recognizing the often interconnected web of commercial activities among the states and the ability of Congress to intervene to insure a smooth-running economy.

This expansive view of federal powers held sway for much of the nineteenth century and allowed the federal government to adapt to change. At the end of the century, the Supreme Court retreated from this view. As an economic system based on laissez-faire capitalism collided with the federal government's attempts to limit its harshest effects, states rights became a rallying point for those wishing to resist federal intrusion. The Court began to rein in Congress, relying on the Tenth Amendment, which (as described above) gave to the states and the people powers not delegated in the Constitution (Nowak and Rotunda 1995). This reserve power was interpreted by the Court as providing protection against too much regulation by the federal government.

To restrain Congress, the Supreme Court coupled the Tenth Amendment with a restrictive interpretation of the Commerce Clause that eliminated as many activities as possible from the sphere of commerce. It did this by parsing the word *commerce*, making a distinction, for example, between the manufacturing and selling of goods, with the former not considered part of commerce. On this basis, the Court invalidated several progressive federal laws, including the regulation of child labor and a law protecting union membership, deciding that such activities affected only the making, and not the selling, of goods (*Adair v. United States* 1908; *Hammer v. Dagenhart* 1918). Activities that only indirectly affected commerce, such as federal laws that made railroads and other common carriers liable for negligence, were also considered outside the scope of federal power (*The Employers Liability Cases* 1908). This interpretation of the Commerce Clause was in sharp contrast to the earlier view of the Court, cited in *Ogden* above, which indicated a willingness to defer to Congress when it came to legislation concerning the economy.

During this period attempts by Congress to regulate certain conduct through other provisions of the Constitution also proved futile. Using the Fourteenth Amendment as its base, Congress attempted to prohibit

racial discrimination in public places, including theaters, hotels, and railroad cars, by imposing financial penalties on the owners of such establishments.[3] The Supreme Court thwarted the attempt, holding in *In re Civil Rights Cases* (1883) that the Fourteenth Amendment applies only to governmental, not private, action. Since private persons, not the government, own theaters, restaurants, and railroad cars, the conduct of such persons cannot be regulated by the government. This landmark case, which has never been overturned by the Court, proved to be a significant hurdle for enacting civil rights legislation. It forced proponents of such legislation to look elsewhere, including the Commerce Clause, when Congress tried once again, in the 1960s, to enact civil rights laws.

In 1937, this restrictive view of federal power met its match. After the Supreme Court invalidated a string of New Deal legislation, including laws regulating labor relationships and hourly and wage standards, President Franklin Delano Roosevelt proposed his court-packing plan to appoint several new justices that would tip the Court in his favor (Hofstadter 1955). While the plan was defeated by Congress, it had its intended effect. At least one justice shifted his position, and that, coupled with the appointments of seven new justices over the next 4 years, altered the ideological composition of the Court (Nowak and Rotunda 1995). The power of Congress to legislate in the national interest was affirmed, and Congress was freed from the straightjacket imposed on it by earlier Court decisions.

The Supreme Court began to fashion a new test for determining the scope of federal power (Nowak and Rotunda 1995). The Tenth Amendment was no longer construed as limiting that power. The utility of the Commerce Clause as a basis for Congressional action was restored and then expanded. The Court ruled that any activity that affected commerce, even if it was not commerce itself, could be regulated, thus eliminating the distinction between manufacturing and commerce and broadening commerce to include even noncommerce-type activities. Congress need not even have the regulation of commerce as its purpose as long as the effect on commerce was substantial. Hence, statutes addressing "moral and social wrongs" could find a home in the Commerce Clause alongside laws directed at more traditional economic concerns (*Heart of Atlanta Motel, Inc. v. United States* 1967, p. 258). Congress could even reach into activities occurring within a single state as long those activities affected commerce outside the state. Finally, Congress, not the courts, would decide whether a particular activity affected commerce. The Court was limited to deciding whether Congress's actions were rational, the lowest level of scrutiny applied by the Court, signaling that great deference was afforded to Congress.[4]

Using this broad test, over the next 50-plus years Congress greatly expanded the federal government's role in a range of activities. The

Supreme Court did not once invalidate legislation on the basis that Congress had exceeded its powers under the Commerce Clause (Cramer 2000). Laws regulating the more conventional areas that affect commerce, including union activities and working conditions, were upheld by the Court (*NLRB v. Jones & Laughlin Steel Corp.* 1937; *United States v. Darby* 1941). With the passage of the Food Drug and Cosmetic Act (1938), requiring the inclusion of certain information about products on their labels, consumer protection, health, and safety also fell within the legitimate scope of the Commerce Clause (*United States v. Sullivan* 1948).

Congress also used the Commerce Clause to reach activities more usually associated with civil rights than economic rights, enacting the Civil Rights Act of 1964, which outlawed racial discrimination in public accommodations. The use of the Commerce Clause in this instance was a way around earlier Supreme Court decisions, described above, that prevented Congress from using the Fourteenth Amendment to regulate conduct among private persons.

The Supreme Court decisions upholding these laws are illustrative of how willing the Court was to let Congress decide the limits of the clause and regulate activities that were in any way connected to commerce between the states. Thus in *Katzenbach v. McClung* (1964), the Court affirmed Congress's ability to extend its reach deep into individual states, holding that a small family-owned restaurant that never served out-of-state travelers was nevertheless subject to antidiscrimination laws because it purchased meat from a local supplier who received it from an out-of-state source. And in *Heart of Atlanta*, the Court made clear it would not second-guess Congress on the proof needed to establish the connection between a regulated activity and commerce. It permitted Congress to rely on anecdotal evidence, and not formalized findings, that racial discrimination by motels and restaurants affected commerce. In short, the Court in *Katzenbach* stated, "The power of the Congress in this field is broad and sweeping" (p. 305).

With these cases firmly establishing the Commerce Clause as a legitimate basis for combating discrimination, the clause came to support a wide array of civil rights laws, including Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment; the Age Discrimination in Employment Act of 1967; and the Americans with Disabilities Act of 1990 (Cramer 2000). The Commerce Clause thus became an instrument for repairing not only economic problems but also social problems, as long as Congress could show some connection between the two. This was not difficult to do because most social problems are intertwined with economic forces, and because the Supreme Court lowered the bar for establishing the relationship between a particular problem and the national economy.

In sum, except between the end of the nineteenth century and 1937,

the Supreme Court's concept of federalism, expressed primarily through its interpretation of the Commerce Clause, reflected the notion that to maintain the well-being of the country and its citizens, the tension between state sovereignty and national power often needed to be resolved in favor of the latter. Even in the early days of the nation the Court recognized the unifying force of the federal government and the desirability of permitting Congress to fashion national solutions to national ills. The Court deviated from this path only during the heyday of laissez-faire capitalism, bringing on a constitutional crisis that threatened the institutional integrity of the Court. For nearly 60 years since then, the Court has recognized the increasing interdependence of modern life and the need for federal intervention to smooth and shape its course. As will be described in next section, recent decisions of the Supreme Court indicate a return to that period when the Court tried to limit Congress's activity.

The New Commerce Clause Jurisprudence

The first sign that the Supreme Court was poised to reverse course came in 1995 in the case of *United States v. Lopez*. *Lopez* involved a challenge to the federally enacted Gun Free School Zones Act (1990), which made it a federal crime knowingly to possess a firearm in a school zone. The Court found that there is no connection between illegally possessing a gun and interstate commerce. It rejected arguments that guns cause violent crimes that affect economic activity by increasing insurance costs, by making people hesitant to engage in business in unsafe areas, and by interfering with the educational process (thereby reducing the productivity and efficiency of workers). *Lopez* has the distinction of being the first time in 58 years the Court struck down a federal law based on the Commerce Clause.

With the *Lopez* decision, the Supreme Court did not expressly overrule its previous precedents on the Commerce Clause, but it criticized these earlier cases, indicating that the Court had too easily deferred to Congress's judgment in the past. The Court found that to continue to do so would obliterate the "distinction between what is truly national and what is truly local," thus allowing the federal government to intrude into areas traditionally regulated by the state (*Lopez*, p. 567).

Lopez left the future of the Commerce Clause unclear and legal commentators unsure of the status of Commerce Clause jurisprudence (Kolenc 1998; Cramer 2000). A partial answer came in the Supreme Court's 1999 term in the case of *United States v. Morrison*, which involved a challenge to the VAW Act of 1994. The act was designed to address the escalating problem of violence against women by providing a new avenue of redress for victims. Recognizing that both the criminal justice system and the state court civil system often failed fully to compensate victims

of gender-based violence, Congress provided a new remedy, permitting victims to sue their attackers in federal court for money damages.

Congress's remedy came after 4 years of extensive investigation and voluminous testimony on the extent of violence against women and how this violence affects women's economic opportunities. Multiple groups provided evidence linking commercial activity and violence against women: employers who lost $3–$5 billion annually through absenteeism related to domestic violence (U.S. Senate 1990); victims who suffered from "lost careers, decreased productivity, foregone educational opportunities, and long-term health problems" (U.S. Senate 1990, p. 33); and women in general who faced shrinking employment choices as they avoided work in unsafe places, late-hour work, or work that required unsafe public transportation (U.S. Senate 1993).

Despite the voluminous evidence submitted, the Supreme Court, in a 5-4 decision, invalidated part of the act, holding that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity" and, hence, cannot be regulated under the Commerce Clause (*Morrison*, p. 1751). The Court reasserted its concern that Congress might use the Commerce Clause "to effectively obliterate the distinction between what is national and what is local" (p. 1749). To the Court, letting Congress regulate gender-based violence with civil remedies is a slippery slope that will lead to the regulation of such traditional areas of state concern as marriage, divorce, and child rearing. To prevent such legislation, the Court again distinguished between commerce and noncommercial activities that might affect commerce.

After nearly 60 years of deferring to Congress's judgment on which activities constitute a substantial effect on commerce, the Supreme Court reasserted its power to override Congress. The Court notes that the "framers adopted a written Constitution that further divided authority at the federal level [among the judicial, executive and legislative branch] so that the Constitution would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self restraint." Thus the Court has the final say on the Constitution and the "authority to define [the] boundary [of the Commerce Clause]" (p. 1753).

In his dissenting opinion on *Morrison*, which was joined by three other justices, Justice David Souter objects to the majority's return to the past and the disruption of long-standing Commerce Clause analysis. He notes that before *Lopez* in 1995, the Supreme Court would have upheld the act. Why, Souter asks, is it valid to use the Commerce Clause to prohibit racial discrimination (see *Heart of Atlanta* and *Katzenbach*) but not to provide a remedy for gender-based violence? He notes that "the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title VII of the Civil Rights Act" (*Morrison*, p. 1763); he also notes that "gender-

based violence in the 1990s was shown to operate in a manner similar to racial discrimination in the 1960s in reducing the mobility of employees and their production and consumption of goods shaped in interstate commerce. Like racial discrimination, gender-based violence bars its most likely target—women—from full participation in the national economy" (p. 1763).

Souter contends that the Supreme Court's revival of the commercial and noncommercial distinction and that its higher level of scrutiny is designed to further its vision of federalism and "does not turn on any logic serving the text of the Commerce Clause" (p. 1768).[5] He reminds the majority of the judicial crisis that befell the Court when it resorted to such artificial distinctions during the New Deal. Finally, Souter argues that growth in federal power is inevitable as the economy grows and becomes more integrated. This makes it imperative that Congress, through the political process, be able to resolve economic problems and conflicts without undue interference by the Court, which does not have the institutional capacity to make these judgments. The dissenters argue that the majority's concern that state sovereignty is somehow at stake in this process is misplaced. Noting that 36 states filed amicus briefs in support of the act, Souter writes, it is "not the least irony of these cases that the states will be forced to enjoy the new federalism whether they want it or not" (p. 1773).

In sum, both *Morrison* and *Lopez* seem to indicate that the Supreme Court is flexing its muscles. The Court is changing both the definition of commerce and who gets to delineate the scope of that definition. It is shrinking its interpretation of the word *commerce* even while the tentacles of commerce are ever more wrapped around the economic, political, and social environments. It seems likely that the Court will actively shape the contours of federalism by subjecting laws passed under the Commerce Clause to increased scrutiny.

The Consequences of Judicial Federalism

The Supreme Court is not alone in its interest in federalism. In many ways the Court is merely following the lead of the legislative and executive branches. Virtually every president over the last 30 years has championed federalism, advocating an increased role for states even amid growing federal power (Kinkaid 1995). Richard Nixon advocated revenue sharing, which implied a partnership rather than a hierarchical relationship between federal and state governments (Gilbert and Terrell 1998). Ronald Reagan advocated the use of block grants to give the states more flexibility and control over federal funds (Gilbert and Terrell 1998). Bill Clinton, a former governor, was particularly attuned to the needs of states. Among other examples, his reinventing government program streamlined funding sources to states and included a sorting-

out component that more carefully delineated the respective roles of the federal and state governments (Executive Order 1993).

Congress also has demonstrated a strong interest in federalism. The 104th Congress, and in particular the Republicans' Contract with America, made devolution one of its defining themes. The result was legislation such as the Personal Responsibility and Work Opportunity Reconciliation Act, which reshaped the social welfare system. Like the Supreme Court in its recent decisions, Congress reached back to pre-New Deal days, ending decades of federal centralization and replacing it with a system that returns to the states, the localities, and even the private sector a major part of the responsibility for providing public welfare (Cammisa 1998). In 1995 Congress also passed the Unfunded Mandate Reform Act, which is designed to protect the states from too much federal intrusion by requiring Congress, among other things, to consider the costs to the states of legislation that imposes responsibilities or duties on state or local governments (Osbourn 1995).

It is not surprising that legislative and executive trends in governing are mirrored by the judicial branch. Despite the judiciary's sheen of independence and impartiality, "the courts are rarely out of sync with the general tenor of political life for long periods" (Kincaid 1995, p. 915). Courts, and the judges who staff them, are not immune from public opinion, and their decisions routinely reflect existing cultural and political mores and attitudes (Cross 1999).[6]

The Supreme Court then is, in many ways, simply reinforcing and amplifying political trends in other parts of the body politic. It could be argued that by reining in Congress's power with a restrictive interpretation of the Commerce Clause, the Court is enhancing the trend toward more local and state control. However, the consequences may be quite different when it is the Court, and not the legislature or the executive, that is arbitrating the delicate balance between the state and the federal government.

Understanding why this is so first requires an understanding of the principles behind federalism, the core of the U.S. system of governing. Federalism is characterized by a multitiered power-sharing arrangement between a central authority and parallel, autonomous state governments (Riker 1964; Beer 1993; Merrill 1998). Such a design recognizes that a centralized authority is often necessary to unify a nation and to respond to shared problems while at the same time acknowledging that concentrating too much power in any one place can prove dangerous. Federalism thus acts as a power check, dispersing political power through various levels of government (Ostrom 1991; Beer 1993; Chemerinsky 1994). At the same time, a central authority can help reduce the factionalism, competitiveness, and discord characteristic of small, homogeneous units of government (Sullivan 1997).

Although federalism as a philosophy is neither conservative nor lib-

eral, it has historically been associated most often with the former (Chemerinsky 1994; Cross 1999). States rights was a central argument used to ward off federal civil rights intervention on behalf of blacks and other minorities (Kincaid 1995). More recently, states rights is seen by conservatives as a way to improve government by making it more responsive to local interests and conditions (Yoo 1998). However, liberals, too, have at times recognized the value of federalism, especially when the national government has been dominated by conservatives, as it was in the 1980s in the Reagan era (Kincaid 1995). It is then that liberals will often turn to local and state governments to protect their constituencies or advance their policies. Thus whether it is the liberals' cry for community empowerment or the conservatives' lament for states rights, federalism is a flexible system of governing that allows for shifting power arrangements.

Beer (1993) identifies three specific values served by federalism: community, utility, and liberty. Community emphasizes the desirability of letting individual communities make their own decisions. It encourages flexibility and experimentation in governing by permitting communities to mold policies to unique, local characteristics. It can be, therefore, a way to preserve diversity (Chemerinsky 1994).

Utility emphasizes the practical aspect of federalism (Beer 1993). This value of federalism looks to what works best: what level of government can more efficiently and expertly handle the task at hand. Thus, for example, military defense is better handled by the federal government, while marriage licenses are issued by the locality. Traditionally in most federalist systems there is at least some agreement on how power should be allocated. Commerce among different units within the system, defense and foreign policy, and the monetary system are usually administered at the federal level, while local and state units of government are typically given authority over education, cultural issues, and the family (Merrill 1998).

The third value of federalism is individual liberty (Beer 1993). According to John Yoo (1998), federalism protects liberty in two ways: state governments could interpose themselves against the federal government if it began to oppress people, and state governments themselves could act to extend individual liberties beyond those provided by the national government. However, other commentators argue that it is the federal government, and not the states, that is more likely to protect individual rights (Kincaid 1995; Malloy 1998).

Balancing these three values—community, utility, and individual liberty—is a delicate and subtle task made all the more complicated by the increasing complexity of modern life. In a world of global markets is it more efficient for the federal government to extend its reach over everything economic? Is education still only a matter of local concern when advances in technology make it a necessity for competing in global

markets? Are the advantages of local control negated as communities become defined less by geography than by shared interests or ethnic identity?

Several commentators argue that answering these questions should be the job of the political branches, not the judiciary (Stacey 1996; Cross 1999; Kramer 2000). "Because the net effect of federalism's underlying values depends on a host of contestable and revisable judgments of policy and prediction, it is better determined by the trial and error of the political process" (Stacey 1996, p. 258). According to these commentators, the judiciary does not have the institutional resources to make these judgments. It cannot hold hearings, weigh testimony, and negotiate and compromise with different interest groups to decide where along the continuum of federal and state power the solution lies. Nor can it properly consider the underlying values served by federalism.

The VAW Act is illustrative of why I believe the Court should hesitate before substituting its own judgment for that of the legislature. The act represents a legislative consensus, formed after intensive investigations and considerable input from individual states, law enforcement agencies, researchers, victims, and others. Legislators determined that gender-based violence infringes on a woman's basic right to move freely and safely within society and that it requires a broader-based remedy than the piecemeal and ineffectual remedies currently available in state courts. Thus, the federalist values of utility and individual liberty support an expansion of federal power in this case.

The finality of Supreme Court decisions also mitigates against the Court too readily invalidating a law supported by a majority of the states. The Supreme Court is the only branch of government whose power in such cases is virtually unchecked. Supreme Court justices cannot be voted out of office and are not held accountable for their decisions in the same way that the legislature or executive is. While, for example, the 104th Congress's Contract with America may be discarded or modified in the next electoral cycle, the *Morrison* decision is final. Congress cannot simply reintroduce the same legislation next year because its unconstitutionality has been decided. Nor can the states pass laws providing for a federal civil remedy for gender-based violence; only Congress can. The Supreme Court's decision will thus stand as a perpetual barrier to such a remedy despite its broad popular support.

The *Morrison* decision thus demonstrates how, at times, the Supreme Court can hamper the machinery of federalism. Federalism requires fluidity for it to work, with state and federal governments deciding what level of government can best address a particular problem at a particular time. Supreme Court decisions are usually more like stone than liquid; immovable, insurmountable, and resistant to change because of the institutional value of precedent and the Court's insularity from political pressure.

Thus, when the Supreme Court second-guesses the legislature, as it did in *Morrison*, it makes it more difficult for states and the national government to resolve federalism issues. The ability to move through different levels of government searching for solutions is essential in a diverse society; without this process, political paralysis may result, and experimentation may be hampered (Kincaid 1995). And it is arguably the political, not the judicial process, that is more conducive to deciding when joint governmental resources should be deployed or when to label one problem national and another local. At times the states will be able to offer a better solution because "states can tailor programs to local conditions and needs and can act as innovators in creating new programs" (Yoo 1998, p. 42). At other times it will be the federal government that can provide the most effective and comprehensive response. In short, a flexible federalism, forged primarily through the interaction between the federal and state governments, is likely to be more effective than judicially ordained solutions.

To be sure, the division of power between the states and the federal government cannot always be left to the political process. An overreaching federal government left unchecked can stifle the states, preventing creative and flexible solutions to local problems (Yoo 1998). If too much power emanates from the federal level, states may become more like administrative units of the federal government than the autonomous entities federalism requires. Thus, just as the judiciary protects the infringement of individual rights, it must also protect against the infringement of states' autonomy.

However, the Supreme Court's recent decisions indicate a willingness to protect the states even when their autonomy is not at stake. The VAW Act remedy of a federal civil action for individual victims of gender violence did not impinge on the states' domain; it only gave to individual citizens a private remedy they did not have before. And it did so with the support of the states, as more than two-thirds of states joined with the federal government in arguing for the VAW Act before the Court.

In sum, while the Supreme Court must play a role in shaping the balance of power under federalism, its most recent decisions indicate a willingness to take a more activist role in deciding where that balance should lie. This increased scrutiny of federal legislation will likely upset long-standing institutional arrangements between the states and federal governments (Kramer 2000). As I discuss next, this scrutiny will also make it more difficult to enact certain legislation on the federal level.

Future Implications

"When the Supreme Court strikes down a law, at least when it does so in a high-profile case, it does more than merely invalidate a particular statute. It sends a pulse into the lawmaking process that can have per-

vasive effects on a wide range of legislation, and it creates a rhetorical tool that can be used to great effect by ideologically motivated politicians and legislators" (Kramer 2000, p. 290). That pulse started with *Lopez*, with the shock waves increasing after *Morrison*, although the full effect of these two decisions will not be known for years to come. Many laws, from such diverse areas as the environment to child-support enforcement, rely on the Commerce Clause as a basis for federal authority and are now in question (Kolenc 1998). A specific example is the Child Support Recovery Act, passed by Congress in 1992 to make the collection of child support across state lines easier by, among other things, providing a criminal penalty for parents who fail to pay child support and who reside in a separate state from their child. While this act appeared to be surviving after *Lopez* (Kolenc 1998), it is not faring so well after *Morrison*. The Sixth Circuit Court of Appeals recently held the criminal provisions of the act to be invalid, finding, consistent with *Morrison*, that child support is not a form of commerce but is related to an area—family law—more properly left to the states (*United States v. Faasse* 2000).

The Spending Clause of the Constitution, which permits Congress to spend for the general welfare, does allow the federal government indirectly to set social policy by attaching conditions to the receipt of federal funds (Levy 2000).[7] The only restriction, established by the Supreme Court in *South Dakota v. Dole* (1987), is that the condition relate to the purposes of the federal grant. While this power has not been limited by recent Supreme Court decisions, the Spending Clause is an inadequate substitute for the Commerce Clause, and at least one commentator has suggested that it may be the next clause to be scrutinized under the Supreme Court's new federalism revolution (Levy 2000). Not all remedies to social problems necessarily require the direct expenditure of federal funds. For example, the civil remedy of permitting women to sue their attackers in federal court provided under the VAW Act was not tied to grant of federal monies and, hence, could not have been enacted under the Spending Clause. The fact that federal funds must be expended before a particular condition can be required may also act as a deterrent, especially in the often politically unpopular field of social welfare.

With no firm anchor for a wide range of civil rights and social welfare legislation, advocacy efforts on the federal level will be chilled. Statutes such as the VAW Act require a tremendous amount of energy to propose and pass; evidence must be gathered, coalitions formed, adversaries challenged, and legislators lobbied. If the constitutionality of such legislation is in doubt, support from legislators will be much harder to obtain. This is especially true for legislators who may be wavering in their support; saying no because of the Constitution is easier than merely saying no. However, *Morrison* should be read as a yellow—not a red—light for federal legislative advocacy. Even in *Morrison*, the entire

VAW Act was not invalidated; the new remedy of criminal penalties for perpetrators of gender-based violence still exists. Thus, future approaches may require scaled-down proposals that avoid constitutional objections rather than no proposals at all.

Beyond the legal lesson, there is another lesson to be learned from *Lopez* and *Morrison*. The justices who formed the majority in *Morrison*—William Rehnquist, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas—were appointed by three conservative presidents: Nixon, George Bush, and Reagan. The appointment of Supreme Court justices is one of the most important legacies left by a president. But while we are used to scrutinizing the appointment of justices and the election of presidents on hot-button issues, we are often less cognizant of their overall judicial philosophy. Unless one of the more known precedents of the Court, such as *Roe v. Wade*, appears to be in danger, the politics of Supreme Court selections often recedes into the background. This could have serious consequences, especially in the instant case. How far the Supreme Court will extend its new interpretation of the Commerce Clause will, in part, be influenced by future appointments to the Court. Therefore, policy makers and advocates, including social workers, should familiarize themselves with this less known judicial doctrine and be ready to educate the public on it and to interject it into policy debates, especially around election time.

This knowledge can help social workers in other ways as well, primarily by helping to guide strategies for influencing public policy. If remedial legislation is needed to combat a specific problem or to protect the rights of a disenfranchised group, then a determination must be made whether, given the current composition of the Supreme Court, it is likely to pass constitutional muster. If not, state and local legislatures and other regional institutions must become the focus of advocacy efforts. The current political trend of devolution has already made involvement in state and local politics a necessity (Reisch 2000). The judicial trend in the same direction requires a similar response.

Appendix

List of Legal Cases

Adair v. United States, 208 U.S. 161 (1908).
Alden v. Maine, 119 S. Ct. 2240 (1999).
Board of Trustees of the University of Alabama v. Garrett, 2001 U.S. Lexis 1700 (2001).
Bradwell v. Illinois, 83 U.S. 130 (1872).
City of Boerne v. Flores, 521 U.S. 549 (1997).
Gibbons v. Ogden, 22 U.S. 9 (1824).
Hammer v. Dagenhart, 247 U.S. 251 (1918).
Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1967).

In re Civil Rights Cases, 109 U.S. 3 (1883).
Katzenbach v. McClung, 379 U.S. 294 (1964).
Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000).
McCulloch v. Maryland, 17 U.S. 316 (1819).
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
Printz v. United States, 521 U.S. 898 (1997).
Roe v. Wade, 410 U.S. 959 (1973).
South Dakota v. Dole, 483 U.S. 203 (1987).
The Employers Liability Cases, 207 U.S. 463 (1908).
United States v. Darby, 312 U.S. 100 (1941).
United States v. Faasse, 2000 Fed. App. 0337P (6th Cir. 2000).
United States v. Lopez, 514 U.S. 549 (1995).
United States v. Morrison, 120 S. Ct. 1740 (2000).
United States v. Sullivan, 332 U.S. 689 (1948).

References

Abramovitz, Mimi. 1986. "The Privatization of the Welfare State: A Review." *Social Work* 31 (4): 257–64.

Age Discrimination in Employment Act of 1967. U.S. Public Law 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. 621–34 [1988]).

Americans with Disabilities Act of 1990. U.S. Public Law 101-336, 104 Stat. 328.

Beer, Samuel H. 1993. *To Make a Nation: The Rediscovery of American Federalism*. Cambridge, Mass.: Harvard University Press.

Brady Handgun Violence Protection Act. 1993. U.S. Public Law 103-159, 107 Stat. 1536.

Brilliant, Eleanor L. 1997. "Nonprofit Organizations, Social Policy, and Public Welfare." Pp. 68–79 in *Social Work in the Twenty-First Century*, ed. Michael Reisch and Eileen E. Gambrill. Thousand Oaks, Calif.: Pine Forge.

Cammisa, Anne Marie. 1998. *From Rhetoric to Reform?* Boulder, Colo.: Westview.

Chemerinsky, Erwin. 1994. "Courts and Constitutions: Rehabilitating Federalism." *Michigan Law Review* 92:1333–46.

Child Support Recovery Act of 1992. U.S. Public Law 102-521, 106 Stat. 3403.

Civil Rights Act of 1964. U.S. Public Law 88-352, 78 Stat. 241.

Cramer, Anna Johnson. 2000. "The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause." *Vanderbilt Law Review* 53:271–310.

Cross, Frank B. 1999. "Realism about Federalism." *New York University Law Review* 74: 1304–35.

Cross, Frank B., and Emerson H. Tiller. 2000. "The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence." *Southern California Law Review* 73:741–71.

Executive Order 12866 of September 30, 1993. Regulatory Planning and Review. 58 Fed. Reg. 51735.

Fair Labor Standards Act. 1989. U.S. Public Law 101-157, 103 Stat. 938.

Gibelman, Margaret, and Harold W. Demone, Jr., eds. 1998. *The Privatization of Human Services: Policy and Practice Issues*. New York: Springer.

Gilbert, Neil, and Paul Terrell. 1998. *Dimensions of Social Welfare Policy*. Boston: Allyn & Bacon.

Gun Free School Zones Act of 1990. U.S. Public Law 101-104, 104 Stat. 4789.

Hofstadter, Richard. 1955. *The Age of Reform: From Bryan to FDR*. New York: Random House.

Kamerman, Sheila B., and Alfred J. Kahn, eds. 1989. *Privatization and the Welfare State*. Princeton, N.J.: Princeton University Press.

Kincaid, John. 1995. "The New Federalism Context of the New Judicial Federalism." *Rutgers Law Journal* 26:913–47.

Kolenc, Antony Barone. 1998. "Commerce Clause Challenges after *United States v. Lopez*." *Florida Law Review* 50:867–931.

Kramer, Larry D. 2000. "Putting the Politics into the Political Safeguards of Federalism." *Columbia Law Review* 100:215–93.
Levy, Richard E. 2000. "Federalism: The Next Generation." *Loyola of Los Angeles Law Review* 33:1629–64.
Malloy, Elizabeth Wilborn. 1998. "Whose Federalism?" *Indiana Law Review* 32:45–70.
Merrill, Thoman W. 1998. "A New Age of Federalism." *Green Bag* 1:153–62.
Nowak, John E., and Ronald D. Rotunda. 1995. *Constitutional Law.* 5th ed. St. Paul, Minn.: West.
Osbourn, Sandra S. 1995. *Unfunded Mandate Reform Act: A Brief Summary.* Washington, D.C.: Congressional Research Service.
Ostrom, Vincent. 1991. *The Meaning of American Federalism: Constituting A Self-Governing Society.* San Francisco: Institute for Contemporary Studies.
Personal Responsibility and Work Opportunity Reconciliation Act of 1996. U.S. Public Law 104-193, 110 Stat. 2105.
Reisch, Michael. 2000. "Social Workers and Politics in the New Century." *Social Work* 45 (4): 293–97.
Religious Freedom Restoration Act. 1993. U.S. Public Law 103-141, 107 Stat. 1488.
Riker, William. 1964. *Federalism: Origin, Operation, Significance.* Boston: Little, Brown.
Stacey, Tom. 1996. "What's Wrong with Lopez." *Kansas Law Review* 44:243–62.
Sullivan, Kathleen. 1997. "The Contemporary Relevance of the Federalist." In *New Federalist Papers*, ed. Alan Brinkley, Nelson W. Polsby, and Kathleen M. Sullivan. New York: Norton.
U.S. Senate. 1990. *The Violence against Women Act of 1990: Committee on the Judiciary Conference Report.* Senate Report no. 101-545.
———. 1993. *The Violence against Women Act of 1993: Committee on the Judiciary Conference Report.* Senate Report no. 103-138.
Violence against Women Act of 1994. U.S. Public Law 106-556, 108 Stat. 1941.
Yoo, John C. 1998. "Sounds of Sovereignty: Defining Federalism in the 1990s." *Indiana Law Review* 32:27–44.

Notes

1. In *Kimel v. Florida Board of Regents* (2000) the Supreme Court held that a federal law prohibiting discrimination against the aged in employment (the ADEA) is not applicable to state governments. Similarly, in *Alden v. Maine* (1999), the Court held that Maine could not be sued in state court for violating the Fair Labor Standards Act. In *Board of Trustees of the University of Alabama v. Garrett* (2001), the Court held that state employees cannot sue for damages for violations of the American with Disabilities Act. All three decisions were based on a broad interpretation of the Eleventh Amendment, which prohibits lawsuits against a state without its consent. In *Printz v. United States* (1997), the Court struck down the Brady Handgun Violence Protection Act (1993) on the ground that Congress could not use state officials to enforce federal laws. This act required state and local law enforcement officials to conduct background checks before issuing permits for firearms. The Court found that commandeering state officials to enforce federal law violated the Tenth Amendment, which reserves all powers not delegated to the federal government to the states. In *City of Boerne v. Flores* (1997), the Court invalidated the Religious Freedom Restoration Act(1993), a federal law that limited a state's ability to pass laws that burdened an individual's ability to exercise his or her religion. The Court based its decision on the Fourteenth Amendment (explained in n. 3 below), holding that it could not be used to create new rights.

2. The Commerce Clause states: "The Congress shall have the power to… regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (U.S. Const. art. I, sec. 8 [3]).

3. The Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The highest standard of review, strict scrutiny, requires the state to show a compelling

reason for its actions and indicate that its choice results in the least amount of interference with individual rights. In contrast, the rational basis test requires only that the state have a legitimate legislative purpose and that the means chosen are not the best or even the most effective, but rational (Nowak and Rotunda 1995).

5. A study by Frank Cross and Emerson Tiller (2000) of every Supreme Court decision on federalism between 1985 and 1997 finds that the Court was more likely to rule against a liberal than a conservative plaintiff who argued for broad federal powers. Perhaps a conservative outcome sometimes supplants the uniform application of the principles of federalism.

6. Court decisions often reveal societal attitudes during a particular time period. For example, in *Bradwell v. Illinois* (1872), the Supreme Court prohibited women from practicing law, stating that, "Man is or should be women's protector and defender. The paramount destiny and mission of women are to fulfill the noble and benign office of wife and mother." Such culturally infused language underscores the fact that the judiciary can be permeated with ideology. Examples can be found in more modern cases as well.

7. For example, states that receive federal funds for welfare programs such as Temporary Assistance to Needy Families are required also to set up procedures for the collection of child support. States that receive highway funds are required to set a minimum drinking age of 21.