THE JUDICIAL SAFEGUARDS OF FEDERALISM

JOHN C. YOO*

A survey of leading constitutional law courses and casebooks might suggest that *Garcia v. San Antonio Metropolitan Transit Authority*[1] is good law.[2] It is not, nor should it be. Nevertheless, *Garcia* receives central placement in the study of American constitutional law for several reasons. It is a striking example of the manner in which the personal preferences of the individual Justices can force wholesale changes in the law. Justice Blackmun provided the fifth vote in *Garcia* to overrule directly a case decided less than ten years earlier, *National League of Cities v. Usery*, in which he also had provided the fifth vote for a holding opposite that reached in *Garcia*. Putting the Court's failure to obey its own precedents to one side, *Garcia* also presents a rare case of withdrawal of judicial review from a certain issue: here, questions concerning federal power vis-à-vis the sovereignty of the states. For it was in *Garcia* that the Court announced that it no longer would examine the constitutionality of federal legislation that threatened to violate the sovereignty of the states. After

* Acting Professor of Law, University of California at Berkeley School of Law (Boalt Hall). A.B., 1989, Harvard College; J.D., 1992, Yale Law School.

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1. 469 U.S. 528 (1985).

2. *See, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW 157-75 (12th ed. 1991); WILLIAM B. LOCKHART, YALE KAMISAR, JESSE H. CHOPER, STEVEN H. SHIFFRIN & RICHARD H. FALLON, JR., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 145-157 (8th ed. 1996); GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 266-87 (3rd ed. 1996).

Garcia, the Court declared, the rights of the states would have to find protection from the national political process. Imagine if the Court applied the same doctrine to individual rights.

Perhaps most valuable for pedagogical purposes, *Garcia* explicitly adopted an academic theory concerning the nature of the Constitution and the political process in order to justify its finding of nonjusticiability. Known commonly as the "Political Safeguards of Federalism," this theory first was put forward by Professor Herbert Wechsler and then elaborated and expanded by Professor Jesse Choper.[3] It maintains that the states do not need judicial protection from expansive federal legislation, because their role in the makeup and the operation of the national government provides them with sufficient means to protect their rights. By relying heavily on Wechsler's and Choper's work, the Court perhaps presented more interesting and challenging theoretical justifications for its holding than is commonly the case, thereby making *Garcia* a lively case to teach and discuss in law school.

This article seeks to demonstrate that under recent Supreme Court decisions, *Garcia* is no longer the controlling theory concerning judicial review of federalism questions. Despite *Garcia*'s application to questions concerning the federal laws that govern public employees, cases such as *Gregory v. Ashcroft*,[4] *New York v. United States*,[5] *United States v. Lopez*,[6] and *Seminole Tribe v. Florida*,[7] have reasserted the applicability of judicial review to questions concerning state sovereignty and the proper balance between the national and state governments. In these cases, the Court has articulated its intention to establish areas of state control that are to remain immune from federal regulation, and it has suggested that these areas can be identified by policing Congress' use of its enumerated powers. Although the Court has and will continue to debate where the line is to be drawn between federal enumerated powers and state sovereignty, there seems to be little dispute on the Court over its institutional obligation to draw that line.

3. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. Rev. 543 (1954); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

4. 501 U.S. 452 (1991).

5. 505 U.S. 144 (1992).

6. 115 S. Ct. 1624 (1995).

7. 116 S. Ct. 1114 (1996).

Resurrection of judicial review in federalism cases is supported by this Article's analysis of the text, structure, and history of the Constitution. As is apparent from a reading of the text of the Constitution, there is no explicit exception of federalism cases from the Court's jurisdiction, nor is there any other clear indication that such issues are to receive second-class status before the courts. To the extent one believes (as I do) that the Constitution and its Framers provided for judicial review, the available historical evidence demonstrates that questions of state and federal power were to receive the fullest—if not the primary—attention of the Supreme Court. Although there is a great deal of historical support for the idea that the national government itself would protect state interests, there is no evidence that the Framers understood the political process to be the *exclusive* safeguard of federalism. In fact, a review of the historical materials from the ratification process strongly indicates that the Framers believed judicial review would work in conjunction with the political process to maintain the proper balance between federal and state powers.[8]

Judicial review was necessary because of the role that the states were to play in the national political system. States were much more than mere field offices of the national government; nor were they simply the instruments of decentralized administration. Despite initial Federalist proposals to eliminate the sovereignty of the states, by the end of the ratification debates the states were understood to be primary defenders of individual rights. States would protect the rights of their citizens not only by creating and enforcing new rights, but also by simply checking the power of the federal government. The national political process could not be trusted to perform this critical function because, at least according to the Framers, national representatives would pursue their own personal or institutional interests, rather than those of the states, or of the people. Judicial review was to serve two functions, first as a guarantor of state sovereignty, and second as a protector of a state's ability to promote and preserve the rights and liberty of the people.

8. This article has drawn upon the great wealth of historical scholarship that has appeared recently concerning the ratification of the Constitution and the revolutionary and early national periods of American history. I have depended upon, as anyone who writes in this field must, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); FORREST MCDONALD, NOVUS ORDO SECULORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969), in addition to other articles and books discussed in the notes. The standard reference work will soon be JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

This Article's understanding of the purpose of judicial review suggests that the political safeguards approach may produce consequences directly opposite to the ones originally intended. Influenced by the theory of *Carolene Products*' footnote four,[9] the political safeguards argument was intended to justify the reorientation of judicial review toward the protection of discrete and insular minorities. By withdrawing from contentious federalism questions, it was hoped, the judiciary would save its political capital for use in defending individual and minority rights. In the process, however, the courts would remove the final, and perhaps ultimate, protection for rights provided by the sovereiguty of the states. If the states cannot act as *political* entities with some degree of independence, their ability to define and enforce individual rights will be damaged. By diverging from the Framers' approach to judicial review and state sovereignty, the political safeguards theory may have undermined the protection of the very individual rights that it held so dear.

Part I of this Article describes the history and formulation of the political safeguards of federalism theory. Part II then discusses *National League of Cities* and *Garcia*, and criticizes the *Garcia* Court for its failure to explain adequately its justifications for withdrawing judicial review over federalism questions. Part III traces the Court's recent rejection of the political safeguards approach, and it demonstrates how these cases have essentially overruled the reasoning of *Garcia*. Part IV shows that the Court's recent actions in this regard are fully supported by the original understanding prevalent during the Constitntion's ratification. In particular, the evidence shows that the founding generation believed that judicial review would apply to questions of federal and state power in case the normal political checks on Congress might fail. Part V places the conclusions gleaned from Parts II, III, and IV in the context of the scholarly debate over the normative value of federalism in the modern world.[10]

9. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

10. This Article does not address two significant questions related to the inquiry concerning judicial review and federalism. First, assuming that judicial review exists, it does not examine what standards the Court should bring to the line-drawing problem raised by cases such as *Garcia* and *Lopez*. This is an admittedly difficult and interesting task, but it is an undertaking that would require an entirely separate article. Second, assuming that this article proves convincing, it does not ask whether the ratification of the Fourteenth Amendment altered the scope and purposes of judicial review over federalism questions. To be sure, the Fourteenth Amendment represented a radical shift in the balance between federal and state power, one that the Court still recognizes by its refusal to allow state sovereignty to stand in the way of enforcement of laws passed pursuant to the Civil War amendments. *See, e.g.*, Henry Paul Monaghan, Comment, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996). Nonetheless, I have found no evidence from the recent scholarship on the Reconstruction period that indicates that the Fourteenth Amendment's Framers intended to remove judicial review from the federalism area. *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE:

I. THE POLITICAL SAFEGUARDS OF FEDERALISM

The argument that federal courts should not adjudicate federalism disputes was most famously posited by Herbert Wechsler in his classic article, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government.*[11] Wechsler's thesis received a more sophisticated treatment in Professor Jesse Choper's book, *Judicial Review and the National Political Process.*[12] Part A of this section will review Professor Wechsler's original insights in this area. Part B will describe Professor Choper's elaboration and expansion of the political safeguards theory, which eventually was adopted by the Court in *Garcia.*

A. THE POLITICAL SAFEGUARDS OF FEDERALISM, CIRCA 1954

Originally given at a conference on federalism to celebrate the bicentennial of Columbia University, Professor Wechsler's paper outlined the claim that the federal courts should not enforce the Constitution's textual limits on the power of the national government. One might observe that Wechsler's argument at the time amounted to a sort of academic pile-on, as the Court had declared a decade earlier that few substantive limits existed upon Congress' Commerce Clause powers.[13] Wechsler's theory, however, was significant because it provided a theoretical justification for the Court's decision to remove any meaningful restrictions on Congress'

THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

Further, it should be noted that the Supreme Court's recent decision in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), assumes that the federal courts may exercise judicial review over federalism questions, even in the context of the Fourteenth Amendment. Although Congress had enacted the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to bb-4, pursuant to its enforcement powers under Section 5 of the Fourteenth Amendment, the Court proceeded to review the constitutionality of the law to determine whether it exceeded Congress' authority and infringed on the reserved powers of the states. For example, the Court declared that "[t]he design of the [Fourteenth] Amendment and the text of [Section] 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *City Of Boerne*, 117 S. Ct. at 2164. To dispel the notion "that Congress has a substantive, non-remedial power under the Fourteenth Amendment," the Court relied upon *Oregon v. Mitchell*, 400 U.S. 112 (1970), as an example that Congress could not use its Section 5 powers to "intrud[e] into an area reserved by the Constitution to the States." *Id.* at 2167.

11. Herbert Wechsler, *supra* note 3.

12. JESSE H. CHOPER, *supra* note 3, at 171-259.

13. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

use of its power over the economy. In fact, the political safeguards of federalism theory cleverly transformed Congress from the villain into the savior, from the enemy of states' rights into their protector.

According to Wechsler, judicial intervention in federalism questions is unnecessary because the national political process itself would protect the interests of the states. Of paramount importance to Wechsler was the states' "crucial role in the selection and composition of the national authority."[14] Wechsler placed obvious importance on the equal representation of the states in the Senate and that chamber's reliance upon the seniority system, committee chairmanships, and the filibuster rule, which could allow a minority of states to block popular legislation.[15] Due to the filibuster rule, for example, the senators of only 21 states can block any legislative action by Congress. Seniority and committee organization centralize power in individual senators at the expense of the will of the majority.

Wechsler also believed that the House buttressed the voice of the states in the federal government. Although conceding that the House was a truer reflection of democratic will, Wechsler observed that the Constitution distributed representatives by state and that the states controlled the shape of congressional districts as well as voter qualifications.[16] Because he did not foresee the Court's future intervention in voting rights,[17] Wechsler maintained that the states could still manipulate the electoral process to disfavor urban population centers and to favor rural areas. While today federal law controls the composition of the electorate, in 1954 it was unclear if the Constitution even guaranteed a right to vote.

Finally, Wechsler argued that the electoral college's winner-take-all system required presidential candidates to campaign state-by-state and to appeal to state interests to build an electoral majority.[18] In order to even become a candidate for office, the President must win the state-by-state primaries in which local officials and local interests can exercise great power.[19] Although the President is the only nationally elected official of the federal government, Wechsler concluded that "the mode of his selec-

14. Wechsler, *supra* note 3, at 546.

15. *See id.* at 547-48.

16. *See id.* at 549.

17. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

18. *See* Wechsler, *supra* note 3, at 552-57.

19. Primaries themselves were not widely used until after 1960. From the 1920s to the 1960s, many states followed a party dominated model in which local party leaders played an important role in choosing the nominee. These party leaders likely were more sympathetic to state sovereignty than the average voter. JAMES W. CAESAR, PRESIDENTIAL SELECTION 227-36 (1979).

tion and the future of his party require that he also be responsive to local values that have large support within the states."[20] Responsiveness to local and state values is aptly illustrated by President Clinton's numerous visits to California during his first term; suffice it to say that he did not visit California thirty times just because he liked the weather.

Given that the states have ample means to defend their institutional interests within the federal government, Wechsler concluded that judicial review is unnecessary to protect state prerogatives. According to Professor Wechsler, "[f]ederal intervention as against the states is . . . primarily a matter for congressional determination in our system as it stands."[21] Instead of protecting states, the Court's primary role in the federalism area is in policing the states and their efforts to nullify or usurp the powers of the federal government. *McCulloch v. Maryland*,[22] not *United States v. Lopez*,[23] is the type of case ripe for judicial review. While one might read Wechsler as saying only that courts should defer to Congress rather than abstain, Wechsler never defined any role for judicial review in federalism questions.

In addition to this functional and political argument, Professor Wechsler invoked the intent of the Framers for tacit approval of his thesis. For example, Wechsler placed primary reliance upon a quote by James Madison: "as a security of the rights and powers of the states in their individual capacities ag[ainst] an undue preponderance of the powers granted to the Government over them in their united capacity; the Constitution has relied on *1*. The responsibility of the Senators and Representatives in the Legislatures of the U.S. to the Legislatures & peoples of the States . . . ."[24] Unfortunately, Wechsler was quoting a private letter written by Madison in 1830, more than forty years after the ratification of the Constitution. Madison's letter represented postratification legislative history, and therefore the quote can tell us little about the original understanding of the Court's role in federalism disputes.[25] Professor Wechsler also quoted the James Madison of *The Federalist Papers*, but only for the proposition that members of the national government would feel great loyalty to their

20. *Id.* at 558.

21. *Id.* at 559.

22. 17 U.S. (4 Wheat.) 316 (1819).

23. 115 S.Ct. 1624 (1995).

24. Wechsler, *supra* note 3, at 558.

25. Professor Wechsler also relied upon letters by Madison to others that were written in 1821, 1823, and 1825. *See id.* at 559 n.54. These sources suffer from the same problem: They fail to shed much light on the understanding of the judiciary's role that the Framers held 30 years earlier. Like anyone, Madison could change his views, and he sometimes did.

states.[26] While Wechsler correctly demonstrated that the Framers believed the political branches would play a role in protecting the states, he was unable—for reasons we will examine below—to marshal any evidence that the Framers intended this role to be exclusive.

B. THE POLITICAL SAFEGUARDS OF FEDERALISM, CIRCA 1980

Professor Choper's 1980 book was much more than a restatement of Wechsler's political safeguards thesis. To be sure, it shored up some of the shaky political and constitutional foundations of Wechsler's approach. But, more importantly, Choper expanded the scope of the theory by elevating it from the level of substance to the level of jurisdiction. Rather than struggle over what lines to draw between federal and state power, Choper argued that courts should cease drawing the lines at all. Furthermore, Choper incorporated the political safeguards thesis into a grander theory about the purposes of judicial review and the institutional role of the Supreme Court in our democracy. It was Choper's theory, more so than Wechsler's, that the Supreme Court adopted in *Garcia*.

Like Wechsler, Choper relied on the political branches to enforce the Constitution's limitations on federal power and to protect the interests of the states. Whereas Wechsler left undefined any residuary role to be left to the courts, Choper argued that the courts were to be completely ousted from questions concerning state sovereignty. Choper described what he called the "Federalism Proposal":

> The federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates "states' rights" should be treated as nonjusticiable, final resolution being relegated to the political branches—i.e., Congress and the President.[27]

Choper's "Federalism Proposal" was linked to three other proposals. The first and most significant was the "Individual Rights Proposal," in which he asserted that the Court's insulation from the political process made it the most suited of the three branches to protect individual rights—hence, all individual rights cases were to be justiciable. The second proposal, the "Separation Proposal," found that all questions involving the allocation of power between the President and Congress were, like the "Federalism Proposal," to be nonjusticiable because of the political

26. *See id.* at 546-47 (quoting THE FEDERALIST NOS. 45, 46 (James Madison)).

27. CHOPER, *supra* note 3, at 175.

branches' abilities to use other tools at their disposal to resolve their differences.[28] The final proposal, the "Judicial Proposal," maintained that the federal courts should be the final judge of the limits on the judicial power.[29]

These proposals derive from the widely shared belief that the Supreme Court is the least democratic organ of the national government.[30] Because of the judiciary's lack of power over either the sword or the purse and its lack of democratic legitimacy, the Court must depend on others to enforce its rulings. Furthermore, the Court always risks the possibility that the other branches and the public simply will ignore its rulings. Thus, Choper's effort to convince the Court to withdraw from the federalism and separation of powers arenas represents an attempt to conserve judicial legitimacy for what really counts: the protection of individual rights. By narrowing the potential scope of judicial decisions that might spark disobedience, Choper hopes that individual rights decisions will receive greater acceptance by the populace and by the goverument. Following in the footsteps of Professor Alexander Bickel, Choper believes that the Court possesses "exhaustible institutional capital" that should be reserved for protecting those who have no resort to the democratic political process.

The presence of the political safeguards of federalism is crucial to this theory. Choper can make the normative choice that individual rights, rather than federalism, should receive the Court's attentions because he believes that the Court's "activity [in the latter area] is unnecessary to effective preservation of the constitutional scheme."[31] Adding to Wechsler's arguments, Choper asserts that the composition of the national government not only is controlled by the states, but also that its members usually are drawn from the body of state officials and representatives. Moreover, the emergence of groups that lobby Congress on behalf of state governments (such as the National Association of Attorneys General or the National Governors Association) ensures that the voice of the states as institutions are heard in the hallways of the capitol.[32] These factors, according to Choper, are supported by the evidence of history, which shows that Congress has long been solicitous of states' rights and interests and that states continue to maintain their vitality.[33]

28. *See id.* at 263.

29. *See id.* at 382-83.

30. For the leading proponent of this position, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

31. CHOPER, *supra* note 3, at 169.

32. *See id.* at 80-81.

33. *See id.* at 184-90.

Anticipating potential arguments based on evidence of the Framers' intent, Choper claimed that such history was no guide. *The Federalist Papers* and its authors, he asserted, were contradictory on this point. For example, even though Madison believed in judicial review, he also wrote *The Federalist No. 46*, in which he explained that the federal government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments."[34] Although Hamilton wrote the famous defense of judicial review in *The Federalist No. 78*, he never mentioned any role for the federal courts in *The Federalist No. 33*'s discussion of the limits on congressional power. *The Federalist Papers* themselves were not authoritative legislative history, Choper suggests, but instead were partisan devices aimed at mollifying opposition to the Constitution. A better reading indicates that the primary role for judicial review in the federalism area is to protect the federal government from the states, not vice versa. But even if the history were certain, Choper concludes, it is of questionable use for the process of constitutional interpretation.[35]

Choper essentially surmised that the intent of the Framers, if there were one, could not withstand the weight of experience. Summarizing a wealth of political science literature, Choper maintained that Wechsler's theory worked in practice; it worked so well, in fact, that judicial review was unnecessary for the protection of the states. This was, frankly, not only an ahistorical approach, but a nonlegal one as well. His arguments were not rooted in any interpretation of the constitutional text, nor in any examination of the surrounding history and structure of the document. Instead, as his book's subtitle—*A* Functional *Reconsideration of the Role of the Supreme Court*—indicates, Choper's analysis is one that attempts to determine what mechanisms of government are best suited for which tasks. As I have argued in another context, basing constitutional interpretation exclusively on function is inconsistent with the point of a written constitution.[36] Such an approach implies that if the institutional competencies of different branches should change, then the Constitution should change as well—a result at odds with the establishment of a written constitution of "defined and limited" powers.[37]

34. THE FEDERALIST NO. 46, at 319 (James Madison) (Jacob E. Cooke ed., 1961).

35. *See* CHOPER, *supra* note 3, at 242.

36. *See* John C. Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996).

37. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

Critics have identified a number of other difficulties with the political safeguards approach.[38] Several have argued that the political science underlying the idea that the interests of the states were well represented in the national government was probably outdated in 1954, and certainly was by 1980. Ratification of the Seventeenth Amendment appears to have severed any institutional link between a state government and its senators. Changes in culture, technology, and the economy have diluted regional and local identities in favor of politics that are national in scope and in focus. If there ever was a political culture that emphasized reliance upon the states for the solution to social and economic problems, the sweeping federal environmental, economic, welfare, and entitlement laws of the 1960s and 1970s replaced it with a mindset that seeks federal answers first. The Supreme Court in the same period federalized control over the composition of the electorate, and presidential elections evolved into a plebiscitary primary system.[39] The political safeguards model also failed to take into account the vast power that the federal government could wield against the states by using federal money and grant programs.[40] Others have argued that the political safeguards theory simply is inconsistent with the text of the Constitution, for it ignores the absence of any textual exception for judicial review of federalism questions, and it also overlooks other provisions that seem to recognize state sovereignty, such as the Guarantee Clause.[41] As we will see in the next section, however, these criticisms did not prevent the Court in *Garcia* from withdrawing judicial review over questions concerning the scope of federal and state power.

II. THE COURT AND THE POLITICAL SAFEGUARDS OF FEDERALISM

This Section describes the Supreme Court's willing embrace of the political safeguards argnment. It discusses the background of the issue that the Court finally resolved in *Garcia v. San Antonio Metropolitan Transit Authority*, and it lays out the theoretical justifications offered by the majority and the minority in *Garcia* itself. The next Section will trace

38. A useful description of the various modern criticisms of the political safeguards model can be found in Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1996) and in John C. Pittenger, Garcia *and the Political Safeguards of Federalism: Is There a Better Solution to the Conundrum of the Tenth Amendment?*, 22 PUBLIUS 1 (1992).

39. *See* CAESAR, *supra* note 19, at 236-59.

40. *See* Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979).

41. *See, e.g.*, William W. Van Alstyne, Comment, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

the success of the political safeguards approach in subsequent cases. In these more recent cases, I conclude, the Court appears to have overruled *Garcia* sub silentio.

A. THE FIRST SWING AT THE PLATE: *NATIONAL LEAGUE OF CITIES*

Garcia and the cases before it addressed the difficult problem of the extent to which the federal government can regulate the operations of state government. *Garcia* attempted to end a controversy on the Court over whether state sovereignty precluded Congress from forcing state governments to obey broad regulatory schemes "in areas of traditional governmental functions."[42] The *Garcia* Court also appeared to settle the issue of whether the federal judiciary even ought to review questions concerning the balance between federal and state power. In order to understand both *Garcia* and the stance of the current Court, it is useful to review the background leading to *Garcia.*

Both *National League of Cities* and *Garcia* addressed the applicability of the Fair Labor Standards Act ("FLSA") to employees of state and local governments. Passed in 1938, the FLSA sets national standards for the minimum wages and overtime pay that *private* employers must pay to their employees.[43] In 1941, a unanimous Supreme Conrt upheld the FLSA as a legitimate exercise of Congress' plenary authority nnder the Interstate Commerce Clause.[44] Although the FLSA at first excluded states and political subdivisions from its coverage, Congress, in the 1960s and 1970s, chose to subject a variety of *public* employers to its provisions. In the 1968 case of *Maryland v. Wirtz,*[45] the Court upheld this expansion and conclnded that the claim that the FLSA "may not be constitutionally applied to state-operated institutions because [the Commerce Clause] must yield to state sovereignty in the performance of governmental functions" was "not tenable."[46] It must be noted, however, that *Wirtz* was not unanimous, as Justice Donglas, joined by Justice Stewart, dissented on the ground that "what is done here is . . . such a serious . . . invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism."[47]

42. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1984).
43. *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1994).
44. *See* United States v. Darby, 312 U.S. 100 (1941).
45. 392 U.S. 183 (1968).
46. *Id.* at 195.
47. *Id.* at 201 (Douglas, J., dissenting).

During the nation's bicentennial year, the Court overruled *Wirtz* in *National League of Cities v. Usery*.[48] *National League of Cities* challenged the constitutionality of amendments to the FLSA that expanded its coverage to "almost all public employees employed by the States and by their various political subdivisions."[49] Although the Court recognized its earlier holding that the FLSA lay within Congress' Commerce Clause powers, it found that this authority did not apply with the same force to the states as it did to private employers. As then-Jnstice Rehnquist wrote for a 5-4 Conrt: "It is one thing to recognize the anthority of Congress to enact laws regnlating individual businesses," but it is "qnite another to uphold a similar exercise of congressional authority directed, not to private citizens, bnt to the States as States."[50] The Constitution prohibited Congress from regulating the states "not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[51]

National League of Cities presented the Court with a difficult problem, however, because the Constitution contains few affirmative descriptions or enumerations of a state's sovereiguty. Article I contains several descriptions of a state's authority in the electoral process. Article I, Section 10, as well as the Bill of Rights and the Reconstruction Amendments, contain negative prohibitions on the states, which provide some clue about the powers that the states possess in the absence of those prohibitions. Article IV guarantees a "Republican Form of Government" in each state. The Ninth and Tenth Amendments contain general reservations clauses which indicate that the states and their people are to retain all the powers and rights not explicitly given to the federal government. But beyond these provisions, the text of the Constitution provides little guidance abont the scope of state sovereignty and its freedom from federal regulation.

Faced with this challenge, the Court attempted to draw the line between federal and state power by inquiring into the core functions of the states. If the federal law precludes state determinations involving "functions essential to separate and independent existence"[52] of the states, the Court declared, then "Congress may not abrogate the States' otherwise

48. 426 U.S. 833 (1976). Although the Court followed *Wirtz* in *Fry v. United States*, 421 U.S. 542 (1975), it did so on narrow grounds because the Economic Stabilization Act at issue in that case was a limited emergency measure.

49. 426 U.S. at 836.

50. *Id.* at 845.

51. *Id.*

52. *Id.* (quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911)).

plenary authority to make them."[53] As the Court described it, "[o]ne undoubted attribute of state sovereignty," was the power to determine the hours and compensation of employees who work for the state government.[54] The FLSA not only increased the financial burdens on the states, but it also "supplant[ed] the considered policy choices" of the states concerning employment, and it threatened to "substantially restructure traditional ways in which the local governments have arranged their affairs."[55] *Wirtz* had to be overruled, the Court concluded, because the FLSA had the effect of impermissibly interfering with "integral governmental functions" and of impairing the states' "ability to function effectively in a federal system."[56]

Justice Brennan's blistering dissent laid the theoretical foundations for the Court's about-face in *Garcia*. Calling the majority opinion a "catastrophic judicial body blow at Congress' power under the Commerce Clause,"[57] Justice Brennan asserted that the Constitution did not provide explicit judicial protections for state sovereignty. "[T]here is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on the commerce power."[58] The dissent claimed that cases as venerable as *Gibbons v. Ogden*[59] and as recent as *Wickard v. Filburn*[60] had established that Congress' Commerce Clause authority was truly plenary.

Justice Brennan's dissent surely went too far in arguing that the Constitution did not protect the sovereignty of the states. Justice Brennan and his fellow dissenters apparently saw no constitutional difficulty in the federal management of every incident of state government, and their reasoning implied that the states merely existed at the sufferance of the national government. As we will see later, such an idea would have horrified the Framers and would have undermined Justice Brennan's subsequent insight that the states have a significant role to play in protecting individual rights.[61]

53. *Id.* at 845-46.
54. *Id.* at 845.
55. *Id.* at 848, 849 (quoting *Fry v. United States*, 421 U.S. 542, 547 (1975)).
56. *Id.* at 851, 852.
57. *Id.* at 880 (Brennan, J., dissenting).
58. *Id.* at 858 (Brennan, J., dissenting) (footnote omitted).
59. 22 U.S. (9 Wheat.) 1 (1824).
60. 317 U.S. 111 (1942).
61. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

Justice Brennan found firmer ground when he contended that the structure of the national government would protect state interests. As he declared in dissent: "Judicial restraint in this area merely recognizes that the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and that the States are fully able to protect their own interests in the premises."[62] Relying heavily on two of James Madison's contributions to *The Federalist Papers* and on Professor Wechsler's article on the political safeguards of federalism, the dissent argued that the proper allocation of power between the federal and state governments did not require judicial intervention.[63] Any exercise of power by the federal government at the expense of the states therefore was ipso facto constitutional because the states, which controlled the national government through its elected representatives, had given their political assent. "Decisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are in that sense decisions of the States themselves," Justice Brennan concluded.[64]

As is often the case, in the years following *National League of Cities,* the Court attempted to formulate its protections for state sovereignty into a test. In four cases between *National League of Cities* and *Garcia*, the Court upheld the application of various laws to the states, but in so doing developed several criteria for government immunity.[65]

> First, the federal statute must regulate "the 'States as States.'" Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.'" Third, state compliance with the federal statute must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the relation of federal and state interests must not be such that "the nature of the federal interest . . . justifies state submission."[66]

In particular, the third factor—areas of "traditional governmental functions"—produced confusion and difficulties. As the Court was to make clear in *Garcia*, the lower federal courts split chaotically in their efforts to identify areas that were within the traditional control of the

62. *National League of Cities*, 426 U.S. at 876 (Brennan, J., dissenting).

63. *See id.* at 876-77 (Brennan, J., dissenting).

64. *Id.* at 876.

65. *See* EEOC v. Wyoming, 460 U.S. 226 (1983); FERC v. Mississippi, 456 U.S. 742 (1982); United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

66. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537 (1984) (quoting *Hodel v. Virginia Surface Mining and Reclamation Ass'n.*, 452 U.S. 264, 287-88 & n.29 (1981)).

states.[67] Nor did the Court use either *National League of Cities* or the cases that followed to identify principles that could define which state functions were immune from federal regulation and which were not. It was unclear whether the courts were to use a historical approach, which would ask whether states had traditionally held authority in a certain field, or a more functional approach. For example, the Court gave little indication whether a difference existed between a state function that was performed only by the government—such as police or fire protection—and one in which the state was in competition with private actors—such as operating a college or a hospital.[68]

Commentators quickly attacked *National League of Cities* for its failure in providing detailed guidance for the future. Some argued that the majority failed to articulate a general principle that could direct legislators and judges in determining the scope of federal regulatory power.[69] A later writer compared the Court's effort to restrain federal power to its earlier attempt in *Lochner v. New York*[70] to protect economic rights because in both cases a majority of the Court had relied upon "unclear" and "indefinite" constitutional concepts to substitute its substantive policy views for those of the elected branches.[71] Even supporters of the Court's general project to protect federalism complained that its effort to articulate a doctrine with clear, meaningful standards was unsatisfying.[72]

As would become clear, this problem troubled Justice Blackmun, who had provided the crucial fifth vote in *National League of Cities* and who had concurred to express his reservations.[73] In the cases that followed, Justice Blackmun joined with the four dissenters from *National League of Cities* to uphold federal regulation of the states. Although the Court reduced *National League of Cities* to a four-part test, it did little to further articulate or refine the standards that would apply.

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67. *See Garcia*, 469 U.S. at 538-39 (collecting cases).

68. *See* Kaden, *supra* note 40, at 887.

69. *See, e.g.*, Choper, *supra* note 3; Archibald Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U. L. REV. 1 (1978); Laurence H. Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

70. 198 U.S. 45 (1905).

71. *See* Martha A. Field, Comment, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 89-95 (1985).

72. *See* Kaden, *supra* note 40, at 886-89.

73. Field, *supra* note 71, at 87. For an interesting examination of Justice Blackmun's decision to switch his position based on internal court documents, see Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 VAND. L. REV. 1623 (1994).

B. THE SECOND SWING: *GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY*

In *Garcia*, Justice Blackmun switched sides on the judicial review question and sided with the four dissenters in *National League of Cities*. Lower courts had split on the question whether the state or local provision of a mass-transit system was a "traditional governmental function" under *National League of Cities* and therefore was exempt from the FLSA.[74] Both parties conceded, and the Supreme Court agreed, that if the San Antonio Metropolitan Transit Authority were a private employer, Congress would possess the authority to regulate its activities under the Commerce Clause.[75]

Focusing on the third factor of the *National League of Cities* test, the Court asserted that it was "difficult, if not impossible" to articulate a principle that could identify traditional governmental functions.[76] After reviewing the Court's similar failure in the related area of intergovernmental tax immunity, the Court declared that there were no distinctions or "standards that might be employed to distinguish between protected and unprotected governmental functions."[77] Both historical and functional inquiries, the Court concluded, were equally unworkable and unmanageable. In fact, any effort to identify such standards was inconsistent with the principles of federalism, which ought to leave open to the states any powers they might need to advance the common good.[78]

Federalism also required that the states could not escape regulation by the federal government. According to the Court, because the Constitution itself places limits on the powers of the states, there were no permanent, fundamental elements of state sovereiguty. States retain their powers only to the extent that the Constitution did not transfer them to the national government. Therefore, state sovereiguty must give way before valid exercises of Congress' plenary powers. In admitting that some residual state sovereignty might exist, the Court brought forth the argument that the political structure of the national government provided adequate protection for state interests. Justice Blackmun declared:

> The principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Fed-

74. See cases cited in *Garcia*, 469 U.S. at 530 n.1.
75. *See id.* at 537.
76. *Id.* at 539.
77. *Id.* at 543.
78. *See id.* at 546.

> eral Government was designed in large part to protect the States from overreaching by Congress.[79]

Here, the Court cited approvingly to both Professor Jesse Choper's 1980 book, *Judicial Review and the National Political Process*, and Professor Herbert Wechsler's 1954 article *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government.*[80]

The Court relied upon its reading of the Framers' intent for the extraordinary proposition that judicial review over federalism issues was no longer necessary. According to Justice Blackmun's opinion, state control over voter qualifications and the state role in the electoral college gave the states a powerful voice in the selection of both President and the House. States also possessed direct influence in the legislative process, due to their equal representation in the Senate, which the Constitution protected from change even by constitutional amendment. Two pieces of evidence allegedly supported the Court's conclusion that these structural elements provided an adequate protection for state interests. First, the Court quoted James Madison and James Wilson to prove that the Framers shared an intent to oust judicial review in this area. "[T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority."[81] Second, the Court claimed that modern legislation proved that the Framers' political safeguards were functioning as intended. In particular, the Court pointed to examples of federal grant money to states and exemptions for states contained in federal regulatory programs to prove its point.[82] According to the Court, this evidence demonstrated:

> [T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."[83]

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79. *Id.* at 550-51.

80. *Id.* at 551 n.11. The Court also cited for support D. Bruce LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982).

81. *Garcia*, 469 U.S. at 552.

82. *See id.* at 552-553.

83. *Id.* at 554 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1985)).

Toward the end of the opinion, the majority did note that the case did not require the Court to identify "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause."[84] Nonetheless, the Court indicated that such affirmative limits would not be necessary because, in its view, "[t]he political process ensures that laws that unduly burden the States will not be promulgated."[85] As observers noted soon after the decision, the Court had withdrawn from the enforcement of any substantive limits on federal power in favor of a process-based approach to judicial review.[86]

Four Justices dissented in opinions by Justices Powell, Rehnquist, and O'Connor. Justice Powell's main dissent, like Justice O'Connor's, concentrated primarily on stare decisis, the benefits of federalism, and the need to identify standards limiting federal power. In a short section addressing the political safeguards theory, Justice Powell made two arguments, one based in political science and another based on the Constitution. First, Justice Powell argued that there was no reason to believe that national officeholders would feel any loyalty to the states once they assumed office. In a footnote, he detailed recent structural and political changes in the federal system that have elevated the concerns of uational constituencies over local concerns: the direct election of senators,[87] the weakening of political parties locally, and the rise of the national media.[88]

Second, Justice Powell argued that the Court had abdicated its duty to enforce the Constitution. Simply because the political process has the effect of protecting federalism, Justice Powell argued, does not mean that the political process is the only way of enforcing federalism. "The fact that Congress generally does not transgress constitntional limits on its power to reach state activities does not make judicial review any less necessary to rectify the cases in which it does do so."[89] Summoning forth both *The Federalist No. 78* and *Marbury v. Madison*,[90] the dissent argued that the "fundamental principles of our constitutional system" require that the Court not create an exception to judicial review.[91] The dissent also noted in passing that the majority's theory would preclude judicial review of separation of powers questions, since the executive branch could protect its

84. *Id.* at 556.

85. *Id.*

86. *See, e.g.*, Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 1985 SUP. CT. REV. 341.

87. *See* U.S. CONST. amend. XVII.

88. *See Garcia*, 469 U.S. at 565 n.9 (Powell, J., dissenting).

89. *Id.* at 566-67 (Powell, J., dissenting).

90. 5 U.S. (I Cranch) 137 (1803).

91. *Garcia*, 469 U.S. at 567 (Powell, J., dissenting).

interests in the electoral process, and even forestall review of individual rights questions, because Congress is composed of individuals.[92]

Relatively unmoved by the dissent's arguments, the *Garcia* majority did not take the trouble to address several of the siguificant points raised. It simply did not reply to Jnstice Powell's arguments about the nature of judicial review, nor did it meaningfully reply to his claim that politics had become more focused on national issues. To be sure, the Court did discuss how the political process could, and often does, succeed in protecting state interests. But the Court did not explain whether judicial review was unnecessary because the political process always protected state sovereignty, or because Congress was functionally superior to the judiciary in performing that task. Nor did the Court confront the question of whether judicial review would be necessary if the political process ceased protecting state sovereignty, if a large coalition of states nsed the political process to oppress a minority of states, or if certain structural defects skewed the results of the national political process against state interests.

A central source of the unsatisfactory nature of the majority opinion was its assumption that the protection of the interests of individual states paralleled the promotion of federalism. In fact, the Court seemed to assume that state interests and the interests of the federal system of government would be identical. There was no discussion of the point, which the dissent admittedly had not pressed clearly, that the interests of the people as a whole, or of the people of the states, at times might be contrary to the purposes of federalism. Indeed, it is possible that the temporal interests of the states could vary from the more permanent structural interests behind the federal system of government. This might occur if all of the states wanted to turn over a basic function, for example, law enforcement, to the federal government because it was too expensive.[93]

Perhaps even more disturbing, the majority saw little need to answer the dissent's claims about judicial review. Justice Blackmun's opinion for the Court provided a political reason why judicial review was unnecessary in federalism cases, but it provided no constitutional reason. For all of its reliance upon the framing, the Court revealed no evidence that demonstrated that the drafters and ratifiers of the Constitution thonght judicial review would not apply to questions of federal and state power. Jnstice Blackmnn never explained why the text and structure of the Constitution, which Chief Justice Marshall had invoked so elegantly to formulate the

92. *See id.* at 565 n.8, 567 n.12.

93. *See infra* text accompanying notes 362-66.

principle of judicial review, should contain this implicit exception for cases involving state sovereignty.

Worse yet, the Court placed no limits on its theory concerning judicial review. The majority's reasoning suggests that if a group or institution is properly represented in the national political process, it has no need for judicial protection from unconstitutional legislation. Indeed, the reasoning of *Garcia* implies that judicial review as a whole is unnecessary in many other cases, such as those involving the separation of powers. As Professor William W. Van Alstyne wrote after *Garcia* was decided: "Stripped of its elegance, *Garcia* proposes the piecemeal repeal of judicial review. It also involves a double counting of what are in fact merely prejudicial and post-judicial 'safegnards' of the American constitutional plan, safeguards (such as they are) merely additional to, *and not in substitution of*, substantive judicial review."[94]

Instead of refusing to address the *Marbury* argument, the Court could have argued that federalism interests had to take a back seat to other, more important values. Following the approach of Professor Choper, for example, the Court could have concluded that enforcing federalism would only detract from its ability to protect individual rights and that its higher constitutional responsibilities in the latter area meant withdrawing judicial review from the former. But the Court did not adopt this "political capital" theory and thus failed to place any coherent limits on its political safeguards theory.

Another argnment lay ready for the majority, only to be left unspent. In reviewing the need to reexamine *National League of Cities*, the Court emphasized the difficulties in articulating principles concerning state sovereignty that judges and legislators could apply. Justice Blackmun could have taken the next step and maintained that the whole area of federalism was a political question better left to the political branches. This would have been natural, as the author of the *National League of Cities* dissent, Justice Brennan, also had given the political question doctrine its modern form in *Baker v. Carr*.[95] Several of the arguments made by Justice Blackmun in *Garcia* closely paralleled three of the most prominent factors that indicate the presence of a political question: first, "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; second, "a lack of judicially discoverable and manageable stan-

94. Van Alstyne, *supra* note 41, at 1724.
95. 369 U.S. 186 (1962).

dards for resolving it"; and third, "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[96]

It is puzzling that the *Garcia* majority did not resort to the political question doctrine, especially since some members of the dissent, in other cases, had acknowledged its application.[97] Perhaps Justice Blackmun chose not to press the point because he did not want the case to turn on the identification of applicable standards. It bears noting that the majority had only discussed the difficulty of articulating standards to indicate that there was a deeper difficulty with judicial review in this area. It had avoided the implication that the lack of articulable standards constituted sufficient grounds for eliminating judicial review, and it refused to respond to Justice Powell's and Justice O'Connor's arguments that the Court could produce manageable standards in the area of federalism, which suggested that this point was not crucial after all. Perhaps the Court was admitting, as had Professor Choper, that standards in individual rights cases could be just as difficult to articulate and apply as those involving federalism. In Professor Choper's words, "[a] great many of the personal liberties questions that the Court decides . . . similarly subsume large policy issues with complex and debatable factual considerations."[98]

A deeper purpose, however, motivating the Court may have derived from its vision of the purpose of judicial review. Although the Court refused to answer the dissent's *Marbury* argument, the majority's reasoning can be seen as a natural outgrowth of the *Carolene Products* approach to protecting individual rights. In footnote four of *Carolene Products*, Chief Justice Stone had questioned "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[99] Judicial review was required in the individual rights area because of the breakdown or the unreliability of the political process in protecting minority rights. Judicial review, which the Court had withdrawn from cases involving economic regulation, now was to be reoriented toward policing the workings of majoritarian democracy.[100]

96. *Id.* at 217.

97. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979) (Rehnquist, J., concurring); *id.* at 998 (Powell, J., concurring).

98. CHOPER, *supra* note 3, at 203.

99. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

100. *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 714-15 (1985); Jack M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 283 (1989); Owen Fiss, *Foreward: The Forms of Justice*, 93 HARV. L. REV. 1, 6-7 (1979).

Refusing to employ judicial review in the federalism area inverts the *Carolene Products* approach. If judicial review is necessary when the political process fails to protect a group, then judicial intervention should be equally unnecessary when a group—here, the states—is adequately represented in the governmental system. All that remains for the federal courts, then, is to determine if the national political process itself "did not operate in a defective manner."[101] Analyzing the Court's decision in this manner, however, reveals again some of the shortcomings of the majority's approach. Justice Blackmun's opinion, for example, does not (and perhaps cannot) discuss how a court would determine when the political process was operating in a defective manner. How would a court distinguish between results that arise from states losing a political contest and results produced because states constituted a minority subject to systematic and intentional discrimination?[102] What remedy should a federal court employ if the states became a minority group whose interests were consistently overridden by the national government? The fact that the federal government can and often does protect state sovereignty does not mean that it always will.

There is one last troubling aspect to the *Garcia* majority's opinion. Despite the numerous significant arguments that were raised, or could have been raised, by the dissents, the majority refused to narrow the reach of its reasoning. The Court could have limited its decision to cases in which the states were regulated directly, rather than when they were merely subjected to general laws.[103] The Court also might have attempted to distinguish between the regulation of states and the general use of Congress' Commerce Clause powers. Instead, the Court's expansive holdings, and its reliance on Professors Wechsler and Choper, suggested that not just the states but also their *interests* would be protected through the political process. As *Garcia* concluded, "[s]tate sovereigu interests, then, are more properly protected by procedural safegnards inherent in the structure of the federal system than by judicially created limitations on federal power."[104] When combined with the Court's post-1930s refusal to enforce limits on the general Commerce Clause power, this suggested that the Court was an-

101. South Carolina v. Baker, 485 U.S. 505, 513 (1988).

102. *See* Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1089-91 (1982).

103. The provisions of the FLSA at issue had been added by Congress specifically to include employees of state and local governments. Originally, the FLSA had not applied to government employees. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 533 (1985).

104. *Id.* at 552.

nouncing its intention to withdraw from all questions involving the boundaries between federal and state power.

Perhaps it was the cursory, almost cavalier manner in which the majority shrugged off the dissents that led both then-Justice Rehnquist and Justice O'Connor to promise that they would work to reverse *Garcia*.[105] We will see in the next section that the Chief Justice and Justice O'Connor, joined by three new members of the Court, have kept their promise.

III. THE THIRD SWING: JUDICIAL REVIEW IN THE REHNQUIST COURT

Since *Garcia*, four cases have come before the Court that could have been avoided under the political safeguards theory: *Gregory v. Ashcroft*,[106] *New York v. United States*,[107] *United States v. Lopez*,[108] and *Seminole Tribe v. Florida*.[109] In each case, rather than accept the decision of the elected, coordinate branches, the Court moved forward to decide the federalism issue on the merits. Instead of examining whether the States had the opportunity to make their interests known in the political process, the Court intervened to enforce limits on federal power. Rather than defer to the results of the political process, the Court attempted to draw clear lines between the enumerated powers of the federal government and the sovereignty of the States. In each of these cases, the dissenters in *Garcia* were able to attract new Justices to join their side, making good on their efforts to reverse the *Garcia* approach to judicial review.

Despite its active intervention in federalism questions, the Court has yet to explicitly override *Garcia*. The dissents in *Ashcroft* and *New York*

105. *See id.* at 580 (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."); *id.* at 589 (O'Connor, J., dissenting) ("I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility.").

106. 501 U.S. 452 (1991).

107. 505 U.S. 144 (1992).

108. 514 U.S. 549 (1995).

109. 116 S. Ct. 1114 (1996). In late June 1997, as this article was going to press, the Court issued three significant decisions involving state sovereignty: *Printz v. United States*, 117 S. Ct. 2365 (1997) (invalidating portion of Brady Handgun Violence Prevention Act for commandeering state executive officers to execute federal law); *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (invalidating Religious Freedom Restoration Act as beyond Congress' powers under Section 5 of the Fourteenth Amendment); *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028 (1997) (dismissing claim by Indian tribe against state on state sovereign immunity grounds). Production schedules prevent a full examination of these cases, but in main they reinforce the conclusions of this article. Notes will mark where these cases support different points made in this section.

accused the majority of essentially doing so, but the Court did not take up the opportunity. In *Lopez* and *Seminole Tribe*, the same majority again plunged into line-drawing questions concerning the border between federal and state power, but this time the dissents failed to resurrect the Political Safeguards theory, even though it would have bolstered their arguments. It seems, therefore, that both the current majority on the Court, which has favored restrictions on federal authority, and the dissenters, who have been less willing to enforce such limits, have acquiesced in the overruling of *Garcia*. Whether the Court will explicitly overrule *Garcia* is almost a moot question, because the Court already has decided to ignore its requirements and to exert full judicial review over questions involving state sovereignty and federalism.

A. *GREGORY V. ASHCROFT*

Gregory v. Ashcroft[110] struck the first blow against the political safeguards theory. The case called upon the Court to determine whether the Age Discrimination in Employment Act of 1967 ("ADEA")[111] applied to state judges who had reached mandatory retirement age under state law. Justice O'Connor, writing the majority opinion for *Gregory*, crafted a new clear statement rule that required Congress to state explicitly its intent to regulate state employees. If *Garcia* meant, however, that such questions were to be left entirely up to the political branches, then such a clear statement rule should not have been compelled.[112] The Court's decision not to employ normal methods of statutory interpretation indicated that a new majority—led by Chief Justice Rehnquist and by Justice O'Connor—would be willing to discard *Garcia*.

In *Ashcroft*, several Missouri state judges brought suit against the governor to prevent enforcement of a state constitutional provision that required most state judges to retire at age seventy.[113] They claimed that the state law was illegal under the ADEA, which prohibits any "employer" from "discharg[ing] any individual" who is at least 40 years old "because of such individual's age."[114] These judges appeared to have a meritorious case. Expressing an explicit intent to bring states within the ADEA's coverage, Congress had defined "employer" to include "a State or political

110. 501 U.S. 452 (1991).

111. 29 U.S.C. §§ 621-34 (1994) (as amended).

112. One might read *Ashcroft* as forcing Congress to truly deliberate before deciding to encroach upon state sovereignty, a result in line with process theory. *Ashcroft*, however, is better read in light of *New York*, *Lopez*, and *Seminole Tribe* in the manner presented here.

113. *See* MO. CONST. art. V, § 26.

114. 29 U.S.C. §§ 623(a), 631(a) (1967).

subdivision of a State."[115] Congress did exclude, however, individuals who were "elected to public office," their personal staffs, "an appointee at the policymaking level," and certain "immediate adviser[s]."[116] But nowhere did the statute contain an explicit exemption for judges.

As the state argued, one certainly could read "appointee at the policymaking level" to include judges. This reading, however, would be a stretch. Applying the canon of *noscitur a sociis*—that a word is known by the company it keeps[117]—it seems reasonably clear that Congress intended all three exceptions to apply to elected officials, their staffs, and appointees such as agency or commission heads. Indeed, as the Court itself conceded, the phrase *policymaking appointee* "particularly in the context of the other exceptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not 'employees' would seem the most efficient phrasing."[118] One does not need to join the dissenters in their excursion into legislative history to agree with them, because the ADEA's text provides a fairly clear answer.[119]

A reading of the ADEA, therefore, according to the normal rules of statutory interpretation would yield the natural result that the ADEA was iutended to protect state judges from mandatory retirement laws. In this respect, the ADEA resembled the FLSA, because both laws sought to expose public employers to the same regulatory environment governing private employers. Under *Garcia*, this decision was wholly within the plenary authority and discretion of Congress, and if the states objected to this expansion of federal regulation, they had to seek redress through the political branches. A faithful application of the political safeguards approach would have required the Court to uphold the application of the ADEA to state judges.

Justice O'Connor and the majority, however, did not see things so clearly. Justice O'Connor began her opinion in the same manner as Justice Rehnquist had begun his majority opinion in *National League of Cities* and as Justice Powell had begun his dissent in *Garcia*: by a recitation of the values of federalism. The Constitution, Justice O'Connor reminds us, established a government of dual sovereigns, in which the federal government exercised only limited, enumerated powers and in which the states,

115. *Id.* at § 630(b)(2).

116. *Id.* at § 630(f).

117. *See, e.g.*, Russell Motor Car Co. v. United States, 261 U.S. 514, 519-20 (1923). For a recent dispute over the canon's application, see Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 575 (1995); *id.* at 586-87 (Thomas, J., dissenting).

118. Gregory v. Ashcroft, 501 U.S. 452, 467 (1991).

119. *See id.* at 489-94 (Blackmun, J., dissenting).

by virtue of the Tenth Amendment, "retain substantial sovereign authority."[120] Relying upon Justice Powell's dissent in *Garcia* and upon *The Federalist Papers*, among other sources, the Court declared that "the principal benefit of the federalist system is a check on abuses of government power."[121] The Court believed that a "proper balance" between federal and state power had to be maintained in order for them to restrain each other. "In the tension between federal and state power," the Court intoued, "lies the promise of liberty."[122] Although the Court did not explicitly state its role in this tension-filled relationship, it became apparent who was to maintain that balance.

In light of the importance of preserving federalism, the Court declared that it would impose a presumption, in the form of a clear statement rule, against interpreting federal statutes to regulate state officers. At issue was the state's sovereign right to define the qualifications of its most important officials. "[A]n authority," the Court observed, "that lies at the heart of representative government" and is reserved to the states by the Tenth Amendment and the Guarantee Clause.[123] To protect this power, the Court drew upon two related doctrines in crafting a clear statement rnle. First, the Court relied upon its Eleventh Amendment precedent, which requires Congress to state clearly when it intends to override state sovereign immunity, and similar federal preemption cases.[124] Second, the Court referred to the "political function" exception to the review of state laws that exclude aliens from important government positions.[125]

Borrowing from these doctrines, the Court held that Congress must state clearly its intent to regulate the qualifications of state governmental officials. Apparently, this was consistent with *Garcia*, which the majority admitted "constrained [its] ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause."[126] Instead, the plain statement rnle was necessary to avoid constitutional difficulties. "Indeed," the Court declared, "inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."[127]

120. *Id.* at 457.
121. *Id.* at 458.
122. *Id.* at 459.
123. *Id.* at 463 (citing Bernal v. Fainter, 467 U.S. 216, 220 (1984)).
124. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237-40 (1985); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98-99 (1984).
125. *Ashcroft*, 501 U.S. at 462-63 (citing Bernal v. Fainter, 467 U.S. 216 (1984)).
126. *Id.* at 464.
127. *Id.*

While one might argue that this conclusion is not inconsistent with *Garcia*'s core holding, *Garcia* would seem to relieve the Court of any concern at all about such constitutional problems, which are to be wholly in the hands of the political branches. Nonetheless, finding no clear and unequivocal statement, the Court decided that the ADEA did not supercede the Missouri constitution's mandatory retirement age for judges.

As dissenting Justices observed, the Court's plain statement rule was inconsistent with the political safeguards theory and the reasoning of *Garcia*. First, the plain statement doctrines borrowed by the Court were created to define and protect spheres of state sovereignty. Transplanting these doctrines into the Tenth Amendment and the Commerce Clause was neither easy nor natural. In the Eleventh Amendment context, for example, the question involved is not whether a federal statute that preempts state law is to be given a narrow or broad application, but whether the statute extends to the states in the first instance.[128] Since the ADEA already reflected Congress' intent to regulate the operations of the states, the plain statement rule was of questionable applicability. As for the second plain statement rule, the political function exception applied only to the definition of the rights of aliens under the Equal Protection Clause, and hence was not relevant to the determination of statutory rights created by Congress. More importantly, both doctrines existed because the Court saw the need in the Eleventh Amendment and Equal Protection Clause contexts to recoguize and protect state sovereiguty. Protecting state sovereignty, of course, is exactly what *Garcia* had removed from the ambit of the federal courts in the Commerce Clause and Tenth Amendment contexts.

Second, the majority defended its plain statement rule on the ground that it was necessary to avoid constitutional problems. While the Court's approach hearkened back to *Ashwander*[129] and concerns about judicial restraint, it neglected to ask whether a constitutional problem existed in the first place. As with the *Ashwander* doctrine itself, it makes little sense to impose a plain statement rule or to stretch the interpretation of a statute to avoid a constitutional problem that does not exist.[130] If given a faithful

128. *See id.* at 476 (White, J., concurring in part, dissenting in part, and concurring in the judgment).

129. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'") (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). *See generally* Frederick Schauer, Ashwander *Revisited*, 1996 S. CT. REV. 71; Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997).

130. *See, e.g.*, Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898 (D.C. Cir. 1993).

reading, *Garcia* appeared to settle the question of the constitutionality of Commerce Clause regulation of state government. In other words, the *Ashwander* doctrine should not have applied to the ADEA because even if the ADEA were read to apply to state judges, no constitutional problems would have resulted. *Garcia* had settled that question only seven years before by upholding the federal regulation of state employment policies under the FLSA.

Third, the Court's analytical approach in *Ashcroft* directly attacked the political safeguards theory that sustained the *Garcia* majority. The Court began by declaring that a line should exist between federal power and state sovereignty, and then attempted to define an area of activity that should be within state control. Next, the Court erected the plain statement rule to either completely protect or at least partially shield this delineated area of state sovereiguty from federal regulation. Justice O'Connor wrote, "Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers."[131] As Professors William Eskridge and Philip Frickey have observed, *Ashcroft*'s clear statement rule, like other such canons of construction, seeks to enforce constitutional principles and values under the guise of statutory interpretation.[132]

Aside from the difference in the forcefulness of the mechanism chosen to protect state sovereiguty, this approach bears a close resemblance to the methodology of *National League of Cities* and its short-lived progeny. It was a methodology that *Garcia* expressly disavowed. As the dissent in *Ashcroft* noted, *Garcia* clearly rejected "as unsound in principle and unworkable in practice" a test that required a judicial determination of protected spheres of state activity.[133] If Congress improperly stepped over the line between federal and state power, then "[s]tates must find their protection from congressional regulation through the national political process."[134] But what states could not do, according to *Garcia*, is seek ultimate protection "through judicially defined spheres of unregulable state activity."[135] *Ashcroft* represented the Court's growing confidence that it could once again define such areas of state immunity.

131. *Ashcroft*, 501 U.S. at 460.

132. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 623-24 (1992).

133. *Ashcroft*, 501 U.S. at 477 (White, J., concurring in part, dissenting in part, and concurring in the judgment) (quoting *Garcia*, 469 U.S. at 546).

134. *Id.*

135. *Id.*

Gregory v. Ashcroft indicates that by 1991 a majority of the Court already had rejected the underlying tenets of *Garcia*. Although the Court did not erect a complete barrier to federal regulation of state employment practices, it implemented a plain statement rule of constitutional significance that forced Congress to state clearly its intent to infringe state sovereignty. More importantly, the Court's imposition of such a rule indicated that it believed that constitutional problems would be raised if Congress had sought to regulate state judges. Articulation of the plain statement rule, therefore, required the Court first to identify an area of state sovereignty that ought to be free of federal regulation and then to shield it. In the following year, the Court would expand upon this approach in *New York v. United States* and directly contradict the theory and practice laid down in *Garcia*.

B. *NEW YORK V. UNITED STATES*

New York v. United States advanced *Ashcroft*'s attack on *Garcia* by imposing a direct constitutional prohibition on congressional regulation of a state activity. In this case, the Court confronted the constitutionality of the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.[136] For better or worse, apparently "[w]e live in a world full of low level radioactive waste."[137] To deal with this environmental problem, the Act gave each state the responsibility of providing for the disposal of low-level radioactive waste generated within its borders, and it recognized that regional compacts might be a possible means for state compliance.[138] Resorting to three types of incentives, Congress encouraged states to meet statutory deadlines for the development of disposal plans. First, states that met the deadlines would receive monetary payments from the federal government.[139] Second, states that failed to develop disposal plans would receive surcharges for waste disposal and, ultimately, those states could be excluded from existing national waste disposal sites.[140] Third, and "most severe,"[141] states that failed to meet the final deadline would be forced to take title to the radioactive waste, would be obliged to take possession of the waste, and would be liable for dam-

136. 42 U.S.C. § 2021b (1984).
137. New York v. United States, 505 U.S. 144, 149 (1992).
138. 42 U.S.C. § 2021c(a)(1)(A) (1984).
139. *See id.* § 2021e(d)(2)(B).
140. *See id.* § 2021e(e)(2)(A).
141. *New York*, 505 U.S. at 153.

ages resulting from any delay in taking title.[142] In other words, the federal government was coercing the states to curb their dogs.

After participating in negotiations that led to the 1985 Act, New York met the initial deadlines but failed to create a waste site due to local opposition. Then, the state and two counties brought suit against the United States which sought a declaratory judgment that the Act violated the Tenth Amendment and the Guarantee Clause. In response, the United States argued that the Act only imposed a set of choices upon the states and that the Act imposed sanctions only for failure to comply with the statutory deadlines.

Writing again for a majority of the Court, Justice O'Connor concluded that the "take title" provision violated the Constitution because it sought to "commandeer" state legislatures. "The Federal Government may not compel the States to enact or administer a federal regulatory program," the Court declared.[143] Requiring a state to take title to the waste if it refused to enact a legislative program "would 'commandeer' state governments into the service of federal regulatory purposes," which would "be inconsistent with the Constitution's division of authority between federal and state governments."[144] Forcing states to choose between enacting waste legislation or taking title was unconstitutional, because a "choice between two unconstitutionally coercive regulatory techniques is no choice at all."[145]

As with *Ashcroft*, the majority began its analysis by laying out the original understanding of federalism. Justice O'Connor declared, as she had a year before, that the federal government was one of limited powers and that the Tenth Amendment recognized the existence of state sovereignty. Again, she announced that there was a line between federal and state power, and she admitted that "the task of ascertaining the constitutional line" was a difficult one.[146] At this point, she introduced a simple

142. *See* 42 U.S.C. § 2021e(d)(2)(C) (1984).

143. *New York*, 505 U.S. at 188.

144. *Id.* at 175.

145. *Id.* at 176. In *Printz v. United States*, the Court reaffirmed *New York*'s prohibition on commandeering state legislatures and extended the principle to state executive officers as well. Relying upon the framers' intent and upon *New York*, the Court found that the Constitution prohibited the federal government from ordering state executive offieers to execute the background check provisions of the Brady Handgun Violence Prevention Act. Allowing the federal government "to impress into its serviee—and at no cost to itself—the police officers of the 50 States" would tilt the balance between national and state power too far toward the former at the expense of the latter. Printz v. United States, 117 S. Ct. 2365, 2378 (1997). After *New York* and *Printz*, it appears that the only branch of state government that Congress may require to enforce federal law is the judiciary. *See id.* at 2371.

146. *New York*, 505 U.S. at 155.

yet powerful concept. She noted that the Court, in some cases, had examined whether Congress had exceeded the limits of its enumerated authority under Article I. In other cases, Justice O'Connor observed, the Court had asked whether a federal law had invaded the sovereignty of the states guaranteed by the Tenth Amendment. These inquiries, Justice O'Connor reasoned, "are mirror images of each other."[147] If the Constitution has given Congress a power, then it cannot be reserved to the states; if the Tenth Amendment reserves an attribute of sovereignty to the states, it cannot lie within the enumerated powers of Congress.

This is surely correct in cases which only require the Court to determine the proper allocation between federal and state power.[148] However, there are other types of cases, such as those involving individual rights[149] or certain fundamental structural issues,[150] in which neither the federal government nor the states have any power over the subject. But putting those areas aside, even if the Tenth Amendment is but a truism, as the Court has intimated,[151] it must stand for the proposition that anything beyond the limits of Congress' enumerated powers must belong to the states. As Justice Story observed, "[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred is withheld, and belongs to the state authorities."[152] Justice O'Connor and the Court, however, would take Justice Story one step further. State sovereignty, she believes, can be

147. *Id.* at 155-56. Justice Scalia, writing for the same five-justice majority that invalidated federal laws in *Seminole Tribe* and *Lopez*, echoed this theme in *Printz*: "Although the States surrendered many of their powers to the new Federal Governement, they retained a residuary and inviolable sovereignty," he declared. *Printz*, 117 S. Ct. at 2376 (internal quotes omitted). Not only is this "reflected throughout the Constitution's text," Justice Scalia observed, but "[r]esidual state sovereignty was also implicit, of course, in the Constitutions's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.'" *Id.* at 2376-77 (citation omitted).

148. Of course, others might disagree. *See* Martin H. Redish, *Doing it with Mirrors:* New York v. United States *and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593 (1994).

149. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954) (concluding states cannot operated racially segregated schools); Bolling v. Sharpe, 347 U.S. 497 (1954) (concluding the federal government cannot operate racially segregated schools).

150. *See, e.g.*, U.S. Term Limits v. Thornton, 115 S. Ct. 1842 (1995).

151. *See* United States v. Darby, 312 U.S. 100, 124 (1941) (asserting Tenth Amendment "states but a truism that all is retained which has not been surrendered").

152. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833), *quoted in New York*, 505 U.S. at 156.

identified directly by the Court, rather than seen in the afterglow of the national government's enumerated powers.

This insight removed yet one more of *Garcia*'s theoretical underpinnings. According to Justice O'Connor's mirror image thesis, every time the Court decides a case testing the limits of Congress' enumerated powers, it is concurrently deciding issues concerning the scope of state sovereign immunity. Tenth Amendment questions, the *New York* Court suggests, must be justiciable; otherwise, cases involving the limits of Congress' euumerated powers must be nonjusticiable. Justice O'Connor seized upon this line of argument to justify the return of judicial supervision over the constitutional line between the powers of the federal and state governments. "In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government," Justice O'Connor argued, or "one of discerning the core of sovereignty retained by the States under the Tenth Amendment." For "either way," Justice O'Connor further contended, the Court must decide the constitutionality of the Act.[153]

In determining where the line between federal and state power lay, the Court continued to employ the method used in *Ashcroft*, which itself had hearkened back to the discredited *National League of Cities*. First, Justice O'Connor examined the original understanding of the Constitution, and from her examination of the Constitutional Convention, *The Federalist Papers*, and the ratification debates, she concluded that the Constitution did not give the federal government direct authority over the states qua states. "In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regnlate individuals, not States."[154] An attempt to order a state to enact a regulatory program, the Court found, would violate this principle. Such an effort would "'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments."[155] States, Justice O'Connor declared, are "not mere political subdivisions of the United States," nor are they "regional offices nor administrative agencies of the Federal Government."[156] Instead, she announced, the states retain "'a residuary and inviolable sovereignty.'"[157]

153. *New York*, 505 U.S. at 159.
154. *Id.* at 166.
155. *Id.* at 175.
156. *Id.* at 188 (citing to THE FEDERALIST NO. 39 (James Madison)).
157. *Id.*

While Congress could use various incentives to encourage states to follow federal wishes, it could not actually compel states to act in a certain manner. Forcing the states to enact and enforce a certain type of legislation as part of an overall federal regulatory program amounted to "commandeering" of the organs of state government. This undermined the state's right to govern itself, Justice O'Connor argued, because the accountability of both federal and state officials is diminished. The Court feared that if state officials must carry out federal mandates, then state officials may bear "the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[158] The majority also claimed that this anticommandeering rule emanated from earlier precedents. Citing the holdings of *FERC v. Mississippi* and *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, the Court concluded that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[159] These cases, however, were decided before *Garcia* and their comments on commandeering were unnecessary for the decision of the case.[160]

Regardless of whether one agrees with the substantive result reached by the Court,[161] it is apparent that *New York* represented a clean break from *Garcia*. Here, the Court identified a distinct sphere of state autonomy and invalidated federal legislation that had attempted to invade that sphere. This fact was not lost on either the United States or the dissent, both of which raised *Garcia* in an attempt to forestall the majority. The Court attempted to sidestep this thrust by arguing that *Garcia* had involved the authority of Congress "to subject state governments to generally applicable laws,"[162] whereas *New York* raised the different question of whether Congress could turn the states into federal field offices.

Although the difference between targeted and general laws may provide a ground for distinguishing between the FLSA and the Low-Level Radioactive Waste Policy Act Amendments of 1985, the Court could pro-

158. *Id.* at 169.

159. *Id.* at 162.

160. *See id.* at 161-62 (citing FERC v. Mississippi, 456 U.S. 742 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981)).

161. A sophisticated debate concerning the ability of the federal government to commandeer state governments was conducted almost immediately after *New York* was decided. *See, e.g.*, Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

162. *New York*, 505 U.S. at 160.

vide no doctrinal or theoretical justifications to explain why the distinction made a difference. At the same time, the majority also suggested that *Garcia* had been an aberration. After describing the line of cases from *Maryland v. Wirtz* to *Gregory v. Ashcroft* as one in which "the Court's jurisprudence . . . has traveled an unsteady path,"[163] the majority noted that the Court in the past had evaluated the balance between federal interests and state sovereignty, and that *Garcia* had simply represented a "recent[] depart[ure] from this approach."[164] The ends of the federal legislation, moreover, could not justify such means. "The shortage of disposal sites for radioactive waste is a pressing national problem, but a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse."[165]

Quite properly, the dissent sharply criticized the majority for attempting to distingnish away *Garcia* in this manner. As Justice White correctly noted, there was no support in the case law for the Court's distinction between laws that subjected states to laws of general applicability and laws that plainly regulated states.[166] Moreover, neither *FERC* nor *Hodel* truly stand for the anticommandeering rnle, for those cases had not even invalidated a federal law. Indeed, as Justice White argued, *Garcia* itself never made such a distinction between the types of federal regulation. As he rather dryly observed: "Certainly one would be hard-pressed to read the spirited exchanges between the Court and dissenting Justices in *National League of Cities* . . . and in *Garcia v. San Antonio Metropolitan Transit Authority* . . . as having been based on the distinction now drawn by the Court."[167] If the Court were to follow *Garcia*, the dissent concluded, it would find that the state of New York had participated fully in the legislative process that had produced the 1985 Act. Unfortunately, Justice White wrote, the Court "rejects this process-based argument by resortmg to generalities and platitudes about the purpose of federalism being to protect individual rights."[168]

163. *Id.*

164. *Id.* at 178.

165. *Id.* at 187-88.

166. *See id.* at 201 (White, J., concurring in part and dissenting in part).

167. *Id.*

168. *Id.* at 206 (White, J., concurring in part and dissenting in part). The dissent perhaps was on better ground when it criticized the majority for its selective use of history. Justice White quite properly noted that the Court had failed to take account of the great expansions in federal power that occurred during Reconstruction and the New Deal. It is not clear, however, that a shift in the line between federal and state power should alter the Court's Article III duty to adjudicate where that line is.

The dissent in *Printz* similarly criticized the majority for failing to respect *Garcia*. After quoting *Garcia*, Justice Stevens restated the fundamental premise of the decision: "Given the fact that the Members of Congress are elected by the people of the several States, with each State receiving an

The dissent was quite right to question the distinction pressed by the majority, for it does not appear to be logically consistent with the Court's pre-*New York* case law in the Tenth Amendment area. As the Court explained in *Ashcroft* and *New York*, its primary analytical step is to delineate an area of state autonomy that should be free of federal power, although what standards are to be used has not been made clear. In the former case, the Court found that a state's control over the qualifications of its constitutional officers should rest within a state's sovereignty; in the latter, the area of state authority included the state government's right to be free from commandeeriug. Accordingly, whether these areas of state autonomy are to receive judicial and hence constitutional protection should be a question that is independent of the nature of the federal power at issue. A state may suffer the same encroachment on its autonomy from a generally applicable law as it might from a law directed at states qua states.[169] In either case, the federal government restricts the scope of state power.[170]

Justice O'Connor's attempt to distingnish *Garcia* inevitably leads to the very type of balancing test that caused the Court to reject *National League of Cities* in the first place. If laws that solely regulate states are justiciable, but efforts to subject states to general laws are not, then the protection given to state sovereiguty is not solely a function of the nature

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equivalent number of Senators in order to ensure that even the smallest States have a powerful voice in the legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents." Printz v. United States, 117 S. Ct. 2365, 2394 (1997) (Stevens, J. dissenting). Criticizing the majority for reading its preferences into the Constitution, the dissent argued that the "majority points to nothing suggesting that the political safeguards of federalism identified in *Garcia* need be supplemented by a rule, grounded in neither constitutional history nor text, flatly prohibiting the National Government from enlisting state and local officials in the implementation of federal law." *Id.* at 2395 (Stevens, J. dissenting).

Significantly, the majority did not respond to the dissent's invocation of *Garcia*. In fact, Justice Scalia's opinion for the majority suggested that even in the context of generally applicable laws, the court had a role to play in protecting state sovereignty. Rejecting various subsidiary arguments by the United States in defense of the Brady law, the Court observed: "[A]ssuming all the mentioncd factors were true, they might be relevant if we were evaluating whether the incidental application of the States of a federal law of general applicability excessively interfered with the functioning of state governments." *Id.* at 2382. Justice Scalia then favorably cited three cases: *Fry v. United States*, 421 U.S. 542 (1975); *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overrruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); and *South Carolina v. Baker*, 485 U.S. 505 (1988). If *Garcia* continued to be good law, none of these factors could be relevant to a determination of the effect of generally applicable laws on state sovereignty because *Garcia* autonatically requires the court to uphold such laws.

169. *See New York*, 505 U.S. at 201-02. (White, J., concurring in part and dissenting in part).

170. One of the "Framers" of the political safeguards theory also has concluded that *New York* has directly undermined *Garcia*. *See* Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577 (1994).

of the state activity. Rather, judicial intervention will depend on the character of the exercise of federal power in each case. For example, if *Garcia* is still good law, then Congress can continue to subject the states to minimum wage and benefit laws. In the wake of *New York*, however, Congress cannot order the states to enact such laws and compel states to bring their standards into harmony with federal programs. In both cases, the federal government has infringed on the states' control over their employees and officials, but the latter is judicially reviewable, the former is not.

The *New York* majority further attempted to distinguish *Garcia* by arguing that commandeering would undermine the accountability of state and federal governments. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation."[171] This, however, is an unconvincing justification. First, the Constitution itself blurs the line of accountability between the federal and state governments. State officials often enforce federal law; state judges are required to do so by Article VI of the Constitution. Second, Justice O'Connor's argument turns wholly on which goverument a state citizen perceives to be responsible for a government program. If the state citizenry is well informed, then accountability concerns should be diminished; if it is not, then accountability may be blurred. *New York* would have the constitutionality of federal legislation turn on the perceptions of a reasonable citizen, rather than on reality.

Perhaps Congress should receive more leeway when it brings the states into a generally applicable federal regulatory scheme. In some cases, leaving states out of a regulatory program may undermine Congress' ability to establish uniform, effective standards for national industries and markets. For example, as state goverument has grown and the number of public employees has become a larger share of the national labor market, it may make sense for Congress to regulate state employees as part of an overall effort to impose national, uniform standards on the labor markets. But if the purpose of judicial review in the Tenth Amendment area is to protect state sovereiguty, the ability of the federal government to wield its enumerated powers effectively should not be relevant—unless the Court is actually balancing federal interests against state interests. If that is the

171. *New York*, 505 U.S. at 169.

case, then Justice O'Connor's initial observation that the Tenth Amendment and the Commerce Clause inquiry are "mirror images of each other"[172] no louger holds. If the Court balances federal interests against state autonomy on a case by case basis, then the results of a Tenth Amendment inquiry (whether an activity is within a state's sovereignty) will not always correspond to the results of the Commerce Clause inquiry (whether Congress should have power over a certain activity generally).

Further, the *New York* Court's distinction leaves many questions unanswered. It is unclear if the determining factor is whether the legislation is aimed at states or whether the *New York* test is more narrowly focused on commandeering of state government. For illustrative purposes, the statute at issue in *Garcia* was passed solely to subject states to the federal minimum wage and hour laws, which had been applied to private employers almost three decades before. *New York* does not inform us whether the intent behind the FLSA amendments to single out the states for regulation is important for the question of judicial review, or whether that fact is overshadowed by the general federal objective of establishing uniform labor laws.

New York also fails to indicate what courts are to do when the line between generally applicable laws and laws that regulate states qua states becomes blurred. For example, it is possible that Congress could enact legislation that seeks to commandeer state government in the service of generally applicable laws. Imagine a law that simply ordered states to pass minimum wage and hour regulations that brought public employees up to par with private employees. Likewise, envision a law that required states to promulgate rnles that forced state agencies to comply with the same federal environmental standards that governed private employers. In those hypothetical cases, the Court must confront the question whether Congress' power to pass generally applicable laws trumps areas of state sovereignty.

All of this is not to show that the Court reached the wrong result in *New York*. Instead, this discussion seeks to demonstrate that the Court could not provide a meaningful distinction that would allow it to exercise judicial review in *New York* but not in *Garcia*. Although the Court did not explicitly overrule *Garcia*, it achieved exactly what was forbidden: It identified an area of absolute state sovereignty and it invalidated a federal

172. *New York*, 505 U.S. at 156.

law that sought to invade that area of autonomy.[173] Despite clear evidence that Congress passed the 1985 Act at the behest of the states,[174] the Court did not ask whether the national political process worked properly or whether New York had an opportunity to participate in that process. Instead, as in *Ashcroft*, the Court imposed clear restraints on the exercise of plenary federal power over the states.

C. THE DOGS THAT DID NOT BARK: *LOPEZ* AND *SEMINOLE TRIBE*

Perhaps the strongest indication of the Rehnquist Court's rejection of *Garcia* and of the political safeguards approach may be seen in two cases that have been decided since *New York*. In *United States v. Lopez*, the Court invalidated a federal law that regulated firearms possessed near school zones.[175] In *Seminole Tribe v. Florida*, the Court prohibited Congress from overriding the sovereign immunity of the states from suit in federal court.[176] These decisions are notable not just for the Court's willingness to review federal laws on federalism grounds, but also because the dissents failed to raise *Garcia* as arguments in their favor. *Lopez* and *Seminole Tribe* indicate that while the Court remains split on the substantive standards to govern in federalism cases, there is agreement that the federal courts ought to articulate and apply those standards.

Lopez raised the question of the constitutionality of the Gun Free School Zones Act,[177] which Congress had enacted pursuant to its Commerce Clause powers. Passed in 1990, the Act prohibited the knowing possession of firearms within a school zone.[178] Writing for a 5-4 majority, Chief Justice Rehnquist held that the Act exceeded Congress' authority because it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."[179] Beginning "with first principles," the Court emphasized that while the federal government was one of limited, enumerated powers, those of the states were "numerous and indefinite."[180] Citing *Ashcroft*, the majority reaffirmed that the purpose of federalism was to prevent any

173. It is possible that Justices O'Connor, Kennedy, and Souter may have been unwilling to overrule *Garcia* directly due to their joint defense of stare decisis a few weeks after *New York* in *Planned Parenthood v. Casey*, 505 U.S. 833, 854-61 (1992).

174. *See New York*, 505 U.S. at 188-94 (White, J., concurriug in part and dissenting in part).

175. 115 S. Ct. 1624 (1995).

176. 116 S. Ct. 1114 (1996).

177. 18 U.S.C. § 922(q)(1) (1994).

178. *See id.*

179. *Lopez*, 115 S. Ct. at 1626.

180. *See id.* (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Jacob E. Cooke ed., 1961)).

branch of government from accumulating too much power and thereby threatening individual liberty.[181] In the Court's opiniou, *Lopez* clearly was a coutinuatiou of its efforts in *Ashcroft* and *New York* to impose limitations on federal power and to protect the sovereign authority of the states.

Perhaps the most striking aspect of the majority opinion is that it saw no need to justify the appropriateness of judicial review. Although, as we will see, the dissents did not challenge the main opinion on justiciability grounds, the political safeguards theory would demand that the Court refuse to address questions of the proper allocation of law enforcement power between the federal and state governments. For example, Professor Choper argnes that there is a significant distinction between pure claims of individual rights and claims in which individuals assert states' rights.[182] In the former case, courts should adjudicate the dispute because it involves a conflict between the total scope of individual liberty against all government. In the latter case, however, judicial review is unnecessary because the individual is not claiming freedom from both federal and state regulation. Instead, the individual is merely calling upon the courts to decide the proper distribution of authority to regulate personal action between the national and state government.[183] Professor Choper explains: "If the states concededly may do to the individual what it is claimed that the federal government may not do, the issue of concern is primarily one for the states and . . . may be entrusted to the states' representatives in the national political branches to decide."[184]

Under this approach, the Court should have refused to reach the merits in *Lopez*. As it does not appear that Mr. Lopez had raised any Second Amendment claims before the Supreme Court, he was not asserting that he had an individual right to possess a .38 caliber handgun in school. Instead, the defendant challenged the authority of the federal government to regnlate the possession of firearms in a school zone. Indeed, it appears that the states would have ample authority to regulate such conduct.

Rather than take up the cudgel of the political safegnards theory, the dissents focused on the applicable standard of review in the Commerce Clause context. In fact, Justice Breyer, who wrote on behalf of the four dissenters, acknowledged up front his recognition "that we inust judge this matter independently."[185] The main dissent then spent its energies dein-

181. *See id.* (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).
182. *See* CHOPER, *supra* note 3, at 195-205.
183. *Id.* at 196.
184. *Id.*
185. *Lopez*, 115 S. Ct. at 1658 (Breyer, J., dissenting).

onstrating that Congress had a rational basis for finding a substantial link between interstate commerce and school violence. While the dissent may have shown that the possession of guns near school can impact interstate commerce, it responded neither to the majority's declaration of first principles nor to its decision to employ judicial review. Justice Souter's dissent also failed to challenge the appropriateness of judicial review, implicitly conceding that federal courts could decide federalism questions.[186] Instead, Justice Souter argued that the majority simply had chosen the wrong standard of review.[187] Justice Souter claimed that the Commerce Clause power was plenary and that the idea that it diminish as it approached "customary state concerns" has been "flatly rejected" by cases such as *Garcia*.[188] Although he argued for a deferential standard of review, Justice Souter never challenged that the federal courts could engage in judicial review in the first place. To be sure, the dissenters may have believed that *Garcia* applies only to situations in which states are attempting to protect themselves as institutions against federal power, rather than to cases involving individuals. Members of the *Lopez* majority, however, clearly emphasized the link between a state's institutional autonomy and its reserved authority over certain subject areas, such as education. It would have been in the dissenters' interest either to accept this link and then to argue that the whole field was nonjusticiable under *Garcia*, or to point out that this link did not exist, in which case *Garcia* again would have been useful.

The silence of the dissents is even more striking in light of the vigorous assertions of judicial power made by others in the majority. In a separate concurrence joined by Justice O'Connor, Justice Kennedy argued that deference to Congress could not amount to the judiciary's abdication of its role in monitoring the balance between federal and state powers. After drawing npon the same structural and originalist arguments that the Court had adopted in *Ashcroft* and *New York*, Justice Kennedy declared that: "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."[189] Although he noted that one could conclnde from *The Federalist*

186. This should not be surprising, as Justice Souter had voted with the majority in *Gregory v. Ashcroft* and in *New York v. United States*.

187. *See Lopez*, 115 S. Ct. at 1655 (Souter J., dissenting) ("[O]ur hesitance to presume that Congress has acted to alter the state-federal status quo (when presented with a plausible alternative) has no relevance whatever to the enquiry whether it has the commerce power to do so or to the standard of judicial review when Congress has definitely meant to exercise that power.").

188. *Id.* at 1654.

189. *Id.* at 1639 (Kennedy, J., concurring).

Papers that "the balance between national and state power is entrusted in its entirety to the political process," Justice Kennedy clearly rejected this proposition.[190]

Justice Kennedy turned *Garcia*'s structural argument against itself. Acknowledging that Congress did enjoy some discretion and control over this balance because of its plenary control over interstate commerce, Justice Kennedy stated that members of the political branches had an equal responsibility to maintain the proper spheres between the federal and state governments. Judicial review becomes necessary, however, because federal officials, contrary to the theory of *Garcia*, have insufficient incentives to observe the boundaries of their power. "[T]he absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role," Justice Kennedy declared.[191]

It is important to note that Justice Kennedy did not differentiate between laws that regulated states qua states and those that regulated private parties in areas that might be thought to lie within state power. Following Chief Justice Rehnquist's majority opinion, Justice Kennedy's concurrence treated the exercise of any federal power as a diminution of the power of the states and hence a reduction of state sovereignty. Therefore, the Gun Free School Zones Act's attempt to regulate noncommercial activity was not its only constitutional defect. The Act also failed constitutional scrutiny because it "foreclose[d] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise."[192] This conclusion was shared by the majority opinion and by Justice Thomas' concurrence, which also emphasized that federal authority could not infringe on the states' general police power.[193] Citing *New York, Ashcroft,* and *Wirtz* as examples, Justice Thomas declared that "we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power."[194]

Following upon *New York*, the *Lopez* decision is significant because it confirms the dramatic expansion of the Court's conception of state sovereignty. Judicial protection for state sovereignty is no longer limited, as it

190. *Id.*
191. *Id.*
192. *Id.* at 1641.
193. *Id.* at 1642 (Thomas, J., concurring).
194. *Id.*

was in *National League of Cities* and in *Garcia*, to "functions essential to the separate and independent existence" of the states. State sovereignty now includes the state's right to regnlate "an area to which States lay claim by right of history and expertise."[195] Nor is state sovereignty inferred solely by the powers remaining after the full exercise of federal authority. Instead, according to the *Ashcroft* and *New York* Courts, the federal government's enumerated powers and the reserved powers of the states are the flip sides of the same coin; an expansion in the former is inevitably a reduction of the latter. None of the Justices in the majority or the dissent challenged this proposition, nor did they question the role of the federal courts to protect this new, larger definition of state sovereignty. The only questions were which standard of review to apply and whether Congress had met that standard.

In the next significant federalism case, neither the majority nor the dissenters questioned that the Court should exercise judicial review over questions involving the balance between federal and state power. *Seminole Tribe v. Florida* asked the Court to reexamine whether Congress could use its Article I, Section 8 powers to abrogate the sovereign immunity of the States.[196] Passed pursuant to Congress' plenary power over Indian commerce,[197] the Indian Gaming Regulatory Act of 1988 had allowed Indian tribes to conduct gambling operations only if the tribe and the state within which the gaming was located had reached a valid compact.[198] The law requires a state to negotiate with the tribe in good faith, and it permits the tribe to bring suit in federal court to force the state to live up to that obligation.[199]

Writing for a 5-4 Court, Chief Justice Rehnquist found that Congress could not use its Indian Commerce Clause powers to force a state to appear in federal court. Although the Court had decided in an earlier case that Congress enjoyed this authority under the Interstate Commerce Clause,[200] the *Seminole Tribe* majority overruled this precedent because it was produced by a fractured Court, because it had caused confusion in the lower courts, and because it "deviated sharply from [the Court's] established federalism jurisprudence."[201] Most importantly, however, the Court removed Congress' power to abrogate state immunity because that authority

195. *Id.* at 1641 (Kennedy, J., concurring).
196. 116 S. Ct. 1114 (1996).
197. *See* U.S. CONST., art. I, § 8, cl. 3.
198. 25 U.S.C. § 2710(d)(1)(C) (1994).
199. *See id.* § 2710(d)(3)(A), § 2710(d)(7).
200. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).
201. *Seminole Tribe*, 116 S. Ct. at 1127.

was at war with what it considered one of the essential attributes of state sovereignty. As in *Lopez*, *New York*, *Ashcroft*, and *National League of Cities*, the Court declared that state sovereignty would not give way simply because Congress possessed plenary authority over interstate commerce. Wrote the Chief Justice: "we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government."[202]

To be sure, state sovereign immunity derives in part from a different amendment—the Eleventh—than the Tenth Amendment, which is the constitutional provision centrally involved in other state sovereignty cases. As the Court has recognized, however, state sovereign immunity derives from the structure of the Constitution's federal system itself, rather than the text of the Eleventh Amendment alone.[203] Indeed, *The Federalist Papers* claimed that the states possessed sovereign immunity several years before the Eleventh Amendment was even ratified. "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*," wrote Alexander Hamilton. "Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal."[204] While the meaning and scope of the Eleventh Amendment and of state sovereign immunity have been the subject of intense scholarly criticism and debate,[205] the Court clearly believes that sovereign immunity derives not just from the Eleventh Amendment but also from the sovereignty of the states qua states. As the Court stated in *Seminole Tribe*, the principle of state sovereign immunity derives from the basic presupposition of our constitutional system "that each State is a sovereign entity in our federal sys tem . . . ."[206]

202. *Id.* at 1131.

203. *See Seminole Tribe*, 116 S. Ct. at 1122 & n.7. *See also* Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028 (1997).

204. THE FEDERALIST NO. 81, at 548-49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

205. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978); Martha Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989).

206. *Seminole Tribe*, 116 S. Ct. at 1122.

Seminole Tribe provides a recent example of the Court's new approach to questions of state sovereignty. First, the Court determines certain functions and rights that inhere to the states qua states, and then it shields that attribute of sovereignty from federal regulation, regardless of the extent of Congress' constitutional authority over the subject matter at hand. Most important for purposes of this paper, the Court no longer questions whether it is appropriate for the federal judiciary to engage in the delicate and difficult task of defining the attributes of state sovereignty. In *Seminole Tribe*, neither the Chief Justice's majority opinion nor any concurrences discussed whether judicial review was necessary to supervise the balance between federal power and state sovereign immunity. The majority simply assumed it had the power and duty to do so.[207]

Throughout, the majority has stressed its ability to identify those attributes of state sovereignty that are to receive judicial protection. At other times, the Court has suggested that the areas of state sovereignty are to be discerned by examining the limits on the federal government's enumerated powers. While perhaps not contradictory, these approaches are quite different. The former recoguizes that the states exist as independent, autonomous entities whose powers and authorities endure without reference to the nature of the federal power at issue. The latter defines state sovereignty by implication after the scope of federal power has been determined. To the extent that confusion between these different approaches exists on the Court, *Seminole Tribe* suggests that the majority favors a methodology that emphasizes the inherent autonomy of the states.[208]

Even the rather lengthy dissents by Justices Stevens and Souter, which argued that the Eleventh Amendment did not provide for the ex-

207. Similarly, the court did not question in *Idaho v. Coeur d'Alene Tribe* that it had the authority to review whether the tribe's use of the *Ex Parte Young* doctrine to sue a state in federal court violated state sovereignty. In *Coeur d'Alene Tribe*, the Court reviewed whether an Indian tribe could sue Idaho state officers for declaratory or injunctive relief supporting its claim to ownership of certain submerged lands and beds of Lake Coeur d'Alene and its rivers. The Court found that federal courts could not hear the suit, even though it was brought under federal law, because it was the "functional equivalent" of a quiet-title action that was barred by state sovereign immunity. *Coeur d'Alene Tribe*, 117 S. Ct. at 2040.

208. The Court's preference for this approach was revealed further in *Idaho v. Coeur d'Alene Tribe*. In *Coeur d'Alene Tribe*, for example, the Court found the suit prevented a State's "principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands." *Coeur d'Alene Tribe*, 117 S. Ct. at 2040. The Court then reiterated that state control over submerged lands "uniquely implicate[s] sovereign interests" and were of the greatest "importance ... to state sovereignty." *Id.* at 2041.

panded sovereign immunity created by the majority, failed to mention *Garcia* or the political safeguards of federalism. This is especially curious because it was very much in the interests of the dissenters to make a *Garcia* argnment. Both Justices Stevens and Souter suggested that the Eleventh Amendment only repealed federal jurisdiction over a narrow class of cases: those between a state and a diverse or foreign plaintiff. Instead of claiming that the states possessed no sovereign immunity beyond the four corners of the Eleventh Amendment, the dissenters could have relied upon the political safeguards of federalism. Even if they had conceded for purposes of argnment that the states possess a sovereign immunity from suit, the dissents could have claimed that the national political process contains sufficient checks on federal power to secure the interests of the states. If Congress—which is composed of representatives elected from the states—had chosen to override state sovereign immunity in the Indian National Gaming Act,[209] the dissents could have contended, then, that it must be the desire of the states to override their own immunity.[210] It would make little sense for the federal courts to intervene and defend state sovereignty when the states themselves wanted to expand federal power in this area and when the national political process offered ample safeguards for the protection of state interests.

While it does not appear that a *Garcia*-style argument would have changed the minds of the majority, the dissents' silence on this point is significant. As in *Lopez*, the four Justices who challenged the expansion and protection of state sovereignty did not take issue with the majority's exercise of judicial review.[211] As in *Lopez*, the controversy centered on the substantive constitutional standard to be applied once the Court reached the merits, rather than on whether the Court should reach the merits at all. The dissents' reliance upon *Garcia*, once so firm in *Ashcroft* and *New York*, has dissipated in the space of four short years to the point where every member of the Court accepts the proposition that judicial review is appropriate in federalism cases involving questions of state sovereignty.[212]

209. 25 U.S.C. §§ 2701-21 (1994).

210. Of course, each state could have chosen to waive its sovereignty individually. An individual state, however, might be unwilling to waive its immunity unless it received guarantees that all other states also would waive their immunity, hence the need for federal legislation.

211. In fact, Justice Souter's lengthy dissent in *Seminole Tribe* raises a potential Tenth Amendment/*New York* issue, but does not suggest that the issue is nonjusticiable. *Seminole Tribe*, 116 S. Ct. at 1185 n.65 (Souter, J., dissenting).

212. This conclusion, however, is undermined somewhat by Justice Steven's *Printz* dissent, which was joined by Justices Souter, Ginsburg, and Breyer. In criticizing the majority's extension of New York's anticommandeering rule to state executives, the dissent argued that the political safeguards of federalism made such a rule unnecessary. "The majority points to nothing suggesting that the political safeguards of federalism identified in *Garcia* need be supplemented by a rule, grounded

Although the Court has not overruled *Garcia* explicitly, it no longer needs to, for *Garcia* has presented little obstacle to a Court that is increasingly intent on defining the shape of state sovereign immunity and defending it from federal intrusion.

IV. FEDERALISM, JUDICIAL REVIEW, AND THE ORIGINAL UNDERSTANDING OF THE CONSTITUTION

The political safeguards argument is an ahistorical one. As Professor Choper notes in the subtitle of his book, the conclusion that the judiciary has no role in federalism questions arises from *A Functional Reconsideration of the Role of the Supreme Court.* This functional approach, which the Court adopted in *Garcia*, is at odds with the original understanding of the Constitution and its provisions on federalism and judicial review. An examination of the historical materials supports the conclusion that the Framers understood the Constitution to provide for judicial review of the balance of power between the federal and state governments. Evidence of the original understanding, therefore, fully supports the Supreme Court's decisions in *National League of Cities*, *Ashcroft*, *New York*, *Lopez*, and *Seminole Tribe.*

History is of the utmost relevance here for several reasons. First, and perhaps most importantly, the Supreme Court's renewed interest in the Constitution's protections for state sovereignty is deeply rooted in its examination of the original understanding of the Constitution. For example, in concluding in *Gregory v. Ashcroft* that "the principal benefit of the federalist system is a check on abuses of government power," Justice O'Connor relied primarily on *The Federalist Papers*.[213] In *New York v. United States*, Justice O'Connor and the majority again closely reviewed the records of the Constitutional Convention, *The Federalist Papers*, and the ratification debates to conclude that the federal government did not

in neither constitutional history nor text, flatly prohibiting the National Government from enlisting state and local officials in the implementation of federal law." Printz v. United States, 117 S. Ct. 2365, 2395 (1997) (Stevens, J., dissenting). Justice Stevens, however, does not appear to be arguing that judicial review in *Printz* or *New York* was improper. Instead, he almost seems to portray *Garcia* as a decision concerning the substantive limits of Congress' Commerce Clause power, and thus he interprets *New York* and *Printz* only as exceptions (however justified) to that power. Nonetheless, Justice Steven's dissent suggests that *Garcia* may not pass as quietly into the night as *Lopez* and *Seminole Tribe* might suggest. It should also be noted, however, that Justice Scalia's majority opinion in *Printz* does not even trouble itself to respond to Justice Stevens' invocation of *Garcia.* This may indicate that at least the five-Justice majority of *Printz*, *Coeur d'Alene Tribe*, *Seminole Tribe*, and *Lopez* consider the political safeguard theory to be effectively dead and buried.

213. *See* 501 U.S. 452, 458 (1991).

have the power to regulate states qua states.[214] *Lopez* and *Seminole Tribe* also were replete with examinations of and quotations from the historical record of the ratification of the Constitution.[215] If the Court is to honestly confront the tension it has created between *Garcia* and its recent federalism jurisprudence, it will almost certainly refer to the original understanding to guide its approach to judicial review and states' rights.

Second, both the Supreme Court and leading academics have come to accept that evidence of the Framers' intent is relevant to auy discussion of the meaning of the Constitution. Naturally, there is significant room for disagreement as to the weight to give to the original understanding of the Constitution's text. Some Justices of the Supreme Court, such as Justices Scalia and Thomas, would make historical evidence dispositive on questions of constitutional interpretation.[216] Other recent decisions by the Court indicate that a majority at least believe history to be relevant, if not decisive, on questions of constitutional structure and constitutional rights.[217] Earlier Courts once provided the Framers with even more deference. As the Court declared in 1905, "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now."[218]

This difference of views on the Court is mirrored in academia, particularly in the scholarship concerning the structural provisions of the Constitution. However, this difference, for the most part, is over how much deference to provide the Framers, not whether to do so at all. In the area of separation of powers, for example, both sides of a sharp debate over the nature of the executive power continue to rely heavily upon the

214. *See* 505 U.S. 144, 155, 163-66 (1992).

215. *See, e.g.*, Seminole Tribe v. Florida, 116 S. Ct. 1114, 1130 (1996); *id.* at 1148-52, 1160-73 (Souter, J., dissenting); United States v. Lopez, 115 S. Ct. 1624, 1642 (1995) (Thomas, J., concurring); *id.* at 1638-39 (Kennedy, J., concurring). The importance of history to both sides of the federalism debate was displayed again in *Printz v. United States*. Justice Scalia's opinion for the majority conducted a detailed examination of *The Federalist Papers*, early state and national practices, and the ratification debates. *Printz*, 117 S. Ct. at 2372-75. Justice Stevens' dissent discussed the Articles of Confederation, *The Federalist Papers*, and statutes passed by the early Congresses. *See id.* at 2389-93 (Stevens, J. dissenting). In a very unusual exchange, Justice Scalia and Justice Souter even engaged in a sharp debate over the meaning of certain phrases in *The Federalist No. 27* and *The Federalist No. 44*. *See id.* at 2373-75, 2402-04.

216. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 359 (1995) (Thomas, J., concurring); Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849 (1989).

217. *See, e.g.*, *Seminole Tribe*, 116 S. Ct. at 1145 (Souter, J., dissenting); United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 802-15 (1995).

218. *South Carolina v. United States*, 199 U.S. 437, 448 (1905), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

original understanding.[219] Similarly, much of the recent scholarship on the Court's resurrection of federalism has focused on the Framers' intent concerning the Commerce Clause and the Tenth Amendment.[220] To be sure, some scholarship on federalism is decidedly ahistorical, but these discussions often have less to do with the meaning of constitutional provisions and more to do with the normative goals furthered by federalism.[221] Regardless of which side one falls on in these debates, however, the history at least can illuminate the constitutional structure we are examining and can inform our discussion.

A critic of this approach could respond that historical intent is impossible to determine, or that one can assemble a few quotes of the Framers on one side to counterbalance the quotes on the other side.[222] This might be the case, for example, when the Framers simply did not think about a certain issue or engaged in a confusing and inconclusive debate about a constitutional provision. Federalism, however, did not suffer from such neglect. Federalists and Anti-Federalists conducted an extensive, sophisticated debate (of which *The Federalist Papers* were the most famous example) over the spheres to be occupied by the federal and state governments. Opponents and supporters of the new Constitution were obsessed with the relationship between the federal and state governments, and it might not be too much of an overstatement to say that the most pressing problem that prompted the Constitutional Convention was how to create a nation out of a collection of autonomous states.

It would be incorrect, however, to comb the historical evidence from the ratification period for a few quotes that defend either side of an argument. Instead, we should approach the evidence as a dialogue, in which Federalists advanced various justifications for constitutional provisions in response to specific Anti-Federalist complaints. As the debates began in the press and in the ratifying conventions soon after the end of the Phila-

219. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

220. *See, e.g.*, Caminker, *supra* note 161 (discussing *New York*); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615 (1995); H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651 (1995) (discussing *Lopez*); Prakash, *supra* note 161.

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

222. *See, e.g.*, CHOPER, *supra* note 3, at 242-43; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

delphia Convention's work, different arguments were raised, tested, and discarded. Out of this crucible emerged the justifications and explanations for the Constitution that won the day. It is these arguments that we should accept not just as indications of "Framers' intent," but also as evidence of what the Framers, both Federalist and Anti-Federalist, understood the Constitution's terms to mean. Furthermore, the public explanation of the Constitution's meaning must bear controlling weight, for it was that explanation that shaped the understanding of the people who ratified the Constitution.

On this methodological point, I am following the distinctions that several historians of the ratification period have made.[223] These scholars distinguish between "original intent" and "original understanding": The former refers to the purposes and decisions of the Constitution's authors (reflected primarily by their comments and actions during the Constitutional Convention in Philadelphia), while the latter includes the impressions and interpretations of the Constitution held by its "original readers—the citizens, polemicists, and convention delegates who participated in one way or another in ratification."[224] Our choice of what evidence from the ratification to treat as relevant depends on the normative premises we bring to the job of constitutional interpretation, and therefore whether we believe the original intent or the original understanding is more siguificant. If we analogize to the task of statutory interpretation, we must decide whether to choose between the intent of the individual or group that drafted a statute and the understanding of the legislators who voted for it.

If one is looking at the history simply to inform a contemporary decision regarding the Constitution, then all sorts of material, including both the debates from the Philadelphia Convention and postratification interpretations of the Constitution, become reasonably authoritative.[225] If we begin, however, from the normative starting point that the Constitution's authority derives from its popular ratification, then a smaller subset of sources becomes relevant to the enterprise of interpretation. If it is the approval by the state ratification conventions that gives the Constitution legitimacy today, then the understanding of those who participated in the ratification should guide our interpretation of the text.[226] In that case, the

223. *See, e.g.*, LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 1-29 (1988); RAKOVE, *supra* note 8, at 8-9; Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMM. 77, 111-13 (1988).

224. RAKOVE, *supra* note 8, at 8.

225. *See id.*

226. *See id.* at 9. *See also* LEVY, *supra* note 223, at 1-29; Lofgren, *supra* note 223, at 78-79, 111-13.

most relevant evidence will be speeches, articles, and other documents that indicate what the ratifiers—those whose actions gave the Constitution its legal force—believed the text and structure of the Constitution to mean.[227]

This approach deemphasizes the relevance of other sources that are commonly relied upon in some efforts to determine original intent. Decisions and events that took place out of the public eye (such as the choices made during the Philadelphia Convention or private letters and conversations) or government actions that occurred after the ratification (such as during the Washington, Adams, or Jefferson administrations) will not prove as central to the determination of the original understanding. To be sure, these sources can help illustrate the general understanding of certain words, concepts, and ideas held during the late eighteenth and early nineteenth centuries. They cannot, however, provide direct evidence of the understanding of the Constitution held by the delegates to the ratification conventions, and indeed by the American public, from 1787-88. A better guide to constitutional meaning is the document's text and any evidence that sheds light on how the polity of the day would have understood it.

Even if one does not agree that the original understanding is relevant—either as the starting point for a contemporary discussion or as the definitive interpretation of the Constitution—there is yet one more reason to give serious consideration to the views of the Framers. Perhaps we should not pay deference to the views of men such as James Madison, Alexander Hamilton, and the other Federalists, or Anti-Federalist writers such as Luther Martin, "Brutus," and "Cato" just because they happened to be present when the Constitution was ratified, or even because they spoke loudest at the time. Nevertheless, we still should give their views our fullest attention because they were a collection of some of the greatest political thinkers our nation has known. They anticipated many of the arguments that are raised today in defense of the political safeguards of federalism; indeed, we will see below that the Federalists themselves first developed the theory that Professors Wechsler and Choper would resurrect to such great effect. The Federalists not only anticipated these arguments, they went beyond them with powerful theories that are as compelling today as they were more than 200 years ago. In this respect, the views of Madison, Hamilton, and the other Framers are important not just because they reflect the original understanding, but also because they represent

227. In other contexts, for example, I have argued that great importance should be placed on the revolutionary state constitutions, because they formed the legal background and context within which the ratifiers would have understood the Constitution's text. *See* John C. Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 973-78 (1993); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 218 (1996).

penetrating lines of thought whose force has endured to this day. The framers' views are important not just as history but as arguments on the merits.

A. THE ORIGINS OF FEDERALISM AND THE CONSTITUTIONAL CONVENTION

1. *Prelude to the Constitution*

In order to understand the Framers' approach to federalism and judicial review, it is useful to examine the political and legal background that would have informed their thinking on the issue. If federalism refers to a political system that allocates authority between different types of sovereign governments that coexist within the same territory, then the question of federalism was one the British empire and its colonies had struggled with for some time. The revolution did not truly solve the challenge of distributing power between the national and state governments; it was the delegates to the Philadelphia Convention who finally attempted to find a solution to the problem. The proposed Constitution that resulted from the Convention, however, is notable not just for its enumeration of new national powers but also for its rejection of efforts to fundamentally reduce the role of the states in the national political system.

It perhaps would be farfetched to believe that the Framers of the Constitution had invented federalism.[228] The problem of how to distribute authority and how to structure the relationships between local and national levels of governments had confronted Americans well before the American Revolution. Indeed, federalism questions were fundamentally questions of imperial governance that had challenged the great empires of history. It was a problem that became acute after the revolution, and it was this central question that led to the calling of the Constitutional Convention.

Perhaps the most important factor in the Framers' political thinking was recent experience, particularly their struggle with the British Crown. In many ways, the American Revolution was fought over the proper allocation of powers between a central government—the Crown—and its peripheries—the colonies. As historian Jack Greene has suggested, the issue of American federalism actually had its roots in the question of imperial

228. For an example of this prevalent assumption, see United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.").

organization and governance.[229] In this respect, the British "imperial constitution" approached the question of colonial governance quite differently than did the ancients with whom the revolutionary generation was so familiar. Greek colonies, for example, took the form of autonomous city-states composed of excess population from the mother country, while the Romans used colonies almost as garrisons to control conquered peoples.[230]

Great Britain's American colonies did not hew to either of these models. As expressed in their charters and constitutions, the North American colonies possessed a mixture of both self-governance and political and economic dependence on the Crown. The revolutionaries sought what they believed were their rights as Englishmen, which they construed to include the right to democratic self-government, at least in the areas of taxation and spending. Although they might not have thought of things in precisely this manner, as citizens of the British empire the American colonists lived under three separate constitutions.[231] First was the British constitution, which governed England and its nearby dependencies, such as Scotland and Wales. Second, there were the constitutions of the individual American colonies, which had their roots in the charters granted to the original colonial settlers by the Crown. Third, there was a developing imperial constitution that distributed authority between the mother country and the colonies, with Parliament legislating on general matters, such as war and peace, and the colonial assemblies handling local affairs. As historian Bernard Bailyn puts it, king and Parliament "touched only the outer fringes of colonial life; they dealt with matters obviously beyond the competence of any lesser authority .... All other powers were enjoyed, in fact if not in constitutional theory, by local, colonial organs of government."[232] It was the imperial constitution that would lay the foundations for the American federal system.

229. *See* JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788 (1986). *See also* Charles A. Lofgren, *The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention*, *in* CHARLES LOFGREN, GOVERNMENT FROM REFLECTION AND CHOICE 70, 75 (1986) ("The problem of dividing authority between two levels of government was hardly new to the late 1780s."). The literature on the Constitutional dispute that led to the American Revolution is vast. In this section, I have relied upon, but not cited, these works: JOHN P. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (1986); Barbara Black, *The Constitution of the Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976). A useful summary of the scholarship is contained in Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 536-49 (1995).

230. *See* GREENE, *supra* note 229, at 9.

231. *See id.* at 67.

232. BAILYN, *supra* note 8, at 203.

Parliament's attempt to change this arrangement during the latter half of the eighteenth century was a precipitating cause of the American Revolution. In order to pay for the costs of the French-Indian Wars and of the continuing military protection of the colonies, Parliament sought to impose direct taxes in the colonies based on a theory of parliamentary supremacy throughout the empire. The American colonists resisted on the ground that the nascent imperial constitution, which recognized that different sovereign governments could coexist within the British empire, allocated the power of internal taxation to the local assemblies.[233] To be sure, the revolutionaries also claimed that they were defending the individual rights they had enjoyed as Englishmen. But the defense of these rights was intimately connected to the protection of the limited autonomy and authority of the colonies and their representative assemblies. As Profesor Jack Greene describes the controversy: "Throughout the Stamp Act crisis, colonial spokesmen put enormous stress upon the traditional conception of their assemblies as the primary guardians of both the individual liberties of their constituents and the corporate rights of the colonies."[234] The colonial (soon state) assemblies both regulated local matters and protected individual rights by limiting the power of Parliament over their citizens.[235] It was only when Parliament asserted a theory of complete and indivisible sovereignty that the colonists asserted that the colonial assemblies were the equal of Parliament and that they were part of Great Britain only through their links to the Crown.[236] These themes were to return with a vengeance during the ratification debates.

The Articles of Confederation represented America's first try at establishing a workable balance of power between the states and the national government. Taking effect on March 1, 1781, its defects were widely seen at the time as preventing the United States from pursuing its interests abroad and from guaranteeing security at home. The Continental Congress had no direct authority over individuals, but instead had to rely upon the good faith of the state governments to execute its decisions.[237] The national government had no power to regulate interstate or international commerce; it could not impose taxes or raise armies on its own, and it could not force states to obey treaties or even national legislation. Failure by the states to fulfill Congress' financial requests and to obey the provi-

233. *See id.* at 198-229.

234. *See* GREENE, *supra* note 229, at 83.

235. *See* BAILYN, *supra* note 8, at 217-29.

236. *See id.* at 223-28.

237. *See* JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS (1979). *See also* Prakash, *supra* note 161, at 1964-65.

sions of the peace agreement with Great Britain, the Treaty of Paris, suggested that the states would use their sovereign power to frustrate rather than to advance the national interest.[238] No Supremacy Clause provided the national government with the authority to supercede conflicting state laws. If one did not realize that the states held the upper hand, the text of the Articles of Confederation served as a reminder by declaring that "each state retains its sovereignty, freedom and independence . . . ."[239] By the 1780s, states were passing discriminatory tariff and custom laws against each other and disputes were breaking out over the peace with Great Britain and the division of the western lands.[240]

Much of the fault lay not just with the lack of authority vested in the national government but also with the internal organization of the national government. Under the Articles, each state possessed the effective power to block any national legislation, thereby preventing Congress from passing laws that benefited the nation as a whole but which harmed individual states.[241] Further, the Articles did not create an executive branch or a judiciary that could enforce federal law throughout the land. The lack of a federal judiciary was especially noticeable when it came to questions of federalism, for no independent tribunal existed that could draw the lines between the proper spheres of the national and state governments. While Congress could act as a court for the purpose of deciding interstate disputes, no judicial tribunal existed to hear claims of overweening national power or of state encroachment on national prerogatives.

Frustration with state governments was high among the leaders of the Convention that met in Philadelphia in the summer of 1787 to revise the Articles of Confederation. In the spring, for example, James Madison wrote a document, *Vices of the Political System of the United States*, which attributed the failures of the Continental Congress not just to the difficulties of collective action by the states but also to internal structural and political defects within the state governments.[242] He argued that members of

238. *See* RAKOVE, *supra* note 8, at 29.

239. ARTICLES OF CONFEDERATION art. II.

240. *See* Harry N. Scheiber, *Federalism and the Constitution: The Original Understanding*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 85, 86-88 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978)

241. While most legislation under the Articles required nine out of thirteen votes for passage, the lack of a national enforcement mechanism allowed any state to refuse to follow national laws.

242. 9 THE PAPERS OF JAMES MADISON 345-57 (Robert A. Rutland ed., 1975). Madison was quite explicit in drawing the connection between the failures of government at the national level and the failures of government at the state level. "In developing the evils which viciate [sic] the political system of the U.S. it is proper to include those which are found within the States individually, as well

the state assemblies often pursued their personal interests rather than the good of their constituents.[243] The people, however, were not free from blame for unjust state laws: "A still more fatal if not more frequent cause [of injustice] lies among the people themselves."[244] In particular, Madison argued that in a small republic—the only ones that ancient and modern political theorists believed could support democratic self-government—"an apparent interest or passion" would move the majority to approve of "unjust violations of the rights and interests of the minority, or of individuals."[245] This insight would become the basis for Madison's argument for an extended republic in *The Federalist No. 10*, and it would supply one of the reasons for Madison's efforts to circumscribe state power in the new Constitution.

2. *Federalism and the Philadelphia Convention*

The opposition of Madison and others to the power of the states is worth examiniug because it highlights their manifest failure to convince the Philadelphia Convention to undermine, eliminate, or significantly reduce the scope of sovereignty. To be sure, the Constitution vested Congress with numerous powers that it had lacked under the Articles of Confederation. The national government now could impose taxes and duties, borrow money, regulate interstate and international commerce, conduct foreign relations, and operate an independent military.[246] Furthermore, the Constitution prohibited the states from interfering primarily in matters of foreigu relations, war, and interstate commerce.[247] The Federalists also succeeded in creating a federal government that could act directly upon individuals, without relying upon the intervention of the states. As Alexander Hamilton argued in *The Federalist No. 15*, "[t]he great and radical vice" of the Articles lies "in the principle of LEGISLATION for STATES or GOVERNMENTS in their CORPORATE or COLLECTIVE CAPACITIES and as contradistinguished from the INDIVIDUALS of whom they consist."[248] With the establishment of an independent executive and judicial branch, the invention of the Supremacy Clause, and thus the effective elimination of the state veto on legislation, the national government no

as those which directly affect the States collectively, since the former class have an indirect influence on the gcneral malady and must not be overlooked in forming a compleat [sic] remedy." *Id.* at 353.

243. *See id.* at 354.

244. *Id.* at 355.

245. *Id.* at 358.

246. *See* U.S. CONST. art. I, § 8.

247. *See* U.S. CONST. art. I, § 10.

248. THE FEDERALIST NO. 15, at 93 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

longer would be forced to rely upon the states to enact, execute, or adjudicate its laws.

The new government, however, would be neither a consolidated nation nor a confederation of sovereign nations. Instead, it would constitute, in Madison's classic phrase, a "compound republic,"[249] partly federal and partly national. "The proposed Constitution therefore is in strictness neither a national nor a federal constitution; but a composition of both," Madison wrote.[250] Despite Article I, Section 8's enumeration of new national powers vested in Congress and Article I, Section 10's prohibitions on state action, the Constitution clearly accommodated the independent sovereignty of the states over most affairs in everyday life. In *The Federalist No. 39*, Madison declared that the federal government's "jurisdiction extends to certain enumerated objects only," while the states continued to possess "a residuary and inviolable sovereignty over all other objects."[251]

Aside from the written exceptions to their powers in the Constitution, the states emerged from the Philadelphia Convention with much of their sovereignty fundamentally intact and with certain institutional mechanisms built into the national government to provide for their continuing protection. The significance of the constitutional permanency of the states is all the more remarkable in light of the efforts of many of the Framers to abolish it. For example, the initial proposal for the Constitution, the Virginia Plan, sought to remove Congress' operation on an equal vote for each state and to substitute in its place a legislature based solely on the principle of proportional representation. Popularly elected representatives in the lower house would elect the members of the upper house, the Senate. At Madison's suggestion, part of the plan provided the national government with the authority to veto any state legislation that "contraven[ed] the articles of union." The national veto over state legislation was the centerpiece of an effort to transform the states from their status as independent sovereigns under the Articles of Confederation to something more akin to the "lesser jurisdictions," of a "large Government," as James Wilson described it during the Convention.[252]

249. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

250. THE FEDERALIST NO. 39, at 257 (James Madison) (Jacob E. Cooke ed., 1961). ("In its foundation, it is federal, not national; in the sources from which the ordinary powers of the Government are drawn, it is partly federal and partly national: in the operation of these powers, it is national, not federal: In the extent of them again, it is federal, not national: And finally, in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national.").

251. *Id.* at 256.

252. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 323 (Max Farrand ed., 1966) [hereinafter RECORDS].

Wilson's view of the states was shared by many of the Convention's leaders. In his famous speech before the Convention in June, Alexander Hamilton even argued that the states should be "swallowed up" by the national government and called for the elimination of their independent sovereignty.[253] Rufus King declared that "[t]he states were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty."[254] Even George Read of Delaware, the representative of a small state, argued at one point that "the idea of distinct states" would be a "perpetual source of discord."[255] The "cure for this evil," Read concluded, "would be in doing away [with] States altogether and uniting them all into one great Society."[256] The only reason that the new plan of government ought to retain the states at all, Madison, Wilson, and Hamilton suggested, was because of the practical difficulties that a single government would encounter in administering so large a republic. "Were it practicable for the Genl. Govt. to extend its care to every requisite object without the cooperation of the State Govts.," Madison declared before the Convention, "the people would not be less free as members of one great Republic than as members of thirteen small ones."[257]

Significantly, the Philadelphia Convention delegates rejected these pleas and even created mechanisms for the states to protect themselves from the national government. As part of the Great Compromise that broke the deadlock between the large and small states, the Senate was to be composed of two senators chosen by each state legislature. The purpose of this provision was not just to represent the interests of states such as Delaware and Rhode Island, but also to protect the states themselves from the national government. As George Mason of Virginia, one of the delegates of the largest states, said, "the State Legislatures also ought to have some means of defending themselves agst, encroachments of the Natl. Govt."[258] Writing later as Publius, James Madison would echo Mason's theme: "the equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty."[259]

This recognition of state sovereignty undermined the prospects for Madison's proposed veto over state legislation, and it soon disappeared

253. *Id.* at 284-93.
254. *Id.* at 323.
255. *Id.* at 202.
256. *Id. See also id.* at 136 (George Read); *id.* at 34 (Governeur Morris).
257. *Id.* at 357.
258. *Id.* at 155.
259. THE FEDERALIST NO. 62, at 417 (James Madison) (Jacob E. Cooke ed., 1961).

from the proposed Constitution. Professor Wechsler was quite right to focus on the Senate as the representative of state interests in the national government, as the similarity of the Senate's structure to that of the Congress of the Confederation would have been clear to any member of the founding generation who read the new Constitution. By the end of the Convention, state sovereignty received such overwhelming support that the right of each state to equal representation in the Senate became the only clause forever protected from future amendment.[260]

The Senate, however, was not a perfect representative of state interests. As others have remarked, ratification of the Seventeenth Amendment, which provided for the popular election of senators, diluted the ties between senators and their states qua states. Even if the people had not amended the Constitution, however, the Senate still would not be an institution wholly devoted to defending state sovereignty. Were the Senate to play only a representational function, it would have been enough to give the Senate a coequal role with the House in the passage of legislation and to force senators to stand for reelection every two years. But the Senate was more than a House of Representatives for the states. In the minds of Madison and others, as Jack Rakove has written, "the Senate's representative character was incidental to its substantive functions and deliberative qualities."[261] The Framers intended the Senate to constitute a sort of privy council that would safeguard the interests of the nation as a whole. Thus, the Convention gave the Senate its special role in the treatymaking process, a power that under the British constitution rested solely with the Crown, and the power of advice and consent in the appointment of federal judges and executive branch officials, which were also powers that under the British constitution had rested solely in the hands of the king.

These powers were given to the Senate, as Publius explained in *The Federalist Papers*, because the Senate would form a wiser and more stable body—due to the longer term of office—that could form and advance a more considered conception of the national interest. As Madison wrote, "[t]he necessity of a senate is not less indicated by the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate

260. *See* U.S. CONST. art. V ("no State, without its Consent, shall be deprived of its equal Suffrage in the Senate"). For the debate on this provision and its unanimous adoption, see 2 RECORDS, *supra* note 252, at 629-31.

261. RAKOVE, *supra* note 8, at 78. *See also* Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1389-99 (1996).

and pernicious resolutions."[262] In the realm of foreign affairs, Madison argued, "[w]ithout a select and stable [Senate], the esteem of foreign powers will not only be forfeited by an unenlightened and variable policy . . . but the national councils will not possess that sensibility to the opinion of the world, which is perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence."[263]

Two other attributes of the Senate indicated that it would not perform a solely representative function on behalf of state sovereignty.[264] First, unlike the Continental Congress and the Philadelphia Convention, voting would not run along state-delegation lines, with each state delegation possessing an equal vote. Instead, each Senator was to have a vote, hardly an ideal system if the Senate existed only to represent states as independent entities. Senators, particularly from larger, more diverse states, might even seek to represent different interests within a state, rather than the institutional interest of the state as a whole. Second, again unlike the Continental Congress, the Constitution provided for the national payment of senatorial salaries. When the Committee on Detail had proposed that states carry this financial burden, the Convention as a whole demanded that the national government pay the salaries of these officers of the national government. Oliver Ellsworth declared that he was "satisfied that too much dependence on the States would be produced" otherwise, while another delegate argued that national salaries were necessary because "[t]he Senate was to represent and manage the affairs of the whole, and not to be the advocates of State interests."[265] Although no ratifier of the Constitution could deny that the Senate was to play a significant role in representing state interests, the Senate's other roles and qualities—made quite clear by the text of the Constitution—indicated that this would not be its only function.

The Senate's multiple functions—or the difference between its purpose of representation and its role in the operation of the national government—explain why the delegates to the Philadelphia Convention did not place the Senate in the position of the exclusive protector of state sovereignty. For this reason, the members of the Philadelphia Convention created another institution that could provide a strong defense of the states qua states: the federal judiciary. It is beyond the scope of this Article to

262. THE FEDERALIST NO. 62, at 418 (James Madison) (Jacob E. Cooke ed., 1961).

263. THE FEDERALIST NO. 63, at 422 (James Madison) (Jacob E. Cooke ed., 1961). *See also* THE FEDERALIST NO. 64 (John Jay).

264. *See generally* RAKOVE, *supra* note 8, at 170-71.

265. 2 RECORDS, *supra* note 252, at 290-92. *Cf.* United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 804 (1995).

provide a complete discussion of whether the delegates to the Philadelphia Convention intended to give the Supreme Court the power of judicial review.[266] To complete the approach of this Article, however, it is worthwhile to sketch out the historical evidence that suggests that the delegates to the Constitutional Convention believed that the federal courts would exercise judicial review. If one accepts that the Constitution was understood to create judicial review, then the conclusion naturally follows that judicial review ought to exist over questions concerning the balance between federal and state power. Article III, it should be remembered, was ratified as part of a Constitution that initially lacked a Bill of Rights. Although judicial review also might have extended to unenumerated rights that existed by implication,[267] before the Bill of Rights was ratified in 1791 federal question cases would have arisen primarily if not exclusively in the context of federalism disputes.

To be sure, as has been pointed out by others, the idea of judicial review itself was not discussed during the Philadelphia Convention with the same intensity as, for example, the question of state representation in the Senate.[268] Nonetheless, recent work suggests that several of the most influential delegates to the Constitutional Convention were intimately familiar with the concept of judicial review.[269] In addition, it seems reasonably clear that the Framers believed that judicial review would play some role in preventing the national legislature from overstepping the constitutional limits on its powers. For example, the power of judicial review was one factor that led the Framers to reject a proposal for a council of revision, which would have exercised a veto on all legislation and would have included members of both the executive and the judiciary. Luther Martin ar-

266. Examining the question is not truly necessary for the purposes of this argument because those who support the political safeguards thesis do not challenge generally the legitimacy of judicial review. Indeed, Professor Choper argues that nonjusticiability in federalism cases is necessary in order for the federal courts to exercise judicial review with greater authority in controversies involving individual rights. *See* CHOPER, *supra* note 3, at 169.

267. *See, e.g.*, John C. Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 987-89 (1993).

268. See LEVY, *supra* note 223, at 89-123, for a summary and discussion of the critics and supporters of judicial review and their use of ratification era sources. The most significant works on the original intention concerning judicial review include CHARLES A. BEARD, THE SUPREME COURT AND THE CONSTITUTION (1962); RAOUL BERGER, CONGRESS V. THE SUPREME COURT (1969); 1 LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY (1932); ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW (1989); EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW (1914); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953); CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY (2d. ed. 1959).

269. *See* William Michael Treanor, *The* Case of the Prisoners *and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994).

gued against the council because it would give the judiciary "a double negative" over legislation since, "as to the Constitutionality of laws, that point will come before the Judges in their proper official character."[270] Judicial review, records from the Convention suggest, would extend to questions of federalism as well as the separation of powers. Judicial review, for example, provided the Framers with a reason not to provide the President with the power to remove federal judges. In opposing this proposal, John Rutledge argued, "If the supreme Court is to judge between the U.S. and particular States, this alone is an insuperable objection [to the idea]."[271] If the Framers believed that the federal courts would exercise judicial review only over separation of powers or individual rights questions, there would have been no need for Rutledge's statement.

Of course much of the Framers' concern about the balance between the United States and "particular States" stemmed from their fear that the states would exercise too much power against the national government. The Framers addressed this problem, however, by using judicial review at the state level as well as the federal. Once Madison's proposal for a national veto over state laws had failed, efforts turned toward the Supremacy Clause as the best check on encroaching state power. The Supremacy Clause, which declares that "this Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,"[272] imposes a requirement on state judges to invalidate unconstitutional state laws. In other words, Article VI appears to give state courts the power of judicial review over questions involving the powers of the federal and state government.[273] Since Article III gives the Supreme Court appellate jurisdiction over "arising under" cases, even if they originate in the state court system, it seems unlikely that the Framers would have believed that the federal courts could not exercise judicial review in federalism cases. And certainly this understanding was fulfilled by Article 25 of the Judiciary Act of 1789, in which Congress gave the Supreme Court ap-

270. 2 RECORDS, *supra* note 252, at 76.

271. *Id.* at 428. As Rakove correctly suggests, Madison's brief allusion in *The Federalist No. 39* also was a reference to judicial review over federalism questions. "[I]n controversies relating to the boundary between the [national and state governments]," Madison wrote, "the tribunal which is ultimately to decide, is to be established under the general government. . . . The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure the impartiality." THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961).

272. U.S. CONST. art. VI.

273. *See, e.g.*, LEARNED HAND, THE BILL OF RIGHTS 28 (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3-5 (1959).

pellate jurisdiction over state court decisions holding federal laws unconstitutional.[274]

No convincing evidence indicates that the Framers believed that judicial review ought to be exercised when the states were tipping the balance of power towards themselves but not when the federal government tipped the scales in the other direction. Indeed, in either case, the judiciary would be performing the same function: drawing the proper line between federal and state power. Cases involving either encroaching federal power or expanding state power are merely the flip sides of the same coin. To be sure, one could read Article VI as an authorization for state judges to exercise judicial review only over state laws. Any ruling, however, on such an issue also would be a judgment on the power of the federal government, for in order to determine whether a state law is in conflict with federal law, a court first must determine whether the federal law itself is a legitimate exercise of constitutional power.

Furthermore, the Constitutional Convention failed to draw any distinctions in the text of the Constitution between different types of constitutional cases. Article III simply provides that the "Judicial Power shall extend to *all* Cases, in Law and Equity, arising under this Constitution." The text of the Constitution does not distinguish between federalism cases and individual rights cases, or cases of state power versus cases of national power. This constitutional text is surely the best piece of evidence concerning the intentions of the Philadelphia Convention, for it is this language that the delegates voted to send to the states for ratification. As we will see shortly, during the process of ratification the Federalists explained quite clearly their belief that the federal judiciary would exercise judicial review over federalism questions. As I have argued, it is the understanding of the ratifiers that should be of the highest relevance for our analysis, while that of the delegates to the Philadelphia Convention should be held in lower regard.

Notwithstanding the methodologies of original understanding analysis, the Philadelphia Convention's proceedings support the thesis that the Framers did not intend to place constitutional protections for state sovereiguty on a lesser plane than for other types of cases. The events of the summer of 1787 show that the delegates rejected concerted efforts by Madison, Hamilton, and others to reduce drastically the structural independence of the states in the American political system. Instead, the drafters of the Constitution provided for the permanent presence and protection

274. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85 (1789). *See* CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 23-25 (1960).

of the states, not just by guaranteeing equal state representation in the Senate, but also by creating written limitations on federal power, which were to be enforced by a new, independent federal judiciary. To any of the founding generation, these two innovations and their purposes would have been clear on their face.

B. RATIFICATION AND JUDICIAL REVIEW

In determining whether the Constitution grants the federal courts the authority to invalidate legislation that encroaches on state sovereignty, we must place the highest value on the understanding of the ratifiers of the Constitution. This conclusion derives from a normative judgment that it was the adoption of the Constitution by the representatives of the people, sitting in specially convened state ratifying conventions, that gives the Constitution its legal force. As historians have noted, it was this innovation of popular sovereignty that made the American approach to government in the late eighteenth century unique in the Western world.[275] When the Federalists went to the states to defend their work, they clearly argned that the actions of the Convention had no legal force at all, but that it was the action of ratification that would give the Constitution its "value and authority," its "character of authenticity and power."[276] To the extent that history matters, it is the original understanding of the ratifiers that we should seek to enforce.

Ratification was by no means a smooth political process, even by today's standards. After the Philadelphia Convention, there was no physically unified forum for debate to occur; events moved to the thirteen state ratifying conventions, which were separated by both geography and time. Perhaps to their benefit, the Framers lacked the almost instantaneous communications we have today and instead relied upon letters and newspapers carried by horse or sea for information. The ratification struggle

275. *See, e.g.*, WOOD, *supra* note 8, at 306-89.

276. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY] (speech of James Wilson before the Pennsylvania ratifying convention on December 4, 1787) ("[T]he late Convention have done nothing beyond their [sic] powers. The fact is, they have exercised no power at all. And in point of validity, this Constitution proposed by them . . . claims no more than a production of the same nature would claim, flowing from a private pen. It is laid before the citizens of the United States, unfettered by restraint; it is laid before them to be judged by the natural, civil, and political rights of men."). *See also* THE FEDERALIST NO. 40, at 263-64 (James Madison) (Jacob E. Cooke ed., 1961) ("[T]he powers [of the Convention] were merely advisory and recommendatory; that they were so meant by the States, and so understood by the Convention; and that the latter have accordingly planned and proposed a Constitution, which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed.").

did not occur solely in the conventions; a parallel debate also took place in the public square, in which the printed pamphlet and newsletter were the preferred means of communication. Although ratification was an up-or-down question, the very complexity and breadth of the subjects treated by the Constitution meant that the debate would be broad, complex, and unmanaged. A glance through the many volumes of the definitive documentary record of the debate, *The Documentary History of the Ratification of the Constitution*, shows that the debate had uo mechanism for quality control: pieces ranged from the sophistication of *The Federalist Papers* to bits of song and bad poetry.[277]

It would be understandable to look at this diverse mass of information and conclude that the ratifiers had no single understanding, that the ratification debates had no consistent or common themes. This might be the case with some clauses of the Constitution that were discussed only briefly or not at all. This was not so, however, with questions of federalism. As we shall see shortly, the question of state sovereignty was perhaps the leading intellectual issue that dominated the ratification debates, with the question of the need for a bill of rights coming in a close second. In fact, these two issues—federalism and individual rights—were theoretically intertwined, as both raised the same fundamental questions concerning the limits of the federal government's enumerated powers and the institutional means necessary to police them.[278] When we examine the debates concerning the question of federalism and judicial review, I believe that a pattern does emerge. While the Framers believed that the political branches at times would guard state sovereignty, they did not believe that these protections should be exclusive. Instead, by the end of the ratification process, it seems evident that the founding generation understood that the federal courts—exercising the power of judicial review—also would check national legislation that trampled on states' rights.

This understandiug became clear as the ratification debates evolved through the give-and-take between the Federalists and the Anti-Federalists. If the Anti-Federalists shared any common argument, it was that the Constitution created a "consolidated" government in which the national authority would absorb the states. When Federalists found that simply repeating the mantra that the national government was one of enumerated

277. *See* 2 DOCUMENTARY HISTORY, *supra* note 276, at 94-96.

278. For example, as I have argued elsewhere, the question of whether the Constitution recognized unenumerated rights under the Ninth Amendment was closely related at the time to the question of what check existed on the national government and its powers. *See* Yoo, *supra* note 267. *See also* Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

powers would not solve the controversy, the debate shifted to the question of institutional enforcement of the Constitution's written limits on federal power. For even if there were limits, they would be of little use if Congress possessed such unlimited institutional power that it could overcome any resistance to its unconstitutional actions. At first, Federalists responded that this would not come to pass because the states were well represented in the political process. When these arguments did not prove convincing, the Federalists turned to the judiciary as an alternative institution that would enforce the limits on congressional power over the states. Contrary to common wisdom, it was in the context of state sovereignty, alongside that of individual rights, in which *The Federalist No. 78*'s theory of judicial review was so forcefully developed.

When the proposed Constitution went to the States, opponents immediately raised objections that the federal government would destroy the state governments. As the "Federal Farmer," one of the more thoughtful and moderate Anti-Federalist authors, wrote:

> [B]ut as to powers, the general government will possess all essential ones, at least on paper, and those of the states a mere shadow of power. And therefore, unless the people shall make some great exertions to restore to the state governments their powers in matters of internal police; as the powers to lay and collect, exclusively, internal taxes, to govern the militia, and to hold the decisions of their own judicial courts upon their own laws final, the balance cannot possibly continue long; but the state governments must be annihilated, or continue to exist for no purpose.[279]

This "annihilation" argument was repeated by Anti-Federalists in every state from which we have records and was one of the central issues debated in the first state in which ratification was contested: Pennsylvania. Soon after the Pennsylvania ratifying convention approved the Constitution on December 12, 1787, by a vote of 46-23, the losing Anti-Federalists published a "dissent." "We dissent . . . because the powers vested in Congress by this constitution, must necessarily annihilate and absorb the legislative, executive, and judicial powers of the several states, and produce from their ruins one consolidated government, which from the nature of things will be *an iron handed despotism* . . . ."[280]

In this initial attack, Anti-Federalists used as ammunition the open-ended clauses of the Constitution. In particular, they argued that the Nec-

279. Letter II from the "Federal Farmer" to "The Republican" (October 9, 1787), *reprinted in* 1 DEBATE ON THE CONSTITUTION 257-58 (Bernard Bailyn, ed., 1993).

280. *Dissent of the Minority of the Pennsylvania Convention*, PENNSYLVANIA PACKET, Dec. 18, 1787, *reprinted in* I DEBATE ON THE CONSTITUTION, *supra* note 279, at 536.

essary and Proper Clause, when combined with the Supremacy Clause and the General Welfare Clause, which they read to vest in Congress the power to pass all laws necessary for the "common Defence and general Welfare," would permit the federal government to legislate on any subject it chose. According to the minority who dissented from Pennsylvania's ratification, these three clauses gave Congress power that "is so unlimited in its nature; may be so comprehensive and boundless in its exercise, that this alone would be amply sufficient to annihilate the state governments, and swallow them up in the grand vortex of general empire."[281] Wrote "Brutus," perhaps the most intelligent and influential of the Anti-Federalist writers: "The inference is natural that the legislature will have an authority to make all laws which they shall judge necessary for the common safety, and to promote the general welfare. This amounts to a power to make laws at discretion."[282] Even the clear limitations on federal power in the Constitution could not limit the potential breadth of these clauses, and since Congress would have independent sources of revenue and could raise a dreaded standing army, Anti-Federalists believed that the national government would experience little difficulty in enforcing its illegal measures. According to the Federal Farmer, Congress would be unable to enforce its laws "without calling to its aid a military force, which must very soon destroy all elective governments in the country, produce anarchy, or establish despotism."[283]

Federalists responded to this argument by maintaining that the federal government, unlike those of the states, was one of only enumerated and defined powers. All other remaining powers and rights would remain with the states or with the people. As Publius wrote in *The Federalist No. 14*,

> the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments which can extend their care to all those other ob-

281. *Id.* at 540. Because they were one of the earliest groups of Anti-Federalists to put their objections to the Constitution in writing, the Pennsylvania minority's views were repeated by their allies throughout the nation.

282. *Brutus V*, NEW YORK JOURNAL, Dec. 13, 1787, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 500.

283. Letter II from the "Federal Farmer" to "The Republican" (Oct. 9, 1787), *supra* note 279, at 258. On Anti-Federalists fears of a standing army, the Federalist response, and their significance concerning the ongoing debate over war powers, see John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 270-86 (1996).

jects, which can be separately provided for, will retain their due authority and activity.[284]

In regards to state sovereignty, this principle of limited enumeration meant that any power not expressly granted to the federal government was retained. Wrote Publius in *The Federalist No. 32*: "As the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States."[285] At this early stage in the argnment, the defenders of the Constitution did not elaborate on *who* would enforce the boundaries of federal power, should Congress overstep them. For them, it was merely enough to argue that the Constitution's written limitations on federal power would be sufficient.

The Federalists' *expressio unius* argument proved singularly unsuccessful; it also would fail when raised in response to demands for a bill of rights. In particular, the Federalists initially had difficulty responding to two related Anti-Federalist arguments that "parchment barriers" would not contain the national government.[286] First, Anti-Federalists argued that the Constitution violated the ancient principle—*imperium in imperio*—that two governments could not exist within the same territory. Violation of this principle would force the national government to eliminate the states in order to vindicate its own authority, the Anti-Federalists argued. Second, Anti-Federalists turned to Montesquieu's famous argument that a republic could exist only within a small territory.[287] According to the Anti-Federalists, the large size of the United States, which extended farther than any other republic in history, would force the central government to become despotic in order to be effective. Both principles, drawn from the examples of ancient history that had such great effect on the founding generation, had the virtue of being well known throughout the colonies and therefore required little explanation.

Throughout the states, the Federalists raised the political safeguards argument to fend off these powerful claims. In one of the first major public defenses of the Constitution, James Wilson in his Pennsylvania State House Yard speech rhetorically asked: "But upon what pretence can it be

284. THE FEDERALIST NO. 14, at 86 (James Madison) (Jacob E. Cooke ed., 1961).

285. THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

286. *See* RAKOVE, *supra* note 8, at 182-83.

287. *See* CHARLES LOUIS DE SECONDAT, BARON DE LA BREDE ET DE MONTESQUIEU, THE SPIRIT OF LAWS 176 (David Wallace Carrithers ed., 1977) ("It is natural to a republic to have only a small territory; otherwise it cannot long subsist.").

alleged that [the Constitution] was designed to annihilate the state governments?" In answer, Wilson observed that the presidency was selected by electors chosen by rules of the state legislature, that senators were elected directly by the state legislature, and that even representatives were chosen by an electorate defined by the state legislature. "If there is no [state] legislature," said Wilson, "there can be no senate, [or President, or House]."[288] Publius in *The Federalist No. 45* agreed:

> Without the intervention of the State Legislatures, the President of the United States cannot be elected at all.... The Senate will be elected absolutely and exclusively by the State Legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State Legislatures.[289]

In fact, Publius predicted that the influence of the states perhaps might be too strong: "Thus each of the principal branches of the federal Government will owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them."[290]

In making this argnment, the Federalists recognized that the states, as representatives of the people, also were parties to the great contract known as the Constitution. As Publius would comment a few months later in *The Federalist No. 62*, "the equal vote allowed to each state [in the Senate], is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty."[291] So represented in the national government, both large and small states would "guard by every possible expedient against an improper consolidation of the states into one simple republic."[292] As Oliver Ellsworth, under the pseudonym "A Landholder," wrote in response to Anti-Federalist Elbridge Gerry: "State representation and government is the very basis of the congressional power proposed."[293] Federalists repeated these arguments not only in the press but also in the state ratifying

288. James Wilson, Speech in State House Yard (Oct. 6, 1787), *in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 67.

289. THE FEDERALIST NO. 45, at 311 (James Madison) (Jacob E. Cooke ed., 1961).

290. *Id.*

291. THE FEDERALIST NO. 62, at 417 (James Madison) (Jacob E. Cooke ed., 1961).

292. *Id.*

293. Oliver Ellsworth, *A Landholder IV*, CONNECTICUT COURANT, Nov. 26, 1787, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 237.

conventions.[294] Asked James Madison during the Virginia ratifying convention: "Are not the States integral parts of the General Government?"[295] Declared Alexander Hamilton, "the senators will constantly be attended with a reflection, that their future existence is absolutely in the power of the states."[296]

Professor Wechsler and Professor Choper are to be praised for restoring to us this understanding of the structure of the Constitution. It is undeniable that the Framers understood that each of the components of the political branches would be "dependent," in Madison's words, on the state governments.[297] Senators *did* rely upon the state legislatures for their appointment; these bodies could be assumed to be more solicitous of state sovereignty than any other actor in the national political system. The President *is* elected by a college of electors who are chosen "in such Manner as the [state] Legislature may direct,"[298] and the members of the House were once elected by voters according to qualifications set by the state legislature. One might even suggest that the original structure of the Constitution was designed to protect the rights of the states just as much as it was intended to protect the rights of individuals. For example, Article I, Section 9's limitations on Congress contain restrictions that favor both the states[299] and the individual.[300] And as noted earlier, the Federalists responded to arguments both that a bill of rights was needed and that states' rights were jeopardized by emphasizing the strict enumeration of the fed-

294. *See also* THE FEDERALIST NO. 45, at 311 (James Madison) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 46, at 317-19 (James Madison) (Jacob E. Cooke ed., 1961); Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 197; *The Republican*, CONNECTICUT COURANT, Jan. 7, 1788, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 715; James Wilson, Opening Address at the Philadelphia Ratifying Convention (Nov. 24, 1787), *in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 796; Charles Cotesworth Pinckney, Address at the South Carolina Ratifying Convention (May 14, 1788), *in* 2 DEBATE ON THE CONSTITUTION, *supra* note 279, at 589; James Madison, Address at the Virginia Ratifying Convention (June 6, 1788), *in* 2 DEBATE ON THE CONSTITUTION, *supra* note 279, at 619-21; Alexander Hamilton, Address at the New York Ratifying Convention (June 25, 1788), *in* 2 DEBATE ON THE CONSTITUTION, *supra* note 279, at 811.

295. James Madison, Address at the Virginia Ratifying Convention (June 11, 1788), *in* 2 DEBATE ON THE CONSTITUTION, *supra* note 279, at 658.

296. Alexander Hamilton, Speech at the New York Ratifying Convention, *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 317-18 (Jonathan Elliot ed., 1937).

297. THE FEDERALIST NO. 46, at 317 (James Madison) (Jacob E. Cooke ed., 1961).

298. U.S. CONST art. III, § 1.

299. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 1 (restriction on congressional authority to regulate slave trade), cl. 4 (tax in proportion to state population), cl. 5 (no tax or duty on state exports), cl. 6 (no port preference).

300. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 2 (suspension of writ of habeas corpus), cl. 3 (prohibition on bills of attainder and ex post facto laws).

eral government's limited powers. It is a shame that neither Professor Wechsler nor Professor Choper turned to the historical evidence to elaborate their argument, because the statements of those who framed our Constitution support their insight that the very structure of the federal government would protect the states.

But while the history of the Constitution's ratification highlights the preeminent role that the Senate (and the House and President) were to play in maintaining federalism, there is no evidence that these political mechanisms were originally understood to be the *exclusive* means for curbing federal power. In fact, because the Anti-Federalists remained unpersuaded by the political safeguards theory, the Federalists emphasized other checks on congressional power, most notably the judiciary. Anti-Federalist arguments remained unanswered because of yet a third, allegedly universal, principle of eighteenth century political science: that any group of rulers would seek to expand their power at the expense of the people. "[T]he records of all ages and of all nations," one Anti-Federalist wrote, "[showed] that the liberties and the rights of the people have been always encroached on, and finally destroyed by those, whom they had entrusted with the power of government . . . ."[301] Brutus agreed that "it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way."[302] Such had been the lesson of the Roman Republic's transformation into the Roman Empire, and, Anti-Federalists feared, such would be the future of the United States.

To the critics of the Constitution, these lessons of history proved that the political safeguards of federalism would be no safeguards at all—precisely because of their political nature. According to Anti-Federalist writers, the senators and representatives, once elected as members of the national government, would pay little attention to the needs of their constituents or of their states. Due to the large distances of the country, the people would have little knowledge of their elected representatives, and, conversely, their elected officials would feel little need to represent their distant constituents.[303] In modern parlance, an "inside-the-beltway" mentality would seize the minds of members of Congress, with the result that accountability and responsibility between representative and the repre-

301. 14 DOCUMENTARY HISTORY, *supra* note 276, at 373.

302. *Brutus I*, NEW YORK JOURNAL, Oct. 18, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 276, at 416.

303. *See, e.g.*, *Brutus IV*, NEW YORK JOURNAL, Nov. 29, 1787, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 424-27.

sented would dissipate. As the links of representation between constituent and official disappeared, the new government would find it easy to rule by corruption and force. As the minority of the Pennsylvania ratifying convention put it:

> The permanency of the appointments of senators and representatives, and the controul the congress have over their election, will place them independent of the sentiments and rcsentment of the people, and the administration having a greater interest in the governmcnt than in the community, there will be no considcration to restrain them from oppression and tyranny.[304]

Anti-Federalists had turned Madison's famous argument in *The Federalist No. 10* on its head: The great size of the republic would lead to greater, not less, undemocratic government.[305]

Parchment barriers, according to the Anti-Federalists, could not stand before the natural instinct of the rulers to expand their powers. Indeed, having raised the specter of an unaccountable and distant federal Congress, the Anti-Federalists then turned the political safeguards argument back upon the Federalists, to good effect. State representation in Congress only made it possible for states to attempt to ensure that the constitutional limitations on federal power would be observed; it did not guarantee that Congress would never pass unconstitutional legislation. Worst of all, thought the Anti-Federalists, if Congressmen became corrupted by the false idol of federal power, they would be the only judges of their own authority, which would soon become limitless. Anti-Federalist writer Brutus, for one, asked who could define the limits of the General Welfare and Common Defense Clause in Article I, Section 8: "Are these terms definite, and will they be understood in the same manner, and to apply to the same cases by every one?" he asked rhetorically. "No one will pretend they will. It will then be matter of opinion, what tends to the general welfare; and the Congress will be the only judges in the matter."[306] In a different paper, Brutus noted that "[n]o terms can be found more indefinite than these, and it is obvious, that the legislature alone must judge what laws are proper and necessary for the purpose."[307]

304. *Dissent of the Minority of the Pennsylvania Convention*, *supra* note 280, at 548. *See also Brutus IV*, *supra* note 303, at 426.

305. *See* Akhil Reed Amar, *Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1139-42 (1991).

306. *Brutus VI*, NEW YORK JOURNAL, Dec. 27, 1787, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 618.

307. *Brutus V*, NEW YORK JOURNAL, Dec. 13, 1787, *in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 500. *See also* Letter from Thomas Wait to George Thatcher (Jan. 8, 1788), *in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 728.

If Congress were the only judge of its own powers, then the safeguards of a written Constitution would become meaningless. As Brutus concluded, every expansion of federal power would be constitutional because Congress had already given its approval by passing the legislation. "The government would always say, their measures were designed and calculated to promote the public good; and there being no judge between them and the people, the rulers themselves must, and would always, judge for themselves."[308] Anti-Federalists made similar arguments in other states; the Pennsylvania dissenters, for example, argued that Article VI's grant of supremacy to laws made in pursuance of the Constitution would be a blank check for national power. "In our opinion," they wrote, "'pursuant to the constitution' will be co-extensive with the *will* and *pleasure* of Congress, which, indeed, will be the only limitation of their powers."[309] Anti-Federalists not only rejected the political safegnards of federalism theory in much the same way the dissenters in *Garcia* would two centuries later, they also appropriated the Federalists' institutional argnments to show that Congress would expand, rather than restrain, the exercise of its powers over the states.

Once they were pressed to the wall by these arguments, the Federalists first began to articulate publicly a theory of judicial review. Initially, Federalists had argued that if Congress exceeded its powers, the people themselves could rise up against it with the support of the state governments.[310] This argument, however, carried little weight, because such an extreme form of popular sovereignty also undermined the need for a written Constitution. Instead of continuing to rely upon the political safegnards theory, the Federalists switched their response to the arguments that would justify judicial review and would appear two decades later in *Marbury v. Madison*. Federalists argued that the Constitution was the supreme law of the land, and because the judiciary was the expositor of the laws, it would have the authority to declare unconstitutional any unjustified exercise of congressional power.

308. *Brutus VI*, *supra* note 306, at 619.

309. *Dissent of the Minority of the Pennsylvania Convention*, *supra* note 280, at 538.

310. As James Madison wrote:

> But ambitious encroachments of the Federal Government, on the authority of the State governments, would not excite the opposition of a single State or of a few States only. They would be signals of general alarm. Every Government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combination would result from an apprehension of the federal, as was produced by the dread of a foreign yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case, as was made in the other.

THE FEDERALIST NO. 46, at 320 (James Madison) (Jacob E. Cooke ed., 1961).

James Wilson's speech before the Pennsylvania ratifying convention is most telling on this point. During the convention, he conceded the Anti-Federalist contention that the political safeguards could not guarantee that unconstitutional acts would not pass Congress. In response to Anti-Federalist William Findley's arguments that the Constitution was just a plan for the "national consolidation" of all government, Wilson chose to turn to the judiciary, rather than to the Senate, as the ultimate guardian of state sovereiguty.

> [U]nder this constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. . . . I had occasion, on a former day, to state that the power of the constitution was paramount to the power of the legislature, acting under that constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles, and find it to be incompatible with the superior power of the constitution, it is their duty to pronounce it void . . . .[311]

Wilson, second perhaps only to Madison in his influence upon the Constitution, saw no inconsistency between the political safeguards and a potent judicial review of federalism questions. Nor did he believe that the political safeguards were the exclusive protection against overweening federal authority. In fact, in the very passage just quoted, Wilson goes on to note that the people can vote either representatives or senators out of office if they do not respect the constitutional limitations on their power. "The congress may be restrained," Wilson asserted, "by the election of its constituent parts,"[312] and one of those parts, he reminded the Pennsylvania Convention, represented the states. Ultimately, the people always could pass a constitutional amendment to reverse illegal exercises of congressional power. Or, as Wilson put it rather pithily, "they may revoke the lease, when the conditions are broken by the tenant."[313] But, as the excerpted passage makes clear, these remedies for federal transgressions were supplementary to the safeguards created by judicial review.

Wilson's statements were not random ones. Instead, they were part of a sophisticated, long-running dialogue between Federalists and Anti-Federalists throughout the states. Admitting the force of Anti-Federalist arguments that Congress could not be trusted to keep its own power within

311. James Wilson, Remarks at Pennsylvania Ratifying Convention (Dec. 1, 1787), *in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 822-23.

312. *Id.*

313. *Id.* at 823.

constitutional limits, the Federalists pointed to the separation of powers as an additional bulwark for federalism. For example, Virginia Governor Edmund Randolph published a letter criticizing the Constitution because it provided Congress with general and ambiguous power grants that could be used to swallow the state governments. Writing under the pseudonym "Americanus," John Stevens of New York answered by conceding that while the Necessary and Proper Clause might be ambiguous, the judiciary would be present to prevent its abuse:

> But it may be asked in what manner is this *discretionary* power to be kept within due bounds? I answer, that the Constitution itself is a *supreme law of the land*, unrepealable by any *subsequent law*: every law that is not made in conformity to *that*, is in itself nugatory and the Judges, who by their oath, are bound to support the Constitution as the *supreme law of the land* must determine accordingly.[314]

Publius, the author of *The Federalist*, similarly saw no conflict between the political safeguards and judicial review. In fact, Publius initially indicated that both the judicial and executive branches would have the obligation to refuse to enforce congressional enactments that overstepped constitutional bounds. In *The Federalist No. 44*, for example, Publius responded to the Anti-Federalist concern about the open-ended Necessary and Proper Clause by invoking the separation of powers:

> If it be asked, what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning? I answer the same as if they should misconstrue or enlarge any other power vested in them, as if the general power had been reduced to particulars, and any one of these were to be violated; the same in short, as if the State Legislatures should violate their respective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts . . . .[315]

Thus, the Federalists suggested that the federal judiciary, under its authority to hear cases and controversies arising under the Constitution, and the President, under his power to execute the laws, would check congressional infringements on state sovereignty.

In *The Federalist No. 78*, Publius responded more directly, and most famously, to Brutus' charge that Congress could not be trusted to control the exercise of its own powers. All at this point agreed that "[n]o legislative act therefore contrary to the constitution can be valid" because this

314. John Stevens, *Americanus VII*, DAILY ADVERTISER, Jan. 21, 1788, *reprinted in* 2 DEBATE ON THE CONSTITUTION, *supra* note 279, at 60 (emphasis in original).

315. THE FEDERALIST NO. 44, at 305 (James Madison) (Jacob E. Cooke ed., 1961).

was inconsistent with the model of delegated and enumerated powers.[316] But because of the Anti-Federalist assault, the question had became one of institutional competence; in other words, the debate now revolved around which branch had the authority to make the judgment of constitutionality. According to Publius, the legislature had the first cut on the question, but not the last:

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution.[317]

Publius's thought here elaborated on his earlier argument that each branch had a duty to interpret the Constitution and restrain the other branches from unconstitutional actions. Although Congress had the power to decide on the constitutionality of its own enactments, its determinations on this score had *no* binding weight on the other branches. If the Constitution wanted Congress to have the last word, there would have been a clause in the Constitution expressly providing for it.

It is thus in the context of the ratification debate over the political safeguards theory that we must understand *The Federalist No. 78*'s famous discussion of the purposes and operation of judicial review. *The Federalist No. 78* does not deny that Congress can protect the states by refusing to enact laws that extend beyond its delegated powers. Publius emphasizes, however, that Congress is not the only judge of constitutionality. Because the Constitution is the supreme law as ratified by the people in convention, Congress cannot judge its own enactments to be superior to it. Instead, as the expositors and enforcers of the law, the courts are better suited to maintain the Constitution's checks on congressional power. As Publius wrote:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.[318]

To allow Congress to be the final judge of the constitutionality of its enactments would allow Congress to place its authority before that of the people. "[T]he constitution ought to be preferred to the statute, the

316. THE FEDERALIST NO. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
317. *Id.* at 524-25.
318. *Id.* at 525.

intention of the people to the intention of their agents."[319] If Congress did pass a statute contrary to the Constitution, the legislature would be acting ultra vires, and its judgment as to the law's constitutionality could have no weight. "[W]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former."[320]

The Federalists repeated their reliance upon judicial review in other state conventions from which we have records. For example, in the Connecticut ratifying convention, the argument was taken up by no less than Oliver Ellsworth, who wrote the widely published "Landholder" pamphlets during the debates in the press, who as a senator would draft the Judiciary Act of 1789, and who would become Chief Justice of the Supreme Court. In response to objections that two governments could not coexist within the same territory, Ellsworth responded:

> This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void.[321]

In the Virginia ratifying convention, John Marshall, the future Chief Justice, listed many of the subjects, such as property or contract law, that he believed to be outside of Congress' delegated powers. Responding to George Mason's claims that Congress could enact general legislation throughout the country, Marshall declared:

> Can they [Congress] go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard:—They would not consider such a law as coming under their jurisdiction.—They would declare it void.[322]

Marshall, like Hamilton and Madison, Ellsworth, Wilson, and other Federalists, saw the authority of judicial review as the federal institution of last resort, as the final bulwark against a Congress intent on grabbing

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319. *Id.*

320. *Id.*

321. Oliver Ellsworth, Remarks at the Connecticut Ratifying Convention (Jan. 7, 1788), *in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 883.

322. John Marshall, Remarks at Virginia Ratifying Convention (June 20, 1788), *in* 2 DEBATE ON THE CONSTITUTION, *supra* note 279, at 731-32.

power. "To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the Judiciary? There is no other body that can afford such a protection."[323] Article III, Section 2's establishment of "arising under" jurisdiction, Marshall observed, guaranteed that the Court would have the authority to intervene in cases where the federal government surpassed the written limitations on its power.

Perhaps surprisingly, some Anti-Federalists agreed with the Federalists that the national courts would be the ultimate arbiters of questions about federal and state powers. Brutus concurred in the Federalist reading of Article III, Section 2. The courts "are authorised to determine all questions that may arise upon the meaning of the constitution in law. This article vests the courts with authority to give the constitution a legal construction, or to explain it according to the rules laid down for construing a law."[324] If a law were inconsistent with the Constitution, the courts would have the authority under Article III and Article VI to declare it void regardless of Congress' judgment of its constitutionality. Wrote Brutus:

> In determining these questions, the court must and will assume certain principles, from which they will reason, in forming their decisions. These principles, whatever they may be, when they become fixed, by a course of decisions, will be adopted by the legislature, and will be the rule by which they explain their own powers. This appears evident from this consideration, that if the legislature pass laws, which, in the judgment of the court, they are not authorised to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. And the courts are vested with the supreme and uncontroulable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior.[325]

Because the Constitution was the supreme law and the courts were the interpreters of that law, concluded Brutus, the legislature must be bound by the judiciary's decision on the constitutionality of enactments. "And I conceive the legislature themselves, cannot set aside a judgment of this

323. *Id.* at 732-33. Marshall asked later in his speech: "If a law be executed tyrannically in Virginia, to what can you trust? To your Judiciary. What security have you for justice? Their independence. Will it not be so in the Federal Court?" *Id.* at 738.

324. *Brutus XI*, NEW YORK JOURNAL, Jan. 31, 1788, *reprinted in* 2 DEBATE ON THE CONSTITUTION, *supra* note 279, at 131.

325. *Brutus XII*, NEW YORK JOURNAL, Feb. 7-14, 1788, *reprinted in* 2 DEBATE ON THE CONSTITUTION, *supra* note 279, at 172.

court, because they are authorised by the constitution to decide in the last resort. The legislature must be controuled by the constitution, and not the constitution by them."[326] Since the three branches were independent, one could not attempt to interfere with the constitutional duties of the other, and the duty of the judiciary was to interpret the Constitution. Other Anti-Federalists in New York and Virginia made similar arguments that assumed that the federal courts would exercise judicial review over federalism questions.[327]

Of course, the Anti-Federalists were not experiencing a conversion on the road to Damascus. Rather, they argued that the intervention of the federal courts would work only to expand, rather than restrict, federal power. First, the Anti-Federalists believed that the courts would not be bound by the normal rules of interpretation when construing the breadth of the Constitution's grant of powers. Of particular concern was Article III, Section 2's grant of jurisdiction over all cases arising under the Constitution "in Law and Equity." Quoting Blackstone and Grotius, Brutus argued: "By this they [the courts] are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter."[328] "[I]n their decisions," he explained, "they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution."[329] Because the Constitution, in Brutus' opinion, used such "general and indefinite terms," the courts would find it easy to expand the federal government's power beyond the intent of the Framers.[330] As an example, Brutus cited the Constitution's preamble and argued that the courts would give the Constitution an equitable interpretation in the spirit of its goal to "form a more perfect union." The judiciary would invalidate any state laws that interfered with this objective, with the likely result that in order to "form a more perfect Union" it would soon become "necessary to abolish all inferior governments, and to give the general one complete legislative, executive, and judicial powers to every purpose."[331]

326. *Brutus XI*, *supra* note 324, at 132.

327. *See* Letter from Samuel Osgood to Samuel Adams (Jan. 5, 1788), *in* 1 DEBATE ON THE CONSTITUTION, *supra* note 279, at 705-06; George Mason, Remarks at Virginia Ratification Convention (June 19, 1788), *in* 2 DEBATE ON THE CONSTITUTION, *supra* note 279, at 720.

328. *Brutus XI*, *supra* note 324, at 131.

329. *Id.* at 132.

330. For an extended discussion of the meaning of Article III, Section 2 and the Framers' thoughts on equity, see Yoo, *supra* note 36, at 1151-61.

331. *Brutus XII*, *supra* note 325, at 174.

Second, the Anti-Federalists declared that federal judges would be no more immune from the corrupting effects of power than the other members of the federal government. In their minds, the federal judiciary (as a part of the national government) would have a powerful self-interest in expanding federal authority so as to increase their own jurisdiction and power. "[T]he judicial power of the United States . . . will lean strongly in favour of the general government, and will give such an explanation to the constitution, as will favour an extension of its jurisdiction," warned Brutus.[332] This was, in essence, merely an extension of the Anti-Federalists' fear that Congress would seek to expand its powers and importance by sweeping more areas within its jurisdiction. "Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise."[333] As the promulgator, rather than the interpreter, of the laws, Congress would follow the courts in the expansion of federal jurisdiction. Brutus predicted that "the judgment of the judicial, on the constitution, will become the rule to gnide the legislature in their construction of their powers."[334]

Third, Anti-Federalists feared that the combination of an expansionist judiciary and an unchecked Congress would produce a dynamic that ultimately would annihilate the states. Because the unelected Supreme Court, rather than the states, or even the Congress, was the final expositor of the laws, no entity could reverse the Court's decisions, which inexorably would sanction ever more aggressive uses of federal power. As Brutus described it: "the general legislature might pass one law after another, extending the general and abridging the state jurisdictions, and to sanction their proceedings would have a course of decisions of the judicial to whom the constitution has committed the power of explaining the constitution."[335] Should the states attempt to resist these encroachments, "the constitutional mode of deciding upon the validity of the law, is with the supreme court, and neither people, nor state legislatures, nor the general legislature can remove them or reverse their decrees."[336] In the end, the separation of powers would pose no restraint on Congress' power because,

332. *Brutus XI*, *supra* note 324, at 133.

333. *Id.* at 134.

334. *Brutus XII*, *supra* note 325, at 172.

335. *Brutus XV*, NEW YORK JOURNAL, March 20, 1788, *reprinted in* 2 DEBATE ON THE CONSTITUTION, *supra* note 279, at 377.

336. *Id.*

in the eyes of the Anti-Federalists, the different branches would have a joint institutional interest in expanding federal authority.

Federalists answered this vigorous attack by denying that the courts would be utterly free to interpret the Constitution. This explains why Publius devoted substantial portions of *The Federalist Nos. 78, 81,* and *83* to discussions of the canons of interpretation, perhaps not the most pressing issue to discuss during a debate on the need for a new national government. Publius sought to reassure his readers that the courts would not wield the unchecked power predicted by the Auti-Federalists: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ."[337] But this was not an argument that the Federalists wished to push too hard, because it was not an argument they needed to continue. The Federalists and Anti-Federalists had reached some agreement about which institutions would address questions concerning the balance between federal and state authority. They differed only over how those questions would be resolved.

To summarize, the Framers—both Federalists and Anti-Federalists—understood the text and the structure of the Constitution to permit judicial review in cases questioning the scope of federal power. This conclusion does not deny that the Constitution, as originally understood, provided for state influence over federal decisionmaking via the structures of the legislative and executive branches. In fact, both Federalists and Anti-Federalists anticipated that Congress would have the ability to curb its own actions when they threatened to overstep the boundaries set by the Constitution. The historical evidence, however, also shows an understanding among the leading ratifiers that while the national political process may have been the primary safeguard of federalism, it was not the exclusive safeguard of federalism. If matters were otherwise, any act of Congress, no matter what its actual textual authorization, would be per se constitutional because of its enactment. Only after a lengthy, sophisticated, and detailed debate that spanned the distance and time of ratification, did it become clear that the Supreme Court was to play the role it recently has in protecting state sovereignty. Under the Framers' conception of judicial review, the federal courts were created to protect state rights, as much as the rights of individuals.

337. THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). For discussion of the rules of statutory interpretation in the early American republic, see John C. Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607 (1992).

V. SOVEREIGNTY THEN AND NOW

The Framers' view of the role of judicial review and federalism was very much in keeping with their understanding of constitutional law, which, I would suggest, is quite different from the way Professors Wechsler and Choper or most constitutional scholars view the subject. Underlying the political safeguards approach to judicial review is a concern over individual rights. Only by abstaining from federalism or separation of powers controversies, Professor Choper argues, can the Court preserve the political capital that allows it to protect individuals from an oppressive majority. This approach is very much in keeping with the manner in which the Constitution is taught and studied, with a division between the structural elements of the Constitution and its rights-bearing provisions. Until recently, the Supreme Court perhaps has fallen prey to this way of thinking as well. An examination of the Court's docket during the last few years certainly suggests that the Court has been more aggressive in defense of individual rights than of federalism or the separation of powers.

But as Professor Akhil Amar has suggested, the Framers did not understand the Constitution to embody this neat separation between structural issues on the one hand and individual rights on the other.[338] The Bill of Rights and the structural elements of the Constitution should be viewed as a whole, and just as the Constitution itself has certain protections for individuals, such as the Ex Post Facto Clause, the Bill of Rights has much to say about federalism. Indeed, when one examines together the debates about a bill of rights and judicial review of federalism questions, it becomes clear that the Federalists and Anti-Federalists were really arguing about the same conceptual issue. Rather than federalism and individual rights, both debates were about controlling the central government. Above all, the Framers were not concerned so much about whether individuals would have the unimpeded right of free expression as they were concerned about restraining a federal government that someday might lose touch with the people and act in its own self-interest. To be sure, guaranteeing that "Congress shall make no law . . . abridging the freedom of speech, or of the press," might have the expected side effect of securing the individual right to free speech. But, as I have argued elsewhere in regards to the Ninth Amendment, the main purpose of the First Amendment and much of the Bill of Rights, which was added in response to Anti-Federalist de-

338. *See* Amar, *supra* note 305.

mands, simply was to deny the federal government power rather than to define the rights of the individual.[339]

The Framers' unified understanding of federalism and individual rights becomes clear when the Bill of Rights and its history are briefly examined. A reading of the Bill of Rights reveals that many of its guarantees are not written as individual rights as such but as restrictions on the federal government's use of its enumerated powers. Thus, the First Amendment does not speak of the individual's right to free speech or freedom of religion, as did several of the state declarations of rights at the time, but instead says that "Congress shall make no law respecting" those subjects. The Third Amendment forbids the federal government from quartering troops; the Fourth Amendment forbids the issuance of warrants without probable cause; the Eighth Amendment forbids excessive bails and fines, or cruel and unusual punishments. These amendments do not define, in positive law, the rights of the individual. Instead, they are simply a list of actions that the federal government may not take, much like those listed in Article I, Section 9.

Indeed, one need only read to the end of the Bill, when one encounters the Ninth and Tenth Amendments, to fully understand the link between federalism and the Bill of Rights, for it is in these two amendments that the two are linked expressly. The Ninth Amendment states that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Thus, the Ninth Amendment is, at a minimum, a rule of construction forbidding the expansion of federal power by negative implication,[340] and an explicit recognition of other popular rights, such as the right to alter and abolish government, that impose further restraints on the operation of federal power.[341] The Tenth Amendment states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The federalism aspects of this amendment, the last of the Bill of Rights, could not be clearer. It declares expressly what the Federalists had argued was already implicit in the strncture of the Constitution: that the federal government would be one of delegated powers, and as such it could not act beyond those limitations.

Furthermore, the Bill of Rights, to the extent it protects rights rather than restricts powers, recognizes rights that belong to those in the majority,

339. *See* Yoo, *supra* note 267.
340. *See* McAffee, *supra* note 278.
341. *See* Yoo, *supra* note 267, at 972-86.

rather than the minority, and to the States, rather than to individuals. Thus, the First Amendment does not give the individual a right to associate, but instead holds that Congress cannot abridge the right of "the people" to assemble or to petition the government. The Bill of Rights' use of "the people," rather than the individual, emphasizes that the rights protected are those of the majority—the people's right to keep and bear arms, for example—against an oppressive central government.[342] This was precisely the same concern that Federalists sought to address with their arguments concerning the political safeguards of federalism and, ultimately, judicial review. Further, the Constitution recoguizes intermediate institutions whose roles are to be preserved: established state churches, state militias, and the jury. All of these entities imposed successive checks on the powers and reach of the federal government, and both the church and the militia were critical to state authority.[343] By including these provisions in the Bill of Rights, the Framers quite consciously understood them to defend principles of federalism.

Although there are no records of the state ratifications of the Bill of Rights, the history we have of its drafting indicate that its purpose was to use judicial review to check Congress. In this sense, the Bill of Rights was significant because it provided individual rights the *same protections* that the Constitution already had given to the states. In initially debating the need for amendments, James Madison argned, "I do conceive that the constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done . . . ."[344] Further, in discussing the enforceability of the Bill of Rights, Madison explicitly declared that both the federal courts and the states would ensure that the federal government would not encroach on the rights of the people:

> If [these amendments] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. Besides, this security, there is a great probability that such a declaration in the fcderal

342. When state constitutions and declarations of rights used the terms the "rights" of "the people," they referred specifically to popular sovereignty rights necded to control and, if necessary, abolish the government. *See* Yoo, *supra* note 267, at 974.

343. *See* Amar, *supra* note 305, at 1157-74.

344. James Madison, Remarks to the House of Representatives (June 8, 1789), *in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1025 (1971).

> system would be enforced; because the State Legislatures will jealously and closely watch the operations of this Government, and be able to resist with more effect every assumption of power, than any other power on earth can do; and the greatest opponents to a Federal Government admit the State Legislatures to be sure guardians of the people's liberty.[345]

If the Bill of Rights were solely about individual rights, there would be little need for the state legislatures to join the federal courts in enforcement. But reliance upon the states makes perfect sense when it is "assumption[s] of power" that must be controlled. When that is the task, the Framers saw no inconsistency in having both the federal courts and the states—either independently or through the federal government itself—involved in opposing unconstitutional exercises of power.

Another way to examine this point is to ask whether the Framers believed that the federal courts would be the primary enforcers of individual rights. Certainly, as the dissenters in *Garcia* noted, the political safeguards theory can apply to individual rights as easily as it does to federalism. Because individuals are adequately represented in the federal government—they directly elect members of the House and Senate, and indirectly choose the President—does not the political safeguards theory demand that individuals rely upon the political process to safeguard their rights? As Justice Powell put it, "[o]ne can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process."[346] During the ratification debates, the Framers rarely mentioned that the federal courts would become the guardians of individual liberties. In fact, it appears that they discussed judicial review of federalism more often than they did judicial review of individual rights. With passage of the Bill of Rights, the Framers raised individual rights to the same level as federalism in terms of their importance, and, ultimately, their protection by the courts.

One final way to examine the link between state sovereignty and individual rights is to recall the Framers' understanding of the role of the former in protecting the latter. As we saw earlier, the revolutionaries had come to view the state legislatures as the primary guardians of their rights and liberties against the Crown and Parliament.[347] This understanding continued under the Articles of Confederation and the new Constitution.

345. *Id.* at 1031-32.

346. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 565 n.8 (1985) (Powell, J., dissenting).

347. *See supra* notes 229-36 and accompanying text.

The Framers agreed that state legislatures would play two important roles in regard to rights. First, the states would continue to bear the primary responsibility for defining and enforcing individual rights. While the national government's powers "will be exercised principally on external objects, as war, peace, negociation [sic], and foreign commerce," Publius wrote in *The Federalist No. 45*, "[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people . . . ."[348] Justice Brennan similarly believed that states should play a creative role in defining individual rights more broadly than the federal government.[349]

In addition to creating rights, states also were to serve as the primary defender of those rights when the national government exceeded the boundaries on its powers. Even if parties within the national legislature failed to restrain Congress, Publius wrote in *The Federalist No. 26*:

> [T]he state Legislature, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens, against [e]ncroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers and will be ready enough, if any thing improper appears, to sound the alarm to the people and not only to be the VOICE but if necessary the ARM of their discontent.[350]

In addition to blocking unwarranted federal action through their participation in the selection of the national government, state legislatures can protect the people's rights by organizing outside opposition to the national government.[351] States perform this function not only by acting as something of a trip wire to detect illegal federal action but also by acting as the loci and organizers of resistance. As Publius put it, states "can at once adopt a regnlar plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different states; and unite their common forces for the protection of their common liberty."[352] Ultimately, this resistance could take a military form, as Publius argned: "[T]he existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterpri[s]es of ambition, more insur-

348. THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).
349. Brennan, *supra* note 61, at 491.
350. THE FEDERALIST NO. 26, at 169 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
351. *See* Kramer, *supra* note 38, at 1515.
352. THE FEDERALIST NO. 28, at 180 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

mountable than any which a simple government of any form can admit of."[353]

In this dual way, the continued existence of states as quasi-independent sovereigns is crucial to the preservation of individual liberty. Removing one of the primary institutional checks on the power of Congress—judicial review—in order to better protect individual rights would have made little sense to the Framers. They would have seen the disintegration of state sovereignty as a potential threat to individual rights, first, because it would prevent innovation in their creation, and second, because it would eliminate a check on the national government's ability to invade them. Judicial review, therefore, has two salutary effects in regard to individual rights. It not only protects those rights, it also shields other institutions that are charged with guarding rights.

Of course, a critic of this position and a supporter of the political safeguards theory might argue that as times have changed, the character of judicial review and the role of the Supreme Court must change as well. *Carolene Products* has reoriented the purpose of judicial review away from states' rights and toward the protection of minorities that are excluded from the political process. On issues of federalism, the states are fully capable of defending themselves through the political process. By saving political capital through withdrawal from federalism cases, the federal courts can devote their energies to protecting discrete and insular minorities from discrimination by an impure political process.

This Article indicates that the Framers' understanding of state sovereignty and judicial review seems to have anticipated some of the concerns raised in recent scholarship concerning the legislative process. Some public choice scholars analyze the legislative process as a market, in which the product—legislation—is determined by the efforts of organized groups to achieve their special interests.[354] Under this theory, congressmen further their interests by seeking to maximize their chances for reelection. Congressmen will provide legislation to those groups that can produce the most campaign donations and political support—in other words, legislation goes to the highest bidder. Such lawmaking often will not further the public good because private groups will be likely to seek laws that generate narrow benefits for their members at the expense of costs that are im-

353. THE FEDERALIST NO. 46, at 321-22 (James Madison) (Jacob E. Cooke ed., 1961).

354. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12-17 (1991). The summary of the public choice approach here is necessarily brief; for a comprehensive description of interest group theory and its faults, see generally Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

posed on a diffuse, unorganized general public. Reaction to this thesis has been twofold. There are those who argue that this pluralism ought to be accepted, and that courts must enforce statutes in order to give effect to the legislative bargains between interest groups.[355] In other words, groups should get what they pay for. Others believe that interest group theory justifies more active judicial review that prevents private groups from using the legislative process in ways that harm the public good.[356]

The Framers clearly anticipated the possibility that organized factions would seek to use the legislative process to the detriment of the public good. Abuse of the legislative process, after all, is not a phenomenon of the twentieth century. James Madison's solution, set out in *The Federalist No. 10*, was to create a large republic, in which "clashing interests" would cancel each other out due to the numerous interests that would exist in a large nation. Because Madison believed that "the most common and durable source of factions has been the various and unequal distribution of property," his answer to the problem of interest group legislation seems designed to address laws involving economic concerns. These multifarious interests would prevent each other from capturing the legislative process, which then could perform its role in protecting state interests properly. In a sense, then, the Framers believed that the political safeguards would work, particularly when it came to economic legislation.

But what the Framers emphasized during their debate over federalism appears to have been underemphasized by public choice scholars. The Framers shared the modern concern about the potential for a gap between the duty of representation and the incentives created by personal interests; in other words, they realized that the interests of legislators would not necessarily match the interests of their constituents. Under the founding generation's conception, however, legislators' interests would not naturally fall into line with those of powerful factions either. Instead, the greater fear was that the people's representatives would pursue their own *institutional* interests to expand national authority in the face of the Constitution's written limitations on federal enumerated powers. As we saw earlier, the statement of the minority of the Pennsylvania ratifying convention

355. *See, e.g.*, William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

356. *See* MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 17-25, 31-40 (1966); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

is illustrative: "The permanency of the appointments of senators and representatives, and the controul the congress have over their election, will place them independent of the sentiments and resentment of the people, and the administration having a greater interest in the government than in the community, there will be no consideration to restrain them from oppression and tyranny."[357] A decline in federalism and state rights might be exactly the type of diffuse costs an interest group would seek to impose, but federal legislators also would seek to expand their power even when they were not benefiting any particular interest group.

As members of the federal government, legislators would possess the driving interest to expand the power of the federal government, even if it did not benefit them in terms of electoral support. The founding generation feared that Congress would seek to grab more power from the states in order to enhance their own institutional power, prestige, and glory. Some public choice theorists would express this as the idea that federal legislators always would seek to expand national powers because a broader national jurisdiction would allow them to regulate more issues, which would then allow them to attract more political support from more coalitions interested in those issues.[358] Others might argue that under certain conditions the self-interested federal legislator would defer to state regulations, specifically when a group has made an investment in certain state laws, or when customized state law has been tailored to the needs of local interest groups, or when the federal government seeks to avoid politically risky issues.[359] In the Framers' eyes, however, the problem was more than preventing the legislature from providing special benefits to organized groups. The Framers chose to extend judicial review to federalism questions precisely because they did not trust legislators to pursue the interests of their constituents above their own institutional interests. They believed that legislators would bear a personal interest in expanding the powers of their institution at the expense of the powers of the states. The Framers feared that members of Congress would seek power for power's sake.

Even if one could show that senators or members of the House served as transparent communicators of constituent interests, the Framers still would have established judicial review. Members of Congress may represent popular interests back home, but those popular interests might not always represent the states qua states. A state's popular interests and a

357. *Dissent of the Minority of the Pennsylvania Convention*, *supra* note 280, at 548. *See also Brutus IV*, *supra* note 304, at 426.

358. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 269-74 (1990).

359. *See id.* at 274-90.

state's institutional rights became detached at least at the time of the ratification of the Seventeenth Amendment, which removed state legislatures from the equation for electing senators. State legislatures, as opposed to the people of a state, were perhaps the only institutions that had a consistent, long-term interest in protecting state sovereignty. It seems telling that since the passage of the Seventeenth Amendment, state governmental entities, such as legislators, attorney generals, and governors, have had to organize into national interest groups to make their interests known in the political process. We also have witnessed the growth in strength of other institutions, such as political parties, that allow states to influence the political process.[360] The very presence of these groups and outside mechanisms indicate that the political safeguards have failed. States should not have to organize into *national* lobbying groups if, as the political safeguards theory holds, they could pursue their interests directly through their elected representatives in Congress. One also could catalogue other developments, such as the nationalizing effect of changes in technology, economics, and culture, that have contributed to the decline in respect for local concerns in the halls of Washington.[361]

Even before passage of the Seventeenth Amendment, however, the Framers understood that a state's passing interests would not automatically equate with that state's long-term institutional interests. Alexander Hamilton made this point during the ratification debates in New York. During the state convention, Anti-Federalist Melancton Smith proposed an amendment that in part would have allowed the state legislatures to recall their senators. In defending the amendment, Smith argned "that as the senators are the representatives of the state legislatures, it is reasonable and proper that they should be under their controul."[362] Hamilton successfully defeated the amendment by arguing that, while senators did represent the states in the federal government, senators were there to defend the *rights* of a state first, and its *interests* second. Said Hamilton:

> [T]he [constitutional convention] certainly perceive[d] the distinction between the rights of a state and its interests. The rights of a state are defined by the constitution, and cannot be invaded without a violation of it; but the interests of a state have no connection with the constitution, and may be in a thousand instances constitutionally sacrificed.[363]

360. *See generally* Kramer, *supra* note 38.

361. *See id.* at 1503-14.

362. Melancton Smith and Alexander Hamilton, Debate at the New York Ratifying Convention (June 25, 1788), *in* 2 DEBATE ON THE CONSTITUTION, *supra* note 279, at 805.

363. *Id.* at 813.

As Hamilton explained, it was precisely because the short-term interests of a state and its people might seek to overcome the longer-term good of maintaining the limitations on federal power that, in part, the Constitution gave senators six-year terms. "To prevent this, it is necessary that the senate should be so formed, as in some measure to check the state government, and preclude the communication of the false impressions which they receive from the people."[364] Continuing Hamilton's point, if we cannot trust states to consistently protect their own constitutional interests, we certainly cannot expect that the Senate or the Congress will be full-time guardians of federalism, hence the need for a judicial role in policing the balance between federal and state powers.

In part, this insight may explain why the federal government has been able to expand its powers so dramatically in the last sixty years. To be sure, the Supreme Court opened the door by granting Congress substantial deference in the exercise of its Commerce Clause powers. The Court, however, did not force Congress to run through with the speed it has. The political safeguards theory would predict that Congress would restrain itself because the states would prevent their senators and representatives from invading the sovereiguty of the states. Today's great mass of federal regulation, however, makes more sense when we consider the Framers' insight that the momentary interests of a state and the institutional or constitutional interests of a state at times might be in conflict.

We can understand Hamilton's point more clearly if we portray the relationship among the states, and between the states and the federal government, as a game in which each state seeks to maximize the welfare of its inhabitants. A significant determinant of state welfare is the great pool of federal funds available through a variety of national programs. Sometimes federal funds will not be available without a corresponding loss of state sovereiguty. For example, in order to receive funds a state often must accept federal conditions on how the money is spent, such as with highway construction or welfare programs, or a state must transfer partial decisionmaking authority to federal regnlators.[365] If the fifty states are in competition for these funds, then the states that are most willing to surrender some of their autonomy will be the ones that acquire federal funds with the greatest ease. Therefore, those states that are most willing to give up some aspects of their sovereignty will be the states that maximize the welfare of their inhabitants. To borrow from a concept in corporate law, there will be

364. *Id.* at 811.

365. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987).

a "race to the bottom" in order to attract federal funds.[366] But unlike the race-to-the-bottom theory, this destructive competition arises not from state efforts to attract private commercial activity, whether it be business incorporations or industrial plants, but from state efforts to attract federal largess and support.

Judicial review provides an important check on the temptation to surrender state sovereignty voluntarily. To some extent, judicial review also may guard against the threat of legislative instability or the possibility of unconstitutional actions taken in the heat of emotion.[367] Just as importantly, however, judicial review prevents states that are fully informed from sacrificing their sovereignty for some greater financial gain. Put in public choice terms, federalism and the maintenance of a federal government of limited, enumerated powers may be a positive externality that no individual state acting individually or collectively fully internalizes. The Framers viewed federalism as a normative good which ought to be promoted despite any state's momentary interest in reducing its rights.

In this regard, the Framers' decision to use judicial review to protect state sovereignty provides new insights for the ongoing discussion concerning the value of federalism. In recent years, there has been renewed interest in legal scholarship concerning the costs and benefits of federalism. Supporters of a rejuvenated respect for state sovereignty argue that states can bring important advantages to the execution of good public policy. First, federalism is a decentralized decisionmaking system that is more responsive to local interests and preference, that can tailor programs to local conditions and needs, and that can provide innovation in creating new programs.[368] Economists have found that under certain conditions, smaller governments can provide a more efficient allocation of resources that maximizes the well-being of their citizens.[369] State governments

366. Whether such a race to the bottom exists in corporate law, or other areas of law, due to the competition among states, is open to debate. *See, e.g.*, Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Ralph Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

367. James Madison wrote in *The Federalist No. 62* concerning the "propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions" and the problem of "mutability in the public councils." THE FEDERALIST NO. 62, at 418-19 (James Madison) (Jacob E. Cooke ed., 1961).

368. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-1500 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 8-10 (1988). For a useful exposition of the profederalism arguments, see DAVID L SHAPIRO, FEDERALISM: A DIALOGUE 58-106 (1995).

369. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). I have relied upon the works of my colleague, Daniel Rubinfeld, to guide the way through the econom-

compete for households and businesses by enacting efficient policies; this competition produces overall efficiency for the entire system in the long run.[370] Indeed, for much of our nation's history, the states played the primary role in developing economic programs designed to enhance their citizens' welfare.[371] Recent writing also has stressed that a decentralized state system enhances democracy, either by increasing political participation at the state and local level or by reducing the opportunities of powerful interest groups to receive rent-seeking legislation at the national level, thereby increasing the costs of passing such legislation.[372]

As noted earlier, however, the Framers believed that the chief role states would play in their relationship with the federal government would be the protection of the people's liberty. Although limiting the power of the federal government might produce inefficiencies, the Framers believed that this cost was necessary in order to guard against potential tyranny by a federal government filled with self-interested, ambitious politicians. In this sense, the Framers' discussions indicate their belief that federalism brought important advantages solely by diffusing power. To be sure, creating different power centers and merely decentralizing decisionmaking authority are not the same thing. Indeed, my colleagues Malcolm Feeley and Ed Rubin have argued that many of the benefits observers commonly associate with federalism trnly are those that arise only from the decentralization of power and that states are only convenient administrative divisions of the national government.[373] No doubt they are correct on their first point, but they overlook the crucial benefit that states bring because of their independent sovereiguty. As separate political units, states can oppose the exercise of power by the national government, even if the national

ics literature on federalism. *See* Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203 (1997); Daniel L. Rubinfeld, *The Economics of the Local Public Sector*, *in* 2 ALAN AUERBACH AND MARTIN FELDSTEIN, HANDBOOK OF PUBLIC ECONOMICS 571-645 (1987).

370. Of course, for this to be true, a number of conditions must exist: i) publicly provided goods and services are provided at minimum average cost; ii) a perfectly elastic supply of jurisdictions exists; iii) households and businesses have full information about each jurisdiction's policies; iv) mobility is costless; and v) no interjurisdictional externalities or spillovers exist. *See* Inman & Rubinfeld, *supra* note 369, at 17.

371. *See, e.g.*, Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 LAW & SOCIETY 57 (1975); Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 132 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978).

372. Macey, *supra* note 358.

373. Rubin & Feeley, *supra* note 221.

government and the people believe that the centralization of power at that moment is good public policy.

By allowing, or even encouraging, the federal and the state governments to check each other, the Framers' Constitution seeks to create an area of liberty that cannot be regulated by either government. Dividing political power between the two levels of government appears even more effective in light of the presence of a separation of powers in both governments. As James Madison wrote in *The Federalist No. 51*, "In the compound republic of America, the power surrendered by the people, is first divided between two distinct and separate departments," here the federal and state governments, "and then the portion alloted to each, subdivided among distinct and separate departments," in other words, the legislative, executive, and judicial branches.[374] "Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself."[375]

As I argued earlier, the Framers did envision that individual liberties would receive protection through the competition between federal and state governments to provide rights to their citizens. But this was not the only way, in the Framers' minds, that federalism would become the shield of liberty. Freedom also would arise from the inefficiencies that the Framers built into the federal system itself. The nation's governments simply would not be able to regulate all the issues of life because, even if they could overcome the internal checks created by their separation of powers, their external powers would come into conflict and cancel each other out. In a sense, this conclusion is somewhat at odds with the public choice approach to federalism sketched above because in this conception federalism does not exist purely to advance efficiency. Instead, in some cases federalism can prevent the national government from enacting policies that produce national benefits that outweigh the costs.

The Framers believed this deliberate inefficiency to be necessary in order to protect liberty. An absence of judicial review, however, over federalism questions would abort the Framers' desigu. The Framers created judicial review in order to prevent any of the branches or levels of government from exceeding the written limitations on their powers. The federal courts would prevent the states from frustrating the legitimate exercise of national power, and, on the flip side of the coin, they would block the national government from infringing upon the independent sovereignty of the states. From this clashing of institutional interests, of government

374. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).
375. *Id.*

competition, and of governmental power, the Framers hoped that liberty would result. By creating a theory designed to protect individual rights at the expense of federalism, the advocates of the political safeguards of federalism may have undermined the Framers' most effective mechanism for guarding individual freedom.