

The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*

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Federalism has been a central element of the American polity from the nation's inception to the present day. Many of the most salient provisions of the Constitution and its amendments concern the distribution of governmental authority between the nation and its component states. Most of these constitutional ordinances describe the powers assigned to the central government; some withhold from the central government powers that would impose on the prerogatives of the states; others prohibit the constituent states from encroaching on exclusively national domains; all seek to fulfill the clearly understood seminal principle, elaborated in the Tenth Amendment,¹ that the authority of the United States is limited to its constitutionally specified delegated powers, with the residuum of governmental power reserved to the states.

This article considers the appropriate role for the federal judiciary on questions arising under these constitutional provisions. Federalism issues have been continually adjudicated over the course of our constitutional history and have formed the basis of many of the Supreme Court's most consequential decisions—the most recent being *National League of Cities v. Usery*.² The argument that follows will urge not only that *Usery* be overruled, but also that the Court forthrightly abandon judicial review of one set of federalism questions.

This article will first articulate the constitutional background, premises, and contours of what will be termed the Federalism Proposal. Part II will survey the structural and behavioral features of the federal legislature and executive that enable those branches to resolve constitutional federalism issues. The impact of the Federalism

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1. "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." U.S. Const. amend. X.

2. 426 U.S. 833 (1976).

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Proposal will be assessed in Part III. Part IV will consider possible objections to the Proposal.

I. Introduction

A. *Constitutional Framework*

Although exhaustive listing of the constitutional provisions defining federalism is not necessary, it might be helpful to identify some of the most significant clauses that allocate governmental dominion between the nation and the states. The major sources of national power are contained in Articles I, II, and IV, and in a number of the amendments.³ The power of the central government with respect to the states is further defined by a series of provisions, principally in Article I, § 10, that specifically limit state authority.⁴

The philosophy of divided government authority is also articulated in a number of clauses that assign powers to the states. Some provisions expressly stipulate state control over certain matters and, in context, impliedly negate national governance.⁵ Other provisions ex-

3. The judiciary has given wide scope to many grants of congressional authority, particularly to the powers to regulate commerce and to lay taxes and spend to "provide for the common Defence and general Welfare." U.S. CONST. art. I, § 8. *See* pp. 1598-99 *infra* (spending power); note 228 *infra* (taxing power); and pp. 1594-95 *infra* (commerce power). Article I, § 8 also delegates to Congress control of naturalization and of bankruptcy; the maintenance of a monetary system, postal service, and lower federal courts; and the power to declare war, regulation of the national armed forces, and organization of state militias. Article I, § 4 authorizes Congress to make rules or to alter state regulations of the time, place, and manner of electing United States Senators and Representatives. Article II, § 2 empowers the President and the Senate to make treaties with foreign nations, and Article IV grants Congress the capacity to effectuate the full faith and credit principle, to admit new states into the union, to regulate the territories and property of the United States, and to guarantee to every state "a Republican Form of Government."

Sections of several of the amendments empower Congress to enforce the substantive terms of the amendments, including the Thirteenth Amendment's prohibition of slavery, the Fourteenth Amendment's guarantee of due process and equal protection of the laws, and the proscriptions against denials of the right to vote of the Fifteenth Amendment ("race, color, or previous condition of servitude"), the Nineteenth Amendment (women's suffrage), the Twenty-Fourth Amendment (poll tax), and the Twenty-Sixth Amendment (18-year-old vote).

4. Thus restrained are the states' powers to enter into any "Treaty, Alliance, or Confederation" and to coin money or issue bills of credit. Further, without the consent of Congress, states may not impose import or export duties "except what may be absolutely necessary for executing . . . inspection Laws," nor maintain military forces in time of peace.

5. For example, Article I, § 2 declares that the qualifications of voters for members of the House of Representatives shall be those "requisite for Electors of the most numerous Branch of the State Legislature," and the Seventeenth Amendment sets the same qualifications with respect to senatorial elections. Further, the Twenty-First Amendment prohibits, if contrary to state law, the "transportation or importation" into a state of "intoxicating liquors" "for delivery or use therein."

plicitly deny national power and, in context, implicitly recognize state rule.⁶ Finally, the Supreme Court has interpreted several constitutional clauses as forbidding only national government action because the clauses do not address interests sufficiently fundamental to be secure from abridgment by all levels of government.⁷ As with the Eleventh Amendment,⁸ this last class of provisions may raise issues as to the scope of the "judicial Power of the United States" under Article III, a subject beyond the reach of the following discussion. But for present purposes, the last class of provisions further illustrates the federal character of the regime established in the basic charter.

This brief review of the constitutional provisions that apportion power between the nation and the states confirms that the central government possesses only limited authority, with the balance belonging to the states. More important, it indicates that many significant constitutional clauses involve only federalism considerations, in contrast to those provisions that deal with the separation of powers at the national level⁹ and those that designate individual rights.¹⁰

B. *Individual Rights versus States' Rights*

Underlying this article is the contention that there is a qualitative difference that separates constitutional issues of federalism from those of individual liberty, a dissimilarity that augurs for the variant judicial role proposed. The disparity does not lie in the relative difficulty or intricacy of the questions involved in either category, for both comprehend multifaceted and complex matters. Rather, the difference may be described as one between issues of practicality and issues of principle.

When governmental action abridges constitutionally ordained individual liberties, it seems likely that, at least in view of short-run con-

6. Article I, § 9 prohibits Congress from laying direct taxes "unless in Proportion to the Census." This bar has been modified by the Sixteenth Amendment in respect to income taxes. The Eleventh Amendment restricts the federal judicial power from extending to suits against a state by a citizen of another state.

7. See *Hurtado v. California*, 110 U.S. 516, 534-35 (1884) (no grand jury requirement in state murder prosecution despite Fifth Amendment's requirement of grand jury indictment), and *Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211 (1916) (no jury required in state court negligence trial despite Seventh Amendment's guarantee of petit jury in civil cases).

8. See note 6 *supra*.

9. See, e.g., U.S. CONST. art. I, § 1 ("All legislative Powers . . . shall be vested in a Congress . . ."); art. II, § 2 (presidential treaty, war-making, and appointment powers).

10. See, e.g., U.S. CONST. amend. I (freedom of speech, press, assembly, and religion). As discussed in this article, "individual rights" will refer to those liberties protected against all governmental power, that of the national government as well as that of the states.

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cerns for efficient public administration, the commonweal would usually be served best by compromising the individual interests seeking judicial protection. But our historic ideals and our special regard for the dignity of the individual compel the collectivity to subjugate its more immediate needs to the preservation of designated individual rights. In short, government is limited by principle.

Constitutional issues of federalism, on the other hand, are a distinguishable species. When the contention is made that the national government has engaged in activity beyond its delegated authority,¹¹ or when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. The essence of the individual rights claim is that no organ of government, national or state, may undertake the challenged activity. In contrast, an alleged constitutional violation of the federalism principle concedes that one of the two levels of government has power to engage in the questioned conduct; the issue is simply whether the particular level that has acted is the constitutionally proper one.

In addressing this latter question, it must be remembered that one of the principal purposes behind the abandonment of the Articles of Confederation and the adoption of the Constitution, if not *the* major purpose, was to establish a workable central government. The resulting national government was unquestionably limited but, nonetheless, it was given sufficient power to cope with problems that states separately were incompetent to resolve.¹² An assessment of the relative capabilities of the different levels of government, then, is a key step in determining whether a particular exercise of federal power exceeds the assigned boundaries. As between the two levels of government, Madison saw "the impossibility of dividing powers of legislation, in such a manner, as to be free . . . even from ambiguity in the judgment of the impartial."¹³ Woodrow Wilson argued that the relations of federal and state governments "cannot . . . be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."¹⁴

11. Such a contention will usually be made with respect to congressional action, although executive action or treaties undertaken by the President and the Senate might be challenged for the same reason.

12. See Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1337-41 (1934). Cf. W. RIKER, *FEDERALISM* 17-20 (1964) (fear of European aggression motivated formation of central government with real powers).

13. 5 THE WRITINGS OF JAMES MADISON 26 (G. Hunt ed. 1905).

14. W. WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 173 (1911).

The functional, borderline question posed by federalism disputes is one of comparative skill and effectiveness of governmental levels: in a word, an issue of practicability. Whatever the judiciary's purported or self-professed special competence in adjudicating disputes over individual rights, when the fundamental constitutional issue turns on the relative competence of different levels of government to deal with societal problems, the courts are no more inherently capable of correct judgment than are the companion federal branches. Indeed, the judiciary may well be less capable than the national legislature or executive in such inquiries, given both the highly pragmatic nature of federal-state questions and the forceful representation of the states in the national process of political decisionmaking. Thus for Madison, we are told, "[t]he roles of the [state and national] governments would not depend upon legal line-drawing but upon the political process by which they were constituted."¹⁵

The contention here is not that the political branches should make constitutional decisions of federalism because they are better equipped to gather the underlying factual data necessary for intelligent judgment or because they are more adept at fashioning the broad evaluations required for making wise public policy. A great many personal rights questions passed upon by the Court—such as the nature of the threat posed by political "subversives," the ability of the accused criminal to defend without the assistance of counsel, the requirement that an abortion be performed in a licensed hospital—similarly subsume large policy issues with complex and debatable factual considerations. Rather, the point is that constitutional questions of federalism differ from those of individual liberty both in their distinctive, pragmatic quality and in the likelihood of their fair resolution within the national political chambers.

This article will argue that state representation in the national executive and legislature places the President and Congress in a trustworthy position to view the issues involved in federalism disputes.¹⁶ In contrast, beneficiaries of individual rights, such as members of minority groups, are often not adequately represented in the deliberations of the political branches. A more active judicial role in personal rights cases is thus necessitated.¹⁷ But when democratic processes may

15. Huntington, *The Founding Fathers and the Division of Powers*, in *AREA AND POWER* 150, 193 (A. Maass ed. 1959).

16. See pp. 1560-77 *infra*.

17. See, e.g., C. BLACK, *THE PEOPLE AND THE COURT* 103-04 (1960) ("Those who need the Bill of Rights need it because they cannot prevail in the 'political process'"); T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 31-35 (1966) ("[I]n the legislative struggles of the great pressure groups there is none which represents as such the more general . . . interest in preserving fundamental but less immediate values.")

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be trusted to produce a fair constitutional judgment, as in cases involving the allocation of power between the states and the national government, it advances the democratic tradition to vest that judgment with popularly responsible institutions.

C. *The Federalism Proposal*

The major thesis of this article, the Federalism Proposal, may be stated briefly: the federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; the constitutional issue whether federal action is beyond the authority of the central government and thus violates "states' rights" should be treated as nonjusticiable, with final resolution left to the political branches. Neither this Proposal nor the discussion that follows treats the substantive question whether, in any given instance, the national government has overreached its delegated authority; the focus instead will be on which branch of government should decide this constitutional issue.¹⁸

The contours of the Federalism Proposal may be highlighted by applying it to previous cases. Under the Proposal, the states' rights challenges to congressional exercise of the taxing power in *Bailey v. Drexel Furniture Co.*,¹⁹ the child labor tax case, and in *Pollock v. Farmers' Loan & Trust Co.*,²⁰ the income tax case, would not be heard. It could not be argued in court, as it has been in the past, that congressional action under the Civil War Amendments to end racial discrimination overstepped the bounds of federal power.²¹ Congressional use of the spending,²² commerce,²³ war,²⁴ and other pow-

18. The Federalism Proposal would not alter the Court's role in cases involving state encroachments on federal power. See pp. 1583-87 *infra*.

19. 259 U.S. 20 (1922) (denying congressional power to impose tax on enterprises using child labor).

20. 157 U.S. 429 (1895) (striking down pre-Sixteenth Amendment federal income tax).

21. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (upholding congressional power under Thirteenth Amendment to forbid private racial discrimination in housing); *United States v. Raines*, 362 U.S. 17 (1960) (concerning power of Congress under Fifteenth Amendment to forbid racial discrimination in voting); *Civil Rights Cases*, 109 U.S. 3 (1883) (denying power of Congress under Fourteenth Amendment to prohibit racial discrimination in public accommodations).

22. See, e.g., *United States v. Butler*, 297 U.S. 1 (1936) (disapproving use of spending power to pay farmers to reduce planted acreage).

23. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (denying congressional authority to prohibit interstate transportation of goods from factories employing child labor).

24. See, e.g., *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948) (upholding congressional use of war power to regulate rents in post-World War II period).

ers²⁵ would similarly be protected from federalism-based attacks.²⁶

It is important, however, to recognize that true constitutional questions of personal rights may arise from action of the central government that is also independently alleged to be beyond national power vis-à-vis the states.²⁷ The Federalism Proposal would raise no bar to

25. States' rights challenges have also been posed to national actions based on the treaty power, *Missouri v. Holland*, 252 U.S. 416 (1920) (treaty with Canada regulating hunting of migratory birds), the power over the manner of electing congressmen, *United States v. Classic*, 313 U.S. 299 (1941) (Congress can regulate vote fraud in federal election), and the power to admit new states, *Coyle v. Smith*, 221 U.S. 559 (1911) (Congress exceeded its powers by conditioning admission of Oklahoma to Union on retention of Guthrie as capital).

26. Another constitutional question that concerns only states' rights is whether Congress, as a necessary and proper exercise of its delegated powers, may generally subject the states to lawsuits in federal courts (or before international tribunals). The states contend that such action violates their sovereign immunity secured in the Eleventh Amendment. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973); Nathanson, *Constitutional Problems Involved in Adherence by the United States to a Convention for the Protection of Human Rights and Fundamental Freedoms*, 50 CORNELL L. REV. 235, 240-42 (1965). Yet another question involves legislative authority over intoxicating liquors; the powers of Congress to regulate and tax are pitted against the specific grant of control to the states in the Twenty-First Amendment. *See, e.g., Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (claim that state liquor tax violates export-import clause); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (claim that state liquor regulation violates commerce clause).

Other issues, though less clearly related to a particular constitutional provision, nonetheless involve only matters of federalism and should therefore be left to the national political process for final resolution. The constitutional immunity of state property and activities from federal taxation and regulation is probably the most significant both in terms of quantity of litigation, *see, e.g., New York v. United States*, 326 U.S. 572 (1946); *Helvering v. Gerhardt*, 304 U.S. 405 (1938); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871) (taxation immunity), and as a source of current controversy, *see, e.g., National League of Cities v. Usery*, 426 U.S. 833 (1976); *Fry v. United States*, 421 U.S. 542 (1975) (regulation immunity). Similarly, the constitutional question whether an executive agreement concerns a subject that lies beyond federal power and is thus reserved to the states should not be within the realm of the federal judiciary. *See United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

27. In all of the above illustrations, the argument attacking the constitutionality of exercises of national power implicitly concedes that the challenged conduct could have been undertaken by state governments acting within their jurisdiction. Thus the attack makes no genuine constitutional claim of individual freedom. Such an allegation, however, may be constructed. If the disputed actions of the federal political branches are constitutionally ultra vires the central government, the argument would proceed, then the actions are nullities. It would therefore be a violation of personal liberty to undertake such actions to the detriment of any individual. The point may even be lent specific constitutional dignity by adding that the regulation of an individual's life, liberty, or property by means of a constitutionally invalid rule is a denial of due process of law.

This construct is by no means an impossible one. But, unlike other approaches that equate violations of federalism with deprivations of personal liberty (which will be examined and rejected below), it is built more on semantics than substance. For, no matter how phrased, the root of the argument is an abridgment of states' rights. The claim of personal liberty is merely a derivative of that primary finding. The argument concludes that this transgression of the federalism principle violates civil liberty or

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such claims. Thus, in *United States v. Darby*²⁸ it was contended that the Fair Labor Standards Act of 1936 exceeded Congress's commerce power *and* that such regulation of personal economic freedom was a deprivation of property without due process of law. This same duet of constitutional objections was lodged against the 1964 Civil Rights Act's ban against racial discrimination in public accommodations that are deemed under the Act to affect interstate commerce.²⁹ In *United States v. Belmont*³⁰ and *United States v. Pink*,³¹ the defendants charged both that President Roosevelt's executive agreement with the Soviet Union respecting Russian assets within the states was an invasion of states' rights *and* that the agreement violated the Fifth Amendment by depriving individual creditors of property without due process of law or just compensation. The attack on the suspension of literacy tests for some groups of citizens under the Voting Rights Act of 1965 urged not only that the entire subject rested within the province of the states, but also that, even if the national government did have power over this aspect of the franchise, the statute's discrimination among groups of citizens violated the equal protection clause.³²

The constitutional merit of the individual rights contention presented in these cases is beyond this discussion. But it is critical, for present purposes, to distinguish between these contentions and the federalism issue with which they were yoked. For the individual rights claims present primary and independent constitutional issues. If the Supreme Court addresses the states' rights argument, and the Fed-

"due process" but, without the provision of its supporting rationale, this conclusion is simply assumed. The argument ignores the essential difference between judicial invalidations of government action that augment the total range of individual liberty (the individual rights category) and those judicial interventions that result only in a redistribution between the nation and states of authority to regulate personal action (the federalism category). In the latter category, since the states may do to the individual what it is claimed that the federal government may not do, the question of distribution of powers may be decided by the states' representatives in the national political branches. *See pp. 1560-77 infra.*

28. 312 U.S. 100 (1941) (upholding Fair Labor Standards Act of 1938, ch. 676, 60 Stat. 1060).

29. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (challenging Title II of Civil Rights Act of 1964, § 201(a), (b)(1), (c)(1), 42 U.S.C. § 2000a(a), (b)(1), (c)(1) (1970)).

30. 301 U.S. 324 (1937).

31. 315 U.S. 203 (1942).

32. *See Katzenbach v. Morgan*, 384 U.S. 641, 656-57 (1966) (challenging Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (1965) (current version at 42 U.S.C. § 1973b (Supp. V 1975))). Analogous objections may be raised to virtually all federal enlargements of the franchise. Wholly apart from whether such power belongs to the national government or to the states, the allegation may be advanced that, by increasing the voting ability of some persons, Congress has "restricted" or "diluted" that of others in violation of their personal constitutional rights.

eralism Proposal urges that it should not, the Court need only determine whether federal action has gone too far and has thus invaded the realm of the states. But, in responding to the personal liberties contentions, the Court must decide the far more consequential matter whether all governmental power to take the disputed action is constitutionally forbidden.³³

II. Representation of State Interests in the National Political Process

A primary justification for judicial review of claimed infringements of individual liberty is the teaching of theory and experience that these constitutionally secured interests are unlikely to receive sympathetic consideration in the political process.³⁴ But this analysis does not apply to federalism questions. Numerous structural aspects of the national political system serve to assure that states' rights will not be trampled, and the lesson of practice is that they have not been.³⁵

33. Under the Federalism Proposal the Court will be unable to dispose of controversial cases on narrower federalism grounds. For example, the Court would not be able to avoid deciding whether national action abrogates individual rights by ruling that states' rights have been violated. But this seeming disadvantage is more theoretical than real. Occasionally, in the absence of a national regulation applicable in all states, no single state will so burden its citizens because of the competitive disadvantage that would result. But since most action deemed necessary by the national government would likely commend itself to at least one of the states, the individual rights issue would probably arise in an action against a state agency and would reach the Court in any event.

34. See Choper, *On the Warren Court and Judicial Review*, 17 CATH. U.L. REV. 20, 40-41 (1967). See also note 17 *supra*.

35. Herbert Wechsler presented a version of this thesis in *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). More recent renditions, using the states' representation in Congress as the predicate for various contentions, include Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 614 (1975) (since states are represented in Congress, Congress should, under U.S. CONST. amend. XIV, § 5, be able to restrict state power more than the judiciary alone could); Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1263-72 (1977) (because political safeguards of federalism are powerful in context of environmental policy, courts may not need to impose federalism constraints on environmental legislation); and Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 713 (1976) (Congress crucial to resolution of federalism issues, for "[o]nly in Congress are the states represented in a way that reasonably assures consideration of their institutional interests. The central mission of courts . . . should therefore be to protect Congress' role . . .") [hereinafter cited as Tribe, *Intergovernmental Immunities*]. But see Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1067-78 (1977) (because states' interests may be represented imperfectly in Congress, individuals should be able to vindicate those rights derived from state sovereignty) [hereinafter cited as Tribe, *Unraveling*]; Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871, 1885 (1976) (claiming representation of states' interests in Congress is inadequate).

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A. Congress

The Senate, in Madison's words, is "that one branch of the legislature" which functions as a "representation . . . of the states."³⁶ Marshall noted that "the states themselves, are represented in Congress,"³⁷ and characterized members of the Senate as "the representatives of the state sovereignties."³⁸ That the Senate, a body "in which the smallest state has as much weight as the greatest,"³⁹ was originally intended to protect state interests is clear in the unalterable equality of Senate representation for each state⁴⁰ and in the since-amended provision that Senators be chosen by the state legislatures.⁴¹ Even if the House of Representatives would be "a representation of citizens,"⁴² the Senate, with its special powers over the making of treaties and the appointment of important national officials, could be depended upon as a conservator of states' rights; for no law of the central government could be enacted "without the concurrence first of a majority of the people, and then of a majority of the states."⁴³

The lower house, however, is not wholly devoid of mechanisms for state representation. Although not a major factor, the constitutional requirement that each state have at least one representative in the House is, nonetheless, a factor.⁴⁴ The opportunities for state legislatures to influence the selection of congressmen through their authority to draw district lines that reflect political considerations is a more substantial factor, since this power has apparently survived the Court's proscription of malapportionment.⁴⁵ Further, there is evidence that many bipartisan state delegations in the House seek to coordinate their behavior in order to serve mutual interests. Some of these state delegations often engage in bloc voting, either to achieve particular results or to establish a future bargaining position.⁴⁶ Ordinarily, such

36. THE FEDERALIST No. 58 (J. Madison) 391, 392 (J. Cooke ed. 1961) [hereinafter cited to this edition without reference to the editor].

37. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435 (1819).

38. John Marshall, *Essays from the Alexandria Gazette*, 21 STAN. L. REV. 456, 495 (1969).

39. Statement by Mr. Justice Johnson to John Taylor, NILES WEEKLY REGISTER, Oct. 9, 1830, at 119, quoted in D. MORGAN, CONGRESS AND THE CONSTITUTION 91 (1966).

40. U.S. CONST. art. V (no state shall be deprived of its equal vote in the Senate).

41. U.S. CONST. art. I, § 3, cl. 1 (1789, amended 1913).

42. THE FEDERALIST No. 58 (J. Madison) 391, 392.

43. *Id.* No. 62 (J. Madison) 415, 417.

44. Based on 1970 Census data, two states, Alaska and Wyoming, have only about two-thirds of the population of an average congressional district. CONGRESSIONAL QUARTERLY, CONGRESSIONAL DISTRICTS IN THE 1970s 2 (1973). Nevertheless, each state has a Representative under U.S. CONST. art. I, § 2, cl. 3.

45. See *Gaffney v. Cummings*, 412 U.S. 735, 752-54 (1973).

46. See Fiellin, *The Functions of Informal Groups: A State Delegation*, in NEW PERSPECTIVES ON THE HOUSE OF REPRESENTATIVES 105, 118-21 (R. Peabody & N. Polsby eds., 2d ed. 1969) [volume hereinafter cited as NEW PERSPECTIVES].

delegations are fairly homogeneous in ideology. But even within state delegations that are ideologically diverse, legislative issues of common concern are frequently discussed, although without pressure on the individual representatives to arrive at a common voting position.⁴⁷ Finally, both the Democratic and Republican leaderships in the House make special efforts in the committee assignment process to ensure fair representation from individual states, regions, and sub-regions,⁴⁸ and many state delegations work cohesively to obtain desirable assignments for their members.⁴⁹

Examination of the backgrounds of congressmen provides additional evidence of the likely sensitivity of Congress to state issues. Madison's belief that "[e]ven 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,"⁵⁰ has been vindicated. Since the 1790s, usually more than three-fourths of the members of Congress have been graduates of state and municipal offices.⁵¹ In the Senate of the 95th Congress, for example, fifteen of the Senators were former state governors, thirty-three others had served in various state government positions, and fourteen others in local government.⁵² For a variety of reasons, including the recruitment practices of local political parties that choose candidates and the electorate's hostility to "carpetbagger" office seekers, congressmen have

47. See Deckard, *State Party Delegations in the United States House of Representatives—An Analysis of Group Action*, 5 *POLITY* 311, 333 (1973); Fiellin, *supra* note 46, at 111-14, 116-17.

48. See R. FENNO, *THE POWER OF THE PURSE* 54-61 (1966); Masters, *Committee Assignments in the House of Representatives*, 55 *AM. POLITICAL SCI. REV.* 345, 346 (1961). Masters claims that committee assignments are frequently channeled through the senior member of the state party delegation. *Id.* at 346-48.

49. See Deckard, *supra* note 47, at 322-27.

50. *THE FEDERALIST* No. 45 (J. Madison) 308, 311.

State legislative control over members in both houses of Congress through the states' right to establish the qualifications of electors has been substantially diluted by a series of constitutional amendments and by recent federal legislation and judicial edicts that greatly expand the right to vote. It is no longer possible for state political chieftains to exclude significant segments of the citizenry through such devices as poll taxes and literacy tests. Yet this does not mean that congressmen are now less reflective of state points of view. Rather, it simply means that the identification of state interests requires a broader survey of state opinion because, under the constitutional and statutory enlargements of the franchise, the voters who elect congressmen are the very same voters who elect state officials.

51. A. HOLCOMBE, *OUR MORE PERFECT UNION* 205-06 (1950); see Huntington, *Congressional Responses to the Twentieth Century*, in *THE CONGRESS AND AMERICA'S FUTURE* 5, 14 (D. Truman ed. 1965) (most congressional leaders have prior experience in state or local government).

52. *OFFICIAL CONGRESSIONAL DIRECTORY* 4-194 (1975) (data compiled from biographical sketches).

characteristically had very long and intimate ties to their districts.⁵³ Indeed, a contemporary study has revealed that "about 75 per cent of the members of recent Congresses were born in the state which they represent" and that congressmen are less mobile than the general public and much less mobile than other elite groupings.⁵⁴

These considerations may generate a parochialism and insularity of view in Congress that is subject to criticism on normative grounds. But the same considerations also constitute significant evidence that congressmen do reflect state opinion and are particularly sensitive to local concerns, even when such behavior conflicts with the dictates of political party allegiance.⁵⁵

B. *The Presidency*

The executive's key role in the national lawmaking system can also protect the states from encroachments by the national government. As a structural matter, the electoral college scheme places the separate states *as states* directly in a nominee's path to the White House. Although the early practice of choosing electors through the state legislatures gave the states a more prominent role in the presidential selection process,⁵⁶ state influence on presidential selection still exists, albeit to a lesser extent. Of greater impact is the President's frequent

53. Hacker, *The Elected and the Anointed*, 55 AM. POLITICAL SCI. REV. 539, 544 (1961) (41% of congressmen live in original hometown; only 12% of corporate executives do). See Davidson, *Congress in the American Political System*, in LEGISLATURES IN DEVELOPMENTAL PERSPECTIVE 129, 151-53 (A. Kornberg & L. Musolf eds. 1970). Examples of concern over "carpetbaggers" include the experience of John D. Rockefeller IV, who claimed that he was opposed on that issue in the 1972 West Virginia gubernatorial campaign. N.Y. Times, Nov. 5, 1972, § 4, at 2, col. 2. After losing the election, Rockefeller said "[West Virginia] had to see if, rejected, I would stay." N.Y. Times, Nov. 12, 1972, at 35, col. 1. He was elected Governor of West Virginia in 1976. Cf. N.Y. Times, Nov. 5, 1964, at 18, col. 1 (Pierre Salinger attributed loss in California senatorial campaign to carpetbagger issue).

54. Davidson, *supra* note 53, at 152.

55. R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES 131 (1967) [hereinafter cited as R. DAHL, PLURALIST DEMOCRACY]; Truman, *Federalism and the Party System*, in FEDERALISM 115, 117-25 (A. Macmahon ed. 1955).

Under the current campaign finance statutes, the trend in congressional races has been toward greater reliance on national, not local, sources of campaign funds. See H. ALEXANDER, FINANCING POLITICS 126-27 (1976) (national special interest groups increasing campaign contributions to congressional candidates); H. ALEXANDER, MONEY IN POLITICS 124-32 (1972) (national parties providing greater support for local candidates). Nevertheless, local financing of congressional candidates remains strong. Of approximately \$74 million given to 1974 congressional candidates, only \$12.5 million came from national interest groups. H. ALEXANDER, FINANCING POLITICS 225-28 (1976) (national party contributions to congressional races not available).

56. This procedure was abandoned in most states by 1832, N. PEIRCE, THE PEOPLE'S PRESIDENT 74-78 (1968), although the South Carolina legislature chose that state's electors until 1860 and both Florida in 1868 and Colorado in 1876 used legislative selection for one presidential election year. *McPherson v. Blacker*, 146 U.S. 1, 33 (1892).

obligation to local party organizations and to state political leaders because of their substantial influence in the presidential nominating process.⁵⁷ The increasing use of primaries notwithstanding, the felt obligation of incumbents to cultivate local groups when seeking to secure their own renomination or that of their preferred successor has not wholly diminished.⁵⁸ But the strongest assurance that executive action will be sensitive to the matter of states' rights derives from the President's need to maintain rapport with Congress, a body whose binding local ties have been explored.⁵⁹ President Carter's recent conflict with Congress over funding of federal water projects demonstrates both congressional vigilance over the impact of executive actions on localities and the President's realization that he must treat such legislative concern delicately, if not deferentially.⁶⁰

Executive solicitude for states' rights can even be seen in foreign policy, where the President's diplomatic representatives are traditionally reluctant to negotiate about "local matters."⁶¹ Many treaties include "constitutionally unnecessary but politically attractive" "federal-state" clauses that alter national obligations to account for federal structures of government.⁶² Equally obvious examples of this solicitude are the creation of a special White House unit for federal-state relations⁶³ and the designation of a high-ranking administration of-

57. See C. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* 399 (4th ed. 1968). An example is the role of the late Mayor Richard Daley of Chicago in the nomination and election of President John F. Kennedy, L. O'CONNOR, *CLOUT: MAYOR DALEY AND HIS CITY* 150-62 (1975), and the subsequent control the mayor allegedly held over the appointment of federal judges in Chicago, J. GOULDEN, *THE BENCHWARMERS* 118-21 (1974).

58. Despite the increasing popularity of the direct primary system for choosing delegates, see N. POLSBY & A. WILDAVSKY, *PRESIDENTIAL ELECTIONS* 107-14 (4th ed. 1976); A. RANNEY, *CURING THE MISCHIEF OF FACTION* (1975), candidates still rely on local political organizations in many instances. And many states use traditional delegate selection procedures, such as the caucus system in Iowa that produced Jimmy Carter's first victory on the road to the Presidency. *NEWSWEEK*, Feb. 2, 1976, at 18-19.

59. See pp. 1561-63 *supra*.

60. President Carter's initial plan to cut funding for nineteen projects was sharply criticized in Congress. The projects had previously received congressional approval. *N.Y. Times*, Feb. 22, 1977, at 13, col. 1. A Senate amendment to an unrelated public works bill denounced the President's move to review the water projects. *N.Y. Times*, Mar. 11, 1977, at 1, col. 2. The House of Representatives refused to delete sixteen of the projects from the budget, *N.Y. Times*, June 15, 1977, § A, at 1, col. 8, but the following day the Senate Appropriations Subcommittee on Public Works moved toward a compromise by withholding funds for nine of the projects. *N.Y. Times*, June 16, 1977, § A, at 13, col. 1. Funding for nine projects originally cut off by Carter was approved by Congress in late July, *N.Y. Times*, July 26, 1977, at 10, col. 4, and signed into law by the President. Public Works for Water and Power Development and Energy Development Research Appropriations Act of 1977, Pub. L. No. 95-96.

61. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 247-48 (1972).

62. *Id.* at 248.

63. 5 WEEKLY COMP. OF PRES. DOC. 258-59 (1969).

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ficial, in recent years often the Vice President, to be the President's liaison with the states.⁶⁴

C. Identifying the "Viewpoint" of a State

Accepting that both national political branches are sensitive to state and local concerns, the task of identifying precisely a particular state's "interest" or "point of view" on any specific issue may often be fraught with uncertainty. If both of a state's senators, a majority of its delegation in the House of Representatives, and its governor all agree on a matter, then the "state's view" has most likely been accurately ascertained. But if there is a divergence of opinion among these officials, it may legitimately be asked: who represents the "state's opinion" in the dispute?

In *National League of Cities v. Usery*,⁶⁵ for example, the attorneys general of twenty-two states, joined by the National League of Cities and the National Association of Counties, urged that amendments to the Fair Labor Standards Act (FLSA) establishing federal regulation of the wages of state and municipal employees exceeded national power vis-à-vis the states.⁶⁶ Four state attorneys general filed amicus curiae briefs defending Congress's action in expanding the reach of the FLSA.⁶⁷ Was this law approved by the "representatives of a majority of the separate States"? The provision challenged in the litigation was most squarely addressed in the legislative process by a proposed Senate amendment to exempt overtime for police and firemen from the coverage of the Act.⁶⁸ The exemption was roundly defeated by the Senate, 29-65.⁶⁹

What was the position of the national representatives of the states

64. *Id.* See also L. FISHER, PRESIDENT AND CONGRESS 126 (1973):

After the November 1966 elections, President Johnson announced a \$5.3 billion reduction in Federal programs. Economic and legal justifications presented by the Administration failed to placate the localities affected by the cutbacks. Sensitive to criticism from the states, President Johnson released some of the money in February 1967, and on the eve of a conference the next month with governors he released additional amounts.

65. 426 U.S. 833 (1976). The Court held unconstitutional 29 U.S.C. § 203(s)(5) (Supp. V 1975) ("public agencies" are employers for purposes of Fair Labor Standards Act) and *id.* § 203(x) (state and local governments are "public agencies").

66. 426 U.S. at 834-35.

67. *Id.* at 835.

68. 30 CONG. Q. ALMANAC 10-S (1974).

69. *Id.* These provisions were not voted on in the House. The original House bill did not cover police and firemen overtime pay, but, after the Conference Committee adopted a modified Senate version, the House approved the complete bill by a vote of 345-50. 30 CONG. Q. ALMANAC 244, 28-H, 29-H (1974). For details of the House vote, see *id.* at 28-H, 29-H.

whose attorneys general disputed the constitutionality of this provision? Both Senators from seven of those states voted to regulate the hours and wages of police and firemen.⁷⁰ The one Senator from Missouri who voted was also in favor, but the one Arizona Senator voting was in opposition.⁷¹ The Senators from ten of the other *Usery* states split on the proposed Senate amendment,⁷² while only three of the states whose attorneys general later challenged the law had both Senators in opposition.⁷³

These data, of course, do not conclusively demonstrate that most of the attorneys general who opposed the statute in *Usery* failed to reflect their states' true positions. But it surely raises questions as to whether they did. At a formalistic level, it is tempting to equate a "state's interest" with the positions voiced by state and local officials rather than with the ballots cast by the state's representatives in the nation's capital. It is often heard that once congressmen reach Washington they shed their regional bonds and adopt a broader, national perspective. But the available data suggest otherwise.⁷⁴ Even if it could be assumed that an argument advanced before the Supreme Court by a state attorney general describes the view of the state's governor or of a majority of its legislature, it by no means follows that that position better resembles the "opinion of the state" than that

70. California, Iowa, Massachusetts, Mississippi, Montana, New York, and South Dakota. Support for the measure came from liberal Democrats like Sen. Cranston of California and Sen. McGovern of South Dakota, from a liberal Republican like Sen. Javits of New York, and from Sen. Buckley of New York, a noted conservative. 30 CONG. Q. ALMANAC 10-S (1974) (vote 57). In addition, in the less telling House ballot, the delegations from six of these states voted overwhelmingly for the bill, with the South Dakota delegation evenly divided. *Id.* at 28-H.

71. *Id.* at 10-S. All eight Missouri congressmen who voted approved the related House measure, while the Arizona House delegation split. *Id.* at 28-H.

72. As to eight of these states—Indiana, Nevada, New Hampshire, Oregon, South Carolina, Texas, Utah, and Wyoming—the representatives supported the law by at least 2-1; the Maryland House delegation divided evenly; a majority of Virginia's House members opposed it. *Id.* at 28-H to 29-H.

73. Delaware, Nebraska, and Oklahoma. *Id.* at 10-S. The House delegations of all three of these states, however, backed the final bill by a wide margin. *Id.* at 28-H to 29-H.

74. Miller & Stokes, *Constituency Influence in Congress*, 57 AM. POLITICAL SCI. REV. 45 (1963) (congressmen influenced by their perception of constituency preferences and by their own personal preferences). See also Dexter, *The Representative and His District*, in NEW PERSPECTIVES, *supra* note 46, at 3.

A longstanding indictment of Congress has been that it heeds the provincial concerns of the states to the detriment of the nation as a whole. Moreover, it has been observed that the political attitudes and policy conflicts that exist in Congress are the same as those present in most state legislatures and that "state officials find a large variety of values pressing upon them as they carry out their responsibilities, of which states' rights is usually a minor one." See Weidner, *Decision-Making in a Federal System*, in FEDERALISM, *supra*, note 55, at 363, 370, 371.

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articulated by the state's members of Congress.⁷⁵ That state and local officers may, because of budgetary problems, oppose a federal minimum wage for state and local employees does not mean that the "state" is opposed. Just as Madison perceived the Constitution as created not by "state governments" but rather by the "people of the states,"⁷⁶ so, too, it is not the viewpoint of a state's government but rather that of the people of the state that is at issue. As to this latter quantity, the judgment of the state's congressional representatives, who are politically responsible to the electorate of the state, may fairly be relied upon.

D. *The Record of Experience*

The early view, expressed throughout *The Federalist* by both Hamilton and Madison, was that "[t]he State Governments may be regarded as constituent and essential parts of the federal Government";⁷⁷ that "[a] local spirit will infallibly prevail . . . in the members of the Congress";⁷⁸ that "the people of each State would be apt to feel a stronger [bias] towards their local governments than towards the government of the Union";⁷⁹ that "ambitious encroachments of the Federal Government on the authority of the State governments . . . would be signals of general alarm. Every Government would espouse the common cause"⁸⁰ and "exert their local influence in effecting a change of federal representatives."⁸¹ The prediction that the voice of the states would be heard distinctly in the nation's capital has been forcefully confirmed in practice. Indeed, Madison's pessimistic forecast that "[m]easures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests and pursuits of the governments and people of the individual States"⁸² has been largely realized.

Imposition of the states' attitudes on the national lawmaking system is facilitated by the negative mechanisms of the congressional

75. The assumption that the attorney general speaks for the "state *qua* state" is extremely fragile in the many states, like California and New York, where the attorney general is elected independently. Such an independently chosen official is not responsible either to the governor or to the state legislature.

76. Huntington, *supra* note 15, at 188. See also Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1167 (1977) (reviewing possible definitions of "state" in *Usery* opinion).

77. THE FEDERALIST No. 45 (J. Madison) 308, 311.

78. *Id.* No. 46 (J. Madison) 315, 318.

79. *Id.* No. 17 (A. Hamilton) 105, 107.

80. *Id.* No. 46 (J. Madison) 315, 320.

81. *Id.* No. 44 (J. Madison) 299, 305.

82. *Id.* No. 46 (J. Madison) 315, 318.

process, such as bicameralism, the committee system, and the filibuster.⁸³ Such devices permit Representatives elected by very few citizens and Senators representing an insignificant fraction of the national electorate to block the enactment of laws. The executive veto, moreover, allows one stroke of the presidential pen to nullify the will of both legislative chambers. As a consequence, if proposed federal legislation touches the nerve of states' rights in any meaningful way, it is vulnerable to its opposition on all sides. This vulnerability is so great that, as Madison foresaw, when the political branches finally decree a national solution for a problem of state concern, when they "become more partial to the federal than to the State governments, the change can only result, from such manifest and irresistible proofs of a better administration, as will overcome all [the political branches'] antecedent propensities."⁸⁴

The immense growth of the national government's activities cannot be denied. This expansion was a response to the multitude of societal problems that have been recognized and to the increased interdependence of the states that has resulted from industrialization and from improved transportation and communication. But the proliferation of national programs has neither led to a centralized autocracy nor resulted in the concentration of federal power to the exclusion of the individual states. As illustrated by the prolonged constitutional debates in Congress that delayed passage of the Sherman Act for several years⁸⁵ and that stalled desperately needed antilynching laws and civil rights legislation for too many more,⁸⁶ Congress has generally paid fastidious attention to the reserved power of the states. As late as 1948, Charles Beard could write that

83. See Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 830-832 (1974).

84. THE FEDERALIST No. 46 (J. Madison) 315, 317 (footnote omitted).

85. See D. MORGAN, *supra* note 39, at 144-50. The constitutional attack alleged that the Sherman Act went beyond Congress's power to regulate commerce. H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 178 (1954). The measure was under consideration for two years and was actively debated on the floor of Congress over a three-month period. See *id.* at 177-210. See also Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

86. Antilynching legislation was filibustered to death in the Republican-controlled Senate in 1922 after passing the House 230-119; similar proposals also fell victim to filibusters by southern senators in 1935 and 1938. A 1940 proposal passed the House by 252-131, but the Senate Majority Leader, Alben Barkley, refused to bring the measure up for a vote "in the midst of our international situation, our defense program, and the condition in which the world finds itself." NAACP, *A GENERATION OF LYNCHING IN THE UNITED STATES, 1921-46*, reprinted in *Antilynching: Hearings on H.R. 41 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 80th Cong., 2d Sess. 61, 63-64 (1948). From 1921 to 1945, the NAACP reported 420 lynchings. *Id.* at 63.

After 1875, Congress ignored civil rights issues until World War II and did not pass any civil rights legislation until the Civil Rights Act of 1957, which protected the right

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efforts to effect uniformity of the suffrage by national action have repeatedly been defeated in Congress, especially in the Senate, where the states are equally represented. [The poll-tax controversy has] vividly demonstrated that the federal principle of state control over the suffrage cannot be easily broken down, if at all, by action on the part of the national government.⁸⁷

The examples of congressional hesitancy regarding federal intrusions on the states could easily be multiplied many times. In 1789 Congress refused to create a "Home Department" in part because the agency might trespass on the states' authority.⁸⁸ Throughout American history, Congress has demonstrated judicious concern for local control over education when considering proposals for federal financial aid.⁸⁹ The legislative branch repeatedly rejected proposals by Presidents Nixon and Ford to set a national minimum for state unemployment compensation.⁹⁰

Presidents have also resisted the weakening of the federal system. Such was the basis for Andrew Jackson's rejection of legislation renewing the charter of the Bank of the United States,⁹¹ and for vetoes by James Monroe of legislation extending national regulation of roads⁹² and by Franklin Pierce of a law aiding the insane.⁹³ Richard Nixon's "New Federalism"⁹⁴ emphasized the return to state and local government of large areas of substantive responsibility and great amounts of revenue.

Federal revenue sharing, proposed for a variety of national purposes but finally enacted to alleviate the desperate financial plight of local government,⁹⁵ was hardly a recent phenomenon. Revenue shar-

to vote. 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 837-39 (B. Schwartz ed. 1970). The 1964 Civil Rights Act was passed after ten weeks of filibuster in the Senate. D. MORGAN, *supra* note 39, at 321.

87. C. BEARD, *THE ENDURING FEDERALIST* 6 (1948).

88. See L. CALDWELL, *THE ADMINISTRATIVE THEORIES OF HAMILTON & JEFFERSON* 213 (1944).

89. See, e.g., 21 CONG. Q. ALMANAC 279-81, 288 (1965); 17 *id.* at 208-09 (1961). See generally Fenno, *The House of Representatives and Federal Aid to Education*, in *NEW PERSPECTIVES*, *supra* note 46, at 283.

90. See, e.g., 9 WEEKLY COMP. OF PRES. DOC. 368-72 (1972).

91. 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1148-53 (J. Richardson ed. 1897).

92. 2 *id.* at 711-12. Monroe appended to his veto message a lengthy review of "the right of Congress to adopt and execute a system of internal improvement," which he asserted "does not exist." *Id.* at 713, 748. See also 3 *id.* at 1046, 1054-55 (Jackson veto message on legislation establishing turnpike construction company; calls for constitutional amendment granting such power to federal government "and defining and restricting its exercise with reference to the sovereignty of the States").

93. 7 *id.* at 2780, 2782-83.

94. 5 WEEKLY COMP. OF PRES. DOC. 1214 (1969).

95. See J. PECHMAN, *FEDERAL TAX POLICY* 245-46, 277-82 (3d ed. 1977); Myers, *A Legislative History of Revenue Sharing*, 419 ANNALS 1, 2-3 (1975).

ing supplemented the traditional policies of excluding from federal gross income the interest paid on state and local bonds and of permitting the deduction of state and local taxes from the federal income tax. Both practices represent effective monetary awards to states with no federal strings attached.⁹⁶ Revenue sharing also built on the long-standing, though more nationally controlled, federal practice of providing grants-in-aid for programs administered by state and local agencies.⁹⁷ Even Franklin Roosevelt, probably the most aggressively centralizing of the Presidents, manifested concern for preserving federalism when he overruled his advisers by assigning the administration of unemployment insurance to the states.⁹⁸ Thus there is ample support for Herbert Wechsler's persuasive conclusion that, "far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states."⁹⁹

This conclusion and its underlying rationale have singular pertinence to the view, contained in the Federalism Proposal, that the Supreme Court should not adjudicate constitutional questions of national power versus states' rights. Cases that allege an excessive act by the central government are presented to the Court only after the act has attained the broad consensus that is required to overcome the inertia and the various negative features of the national lawmaking process. Legislation affecting states' rights must also clear the imposing hurdle of active congressional concern for state sovereignty, a solicitude, it will be argued below,¹⁰⁰ that cannot be attributed to the threat of judicial invalidation. For, except in a few notable instances,¹⁰¹ the Court's definitions of national powers have afforded the political branches exceedingly broad discretion in this area. In contrast to the undemocratic aspect of malapportionment, which permits minority representatives to impose laws on the majority, national legislation affecting states' rights must have the widespread support of those affected. Under these conditions, the need for judicial review is at its lowest ebb.

96. J. PECHMAN, *supra* note 95, at 87, 255-58. The deduction for state and local taxes is provided by I.R.C. § 164. I.R.C. § 103 excludes from gross income the interest paid on state and local bonds. On the effect of this exclusion, see J. PECHMAN, *supra* note 95, at 112-16.

97. See COMMISSION ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS 118-42 (1955).

98. A. SCHLESINGER, JR., THE COMING OF THE NEW DEAL 304-06 (1958).

99. Wechsler, *supra* note 35, at 558.

100. See pp. 1600-05 *infra*.

101. See pp. 1581-82 *infra*.

E. *The Role of Regional Interests in the National Political Process*

Caution must be exercised to avoid exaggerating the case for state representation in the national political process. The fact remains that vital regional interests are often not represented by a majority in Congress.¹⁰² Indeed, irrespective of the "negative power" advantages held in Congress by even a single state, the desires of certain segments of the country have been and will be periodically submerged by the force of competing numbers.

Tariffs are examples of laws that benefit some states at the expense of others. The protective tariffs enacted by Congress in the early 19th century generated bitter geographic strife by favoring northern industrial states over the nation's agricultural regions.¹⁰³ The opposition to the tariffs included both John Calhoun's theory of nullification¹⁰⁴ and South Carolina's authorization of armed resistance to the collection of duties within the state. The latter led President Jackson and Congress to threaten military intervention.¹⁰⁵ But given the specifically delegated authority of Congress "[t]o regulate Commerce with foreign Nations,"¹⁰⁶ there can be little question that the central government possesses the power to treat the distinct interests of certain states or regions prejudicially. Whether the national government should exercise such power may well present a perplexing issue of federalism at the political level. But since there is no constitutional problem, judicial review to aid the cause of states' rights would be unavailing.

Similarly, Congress's explicit power "to dispose of . . . Property belonging to the United States"¹⁰⁷ immunizes from judicial scrutiny the ability of the federal political branches to favor some states over others. For example, in the Submerged Lands Act of 1953, Congress conveyed extremely valuable offshore properties to certain seaboard states over the objections of other, less-favored states.¹⁰⁸ Federal spending programs provide additional instances of constitutionally unimpeachable national power to affect unevenly the states' vital concerns. In the 1972 battle over federal revenue sharing, for example, the Senate, bending to the financial interests of the more numerous

102. *New York v. United States*, 326 U.S. 572, 594 (1946) (Douglas, J., dissenting).

103. See *Original Draft of the South Carolina Exposition*, in 6 THE WORKS OF JOHN C. CALHOUN 1, 5 (R. Crallé ed. 1855).

104. *Id.* at 41.

105. A. SCHLESINGER, JR., *THE AGE OF JACKSON* 95-96 (1950).

106. U.S. CONST. art. I, § 8, cl. 3.

107. U.S. CONST. art. V, § 3, cl. 2.

108. Submerged Lands Act of 1953, ch. 65, 67 Stat. 29 (1953). See *Alabama v. Texas*, 347 U.S. 272 (1954).

smaller states, rejected an attempt to allocate a larger share of federal funds to industrial states, despite the plight of their cities.¹⁰⁹ Obviously, agricultural price supports are more popular among the people in Kansas than in Connecticut, and federal subsidies for education take from the more affluent in California to pay the less fortunate in Mississippi. Since such key issues of federal-state relations are committed to resolution on the political battlefield, the need for the Supreme Court to act as protector of states' rights on subjects of similar conflict is hardly compelling.

Furthermore, although some social and cultural differences among the people in the country may be identified by reference to state and regional boundaries, the divergence thus defined exists more plainly in its statement than in reality. Often the facile correlation of a particular state or region with a particular set of interests or a general point of view is simply erroneous.¹¹⁰ Moreover, most of the genuine disputes concerning regional interests involve economic issues: certain regions are more heavily associated with manufacturing or the lack of it; with unionization or the lack of it; with agriculture or the lack of it. Yet, due to the economic interdependence of modern America and to the capacious reach of the commerce clause, the central government probably enjoys its least challenged authority over economic issues.¹¹¹ A controversy over economic policy is usually one of wisdom rather than of constitutionality. Judicial review of national power used in such a controversy would be of least value to those who cherish localism.

Apart from economic issues, the foremost issue of true regional conflict—the chasm that literally split the union—has been race. The rights of the Negro divided congressional opinion along geographic lines for many years. But in the 1960s, when the majority of the states' national representatives ultimately decreed a national solution, the Court, relying on several sources of congressional authority, unreservedly upheld the national power to do so.¹¹² Despite the highly uneven impact of the new federal laws on the separate states, the issue

109. San Francisco Chronicle, Sept. 7, 1972, at 8, col. 1.

110. R. DAHL, PLURALIST DEMOCRACY, *supra* note 55, at 344. Dahl questions the validity of viewing various regions as embodying homogeneous values and interests: "the various regions of the United States are internally very heterogeneous. So much so, in fact, that it is exceedingly difficult to decide how to draw regional boundaries: One must choose one set of states for one purpose, another set for a different purpose." *Id.*

111. See pp. 1594-95 *infra*.

112. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). See also Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

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of constitutional federalism was properly held to rest outside the judicial process.¹¹³

With the primacy of national policy established on issues such as economics and race, there is little reason to keep the Court in reserve to strike down national laws of murder, divorce, inheritance, descent and distribution, or recording of land titles, to mention some of the regulatory concerns often claimed to be within the sacrosanct province of the states.¹¹⁴ On these matters, unlike race or economic issues, and like the minimum age for voting,¹¹⁵ national rules would affect the states fairly uniformly. Indeed, most acts of Congress that are challenged, usually by private parties,¹¹⁶ for invading the realm of the states are of this genre.¹¹⁷ Here, the judgment of the political branches may safely be trusted to preserve the values of American federalism.

F. *The Competence of Political Branches on Constitutional Issues*

Observers of national government and defenders of judicial review in particular have often argued that the nonjudicial branches are simply incapable of responsible constitutional decisionmaking. Even before the first Congress convened, Hamilton wrote that

[t]he members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and . . . on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear, that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides, will be too apt to stifle the voice both of law and of equity.¹¹⁸

Hamilton's concern over the impact of the selection process and the pressure of politics on legislators has frequently been reiterated.¹¹⁹ Even if a congressman or a president has had legal training, his vocational experience severely limits his ability to render profound constitutional judgments. He is likely to rely heavily on the constitutional

113. See *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966).

114. See, e.g., *United States v. Oregon*, 366 U.S. 643, 654-55 (1966) (Douglas, J., dissenting).

115. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court, before acceptance of the Twenty-Sixth Amendment, held that this subject was beyond the national legislative power.

116. See pp. 1577-79 *infra*.

117. See, e.g., *United States v. Kahriger*, 345 U.S. 22, 23-32 (1953) (gambling control); *United States v. Darby*, 312 U.S. 100, 123-24 (1941) (minimum wage legislation); *United States v. Doremus*, 249 U.S. 86 (1919) (drug control).

118. *THE FEDERALIST* No. 81 (A. Hamilton) 541, 544.

119. See, e.g., M. SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 29-30 (1966).

interpretations of those, within and without the political system, who profess expertise. Due to the compartmentalized nature of the federal legislative process, issues of constitutionality often are explored only by a single committee in each chamber. If the committee fails to consider the point, the matter may lie submerged throughout the remaining legislative deliberations. In Congress, unlike in the courts, the constitutional validity of proposed legislation is only one of a multitude of factors to be considered; it takes its place alongside issues of policy and expediency that are frequently more pressing. Congressional reliance on negotiation and compromise to move the legislative machinery can inhibit the development of a "body of coherent and intelligible constitutional principle."¹²⁰ Congressmen must make and fulfill commitments at different stages of the process without the opportunity to engage in the reflection necessary for enlightened constitutional decisionmaking. Such factors have led commentators like Martin Shapiro to conclude "that the nature of the legislative process, combined with the nature of constitutional issues, makes it virtually impossible for Congress to make independent, unified, or responsible judgments on the constitutionality of its own statutes."¹²¹

But whatever the qualifications of elected federal officers may be for performing judicial tasks generally, or for rendering constitutional judgments particularly, responsible resolution of federalism issues is within the capacities of the political branches. Relatively free of technical considerations that require sophisticated judicial expertise, federalism disputes are concerned more with those practical matters inherent in the development of the country, questions on which the conclusions of informed politicians may be at least as creditworthy as those of distinguished jurists. That some legislators may award substantial weight to the doctrinal views of their more learned and experienced colleagues, or to those of unofficial constitutional scholars, or to the judgments of committees that have heard and considered those views, does not merit condemnation; judges are known to function along similar lines.

Although history has recorded many instances where partisanship and expediency rather than constitutional statesmanship determined the fate of proposed legislation, the most egregious examples have been in the realm of individual rights. This can be seen in the seem-

120. H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 93 (1953 ed.).

121. M. SHAPIRO, *supra* note 119, at 30. This indictment constitutes not only a powerful argument against the Federalism Proposal but also against the whole political question doctrine in all its applications. Indeed, Shapiro's argument cuts directly against any presumption of constitutionality of governmental action, since the presumption is premised on the belief that the political department involved gave due consideration to constitutional questions.

ingly conscious disregard of First Amendment values in the congressional debates over the Alien and Sedition Acts of 1798,¹²² the Communist Control Act of 1954,¹²³ and the establishment of preventive detention in the District of Columbia in 1970.¹²⁴ On the other hand, although surely not all proposed national actions involving states' rights have been thoroughly and dispassionately reviewed on constitutional grounds, it is in this category of constitutional issues that some of the most prominent instances of responsible lawmaking are found. Examples include the extensive and predominantly impartial concern for constitutionality during consideration of the Sherman Act of 1890,¹²⁵ the Civil Rights Act of 1964,¹²⁶ the 18-year-old voting bill of 1970,¹²⁷ and the proposed National No-Fault Motor Vehicle Insurance Act of 1974.¹²⁸ An informative study of the handling of constitutional issues by a recent Congress reaches the conclusion that is suggested here:

There does seem to be a discernible difference in the way Congress approaches the problem of legislating in the face of a . . . "Bill of Rights" prohibition . . . and how it reacts when the ques-

122. Under the threat of war with France, Congress enacted the two measures after deliberating for approximately two months. M. DAUER, *THE ADAMS FEDERALISTS* 152-64 (1953). The Alien Act gave the President power to expel suspected aliens from the country, without any proof of offense. J. MILLER, *CRISIS IN FREEDOM* 163 (1951). The Sedition Act outlawed "false, scandalous, or malicious" statements made with "intent to defame the said government, or either House of the said Congress, or the said President." 1 Stat. 596 (July 14, 1798). The Alien Act expired in 1800, and the Sedition Act lapsed the following year, with President Jefferson pardoning those convicted under the latter law. N. DORSEN, P. BENDER & B. NEUBORNE, 1 *EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 21-22 (4th ed. 1976).

123. Note, *The Communist Control Act of 1954*, 64 *YALE L.J.* 712, 712 (1955) ("Much of [the law] was proposed on the floor of Congress, without hearings and with little opportunity for careful analysis of the statutory language." (footnote omitted)).

124. Mikva & Lundy, *The 91st Congress and the Constitution*, 38 *U. CHI. L. REV.* 449, 469-73 (1971) ("[N]o member of the House other than D.C. Committee members had read the entire bill, and many had not read even the bill's more controversial provisions.")

125. See note 85 *supra*; Bork, *supra* note 85, at 34 n.82 (six of nine members of Senate Judiciary Committee would have opposed "any bill designed to accomplish social or political objectives unrelated to the freedom . . . of interstate commerce" as outside congressional power).

126. D. MORGAN, *supra* note 39, at 297-327.

127. Mikva & Lundy, *supra* note 124, at 475-85 (of constitutional issues faced by 91st Congress, this was "the most thoroughly and carefully considered").

128. See, e.g., S. REP. NO. 757, 93d Cong., 2d Sess. 6-20, 36-47 (1974).

The other class of constitutional issues that has received careful congressional consideration is that of the separation of powers between the political branches, a topic beyond the scope of this article. This is exemplified by the debate on the scope of presidential power as Commander-in-Chief following General Douglas MacArthur's dismissal in 1951, see, e.g., 97 *CONG. REC.* 3697-3705 (1951), and the careful consideration given to those provisions of the Reorganization Act of 1939 dealing with the ability of Congress to delegate powers to the executive and to superintend the delegation. See, e.g., 84 *CONG. REC.* 2375-2416 (1939).

tion is one of determining the extent of express grants of legislative power to Congress itself. In the former case, the attitude is often one of hostility and unwillingness to accept any alleged limitation on congressional power. . . .

On the other hand, when Congress bases legislation on an express grant of power found in the Constitution, the extent of which is uncertain or problematical, it seems far more conscientious and careful in attempting to fathom the true limitations of its power.¹²⁹

The point is not that Congress has done a superlative job in assessing the constitutionality of all proposed legislation in respect to states' rights, or even that it has performed just as effectively here as has the Court, but that on a number of occasions it has acted at least creditably. It is true that some legislators have felt greater responsibility than others in this regard, just as some presidents have shown greater sensitivity to constitutional strictures than have others.¹³⁰ Also, on occasion one house has been more conscientious than the other, and constitutional considerations have often received greater attention when policy issues have been less in dispute.¹³¹ But, especially on questions of national versus state authority, the political branches are well-equipped to make respectable constitutional judgments.¹³² The Judiciary Committees of both houses, to which most constitutional questions have been assigned for nearly a century, have traditionally been composed entirely of lawyers, a number of whom have earned widespread respect for their constitutional expertise.¹³³ There is, moreover, no paucity of resources, living and written, that may be consulted for sound constitutional advice, including the abundance of judicial views already recorded.¹³⁴

129. Mikva & Lundy, *supra* note 124, at 497-98.

130. Examples of executive concern for constitutional issues include Richard Nixon's views on congressional power to lower the voting age, 5 WEEKLY COMP. OF PRES. DOC. 588, 589-90 (May 2, 1970), John Kennedy's position on federal financial aid to church-related schools, 17 CONG. Q. ALMANAC 229 (1961), and James Madison's vetoes, four of six of which were based on constitutional considerations, E. CORWIN, THE PRESIDENT 279 (4th ed. 1957). See p. 1569 *supra*.

131. See, e.g., D. MORGAN, *supra* note 39, at 350; Mikva & Lundy, *supra* note 124, at 497.

132. Cf. D. MORGAN, *supra* note 39, at 9 (presenting recent survey finding that nearly two-thirds of federal legislators polled believed that congressmen should diligently engage in evaluating constitutional issues).

133. *Id.* at 156-57 (lawyer-legislators dominated Sherman Act debate); Mikva & Lundy, *supra* note 124, at 462-63.

134. See D. MORGAN, *supra* note 39, at 202-03, 348-60.

Various techniques are available to enable Congress to improve its performance. In his impressive study of the topic, Morgan has catalogued a number of ways in which Congress might better tool itself for the task of assuming larger responsibility: e.g., clearer identification and definition of constitutional issues by the appropriate com-

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Finally, it should be noted that the Federalism Proposal does not require national legislators to perform such peculiarly judicial functions as applying law to specifically developed facts or “doing justice” in a particular case. A substantial judicial role in federalism cases, primarily focused on the interpretation of federal statutes and executive orders, would remain under the Proposal.¹³⁵ But the ultimate constitutional decision as to whether an exercise of the national government’s power is an unacceptable intrusion on state authority would rest with the political branches.

III. The Judiciary and the Federalism Proposal

The Federalism Proposal affords distinct benefits for the judicial branch. It would permit the Supreme Court to avoid decisions of certain states’ rights claims asserted by private citizens, a procedure which raises legitimate standing issues. More important, by removing one class of constitutional issues from judicial consideration, the Proposal would husband the Supreme Court’s scarce political capital, and thus would enhance the Justices’ ability to act in support of personal liberties. But the Proposal would not affect the Court’s jurisdiction over challenges to state encroachments on national power, since the rationale for its adoption does not apply to that aspect of federalism adjudication.

A. *Assertion of States’ Rights Claims*

Under the Federalism Proposal, the judiciary would refrain from ruling on a states’ rights challenge to a federal enactment that is brought by a private person. The irony in such a challenge would be most poignant if a majority of every state’s congressional representatives voted for the law in question, and if all states defend the law in

mittees; greater committee utilization of auxiliary expert staff and outside sources and materials; avoidance of last minute action by reviving committee hearings when constitutional questions emerge at later stages of the process. *Id.*

It is difficult to measure how many such reforms have been deterred by the notion, inferable under the present scheme of judicial review, that the Constitution “is essentially subordinate, technical, and too abstruse for any but lawyers in the courtroom and judges on the bench to discuss with sense,” and “the belief that a law is not a law, but only a tentative, pressure-wrought statement of policy until judges in court subject it to judicial process and render formal judgment.” D. MORGAN, *supra* note 39, at 335. It is equally hazardous to predict the degree of improvement that would occur if the political branches were unqualifiedly assigned the mantle of final judgment over questions of the reach of national authority. But it is not unreasonable to speculate that some would take place.

135. For discussion of the remaining judicial role, see p. 1605 *infra*.

the resulting litigation. This imagined case lies not very far from real ones.

The first national child labor law, invalidated by the Court on federalism grounds in *Hammer v. Dagenhart*¹³⁶ in 1918, had been approved by a Democratic-controlled Congress two years earlier by votes of 337-46 in the House¹³⁷ and 52-12 in the Senate.¹³⁸ Less than a year after the *Hammer* decision, a Republican-controlled Congress, relying this time on the federal taxing power rather than the commerce clause, attempted to stop child labor by imposing a tax on the products of such labor. The measure passed by votes of 312-11 in the House¹³⁹ and 50-12 in the Senate.¹⁴⁰ Again, the Court found an invasion of states' rights.¹⁴¹ In the 1930s the Court, principally in defense of states' rights, struck down a federal statute that regulated wages and hours of bituminous coal workers.¹⁴² The Court's action was taken despite amicus curiae briefs in support of the law from seven of the major coal producing states.¹⁴³ In none of these cases did any state question the nation's power. The challenges were raised by private persons subject to the federal statutes who, by their federalism-based attacks, conceded that a state that had voiced no objection to the federal enactments could properly impose the substance of the challenged regulations upon them.

The states themselves are rarely permitted to bring court challenges to federal actions that allegedly infringe state sovereignty by imposing, not on states qua states, but on private persons within their borders.¹⁴⁴ Such challenges, it is generally held, present questions that are "political, and not judicial, in character."¹⁴⁵ Although state amicus curiae briefs have on occasion influenced the Court to uphold federal power,¹⁴⁶ the history of judicial review of states' rights claims has resulted, in Justice Jackson's pithy phrase, in "a vested *private* interest in federal impotency rather than a positive privilege of the states them-

136. 247 U.S. 251 (1918) (invalidating Act of Sept. 1, 1916, ch. 432, 39 Stat. 675).

137. 53 CONG. REC. 2035 (1916).

138. *Id.* at 12313.

139. 57 CONG. REC. 3035 (1919).

140. *Id.* at 621.

141. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922). See generally R. DAHL, A PREFACE TO DEMOCRATIC THEORY 106 (1956).

142. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991).

143. *Id.* at 277-78. The states filing amicus briefs were Illinois, Indiana, Kentucky, New Mexico, Ohio, Pennsylvania, and Washington.

144. See Tribe, *Unraveling*, supra note 35, at 1077.

145. *Massachusetts v. Mellon*, 262 U.S. 447, 483 (1923).

146. See, e.g., *Willcuts v. Bunn*, 282 U.S. 216 (1930).

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selves.”¹⁴⁷ Indeed, even the United States Attorney General has been permitted to question the constitutionality of a federal law on the ground that Congress exceeded its delegated powers vis-à-vis the states.¹⁴⁸

The rule barring states from bringing lawsuits that challenge federal regulation of private citizens is an expression of the federal courts’ proper aversion to adjudication of abstract questions of law prior to the presentation of a concrete set of facts. But this concern does not support the companion rule that permits assertion of states’ rights even when the states themselves do not oppose the national government’s action. There can be no assurance that the states’ interests will be properly represented by the private parties. In terms of the appropriate role of the federal judiciary and in view of the states’ role in the national political system, the whole matter should be left outside the judicial process.

B. *Prudential Concerns*

The major impact of the Federalism Proposal on the judiciary would be the liberation of the courts from needless adjudication of a troublesome category of constitutional issues. Historically, review of federalism cases has weakened judicial review’s central function of curbing majoritarian abuse of the constitutional liberties of the individual. Perhaps in earlier days of the Republic, the availability of judicial review as a check against perceived excesses of national power prevented acceptance of the doctrine of state interposition. Perhaps by assuming the role of constitutional umpire of the federal system the Court strengthened its capacity to protect individual liberty. But the Court’s ability to defend the personal rights of minorities who have fared poorly in the political process is a fragile one, ultimately dependent on the willingness of the people to abide by the Court’s anti-majoritarian rulings.¹⁴⁹ Judicial validation of federal power as against states’ rights has often placed the Court at the center of a storm of controversy,¹⁵⁰ and has thus endangered the Court’s authority in other areas of constitutional adjudication. So, too, have the Court’s rulings invalidating such national action ex-

147. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 22 (1941) (emphasis added).

148. See *United States v. Realty Co.*, 163 U.S. 427 (1896). Since 1937, however, the Attorney General has also had the right to intervene in defense of the constitutionality of federal actions disputed by private parties. Act of Aug. 24, 1937, Pub. L. No. 75-352, 50 Stat. 751 (now codified in 28 U.S.C. § 2403 (1970)).

149. See Choper, *supra* note 83, at 855-58, and authorities cited therein.

150. See pp. 1580-81 *infra*.

pended the Court's institutional credit and prestige.¹⁵¹ This is capital desperately needed elsewhere for, as Alexander Bickel reminded, "there is a natural quantitative limit to the number of major, principled interventions the Court can permit itself A Court unmindful of this limit will find that more and more of its pronouncements are unfulfilled promises, which will ultimately discredit and denude the function of constitutional adjudication."¹⁵²

Ironically, judicial approbation of national policies promulgated by Congress and the President has most often resulted in denunciations of the Supreme Court, not of the political branches, for the attrition of state power and the downfall of the federal system. The decision in *McCulloch v. Maryland*¹⁵³ in 1819 is illustrative, as it was the Court's support for "the wide scope of Legislative power" in upholding the authority of Congress to charter a National Bank that "inspired Jefferson and his followers with alarm."¹⁵⁴ The Court's act of legitimation provoked Jefferson's famous characterization of the Justices as "the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric."¹⁵⁵ Congress's Bank was anathema in many parts of the country; but it was the Court's decision that bore the brunt of the enmity. In Tennessee a newspaper wrote: "This Court, above the law and beyond the control of public opinion, has lately made a decision that prostrates the State sovereignty entirely," and that "must sooner or later bring down on the members of it the execration of the community."¹⁵⁶ In Virginia the state legislature called for the creation of a new tribunal to resolve constitutional issues of the reach of federal versus state power.¹⁵⁷

When Congress's legal tender law was upheld in 1884,¹⁵⁸ it was said in Kentucky that the Court had "violated the letter and spirit of the Constitution" and had "consulted its own conception of political and economic expediency, instead of the commands of the organic law."¹⁵⁹ Elsewhere it was written that "[t]he system of con-

151. See pp. 1581-82 *infra*.

152. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 94-95 (1970).

153. 17 U.S. (4 Wheat.) 316 (1819).

154. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 514 (rev. ed. 1928).

155. 10 *THE WRITINGS OF THOMAS JEFFERSON* 170 (P. Ford ed. 1899) (letter of Dec. 25, 1820, to Thomas Ritchie).

156. 1 C. WARREN, *supra* note 154, at 519-20.

157. *Id.* at 519. For an illustration of the severity of the states' reaction, see *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). The State of Ohio had virtually stolen from a local branch of the Bank to collect a state tax on the Bank. 1 C. WARREN, *supra* note 154, at 528-30.

158. *Legal Tender Cases*, 110 U.S. 421 (1884).

159. 2 C. WARREN, *supra* note 154, at 656.

struction adopted in this case is one which weakens the Court itself and enlarges the power of Congress and makes a long stride in the direction of centralization.”¹⁶⁰ And, just a few years ago, after the Court declined to invalidate *Congress’s* extension of the franchise to 18-year-olds in federal elections, the conservative press struck at the *Court* for having rewritten the Constitution by lowering the voting age.¹⁶¹

The crowning injustice is the accusation—articulated by the Conference of State Chief Justices in an influential attack on the federal judiciary—that decisions legitimating the already-exercised authority of the *Congress* and *President* indicate that the *Court* has adopted “the role of policy-maker without proper judicial restraint.”¹⁶² The Conference believed it to be the unhealthy tendency of federal *judicial* decisions, not of federal *political* decisions, “to press the extension of federal power and to press it rapidly.”¹⁶³

Perhaps the Court serves a socially therapeutic function when it is an object of vilification for those defeated on the political battleground. But when the Court validates, just as when it invalidates, it expends official and public support, sustenance critical for its activity in areas where judicial review is vitally needed. Popular displeasure over judicial validations of national power has, in the past as well as recently, spilled over to strengthen those who oppose judicial activism in defense of personal liberties.¹⁶⁴

Interestingly, judicial action in support of states’ rights challenges to national power has also focused great controversy on the Court. The invalidation of the first federal income tax, described by Charles Evans Hughes in 1928 as one of three great “self-inflicted wounds” suffered by the Court,¹⁶⁵ and the series of rulings rejecting New Deal legislation¹⁶⁶ have been among the Court’s worst disasters in terms

160. *Id.* See generally *id.* at 654-59.

161. See Kilpatrick, *Justice Black Has “Edited” Constitution*, Miami Herald, Jan. 2, 1971, § A, at 7, col. 5.

162. *The Report and Resolution of the National Conference of Chief Justices, Conclusions of the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions*, MASS. L.Q., Oct. 1958, at 86, 87 [hereinafter cited as *National Conference of Chief Justices*].

163. *Id.* at 87.

164. See, e.g., 1 C. WARREN, *supra* note 154, at 652-53; *National Conference of Chief Justices*, *supra* note 162, at 87.

165. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATIONS, METHODS AND ACHIEVEMENTS* 50-54 (1928). The other self-inflicted wounds cited by Hughes were *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (upholding Fugitive Slave Act), and *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871) (upholding Legal Tender Act). C. HUGHES, *supra* at 50-53.

166. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991 (1935)); *United States v. Butler*, 297

of damage to the judiciary's public prestige.¹⁶⁷ These decisions, along with other federalism rulings such as the child labor cases¹⁶⁸ and the intergovernmental tax immunity cases,¹⁶⁹ constitute the bulk of those rulings by the Court that have been judged most mistaken, foolish, and destructive of progressive government.¹⁷⁰ Finally, in a crucial group of post-Civil War holdings premised on the Tenth Amendment, the Court, by overturning federal legislation enacted under the enforcement clauses of the Civil War Amendments, largely thwarted the political branches' efforts to insure racial freedom and to advance the civil liberties of the politically underprivileged. These causes, as a consequence, were blocked for nearly seventy-five years.¹⁷¹ The Court, therefore, not only severely injured the cause of liberty but frustrated the processes of democracy as well. The Federalism Proposal would avoid these evils.

Purporting neither to immunize the Court from all hostility nor to insure public acceptance of all its decisions, the Proposal seeks to shield the Court from one category of conflict with the populace and the politicians and thereby to reduce the quantum of public disobedience and political retribution. The contention is not that the Court should desist in the federalism area because all that it has done there has been "bad," although much of it has been, but rather that the Court should not rule on these disputes because its activity there is unnecessary to effective preservation of the constitutional scheme.

Not all of the Court's Tenth Amendment decisions, of course, have brought it popular obloquy or political backlash. Indeed, some rulings most susceptible to normative criticism, such as those decimating

U.S. 1 (1936) (invalidating Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933), as beyond the congressional spending power); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), exceeded congressional power to regulate commerce).

167. See A. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL* 487-96 (1960).

168. See p. 1578 *supra*.

169. During the first third of the twentieth century, immunity from state and federal taxation was found for many private persons and activities. See, e.g., *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928) (no state sales tax on articles sold to federal government); *Long v. Rockwood*, 277 U.S. 142 (1928) (no federal income tax on earnings from patents and copyrights); *Gillespie v. Oklahoma*, 257 U.S. 501 (1922) (no state income tax on earnings of lessees of federal lands). The reach of the doctrine then contracted dramatically following *Helvering v. Gerhardt*, 304 U.S. 405 (1938) (employees of bi-state authority subject to federal income tax), and *James v. Dravo Contracting Co.*, 302 U.S. 154 (1937) (tax on government contractor upheld). See generally W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 485-95 (4th ed. 1975); Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633 (1945); Tribe, *Intergovernmental Immunity*, *supra* note 35.

170. See, e.g., H. COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* 49-54 (1950).

171. See Civil Rights Cases, 109 U.S. 3 (1883); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1340-43 (1952).

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Congress's ability to enforce the Civil War Amendments, were greeted with general public favor.¹⁷² Rather, at the risk of undue repetition, the issues are the necessity of judicial review and the potential for harm to the judiciary. Especially in view of the wide consensus ordinarily required for congressional action derogating states' rights, judicial invalidation of any such law poses high risks for the Court. Further, when the Court acts in the name of states' rights, it often becomes vulnerable to public criticism and political hostility because such national legislation frequently enacts programs responding to the most broadly felt popular needs.

As a final observation on the squandering of political capital, it must be noted that most of the Court's states' rights invalidations of national authority have not survived the test of time. *Dred Scott's*¹⁷³ denial of federal power to prohibit slavery in the territories succumbed to the Emancipation Proclamation in less than a decade. The *Income Tax Case*¹⁷⁴ fell to constitutional amendment within two decades.¹⁷⁵ The Court's inflation of intergovernmental tax immunity and its contraction of national regulatory power over economic matters took longer to remedy, but both doctrines were eventually corrected by the Court itself.¹⁷⁶ A more recent venture that negated the 18-year-old vote in state and local elections survived for less than a year.¹⁷⁷ Indeed, the currently unforeseeable reach of the *Usery* case aside,¹⁷⁸ there is virtually no Tenth Amendment decision of any note that retains meaningful current force. To be sure, the Court's individual rights rulings may ultimately suffer a similar fate. But they are less likely to if the Federalism Proposal is heeded, and if the energy and the political strength of the Court are directed toward its central function as guardian of the people's liberties.

C. State Encroachments on National Power

To this point, the discussion of the Supreme Court's role in dealing with constitutional questions of federalism has covered only one side

172. 2 C. WARREN, *supra* note 154, at 604-06.

173. 60 U.S. (19 How.) 393 (1857).

174. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

175. U.S. CONST. amend. XVI.

176. For intergovernmental immunity cases, see note 169 *supra*; for commerce clause cases, see note 226 *infra*, and Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940).

177. The Supreme Court struck down congressional imposition of the 18-year-old voting age for state and local elections in *Oregon v. Mitchell*, 400 U.S. 112 (1970). On June 30, 1971, the Twenty-Sixth Amendment, which established the 18-year-old standard nationwide, was ratified. N. DORSEN, P. BENDER & B. NEUBORNE, *supra* note 122, at 868.

178. See pp. 1596-1600 *infra*.

of the problem: the role of the Court in cases that allege national encroachments on states' rights. Yet the prevailing view of political historians is that the predominant role envisaged for the Court in this area was to prevent state encroachments on national supremacy.¹⁷⁹ For Herbert Wechsler, "[t]his is made clear by the fact that reliance on the courts was substituted, apparently on Jefferson's suggestion, for the earlier proposal to give Congress a veto of state enactments deemed to trespass on the national domain."¹⁸⁰ The fear that local regulatory and taxing ordinances might conflict with acts of Congress, usurp federal authority by unduly burdening interstate commerce, or even interfere with the property and activities of the central government itself prompted Holmes's well-known dictum: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."¹⁸¹

The rationale calling for the Court's review of such issues is familiar. Hinted at by Hamilton in *The Federalist* No. 17,¹⁸² made more explicit by Madison in Nos. 45 and 46,¹⁸³ echoed by Marshall in *McCulloch v. Maryland*¹⁸⁴ and by Holmes in the statement just quoted, the most thorough articulation of this view was provided by Chief Justice Stone in several cases concerning state legislation.¹⁸⁵ On states' rights matters, "[t]he people of all the States, and the States themselves, are represented in Congress";¹⁸⁶ Congress is thus "subject to political restraints which can be counted on to prevent abuse."¹⁸⁷ But state and local legislatures contain no representatives of the central government or of those persons outside the jurisdiction upon whom the weight of the local laws may fall. And since the force of

179. See, e.g., Schmidhauser, "States' Rights" and the Origin of the Supreme Court's Power as Arbiter in Federal-State Relations, 4 WAYNE L. REV. 101 (1958).

180. Wechsler, *supra* note 35, at 559 (footnote omitted).

181. O. HOLMES, *Law and The Court*, in COLLECTED LEGAL PAPERS 295-96 (1920).

182. "It will always be far more easy for the State governments to encroach upon the national authorities, than for the national government to encroach upon the State authorities." THE FEDERALIST No. 17 (A. Hamilton) 105, 106.

183. "The State Governments may be regarded as constituent and essential parts of the federal Government; whilst the latter is nowise essential to the operation or organization of the former." *Id.* No. 45 (J. Madison) 308, 311. "A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular States." *Id.* No. 46 (J. Madison) 315, 318.

184. 17 U.S. (4 Wheat.) 316, 435 (1819) (Marshall, C.J.).

185. See, e.g., *Helvering v. Gerhardt*, 304 U.S. 405, 412 (1938) (Stone, J.); *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 184-85 n.2 (1938) (Stone, J.).

186. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435 (1819).

187. *Helvering v. Gerhardt*, 304 U.S. 405, 412 (1938).

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special interest groups is markedly greater in local legislative bodies than in the federal political process,¹⁸⁸ state and local lawmaking that affects the federal government or persons engaged in interstate activities may not be similarly trusted. The phenomenon is most clearly exemplified by laws that discriminate against outsiders to the benefit of local interests, either private or governmental.¹⁸⁹ Moreover, even nondiscriminatory local rules that impose equivalent burdens on insiders and outsiders may nonetheless fail to express adequate concern for the broader national interest.¹⁹⁰

Judicial review of individual rights claims is justified in view of the unsatisfactory representation in the political process of the beneficiaries of such rights. Under the Federalism Proposal, the thoroughly effective voice of the states in the national lawmaking system leads to the Court's noninvolvement in that class of issues. So, too, the insufficient reflection of the national interest in the state legislative scheme justifies the Court's oversight of state action that allegedly invades or nullifies federal prerogatives.

There is another reason for approving federal judicial review of state encroachments. When the Court rules on the contention that state or local laws conflict with an existing federal statute and thus violate the supremacy clause, or that they improperly impose upon domains over which the national government is empowered, or that they unduly interfere with the property or activities of the central government, the Court does *not* exercise the momentous power of judicial review. In such decisions, unlike constitutional rulings on individual liberties and on national power versus states' rights, the national political branches, not the Court, speak the final word. The Court's decisions in these areas may be reversed or modified by ordinary federal statutes. The judiciary acts only as an intermediate agency between the states and Congress. This is most obvious when the Court passes on state or local ordinances allegedly in conflict with an act of Congress. But it is equally true when, in the absence of pertinent federal legislation, the Court determines whether the challenged state action unduly imposes on a delegated but unexercised national power. In so doing, the Court performs an essentially legis-

188. See V. KEY, *POLITICS, PARTIES, AND PRESSURE GROUPS* 102 (3d ed. 1952); Willbern, *The States as Components in an Areal Division of Powers*, in *AREA AND POWER* 70, 77-78 (A. Maass ed. 1959).

189. See, e.g., *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) (striking down local ordinance forbidding sale of milk not pasteurized within five miles of city).

190. See, e.g., *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (Arizona statute setting maximum train length); *Baldwin v. Seelig*, 294 U.S. 511 (1935) (New York statute setting minimum milk prices).

lative role by nakedly constructing policies for the particular case that are the product of the Court's own balancing of national versus state concerns.¹⁹¹

The Court may fashion its policy in the name of fulfilling some unspoken intention of Congress, such as

a Congressional purpose to leave undisturbed the authority of the states to make regulations . . . in matters of peculiarly local concern, but to withhold from them the authority to make regulations affecting [subjects] which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority.¹⁹²

Or the Court may act more openly under implicit authorization from Congress based on longstanding practice.¹⁹³ Nevertheless, determination of the impact of state and local laws on an area of national concern, even in the absence of relevant federal legislation, is akin to statutory interpretation, not to judicial review. In such decisions, the tension between constitutional decisionmaking by the federal judiciary and the principles of majoritarian democracy does not arise.

Continuing judicial oversight of alleged state encroachments on national power can also be justified on functional grounds. First, Congress has never established internal machinery for bringing to its attention the myriad of state and local rules that may arguably intrude on the national domain. Due to the pressure of its usual business, Congress appears incapable of accomplishing the task. Furthermore, as a structural matter, Congress seems especially unsuited to the task of determining on an ad hoc basis the compatibility of isolated local ordinances with the broad demands of the federal system. This task requires the gathering and applying of detailed evidence of a particular law's history and administration, which is the traditional work of adjudicative, not legislative, organs. Thus if the courts were not to continue to review these state and local enactments, the final weighing of state and national interests would, due to con-

191. See, e.g., *Brotherhood of Locomotive Firemen v. Chicago, R.I. & P.R.R.*, 393 U.S. 129 (1968) (upholding Arkansas "full-crew" laws requiring minimum train crews for intrastate railroads); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (rejecting Illinois requirement of nonstandard mudguard for trucks as restraint of commerce); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (striking down Arizona limit on length of passenger trains as restraint of commerce). Indeed, the Court not infrequently performs such a legislative role under the guise of the supremacy clause when it "interprets" a "relevant" federal statute whose relationship to the state or local law before the Court is exceedingly indistinct.

192. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 479 n.1 (1939).

193. See generally Dowling, *supra* note 176.

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gressional inertia, effectively rest with state and local lawmaking bodies. On the other hand, despite the undisputed power of Congress to alter judicial decisions in this area, the same legislative inertia usually results in the Court's judgment being the last. Given the unrepresentativeness and parochial perspective of the state and local lawmaking systems, and the federal judiciary's greater impartiality and sensitivity to federal needs, the latter is clearly preferable as a final decisionmaker on these questions.¹⁹⁴

194. Although continued activity by the Court in this area is both consistent with the Federalism Proposal as a matter of theory and generally praiseworthy as a matter of practice, it is not beyond improvement. The challenge to state or local statutes is rarely made by an official representative of the national government, but rather comes from a private person affected by the local enactment—the exceptional instances being when a federal agency claims immunity from a state or local requirement or tax. Just as a private litigant challenging federal action frequently is not asserting his own constitutional rights but rather is seeking to vindicate states' rights, *see pp. 1578-79 supra*, so, too, the person attacking state and local laws is asserting the interest of the central government, not his own constitutionally secured liberties.

It may be that considerations of standing should preclude the litigant from asserting such third-party interests even though the underlying substantive issue is adjudicable. But the weight of the argument appears to favor a grant of standing: because of judicial practice, Congress has implicitly authorized this method for securing the Court's protection of important federal interests; and the Court does not render a "true" constitutional decision in such cases, *see p. 1586 supra*. Nonetheless, the political branches might provide for the appearance of an official federal representative in all cases in which private litigants assail state action on federalism grounds. Such a requirement, which is present in the West German legal system, *see Scharpf, Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 524 (1966), would assure that the Court would hear the fullest possible exposition of national policy.

Judicial error in engaging in its legislative-like balance of the nation's needs against local efforts to deal with pressing problems has significant consequences. If the Court errs on the side of the state, the result is no different than if the Court were not involved at all, *i.e.*, the state judgment would be final in the absence of congressional action. But, if the Court inflates the strength of the national interest in uniform regulation (or nonregulation) and invalidates the state or local law before it, the result is politically unintended federal protection for those persons subject to the challenged ordinance. This immunity from needed and useful local regulation will likely be permanent because of congressional inertia despite the fact that Congress may wholly approve of the state action. This may be simply written off as a necessary cost of invoking the judicial process, especially when measured against the alternative of having no review at all, thus leaving the decision with the state or local lawmaking agencies. Furthermore, it may well be that incorrect judicial rulings in favor of the private persons attacking the state action—and, for purposes of this discussion, we have seen that these are the consequential ones—are more likely to receive congressional reconsideration because of the generally greater influence possessed by the states (as compared to private persons) in the national political process.

Nonetheless, there may be merit in the establishment of a federal agency—along the lines once suggested for issues of state taxation of interstate commerce, Freund, *Review and Federalism*, in SUPREME COURT AND SUPREME LAW 86, 101-05 (E. Cahn ed. 1954)—to act for the Court in this area. Such an administrative agency could enact general rules and regulations, as well as adjudicate particular cases. An agency would presumably possess greater expertise on the variety of complex, frequently economic, questions presented by the cases, and, because of the specific nature of its duties and the political control over its personnel, such an agency should be more familiar with both the spoken and unvoiced thinking of Congress.

Intensive evaluation of this suggestion is beyond the realm of consideration here.

IV. Objections to the Federalism Proposal

A. *Intent of the Framers*

An axiom of American government is that no matter how sound, laudable, or expedient a reasoned constitutional thesis may be, it must fail if it is contradicted by the clear intention of the Framers. This principle may be used to criticize the attempt of the Federalism Proposal to restrict judicial review of constitutional questions of national versus state power. The charge would come armed with prestigious credentials.

Madison may be cited as having suggested on several occasions that the "judicial bench" was intended "as the surest expositor of . . . the boundaries . . . between the Union and its members."¹⁹⁵ In *The Federalist* No. 78, Hamilton argued that the Court would act as a barrier to the growth of congressional power,¹⁹⁶ a growth that would presumably be at the states' expense. Even stronger assertions to this effect were made by key figures in the state ratifying conventions: in Virginia, John Marshall declared that the judiciary would void congressional attempts "to make a law not warranted by any of the powers enumerated";¹⁹⁷ in Pennsylvania, James Wilson stated that if any federal statute were to be "inconsistent with those powers vested by this instrument in Congress, the judges . . . will declare such laws to be null and void";¹⁹⁸ in Massachusetts, Samuel Adams assured the convention that the courts would invalidate national legislation that "extended beyond the power granted by the proposed Constitution."¹⁹⁹ In the mid-twentieth century, the point was one of the few

Caution must be exercised, no matter how attractive the theory, before creating yet another federal regulatory agency. But there may be ancillary benefits from divesting the Court of this responsibility, apart from some modest conservation of its time and energy. Unlike those cases in which the Court, under the supremacy clause, measures state action against enacted federal legislation, the situations under discussion place the Court in the position of itself being responsible (*i.e.*, on its own motion, rather than that of Congress) for invalidating actions by legislatures. Since at least some decisions of this sort may generate controversy, removing them from the judicial arena may enhance the Court's ability to perform its critical role of protecting individual constitutional liberties.

195. 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 349 (Congress ed. 1884). See also *THE FEDERALIST* No. 39 (J. Madison) 250, 256.

196. *THE FEDERALIST* No. 78 (A. Hamilton) 521, 525 ("It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.") See also R. BERGER, *CONGRESS V. THE SUPREME COURT* 203-05 (1969).

197. 3 J. ELLIOTT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 553 (2d ed. 1881).

198. 2 *id.* at 489.

199. *Id.* at 121. In the First Congress, Rep. Michael Stone remarked, without dissent, that one of the functions of the judiciary was to stop the national government from "destroying" the sovereignty of the states. 1 *ANNALS OF CONGRESS* 840 (Gales & Seaton eds. 1789).

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areas of common ground between jurists of such divergent perceptions of the Court's role as Felix Frankfurter and William O. Douglas: the former viewed "the basic function of this Court as the mediator of powers within the federal system,"²⁰⁰ and the latter found that "[t]he Constitution was designed to keep the balance between the States and the Nation outside the field of legislative controversy."²⁰¹

The Federalism Proposal need not be abandoned in the face of this array of historical statements. The original-intent axiom itself is shrouded with uncertainties. For example, what specifically is meant by the "*clear* intention of the Framers"? How *clear* must "*clear*" be? At what point does the Framers' intent contradict rather than merely cast doubt upon a contemporary constitutional interpretation? How precisely is such a contradiction to be defined? Of what significance is the fact that it is a constitution intended for permanence, not a mere statute, easily amended, that was promulgated? Of what relevance is the presence of changed social circumstances since 1789? These are formidable and perplexing questions that pervade all of constitutional law and adjudication. But the historical evidence on this particular issue is sufficiently ambiguous to allow the argument to proceed without attempting the onerous task of plowing this field.

Neither Madison nor Hamilton spoke unqualifiedly. Those who have devoted their attention to the period report that Madison "was guilty, and guilty as a matter of public record, of about as complete inconsistency upon this subject [Supreme Court review of federalism issues] as was possible,"²⁰² and that "[f]or the containment of the national authority Madison did not emphasize the function of the Court; he pointed to the composition of the Congress and to the political processes."²⁰³ As for Hamilton,

[i]n *Federalist* # 33, where he discussed the necessary and proper clause, which anti-ratificationists regarded as vesting *carte blanche* powers in Congress, Hamilton asked who was to judge if Congress "should overpass the just bounds of its authority." Not once in his answer did he allude to the Supreme Court. Congress in the first instance and the people in the last would judge. How then is *Federalist* # 78 to be explained?²⁰⁴

200. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 667 (1943) (Frankfurter, J., dissenting).

201. *New York v. United States*, 326 U.S. 572, 594 (1946) (Douglas, J., dissenting).

202. 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 1011 (1953). See also Ketcham, *James Madison and Judicial Review*, 8 SYRACUSE L. REV. 158 (1957).

203. Wechsler, *supra* note 35, at 558.

204. Levy, *Judicial Review, History and Democracy: An Introduction*, in *JUDICIAL REVIEW AND THE SUPREME COURT* 1, 6 (L. Levy ed. 1967). See also *THE FEDERALIST* No. 31 (A. Hamilton).

And what explanation for the eminent opinions in the ratifying conventions?

The only clear answer to these queries is that there is no clear answer. Perhaps, as has been carefully attempted, the conflicting implications of the Framers' statements may be reconciled.²⁰⁵ Perhaps, as has been urged by some, *The Federalist* should be read with considerable skepticism, at least on this issue:

It was, in reality, a conscious, partisan political device . . . aimed at getting the Constitution adopted in the reluctant and resisting state of New York Thus . . . it is a mistake to take at face value many of its statements on the key issue, in New York, of the division of power between the states and the national government. There can be no doubt that . . . *The Federalist* attempted to mollify the opposition by playing down the powers of the national government.²⁰⁶

Perhaps this view also discloses the motive for the confident views articulated in the state conventions by those who were in support of the document. Perhaps judicial review in this area was intended to assure against state incursions on national power rather than the reverse; a close reading of a number of the statements cited above is quite consistent with this theory. As Samuel Huntington has written, Madison believed that "each government possessed a different 'defensive armour' which was its 'means of preventing or correcting unconstitutional encroachments' by the other. The defensive armor of the states was the political process; that of the national government was the judicial process."²⁰⁷

In light of these considerations, it cannot be said that the Federalism Proposal contravenes the clear intent of the Framers. The most compelling justification for holding that the Federalism Proposal should not be felled on this basis is the doubt surrounding whether any judicial review *at all* was contemplated.²⁰⁸ The Proposal surely is not advanced as a fulfillment of original intent; nevertheless, like judicial review itself, the Proposal represents a policy dictated by

205. See R. BERGER, *supra* note 196, at 91-93 (1969).

206. Greene, *Congressional Power Over the Elective Franchise: The Unconstitutional Phases of Oregon v. Mitchell*, 52 B.U.L. REV. 505, 525-26 (1972) (footnotes omitted).

207. Huntington, *supra* note 15, at 193-94.

208. The dispute over whether the Constitutional Convention intended to establish judicial review has occupied constitutional historians for much of this century. Compare L. BOUDIN, *GOVERNMENT BY JUDICIARY* (1932) with R. BERGER, *supra* note 196. A relatively neutral observer of the battleground concluded that "the record of the debates leaves [the Framers'] intentions unclear." R. DAHL, *PLURALIST DEMOCRACY*, *supra* note 55, at 147.

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structural and prudential considerations and designed to permit effective functioning of government under the Constitution.

B. *Political Branches as Judges of the Scope of Their Own Power*

A further political-legal axiom, traceable to Sir Edward Coke,²⁰⁹ holds that no person should act as judge in his own cause or be the arbiter of the limits of his own power. Yet the Federalism Proposal advocates that the national political branches determine the scope of national authority versus states' rights. It appears flatly to contradict Hamilton's view that, as it "cannot be the natural presumption" "that the legislative body are themselves the constitutional judges of their own powers," it "is far more rational to suppose that the courts were designed . . . to keep the [legislators] within the limits assigned to their authority."²¹⁰ This maxim, however, like most others, need not be without exceptions. Moreover, no matter how unnatural it may appear at first, it is not only rational but desirable to assign authority over constitutional judgments on functional rather than on axiomatic bases.

One need look no further than *Marbury v. Madison*²¹¹ to discover a branch of the national government, in that case the judiciary, acting as the final adjudicator of its own authority. The pragmatic justification for this result lies beyond this article. It is enough to observe that since the federal judicial branch is in no politically meaningful way represented in the national legislative halls, Congress has a natural insensitivity to the constitutional licenses and limits of judicial authority, at least when that authority may obstruct important legislative policies. Thus, for functional reasons, *Marbury* was wise and right. For similar reasons, Congress and the President should be the judges of national power vis-à-vis the states.

Over the course of American history, there has been no paucity of distinguished opinions suggesting that each of the federal branches should make its own determinations of constitutionality and act as the arbiter of its own constitutional power. Madison wrote that "[a]s the Legislative, Executive, and Judicial departments of the United States are co-ordinate, and each equally bound to support the Constitution, it follows that each must, in the exercise of its functions, be

209. *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (K.B. 1610).

210. *THE FEDERALIST* No. 78 (A. Hamilton) 521, 524-25.

211. 5 U.S. (1 Cranch) 137 (1803).

guided by the text of the Constitution according to its own interpretation of it."²¹²

Jefferson's view was that the executive and legislature should follow their own constitutional judgments, even though "contradictory decisions may arise . . . and produce inconvenience."²¹³ He argued that for the judiciary to "decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislative & Executive also, in their spheres, would make the judiciary a despotic branch."²¹⁴ Andrew Jackson stated that "[t]he Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution" and that "[t]he authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."²¹⁵ Lincoln echoed this sentiment when he declared that "while [judicial decisions are] entitled to very high respect and consideration in all parallel cases by all other departments of the Government," nonetheless:

if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically assigned their Government into the hands of that eminent tribunal.²¹⁶

These broadly phrased opinions, of course, were fragmentary responses to particular occasions, not meticulously drafted plans for the respective arbitral roles of the federal branches. So viewed, none is in direct conflict with the position taken that each context must be examined on its own and that functional considerations should govern final assignment of the power to decide.

In respect to some categories of issues, such as constitutionally secured personal liberties, it is not only suitable but necessary that the Court's word be regarded as authoritative. As to federal power vis-à-vis the states, however, it is appropriate to vest the political

212. 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 349 (Congress ed. 1865).

213. 9 THE WRITINGS OF THOMAS JEFFERSON 518 (P. Ford ed. 1897) (letter of June 11, 1815, to W. H. Torrance).

214. 8 *id.* at 311 (letter of Sept. 11, 1804, to Mrs. John Adams). See generally Krislov, *Jefferson and Judicial Review: Refereeing Cahn, Commager and Mendelson*, 9 J. PUB. L. 374 (1960).

215. 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1145 (J. Richardson ed. 1900).

216. 7 *id.* at 3210.

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branches with the final voice. In yet other contexts, whether a particular branch should possess the ultimate responsibility of judgment—and, if so, which branch—is more ambiguous.

This is not the place for a plenary exploration of every potential variant of this approach, but some brief sketch may enhance understanding of the problem. In exercising his "Power to grant Reprieves and Pardons for Offenses against the United States,"²¹⁷ the President should have the final word as to whether the law under which the applicant was convicted was unconstitutional, irrespective of the contrary opinion of the Congress and Court. In contrast, in pursuing his power to execute the laws, the President should not continue to enforce a statute that the Court has held invalid; indeed, unlike the pardon situation, this course of action should be an independent violation of constitutional rights if the threat of further enforcement deters constitutionally protected activity. And in employing his veto power, the President should be unencumbered by the judgment of the Congress and the Court that a law is constitutional; this was the situation, respecting a new charter for the Bank of the United States, to which Jackson most plainly spoke.²¹⁸

Less clear is whether the President should be able to refuse to enforce a law that he believes to be unconstitutional, even though the statute was enacted by Congress, perhaps over his veto, and upheld by the judiciary. Yet more uncertain is the legitimacy of the President's unwillingness to carry out a Supreme Court mandate because of his disagreement with the constitutional merit of the particular ruling. Illustrated by Jackson's alleged response to the *Cherokee Nation* decision,²¹⁹ this question should turn on a complete recitation of the context and consequences. The overriding point, however, is that it is neither unprecedented nor undesirable to rest final constitutional judgment with one of the federal branches on the range of its own authority.

C. *Lost Benefits of Judicial Review*

Adoption of the Federalism Proposal may be opposed as undermining the perceived role of the Supreme Court as ultimate arbiter

217. U.S. CONST. art. II, § 2.

218. See 1 C. WARREN, *supra* note 154, at 761-64.

219. When told of the Court's ruling in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which ordered Georgia to release two missionaries imprisoned for working with the Cherokees without a state license, Jackson reportedly said: "Well, John Marshall has made his decision, now let him enforce it." 1 C. WARREN, *supra* note 154, at 759. Although the story may be apocryphal, Jackson took no steps to enforce the decision. B. SCHWARTZ, *FROM CONFEDERATION TO NATION* 29 (1973).

of all federal-state conflicts. But since the Court has been largely unsympathetic to states' rights claims that challenge aggrandizement of national power, removal of the review function should not adversely affect the states in any significant way. In addition, the belief that judicial review of federalism cases is needed to deter irresponsible congressional incursions on state domains is without substantial force. Finally, the Proposal does not wholly eliminate judicial participation in the ongoing development of constitutional values respecting the division of authority between the national government and the states.

1. *Efficacy of Judicial Review for Preserving Federalism*

Objection might be made that if judicial review of alleged federal usurpation of states' rights were unavailable, Congress would not merely be able to regulate all aspects of human affairs but would also possess the power to swallow the states whole and thus destroy federalism. The list of possible horrors might include a federal statute requiring municipalities to act contrary to state-imposed restrictions²²⁰ or demanding that states adopt or administer regulatory, taxing, or spending programs conforming to federal policies.²²¹ Or Congress might "undertake to abrogate a land tax imposed by the authority of a State"²²² or, indeed, to forbid state taxation altogether. Or a federal law might decree that any state or municipal official who interfered with or refused to implement national policy could be impeached by the Senate. Or Congress might require that state and local officers must be confirmed by the Senate or by some other federal agency.²²³

But the argument cannot withstand realistic analysis. During much of our history, the Court's definitions of the nation's powers have afforded the political branches exceedingly loose reins.²²⁴ Many of the constitutional grants of authority to Congress and the President, especially the most important ones, are phrased in expansive and expandable language. Further, the Court's pronouncements have increased the flexibility of this language. Despite a recent case whose

220. Cf. *Beezer v. City of Seattle*, 62 Wash. 2d 569, 383 P.2d 895 (1963) (conflict of municipal utility law with Federal Power Act).

221. See, e.g., *District of Columbia v. Train*, 521 F.2d 971, 991 (D.C. Cir. 1975), *vacated and remanded sub nom. EPA v. Brown*, 97 S. Ct. 1635 (1977) (federal environmental agency may require states to refuse to license vehicles failing to meet pollution-control standards). See also Note, *Is Federalism Dead? A Constitutional Analysis of the Federal No-Fault Insurance Bill*: S. 354, 12 HARV. J. LEGIS. 668 (1975).

222. THE FEDERALIST No. 33 (A. Hamilton) 203, 206.

223. See generally *id.* No. 39 (J. Madison) 250.

224. For exceptions to this statement, see pp. 1581-82 *supra*.

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narrow and ambiguous thrust may be largely inconsequential,²²⁵ Congress may not only regulate every person or commodity involved in intercourse among the states, but also, under historic and modern interpretations of the commerce clause²²⁶ as well as the Court's lavish construction of the necessary and proper clause,²²⁷ may reach all commercial transactions and virtually every facet of human conduct that has radiations beyond the borders of a single state. Pursuant to its taxing and spending powers, Congress has been held capable of effectively governing activities that may be totally confined within each state's boundaries.²²⁸ In passing upon the power to enter treaties, held jointly by the President and Senate, the Court similarly appears to have handed the political branches a potent weapon to regulate intrastate behavior.²²⁹

Finally, although more remains to be heard from the Court on the subject, and some soundings have been discouraging to advocates of unconditional national power, the thrust of recent decisions explaining Congress's ability to enforce the Civil War Amendments has opened yet another road for national lawmaking drives.²³⁰ The vast potential for this federal regulatory authority may be seen in the judiciary's use of § 1 of the Fourteenth Amendment to require state and local governments to levy taxes,²³¹ to promulgate school desegrega-

225. See *National League of Cities v. Usery*, 426 U.S. 833 (1976) (discussed at pp. 1596-1600 *infra*).

226. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971) (commerce clause gives Congress power to regulate local credit transactions); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (racial discrimination in places of public accommodation); *Wickard v. Filburn*, 317 U.S. 111 (1942) (crops grown for consumption on farm); *Champion v. Ames*, 188 U.S. 321 (1903) (lottery tickets); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (steamboat between New York and New Jersey). For judicial language authorizing virtually unlimited national control of navigation, see *United States v. Twin City Power Co.*, 350 U.S. 222, 224-25 (1956).

227. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

228. Examples of taxing power cases include *United States v. Kahriger*, 345 U.S. 22 (1953) (gambling control); *Sonzinsky v. United States*, 300 U.S. 506 (1937) (gun control); *United States v. Doremus*, 249 U.S. 86 (1919) (narcotics control). Among the prominent spending power cases are *Helvering v. Davis*, 301 U.S. 619 (1937) (control of social insurance), and *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (unemployment compensation). See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950) ("Congress has a substantive power to tax and appropriate for the general welfare, limited only by the requirement that it shall be exercised for the common benefit [not] some mere local purpose.")

229. See *Missouri v. Holland*, 252 U.S. 416 (1920) (approving federal control, under treaty power, of policies affecting migratory birds).

230. See, e.g., *Runyon v. McCrary*, 427 U.S. 160 (1976) (Thirteenth Amendment); *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (same); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (same); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (Fourteenth Amendment); *United States v. Guest*, 383 U.S. 745 (1966) (same); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (Fifteenth Amendment). But see *Oregon v. Mitchell*, 400 U.S. 112 (1970).

231. See *Griffin v. School Bd.*, 377 U.S. 218 (1964).

tion plans,²³² and to adopt specified reapportionment schemes.²³³ Section 5 of that amendment has been held to endow the political branches with even broader power.²³⁴

These decisions suggest that the absence of pervasive federal control over all conduct within the states has been more the product of political than judicial restraint. Nor should this be surprising. In contrast to the state and local orientation of members of the political branches, the Justices are appointed with no specific regard for their geographic origins.²³⁵ They are therefore more inclined to view matters from a national perspective. Congress, on the other hand, has not only refrained from utilizing its powers to anything approaching their full extent, but has also left virtually untapped such potentially fruitful sources of power as the full faith and credit and guarantee clauses in Article IV. Indeed, on a number of occasions, involving such varied subjects as intoxicants and insurance, Congress has reversed judicial denials of state authority.²³⁶ It is thus fair to conclude that, even if one characterizes the Court as a disinterested arbiter between the central government and the states, since the national political branches tend to favor localism the constitutional issues of federalism may safely be vested in Congress and the President.

A qualification of this conclusion might stem from the recent *Usery* case.²³⁷ But a close reading of the opinion reveals the great ambiguity with which the Court phrased the scope of its ruling. The essence of the Court's rationale appears to be that the challenged provisions of the Fair Labor Standards Act were beyond the commerce power because they operated "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions,"²³⁸ and thus interfered with "functions essential to [the]

232. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

233. See *Burns v. Richardson*, 384 U.S. 73 (1966); *Travia v. Lomenzo*, 381 U.S. 480 (1965); *Scott v. Germano*, 381 U.S. 407 (1965).

234. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

235. Presidents sometimes strive toward balanced regional representation on the Supreme Court when they nominate justices. H. ABRAHAM, *JUSTICES AND PRESIDENTS* 55-56 (1974). For example, President Lincoln sought "an outstanding trans-Mississippi lawyer" for one appointment, and President Nixon stated his goal in 1969 as choosing a "Southern jurist of conservative judicial bent." *Id.* But there is no system for selection of Supreme Court nominees analogous to the "senatorial courtesy" method for district court judgeships, where the senators from the relevant state largely control the nominees. J. GOULDEN, *supra* note 57, at 24-26. Even those justices chosen at least in part for geographic identification have no ongoing obligation to their native region.

236. See *Wilkerson v. Rahrer*, 140 U.S. 545 (1891) (upholding national "Local Option" law, Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (1890) (granting states control of regulation of alcohol)); note 271 *infra* (state regulation of insurance).

237. 426 U.S. 833 (1976).

238. *Id.* at 852.

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separate and independent existence' ”²³⁹ of the states. But, as Justice Rehnquist recognized in an earlier dissent that presaged his opinion for the Court in *Usery*, this approach will “undoubtedly present gray areas to be marked out on a case-by-case basis.”²⁴⁰ Justice Blackmun, a member of the five-man majority in *Usery*, accurately described the opinion as adopting a “balancing approach” that “does not outlaw federal power in [other] areas . . . where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.”²⁴¹

Most important, however, the *Usery* decision is specifically limited to the reach of national power under the commerce clause, and then only in connection with direct federal regulation of “the States *qua* States.”²⁴² In this respect, *Usery* parallels the once greatly inflated, but now severely contracted, strictures on Congress’s power to tax.²⁴³ *Usery* explicitly reaffirms Congress’s extraordinarily broad authority under the commerce clause to regulate the conduct of a private person or business: “[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.”²⁴⁴ Further, *Usery* carefully avoids deciding “whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under sections of the Constitution such as the spending power . . . or § 5 of the Fourteenth Amendment.”²⁴⁵ The narrow thrust of the opinion is further illuminated by its concession that powers denied the national government under the commerce clause by *Usery* might validly be imposed on “the States *qua* States” if Congress acted pursuant to its war power.²⁴⁶ Within a week of the *Usery* decision the Court, again speaking through Justice Rehnquist (this time without dissent), was willing to assume national power under § 5 of the Fourteenth Amendment to regulate the hiring practices of the states as states by forbidding sex discrimination.²⁴⁷

Thus *Usery* notwithstanding, the presence of judicial review would appear to afford mean solace to those who fear the national govern-

239. *Id.* at 845 (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1869)).

240. *Fry v. United States*, 421 U.S. 542, 558 (1975).

241. 426 U.S. at 856 (Blackmun, J., concurring).

242. *Id.* at 847.

243. See note 169 *supra*.

244. 426 U.S. at 840 (quoting *Fry v. United States*, 421 U.S. 542, 547 (1975)).

245. 426 U.S. at 852 n.17.

246. *Id.* at 854 n.18.

247. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56 & n.11 (1976).

ment's ability to "devour the essentials of state sovereignty."²⁴⁸ If *Usery* prevents Congress's use of the commerce power to require that states directly adopt national regulatory programs, the decision still permits Congress's use of the commerce power to enact these programs itself by operating directly on persons or businesses within the states. Similarly, if *Usery* prohibits direct federal limitations of maximum salaries for state employees under the commerce clause, it does not, as Justice Rehnquist has acknowledged,²⁴⁹ appear to forbid Congress's recovering the excess wages from the employees under its taxing power.

Alternatively, under judicially articulated doctrines unaffected by *Usery*, Congress could seemingly utilize its spending power in respect to "the States *qua* States" to achieve desired national goals. A 1947 case involving the applicability of the Hatch Act,²⁵⁰ which limits the political activity of federal employees, to state agencies receiving federal funds points the way.²⁵¹ The United States Civil Service Commission had ordered the Oklahoma Highway Commission to remove a commissioner who was also state Democratic Party chairman. The Court rejected Oklahoma's contention that this unconstitutionally abridged its sovereignty, and reasoned that the federal government was not ordering the dismissal of the commissioner but was only threatening the withdrawal of money. This, the Court held, was an acceptable exercise of the federal government's "power to fix the terms upon which its money allotments to states shall be disbursed."²⁵²

It would seem, therefore, that Congress could condition federal law enforcement assistance grants to the states on their payment of designated minimum wages to state police,²⁵³ or could stipulate that state recipients of federal air pollution funds adopt specific auto or

248. *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting).

249. *Fry v. United States*, 421 U.S. 542, 554 n.1 (1975) (Rehnquist, J., dissenting).

250. 5 U.S.C. § 7324(a)(2) (1970). As this issue went to press, Congress was considering a relaxation of the Hatch Act's provisions. See *N.Y. Times*, June 8, 1977, § A, at 12, col. 1.

251. *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947).

252. *Id.* at 143. The Court, in ambiguous dictum, added that "the United States . . . has no power to regulate, local political activities as such of state officials," *id.*, but this consideration was clearly not dispositive of the case. Since the Court has upheld national power to imprison state officers who frustrate interests subject to federal supervision, *Screws v. United States*, 325 U.S. 91 (1945), then no good reason appears for believing that Congress would not also be held to have the authority to remove them from office for similar conduct.

253. Such grants are now conditioned on the absence of discrimination based on race, color, religion, national origin, or sex in activities funded thereunder. 42 U.S.C.A. § 3766(c) (West Pamphlet 1976). See also 42 U.S.C. § 2000d (1970) (prohibiting "discrimination under any program or activity receiving federal financial assistance").

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industrial emission rules,²⁵⁴ or could require that local governments provide property tax relief in order to participate in federal revenue sharing.²⁵⁵ Given the massive federal assistance to state governments, estimated at sixty billion dollars in 1976,²⁵⁶ it is difficult to imagine any state regulatory, taxing, or spending program that Congress and the President could not obtain. Finally, since *Usery* endorses national authority under the commerce clause to set minimum wages for employees of privately owned businesses, and since the Court appears quite ready to uphold federal power under § 5 of the Fourteenth Amendment to affect “the States *qua* States,”²⁵⁷ the narrow result in *Usery* itself might be altered if Congress were able to rely on the latter source of authority. Under § 5 of the Fourteenth Amendment may not Congress rectify the denial of equal protection that results from state employees’ being disadvantaged vis-à-vis comparable employees in the private sector?²⁵⁸

The point, it must be emphasized, is *not* that any of these exercises of national power is constitutional as a matter of abstract principle. There is no disagreement here with the Court’s position in *Usery* that certain federal regulations of “the States *qua* States,” or even of private persons or businesses within the states, otherwise fully within Congress’s delegated powers, may transgress the constitutional prin-

254. Cf., e.g., *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1976), *vacated and remanded*, 97 S. Ct. 1635 (1977) (EPA may not require states to implement transportation controls or vehicle inspection programs).

255. The State and Local Fiscal Assistance Act of 1972 originally limited the use of funds allocated to local governments to so-called “priority expenditures.” These included ordinary and necessary expenditures for public safety, environmental protection, public transportation, health, recreation, libraries, social services for the poor or aged, and financial administration, as well as capital expenditures authorized by law. 31 U.S.C. § 1222(a) (Supp. V 1975). These restrictions were repealed by the State and Local Fiscal Assistance Amendments of 1976, Pub. L. No. 94-488, § 3(a), 90 Stat. 2341 (1976). Like federal programs covered by 42 U.S.C. § 2000d (1970), the Act forbids discrimination in any activity funded under its provisions, 31 U.S.C. § 1242(a) (Supp. V 1975).

256. *National League of Cities v. Usery*, 426 U.S. 833, 878 (1976) (Brennan, J., dissenting).

257. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56 (1976) (approving application to state’s retirement benefit plan for employees of 1972 amendments (Act of Mar. 24, 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972)) to Title VII of Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964)).

258. See Michelman, *supra* note 76, at 1181-91; Percey, *National League of Cities v. Usery: The Tenth Amendment is Alive and Doing Well*, 51 Tul. L. Rev. 95, 106 n.53 (1976). Furthermore, if Congress were to legislate pursuant to the guaranty clause, U.S. CONST. art. IV, § 4, could it not provide—free of any judicial condemnation—for significantly detailed control of many aspects of state government, for example, that designated state functionaries must be elected rather than appointed (or vice versa) or that they must possess particular qualifications? A negative answer seems especially unlikely given the Court’s view that issues of congressional power under the guaranty clause are “political questions,” not subject to judicial review. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

ciple of federalism, just as they may offend against constitutionally secured personal rights.²⁵⁹ Under existing doctrine, several of the federal actions hypothesized would likely pass judicial muster on the merits; others would be altogether avoided by the Court, the final decision being relegated to the political branches. Yet others, such as the Hatch Act's restriction on political activity, raise serious questions of individual rights which the Court would, and should, adjudicate.²⁶⁰ The position here is simply that judicial review is not the steadfast brake to be relied upon to prevent the destruction of state sovereignty.

The *Usery* Court's equation, for purposes of judicial review, of states' rights and individual rights as affirmative limitations on national power should be rejected. As Justice Brennan argued in dissent, so far as protection of states' rights is concerned, it is the national political branches and not the federal judiciary that may be relied upon.²⁶¹ The best support for this position is probably that the most egregious of the hypothetical federal statutes—for example, the national prohibition of all state taxes or the federal confirmation of all state officials—are just that: hypothetical. Equally unreal are federal laws indisputably preferring the ports of one state over those of another or laws erecting a new state within the jurisdiction of an existing one. Since the representation of state interests in the national political system strongly assures against laws posing dire threats to state sovereignty, the Court may confidently permit the constitutional issue to be resolved there.

2. *Deterrent Effect of Judicial Review*

Resistance to the Federalism Proposal may be based on the plausible ground that the record of congressional restraint in favor of states' rights²⁶² is a function of judicial review. The argument holds that, were it not for the deterrent effect of potential judicial invalidation, the federal political branches would have long since engaged in the process of self-arrogation of power or, at the very least, would have been much more generous to the central government in interpreting the breadth of its authority. The logic of this line of thought may

259. 426 U.S. at 841.

260. Similarly, the imagined federal impeachment of state officials, *see* p. 1594 *supra*, could well present personal liberty issues respecting procedural safeguards.

261. 426 U.S. at 857-58 (Brennan, J., dissenting). Justice Brennan's alternative basis for disagreeing with *Usery's* coupling of states' rights and personal rights—that "there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution," *id.* at 858—is not as persuasive.

262. *See* p. 1596 *supra*.

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not be demeaned out of hand. But available data not only suggest its refutation but point in the opposite direction.

In numerous specific instances, the presence of judicial review of proposed legislation that allegedly injured state sovereignty has encouraged the political branches to abdicate their own constitutional responsibility, as the Court itself has recognized.²⁶³ President Roosevelt's advice to Congress in the 1930s is an example. Roosevelt argued that Congress's task was only to judge the need for national action and that questions of constitutionality should be left exclusively to the courts.²⁶⁴ Other examples abound.

In urging passage of the Sherman Act in 1890 against the contention that the legislation entered ground reserved to the states, Senator Washburn asserted:

I know the sentiment of the country with regard to the question of monopolies and trusts, and I believe the people expect the Congress of the United States to make an attempt to secure some valid and satisfactory legislation. While the bill of the Senator from Ohio may not be perfect, while it may not reach every point, and may finally be declared unconstitutional, yet it is a move in the right direction²⁶⁵

Also, when constitutional challenges were leveled against a provision in the Alaska statehood bill in 1958 that authorized the President, subsequent to Alaska's being admitted to the union, to place much of the territory under federal control, Senator Frank Church defended on the ground that citizens who might be adversely affected could always seek judicial recourse.²⁶⁶ Finally, in 1970, when the 18-year-old voting rights act was under consideration in Congress, the debate

developed around three general positions. The first affirmed without question . . . the constitutionality of enacting 18-year-old voting by statute The second held that unquestionably Congress was without constitutional power to lower the voting age by statute. The third position frankly admitted uncertainty on the constitutional issue, but recognized the desirability of enfranchising 18-year-olds and was willing to "let the court decide it."²⁶⁷

263. See, e.g., *Evans v. Gore*, 253 U.S. 245, 248 (1920) ("[I]t appears that . . . Congress regarded [the income tax on federal judicial salaries] as of uncertain constitutionality and . . . intended that the question should be settled by us")

264. 79 CONG. REC. 13449 (1935) (quoting Wash. Daily News, Aug. 10, 1935).

265. 21 CONG. REC. 2608 (1890).

266. 104 CONG. REC. 12458-59 (1958).

267. Mikva & Lundy, *supra* note 124, at 483 (footnote omitted). See also 2 C. WARREN, *supra* note 154, at 209 (Sen. Clayton, in urging 1848 measure on slavery in territories,

These examples are not offered to establish that all considerations of constitutional responsibility have been foresaken in the federal political setting, or even that there have not been serious constitutional arguments voiced in the situations just described. Nor is it the contention that the federal laws enacted in the above cases, whatever the subsequent judicial decisions may have been, in fact abrogated states' rights. It may well be that with or without the most demanding congressional respect for matters of constitutionality, and with or without the established possibility of judicial review, all of the above federal statutes would have been enacted anyway. For, as has been argued, Congresses and Presidents have been extremely solicitous of the sovereign prerogatives of the states.²⁶⁸

Nonetheless, the import of these illustrations is confirmed by a modern poll of congressmen indicating that 31% believed that "Congress generally should 'pass constitutional questions along to the court rather than form its own considered judgment on them.'"²⁶⁹ When this is coupled with the nearly irrebuttable presumption of constitutionality that the Court generally has accorded political decisions in regard to states' rights,²⁷⁰ the presence of judicial review may actually encourage the expansion of national dominion. The argument is simple enough: if the congressmen ignore constitutional considerations of states' rights and defer to the Court, and if the Court then upholds the statute in deference to a congressional judgment of constitutionality that has never really been exercised, then judicial review is not only illusory but self-defeating. The congres-

proposes "to refer the whole matter to the Judiciary").

In the midst of the Depression, when states' rights objections were raised to the Bituminous Coal Conservation Act of 1935,

[c]hacteristic of the attitudes of Representatives favoring the bill was a comment of Mell G. Underwood, Democrat from Ohio, who declined to debate constitutionality because he was "attempting to make this effort to assist the laboring people of the country" and was "willing to leave that question to the proper tribunal, the Supreme Court of the United States." Adolph J. Sabath, veteran member from Illinois, thought that a member should vote for a measure of doubtful constitutionality and then "let the courts finally decide the matter."

D. MORGAN, *supra* note 39, at 180 (footnotes omitted).

During the racial upheaval in the 1960s, Tenth Amendment arguments in Congress against the Civil Rights Act of 1964 drew such responses as that of Senator Paul Douglas: "Why not pass this law and let the Supreme Court make the decision as to whether or not it is constitutional?" 110 CONG. REC. 13434 (1964). Senator Kenneth Keating believed that constitutionality "has to ultimately be decided by the Supreme Court anyway, and . . . we ought to get on with our work here." *Civil Rights—The President's Program, 1963: Hearings on S. 1731 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 204 (1963).

268. See pp. 1560-65 *supra*.

269. D. MORGAN, *supra* note 39, at 336.

270. See pp. 1594-96 *supra*.

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sional view that constitutionality is the equivalent of what the Supreme Court will uphold encourages Congress to move farther into what were previously thought to be state preserves. History does record instances of Congress's acting in the name of states' rights by withdrawing federal laws that have been upheld by the Court.²⁷¹ But although it is by no means true, especially in regard to states' rights, that Congress will exercise all possible authority that may be inferred from judicial decisions,²⁷² there is a likely tendency to follow judicial approval with more political action.²⁷³ For even those congressmen who are sensitive to the limits of national power and who treat the constitutional question with due reflection cannot help but be influenced by judicial approval of earlier exercises of federal authority.

Thus judicial review of states' rights issues can encourage aggrandizement of national power. As has been shown, many arguably invalid federal laws may make it through the legislative process at least in part because of the prospect of future judicial review, yet these same laws may in fact never reach the courts. Indeed, even in those infrequent instances in which the Court does hold federal action unconstitutional, the damage caused by the disapproved action is often far from remedied. Considering the length of the process of judicial review, a given national policy may make a substantial im-

271. In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the Supreme Court, in holding that the Sherman Act applied to the insurance industry, threatened to invalidate much of the system of state regulation of insurance then in existence. In the following year, Congress provided that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business," and that the Sherman, Clayton, and Federal Trade Commission Acts would apply to insurance only "to the extent that such business is not regulated by State law," 15 U.S.C. § 1012 (1970). See generally Gardner, *Insurance and the Anti-trust Laws—A Problem in Synthesis*, 61 HARV. L. REV. 246 (1948).

272. It has been noted that:

During the 91st Congress some of the most interesting and important constitutional debates involved the proper interpretation of constitutional grants of legislative power. It would not have been surprising if Congress had assumed a broad interpretation of such constitutional grants, without questioning their limits. In fact, this turns out not to be the case. Experience with the question of Congress' power to enfranchise 18-year-old voters and the exercise of its war-making powers shows the national legislature to be seriously concerned that the manner in which grants of power are exercised be consonant with the Constitution.

Mikva & Lundy, *supra* note 124, at 474.

273. An analogous development has been frequently observed in respect to judicial validations of government actions allegedly violative of personal liberties. "For instance, after the Court reluctantly upheld the compulsory flag salute rule in *Minersville School District v. Gobitis*, the West Virginia legislature enacted a comparable statute for the state as a whole, and other states quickly joined the repressive band wagon." Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 7-8 (1968) (footnote omitted). See also A. BICKEL, *THE LEAST DANGEROUS BRANCH* 130-31 (1962).

pact prior to its judicial invalidation. A study of Supreme Court nullification of federal statutes calculated that, on the average, close to nine years elapsed between passage and final judgment.²⁷⁴ No matter how subject to qualification statistical averages may be, in the two years that passed between the enactment of the National Industrial Recovery Act (NIRA) in 1933 and its demise in *Schechter Poultry Corp. v. United States*,²⁷⁵ over a thousand national and regional agencies operated under the Act.²⁷⁶ The NIRA's economic tentacles touched virtually every segment of American society; its nullification by the Court, according to the American Federation of Labor, affected more than four and one-half million workers.²⁷⁷ During the short life of the Agricultural Adjustment Act of 1933, which was overturned in *United States v. Butler* in 1935,²⁷⁸ over a billion dollars was collected and spent by the federal government.²⁷⁹ It was impossible to redistribute the funds accurately after the statute was invalidated.²⁸⁰ These examples are, of course, atypical, but they confirm the contention that even accelerated judicial review usually cannot prevent major statutory impact, sometimes with consequent irreparable injury to large numbers of individuals.²⁸¹

The availability of judicial review for alleged infringements of individual rights has similarly encouraged congressional action of doubtful validity. For instance, the legislative histories of both the Communist Control Act of 1954 and the District of Columbia's preventive detention law passed in 1970 disclose an oft-stated "leave it to the courts" attitude.²⁸² But the Court's activity in respect to personal liberties tends to further rather than to diminish the preservation of constitutional values. Unlike its response to the federalism category of issues, the Court, irrespective of differing judicial language, has not accorded a very firm presumption of constitutionality

274. Note, *The Case for an Advisory Function in the Federal Judiciary*, 50 GEO. L.J. 785, 801 (1962).

275. 295 U.S. 495 (1935) (invalidating National Industrial Recovery Act of 1933, § 3, ch. 90, 48 Stat. 196).

276. Note, *supra* note 274, at 801.

277. *Id.*

278. 297 U.S. 1 (1935) (striking down Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31).

279. See Note, *supra* note 274, at 800-02.

280. *Id.* See also L. FISHER, PRESIDENTIAL SPENDING POWER 192 (1975) (noting that Nixon Administration's impoundment of funds under Clean Water Act had great impact even though impoundment invalidated in *Train v. New York*, 420 U.S. 35 (1975)).

281. Indeed, this fact has been forthrightly recognized by congressmen who, because of a law's assured operation for the period of time before judicial invalidation, have urged the enactment of the law despite its conceded unconstitutionality. See D. MORGAN, *supra* note 39, at 180.

282. *Id.* at 264-65; Mikva & Lundy, *supra* note 124, at 472.

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to government action affecting civil liberties.²⁸³ Thus it has avoided the misleading implication of judicial review and the self-generating propensity to narrow the scope of the rights at issue. More important, if the Court were to relegate individual rights issues to the legislative process, their security would be seriously endangered. In contrast, given the forceful state representation in the national legislative system, if the Court were to make clear that the final word on constitutional problems of federal versus state authority lies within that system, the constitutional dangers would be much less apparent. Although there is surely no proving it, such a judicial stance might well result in Congress being even more sensitive to state interests, even more true to the ideals of federalism.

3. *Remaining Judicial Responsibility*

The Federalism Proposal, although resting final constitutional decision with the political branches, does not disrobe the judiciary. The courts would still play a vital role in helping to shape the constitutional decision through the articulation of constitutional values and the nourishment of constitutional understanding. Federal statutes, executive orders, and treaties are rarely so plain and precise as not to require interpretation. If, after surveying the relevant adjudicative facts and the data underlying the federal action, as well as traditional constitutional precepts, the Court believes that the action would exceed the authority of the central government, the Court will virtually always be able to interpret the statute or executive action as inapposite. In so doing, the Court would be following its customary procedure of assuming, in the absence of clear contrary evidence, that Congress or the President either did not intend or did not consider applications of its enactments that test the limits of national power.²⁸⁴ This judicial stance would be especially appropriate if the record indicates that the political branches did not reflect on the question of constitutionality. The Court may continue to pay proper deference to the opinions of federal agencies as to the meaning of the statute or executive action before it.²⁸⁵ But the Court is not bound unless the pertinent political branch has itself unmistakably spoken. In cases raising issues of federal power versus states' rights, the Federalism Proposal urges that that word be final.

283. Strict scrutiny of equal protection claims is an obvious example of this greater concern for individual rights. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 9 (1967); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

284. *See, e.g.,* *United States v. Bass*, 404 U.S. 336, 349-50 (1971); *United States v. Five Gambling Devices*, 346 U.S. 441 (1953).

285. *See* *New York Dep't of Social Serv. v. Dublino*, 413 U.S. 405, 421 (1973).

D. *The Limitations of Judicial Review*

The Federalism Proposal does not depend on the assumption that the states' position in the councils of national government provides an ironclad guarantee that no violations of states' rights will occur. If the federalism question is a close one, however, as almost all constitutional questions are in the real world, then, irrespective of some abstractly viewed "correct" answer, the political branches should be trusted to produce a fair and reasonable judgment.

But should a true constitutional crisis arise, with Congress and the President joining forces in ignoring clear mandates of the Constitution,²⁸⁶ it is probably futile to rely on the Court to right the matter. Learned Hand's observation "that a society so riven that the spirit of moderation is gone, no court can save"²⁸⁷ echoed James Bradley Thayer's conclusion sixty-five years earlier that "[u]nder no system can the power of courts go far to save a people from ruin."²⁸⁸ Thayer, in turn, drew on Justice Gibson's early nineteenth century belief that

[o]nce let public opinion be so corrupt as to sanction every misconstruction of the constitution and abuse of power which the temptation of the moment may dictate, and the party which may happen to be predominant will laugh at the puny efforts of a dependent power [the judiciary] to arrest it in its course.²⁸⁹

In the best of times, the people, viewing the Court as a nonrepresentative institution, ordinarily accord its invalidations of popular action an ambivalent respect. In the worst of times—and that is surely the situation when the elected representatives of the states and of the people determine to transgress plainly established constitutional boundaries—the Court would be practically helpless.²⁹⁰ There is scant reason to believe that a people in social upheaval would heed the Court's counsel. As demonstrated by our own Civil War and by the continued experience of constitutional republics throughout much of the rest of the world, the game of constitutional checks and bal-

286. It must be remembered that the operative agencies in this regard are Congress and the President, not minor federal bureaucrats or even state legislatures.

287. Hand, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 155, 164 (I. Dillard ed. 1953).

288. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *HARV. L. REV.* 129, 156 (1893), reprinted in J. THAYER, *LEGAL ESSAYS* 1, 39 (1908).

289. *Eakin v. Raub*, 12 S. & R. 330, 355 (Pa. 1825) (Gibson, J., dissenting).

290. See, e.g., Adamany, *Legitimacy, Realignment Elections, and the Supreme Court*, 1973 *WIS. L. REV.* 790, 840 (noting that, during pendency of President Roosevelt's court-packing plan in Congress, the Court reversed earlier decisions invalidating New Deal legislation). See generally J. ALSOP & T. CATLEDGE, *THE 168 DAYS* (1938); W. SWINDLER, *COURT AND CONSTITUTION IN THE 20TH CENTURY* 62-80 (1970).

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ances, no matter how bold the lettering and durable the paper, works only if the players respect the rules. For clear constitutional violations, it is only the societal checks of popular conscience and responsibility that can finally preserve American federalism by demanding that the political branches return to course.

Although this is equally true of blatant abridgments of constitutionally prescribed personal liberties, there are somewhat different phenomena in operation when states' rights are at issue. For one thing, there will likely be better organized political resistance to the expansive national action. This reduces the likelihood that such action will occur in the first place or that judicial review could reverse such action once initiated. Encroachments on personal rights, however, ordinarily affect a less well-defined interest group and are less likely to encounter organized political resistance. Most extreme individual rights violations would not strike at the liberty of large numbers of citizens, but rather would be directed at discrete and politically defenseless minorities.²⁹¹ Outrageous national incursions on the federalism principle would, in contrast, be imposed against the will of the majority in at least one, and most probably more, of the constituent states. With the states as a natural focus of resistance to the unconstitutional measures, might it not be likely, in Hamilton's words, "that citizens . . . would flock from the remotest extremes of their respective states to the places of election, to overthrow their tyrants, and to substitute men who would be disposed to avenge the violated majesty of the people?"²⁹² Perhaps public resistance is more likely for this class of constitutional violations than when individual rights are abused. Therefore, whatever the force of judicial review as a last bulwark of the Constitution, it is less necessary for federalism disputes.

E. *Value of Judicial Legitimation*

Another imposing objection to the Federalism Proposal is wholly independent of the benefits said to flow to the American federal system from the ability of the Supreme Court to invalidate national action found to be excessive. Most fully developed by Charles Black, the position is that judicial validation or "legitimation" of those exercises of federal power that the Court finds to be constitutionally permissible is critically important for national unity; that public knowledge that an independent tribunal has approved exercises of

291. An exception might be if Congress were to extend indefinitely the terms of its members and thereby allegedly violate the people's right to vote.

292. THE FEDERALIST No. 60 (A. Hamilton) 403, 410.

authority adds dignity to the laws of the government and inspires confidence that public action is within constitutionally limited boundaries; and that the concurrence and cooperation of all three federal branches is necessary for that psychological acceptance by the people requisite to successful administration of government.²⁹³ The Court's landmark decision in *McCulloch v. Maryland*²⁹⁴ is often cited in support of this postulate. Black credits Chief Justice Marshall's opinion, which sanctioned expansive national power through liberal interpretation of the necessary and proper clause, with providing the amalgam for building a single nation.²⁹⁵

This conclusion may be approached at several levels. At the outset, it is important to note that its foundation has been forcefully challenged. In David Adamany's view, "there seems no question that the widely asserted legitimizing function of the Supreme Court cannot summon adequate empirical support from public opinion studies, does not square with the history of relations between the justices and the popular branches, and will not withstand a searching analysis of its assumptions."²⁹⁶ Beyond this, it may be, as Philip Kurland contends, that we

may have reached the stage of political evolution when "legitimation" of congressional authority is unnecessary. There may now be consensus that there are no areas of individual behavior not subject to national governmental control Those who accept this as a political fact do not need the Court to legitimize it. . . .

. . . [T]he vast amount of national legislation and the small number of cases in which the Court affixes its stamp of approval suggest that legitimacy, acquired in this fashion, is certainly not a *sine qua non* of effective national legislation.²⁹⁷

293. See C. BLACK, *supra* note 17, at 34-86 (1960).

294. 17 U.S. (4 Wheat.) 316 (1819).

295. See C. BLACK, *supra* note 17, at 79-82 (1960).

296. See Adamany, *supra* note 290, at 845-46. One survey, for example, found that only 46.2% of respondents perceived the Supreme Court as dealing with constitutional issues; 39.7% thought "'that it is a proper judicial function to interpret and apply the fundamental principles underlying the polity'"; 37% thought that the Court was "'carrying out its responsibilities in an impartial and competent manner'"; and only 12.8% fell into all three categories. *Id.* at 807-08 (citing Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court*, 2 L. & Soc'y Rev. 357 (1968)). Another study asked respondents: "'[w]ould you be likely to think the right thing had been done in Washington if the action had been taken by the Supreme Court (President) (Congress)?" Fifty percent had confidence in the Congress, 35% in the President, and 28% in the Supreme Court. Thirty-nine percent gave negative responses about the Court, 33% about the President, and 1.6% about Congress. Adamany, *supra* at 812 (citing Dolbeare, *The Public Views the Supreme Court*, in LAW, POLITICS AND THE FEDERAL COURTS 199 (H. Jacob ed. 1967)).

297. P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 36 (1970).

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Most important, whatever the historical or contemporary advantages of judicial “legitimation” may be, this aspect of the Court’s work, particularly when it has validated exertions of national power against the plaint of states’ rights, has been extremely controversial.²⁹⁸ Charles Warren noted that from the earliest period of our history discontent with the Court’s decisions on the limits of congressional power “arose, *not* because the Court held an Act of Congress unconstitutional, but rather because it refused to do so.”²⁹⁹ Validations of national power that make the Court a focus of the political controversy have therefore undermined the Court’s critical function in our system.

As a matter of theory, of course, when the Court rejects a challenge of unconstitutionality, it in no way implies an independent approval or endorsement by the judiciary of the government action upheld. Technically, the Court’s decision holds only that the conduct is within constitutional bounds and, especially because of the powerful presumption of constitutionality generally accorded in the federalism area, the Court’s rulings usually say no more than that the national political branches had some rational or perceivable basis for their decision. But this is not the flavor tasted by the public nor even by most officials. Judicial validation tends to be equated with judicial applause, a perception not infrequently assisted by judicial rhetoric.

F. *Popular Misconception Respecting Nonjusticiability*

The Federalism Proposal urges that the Court explicitly hold that it will not pass on constitutional questions concerning the reach of national authority versus states’ rights, and one of the bases for the Proposal is that the Court’s withdrawal will shield it from hostile public and official reactions. But if there is frequent misreading of the Court’s validations of federal laws,³⁰⁰ will there not be a similar confusion under the Federalism Proposal with similar consequences for the judicial image? If, despite the Court’s protestations to the contrary, even denials of certiorari are often received by the people as favorable decisions on the merits,³⁰¹ then why should a holding

298. See pp. 1580-81 *supra*.

299. 1 C. WARREN, *supra* note 154, at 5 (emphasis in original). Thus, Jefferson’s hostility to the Court stemmed not from its rejection of legislative acts, but from its refusal to strike down laws like the Alien and Sedition Acts. See, e.g., *id.* at 652; 11 THE WRITINGS OF THOMAS JEFFERSON 50-51 (Lipscomb ed. 1905).

300. Cf. note 273 *supra* (invalidation of local law misinterpreted).

301. See, e.g., *MacInnis v. United States*, 191 F.2d 157, 161 n.3 (9th Cir. 1951) (“[W]e, as an intermediate court, can take some comfort . . . from the fact that the denial [of certiorari] is not inconsistent with our views.”); Harper & Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354, 355-56 (1951); Note, 108 U. PA. L. REV. 1160, 1177 n.183 (1960).

that the federalism issue is nonjusticiable be understood differently? Does not the overall record reveal that the public perceives deeds rather than words and that the proposed deed is a judicial refusal to vindicate states' rights claims?

These are legitimate questions to which no confident answer may be made. Nonetheless, several factors should make an unqualified relinquishment of all responsibility for the lawfulness of these national political decisions distinguishable from certiorari denials and "legitimations." As to certiorari denials, there is in fact a good deal of truth in the popular reaction to them as rulings on the merits, and the Court itself has encouraged such speculation on occasion.³⁰² On the issue of legitimation, two decisions rendered by the Court in respect to nonjusticiable "political questions" affirm Fritz Scharpf's judgment that "[e]ven though there may be a broad spectrum of gradations between legitimation and non-legitimation, the political question decision will invariably be found at its far end: it is not intended to, and it cannot, legitimate a government measure that is challenged before the Court."³⁰³ The Court's intention in *Luther v. Borden*,³⁰⁴ in holding the issue a nonjusticiable political question, was generally perceived accurately by the bar, Congress, the public, and the press.³⁰⁵ Both "political parties professed to be satisfied with the decision," and the case "did much to establish confidence in the minds of the American people in the integrity and freedom from partisan bias of the Court as then established."³⁰⁶ Further, after *Colegrove v. Green*³⁰⁷ strongly suggested that legislative malapportionment in Illinois presented a political question, the state, rather than inferring that the Court had approved the system, hastened to modify it because of the felt possibility that the Court might invalidate it the next time around.³⁰⁸ More recently, whatever criticism the Court may have engendered by refusing to adjudicate the constitutional questions surrounding the war in Indochina³⁰⁹ was far less than the enmity it

302. See, e.g., *United States v. Kras*, 409 U.S. 434, 443 (1973) ("[A]lthough a denial of certiorari normally carries no implication or inference . . . the pointed dissents . . . to the denial in *Garland* . . . surely are not without some significance . . .")

303. Scharpf, *supra* note 194, at 535 n.59.

304. 48 U.S. (7 How.) 1 (1849).

305. 2 C. WARREN, *supra* note 154, at 193-95.

306. *Id.* at 193, 195 (footnote omitted).

307. 328 U.S. 549 (1946).

308. See Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1088 (1958).

309. See, e.g., *Massachusetts v. Laird*, 400 U.S. 886 (1970) (denial of leave to file complaint challenging constitutionality of Indochina War); N.Y. Times, Apr. 25, 1972, at 47, col. 1 (suit filed to impeach justices for failing to review case challenging constitutionality of Indochina war).

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would have incurred had it spoken to the issues. On balance, so long as the Court is sufficiently clear in its denials of jurisdiction under the Proposal, both the substance of the action and the motives for taking it should be properly interpreted.

G. *Federalism as a Guarantor of Individual Liberty*

Perhaps the most deeply rooted basis for rejecting the Federalism Proposal would be the view that the federal system was designed to preserve individual freedom and prevent government tyranny. The Framers believed, the argument continues, that a powerful central monolith would become arrogant and despotic; fragmentation of authority would avoid suppression of disagreement and dissent. Years later, Lord Acton found that "the distribution of power among several States is the best check upon democracy. . . . It is the protectorate of minorities, and the consecration of self-government."³¹⁰ As stated tersely by Justice Frankfurter, "[t]ime has not lessened the concern of the Founders in devising a federal system which would . . . be a safeguard against arbitrary government."³¹¹

This premise has important implications for the Federalism Proposal. For if the Court's central function is to assure constitutionally ordained personal liberties, and if the federalism principle was adopted to secure individual rights, then it may follow that the Court's continued review of alleged violations of states' rights is required. Nor does the sensitivity of the national political process to constitutional issues of federalism undermine this syllogism. For the political branches' sensitivity to the possible infringement of personal liberties when large numbers of people are affected does not ordinarily imply that the Court must refuse to pass constitutional judgment on the issue. But the assertion that federalism was meant to protect, or does in fact protect, individual constitutional freedoms has no solid historical or logical basis.

The language of the fundamental charter itself is often cited to support the assertion. If the federalism precept were intended only to guard states' rights, it is asked, why does the Tenth Amendment declare that "the powers not delegated to the United States . . . are reserved to the States respectively, *or to the people*"?³¹² In his monumental, and equally controversial, study of the meaning of the Constitution, William Crosskey, although noting that the "reason for the

310. J. ACTON, *The History of Freedom in Antiquity*, in *ESSAYS ON FREEDOM AND POWER* 49 (1959).

311. *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959).

312. U.S. CONST. amend. X (emphasis added).

inclusion of these four words in the Tenth Amendment has long been something of a puzzle,"³¹³ flatly concludes that "the Tenth Amendment, unlike the preceding first nine, had directly to do with 'States' Rights,' rather than the rights of individuals."³¹⁴

Crosskey persuasively demonstrates that the two phrases "the States respectively" and "the people" do *not* "signify different persons, as has sometimes been supposed; they signify the same persons The meaning of the amendment is *not*, then, that a 'reservation' of powers is made *either* 'to the States respectively *or* to the people,' understanding 'the States respectively' and 'the people,' in divergent senses." Rather, "[t]he two phrases . . . were used in apposition in the amendment and are so punctuated in it."³¹⁵

But even though Crosskey has never been challenged on this point,³¹⁶ the inquiry need not rely exclusively on his painstaking work. The brief filed in the Supreme Court by the United States in the case of *Mulford v. Smith*,³¹⁷ which has been described as "[t]he best account of the legislative history of the Tenth Amendment,"³¹⁸ compiled a comprehensive survey of the debates on the amendment in the ratifying conventions and the First Congress. The brief concludes that the amendment was designed to overcome "two fears: that the national government might assert the right to exercise powers not granted, and that the states would be unable fully to exercise the powers which the Constitution had not taken from them."³¹⁹ "[T]he men who proposed the Tenth Amendment seem to have been clear that the Amendment was simply declaratory of the evident proposition that Congress could not constitutionally exercise powers not granted to it, and that these powers could continue to be exercised by the states."³²⁰ At no point does this study mention "the people" or individual rights. Madison himself demeaned the importance of the Tenth Amendment. He told Congress that the state conventions

313. 1 W. CROSSKEY, *supra* note 202, at 702 (1953).

314. *Id.* at 678.

315. *Id.* at 705-06 (emphasis in original and footnotes omitted).

316. For negative reaction to other aspects of Crosskey's work, see Fairman, *The Supreme Court and the Constitutional Limitation on State Governmental Authority*, 21 U. CHI. L. REV. 40 (1953); Goebel, *Ex Parte Clio*, 54 COLUM. L. REV. 450 (1954); Hart, *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (1954). But see Gilmore, *The Age of Antiquarius: On Legal History in a Time of Troubles*, 39 U. CHI. L. REV. 475, 485-87 (1972).

317. 307 U.S. 38 (1938).

318. Feller, *The Tenth Amendment Retires*, 27 A.B.A.J. 223 n.2 (1941).

319. Brief for the United States at 123, *Mulford v. Smith*, 307 U.S. 38 (1938). The brief also claims that "perhaps the most frequently expressed purpose [of the Tenth Amendment] was to insure that the states should continue able to exercise the numerous powers which had *not* been granted to Congress." *Id.* (emphasis in original).

320. *Id.* at 127.

were “particularly anxious that it should be declared in the constitution, that the powers not therein delegated should be reserved to the several States.” He added, “I admit [this] may be deemed unnecessary; but there can be no harm in making such declaration”³²¹ And despite a single dictum by the Supreme Court that the Tenth Amendment’s “principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted,”³²² the overwhelming view of the Justices, including Marshall, Story, Taney, and Stone, has been to the contrary.³²³

This virtually undisputed interpretation of the Tenth Amendment as being, in the words of an ardent critic of the extension of federal power, an affirmation of sovereignty not “in the people as a whole” but in the “people-as-States”³²⁴ is fully consistent with the broad constitutional scheme mandated by the Framers. The thrust of the fundamental charter was not to secure rights of individuals against exertions of government power, but rather to distribute power between nation and states. It was the surrender of sovereignty by the states that posed the major barrier to an effective union, and it was that issue rather than personal liberties that was resolved by the great compromise. Amendments to the Constitution, which include those relatively few provisions that establish individual rights, do not require the concurrence of “the people” but rather that of an extraordinary majority of the previously independent states. In sum, the contention that federalism secures personal liberty is simply not helped by the Tenth Amendment.

A more subtle line of argument, however, appears to hold greater promise. It concedes that the federalism principle was adopted because of the persisting “passion for separate sovereignty” of the states and that this precept was reaffirmed in the Tenth Amendment.³²⁵ But, the argument continues, the reason for this historic concern for state governments was that they were to be relied upon for the pres-

321. 1 ANNALS OF CONGRESS 458-59 (Gales & Seaton eds. 1789).

322. *Kansas v. Colorado*, 206 U.S. 46, 90 (1907).

323. See *United States v. Darby*, 312 U.S. 100, 124 (1941) (Stone, J.) (Tenth Amendment “but a truism There is nothing in the history of its adoption to suggest . . . that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted”); *Gordon v. United States*, 117 U.S. 697, 705 (1864) (Taney, C.J.) (same); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 372-74 (1819) (Marshall, C.J.) (Tenth Amendment “merely declaratory”); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 325 (1816) (Story, J.) (“[I]t is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States [as the Tenth Amendment certifies].”).

324. J. KILPATRICK, *THE SOVEREIGN STATES* 15 (1957) (emphasis omitted).

325. See generally R. BERGER, *supra* note 196, at 260-63.

ervation of individual liberty. Decentralized decisionmaking units would assure greater individual participation in the political process and better opportunity for the selection of officials whose views reflected those of their constituents. Thus the lower the level of effective government, the greater the control each individual would have over his own destiny. Due to the wide religious, political, and cultural diversity of the people who were spread over the former colonies, small groups of like-minded persons would be much more disposed than a distant national government to impose laws that were locally desired and in harmony with local values. Through these means, freedom would be maintained.

This rationale merits serious attention. As is unfortunately true of many assertions concerning the intentions that motivated the Framers, however, the record in regard to *the* reason for the sanctification of the states is cloudy. But what emerges most clearly is that a primary purpose for the concern for the state governments was not so much to assure personal freedom. Rather, it was to promote the efficiency of government administration. The belief existed that, so far as the central government was concerned, there would be great difficulty in its functioning successfully over a territory that was so large geographically and so diverse culturally.³²⁶ If the federal legislature were to attempt to devote proper attention to the myriad details presented by the concerns of each locality, there would be a wasteful dissipation of federal energy, extravagant expenditures, and an over-expansion of bureaucracy. No matter how effective the national effort, a monolithic central government would impose an added burden of time and expense on those citizens scattered far from the capital who relied upon it for the solution of all public problems. A single, remote national government would more than likely possess neither the systematic knowledge of local conditions nor the flexibility required for wise administration, whereas state government institutions would not only function on a more manageable scale but would also encourage political experimentation and innovative response to arising social needs.

The conclusion that "[t]he issue, then, in controversy over 'States' Rights' . . . [was] not an issue of liberty" but "an issue solely of effective government"³²⁷ may be seen most lucidly in Madison's unqualified statement to the Philadelphia Convention:

326. See generally Graham, *Croskey's Constitution: An Archeological Blueprint*, 7 VAND. L. REV. 340, 359-63 (1954) ("decisive limitation on national legislative powers has always been geographic-political, not constitutional").

327. 1 W. CROSKEY, *supra* note 202, at 47.

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The great objection made [against] an abolition of the State [governments] was that the [general government] could not extend its care to all the minute objects which fall under the cognizance of the local jurisdictions. The objection as stated lay not [against] the probable abuse of the general power, but [against] the imperfect use that could be made of it throughout so great an extent of country, and over so great a variety of objects. . . . Were it practicable for the [general government] to extend its care to every requisite object without the cooperation of the State [governments] the people would not be less free as members of one great Republic than as members of thirteen small ones.³²⁸

In modern times, prominent political theorists continue to urge the greater efficiency of having collective decisions made in the smallest feasible political units.³²⁹ They stress the opportunity for those political parties out of power nationally to have laboratories for testing their policies locally. Brandeis, a fervent twentieth-century federalist, founded his views

on deep convictions regarding the manageable size for the effective conduct of human affairs and the most favorable conditions for the exercise of wise judgment.

. . . As to matters not obviously of common national concern, thereby calling for a centralized system of control, the States have a localized knowledge of details, a concreteness of interest and varieties of social policy, which ought to be allowed tolerant scope.³³⁰

The Conference of State Chief Justices, in its anti-Supreme Court manifesto, decried the decline of American federalism without reference to diminution of personal freedom:

We believe that strong State and local governments are essential to the effective functioning of the American system of Federal government; that they should not be sacrificed needlessly to lev-

328. 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 357 (rev. ed. 1937). DeTocqueville affirmed the point a half-century later in condemning a powerful centralized government as one that "relaxes the sinews of strength." A. DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 87 (Bradley ed. 1946).

329. See J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* 113-15 (1962).

330. Frankfurter, *Mr. Justice Brandeis and the Constitution*, in *MR. JUSTICE BRANDEIS* 84-85 (F. Frankfurter ed. 1932).

Arthur Vanderbilt, in his analysis of contemporary American national government and federalism, expressed the belief that "no government, no matter how well organized, is capable of operating efficiently on such a gigantic scale," and vividly illustrated his age-old criticism: "Approximately one half of the 3 million purchase orders issued annually by the various federal buying agencies average less than \$10 in value, yet the partial cost of processing a purchase transaction is greatly in excess of \$10. In other words, the overhead cost is far more than the cost of the goods themselves." A. VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS* 60-61 (1953).

eling, and sometimes deadening, uniformity; and that in the interest of active, citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened.³³¹

Finally, this “government efficiency” purpose for territorial separation of power was put succinctly by Professor Frankfurter, as he then was: “[f]ederalism is one of the great devices to which the restless modern world turns for reconciling stability with vitality among diverse elements within a political society scattered over wide territory.”³³²

Moreover, the freedom to be protected by curtailing the authority of the central government vis-à-vis the states was of a special genre. The purpose was not to guard the “sovereignty of the individual” from an all-powerful national monolith, but rather to preserve the sovereignty of states as political units. The “right of the people” was not to have some area carved out in which they would be shielded from all governmental incursions, but rather the right to have this area of their affairs governed only by the states. This was a collective rather than a personal right. It was not for the ultimate security of defined liberties but to insure the people’s ability to choose in smaller political units whether and how some activities would be regulated. Recalling the oppressive decisions made for them from across the Atlantic, the former colonists rested their faith in the process of local government to secure their “freedom” and to guard against the arbitrariness of uninformed and unresponsive majorities of strangers.³³³ Thus, in the Virginia ratifying convention, Patrick Henry pointed to the state legislatures for the “care and preservation” of the people;³³⁴ and Thomas Jefferson, at his first inauguration, believed in “the support of the State governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against anti-republican tendencies.”³³⁵

It is true that, at various times when federalism was under discussion, the Framers evinced a concern for “liberty” that would not be fulfilled simply through a bias in favor of local autonomy. If the national government possessed only limited powers, some believed,

331. *National Conference of Chief Justices*, *supra* note 162, at 86.

332. F. FRANKFURTER & W. KATZ, *FEDERAL JURISDICTION AND PROCEDURE* vii (1931).

333. See generally Murphy, *State Sovereignty Prior to the Constitution*, 29 *Miss. L.J.* 115 (1958).

334. 3 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 156 (2d ed. 1881).

335. 1 *MESSAGES AND PAPERS OF THE PRESIDENTS* 323 (J. Richardson ed. 1900).

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certain personal liberties would be protected from *all* public regulation.³³⁶ The suggestion that the federalism principle might achieve this goal is difficult to understand, because federalism concedes the right of local officials to regulate the affairs of the people. Indeed, for Madison, the method by which the federal system of government would secure individual freedom was quite the reverse. He believed that the remedy for those abuses of minorities and individual rights that had occurred under the Articles of Confederation as a result of local tyranny

lay in an improved system of republican government in which the wiser and more balanced national majority could check the arbitrary actions of local majorities . . . [H]e declared that the Union was necessary to bring about a "thorough reform" of the "fluctuating policy" which had prevailed in the states and to guard the people against "those violent and oppressive factions which embitter the cause of liberty."³³⁷

Perhaps the view of some of Madison's contemporaries that federalism would preserve individual freedom can be attributed to the inclusion of individual rights provisions in state constitutions,³³⁸ in contrast to the original federal Constitution's apparent lack of concern for fundamental liberties. The feeling may have been that through the states' bills of rights and restriction of the federal government's actions, personal freedoms would be preserved.

Whether these speculations clear the confusion is not critical for our purposes. The significant fact is that whatever the reason for the Framers' concern over centralism at the expense of states' rights, they were also fearful of a national despotism, of the threat to traditionally defined rights of individuals posed by an unrestrained federal legislature.³³⁹ This fear of legislative tyranny, moreover, was in large measure caused by the broad powers assumed by the state lawmaking bodies in existence at the time.³⁴⁰ Both Hamilton and Madison, the Framers' most knowledgeable spokesmen, explicitly recognized the fact that greater dangers to personal freedom were posed by the states than by the national government. Madison stated that

336. See generally R. BERGER, *supra* note 196, at 8-22 (1969).

337. Huntington, *supra* note 15, at 191-92.

338. The Massachusetts Constitution, adopted in 1780, guaranteed freedom of the press, of assembly and speech, as well as jury trials in capital cases, protection from unreasonable searches and seizures, and several other liberties. CONSTITUTIONAL LAW OF UNITED STATES 51-56 (1820). See also *id.* at 145-47 (protections of 1790 Pennsylvania Constitution).

339. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 608-09 (1969).

340. See M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 143-44 (1967).

the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests, you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.³⁴¹

Hamilton agreed that

[Congress] will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill humors or temporary prejudices and propensities, which in smaller societies frequently contaminate the public councils, beget injustice and oppression of a part of the community, and engender schemes, which though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction and disgust.³⁴²

Whatever hope some may have held that the best promise for individual rights rested in the process of local government units, it is the insight of Madison and Hamilton that has been confirmed by subsequent events. For history has demonstrated that the smaller the population and geographic area, the greater the likelihood of dominance by a single political party or machine with a single set of mores.³⁴³ This also increases the opportunity for economic power to hold sway over the political scene. All these factors create stronger pressures toward conformity, disincentives to political participation by minorities, difficulties for minorities to obtain influence, and narrower community tolerance for deviant beliefs and behavior. Even the most casual survey of the *United States Reports* reveals that in every area of constitutionally designated individual liberties—whether it be speech, race, religion, the rights of the accused, or any other—the record of state and local governments has been far inferior to that of the nation.³⁴⁴ To mention two examples: not until 1965 did the Supreme Court find federal action violative of *any* provision in

341. THE FEDERALIST No. 10 (J. Madison) 56, 64. See also *id.* No. 51 (J. Madison); Huntington, *supra* note 15, at 182.

342. THE FEDERALIST No. 27 (A. Hamilton) 171, 172.

343. E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE* 6-9 (1960). See generally Beth, *The Supreme Court and American Federalism*, 10 ST. LOUIS U.L.J. 376 (1966); Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227, 1250-51 (1973).

344. As of 1972, the Court had held unconstitutional, either on their face or as applied, 92 Acts of Congress, 796 state laws, and 93 municipal ordinances. LIBRARY OF CONGRESS, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA*, S. Doc. No. 92-82, 92d Cong., 2d Sess. 1597-1785 (1973).

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the First Amendment;³⁴⁵ and the Federal Bureau of Investigation, whatever its other failings, used the substance of the *Miranda* warning for many years prior to the Court's requirement in 1966 that they be employed by state and local police.³⁴⁶ Regardless of the explanations for specific failures of local governments to protect individual rights, the hard fact may not be denied: generally, the citizen has greater assurance that his rights will be respected in dealings with federal agencies. This state of affairs might even be worse were it not for judicial review of state action infringing personal liberties.

That personal liberty is neither dependent on nor enhanced by federalism has been substantiated by experience in other countries as well. Nazi Germany presents the most ignominious case of a modern federal system that utterly failed to preserve the rights of the individual, but the Soviet Union, Argentina, and Brazil also illustrate the phenomenon.³⁴⁷ Alternatively, Scandinavia and England provide examples of unitary nations where freedom has flourished. The geographic distribution of power, Arthur Macmahon points out, cannot always "protect minorities, and . . . maximize government with the consent of the governed." The problem, he notes, is that:

The realization of the objective depends upon a neat concentration of national minorities. It is likely, however, that they will be present in many places and in the minority everywhere, subordinate in social prestige, economic power, and influence. When this condition exists, thorough-going federalism may easily result in a kind of feudalism—benevolent, perhaps, but essentially oligarchical in local domination over weaker elements. The situation may indeed be softened by various minor devices The main relief, however, is sought in central constitutional guarantees, centrally enforced.³⁴⁸

In America, the federal Constitution, not the federal system, seeks to guarantee individual rights; and the federal judiciary, not the processes of state and local government, provides the most effective method for their enforcement.

H. *Self-Determination Through Federalism*

But what of that special brand of "freedom" that is afforded by federalism: that "liberty" achieved through decisionmaking in small

345. *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (First Amendment violated by law requiring citizen to request delivery of unsealed mail from communist nations).

346. *Miranda v. Arizona*, 384 U.S. 436, 483 (1966).

347. See W. RIKER, *supra* note 12, at 13-15.

348. Macmahon, *The Problems of Federalism: A Survey*, in *FEDERALISM*, *supra* note 55, at 1, 10.

political units by locally elected officials who are peculiarly sensitive to local concerns? Should the Court not also exercise its power of judicial review to protect this feature of American political life?

Response to these questions may be made at several levels. First, it is important to observe that the issue presented by *National League of Cities v. Usery*³⁴⁹ in no way implicates the kind of "freedom" under discussion. That decision concerns federal regulation of official state functions rather than national authority over the conduct of private persons within the states. Second, since this latter subject may be regulated at the will of locally elected representatives, if the challenged congressional action has the support of a particular state's national representatives, then the people within that state have no cause to complain that their "freedom" has been wrongfully curtailed. But people in those states whose representatives opposed the relevant federal regulation, or people who level a states' rights attack against federal executive action that was never specifically put to the states' delegates in Washington, are in a different posture. But for the challenged national action, the area of such people's conduct subject to the federal regulation might well be, if not altogether free of government control, at least affected in a different and more individualized way.

It may be that the peculiar qualitative nature of constitutional issues of federalism discussed earlier³⁵⁰ should excuse the Court from participation so long as the national political forum has decided that no constitutional violation has occurred. But this answer may not be wholly satisfactory. No matter how large the state majority favoring the federal action, different states and the people within them may be affected by a policy in very different ways: in their lives, their pocketbooks, or simply in their attitudes about national intervention. Nor is the answer strengthened by the Court's current standard for reviewing federalism contentions, which virtually abdicates to the national political process rather than carefully scrutinizing its product. This standard implies the judiciary's considered view that the "freedoms" affected are not comparable to conventionally defined individual rights. But no matter how accurately this may portray the Court's judgment, it assumes the conclusion being debated.

On balance, two principal factors—both already discussed—support the Federalism Proposal. Whatever the precise quality of "freedom" established by a restrained exercise of national power, it is equally

349. 426 U.S. 833 (1976).

350. See pp. 1554-57 *supra*.

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likely that the withdrawal of judicial review will result in more fastidious concern for states' rights by the federal political branches than in their diminished awareness of the virtues of limited national authority. More important, continuing jurisdiction over states' rights claims can only dissipate the Court's energies and undermine its ability to perform the critical task of protecting *all* individual constitutional liberties.

Conclusion

Although a fragmented inquiry into the intentions of the Framers has been undertaken, no suggestion is put forward that the Federalism Proposal was originally ordained. But neither is it contradicted by the historical record or by the basic themes and values then expressed. Indeed, the Proposal is consistent with and furthers the overriding concern for the rights of the individual.

As a bald statement, the Federalism Proposal takes a radical tone by urging the Court to reject the long-established system of judicial review over questions of states' rights. But because the Court has generally left decisions on federalism to the national political branches, the Proposal, in practice rather than in embedded theory, would change few results in concrete cases. This is not to say, however, that the Proposal would be of no real consequence. That the Court now rarely exercises its power of review to invalidate national action is no guarantee that it will not revert to a mistaken policy. A turnabout has already been accomplished in the *Usery* decision, and further shifts may be on the horizon, especially on the presently unsettled question of the reach of federal legislative power under § 5 of the Fourteenth Amendment. On the other hand, if continuing judicial review in this field would produce only the most infrequent invalidations, then there is little justification for the Court to stamp its imprimatur on so many exercises of national power to protect against so few violations of the federalism precept. For the Court to continue to review such federalism cases, moreover, would sap the Court's strength to act on behalf of individual rights. Finally, in the face of extreme national abridgments of federalism, the Court's pronouncements would most likely be futile, symbolic rulings.