Federalism and The Constitution: A Symposium on *Garcia*

Advisory Commission on
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Washington, DC 20575

M-152
July 1987

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ACKNOWLEDGMENTS

The Advisory Commission on Intergovernmental Relations occasionally sponsors scholarly symposia to elucidate important issues bearing upon the future of American federalism. The symposium which was the basis for this volume was convened in April 1986, to explore the implications of the U.S. Supreme Court's controversial decision in *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985).

Thanks are extended to Elinor Ostrom and Vincent Ostrom, Co-directors of the Workshop in Political Theory and Policy Analysis, Indiana University, for their hospitality in hosting the symposium on the Bloomington campus. In addition to those participants who presented papers, now comprising the chapters of this volume, other participants included The Honorable Richard Neely, Associate Justice, West Virginia Supreme Court; The Honorable Ross O. Doyen, Kansas State Senate and Member, ACIR; Eugene Hickok, U.S. Department of Justice; Becky Norton-Dunlop, U.S. Department of Justice; Richard Pacelle, Department of Political Science, Indiana University; York Willbern, School of Public and Environmental Affairs, Indiana University; Roger A. Hanson, Justice Resources, Washington, DC; and Amos Sawyer, Liberia College, Liberia, Africa. To all who contributed to the success of the symposium, the Commission and its staff are grateful.

Editorship of this volume was the primary responsibility of Ronald J. Oakerson, Senior Analyst and Assistant Director of Research, under the general supervision of Lawrence A. Hunter, former Director of Research, and John Kincaid, Director of Research. Thanks to Anita McPhaul, Lori O'Bier, and Mary Dominguez for typing assistance.

John Shannon
Executive Director

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INTRODUCTION

Robert B. Hawkins, Jr.

The decision of the U.S. Supreme Court in *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985) has refocused national attention on the legal and political parameters of American federalism. Not since the early days of the New Deal have the issues been defined so sharply. To what extent may the national government, under the U.S. Constitution, regulate state governments? Does the Constitution offer any substantive limitation upon national regulation of the states? If not, can the states survive as autonomous political units? Can the benefits of a federal system be preserved?

To explore the impact of *Garcia* on federalism and the Constitution, the Advisory Commission on Intergovernmental Relations convened a symposium of legal and political scholars in April 1986. The symposium was hosted by the Workshop in Political Theory and Policy Analysis at Indiana University, Bloomington. This volume consists of the papers from that symposium, including essays by Lawrence A. Hunter and Ronald J. Oakerson, Philip Bobbitt, Robert F. Nagel, and Vincent Ostrom, together with a discussion-essay by Christopher Wolfe. Oakerson and Hunter have added a Postscript.

The immediate legal issue in *Garcia* is the scope of the congressional commerce power in relation to the states. If the commerce power allows the Congress to do anything it wants to the states (in the context of regulating interstate commerce), then, by virtue of the Supremacy Clause, the Congress has legal dominance over the states in a very broad sphere of action. Do the states have any legal enforceable immunity from congressional regulation? If the answer is no, what are the implications for the future of American federalism?

Associate Justice Harry A. Blackmun, writing for the majority on the Supreme Court, contends that the decision in *Garcia* is fully consistent with the principle of federalism. This principle is sustained not by the legal independence of the states, but by their political clout in Congress. The "federal form" of the national government, so called by no less than James Madison, is charged with the preservation of federalism—not judicially enforceable limits on the scope of powers that may be exercised by the Congress.

The Hunter-Oakerson paper, *Chapter One* in this volume, framed the basic issues for the symposium, advancing a thesis that Justice Blackmun was both right and wrong. The *Garcia* opinion, they argue, is correct in its basic reading of what the U.S. Constitution requires, but incorrect in its estimate of the consequences for federalism. The inference that follows is that the Constitution contains an emergent flaw in design and stands in need of amendment, if federalism is to be preserved.

The papers by Bobbitt, Nagel, and Ostrom (*Chapters Two, Three, and Four*) offer a range of alternative perspectives. Bobbitt supplies a succinct and insightful summary of the case law leading up to *Garcia*, while arguing that the Court has, in so many words, painted itself into a corner from which it cannot seem to escape. In contrast to Hunter-Oakerson, Nagel concludes that the Court in *Garcia* was wrong, but sees ample remedy available in ordinary litigation if the Court can rely less on doctrinal argument and more on a didactic approach to deciding cases that involve issues of federalism. Ostrom sets *Garcia* in the broader perspective of constitutional design and concludes that the Court has misread its role in the framers' script. The Court has allowed the Congress to usurp the rightful powers of the states to the detriment of a self-governing society. For all three of these scholars, however, the constitutional framework as it stands may be viewed as sufficient—if the Court is willing to change its approach to federalism issues.

Christopher Wolfe contributes an essay in *Chapter Five* that responds to the arguments advanced in the first four papers. While accepting the basic thesis of Hunter-Oakerson, he is especially critical of remedies that require greater judicial activism. Wolfe neverthe-

less also casts a critical eye upon proposals for constitutional amendment and concludes on the pessimistic note that constitutional federalism has little hope of restoration in late 20th century America.

Finally, Oakerson and Hunter have contributed a *"Postscript"* to the symposium in an effort to sum up the results of the dialogue from their perspective and to raise some additional questions.

Federalism will not evaporate as a constitutional issue. The benefits of federalism, though easily taken for granted, are deeply woven into the fabric of American society. America is a federal society, in part, because it is a diverse society. A threat to federalism is at the same time a threat to fundamental American values. The symposium papers clearly show that potential solutions, consistent with the overall constitutional design of American government, are available. The decline of federalism is not inevitable. What is needed now is an extended national dialogue on both the values of federalism and the institutional requirements for preserving those values into the 21st century. The Advisory Commission on Intergovernmental Relations is pleased to contribute to this effort.

Chapter One

AN INTELLECTUAL CRISIS IN AMERICAN FEDERALISM: THE MEANING OF *GARCIA**

Lawrence A. Hunter and *Ronald J. Oakerson*

INTRODUCTION

Generations of students have been taught that the Supreme Court of the United States is the great umpire of the American political system, an impartial referee policing the boundaries of authority between institutions of government and between government and the individual. The role of the Court, as commonly understood, is to protect against an improper and unconstitutional exercise of power by any institution of government vis-a-vis any other institution or individual, including the actions of both federal and state governments in relation to one another. Yet from 1936 to 1976, the Court did not overturn a single act of Congress for encroaching unduly upon the states' powers.[1]

By 1976, most observers doubted the Court's willingness to overturn federal legislation on the grounds that it breached powers reserved to the states under the Tenth Amendment. In *National League of Cities* v. *Usery* (1976), however, the Court restored some credence to its ascribed role as umpire of federalism, finding that the Congress had overstepped the bounds set by the Tenth Amendment in attempting to apply the minimum wage and overtime provisions of the *Fair Labor Standards Act* (*FLSA*) against the states "in areas of traditional governmental functions."[2]

In a 1985 decision (*Garcia* v. *San Antonio Metropolitan Transit Authority*),[3] the U.S. Supreme Court reversed *NLC*, revealing it as the death throes, not the rejuvenation, of judicial review as a means to protect the states from intrusive congressional action. In a 5-4 decision written by Justice Harry A. Blackmun, the Court declined, not simply to rule against the Congress, but to entertain the possibility that the Congress might, within the scope of its commerce powers, intrude upon the constitutional position of the states. The Court appeared finally to abandon whatever vestige remained of its role as federal umpire between the states and the federal government by refusing to blow the judicial review whistle to signal a congressional foul.

As in *NLC* ten years earlier, the occasion for this decision was the application of the *FLSA* to units of state and local government. In *Garcia*, the Court held that the minimum-wage and overtime provisions of *FLSA* applied to all state and local units of government and that the Constitution afforded the states no immunity from federal regulation under the Commerce Clause. A striking new precedent was established under which the Court no longer will scrutinize federal legislation that regulates interstate commerce for improper intrusion into the governmental prerogatives of the states. In principle, this is a major break with the traditional understanding of federalism in the United States.

Garcia was more a change in form, however, than one of substance. After the New Deal, judicial review of congressional action vis-a-vis the states withered through nonuse. The power of the federal government steadily grew through judicial acquiescence as the Congress repeatedly tested, and found lacking, the limits of its power under the Commerce Clause. In historical context, *NLC* can be seen as the anomalous case, while *Garcia* is viewed as the predictable conclusion of some 50 years of judicial precedent. But in the still broader context of constitutional design, it becomes clear that *Garcia* is a profoundly troubling decision. It brings into question, not simply the location of the legal boundary between the authority of the

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federal government and the authority of the states, but whether such a boundary can be said to exist at all. It is the thesis of this paper that the holdings in both cases can be inferred validly from the U.S. Constitution and that the resulting contradiction stems from profound inconsistencies in the constitutional design of federalism. The whole constitutional structure of federalism—the basic distribution of authority on which the maintenance of a federal system depends—becomes problematic.

THE LEGAL DEBATE: ALTERNATIVE VIEWS OF THE FEDERAL STRUCTURE

In *National League of Cities*, the Court held that the Congress was precluded from extending wage and hour regulations to cover state (and local) employees in areas of "traditional governmental functions." Subsequent litigation focused upon the application of this judicial doctrine to the various circumstances of state and local government. In this important boundary drawing process, no case brought before the Court was found to involve a traditional governmental function; hence no federal action was ever struck down under the *NLC* doctrine.[4] As each new case failed the *NLC* test, the area of state immunity protected from congressional regulation grew narrower. In *Garcia*, the Court dispensed with the test as unworkable and, instead, allowed Congress unfettered discretion under the Commerce Clause.

Both *NLC* and *Garcia* employ a "structural" argument to justify their divergent conclusions. Structural arguments are based more upon the general design of the U.S. Constitution than upon a specific text or doctrine.[5] The heart of a structural argument is an inference that, in order for the design of the Constitution to work properly, one interpretation/doctrine or another is necessary and, therefore, valid. In *Garcia*, the Court concluded that in order for federalism to work as envisioned by the Constitution, the Court must stand aside from questions concerning the division of power between the federal government and the states. In *NLC*, the Court had concluded that federalism could not survive, as constitutionally prescribed, unless the Court was willing to intervene.

The reasoning of the Court in *NLC* has been summarized by Philip Bobbitt as a "paradigm case" of structural argument:

> 1. The Constitution sets up a federal structure necessarily providing for states.
>
> 2. States must perform those functions integral to being a state without congressional regulation or the relationship established by the Constitution between the federal and state structures would become the assimilation of one structure into the other.
>
> 3. It is plausible to conclude that determining the wages and hours of its employees is one of the fundamental state activities as to which state authority should be sovereign, within the various prohibitions of the Constitution. It is possible that choosing whether to elect or appoint certain state officials or where to locate the state capital, and so forth, are other such activities; or it may not be so. But it follows from the very structure of the sort of federalism created by the U.S. Constitution that there must be at least some such activities.[6]

Structural necessity therefore impels the Court to create doctrine to identify this core set of activities, thereby establishing a limit beyond which federal action may not infringe upon state actions. A similar reconstruction of the structural argument used in *Garcia* might read as follows:

> 1. The Constitution sets up a federal structure consisting of a national government, which may exercise only enumerated powers, and state governments, which exercise "reserved" powers—meaning those powers that remain after Congress has chosen how to exercise its enumerated powers.
>
> 2. States must not exercise their reserved powers in ways that contradict national policy enacted pursuant to the enumerated powers.
>
> 3. The determination of hours and wages is an activity within the power of Congress to regulate as it affects interstate commerce.
>
> 4. The federal structure provided by the Constitution does not provide the states with special immunity from federal regulation of interstate commerce.
>
> 5. As long as Congress does not exceed its enumerated powers, the proper remedy for any intrusion into state prerogatives is political and legislative, not legal and judicial.
>
> 6. The Constitution recognizes the appropriateness of a political remedy in this circumstance by structuring the national political process to give

greater weight to state interests (e.g., equal representation in the Senate).

In both *Garcia* and *NLC*, the Court agreed that the Commerce Clause establishes no "special limitation on Congress' action with respect to the states."[7] But the *Garcia* Court goes farther, noting that nowhere in the Constitution is such a limitation to be found: "With rare exceptions, like the guarantee, in Article IV, paragraph 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace."[8] Still further, with obvious reference to the Tenth Amendment the Court found, "the fact that the states remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies."[9] The Court concluded, therefore, that it has "no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."[10] State sovereignty does not *per se* provide a limiting principle appropriate to restrain the power of the Congress; to the contrary, the commerce power is patently intended to limit state sovereignty.[11]

If not in constitutional proscription, where are limitations on the power of Congress vis-a-vis the states to be found? According to the *Garcia* Court, such limits are inherent in the structure and composition of the federal government. Equal representation of the states in the Senate (originally by Senators chosen by state legislatures) and the states' role in voter qualifications and the electoral college combine to give the states a special position in the national political process. State interests, the Court concluded, "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[12]

Consider the immediate problem confronted by the Court: how to disentangle "traditional governmental functions" from all the other functions assumed by state and local governments. In applying this doctrine, the Court found itself drawing essentially arbitrary lines to define the areas of protected state functions. Why? Because the areas deserving of protection could not be determined a priori. Instead of a judicially determined boundary, the Court concluded, the appropriate method of adjustment ought to be one of political negotiation. This is a task suited to the Congress, not the federal courts. The greater flexibility of the political process, structured in part to take account of the position of the states in the federal system, is thought to be vastly superior to a doctrinal process of judicial review in striking a proper balance between state and federal power.[13]

Dissenting from *Garcia*, Justices Lewis F. Powell, Jr., and Sandra Day O'Connor argued that it is manifestly insufficient to entrust the preservation of federalism to the federal government. As Justice Powell observed, "The fact that Congress generally does not transgress constitutional limits on its power to reach state activities does not make judicial review any less necessary to rectify the cases in which it does do so."[14] A "federal" system as defined by the majority opinion in *Garcia* is indistinguishable from a decentralized unitary system. The holding in *Garcia* has the effect of making national politicians "the sole judges of the limits of their own power." To which Justice Powell added: "This result is inconsistent with the fundamental principles of our constitutional system."[15]

Justice Powell's argument draws upon a venerable tradition of constitutional scholarship. Federalism must be so structured that national officers are not placed in a position to be "judge of their own cause" in disputes with state officers. The states are entitled to a fundamental rule of law, grounded in the Constitution, that places essential state powers beyond the reach of national officers.

Because Congress has the advantage of national supremacy (within the scope of the enumerated powers), the states never can be fully equal to the federal government. American federalism, thus, necessarily sets up a relation of inequality between the federal government and the states, wherever the Constitution permits the federal government to act. If there is no area in which the Constitution permits states to act while withholding power from the federal government, then the states are subordinated to the federal government in every area. The key issue, therefore, is whether the Constitution successfully protects the states from wholesale subordination to Congress.

Garcia also differs from *NLC* in pragmatic terms. The majority in *Garcia* concludes that consistent doctrine cannot be derived from the structural argument used in *National League of Cities*. This is because the constitutional structure of federalism affords no obvious standards for determining the exercise of "essential" state functions. The dissenting justices in *Garcia*, on the other hand, ridiculed the weight given by the majority to the role of the states in the national political process since the adoption of the 17th Amendment, which provided for the direct election of Senators. What reason is there to suppose that the states have any greater leverage in Congress than any other well organized set of interests? Each of the two structural arguments views the other as unworkable. Each

condemns the other as undermining the constitutional design of federalism. The ensuing debate has, to date, been over which of these two views is correct. Stepping back from this debate, an unsettling question arises: What if both structural arguments are valid? Answer: The design of federalism, as established by the Constitution, is structurally inconsistent.

Efforts to establish one or the other of these two decisions as the correct view, therefore, miss the point. Both structural arguments draw valid conclusions: (1) under the Constitution, there necessarily must exist a set of nontrivial powers the states can exercise without fear of national preemption or regulation (*NLC*); and (2) with only trivial exceptions, the Constitution does not carve out areas of state sovereignty that Congress may not employ its delegated powers to displace (*Garcia*). Both are valid; yet one contradicts the other.[16]

WEAKNESS IN THE CONSTITUTIONAL DESIGN OF FEDERALISM

The source of the contradiction between *Garcia* and *NLC* is not to be found in the logic of the Court in either case, but in inconsistencies in the underlying design of the U.S. Constitution. Unless both arguments are placed side by side, the constitutional dilemma remains submerged, because both are incomplete structural arguments with regard to federalism—neither view comprehends the full design of federalism established by the Constitution. In each case, the Court is engaged in an elaborate avoidance of the persistent structural tendency of American federalism revealed over a period of nearly 200 years. In spite of a constitutional commitment to the preservation of federalism, the federal government has become progressively less constrained in the actions it may take to regulate the states.

The *Garcia* Court clearly is correct that the design of the Constitution sought to rely on the structure of the federal government and its natural political relationship with the states as a source of constraint on the exercise of national power. Why, then, does the Court in *NLC* find it necessary to rely, in the words of the *Garcia* Court, on "freestanding conceptions of state sovereignty" to limit the Congress when, as the *Garcia* Court points out correctly, the design of the Constitution was not predicated upon any such reliance?

Justice O'Connor, in her articulate dissent from *Garcia*, offered a clue. She suggested that the Court ought to "enforce affirmative limits on federal regulation of the states to complement the judicially crafted expansion of the interstate commerce power."[17] In short, judicial expansion of the commerce power requires judicial expansion of the Tenth Amendment. The failure of the Commerce Clause to constrain as well as to empower the federal government is the missing piece of the puzzle.

The federal government was designed to be a government of limited and enumerated powers. The language of the Tenth Amendment—reserving to the states or the people all other powers not delegated to the federal government or prohibited to the states—simply expresses the obverse of this proposition. Except where prohibited, reserved powers are the powers not delegated to the federal government. It was the limited delegation of power to the federal government that was thought to provide the primary source of constraint on national power vis-a-vis the states.[18] But the Court, in well established doctrine, has abandoned any effort to limit the meaning of enumerated powers, especially the commerce power, beyond the express prohibitions found in the U.S. Bill of Rights.

Given the assumption of a limited delegation of power to the Congress, the framers thought it was unnecessary to specify any of the powers reserved to the states. Within the constraint of the limited powers given the federal government, adjustments between national and state powers safely could be left to a properly structured Congress of the United States and, therein, to a process of political negotiation. The post-New Deal accumulation of judicial doctrine expanding the scope of national power eventually brought into question the presumption of a limited delegation of authority to Congress under the enumerated powers. With *Garcia*, the forthright renunciation of limits on congressional power under the Commerce Clause seems to bring to completion the full legal subordination of the states to the federal government.

Theoretically, it would be possible for the Court to resolve the contradiction between *Garcia* and *NLC*—to constrain the reach of congressional power vis-a-vis the states, as the dissenters in *Garcia* urge, without using "freestanding conceptions of state sovereignty," which the majority criticizes. To do so, however, it would be necessary to reverse generally accepted doctrine on the construction of enumerated powers, most particularly the commerce power. This the Court clearly is unwilling to do. Justice O'Connor, in dissent, offered no hope of limiting the commerce power on grounds other than interference with essential state functions. Too much judicial doctrine—and national policy—has accumulated to expect the Court to roll back national power under the Commerce Clause. It is almost inconceivable that the Court would, for example, declare the national regulation of wages and hours unconstitutional on the grounds that it exceeds Congress' delegated powers.

Instead, Justice O'Connor would have the Court undertake the creation of new doctrine, grafted onto the Tenth Amendment, to constrain national power in view of the present-day impotence of the language of delegation. She conceptualizes this undertaking as one of limiting the "means" by which Congress can exercise the enumerated powers vis-a-vis the states.[19]

Yet, this approach amounts to a basic redesign of the constitutional rules of federalism, raising a political issue of the most fundamental sort in a constitutional system: Ought the other constitutional actors entrust this responsibility to the Court, even assuming a willingness to accept it? Or should the inadequacy of the existing constitutional design be admitted, and the task of correcting the defect be accepted by the states and the Congress in their joint capacity as constitutional decision makers?

The debate on the Court leaves us enmeshed in contradictions. Within the frame of structural argument, the doctrine advanced by the *Garcia* Court to preserve federalism is inconsistent with the Court's expansive view of enumerated powers. The *NLC* position, as well as the view urged by Justice O'Connor in dissenting from *Garcia*, is inconsistent with the manifest design of the Constitution where the clear intent was to avoid a specification of reserved powers as a matter of constitutional law (or judicial doctrine), instead leaving the domain of state power as a definite residual—that which is left over after the operation of other constitutional processes. The course urged by Justice O'Connor would require a new activist Court to create doctrine to counteract the results produced by an activist Court of an earlier era. Somehow the Court finds itself unable simply to return to the original constitutional design in order to preserve a federal system. Instead, normally "restraintist" justices find themselves proposing a new activism as a means of restoring the integrity of federalism.

Is the Court justified in using a structural argument that clearly departs from the structural design of the Constitution, as it does in *NLC*? Is it justified in doing otherwise if, as Justice O'Connor suggests, to do so is to contradict the common understanding of federalism in America—that the states are somehow guaranteed by the Constitution a position that is permanent, significant, and independent of the federal government? Quite clearly, the Constitution presumes that federalism in this sense will endure. Yet, it does not seem to provide the necessary means to assure its preservation.

In an important sense, the *Garcia* Court has handed the states a rare opportunity for constitutional expression. Were Justices Powell, O'Connor, Burger, and Rehnquist members of a majority with respect to this issue, the method of doctrinal creativity would be used to adjust the relation between the federal government and the states as the Court thought present circumstances required. The potent opportunity presented by *Garcia* is to rethink the constitutional design of federalism in view of 200 years of experience and to propose suitable modifications.

RETHINKING THE DESIGN OF FEDERALISM

A convenient place to begin rethinking the design of federalism is with the Tenth Amendment and the meaning of "reserved powers." The domain of powers reserved to the states is indefinite. The only definition offered is negative—those powers not delegated to the United States and not prohibited to the states. One inference is that the powers of the states are acknowledged as plenary—general powers of government. Another inference, not usually noted, is that state polities are understood as self-authorizing. The states do not stand in need of authorization to act by the U.S. Constitution, much less by the Congress. This sharply distinguishes the states from the federal government. From this perspective, the language of the Tenth Amendment simply reinforces and clarifies a view implicit in the enumeration of national powers in Article I.[20] Nevertheless, it is an important clarification which supplies the states with essential legal independence. As long as Congress is silent, the states are free to act (assuming those actions are not constitutionally proscribed). The states cannot be reduced, therefore, to the role into which many local governments have been cast by Dillon's Rule—entirely dependent on prior authorization by a "higher level" of government.

The federal and state governments can be characterized as "concurrent regimes."[21] Each is a complete regime, containing its own means of authorization and able to engage independently in collective action. State governments derive their authority from state constitutions just as the U.S. Government derives its authority from the U.S. Constitution. The advantages of federalism flow from this structure of concurrent regimes. The ability of state governments to act independently of national authorization gives to the states a potential for problem solving and adaptation to diverse circumstances that is not ordinarily found in a unitary regime. At the same time, the federal government remains free to act in relation to those objects of national concern specified by the enumerated powers. National action (taken pursuant to the Constitution) must, of course, preempt conflicting state action, as provided by the Supremacy Clause. But what the fed-

eral government was not meant to have is a generalized veto operating with respect to any and all state undertakings. The preemptive capabilities of the Congress were to be limited to the exercise of delegated powers and to operate in large part indirectly, through the medium of the federal courts according to a rule of law.[22]

The method, implicit in such a federal structure, for judicial review of congressional actions affecting the states is two-tiered: (1) the Court is to determine whether an act of Congress is taken with respect to a permissible object as defined by the enumerated powers and whether that act employs means that are both "necessary and proper" in relation to the objective; (2) assuming that the requirements of the first tier are met, the remaining question is whether state action interferes with the use of the means chosen by Congress to pursue a constitutionally sanctioned national objective. The states are protected by this process in two ways: (1) by judicial scrutiny of both the end pursued by the Congress and the means chosen to reach it; (2) by judicial determination of the fact of preemption, thus limiting congressional preemption of state action to that which can be implied from general acts of law. The Congress was not designed to be a supervisor attending to the discrete acts of individual states.

Garcia raises an issue that brings this process into question. It represents a decision that satisfies the two-tiered process of judicial review, yet is, in its effects, repugnant to the concept of federalism. What has gone wrong?

If the question is—what has changed?—the answer is clearly that the reach of congressional power in pursuit of its enumerated objects is much greater than presumed by the designers of the Constitution. The commerce power effectively authorizes much greater intrusion today into the affairs of state governments, firms and individuals than in the 19th century. Although the Congress was not granted the power to engage in general economic regulation, this, and not simply the regulation of commerce among the states, is clearly the object of the *Fair Labor Standards Act*. The Court has permitted this result to occur by (1) allowing the power of the Congress to regulate interstate commerce to evolve from a limited end to a permissive means that justifies any end, and (2) by being logically unable to restrict the incremental expansion of the definition of "commerce among the states" from encompassing any type[23] of activity that touches upon or is touched by interstate commerce.[24]

If general economic regulation is conceded as a legitimate object of congressional action, authorized by the Commerce Clause, the type of regulation chosen—requirement of a minimum wage and overtime pay—can hardly be said to constitute improper means of economic regulation or to be unnecessary to the attainment of the object. The states are not singled out for regulation, but simply included under the terms of general law. Yet a highly intrusive regulation of state and local governments is the consequence.

What is the source of this breakdown of the federal system? Does the problem lie with judicial error? Or is the problem more deeply rooted—within the Constitution itself?

A general theorem of constitutional design advanced by James Madison in *Federalist 48* can shed light on these questions. The theorem concerns the inadequacy of what Madison terms "parchment barriers" to constrain the exercise of authority. Is it sufficient, he asks, "to mark, with precision, the boundaries of these departments [legislative, executive, judicial] in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?"[25] His general answer, given in *Federalist 51*, is that only a constitution which so contrives "the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places,"[26] is able to constrain authority effectively.

Having set up a structure of "concurrent regimes," as the Constitution of the United States assuredly does, a fundamental question remains: How can the federal structure be maintained? In other words, how is the structure of federalism so contrived that federal and state governments, "by their mutual relations," will keep each other in their proper places as contemplated by the Constitution?

A comparison with two other relationships in the Constitution—first, the distribution of national authority among the Congress, the Presidency, and courts and, second, the relation between government and individual as indicated in the Bill of Rights—reveals the relative weakness of the federal relationship between states and nation. Both the separation of powers and the rights and liberties of individuals are buttressed by an explicit allocation of authority correlative to the authority of the Congress.

The correlative assignment of authority works like this: If Congress steps beyond its "legislative" authority (as contrasted to authority that is properly executive or judicial in nature), to do so it must intrude upon the constitutionally assigned authority of the President or the Supreme Court. The same holds for a President or court which would exceed its constitutionally prescribed role. The offended institution is expected to claim—and act to protect—its constitutional authority, thus giving effect to the "parchment bar-

rier." This constitutional design offers the prospect of human beings acting strategically to protect their own assigned authority as a means of limiting the authority of others. Similarly, with respect to the Bill of Rights, the first eight amendments comprise an allocation of correlative authority to individual persons such that, if the Congress exceeds its enumerated powers vis-a-vis individuals, the affected persons are given explicit claims to assert in order to keep the Congress in its place.

The problem with the two-tier structure of judicial review with reference to issues of federalism is the wholly abstract nature of the first tier. A President can object to congressional action on the grounds that it interferes with his constitutional responsibility as, for instance, commander-in-chief. An individual can challenge the Congress for abridging his or her freedom of speech. But a state must argue that the Congress has gone beyond its enumerated powers, e.g., that it is reaching beyond the proper scope of the Commerce Clause. What principle is to limit the reach of the Congress? The states are given no explicit constitutional ground upon which to stand in challenging national action. The result is a "parchment barrier" which the Congress, aided by the courts, easily transcends by redefining "commerce among the states." A requirement that the federal government confront a countervailing constitutional text explicitly providing for state immunities from national action is unavailable as a means of maintaining federalism. History supports Madison's thecrem: Only when the assignment of authority has been accompanied by explicit limits assigning authority to others is it possible to maintain constraint in the exercise of authority over time.[27]

Applying the logic of parchment barriers to the historical design of American federalism, the Tenth Amendment emerges as a vehicle for creating a federal system, then allowing it to erode from incremental assertions of national authority.[28] The only remedy from this perspective is to establish new limits on national powers defined in terms of the legitimate powers of state government.

WHERE DO WE GO FROM HERE?

With *Garcia*, the Court has virtually abandoned any effort to limit congressional regulation of the states via the Commerce Clause. There remains, nevertheless, one avenue by which the Court could still limit federal control of state governments: by finding a provision of federal law *ultra vires*, i.e., not authorized by one of the enumerated powers. This possibility rests upon the absence, among the enumerated powers, of the regulation of state and local governments as a permissible object of federal action. A future Court could distinguish the facts in *Garcia* as a regulation of state and local governments necessary and proper to the enumerated object of regulating commerce. A provision that singled out the states for restrictive treatment, however, could be viewed by the Court in a different light—as the pursuit of a different object, one not authorized by the enumerated powers.

Such an approach, however, would entail returning to a pre-*Darby* logic, distinguishing the ends of federal action from the means employed to achieve them.[29] This is a course the *Garcia* Court offers no hint of pursuing, relying instead upon the availability of political, as opposed to legal, constraints. The foreclosure of this option for constraining the Congress nevertheless brings into focus certain structural weaknesses in the American formula for constitutional rule.

Federalism in the United States is erected upon the constitutional foundation of a limited delegation of power to the federal government—a limitation of the ends that the Congress may pursue. At the same time, the Constitution appears to grant Congress virtually unlimited power, through the Necessary and Proper Clause, to select the means to pursue its delegated authority. Two weaknesses emerge from this design:

> 1) If the Congress may engage in an activity (in this case the regulation of state and local governments) as a means to attain some other end (in this case imposition of a uniform national minimum wage), virtually any end or object of national policy—say to regulate state governments—can be achieved without ever treating it explicitly as such. Permissiveness in the review of the means selected to pursue legitimate national objectives can provide the opportunity to pursue forbidden objectives by adroit selection of means.[30]
>
> 2) If the distinction between delegated (legitimate) and undelegated (illegitimate) ends of government is to serve as a fundamental principle of constitutional rule—as surely it was intended by the framers—then it must be possible to apply such a distinction in particular cases, something the Court has not consistently been able to do. After years of trying, the Court finally gave up.

The Bill of Rights is effective precisely because it constrains the means chosen to pursue any national policy objective. Limitations implied from the absence of delegated power (e.g., a power to censor the press) are not as likely to be effective as an explicit legal constraint, e.g., "Congress shall make no law . . . ." The

absence of an enumerated power to regulate state and local government is a very slender thread upon which to hang the future of federalism.[31]

Another partial solution to the problems manifested in *Garcia* is simply to overturn the decision. Justice O'Connor's dissent provides the opening legal wedge. To preserve federalism in view of judicial expansion of the commerce power it becomes necessary to invent judicial doctrine limiting the means available to the Congress to pursue the objects of the enumerated powers. In effect, the Court would take it upon itself to write a "bill of states' rights," incrementally as the cases brought before the Court would require. If Congress "got the message," it might never be necessary to elaborate the doctrine in great detail.[32] But the willingness to do so would have to be clear, should the Congress choose to test its limits.

A fundamental philosophical problem, however, confronts those justices who would pursue this course. Put in terms of structural argumentation, the question is this: Is it proper for the Court to use a structural argument to correct a structural defect in the Constitution? Perhaps the most famous and far-reaching example of structural argument is found in *Marbury* v. *Madison*—the Court's claim to the power of judicial review. Yet all that John Marshall's famous opinion did was to operationalize a constitutional necessity—to provide individuals with the power to challenge acts of the Congress as correlative to the power of the Congress to legislate. The Court simply made explicit that which was implicit in the structure of a limited Constitution.[33] As the *Garcia* Court points out, granting states special immunities from national action—exceptions to which private individuals and firms are not entitled—cannot be inferred from a constitutional structure that explicitly relies on other means (a combination of the delegation of limited powers to Congress and a state role in the national political process) to constrain congressional action. To make ad hoc exceptions for the states on the basis of a fictitious "special constitutional status," creating state immunities from national action, is not an elaboration of the constitutional structure; it is a makeshift attempt to correct a structural flaw, a substitute for basic reform.

The remaining possibility to address the problems brought to light in *Garcia* is to amend the U.S. Constitution. The logic of the majority in *Garcia* cannot be ignored. It impels a reexamination of the basic constitutional processes available to maintain a viable federal system. As suggested above, Madisonian political theory itself predicts long-term difficulties with the original design and present structure of American federalism.

The *U.S. Advisory Commission on Intergovernmental Relations* (ACIR) has developed a set of options to consider as possible amendments to the Constitution.[34] These range from a simple instruction to the Court to adjudicate differences between the federal government and the states (in effect writing the minority view in *Garcia* into the Constitution), to basic changes in the allocation of authority to the states. Three approaches, not necessarily mutually exclusive, are evident in the possible reforms considered.

Two approaches follow what might be called a "Bill of Rights" model, adding new language to the Tenth Amendment either (1) to provide explicit criteria for determining the limits of congressional power vis-a-vis the states, or (2) to mark out explicit prohibitions on national actions that would displace essential state powers.

The "explicit criteria" approach seeks to identify the essential core of state powers in a federal system, as in the following suggested amendment:

> Congress shall make no law abridging the freedom of the people of the several states to govern their own affairs, provide for a constitution and laws, raise revenue, secure public employees, regulate commerce within the state, or exercise all other powers necessary and proper to promote the general welfare.[35]

The Court would then be required to make a judgment as to whether any provision of federal law, enacted to pursue a legitimate national objective, unduly burdened the ability of the "people of the several states" to pursue their legitimate objectives. In drawing the boundary between national and state powers, the Court would have to consider—and possibly balance—the values to be served by both the federal and state governments.

In contrast to criteria that invite the Court to balance national values against state values, "explicit prohibitions" would restrict the type of action Congress could take vis-a-vis the states: (1) a prohibition on federal mandating of state action not otherwise required expressly and explicitly by the Constitution, thus limiting the federal government to a negative power over state actions; (2) a prohibition on federal restriction of the power of the states unless required in regulating "the free flow of commerce among the several states or with foreign nations, or preserving or strengthening national markets of exchange"; and (3) a prohibition on federal restriction of the powers of the states "unless in the absence of such law it would be impossible to carry into execution the powers dele-

gated" to the federal government under the present Constitution.

Other possibilities considered are a requirement that federal preemption be expressly and explicitly stated in an act of Congress before a federal Court could find an intent to preempt state action, the requirement of explicit contracts in the process of federal grants-in-aid, and a prohibition on ex post conditioning of federal moneys.

The "explicit criteria" approach looks more toward a judicial process of operationalizing the values associated with independent state governance as declared in an amendment, much as the Court has done historically in applying the Bill of Rights, and balancing these values as against the values implicit in the enumerated objects of national power; the "explicit prohibition" approach relies less on judicial discretion and more on the modification of procedural requirements that can be applied by the courts in a more straightforward manner. Both approaches, however, endeavor to provide a set of limits that avoid the impotence Madison identified with "parchment barriers," by giving the separate states and their citizens specific claims to raise in challenging the legitimacy of federal legislation.

The third approach to constitutional reform follows a "separation of powers" model, reflecting the structural design used by the framers to constitute the relationship between the Congress and the President. The states can be given greater weight in the national political process by creating a power to nullify any congressional act, by agreement of two-thirds of the state legislatures. This provision mirrors the Presidential veto and gives the states, acting collectively, a direct voice in national policy. Federal laws remain supreme, unlike the effect of nullification by individual states once proposed by John C. Calhoun. The intent, much like that of the Presidential veto, is to give the Congress an incentive to take the interests of other legitimate decision makers and their constituencies into account. Under this arrangement, the sort of national political process envisioned by the *Garcia* majority would be more likely to emerge.

One remaining option is of course to do nothing at the constitutional level. In effect, the states are advised by the *Garcia* Court to pursue interest-group politics in the congressional arena—to seek political remedies. Already the states have taken this approach with limited success, securing a series of amendments to *FLSA*, less than a year after *Garcia*, that relieve to some extent the financial pressures the decision had created.[36] In the short term, it would appear that the *Garcia* Court's view of the national political process has been vindicated. In the long run, however, the states have little to win and much to lose in the normal politics of group pressure and bargaining. If the process of erosion in the position of the states continues, at some point state legislatures can be expected to assert their principal constitutional prerogative—to petition the Congress for a Constitutional amendment, if necessary, to compel a new Constitutional Convention.

CONCLUSION

The future of American federalism is in doubt. The *Garcia* decision has brought into the center of political debate the grounds upon which the federal system rests. An issue that ordinarily might be confined to the narrow circles of practicing constitutional lawyers and scholars has spilled over into the larger intellectual and political arena. This can be viewed as a useful, indeed a necessary, step toward a satisfactory resolution. Whatever means of resolution is acted upon—new litigation, constitutional amendment, or politics as usual—it is essential that the substance of that action reflect a broader and deeper understanding of the federal relation, how it is constituted and how it can be sustained. *Garcia* may yet be a productive decision if it becomes the occasion for constitutional dialogue on a long-neglected topic of basic importance in the American system.

ENDNOTES

[1]Between the turn of the century and the New Deal, the Court made a series of rulings that found congressional action in violation of the Tenth Amendment. Perhaps the most famous are the 1918 ruling striking down national child labor standards (*Hammer* v. *Dagenhart*, 246 U.S. 20), in which the Court embellished the Tenth Amendment to read that powers not "'expressly' delegated to the national government are reserved," the 1922 *Child Labor Tax Case* (259 U.S. 20), and *United States* v. *Butler* 297 U.S. 1 (1936). Beginning in 1937, the Court reversed itself on restricting the powers of Congress under the Tenth Amendment. In cases that year, such as *National Labor Relations Board* v. *Jones and Laughlin Steel Co.*

(301 U.S. 1) and *Steward Machine Co.* v. *Davis* (301 U.S. 548), the Court found the Tenth Amendment to be of limited relevance in assessing the constitutionality of congressional taxing and spending policies. Although given several opportunities between 1937 and 1976, the Court refused to strike down national legislation on the grounds that it encroached on powers reserved to the states under the Tenth Amendment. See e.g., *New York* v. *United States* 326 U.S. 572 (1946) and *Fry* v. *United States* 421 U.S. 542 (1975). In reference to the Commerce Clause specifically, on only eight occasions prior to 1937 did the Court find that the Congress had exceeded its limits. The last such case (prior to 1976) was *Carter* v. *Carter Coal Co.* 298 U.S. 238 (1936), which invalidated the *Bituminous Coal Conservation Act of 1935*. The Court held in that case that regulation of production and labor relations lay beyond the allowable object of congressional power—regulation of interstate commerce. The *Fair Labor Standards Act* was upheld in *United States* v. *Darby* 312 U.S. 100 (1941), the Court holding that Congress may by law exclude goods which do not conform to specified labor standards from interstate commerce and may use direct regulation of labor relations to achieve this objective.

[2]426 U.S. 833, 96 S. Ct. 2465, 45 L. Ed. 2d 245 (1976).

[3]105 S. Ct. 1005 (1985).

[4]Federal regulation of the states was upheld in a series of cases in the early 1980's. See *Hodel* v. *Virginia Surface Mining*, 452 U.S. 264 (1981), *United Transportation Union* v. *Long Island RR*, 455 U.S. 678 (1982), *FERC* v. *Mississippi*, 456 U.S. 742 (1982), and *EEOC* v. *Wyoming*, 460 U.S. 226 (1983).

[5]See the discussion of structural argument in Philip Bobbitt, *Constitutional Fate* (New York: Oxford University Press, 1982), pp. 74-92.

[6]*Ibid*, p. 75.

[7]*Garcia*, p. 1016.

[8]*Ibid*, p. 1017.

[9]*Ibid*.

[10]*Ibid*.

[11]*Ibid*, pp. 1016-17.

[12]*Ibid*, p. 1018. The Court's argument is not new. See Herbert Weschler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government." *Columbia Law Review* 54 (1954), pp. 543-52.

[13]This is the view urged upon the Court by Jesse H. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980).

[14]*Garcia*, Powell dissenting, p. 1026.

[15]*Ibid*.

[16]The U.S. Constitution is frequently extolled for its "flexibility," its ability to adapt to changing circumstances while retaining its integral structural features. Flexibility, however, should not be confused with inconsistency; and inconsistencies in fundamental law must not so readily be indulged as that most human attribute, "being of two minds." All individuals, no matter how intelligent, are inconsistent in their thoughts and beliefs over their lifetimes. This is so, in large part, because people tend to forget thoughts and beliefs of an earlier period that may be inconsistent with those they hold today, a problem that codification of the law was meant to remedy for social orders. Humans, however, may be of two minds for other reasons as well. They may not know what they think (they can't decide whether to eat their cake or save it for later) or they may know but believe or desire too much (they want their cake and they want to eat it too). When individuals exhibit these kinds of behavior, they may be perceived as indecisive, spoiled or even greedy. When systems of fundamental law "are of two minds," the consequences are not so benign. In such cases, a constitution either offers no rule by which individuals and institutions may order their relations with others, a prescription for chaos, or it offers multiple, conflicting rules under which rights and prerogatives may be exerted. Since it is impossible for all claims arising under this circumstance to prevail, the ultimate result is the denial of at least one claim well-founded in law: the very definition of injustice.

[17]*Garcia*, O'Connor dissenting, p. 1037.

[18]For the best statement of this view, see Alexander Hamilton, John Jay, and James Madison, *The Federalist 84* (New York: The Modern Library, n.d.), pp. 555-67. This point is discussed at length in Advisory Commission on Intergovernmental Relations, *Reflections on Garcia and Its Implications for Federalism*, M-147, Washington, DC, 1986, pp. 27-39.

[19]*Garcia*, O'Connor dissenting, p. 1037-38.

[20]Thus we accept the argument made by Walter Berns that the Tenth Amendment is "merely declaratory of the division of powers made in the original, unamended Constitution." See Berns, "The Meaning of the Tenth Amendment" in Robert A. Goldwin, ed., *A Nation of States: Essays on the American Federal System* (Chicago: Rand, McNally & Co., 1963), p. 138.

[21]See Vincent Ostrom, *The Political Theory of a Compound Republic: Designing the American Experiment* (Lincoln: University of Nebraska Press, 1987.)

[22]The Constitutional Convention specifically rejected a national veto on state legislative which would have given the federal government open-ended authority to preclude state action, on a state-by-state basis. National preemption via the Supremacy Clause, though it does not act state-by-state, acquires the same open-ended character as a national veto if the powers of Congress are not limited to the objects enumerated in the Constitution. Permissive construction of the enumerated powers leads to open-ended preemption.

[23]See *Wickard* v. *Filburn*, 317 U.S. 111, 127-28 (1942).

[24]Under the basic interpretation of the Constitution maintained by the Court until 1941, the limits of the Commerce Clause could be described generally in the following manner: Congress had authority to pursue the regulation of "commerce among the states" as an end or object of governmental activity; but, Congress did not have authority to use the regulation of interstate commerce as a means to pursue an unauthorized end—an object of governmental activity not authorized by the enumerated powers. This principle was established very early in *McCulloch* v. *Maryland* (1819) when Chief Justice John Marshall held that the Congress may not abuse its authority by enacting laws beyond its constitutionally delegated powers "under the pretext" of exercising powers actually granted to it (see, 4 Wheaton at 423). This principle was applied repeatedly in Commerce Clause decisions, although it eroded gradually over the years (see, *Gibbons* v. *Ogden*, 9 Wheaton 1 (1824); *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918); and *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); but see, *Champion* v. *Ames*, 188 U.S. 321 (1903); and *Hoke* v. *United States*, 227 U.S. 308 (1913) as evidence of the gradual erosion in the distinction between means and ends) and finally was rejected in *United States* v. *Darby* 312 U.S. 100 (1941). Herein lies a seeming paradox. Under this principle, the Congress may regulate noncommerce activities that are necessary and proper (touching upon or touched by commerce even remotely) if the object of regulation is the enumerated object—to regulate commerce among the states. At the same time, the Congress may not regulate commerce among the states, narrowly defined, in order to pursue an object (such as general economic regulation) not among those objects enumerated in the Constitution. The apparent paradox dissolves if the commerce power is understood in the overall context of constitutional design. The framers sought to constrain the federal government by limiting the objects of national power, while allowing all means necessary and proper to attain an enumerated object (see *Federalist 44*, p. 294). Indeed, it is only within this context that Madison's exposition of the scope of the Necessary and Proper Clause in *Federalist 44*, and Marshall's later adoption of Madison's view as judicial doctrine in *McCulloch*, make any sense. Beginning in 1941, in *Darby*, the Court totally rejected the distinction between means and ends, holding that "the motive or purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the Courts are given no control" (312 U.S. at 115). In upholding the *Fair Labor Standards Act*, the Court overturned *Hammer* v. *Dagenhart* and effectively eliminated the means-end distinction under the Commerce Clause. According to Laurence Tribe, "it is now settled that Congress may impose whatever conditions it wishes, so long as the conditions themselves violate no independent constitutional prohibition, on the privilege of producing for, serving customers in, or otherwise 'sitting astride the channels of,' interstate commerce" (see Tribe, *American Constitutional Law*, Mineola, NY: The Foundation Press, Inc., 1978, p. 238). Since virtually every conceivable activity individuals engage in touches or is touched by interstate commerce (even the air they breath) this interpretation leads one to conclude that every aspect of human life is a "privilege" subject to congressional regulation unless the Constitution specifically prohibits it. What the Court has done over the years is, incredibly, to allow the means to justify the end. Coupled with the expansive definition of "commerce among the states," the effect has been fundamentally to alter the character of the federal government from one of delegated power, which must justify its authority to act by the Constitution, to one with plenary power which may act unless restricted by the Constitution. The irony, of course, is that over the same half-century that the Court eschewed "motive analysis" under the Commerce Clause to protect the states from congressional overreach, it developed this form of analysis to a high art under the 14th Amendment to restrict the states (see e.g., *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); and *Hunter* v. *Erickson*, 393 U.S. 385 (1969).

[25]*Federalist 48*, p. 321.

[26]*Ibid*, p. 336.

[27]Hamilton argued the contrary in opposing the addition of a Bill of Rights to the Constitution: it is unnecessary to declare freedom of the press, he wrote, when Congress is given no power to abridge freedom of the press. He thus relied entirely on the limited delegation of power to Congress to constrain national power. See especially *Federalist 84*, pp. 555-67.

[28]In light of the *Garcia* decision, it is revealing to read many of the Anti-Federalists' objections to the Constitution. Pervasive in the writings of the Anti-Federalists is the warning that the new Constitution would, in effect, unravel over time—fear that the new structural arrangement would set in motion a dynamic that would result in disastrous outcomes in the future. Nowhere is this more evident than in Brutus' writings on the state and the judiciary:

> Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people . . . . [O]ne adjudication will form a precedent to the next, and this to a following one . . . . In this situation, the general legislature, might pass one law after another, extending the general and abridging the state jurisdictions, and to sanction their proceedings would have a course of decisions of the judicial to whom the constitution has committed the power of explaining the constitution.—If the states remonstrated, the constitutional mode of deciding upon the validity of the law, is with the supreme court, and neither people, nor state legislatures, nor the general legislature can remove them or reverse their decrees.

See, Essay XV, 20 March 1788, *The Anti-Federalist*, ed. by Herbert J. Storing (Chicago: The University of Chicago Press, Chicago, 1981), pp. 186-87.

[29]See *endnote 23* above. It is understandable that the Court would avoid this approach. Embracing the means-end distinction, even for so obvious a case as protecting states from covert control by Congress, would open the door to legal challenges against a large portion of federal law adopted since World War II.

[30]Permissiveness in the review of means can be viewed either as a design flaw or as a failure of the Court to apply the "proper" half of the "necessary and proper" constraint.

[31]This is especially so if the activity to be regulated touches upon or is touched by interstate commerce, given the Court's proclivity to allow the tail of commerce regulation to wag any dog to which it happens to be attached. See *footnote 23* above.

[32]See the argument advanced by Bobbitt, *Constitutional Fate*, pp. 191-93, that *NLC* represented a "cuing function" of judicial review, an effort to send a message to the Congress that it was ignoring state prerogatives. Although the cuing function did not appear to work in the specific context of labor relations, it might work more generally to preclude further intrusions into traditional areas of state authority and responsibility.

[33]For Hamilton's argument on this point see *Federalist 78*, pp. 505-06. See also Christopher Wolfe, *The Rise of Modern Judicial Review* (New York: Basic Books, Inc., 1986), p. 75.

[34]M-147, pp. 43-50. ACIR endorses none of the possible approaches to constitutional amendment, but offers the set of options as an invitation to dialogue on the implications of *Garcia*.

[35]*Ibid*, p. 44.

[36]The *Fair Labor Standards Amendments of 1985*, PL 99-150, signed by President Ronald Reagan on 13 November 1985, allows state and local governments to give employees compensatory time-and-a-half off for overtime work instead of cash payments. This eases the purely out-of-pocket costs of *FLSA* to state and local governments, but unless state and local governments compensate for the 50% increase in leave time with additional personnel, the legislation still threatens to decrease the quality of public services. It is also considerably less accommodating than the exemption for traditional governmental services enjoyed by the states under *NLC*.

Chapter Two

THE COURT'S ROLE IN CONGRESSIONAL FEDERALISM: A PLAY WITH (AT LEAST) THREE ACTS

Philip Bobbitt[1]

INTRODUCTION

The constitutional drama that climaxed in the *Garcia* case can be usefully understood, by a theatrical metaphor, as a play in three acts. In the first act, the principal characters are introduced and the problematic nature of their relationship established; the way the characters understand their problems *creates* their problems. In the second act an attempt made to overcome the conflict of the first act serves only to intensify the struggle and even threatens values widely shared by the players. In the third act, a futile effort is made to resolve the tensions that now appear almost inevitable among such characters in this situation. The play closes not with a Greek embrace of fate, but with the muttering asides of discontented players who promise, like Fitzgerald's Charlie Wales, that they'll be back, oh they'll be back, and then . . . .

For this is a modern play.

ACT I

THE *STATE OF MARYLAND* v. *WILLARD WIRTZ, SECRETARY OF LABOR*

As is often the case in the modern theatre, the perceived background of the action—what the characters thought to be the principles dividing them and guiding their actions—was really only a setting, or to continue the metaphor, a set. Like a stage set, the setting created an illusion that did structure the action. The mistakes made in the first act, as the characters responded to what they erroneously took the situation to be, created the tension that the characters attempted to resolve during the rest of the play.

This setting was the context provided by the historic doctrinal triumph of the *Darby* case,[2] by which the power of Congress to develop a national economic unit was ratified and the New Deal agenda brought into harmony with the Constitution's system of enumerated federal powers.

Prior to *Darby* there had been two separate strands of permissive interpretation of the power of the Congress "to regulate commerce among the several states." One line of cases held that the Congress could regulate items that were not strictly subject to the interstate commerce power—because they were not being regulated for a commercial purpose—so long as these items were regulated *interstate*. By this means, Congress was allowed to regulate the sale of lottery tickets, obscene material, white slave traffic, and impure food and drugs.

A second line of cases held that the Congress could regulate items that were not strictly subject to the power to regulate interstate commerce—because these items were limited to *intra*state distribution—so long as the regulation was for a commercial purpose, as demonstrated by a showing that such intrastate commerce had a substantial effect on interstate commerce. By means of this case law, Congress regulated the intrastate rates of an interstate carrier. In the famous *Shreveport Rate Case*,[3] this federal power was upheld because such rates have "such a close and substantial relationship to interstate traffic."

These two lines of case law met in *United States* v. *Darby* decided in 1941. At issue was the *Fair Labor Standards Act (FLSA)*, the centerpiece of the "Sec-

ond" New Deal. Chief Justice Harlan Stone wrote for the majority upholding complex regulations that governed minimum hourly wages, maximum working hours, and overtime. In *Darby* the congressional purpose was not strictly commercial *and* the subject of the regulation was not strictly interstate. The new standard held that activities that affected interstate commerce could be regulated by Congress, regardless of Congress' purpose or the scope of these activities.

The *FLSA* required every employer "engaged in commerce or in the production of goods for commerce" to pay a certain minimum wage. The original definition of "employer," however, excluded "the United States or any state or political subdivision of a state . . . ." In 1961, the act was amended to cover all employees of any "enterprise" engaged in commerce or production for commerce, provided that the enterprise also fell into certain listed categories. In 1966, Congress added to the list of categories enterprises "engaged in the operation of a hospital . . . or school . . . (regardless of whether or not such hospital . . . or school is public or private . . .)." At the same time, the Congress modified the definition of employer so as to remove the exemption for states.

This, then, is the setting for the "action" which begins when Maryland, joined by 27 other states and one school district, brings suit against the U.S. Secretary of Labor to enjoin enforcement of the act insofar as it applied to schools and hospitals operated by the states or their subdivisions. In 1967 a three-judge court is convened to hear the case. That court clearly sees the issue as one involving the limits of federal power. As the *Harvard Law Review* comments at the time,

> Judge Winter's analysis rests on a metaphysics of constitutional powers. He postulated that all exclusive powers of Congress are "plenary" and that all plenary powers are "necessarily coterminous." Therefore, he analogized the interstate commerce power to the foreign commerce and war powers, and relied in part on cases upholding exercises of those powers against claims of violation of state sovereignty.[4]

The next scene brings the case to the Supreme Court, which renders a decision in *Maryland* v. *Wirtz* in 1968.[5] The Supreme Court affirms the district court. The Court considers and rejects the appellants' argument that the expansion of coverage of the statute through the "enterprise concept" is beyond the power of Congress under the Commerce Clause. This question, the Court holds, had been settled by *United States* v. *Darby*, which upheld the power of Congress to regulate intrastate activities when they have a substantial effect upon interstate commerce. The Court notes that the Congress had found that substandard wages and excessive hours, when imposed on employees of a company shipping goods into other states, gave the exporting company an advantage over companies in the importing states. Such a situation, notes the Court, constitutes a "rational basis" for the extension of the *FLSA* to all enterprises.

The appellants had also argued that the statute could not constitutionally be applied to state-operated institutions "because that power must yield to state sovereignty." The Court replies that this argument is untenable—there is no "general doctrine implied in the federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." If a state is engaged in economic activities that are validly regulated by the federal government, the Court goes on, the state may be forced to conform to federal regulation.

By the end of the first act, then, the characters have established themselves in this posture:

The Congress, trying to extend federal protection to workers hitherto denied the benefits possessed by virtually the entire workforce, is vindicated by *Darby*. It was in *Darby*, after all, that Stone had made the unfortunate remark, itself a truism, that "the Tenth Amendment is only a truism." This simply meant that the Tenth Amendment expressed the bland view that whatever the extent of federal authority, it must derive from the enumerated powers. With respect to the commerce power, *Darby* set its limits: there were none to be imposed by courts. Hence a fair reading of state sovereignty, in the commerce context, simply caused it to vanish, *should* Congress choose to act. For if we apply the statement "a state engaged in activities that are validly regulated by the federal government must conform to federal regulation" to require only that, were the practice subject to regulation done by private hands the federal power could reach it, we have simply removed the relevance of the fact that it is a *state* that is to be regulated.

The states are in full retreat. Having relied upon their exclusive powers to protect segregation, malapportionment, and criminal laws governing sexual conduct, the states had already seen the first of these fall to an expanded—if degraded—Commerce Clause. By using "federalism" as a code-word for practices that united the Congress against the states, the states had risked losing their greatest protector—the state orientation of congressional delegations. Once this was lost, the Court would not protect them.

The Court has withdrawn—a neutral, impassive actor simply attempting to manage what appeared to be the inevitable triumph of the New Deal over the Old Constitution. Its last words, as it left the stage, seemed to settle the matter.

ACT II
NATIONAL LEAGUE OF CITIES v. USERY

In this act, the Supreme Court, for the only time in the 50 years since *Darby*, holds a congressional regulation of commerce to be unconstitutional.

In *National League of Cities*,[6] although it concedes that the regulations at issue are "undoubtedly within the scope of the Commerce Clause," the Court finds that wage and hour determinations with respect to "functions . . . which are essential to the separate and independent existence" of the states are beyond the reach of congressional power under the Commerce Clause.

The Court was not, therefore, setting new limits on federal power (the regulations were "undoubtedly" within the reach of the commerce power); instead, it was identifying fundamental *limitations*. This would appear to resolve the problem created by *Wirtz*'s erasure-by-logic of state sovereignty; it restores to relevance the element of statehood.

A further, more subtle difficulty, however, had been created for the Court by *Maryland* v. *Wirtz*. It was this: how does a court overrule a decision both "substantively" *and* "procedurally?" For that was what was required; the Court in the first act had gotten both aspects wrong by misconceiving the issue as a mere *Darby* problem. The Court was wrong to say that there are no limitations on the commerce power imposed by federalism, but it was also wrong to *decide* this issue, that is, to arrogate to itself the role of policing the Congress regarding the limitations on plenary powers imposed by federalism. Let us make no mistake: to decide that the Congress has not misread a particular constitutional rule is to assume the power to decide that it has.

One sees the conundrum: how could the Court in the second act—in *National League of Cities*—say both (1) that the Court was wrong in the first act, *Maryland* v. *Wirtz*, not to apply a particular rule and (2) that it was also wrong to apply any rule at all, since the limitations imposed by federalism on the plenary powers of Congress are determined by Congress and not by the Court. The decision creates a kind of Liar's Paradox: if (2) is true then (1) must be false; but if (1) is false, then (2) must be false.

It is as if a character wishes to retract a speech made in the first act on the grounds that he already has too many lines. If the Court were right and had no business *deciding* the case in *Maryland* v. *Wirtz*, then it would have no opportunity now to overrule that case.

A desperate attempt ensues to avoid the conundrum. *Wirtz* is overruled, but the institutional issue of the Court's competence vis-a-vis Congress is not addressed. The Court simply hopes that, by the terms of its decision, it can limit its ruling to the facts in *National League of Cities*—that is, to the application of the *FLSA* to the state practices at issue—and thus not be forced to confront the question of institutional competence.

Such an attempt may be called an exercise of the Court's "cuing function," to employ another theatrical term. There are times when the Court, instead of creating doctrine for the lower courts to apply in the context of constitutional review called the "checking" function, wishes to give a clue to another institutional actor. The decision is accordingly limited to its facts, as far as the courts go, but has its real impact if it is picked up and applied by the Congress, for example, or the President or the states, in the discharge of their own constitutional responsibilities.[7]

The difficulty with this rather subtle exercise of Supreme Court power is not, as you might expect, that Congress misses the cue or fails to act accordingly. Not at all. Rather it lies with the lower courts who, in their fixation on doctrinal argument derived from "checking" cases, wish to use the cue meant for someone else as the occasion for making new doctrine.

Recognizing this in a series of lectures in 1979, I predicted that the Supreme Court, after *NLC*, would adopt the following course:

> If the Court were exercising a cuing function in *National League of Cities* then we would expect to see the Court not granting *certiorari* in cases which present a development of the doctrine announced in *National League of Cities*. We would expect to see little development of the doctrine in the cases taken on appeal. Indeed, citation of *National League of Cities* would be virtually absent except for dicta. Finally, if we were lucky, we might even encounter a case presenting a substantial *National League of Cities* issue which the Court chose wholly to ignore. When the Court did rely on *National League of Cities* it would

only be in cases in which lower courts, misled by the erroneous checking assumption, had actually struck down legislation on that basis.[8]

This is precisely what happened. In the case of *City of LaFayette* v. *Louisiana Power & Light*,[9] which applied the federal antitrust laws to municipalities, there is scarcely a reference to *NLC* even though it was discussed in both briefs and at oral argument and is clearly germane to the decision which followed.

The difficulty was, however, that the lower courts (and the law reviews) were not listening. Moreover, the Supreme Court could not discipline the lower courts without making further doctrinal pronouncements which, in turn, induced the lower courts to further deciding. When one circuit went so far as to get the substantive doctrine exactly wrong and create a conflict within the circuits, the Supreme Court could no longer maintain its silence. So the high Court decided to take three cases, all meant to underscore the view that *NLC* was limited to its facts.

Doing this, of course, simply flouted the underlying reason why *NLC* was limited to its facts. The Court was now making doctrine, taking opportunities to decide cases on the merits, when the fundamental rule it was trying to repair was that it had no right to decide such cases.

The result was an inexorable decline into chaos. As I mentioned, the initial reaction to *NLC* in the legal community was simply to treat it as a checking-function case—indeed as a partial overruling of *Darby*, as claimed by Justice William J. Brennan and the dissenters in *NLC*. The law reviews were unanimous in this misunderstanding. The predictable result was confusion in the lower courts, for *NLC* had not set out to provide them with a doctrinal test to apply. Let us review this play within the play to see what happened.

Soon after the *NLC* announcement, the Second circuit holds that the control of a metropolitan transit system can be regulated by the Congress. *Friends of the Earth* v. *Carey*[10] involved rather extensive changes in traffic programs, licensing, parking, delivery, and taxi regulations that New York state and New York City were required to make in New York City's metropolitan transit control plan in order to comply with the *Clean Air Act*. The state and city argued, among other things, that the federal government could not require these changes because the control of a traffic system was "an integral government function," the phrase used by the Supreme Court in *NLC* to characterize, but not define, state activities so crucial to federalism that Congress could not prescribe their operation, and thus were an improper subject for congressional regulation. The Court holds that the control of a traffic system is not such a function since the regulation of traffic on roads and highways "has long been considered to be a cooperative effort between city, state, and federal authorities."[11]

Then, the first circuit proceeds to hold in *Enrique Molina-Estrada* v. *Puerto Rico Highway Authority*[12] that the operation of a state highway authority is a traditional or integral government function. In this case, employees of the Puerto Rico Highway Authority brought an action for wages due under the *FLSA*. The Puerto Rico Highway Authority built and repaired roads, operated toll roads and parking lots, and planned to build and operate a mass transit system. The Court finds that these are integral government functions because (1) governments have always built roads, making this a traditional function, (2) providing roads and highways is a public service, intended to benefit all, and (3) government is the principal provider of the service.

These are but two examples; there were many others. What finally motivated the Supreme Court to act was that, not despite but because of the high court's fastidiousness, the lower courts were setting up tests of their own, and conflicting case law began to accrete around the various tests.

Thus, the sixth circuit in *Amersbach* v. *City of Cleveland*[13] in the course of deciding that the operation of a municipal airport is an integral government function, announced this test for a reserved state function: (1) the governmental service or activity must benefit the community as a whole and be available to the public at little or no direct expense, (2) the service or activity must have been undertaken for the purpose of public service rather than pecuniary gain, (3) government must be the principal provider of the service or activity, and (4) government must be particularly suited to provide the service or perform the activity because of a communitywide need for the service or activity.[14]

The *Amersbach* court finds that the operation of a municipal airport meets this test. The operation of an airport is essential to an air transportation system, and "[a]irports are increasingly indispensable in a nation where airplanes are relied upon as a principal mode of passenger transportation."[15] Moreover, government is usually the provider of airport service to commercial aviation.

The *Carey* Court had found, a year earlier, however, that the level of federal involvement was the dispositive issue; yet this was not mentioned in *Molina-Estrada* five years later, even though there was certainly federal involvement in Puerto Rico's highway system in the form of federal highway grants and federal regulation through the Department of Transportation and the National Highway Traffic Safety Agency.

The operation of airports is heavily regulated by the Federal Aviation Administration, but the *Amersbach* court never mentioned this fact. The traffic control system in *Carey* surely meets the criteria announced in *Molina-Estrada* and *Amersbach*. Traffic control is a government service, available to all. Government is the principal, if not the sole provider of the service—especially in New York City, where traffic problems are especially complicated—and there is a community-wide need for the service. Such disarray was widespread.

Consider the opinions of the district court and the 11th circuit in *Williams* v. *Eastside Mental Health Center, Inc.*[16] In this case, an employee[17] of a community mental health center brought a suit for wages under the *FLSA*. The mental health center which employed Williams was one of a system of such centers that formed the mental health service of the state. The state retained a certain degree of control over the center, which each court finds determinative, although leading to different results.

The district court holds that the operation of the mental health center satisfied the test enunciated in *Amersbach*, and thus provides "integral" state functions. The court finds that the center is part of the mental health system set up by the state of Alabama to provide mental health care to its citizens.[18] Moreover, government is "particularly suited" to provide these services, and there was a communitywide need. Thus, the *FLSA* does not apply to the employees of the center.

The 11th circuit then reverses on the grounds that the state service provided was not intended for "all" citizens of Alabama. "We think that an integral function is in this context one that a state performs for or in relation to the society at large, the state as a whole . . . . The function involved here addresses a specific problem affecting a limited class of persons within the state."[19] In support of this eccentric view, the court goes on to list some examples of integral functions (taxing power, utilities, water provision) but never gets around to a discussion, much less a refutation, of the analysis used by the district court.

At times even the same circuit appeared to apply different tests. Thus the same court which struck down the federal intervention in *Amersbach*, in 1979, upholds the application of the *Clean Air Act* to the state in *Ohio Department of Highway Safety*,[20] in 1980.

This is too much. The Supreme Court, after five years of self-enforced restraint, breaks its silence. In *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*[21] the Court introduces a three-part test which greatly limits the fact situations which might constitute impermissible federal interference with state functions.

In *Hodel*, an association of coal producers challenged the constitutionality of the *Surface Mining Control and Reclamation Act*, that, among other things, prescribed federal performance standards for surface mining on "steep slopes." The association argued that the act was an unconstitutional interference with the states' traditional function of regulating land use. The Court upholds the act because it merely regulates private activities. The Court distinguishes this type of regulation from regulation of "states as states." Only the latter is prohibited by the Tenth Amendment. The Court announces a new test under *National League of Cities*:

> First, there must be a showing that the challenged statute regulates the "states as states" . . . . Second, the federal regulation must address matters that are indisputably attributes of state sovereignty . . . . Third, it must be apparent that the states' compliance with the federal law would directly impair their ability to 'structure integral operations in areas or traditional governmental functions'.[22]

In 1982, the Court further limits the application of *NLC* in *United Transportation Union* v. *Long Island Railroad Co.*[23] In this case, a union of railroad workers brought action seeking a declaratory judgment that the relationship between the union and that the railroad was governed by the federal *Railway Labor Act (RLA)*, not by New York's Taylor Law. The district court holds that the *RLA* applied, but the circuit court reverses, holding that the operation of a state-owned common carrier was an integral government function, and thus the Tenth Amendment barred application of the federal act. The Supreme Court reverses.

The Court concentrates on the third element of the *Hodel* test: whether the state's compliance with the federal law would directly impair its ability to structure integral operations in areas of traditional government functions. Determining whether a particular function is integral to state government requires more than an inquiry into what is "traditionally" a state function. Instead, "it was meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state's ability to fulfill its role in the Union and endanger its 'separate and independent existence'."[24] The Court concludes that "it can . . . hardly be maintained that application of the Act to the state's operation of the Railroad is likely to impair the state's ability to fulfill its role in the Union

or to endanger the 'separate and independent existence' referred to in *National League of Cities* . . . ,"[25] and accordingly holds that the operation of the Long Island Railroad is not an integral government function.

What kind of federal regulation could possibly fail under this line of cases? A statement by a circuit court judge considering a case in 1982 is illuminating. In *Kramer* v. *New Castle Area Transit Authority*,[26] commenting on the *LIRR* test, Judge Leonard I. Garth wrote:

> I find it almost impossible to hypothesize very many other circumstances in which federal regulation would endanger the 'separate and independent existence of a state' (other than the *National League* fact) . . . . In effect, the endangering test announced by the Court, whatever its wisdom, appears to me to have the virtue of being more certain in application than the 'traditional function' test . . . . [I]t will undoubtedly have the effect of forestalling disputes of the type presented by the instant case.

Finally, the Court's opinion in *EEOC* v. *Wyoming*[27] restricts the scope of plausible checking under *NLC* even further. This opinion applies the balancing test from *Hodel* to require that federal regulation actually threaten the state's existence, an addition that, if anything could do so, would seem to restrict *NLC* to its bare facts.

But the cases continued to come. The Supreme Court was deepening its Faustian pact, using doctrine to cut off the possibility of more doctrine. Still struggling under the paradox created by *Maryland* v. *Wirtz* and the need to rectify that decision, it was worsening the situation as it flailed about. Now there were more cases than ever.

ACT III

GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY

The third act was inevitable.

In *Garcia*, the San Antonio Metropolitan Transit Authority (SAMTA) sought a declaratory judgment that it was entitled to immunity from the overtime pay provisions of the *FLSA*. SAMTA did not question that the transit system affected interstate commerce sufficiently to fall within Congress' power to regulate commerce. Instead, it claimed exemption from federal law as a governmental entity performing a traditional governmental function—the transit system had been publicly owned and operated since 1959. The district court upheld the claim of immunity.

While an appeal to the Supreme Court was pending, the Court decided *United Transportation Union* v. *Long Island Railroad* and subsequently vacated the district court's decision in *Garcia*, remanding the case for further consideration in light of *Long Island Railroad*. When the district court again upheld SAMTA's immunity, it seemed virtually inevitable that the Supreme Court would reverse. This is the situation as the curtain rises on the third act.

Instead of reversing the district court on the narrow ground that SAMTA, like the Long Island Rail Road, was not performing a traditional governmental function, however, the Supreme Court overturns *National League of Cities*. Thus ends the Court's decade-long effort to enforce an area of immunity from federal regulation under the Commerce Clause for certain functions of state and local governments. The Court's language makes clear that Congress' action in affording SAMTA employees the protections of the wage and hour provisions of the *FLSA* contravenes no affirmative limit on Congress' power under the Commerce Clause. The Court also emphasizes that, except for unspecified but extreme threats to the states' very existence, Congress is the ultimate arbiter of the bounds imposed by federalism. So we have the actors now making the same mistakes that led them to the impasse that appeared to require the re-making of those mistakes; hence, when the Court finally overrules the "procedural" elements that unite *Wirtz* and *National League of Cities*, it finds itself trapped into overruling the "substantive" elements of the more recent precedent. It would be irony, but it is too predictable.

Thus the play ends, or in the tradition of the modern theatre, simply stops. There is no satisfying catharsis, no resolution. Some of the players are insisting that the play go on—and it is yet possible that a *deus ex machina* in the form of new court appointments will revive the action.

CODA

What ought to have been done? And what can we learn about our constitutional jurisprudence from these events?

The majority in *National League of Cities* was right in its view that *Maryland* v. *Wirtz* had to be overruled. Left unchecked, the *Wirtz* case would have sim-

ply erased an important structural element of the Constitution, the way the popularity of abstract art effectively removed figurative drawing from art schools; questions of federalism simply would have become irrelevant. What was needed was some way to overrule *Maryland* v. *Wirtz* "substantively" and "procedurally." Here, the Court did not get much help from the commentators or the lawyers. By compromising its position procedurally and then stonewalling, the *NLC* court virtually ensured the case's demise. It might have found a way out, however, in a venerable "procedural" precedent.

In *Marbury* v. *Madison* the Court was at great pains to indicate its views of the constitutional merits arising from the refusal by the Secretary of State of a new administration to deliver the validly issued commissions of its predecessor. "To withhold his commission," Marshall wrote, "is an act deemed by the court not warranted by law, but violative of a vested legal right." Despite this, as we all know, the Court did not grant William Marbury's petition for a writ of mandamus. This dictum is sometimes criticized as an example of the Court rendering an advisory opinion, a criticism of which I am doubtful. In stating the general rule of law applicable to the case, and in determining whether a right existed, Marshall did no more than was logically necessary to bring forward the question of the availability of the remedy. Jurisdiction to hear the case was not at issue. It is the custom nowadays simply to assume the plaintiff's claims and then ask whether a remedy will lie, but to determine their merits does not, by itself, flaunt the rule against advisory opinions. That rule bars courts from deciding questions "in the air," that is, questions detached from actual legal cases and controversies. There is no judicial power "to give answers to legal questions as such but merely the authority to decide them when a litigant [is] before the Court."[28] In *Marbury*, however, the Court was presented with an actual case involving concrete legal issues. The Court served notice that, if such a case should arise when the Congress had properly provided for an Article III remedy, the Court would order the commission delivered.[29] Something of the same lucidity and forbearance was required here.

There is no doubt that the Court in *Garcia*—or in *NLC*—could have joined its correct perception that there are limitations on Congress imposed by the federal structure with its equally correct view that these limitations are for enforcement by the Congress, not the Courts. But so long as courts (and commentators) remain transfixed by the image of one sort of argument—doctrinal—in service of one sort of function—the checking function of constitutional common law—we will not avail ourselves of the many flexible tools provided by the Constitution.

ENDNOTES

[1]I am indebted to Miss Margaret Burns for able research regarding the lower court opinions that followed *National League of Cities*; to Professor Sanford Levinson for his customary generosity in reading an initial draft of this paper; and to Mrs. Candace Howard for secretarial grace under pressure.

[2]*United States* v. *Darby*, 312 U.S. 100 (1941).

[3]234 U.S. 342 (1914).

[4]81 *Harvard Law Review* 1572, 1573 (1968).

[5]*Maryland* v. *Wirtz*, 392 U.S. 183 (1968).

[6]*National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

[7]The declaratory judgment in *Powell* v. *McCormack*, 395 U.S. 486 (1969), is an example of the cuing function between the same actors that we have here.

[8]See also Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York and Oxford: Oxford University Press, 1982), pp. 194-195.

[9]435 U.S. 389 (1978).

[10]552 F.2d 25 (2nd Cir. 1977).

[11]*Ibid.*, p. 38.

[12]680 F.2d 841 (1st Cir. 1982).

[13]598 F.2d 1033 (6th Cir. 1979).

[14]*Ibid.*, p. 1037.

[15]*Ibid.*

[16]509 F. Supp. 579 (D.Ala. 1981), *rev'd* 699 F.2d 671 (11th Cir. 1982).

[17]I am inclined to suspect that it was the availability of private actions that caused the *NLC* solution—which depended on a tacit understanding by the coordinate branches of government—to unravel.

[18]509 F. Supp. at 583.

[19]669 F.2d at 680.

[20]*U.S.* v. *Ohio Department of Highway Safety*, 635 F.2d 1195 (6th Cir. 1980).

[21]452 U.S. 264 (1981).

[22]*Ibid.*, pp. 287-88.

[23]455 U.S. 678 (1982).

[24]*Ibid.*, pp. 686-7, quoting *NLC*, p. 851.

[25]*Ibid.*, pp. 689-90.

[26]677 F.2d 308 (3rd. Cir. 1982).

[27]103 S.Ct. 1054 (1983).

[28]*Eisler* v. *United States*, 338 U.S. 189 (1949) per Frankfurter, J.

[29]I take it there is no doubt regarding Congress' power to provide the Court with such a role should Congress choose to do so.

Chapter Three

FEDERALISM AS A SUBJECT OF INTERPRETATION

Robert F. Nagel

INTRODUCTION

The Supreme Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*[1] runs contrary to two widely held sets of beliefs. Because the *Garcia* opinion makes clear that the Court should play a negligible role in defining the relationship between the states and Congress' power to regulate interstate commerce, the decision conflicts with the traditional idea that it is the special role of the judiciary to protect constitutional values. Moreover, because much of the opinion rests heavily on the supposition that the principle of federalism is adequately protected by the political process, *Garcia* threatens the view that constitutional values like federalism have ascertainable meaning independent of the results produced by political struggle. The opinion appears to mean either that the power of judicial review does not properly extend to protecting the constitutional status of state governments or that the states have no constitutional status that can be articulated.

A predictable kind of criticism of *Garcia* is that, as is so often claimed by legal scholars, the Court used mistaken reasoning and inadequate doctrine. This "mainstream" criticism insists that the Court failed to perceive the intellectual content in the principle of federalism and failed to craft usable, appropriate doctrine to protect that principle.[2] This line of criticism, in one way or another, proposes that the Court should create new judicial tests or should go back and improve on earlier doctrine—for example, the doctrine first articulated in *National League of Cities* v. *Usery*[3]—rather than abandon the effort to interpret the Tenth Amendment. A more unconventional form of criticism holds that the problem is not in the *Garcia* decision *per se*, but in the Constitution.[4] One implication of this critique is that, if the principle of federalism is to be protected by the judiciary, the constitutional text will have to be supplemented and improved by further amendment. Both types of criticism permit the reestablishment of the ordinary expectations that the constitutional principle of federalism has ascertainable content and that the judiciary should protect that content.

These criticisms assume that the normal methods of judicial interpretation, at least if improved by way of better legal doctrine or better constitutional text, are suitable for protecting the principle of federalism. The criticism of *Garcia* to be developed in this paper is different: it emphasizes that the failure of *Garcia* arose in part from unrealistic expectations with respect to the character and capacities of judicial interpretation. In this respect, some critics of *Garcia* make the same mistakes that led to the decision itself. *Garcia* may have been wrong in arguing that judicial interpretation could not be useful in protecting the principle of federalism. But both *Garcia* and its critics are limited by their assumptions about the nature of constitutional interpretation.

MAINSTREAM CRITICISMS

In "The Second Death of Federalism," William Van Alstyne presents an able "mainstream" criticism of *Garcia*. He begins by acknowledging that *Garcia* was probably correct in dismissing as unworkable aspects of the Court's previous approach to federalism. In particular, Van Alstyne focuses on the distinction between "traditional" and "nontraditional" governmental functions, a distinction relied on in *National League of Cities* and emphasized in subsequent cases. He accepts the *Garcia* Court's claim that this distinction is deeply flawed, but differs from the Court in the conclusion to be drawn from this criticism.

Van Alstyne argues that a defect in one aspect of the judicial test for protecting federalism should have led the Court to improve its doctrines rather than to jettison the entire enterprise of interpreting and protecting the Tenth Amendment. Van Alstyne's proposal for improvement is that the Court should center its analysis around a single aspect of the reasoning in *NLC*; ironically, the aspect favored by Van Alstyne is the very contribution to *NLC* that was made by Justice Harry A. Blackmun, who later wrote the *Garcia* opinion. Van Alstyne suggests that the Court ought simply to demand sound commerce-related justifications for national intrusions into the sovereign prerogatives of the states. As in so much of the rest of constitutional law, the Court would simply assess whether an "adequate" justification for the exercise of governmental power exists.

Van Alstyne's prescription is consistent with a respected (but for a time submerged) academic view. Under this view, since 1937 the Court has improperly and unnecessarily approved fanciful extensions of the federal commerce power. Van Alstyne terms these decisions "a series of endless judicial passive acquiescences;"[5] Herbert Wechsler once similarly referred to a "virtual abandonment of limits."[6] For the mainstream critic, then, *Garcia* represents the final step in a long series of judicial mistakes.

As an example of these mistakes, Van Alstyne alludes to the familiar academic criticism of the reasoning in *Katzenbach* v. *McClung*,[7] the case in which the Court approved the extension of the public accommodation section of the *1964 Civil Rights Act* to local vendors. The reasoning was wrong, Van Alstyne suggests, in that the Court failed to demand any sound commerce-related reason for the prohibition against racial discrimination in local restaurants; the source of the local vendors' supplies (even if out of state) had no connection with business practices inside the restaurants. Just as the judicial abdication in *Garcia* was the result of a failure to refine judicial doctrine, the mainstream critic believes that *Garcia* was preceded by a whole series of partial abdications also characterized by the failure of the Court to reason and explain properly.

For Van Alstyne, because the problem has been the Court's failure to examine Commerce Clause justifications carefully enough, the solution is for the Court to demand real justifications for Congress' use of the commerce power. The clear inference is that *NLC* should be expanded rather than repudiated. *NLC* was carefully limited to federal intrusions upon the activities of states "as states" and, therefore, did not restrict Congress' authority to regulate the activities of private individuals within a state. Under Van Alstyne's view, however, if a plausible commerce-related justification cannot be adduced, Congress would be exceeding its authority whether or not that authority had been applied against the states as governments rather than against private conduct within the state. Thus Van Alstyne's critique of *Garcia* points at least to a restrained resuscitation of dual sovereignty. Regulatory authority would again (as it was before 1937) be conceived of as falling into two distinct categories—that plausibly connected to "commerce among the states" and that reserved to the states.

Van Alstyne's suggestion for the proper scope of judicial inquiry is, of course, only one of many suggestions advanced by mainstream critics. An inventive scholar has proposed that aspects of *Garcia* actually reinforce the *NLC* Court's concern for maintaining the capacity of the states to perform their roles within the federal system. Under this view, the doctrinal solution is to abandon the term "sovereignty," turning instead to an analysis of the purposes for which states exist.[8] One can expect to hear proposals in the near future about reviving the idea that courts should examine Commerce Clause legislation to determine if its commercial justification is a mere "pretext" for regulating in nonenumerated areas. Whether the proposal is that the courts realistically examine commercial effects or congressional motives or engage in some other inquiry, mainstream criticism of *Garcia* assumes that the Court's failure to put any significant limits on the federal commerce power is not attributable to the Constitution itself or to intrinsic characteristics of methods of judicial analysis. The history, since 1937, of gradual and increasing abdication is viewed as a series of regrettable errors that can be rectified if the courts try harder at their usual endeavors—assessing justifications, making distinctions, giving reasoned explanations, and so on.

The mainstream criticisms of *Garcia* fatally underestimate the scope of the Supreme Court's difficulties in seeking to protect the principle of federalism by way of conventional legal categories. Indeed, an accurate view of the Court's record of futile attempts to enforce the Tenth Amendment strongly suggests that the kinds of conceptual distinctions available to the judiciary are inappropriate in most Commerce Clause cases. The problem is not, as both *Garcia* and Van Alstyne would have it, that a single judicial distinction (between traditional and nontraditional governmental functions) has proven unworkable. Despite the Court's strenuous efforts to criticize this distinction, it is difficult to take very seriously its concerns.

It may be true, as the Court argued, that a judicial test that selects among state functions is, in a sense, inconsistent with the very effort to protect sovereign

status, because that status presumably involved an authority in each state to make such determinations for itself; however, there are analogous incongruities in other areas, and the Court treats them as unavoidable consequences of judicial review. For instance, in enforcing the Free Exercise Clause of the First Amendment, the Court has itself distinguished "religious" beliefs and practices from the "philosophical and personal"[9]—surely a determination central to the free exercise of religion that is reserved to individuals.

It may also be true that, analytically, the distinction between traditional and nontraditional functions is difficult to maintain. But unfortunately, constitutional law is loaded with distinctions that are difficult to make or even are entirely senseless. Indeed, in such areas as the establishment of religion, obscenity, and abortion, the Court persists in maintaining distinctions despite severe analytic difficulties that are fully known to it.[10] If the problematic nature of the distinction between traditional and nontraditional governmental functions were the reason for the Court's retreat in *Garcia*, the Court should now be engaged in a radical reconsideration of its role in protecting many, if not all, other constitutional values.

Equally important, the distinction criticized in *Garcia* is not the only defective doctrine in the area of interstate commerce. Indeed, an array of useless or dysfunctional distinctions litter the history of the judiciary's effort to enforce the principle of federalism. In its now generally discredited pre-1937 opinions, for example, the Court tried to distinguish between activities that "directly" affected commerce and those that only indirectly affected commerce.[11] Thus local areas of regulation (such as agriculture or manufacture) were distinguished from areas subject to national regulation. In various cases, the Court approved national regulation of "local" activities only if that activity was occurring as a part of the process of commerce (as the Court put it, if the activity was in the "current" of commerce) or otherwise could be conceived of as immediately connected to interstate commerce. Specifically excluded from the analysis was consideration of the size of the activity's impact on commerce.[12]

It is important to recognize why such efforts were failures. The failures were not due to the impossibility of an analytic distinction between commerce and other activities, nor was it caused by isolated judicial mistakes in seeking to apply the distinctions. These cases were justifiably discredited because "local" activities do—especially when cumulated—have important consequences for interstate commerce. A court that insists on the intellectual distinction between commerce (on the one hand) and manufacturing or mining or agriculture (on the other) must operate in the face of overwhelming and inevitable evidence of the interrelationship between commerce and these local activities. It must interpose analytic categories in the teeth of brute facts.

Nevertheless, Van Alstyne suggests that the extension of the *Fair Labor Standards Act (FLSA)* to state and local employees is not justified under the Commerce Clause because those employees are not engaged in manufacturing goods for trade in national markets. A faint echo of the "current of commerce" notion, this argument fails for the plain reason that state and local employees constitute somewhere close to 13% of the country's civilian workforce.[13] Without question, their level of remuneration has a substantial effect on commerce among the states. Just as the distinction between manufacturing and commerce was intelligible, Van Alstyne's distinction between commercial and governmental production is intelligible. Neither distinction, however, can have continuing persuasive power in light of the facts of economic interdependency.

Similarly, efforts to enforce the "pretext rule" were not simply marginally wrong or incorrectly applied in particular instances; the rule was deeply and inherently flawed. Consider, for example, *Hammer* v. *Dagenhart*,[14] in which the Court held that a prohibition of the interstate shipment of goods produced by child labor was not a regulation of interstate commerce. In this instance, the direct regulation of interstate commerce (by the prohibition of certain interstate shipments of commercial goods) was described as a pretext for regulating the conditions under which those goods were produced. And, certainly, no one can doubt that one reason for adopting the prohibition must have been a humanitarian concern about child labor. The difficulty is that any sensible regulation of interstate commerce will not be enacted for its own sake; one would hope, at least, that the regulation of interstate commerce would always be designed to achieve some ulterior and humanitarian purpose. This is to say no more than that before commerce is regulated, there should be good reasons for doing so. Even the desire to improve the speed or reduce the costs with which goods are shipped and sold is a "commercial" purpose that is properly motivated not only by immediate economic concerns, but ultimately by noncommercial considerations regarding the quality of life available to people as a result of efficiency.

The doctrines traditionally used by the judiciary are not only unrealistic or empty, but history demonstrates that their conscientious enforcement would have disastrous consequences. To some mainstream critics, for example, *Katzenbach* v. *McClung* is an example of one of the "endless series of judicial acquies-

cences" in which the judiciary failed to apply doctrine, available to it, in an appropriate way. It is true that the extension of the nondiscrimination principle to local restaurants was probably not motivated primarily by commercial considerations. It is also true that the justification seized upon in the Court's opinion—that the goods sold at the regulated restaurants had moved in interstate commerce prior to their sale—is unconnected to the question of whether racial discrimination in such restaurants was destructive of interstate commerce. However, the vagaries of public regulation are such that long-run consequences often do not coincide with either immediate intentions or effects. Judicial doctrines that require demonstrable "justifications," therefore, can undermine the very values they are designed to protect. No matter how the issue may have appeared in 1964, by now it seems likely that the elimination of racial discrimination in the south (including the elimination of discrimination in essentially local restaurants) has had an enormous impact on interstate commerce.[15] A conscientious Court might have stopped significant aspects of the bold campaign to improve race relations in the south because the motives of members of the Congress centered on racial justice rather than on economic factors or because economic demand could not be shown to be related to racial discrimination. But perversely, this might well have had the consequence of slowing the great economic advances made in the south following the breakdown of the Jim Crow system.

Mainstream criticisms of *Garcia* are bottomed on an indomitable optimism about the benefits of judicial review. These benefits are thought to be potentially available in the area of federalism as they are thought to be actually available in so many other areas of our public life. All that is needed is some tinkering with doctrine. A conclusive demonstration that all possible changes in analytic approach are necessarily futile is probably impossible.[16] However, it should at least give mainstream critics pause that nothing in the Court's disastrous record of interventions and abstentions—from *Dred Scott* to *Carter Coal* to *Garcia*—suggests that the tools typically and habitually used by the judiciary are appropriate for enforcing the principle of federalism.

CONSTITUTIONAL CRITICISMS

The second type of criticism confronts the Court's dismal history unflinchingly, but misdiagnoses its cause. This criticism asserts that the courts can and should enforce the principle of federalism, but that to do so successfully they need more textual guidance.

This view is interesting and unusual in that it diagnoses the Constitution as containing a "fundamental flaw. . .in design."[17] A flaw is thought to exist because, although a superficial reading of the Tenth Amendment would suggest that *something* is reserved to the states, in fact under the Constitution as written nothing significant is reserved to the states. Because the taxing, spending, and commerce powers are as a practical matter limitless, the Tenth Amendment is a kind of false promise. The structure of the Constitution and the wording of the Tenth Amendment both create the common belief that the national government's powers are limited and that some powers are reserved to the states, but the Constitution cannot be properly construed as limiting the powers of the national government, except insofar as individual rights act as affirmative limitations on those powers. In short, the reason that federalism is a dead or dying doctrine is that the Constitution as presently drafted consigns it to that fate. The prescription follows from the diagnosis. Utilizing the model of the Court's successful efforts to protect individual rights, constitutional criticism suggests that explicit protections for state power and status must be added to the Constitution.

Although ostensibly more realistic, and more radical, than mainstream criticism of *Garcia*, constitutional criticism in fact has much in common with the more conventional criticism. Both rely on a limited and naive view of the nature of constitutional interpretation. Constitutional criticism understandably but mistakenly assumes that effective enforcement of constitutional principles such as federalism depends upon clear intent, clearly expressed in constitutional text.

Compromise, Ambiguity, and Interpretation

The Tenth Amendment is frequently attacked as being a mere "truism" (or in modern terminology an "empty set") on the ground that it was adopted as an indeterminate compromise between opposing political forces. Under this view, the Federalists (led by Hamilton and Madison) proposed a new Constitution containing greatly expanded and expansive national powers. The Anti-Federalists' fears concerning an overly powerful national government jeopardized the adoption of the new Constitution and forced the proposal of the first ten amendments. The Tenth Amendment that resulted, however, was a kind of a trick; it changed nothing because the same broad powers were still enumerated, and only those that were not enumerated were reserved to the states. The decision to

remove the word "expressly" from the Tenth Amendment is thought to demonstrate concretely the indeterminacy of this compromise; since the framers decided that the national government's powers need not be "expressly delegated," they must not have intended the Amendment to diminish the implied powers.

To say that the Tenth Amendment merely affirmed what had already been implicit in the original Constitution, however, is to gloss over the question of *what* had already been implicit. The states that ratified the new Constitution certainly cannot be thought to have ratified a Constitution that preserved nothing significant for the states, since it was that fear which was raised during the ratification debates and it was that fear which the Federalists sought to put to rest by their reassurances in *The Federalist* and by the first ten amendments. Thus, even if the Tenth Amendment added no content to the Constitution, it embodied an articulated fear and a concomitant promise regarding the limited powers of the national government. The fact that the limited nature of national government was no more defined after the adoption of the Tenth Amendment than before does not undo the fact that a significant principle was implicit in the Constitution before the first ten amendments and is represented by the Tenth Amendment itself.

This principle is not unimportant merely because the compromising parties were unable to articulate a more determinate division of power. They agreed that the national government would be a government of limited, enumerated powers that were nevertheless broad and adaptable; this is not to have agreed to a single nationalized government. The necessity for compromise frequently made agreement on specifics impossible during the processes of drafting and ratifying the U.S. Constitution. The power of judicial review itself is nowhere expressly provided for in the constitutional text, and it is not unimaginable that one reason for this absence was the anticipated inability of the framers and ratifiers to come to agreement on this issue.[18] Nevertheless, from *Marbury* v. *Madison* forward, the power of judicial review has been thought fairly inferable from what was agreed to, despite the failure of the contesting parties to settle on any explicit provision. Similarly, the fact that no specific division of powers between the national government and the states could be articulated by the framers does not bar the possibility of fair inferences from the logic of what they did draft and ratify.

It is possible, of course, to concede that the political compromise that preceded the Tenth Amendment is compatible with—indeed, requires—serious attention to the overall logic of the document without conceding that the limits on the commerce power are more than negligible. For example, it is usually admitted that the structure of the Constitution contemplates the continued existence of states with a presumptive right to legislate and govern, but it is also asserted that this affirmative limitation on national power entails no important consequences.

It is surprising that the principle that states should be permitted to exist and to function as governments could be thought a negligible constitutional guarantee. Why is such a principle any less important than, say, the principle that religious organizations should be free to function? One answer emphasizes a difference between explicit and implicit guarantees.

Explicit Text and Interpretation

The notion that explicitness can be equated with constitutional significance was refuted by Madison himself. Madison's pejorative use of the term "parchment barrier" was a reference to the idea that explicit intellectual distinctions between the branches of the national government might be significantly enforceable.[19] His view, plainly, was that political self-interest, not intellectual clarity, created the real possibility for permanence in constitutional principles.

A moment's reflection indicates that the importance of a constitutional protection, as a matter of fact, has not turned on textual explicitness. Some important individual rights, which are commonly thought to be important and are frequently enforced, are mentioned nowhere in the Bill of Rights. The right to travel, for example, is usually based on structural arguments about the implicit logic of the Constitution very much like the logic that demands that states continue to exist as governing units.[20] The right to abortion is vigorously enforced despite the fact that it has no persuasive connection to either constitutional text or structure. The expansive meaning of the Necessary and Proper Clause that, as a matter of legal interpretation, is one of the important bases for the inexorable growth of national power is not based on the explicitness of the Necessary and Proper Clause. Chief Justice John Marshall, writing in *McCulloch* v. *Maryland*,[21] had convincingly established the breadth of Congress' implied powers by arguing from the design of the Constitution well before his opinion referred to the Necessary and Proper Clause.[22] Indeed, *McCulloch* was vulnerable to (and attempted to answer) the criticism that its argument, if accepted, made the Necessary and Proper Clause an unnecessary duplication.[23] In this respect, the Necessary and Proper Clause, which has been interpreted as a significant grant of authority, is much like the Tenth Amendment, which has withered to virtual meaninglessness, in that both are mere

"truisms"; both are additional assurances of principles already implicit in the Constitution.

Not only are important constitutional principles frequently implicit, but sometimes explicit principles are in fact given negligible enforcement. For example, the Second Amendment right to keep and bear arms has never had significant impact, nor has the requirement that the President seek "the advice and consent" of the Senate, nor the explicit guarantee to the states of a republican form of government.

A willingness to interpret constitutional provisions vigorously depends upon a combination of factors far more complex and uncontrollable than the degree of explicitness in the text. Unless these factors change, altering constitutional language cannot be expected to improve the judiciary's enforcement of the principle of federalism. Suppose, for example, that the following provisions were added to the Constitution:

> Congress shall make no law, nor shall the Courts make any ruling, pursuant to Article 1, Section 8, Paragraph 3 of the Constitution, restricting the power of any state unless such law is expressly and explicitly for the purpose of regulating the free flow of commerce among the several states or with foreign nations, or preserving or strengthening national markets of exchange.[24]

The evident sense of this provision is to prevent the enactment of federal laws that are only remotely related to interstate commerce. However, the addition of such words to the Constitution would not change the facts of economic interdependency. It would remain true that wage levels and working conditions in coal mines or in state office buildings have a significant relationship to interstate commerce. Unless the Court were willing to overlook this reality, the most likely effect of this provision would be simply to require that Congress provide specific statutory findings and declarations that its regulations were for the purpose of regulating commerce. Such findings would satisfy the literal meaning of "expressly and explicitly."

Of course, the Constitution might be altered in other ways. For example:

> Congress shall make no law abridging the freedom of the people of the several states to govern their own affairs, provide for a constitution and laws, raise revenue, secure public employees, regulate commerce within the state, and exercise all other powers necessary and proper to promote the general welfare. Nothing in this article shall be construed to restrict the power of the Congress to enforce the provisions of this Constitution.[25]

The last sentence of this proposal is necessary because without it, the provision would conflict with the Supremacy Clause, and no one supposes that modern realities would permit a conversion of the United States into a confederacy. However, once the last sentence is added, the amendment could be construed to permit the same degree of national authority over taxing, spending, and commerce as now exists. Despite the heady connotations of the phrase "Congress shall make no law abridging . . . ", states would be immune from federal regulation only to the extent that the restriction could not be shown to be related to commerce (or some other enumerated power), a demonstration that would be as easy after the amendment's adoption as it is now. The amendment might, nevertheless, be thought useful because it itemizes essential components of the states' governmental status; however, that status is protected by the design of the existing constitution. To the extent that courts are now unwilling or unable to protect the governmental status of states, the addition of these few words—as modified by the last sentence—cannot be expected to change their inclinations.

Of course, as is true with respect to changes in judicial doctrine, it is impossible to prove that there could not be significant changes in constitutional language. Nonetheless, it should be sobering to remember that the absolute language of the First Amendment did not precipitate any important judicial enforcement for over a hundred years[26] and that the enforcement that did begin in this century bears little relationship to the intentions of the proponents of that amendment.[27]

Interpretation and the Record of Enforcement

A third basis for the view that the principle of federalism is defective as presently expressed in the Constitution is the unsuccessful record of enforcement. Under this view, there is no necessary reason to pinpoint any specific cause of the defect in the constitutional design; it is sufficient to note that judicial interpretations have never for long prevented the inexorable expansion of national power at the expense of the states. Some go so far as to decree federalism a dead or dying principle.

There is no question that the history of judicial interpretation of the principle of federalism has been a sorry one. Moreover, it is also true that the powers of the national government have grown, sometimes alarmingly. Neither of these observations, however, demonstrates that the constitutional principle of federalism embedded in the logic of that document is defective. After all, states as geographic and political governments have existed continuously in the United States from the beginning. Moreover, these govern-

ments have, almost without exception, had essentially "republican" characteristics. They have all exercised significant governmental functions, including legislation, administration, and adjudication. They have all been pervasive influences in the lives of their citizens. In addition to discharging these generalized functions of governments, the states have also continued to perform specialized functions contemplated in the Constitution; for example, they have played a role in amending the Constitution, in electing the President, and so on. The existence of state governments (including their subsidiary units at the municipal level) has provided countless citizens with opportunities to participate directly and meaningfully in the government of their affairs. This is not a history of a failed constitutional principle. Indeed, federalism is unappreciated partly because it has been such a continuous success that it is taken for granted.

It is true that judicial interpretation has had little to contribute directly to this success.[28] However, a constitutional principle cannot, as a general matter, be considered defective merely because its implementation has not depended upon the judiciary. It is also true that, despite the success described here, power has shifted to the national government over the years. Yet even unfortunate shifts in the balance of power between the national government and the states do not support the conclusion that federalism has been a failure unless federalism is assumed to require some certain, permanent distribution of power.

Federalism as Nonjusticiable

If federalism has been important without any assistance from the judiciary, it might be thought to be a defective constitutional doctrine in a special and limited sense. It might be inherently an insignificant principle insofar as judicial enforcement is concerned. That is, the principle is not defective because unimportant, but because, unlike other important constitutional principles, it has characteristics that make judicial enforcement either negligible or impossible. This view admits that the Tenth Amendment represents a significant principle regarding the continued existence of state governments and even that this principle has been important throughout the country's history. But it insists that the principle is too vague to permit specific inferences of the sort that courts routinely make in the process of adjudicating particular disputes. Under this view, in short, nothing specific and determinate can be fairly inferred from the guarantee that states shall enjoy governmental status.

To the extent that a written constitution embodies only general principles, its application in highly specific circumstances may well seem implausible, especially as time passes and conditions change. Grand principles may have no clear operational import for the kinds of specific circumstances raised and litigated in normal cases. However, critics of the constitutional principle of federalism do not normally suppose that they are attacking the general feasibility of the idea that courts can apply and interpret constitutional provisions in particular cases. In fact, these critics normally contrast the defective nature of the principle of federalism to other kinds of constitutional provisions (chiefly those concerning individual rights) that are thought to be eminently adaptable to enforcement through application in specific cases.[29] Thus the issue is not the general implausibility of the enterprise of judicial review; the issue is whether there is some specific implausibility attaching to that enterprise when it involves the principle of federalism. What is it about the principle of federalism that is thought to make it especially and particularly inappropriate for judicial enforcement?

One putative difference between federalism and constitutional rights is that federalism is not a matter of "principle." Insofar as federalism is aimed at achieving governmental efficiency or some other practical objective, it is thought to be different from those constitutional rights that are defined independently of social utility or practicality. However, it is undeniable that judicial interpretations of individual rights are frequently influenced by practical considerations and therefore, as an empirical matter, cannot be viewed as pure matters of principle. Moreover, it is altogether unclear why federalism, defined as a constitutional principle requiring that states continue to exist as governmental units and be permitted to perform certain functions within the constitutional design, is to be applied only in terms of immediate social utility.

Alternatively, it is thought that even if federalism is a matter of principle in the same way (and to the same limited extent) as matters of individual rights, federalism is so general a principle that specific applications are not feasible. For example, some observers emphasize that a vast array of power allocations are consistent with the simple requirement that states continue to exist as governments. This fact, however, does not in reality distinguish the principle of federalism from the various individual rights that are given such vigorous judicial protection. A vast array of political and social circumstances are consistent with, for example, the principle of freedom of speech. This array extends from a totally unrestrained marketplace of ideas to the kind of highly regulated circumstances found in public broadcasting. In its own way, each opposite model is consistent with significant aspects of the ideal of freedom of speech. In an era in which it is

common to deduce specific individual rights from such general considerations as "personhood," or "minimal standards of human decency," or "democratic accountability," it is odd, to say the least, to claim that notions like "sovereignty" or "governmental status" are too general to support concrete applications.

Some critics of judicial enforcement of federalism contend that the principle is distinctive in that nothing short of an altogether improbable event is plausibly linked to protecting the governmental status of the states. These critics acknowledge that the elimination or destruction of state governments by the national government would violate fair inferences from the Constitution. However, they point out that the destruction of the states is highly unlikely in contrast to threats to individual rights like freedom of speech, which are commonly seen to be not only likely, but frequent. This argument confuses a sense of the conventional with justification. Certainly, aid programs to parochial schools or defamation laws are customarily thought to be potential threats to the underlying values of the First Amendment. However, it is certainly debatable whether the kinds of inroads that these laws represent are serious threats to the principle that there will be no established national religion or to the preservation of an overall system of free expression.[30] At the very least, the gradual and discrete whittling away of the authority and sovereignty of the states that can be seen in the growth of the national government might represent at least as serious a threat to the underlying values represented by the principle of federalism. Although specific inferences from the constitutionally guaranteed governmental status of the states are certainly controversial, so are the inferences and applications that surround litigation regarding other constitutional provisions.

NONINSTRUMENTAL INTERPRETATION

To illustrate the kinds of inferences from the principle of federalism that are plausible, it is necessary only to analyze the issue at stake in *National League of Cities*. The case involved the extension of the minimum-wage and maximum-hours provisions of the *Fair Labor Standards Act (FLSA)* to state and local employees. What is fairly inferable from the general constitutional principle of federalism with respect to this specific dispute?

The general principle at issue, as articulated in relevant constitutional provisions including the Tenth Amendment, is that states should exist as governments. Moreover, the history behind the compromises that forged this principle indicates that state governments were to exist in order to prevent the new and strong national government from degenerating into a centralized tyranny.[31] The fears of the Anti-Federalists were answered by assurances that, because the states would continue to exist, fears of over-centralization were unfounded. States, acting as competitors for the loyalty of the citizenry, would act as a "counterpoise" to national power. The relevant text and history, to be sure, do not suggest an inflexible distribution of regulatory powers as between national and state authority. But they indicate that the new national powers to regulate commerce and to tax and spend would not be employed in such a way as to undermine the fundamental preconditions for competition between governments.

Like the preconditions for such rights as free speech, the preconditions to legitimacy, or to governmental status, are debatable. However, since the principle of federalism was richly elaborated by the framers, it is possible to draw on their thinking as expressed in, for example, *The Federalist*. Governmental status, naturally, requires a capacity to inspire citizen loyalty by way of the kind of symbolism common to all governments. Moreover, although there is no regulatory area that *a priori* can be thought essential to governmental power, governments cannot inspire affection, support, or participation unless significant areas of regulatory authority exist. This regulation, of course, must be carried out by way of some discernible apparatus. The design and history of the Constitution plainly indicate that, although the powers of the national government would be important and expansive, the residual authority reserved to the states would be general and would involve the government in regulatory matters of every day importance in the lives of the people. Governments must also have the authority to organize subsidiary decision-making units. The appropriate delegation of authority is not only essential to the formulation of effective policy that can gain the respect of the citizenry, but also enables governments to achieve appropriate levels of citizen participation and thus loyalty and commitment to the government. The framers rather plainly anticipated that states would have special advantages over the national government with regard to local citizen participation and interest. Finally, in order to compete with other governments as contemplated by the principle of federalism , governments require the capacity to communicate formally (through the enunciation of official rules, legislation, or judicial decrees) and, of course, to deliberate as an official decision-making unit. Even when policies cannot be implemented (as, for example, when state policies conflict with paramount federal policies), the state governments must be free to

deliberate about issues and enunciate policies that might stand as potential alternatives to the policies adopted by the national government.

Although none of the inferences described above is beyond dispute, none would be considered farfetched by any general observer of governments or by any reader of *The Federalist*. The inferences can be applied to the dispute over the constitutionality of the extension of the *FLSA* to state and local employees. As the Court argued in *National League of Cities*, federal control over the wages and hours of state employees plainly involves national control over a state governmental apparatus. This apparatus, as much as flags and capitols, represents the government to the people. Therefore, the symbolism of a government unable to control the pay or working hours of its own employees is the symbolism of impotence rather than sovereignty. In addition, national control over the wages and hours of state employees, while it does not preempt any particular areas of state regulation, exposes all areas of state regulation to federal intrusion. This is so because virtually any regulatory power exercised by the state would have to be carried out by employees whose working conditions and loyalty are significantly controlled by the national government. Thus, the *FLSA* compromises the capacity of states to function as general, residual regulators with a pervasive, intimate influence on the lives of their people. As the Court noted, this federal intrusion into state regulatory authority extends to traditional functions like police and fire protection—functions that have grown by years of association to have a high degree of identification with governmental status.

In *National League of Cities*, the Court also specifically disapproved the extension of the *FLSA* to municipal employees as well as state employees. In this, the Court recognized that the organization of local governments is essential to the legitimacy and competitive capacities of the states. Moreover, the Court's emphasis on insulating "essential" governmental functions, like setting wages, by implication insulates the formal communicative and deliberative functions of state governments. Even the national government itself conceded shortly after *NLC* that the decision appeared to immunize the states' authority to issue formal regulations.[32] In all these ways, *NLC* applied the theory represented by the Tenth Amendment. In a specific dispute, the Court attempted to protect the preconditions for competition between governments.

It is, nevertheless, possible to doubt whether federal control over the incentives and working conditions of state employees would in fact undermine the capacity of states to compete with the national government even in the long run. It may be that despite the *FLSA*, states will retain control over and identification with their employees. In this respect it is useful to compare the much discredited opinion in *NLC* with two of the most respected opinions of the Court. In *Brown* v. *Board of Education*,[33] the Court declared racially segregated schools to be unconstitutional on the ground that separate schooling inherently resulted in inferior education for black students. In *New York Times* v. *Sullivan*[34] the Court overturned the defamation laws in every state on the ground that, as applied to criticism of public officials, these laws created an "atmosphere [of fear and timidity] in which First Amendment freedoms cannot survive." The crucial finding in *Brown* was based on highly controversial social science data, now generally viewed as unsophisticated and doubtful.[35] The central claim in *Sullivan* was based on nothing more than a supposition that the threat of damage awards might deter publication; the Court apparently felt under no obligation to test its claim against the history of relatively robust public debate that had somehow coexisted with traditional defamation rules for most of the nation's history.

In important matters involving vague, long-run, or otherwise immeasurable issues, courts—like other public decision makers—cannot be expected to prove the empirical assumptions that underlie their decisions. The Court's effort in *NLC* to identify some preconditions to governmental legitimacy was at least as serious and justifiable as were the Court's efforts to identify the preconditions for equal protection and free speech in two of its most celebrated cases. The skeptic who rejects *NLC* on the ground that the intuitions on which it was based are implausible must be prepared to reject much of the Court's modern work-product, including many of its most heralded cases.

Although *National League of Cities* is at least as plausible, as constitutional interpretation, as cases like *Brown* and *Sullivan*, it is different from them. In individual-rights cases, the Court's purpose includes not only intangible, but also concrete, objectives. In *Brown*, for example, the Equal Protection Clause was interpreted primarily to achieve the largely immeasurable objective of altering the attitudes and self-images of black students. Similarly, in *Sullivan*, a part of the Court's role was to teach the public a complicated and counterintuitive theory of free speech. However, in any question regarding individual rights the Court is obliged to articulate the right and to enforce it in such a way that every person has the benefit of the legal entitlement. The concomitant insistence on "actualizing" rights in the real world naturally focuses judicial attention on matters of concreteness and measurability. For this reason, the right to "equal protection of the laws" has become largely a matter of assuring adequate ra-

tios of different races in various public schools; similarly, constitutional rules regarding defamation have become a detailed, almost statutory, effort to control disincentives to publication. The same is true in many areas of rights enforcement. For example, the prohibition against cruel and unusual punishment has been enforced by decisions based on counting the number of square feet in prison cells and defining the education certifications of prison dieticians. These decisions, to be sure, strive for intangible objectives, but are also meant to alter the world in concrete ways.

Like *Brown* and *Sullivan*, *National League of Cities* was concerned with intangibles. It sought to maintain preconditions for competition that involved certain perceptions, attitudes, loyalties, and understandings. The decision was didactic. However, *NLC* was different from cases like *Brown* and *Sullivan* in that individuals, as holders of rights, were not involved. The moral imperative that a legal entitlement be consistently and demonstrably actualized is missing in cases that involve the principle of federalism. It is intolerable (or inconsistent with the concept of a right) that any black student be denied equal protection of the law. It is not intolerable (or inconsistent with the structural principle of federalism) that the understandings and values that underlie competition between sovereigns be achieved unevenly and imperfectly. Federalism is not a static, measurable state of affairs; it is a fluid system that needs to be maintained over time, and only roughly.

Nevertheless, the judicial emphasis on uniform and concrete applications so closely associated with the enforcement of rights has influenced the Court's efforts to enforce the principle of federalism as well. The history of judicial failure with respect to interpreting the principle of federalism is traceable to the resulting inability to recognize the limited and special judicial role involved with questions of federalism. The pre-1937 cases that attempted to distinguish between local activities, such as agriculture, and national activities, such as interstate commerce, were designed to create a static and tangible division of power between state and nation.

National League of Cities was an unusual effort by the Court to treat federalism as a process rather than an edifice. The opinion consisted of a series of suggestive phrases (e.g., "the essential role of the states in our federal system"), analogies (e.g., to a federal tax on a state capitol), and contrasts (e.g., to the federal regulation of private citizens). The Court never attempted to complete or schematize its explanation because the nature of the constitutional principle at stake was essentially intellectual and would not require uniform, systematic implementation. Within a few years, however, the Court converted the unclosed but indicative opinion in *NLC* into this rigid formula:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "states as states." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the states' compliance with federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."[36]

This set of "tests" resembles administrative rules because, like such rules, it was designed to enforce concrete alterations in the world.[37] It is not surprising that in *Garcia* the Court found aspects of this formula deficient; the pre-1937 Commerce Clause decisions had already made abundantly clear that rigid, instrumentalist interpretations of the Commerce Clause would prove unworkable. In *Garcia* the Court simply rediscovered the inappropriateness of instrumentalist habits of thought for questions of federalism. Unfortunately, the *Garcia* Court failed to understand the potential in *NLC*'s noninstrumentalist, didactic style of interpretation for maintaining, at least minimally, some of the intangible preconditions for competition between governments.

To the extent that the instrumentalism rejected in *Garcia* is a byproduct of the Court's role in enforcing individual rights, *Garcia* inadvertently and ironically illustrates why the judiciary is not well suited to enforce the principle of federalism. Judges' mental habits are formed by their absorption in matters of individual rights, and therefore judicial decisions requiring more communicative skills are unlikely. Thus, decisions such as *National League of Cities* are not only rare, but can be expected to be quickly converted into inappropriate and unrealistic efforts to treat federalism analogously to matters of individual rights.

Neither improvements in doctrine nor improvements in the animating constitutional text will be sufficient to improve judicial enforcement of the principle of federalism unless the confining intellectual perspective that has developed along with the Court's duty to enforce individual rights is discarded. A modest but useful interpretive function is possible. However, because this function involves fuller appreciation for the Court's noninstrumentalist role, it requires substantial modification of ingrained assumptions about the purposes of constitutional interpretation and the nature of good judicial opinion-writing.

ENDNOTES

[1]105 S. Ct. 1005 (1985).

[2]A clear example is William Van Alstyne, "The Second Death of Federalism," *Michigan Law Review 83*, p. 1709 (1985). Other examples include Howard, "*Garcia* and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles," *19 Georgia Law Review* 789 (1985); and Rapaczynski, "From Sovereignty to Process: The Jurisprudence of Federalism after *Garcia*," *1985 Supreme Court Review* 341. I do not use the word "mainstream" to suggest that most legal scholars disapprove of *Garcia* but to emphasize the respectable lineage of this type of criticism; see Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *73 Harvard Law Review* 1, 23-24 (1959).

[3]426 U.S. 833 (1976).

[4]A forthright example of constitutional criticism is an information report of the Advisory Commission on Intergovernmental Relations, *Reflections on the* Garcia *Decision and its Implications for Federalism*, M-147, (1986). Although Jesse H. Choper does not propose altering the constitutional text, he argues that the judiciary should not enforce Tenth Amendment limitations on the commerce power because of the nature of the constitutional principle at stake. Choper, *Judicial review and the National Political Process* (Chicago: University of Chicago Press, 1980). This position is also reflected in judicial descriptions of the Tenth Amendment as a mere "truism." See, e.g., *United States v. Darby*, 312 U.S. 100, 124 (1941).

[5]Van Alstyne, "The Second Death of Federalism", p. 1711.

[6]Wechsler, "Toward Neutral Principles of Constitutional Law," pp. 23-24.

[7]379 U.S. 294 (1964).

[8]See Rapaczynski, "From Sovereignty to Process."

[9]*Wisconsin* v. *Yoder*, 406 U.S. 205, 215-16 (1972).

[10]With respect to the Establishment Clause cases, the Court (perhaps understanding the matter) has frequently acknowledged that the Justices themselves "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area . . . ." *Mueller* v. *Allen*, 463 U.S. 388, 393 (1983). The Justice who first proposed the constitutional standard for defining obscenity now argues that all such efforts have been intolerably vague. *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, 73, 83-85 (1973) (Brennan, J., dissenting). Justices O'Connor and White have forcefully argued that the Court's emphatic distinction between the second and third trimesters of pregnancy is utterly senseless for the purpose of defining the importance of a state's interest in protecting potential life. See *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, (O'Connor, J., dissenting) (1983); *Thornburgh* v. *American College of Obstetricians*, 106 S. Ct. 2169 (White, J., dissenting) (1986).

[11]*Carter* v. *Carter Coal Co.*, 298 U.S. 238, 307 (1936).

[12]*Ibid.*, p. 308.

[13]U.S. Bureau of the Census, *Statistical Abstract of the United States: 1986*, pp. 294, 390 (106th ed. 1985).

[14]247 U.S. 251 (1918).

[15]For an analysis of the negative economic effects of racial discrimination see Gary Becker, *The Economics of Discrimination*, 2nd ed., (Chicago: University of Chicago Press, 1971), pp. 6, 19; or J. Hoffman, *Racial Discrimination and Economic Development* (1975), pp. 4-18.

[16]It is noteworthy, though, that recent doctrinal proposals have been sketchy and modest. See Van Alstyne, "The Second Death of Federalism," and Rapaczynski, "From Sovereignty to Process," pp. 414-18.

[17]ACIR, *Reflections on* Garcia *and its Implications for Federalism*, p. 7.

[18]Clinton Rossiter, *1787: The Grand Convention* (New York: Macmillan, 1966), p. 297: "The Federalists also won because . . . they showed good judgment in distinguishing the possible from the unacceptable . . . . By adding any one of a half-dozen techniques and arrangements to their Constitution . . . [such as] judicial review . . . the Framers might have tipped the delicately balanced scale of opinion against their cause."

[19]*The Federalist 48*, (E. Bourne ed. 1901), p. 338.

[20]Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969), p. 16.

[21]17 U.S. (4 Wheaton) at 316 (1819).

[22]See Black, *Structure and Relationship in Constitutional Law*, p. 14.

[23]17 U.S. (4 Wheaton) at 414.

[24]ACIR, *Reflections on* Garcia *and its Implications for Federalism*, p. 36.

[25]*Ibid.*, p. 44.

[26]See Rabban, "The First Amendment in Its Forgotten Years," *90 Yale Law Journal* 514 (1981).

[27]For an account of the limited purposes originally envisioned, see Leonard Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1963).

[28]For an argument that this has been true with a number of important constitutional provisions, see Nagel, "Interpretation and Importance in Constitutional Law: A Re-Assessment of Judicial Restraint," in *NOMOS* XXV, J. Roland Pennock & John W. Chapman, eds., *Liberal Democracy* 181 (1983), p. 181.

[29]See, e.g., Choper, *Judicial Review and the National Political Process*.

[30]See, e.g., Nagel, "How Useful is Judicial Review in Free Speech Cases," *69 Cornell Law Review* 302 (1984).

[31]Historical references for the argument sketched here can be found in Nagel, "Federalism as a Fundamental Value: *National League of Cities* in Perspective," *1981 Supreme Court Review* 81.

[32]*EPA* v. *Brown*, 431 U.S. 99, 103 (1977).

[33]347 U.S. 483 (1954).

[34]376 U.S. 254 (1964).

[35]See Nancy St. John, *School Desegregation: Outcomes for Children* (New York: Wiley, 1975), pp. 16-41; Paul L. Rosen, *The Supreme Court and Social Science* (Urbana: University of Illinois Press, 1972), p. 186.

[36]*Hodel* v. *Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264, 287-88 (1981).

[37]On the connections between a "formulaic" style and the Court's functions, see Nagel, "The formulaic Constitution," *84 Michigan Law Review* 165 (1985).

Chapter Four

GARCIA, CONSTITUTIONAL RULE, AND THE CENTRAL-GOVERNMENT TRAP

Vincent Ostrom

TRAPPED: "Man is born (to be) free, and everywhere he is in chains. One who believes himself the master of others is nonetheless a greater slave than they."

J. J. Rousseau[1]

INTRODUCTION

The United States Supreme Court rendered a decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*[2] on February 19, 1985. At issue was a question of whether wage and hour provisions of the *Fair Labor Standards Act* applied to employees of the transit authority or whether the transit authority as an instrumentality of a state was immune from Federal regulation under the Commerce Clause of the U.S. Constitution granting authority to the Congress to regulate commerce "among the several states." The majority opinion prepared by Justice Harry A. Blackmun held that the *Fair Labor Standards Act* applied to the transit authority.

The essential thrust of this decision is not unlike many other decisions regarding the application of national legislation to instrumentalities of state and local governments. What is different is that this decision became an occasion for justices of the Supreme Court to review efforts to establish criteria with reference to the Commerce Clause, in light of the Necessary and Proper Clause and the Tenth Amendment powers "reserved to the states respectively, or to the people." Justice Blackmun, speaking for the Court, could find no criteria that can be used to place discrete limits upon substantive powers that apply to the scope of Federal authority under the U.S. Constitution. The language assigning Congress power to regulate commerce among the several states has been extended to include that which affects or is affected by interstate commerce. So long as that interpretation of the Commerce Clause is used, the powers of the Congress potentially apply, so far as I can understand, to any and all aspects of American society.

In light of these circumstances, Justice Blackmun concludes that the framers of the U.S. Constitution "chose to rely on a federal system in which restraints on [F]ederal power over the states inhered principally in the workings of the National Government itself, rather than in discrete limitations upon the objects of [F]ederal authority. State sovereignty interests, then, are more properly protected by procedural safeguards inherent in the structure of the [F]ederal system than by judicially created limitations on [F]ederal powers."[3]

Specific limitations upon the authority of Congress and upon the states as reflected in the first eight amendments and the 13th, 14th, and 15th amendments would presumably be subject to adjudication. Otherwise, Justice Blackmun can be construed as advancing an argument that the scope of substantive powers of the national government are not subject to adjudication in establishing limits to national authority. Rather, such limits are reflected by "federal" aspects of the structure of the national government that includes reference to states in establishing modes of election, patterns of representation, and membership in Congress, and in electing the President. The way these structures work in the political process is presumed to yield an appropriate set of safeguards. The states and localities can rely upon the structures and procedures of the national government to safeguard their interests. The courts need not and cannot construe limits with reference to the substantive powers of the national government.

Whether *Garcia* becomes only a minor case in American constitutional jurisprudence depends upon how it is construed. So long as the conceptualizations of law and the workings of government which have prevailed in the 20th century are relied upon, the case is of only minor importance, deserving recognition only as a footnote in the continuing nationalization of the American system of government. If, however, the general theory of limited constitutions originally used to design the American federal system of government were relied upon, *Garcia* would be seen as a case where the Supreme Court took an explicitly articulated step toward abandoning constitutional jurisdiction with reference to the substantive powers of the national government.

These ambiguities about interpretation arise from 19th and 20th-century traditions of facade-smashing that became an important mode in the study of law and government.[4] The task of the analyst was to understand the realities of power relationships rather than to be diverted by facades, formalities, and pageantry. Constitutions came to be viewed as formalisms which decorated the facade of politics and concealed fundamental realities. Similarly, theories used to conceptualize and design the structures and processes of government were viewed as "literary theories" and "paper pictures" that have no effective relationship to political realities. Facade-smashing became an integral part of the mode of inquiry pursued by legal and political realists in the 19th and 20th centuries. What self-respecting scholar would devote himself to the study of facades when the fundamental task of science is to understand reality?

There is, however, a basic question of whether human beings, to some significant degree, create their own social realities. Human societies might then be viewed as artifactual in nature. Conceptions used to characterize and to create patterns of social relationships may then be elements of fundamental importance to understanding social realities. An artifact requires reference to the conceptions, intentions, and skills used by those who fashion it, even when those artifacts are consciously ordered patterns of human relationships. Human creations require an account of human cognition, intentionality, and technique if the realm of the artifactual is to be understood. Such conceptions are fundamental to the use of law to achieve patterns of order and change in modern societies. Can such principles also be applied to systems of governance, or are all governments essentially autocratic, subject only to autonomous self-rule of those who exercise leadership prerogatives?

If we use the method of the cultural sciences—a method best exemplified by Alexis de Tocqueville—instead of the method of the natural sciences relied upon by legal and political realists, we would seek to understand design concepts in relation to intentionality. We might then come to understand how theory was used to specify relations between conditions and consequences such that some potentials might be realized and others foreclosed. Any artifact also has the potential for functioning as an instrument or as a tool. The design concept may be faulty and the instrument may not work in the way that it was expected to work. But, such a judgment requires an understanding of how the instrument was intended to be used with a knowledgeable understanding of both capabilities and limitations.

From this point of view, a constitution might be viewed as crudely equivalent to a set of drawings or blueprints specifying essential structural features in assigning the powers and limitations that establish the terms and conditions of government. Explanations of how a design is expected to work provide us with basic concepts in the theory of design.[5] Constitutions need not be dismissed as mere formalisms, and the theories used in their design need not be treated as "literary theories" or "paper pictures." Rather, they provide the essential ingredient for understanding how a system of government is intended to work.

A great difficulty arises in considering the artifactual character of systems of governance because, as Thomas Hobbes noted in the 17th century, human beings are both the principal "matter" and the designers of institutions of government.[6] Each human being, who is a cog in social machinery, so to speak, is able to think for him or herself and act with some measure of independence. Occasions can be expected for both misunderstandings and temptations to arise so that the machinery of government works differently than was intended. Whether the fault lay in design errors, in the misunderstanding of individuals who act as cogs in the works, or in the temptations to enjoy unintended benefits, these problems need to be construed in light of the design theory and of how to cope with those respective problems. We, thus, have many different levels of analysis that must be brought to bear in diagnosing problems of institutional weaknesses and failures and in conceptualizing alterations in design and modifications in structure.

The perspective taken in this essay is to assume that Alexander Hamilton and James Madison were drawing upon a theory of design in offering an explanation both of a federal system of government and of

a limited national government as these bore upon the basic structure articulated in the U.S. Constitution. I assume that Hamilton, in the opening paragraph of *Federalist 1*, was raising a basic question of political artisanship when he asked "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."[7] Political constitutions can be created: (1) by the use of force; (2) by some combination of trial and error, historical happenstance, the pulling and hauling of social forces, and human caprice; or (3) by design considerations derived from reflection and choice.

The last option would suggest that human beings might have recourse to processes of constitutional deliberation and choice where designs could be articulated in the language of law as allocations of authority setting the terms and conditions of government. Those allocations of authority would then function as basic rules—as fundamental law—that apply to the conduct of government itself. To be effective, such rules must relate to authority being assigned in such a way that the rules can be enforced. This requires a very special structure where all exercises of authority are limited—where no one, including individual persons, is devoid of some essential authority to govern, and no one, including governmental officials, is capable of exercising unlimited authority.[8] These are difficult conditions to meet, but they establish the basis for conceptualizing a general theory of limited constitutions appropriate to a federal or compound republic.[9] The basic logic of such a constitutional formulation was worked out by the American federalists drawing upon the prior contributions of Locke, Montesquieu, Hume, and others. A both sympathetic and critical account of how the system worked was provided by Tocqueville. Contrary formulations were advanced by Hobbes, Bentham, Austin, Bagehot, Wilson, and Goodnow.

Hamilton's conjecture about establishing good government from reflection and choice has its complement in the observation that Tocqueville made in the concluding paragraph of his first chapter in *Democracy in America*.

> In that land (America) the great experiment of the attempt to construct society on a new basis was to be made by civilized man; and it was there, for the first time, that theories hitherto unknown, or deemed impracticable, were to exhibit a spectacle for which the world had not been prepared by the history of the past.[10]

The American experiments in constitutional choice were based upon quite different conceptions than had been used in constituting other systems of governance to that point in time, and these conceptions, when acted upon, "were to exhibit a spectacle for which the world had not been prepared by the history of the past."

I construe a general theory of limited constitutions to mean that people as citizens exercise basic prerogatives of governance through processes of constitutional decision making. Constitutions are the fundamental laws establishing the terms and conditions of governance. If sovereignty is defined as the authority to make laws, as Tocqueville does,[11] then people exercise basic sovereignty through processes of constitutional decision making to establish and alter fundamental law. State governments, national governments, and other instrumentalities of government may under national and state constitutions and local charters exercise a derivative "sovereignty." People in their individual capacities may also "legislate" by binding themselves in enforceable contractual relationships. The whole process can be viewed as one where the members of a society enter into binding contracts, compacts, or covenants, in constituting structures for the governance of diverse communities of relationships where all structures of government are subject to the limits of fundamental laws. The radical nature of the American experiments in constitutional choice can be appreciated only if we recognize that it yields a system of governance where *a society* can be said to be self-governing, rather than having recourse to an autonomous and autocratic state that rules over society.

The usual definition of a state as a monopoly of the use of force in a society implies that the exercise of coercive capabilities in a society resides in a single center of ultimate authority that rules over society. Monopoly implies one center of power, and the existence of one ultimate center of power implies, in some basic sense, that it is unlimited, absolute, and indivisible. These are the attributes that are associated with Hobbes' theory of sovereignty, and these attributes are presumed to exist wherever government is organized in relation to some single source of ultimate authority. A logical derivation from such a theory of sovereignty is that a sovereign is the source of law, is above the law, and cannot be held accountable to law. Government is itself autocratic (i.e., subject to self-rule: auto = self; cratic = rule). These statements assume that a single sovereign as ruler is beyond the reach of law and, in some fundamental sense, stands as an "outlaw" in relation to the rest of society.

We, thus, have fundamentally contradictory conceptions that apply to differently conceived experiments in constitutional choice. One set of conceptualizations views sovereignty as being unitary in nature where government is a monopoly of the ultimate law-

making authority and the exercise of coercion in a society. The sovereign rules over society. On the other hand, a general theory of limited constitutions views a shared understanding and agreement about the basic terms and conditions of government as being necessary to a democracy where the people rule and where the terms and conditions can be reiterated for many different units of government in which all exercises of authority are limited and no one exercises an unlimited plenitude of authority.

It is this general theory of limited constitutions that is the source of the Supreme Court's authority to adjudicate controversies arising under the U.S. Constitution. As Hamilton pointed out in *Federalist 81*, "there is not a syllable in the plan under consideration [the U.S. Constitution] that *directly* empowers the national courts to construe the laws according to the spirit of the Constitution."[12] The doctrine of judicial jurisdiction with reference to constitutional matters is derived from the general theory of limited constitutions rather than any specific provision of the U.S. Constitution as such.

If human beings are to establish governments and govern by reflection and choice, it becomes necessary to specify the conceptions that are used to inform human decisions, actions, and judgments. In what follows, I shall examine the Blackmun doctrine with regard to Madison's analysis in *Federalist 39*, which closely parallels Blackmun's argument. There are basic puzzles in fashioning Madison's conjectures into a definitive and plausible legal doctrine.

Anomalies also arise from the Blackmun doctrine because we have difficulties in coming to terms with what we mean when we refer to something called "government." Does "anything go" for that which bears the nomenclature of "government"? Are governments inherently autocratic (self-ruling) in nature? If not anything goes, then what is that shared body of common understanding that people use in determining whether something called "government" meets criteria of propriety and legitimacy?

In a following section, I shall briefly refer to the tie between electoral arrangements, modes of representation, and collective decisions to indicate the tenuous relationship between voting and what something called "government" does. This, in turn, pertains to a larger issue about the structure of government and the rule of law, which I shall consider in the next section. A further question then arises about what happens when instrumentalities of government are free to reach their own mutual autocratic accommodations in the conduct of something called "government." The thesis I shall advance is that the pursuit of opportunities under such circumstances is likely to yield what I refer to as the central-government trap. People create traps for themselves when, without intending consciously to do so, they seriously constrain their available options.

Finally, in the last section, I shall press the analysis to draw some conclusions about the implications that follow with reference to the future of American society. Human beings are never simple, obedient automata, but always have some potential for thinking for themselves and acting in accordance with the opportunities that are perceived to be available to them. As a result, we cannot predict the future in a definitive way, but we can explore options that may be available. A basic issue is whether those options are consistent with conditions for maintaining a self-governing society.

THE BLACKMUN DOCTRINE AND MADISON'S CONJECTURE IN *FEDERALIST 39*

The Blackmun doctrine about the place of "federal" features in the constitution of the American national government closely parallels an extended analysis made by James Madison in *Federalist 39*. If Blackmun's assertion about the framers of the U.S. Constitution choosing to rely upon a design of a federal system where the restraints on national powers over the states turn principally upon the workings of the national government is to be plausible, the only source, of which I am aware, for such an argument among the framers is Madison's *Federalist 39*. Madison's analysis has been used by some scholars as an authoritative statement of true definitions for distinguishing such terms as "federal" and "national." But there are reasons to dispute this argument, as I have indicated elsewhere.[13]

Federalist 37-51 constitute the core of Madison's analysis with reference to the general features of the U.S. Constitution that apply both to its federal structure and to a general theory of limited constitutions. *Federalist 37* addresses general problems of cognition and epistemology. *Federalist 38* addresses the principal objections that had been made to both how the U.S. Constitution was formulated and particular features of that Constitution. Among the objections were those that pertained to the standing of states and to the standing of individuals in the constitution of the proposed government. Those objections point to the

most fundamental theoretical issue raised about the basic structural modifications made in the design of the U.S. Constitution in contrast to the Articles of Confederation. The issue had been posed by Hamilton in *Federalist 9*, critically addressed in *Federalist 15* and *16*, and further elaborated in *Federalist 17* through *22*. The nub of the issue is whether governments can govern other governments as collectivities, or whether the structures and processes of government must relate to the standing of individuals as persons and citizens. Hamilton's analysis leads him to the conclusion that conceptualizing a government of governments is an absurdity because law cannot be made effective and justice cannot be done under circumstances where governments are the objects of collective action.

In *Federalist 39*, Madison addresses himself to this issue from the point of view being expressed by the objectors to the Constitution who urged that the Constitution should be a confederation of states. In setting the framework for that analysis, Madison takes the position that "to rest all our political experiments on the capacity of mankind for self-government" is the basic presupposition animating the American experiments in constitutional choice.[14] It is this principle of resting all our political experiments on the capacity of mankind for self-government that Madison associates with a compound republic. Each unit in a federal system of government would thus rely upon republican principles in its constitution. Article IV, Section 4, of the U.S. Constitution guarantees a republican form of government. A federal republic, however, is composed of many different republics, including each state as a republic. The question to be addressed in *Federalist 39* is the extent to which the proposed constitution also "ought, with equal care, to have preserved the federal form which regards the union as a confederacy of sovereign states"[15] in addition to adhering to republican forms of organization in the government of the Union. Here, Madison is taking "federal form" as that associated with "a confederacy of sovereign states" (Madison's emphasis). He proposes in the next paragraph to examine the constitution of the proposed government to determine the extent to which it conforms to this conception of federal form "without inquiring into the accuracy of the distinction on which the objection is founded."[16] In other words, Madison proposes to use the language and conceptualizations of the opposition to conduct an analysis of the extent to which the proposed Constitution meets their objections without inquiring into the issue that is the focal point of Hamilton's analysis in *Federalist 15* and *16*.

That analysis is consistent with the Blackmun doctrine that the internal constitution of the national government takes account of "federal form" especially in the constitution of the Senate, in the apportionment of representatives to states in the House of Representatives, and in the allocation of votes in the electoral college by a compound ratio that gives the Presidency a mixed character. Whether these structural conditions are sufficient to safeguard state and local interests is not an issue addressed by Madison because he presumed that the national government was a substantively limited national government subject to the constraint of explicitly delegated powers.

In view of the hypothetical nature of Madison's analysis where he questions the "accuracy" of the conceptualizations used in his analysis of the "federal form" of the national government, Blackmun's argument that "the Framers chose to rely upon a federal system" where the restraints upon national authority with reference to the states are operable principally through procedures that derive from the "federal form" of the national government rather than through the language used in the Constitution to specify the substantive authority of the national government is, in light of *Federalist 39*, in error.

Moreover, Madison categorically says that in the "extent" of its powers, the proposed national government is "federal, not national."[17] Madison's argument in *Federalist 39* thus explicitly includes reference to the limited extent of national powers, enumerated in the text of the Constitution, as one of the attributes of a "federal form."

A further issue is raised as to how words on paper can be expected somehow to preserve a "federal form" within the workings of the national government and maintain the constitutional integrity of a national government as such if similar words on paper cannot be acted upon to limit the substantive powers of the national government. This issue turns, in part, upon the extent to which electoral arrangements and modes of representation function in some determinant way to influence what governments do.

ELECTORAL ARRANGEMENTS, MODES OF REPRESENTATION, AND COLLECTIVE DECISIONS

Elections are of basic importance in a democratic society, but the link between voting and what governments do is a tenuous one. Political experience under state constitutions in the 19th century is sufficient to

indicate that intermediate patterns of organization having to do with political parties and how parties come to function in political processes pose a basic puzzle about the viability of democratic societies and the maintenance of republican form. Broad suffrage in democratic elections is insufficient by itself to safeguard the interests of people in the decisions made by governments. The rise of machine politics and boss rule in the United States during the 19th century is indicative of fundamental patterns of corruption that can occur and have occurred in American historical experience. This problem was explored by Madison in *Federalist 51* in his call for "auxiliary precautions."[18] It was also anticipated by Tocqueville in the 15th chapter, on the unlimited power of the majority, of *Democracy in America*. The issue was treated extensively in the second volume of Moisei Ostrogorski's *Democracy and the Organization of Political Parties*.[19]

The domination of the institutions of government by tightly organized political coalitions operating as political machines and run by "bosses" cannot be resolved by recourse to electoral processes as such. Reform movements sought to throw the rascals out and to elect good men to public office, but reformers were confronted with the same structural problems and coalitional politics in re-electing reform slates. Reformers faded like "morning glories" when confronted with the long-term task of maintaining successful reform coalitions.[20]

These problems were eventually resolved and brought within tolerable limits by *constitutional changes*, mainly in state constitutions, through a variety of measures altering electoral arrangements, instituting direct primary elections in which any maverick could challenge a candidate slated by a machine for a place on the general-election ballot, and through extensive limitations on state legislative authority, including limits that established rights of local self-government and authority for local communities to formulate their own home-rule charters.

Electoral arrangements and modes of representation, as such, are insufficient to *determine* collective decisions. The organization of political parties and coalitions which form slates, win elections, and operate as teams in legislative bodies, also has constitutional significance as basic rules, and those constitutions are likely to be strongly oligarchical in larger legislative bodies where a few in leadership positions dominate the proceedings. There is no assurance that procedural safeguards will guarantee that party leadership will take proper account of constituent interests:

> In every political institution, a power to advance the public happiness involves a discretion that can be misapplied and abused.[21]

Coalitions are organized to enable some who function in collective decision processes to prevail over others in the taking of collective decisions. Under a plurality voting rule, those who muster the larger vote determine the decision. If societies were constituted only on the principle that plurality winners prevail, then we might anticipate tightly disciplined coalitions to predominate. This is a problem that is addressed as "majority faction" in *The Federalist* and in other writings on republican or democratic governance. This is why various constitutional provisions bearing upon equal application of the law, due process of law, and the exercise of potential veto capabilities are as important as aggregation rules indicating the minimal plurality for taking collective decisions. Voting rules, due-process requirements, equal-application rules, and veto capabilities must be viewed as complementary to one another in the design of constitutional government.

Since the Congress is authorized under the U.S. Constitution to make and alter regulations pertaining to the times, places, and manner of holding elections for senators and representatives, except as to the place of choosing senators, there is little to constrain the modification of electoral processes by congressional authority. Changes enacted by the Congress can yield quite different coalitional structures than those that now derive from diverse state constitutional and statutory provisions. The "federal form" of the national government, as such, is not a sufficient basis for determining the place of a national government in a federal system of governance.

If electoral arrangements are only weakly linked to what governments do, how then do we come to terms with principles that apply to structuring the basic instrumentalities of government?

THE STRUCTURE OF GOVERNMENT AND THE RULE OF LAW

Systems of government are potentially operable under many different conditions. One condition is to rely primarily upon fear and to clobber anyone who steps out of line or fails to show proper submissiveness to public authorities. Fear is enhanced by unpredictability, and despotic regimes can make a virtue of arbitrariness whenever submissiveness is lacking. While relationships in such societies are ordered by rules, a

reliable standard other than submissive obedience is lacking, and it is doubtful if such societies can properly be characterized as having a rule of law that is publicly knowable and applied in nonarbitrary ways.

The maintenance of a rule of law depends upon distinguishing the processes of law making and law adjudicating from the processes of law enforcing. The executive instrumentalities that collect taxes, spend money, maintain public facilities and services, and control instrumentalities of coercion in a society constitute an essential core in any system of government, whether democratic or not. Distinguishing structures and processes of legislation from executive processes implies that executive instrumentalities can be bound by publicly knowable rules of law, which set standards that apply *alike*—both to executive and judicial officials in their rule-enforcing and rule-adjudicating functions and to individuals in their rule-using functions. When the application of criminal sanctions requires that an accused be entitled to a trial in a court of law, the application of executive sanctions is held in abeyance until an independent judgment is rendered by an impartial judiciary.

Executive instrumentalities can be made to face limits, both with reference to legislatively established rules and to impartially adjudicated judgments, before sanctions can be applied. This is why it is said that freedom depends upon a rule of law. The operation of distinguishable processes of law making and law adjudicating apart from law enforcing means that standards can be created which are publicly knowable and which allow the performance of officials to be subject to a public dialogue by citizens who have the potential for challenging the exercise of executive authority, relying upon legislative and judicial instrumentalities of government in doing so.

Where a rule of law can be said to exist, the institutions of government are subject to distinguishable structures and processes that pertain to law making, law enforcing, and law adjudicating. Where such distinguishable structures and processes exist, there is a specialization of functions accompanying a division of labor that implies a distribution of authority among differentiable structures and processes. How these structures and processes are both differentiated and linked to one another in a more general process of governance is subject to considerable variation in different systems of governance. The existence of distinguishable legislative, executive, and judicial structures and processes means that authority has been distributed among different structures. Some degree of separation of powers can be said to exist in all societies that maintain a rule of law. These principles also apply to parliamentary systems of government.[22]

The development of distinguishable processes of constitutional decision making and the formulation of constitutions as fundamental law in the American system of government has been accompanied by explicit constitutional formulations pertaining to the organization of legislative, executive, and judicial instrumentalities of government. These assignments of authority are the subject of the first three articles of the U.S. Constitution. The assignment of authority to each instrumentality is, in turn, subject to correlative limits inherent in the exercise of authority by the other instrumentalities of government. By avoiding an explicit doctrine of supremacy, except the supremacy of law, the American constitutional formulation does not violate the basic maxim that no one individual, or no one body of individuals, is a fit judge of his, her, or its own cause in relation to the interests of others. This rule must be violated by any constitution having recourse to a unitary sovereign. This breach of a basic maxim of justice is consistent with the prior observation that a supreme sovereign, as the source of law, is above the law, cannot be held accountable to law, and therefore stands as an "outlaw" in relation to the rest of society.

The general theory of limited constitutions as applied in the American system of governance presumes that residual authority resides in the constitutional authority of the people in each state to establish the terms and conditions of government that apply to each state and to the system of governance within each state. The U.S. Constitution was conceived not as a general and full grant of governmental (plenary) authority, but as one that is subject to an explicit delegation of limited authority. The basic structure of state constitutions also tends to emphasize limits upon the law-making authority of state legislatures. Authority not proscribed, however, is presumed to be within the realm of state legislative prerogatives. Yet, state constitutions abound with limits upon legislatures, including those bearing upon provisions for local self-government. Viewed as a system of constitutional contracts, the structure of state constitutions and the U.S. Constitution are based upon different but complementary assumptions, relating to the basic core and nexus of authority relationships. The core is found in the state constitutions; the federal connections are found in the U.S. Constitution and in local charters as these relate to that core of authority "reserved to the states respectively, or to the people" (Tenth Amendment).

A general theory of limited constitutions also implies, as Hamilton argues in *Federalist 78*, that acts of a legislature contrary to the provisions of a constitution cannot be given standing as law by a judiciary in deciding cases that arise under such circumstances. A

constitution is intended to be fundamental law binding upon the basic exercise of governmental authority:

> No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what those powers authorize, but what they forbid.[23]

The standing of fundamental law in governing the processes of government interposes an additional form of jurisprudence beyond that contemplated in civil or common law and that contemplated in criminal law. Constitutional law turns upon the valid exercise of governmental authority. A governmental act which is invalid has no legal standing. Officials have no entitlement to act contrary to fundamental law, and if any injury were caused while acting contrary to fundamental law, an official, in accordance with the principles of a general theory of limited constitutions, would be individually liable as an ordinary person for a redress of that injury. Individuals cannot act in an official capacity when they act beyond the scope of their authority. They stand accountable and liable as ordinary individuals when acting outside the scope of valid authority.

The crux of the decision in *Garcia* arises from the circumstance that the U.S. Constitution as a legal document presumes that a limited and explicit delegation of authority was being specified in light of a presumption of residual authority residing with the people of the several states. A presumption of limited delegation contains very few specifications of what is forbidden. Most such constraints in the U.S. Constitution have been added by amendments. But this should not mean that persons knowledgeable about a general theory of a limited constitution cannot construe a "constitutional contract," so to speak, in light of the declared intentions of the framers. If the constitutional contract needs to be revised, there are stipulated procedures for doing so.

The authority to regulate "commerce . . . among the several states" was, for example, not conceived to be equivalent to all commerce. Power to provide for the "general welfare *of the United States*" was not conceived as an authorization to appropriate and spend national funds for any and all purposes. A "necessary and proper" clause does not justify any expediency. A necessary condition implies necessity: an objective or purpose cannot be yielded in the absence of a necessary condition. A "proper" condition implies meeting standards of propriety applicable to lawful conduct pertaining to normative distinctions between right and wrong, justice, equality, liberty, and so forth.

The extension of "commerce . . . among the several states" to include "anything that affects or is affected by" interstate commerce is not subject to limitation, as Justice Blackmun recognizes. *Garcia* might have been an occasion for questioning the appropriateness of a standard that extended the scope of the Commerce Clause without limitation and to reconsider whether "anything that affects or is affected by" some relationship or grant of power is a proper way to construe meaning in constitutional jurisprudence. "Anything which affects or is affected by" some grant of power is a much less stringent requirement than "necessary and proper."

The Blackmun doctrine takes the position that the substantive grants of powers (i.e., what is authorized) cannot be limited except where prohibitions (what is forbidden) are stated explicitly. There are relatively few such prohibitions that pertain to the exercise of prerogatives by the legislative, executive, and judicial instrumentalities of government in the U.S. Constitution. The Constitution, exclusive of amendments, does not specify the standards that are applicable to a valid rule of law except to prohibit bills of attainder, ex post facto laws, and a few similar provisions. It is a general theory of limited constitutions that must be relied upon in understanding the relationships of the diverse instrumentalities of the national government either to a rule of law or to a federal system of governance.

THE CENTRAL-GOVERNMENT TRAP

In the absence of specific constitutional prohibitions, what patterns can be expected to occur in the exercise of governmental authority by the instrumentalities of the national government when those instrumentalities are free to determine among themselves the scope of their own authority? A positive analysis is needed to respond to this question. I shall pursue such an analysis to indicate the consequences that are likely to follow when instrumentalities of government in the American national government are assumed to have no limits that apply to the exercise of the substantive powers of the national government or upon an exercise of legislative, executive, and judicial authority in such a national government. The analysis is conjectural. The conjectures seek to clarify implications that would follow from the Blackmun doctrine and its

abandonment of limits inherent in a general theory of limited constitutions.

In the analysis that follows, I assume that all human beings are endowed with virtually unlimited imaginations and with seriously limited capabilities. Rich imaginations fuel large aspirations, but any one individual can achieve relatively little. We attempt to compensate for this disparity by taking advantage of the capabilities of others afforded by the institutional arrangements that exist or can be created through recourse to systems of rule-ordered relationships in a society. Those who exercise the prerogatives of government are also subject to the human condition of rich imaginations and limited capabilities. This condition means that human beings never function as perfectly obedient automata. Instead, we can expect human beings to be always striving, testing limits in light of their own essential interests, and then puzzling about the discrepancy between aspirations and what is achieved.

Law is one way for achieving some degree of open order among human beings. Rules of law are a means of transforming all potential acts into those that are prohibited (forbidden), permitted, and required. So long as norms (i.e., the criteria for distinguishing that which is forbidden, permitted, or required) can be used to order human relationships, sufficient predictability can be achieved by excluding some possibilities and requiring some possibilities while permitting others. The range of opportunity, the degree of openness, and the latitudes of freedom enjoyed by individuals and nongovernmental associations in a society are a function of what is permitted, in contrast to what is either prohibited or required.

Law can variously liberate or bind, as in a trap, depending upon how the domains of the prohibited, permitted, and required are proportioned. If unlimited latitudes of authority apply to those who exercise the prerogatives of government, it is reasonable to expect simultaneous tendencies to extend authority and to shirk responsibilities. Aspiration fueled by rich imaginations leads to more extended commitments followed by inabilities to meet those commitments. This is a perennial problem that applies to all human beings. We can expect that problem to manifest itself in the discharge of legislative, executive, and judicial prerogatives in any system of government. The critical issue bears upon the degree of operable constraints that place limits upon the exercise of governmental authority.

Legislation as Positive Morality

With congressional and judicial relaxation of constitutional standards that apply both to what the Congress may do and to how it may be done, we see a very substantial extension of national legislative authority to more and more exigencies of life in American society. But, this process is accompanied by less and less attention to the qualitative character of legislation. Instead of establishing adequate standards that authorize executive action and simultaneously place limits upon the exercise of executive prerogative by reference to the same standards that apply to the entitlements and obligations of individuals, modern legislation has increasingly taken the form of pronouncing a public goal, granting authority to some executive instrumentality to achieve that goal, and assigning to that executive instrumentality authority to formulate the "necessary" rules and regulations. Fundamental rule-making authority is transferred to the executive.

Several problems arise in the use of such methods in processes of governance. First, the specification of goals is fashioned in morally laden terminology that often obfuscates the tasks that are involved in achieving goals. Legislation takes on more the characteristic of positive morality than positive law, and legislators are likely to trap themselves into a position where critical dialogue in a legislative process appears to oppose moral virtue. Under such circumstances, due deliberation is sacrificed to the celebration of virtue.

Second, goals expressed as positive morality can be viewed as values to be maximized. Happiness, justice, welfare, health, safety, a normal life for the handicapped, the preservation of life, pure water, clean air, and so on, all become values to be maximized without due consideration of the costs entailed. If those costs could be confined to monetary costs, the implications would be serious enough in contributing to an escalation of the monetary costs of government. A willingness to spend any amount of money or effort to prolong lives, for example, can entail extraordinary costs. If we now view all nonmonetary values such that each value justifies maximum effort, we confront circumstances that defy rational choice. This concept of maximizing a multitude of different values also applies to the way that rules and regulations are formulated, leaving people with contradictory requirements.

Third, transferring rule-making authority to executive instrumentalities means that law is no longer formulated by those who face constituents with reference to public matters that acquire their publicness within specifiable communities of relationships. Professional criteria become paramount, instead, reinforcing tendencies toward the maximization of particular values and toward a view that implementation as conceived by enforcers should prevail in relation to those who are subject to the rules and regulations. The looseness of legislative standards, efforts to maximize multiple values, and the professional biases of

administrative rule makers and enforcers yield a view of the essential aspect of rules, among professional administrators, as pertaining to their mandatory quality. The areas of law pertaining to that which is prohibited and that which is required are expanded at the cost of that which is permitted. Individuals find themselves in circumstances where they can exercise less and less latitude in the governance of their own affairs and are increasingly bound by rules that yield absurd, contradictory requirements. Law is equated with command, and the governance of society is increasingly viewed as a command-and-control problem.

Fourth, when legislation becomes positive morality instead of positive law, less attention is given to recurrent circumstances that arise in human societies where patterns of human interaction and the structures of opportunities yield counterintentional or counterintuitive consequences.[24] A specification of goals, other than to indicate intentionality, is insufficient in establishing rule-ordered relationships. One needs to know the character of the counterintentional or counterintuitive relationships that are operable and to proceed in light of a critical awareness of those relationships rather than to assume that naive statements of objectives can be made operable. The formula of "one-man, one-vote" plus majority rule, for example, is an insufficient basis for constituting government in a democratic society. It is more likely to yield majority tyranny and democratic despotism. In like fashion, principles of bureaucratic administration will not suffice to yield a rational legal order, as Max Weber presumed, but can be expected to yield loss of control, distortion of information, goal displacement, and corruption, as the aggregate size of governmental administration increases.[25] The art of legislation and the critical knowledge necessary for effective legislation is instead abandoned to preoccupations with glittering generalities and the recurrent problems having to do with money matters, attending to constituency complaints, and seeking re-election.

Finally, the conceptualization of legislation in terms of moral imperatives, where many goals are to be maximized, no longer leaves any ground for establishing a principle of fiscal equivalence in which identifiable communities of potential beneficiaries can be viewed as the relevant communities to bear the costs of collective action. Taxes are sanitized by passing them through the Internal Revenue Service, and members of the Congress function not as trustees spending their constituents' tax moneys for national public services and facilities but as brokers competing with one another to get as much as they can for their constituents from the national treasury. Fiscal realities are replaced by fiscal illusions, as moral imperatives replace positive law, and as executive instrumentalities are instructed to maximize a multitude of different values by mandatory rule.

Executive Reorganization

Similar transformations are occurring in the executive, where increasing authority is being transferred to the office of the President. Reorganization efforts, since the Brownlow Commission of 1937, have viewed the Presidency as the command-and-control center of government, exercising a unity of command over a hierarchically ordered bureaucratic structure that creates a command relationship reaching from the President to the most subordinate individuals in the national administration. Furthermore, the *Administrative Reorganization Act* presumes that relationships internal to the executive can be reconstituted on the basis of reorganization plans formulated by the President and given the force of law. The rule-making authority that Congress assigns to a particular administrative instrumentality of the national government is, thus, subject to reassignment by the President in the form of reorganization plans that have the force of law.

These reorganization plans may take the form of transferring subordinate, administrative responsibility to the President, as was done in the reorganization plan that created the Office of Management and Budget in 1970. The President is then in a position to issue instructions as he sees fit without further notice in the *Federal Register*. The exercise of executive authority is, thus, increasingly subject to executive privilege where standards applicable to executive performance are privy to the executive establishment.

This same reorganization plan included provision for the organization of a Domestic Council in the office of President subject to the same legal presumption that the President may direct as he sees fit. The language in the explanatory documentation indicates that the Domestic Council is the body to decide "what Government should do."[26] The term "Government" in this context is identified with the executive establishment, and the decisions about what "Government" should do is internal to the executive. The presumption is that legislative standards have become sufficiently loose to allow for the effective decisions about public policy to be taken within the councils of the executive, as the President may from time to time direct.

The span-of-control problem is such that any extended command structure will be subject both to a loss of information and to a loss of control without regard to the superior-subordinate status of officials in a hierarchy of command. Highly centralized command systems resolve this problem by developing redundant structures that attempt to extend the reach of a chief

executive with regard to both command and intelligence functions. The reorganization plan for the Office of Management and Budget, for example, anticipates the creation of Washington-based coordinators to extend the reach of the President to subordinate levels of the national bureaucracy and to relationships with state and local government agencies in different regions of the United States. Typically, inspectorates and secret-police agencies provide independent channels to overcome the loss of information characteristic of extended bureaucratic structures. The so-called Plumber's Unit organized in the office of the President during the Nixon Presidency was such an effort to ascertain where "leaks" were occurring in bureaucratic "pipelines."

During the Nixon Presidency efforts were also made to impound funds, appropriated by the Congress, consistent with the presumption that decisions about what Government should do are to be taken by the executive. Such impoundments were held by the U.S. Supreme Court to exceed the powers of the President in one of the rare decisions in recent decades pertaining to constitutional limits with reference to the separation of powers. Recently, Congress has considered vesting the President with discretionary authority to impound funds to bring expenditures within predetermined deficit targets. The logic of the Blackmun doctrine, which assumes that the structural features of congressional organization are a sufficient safeguard in establishing constitutionality, would allow for such an affirmative conveyance of legislative authority to the executive. Congress would then be free to make "appropriations," but those "appropriations" need have no essential bearing upon patterns of public expenditures. Control over the public purse would, so to speak, pass to executive instrumentalities subject to the direction of the President.

Mandatory Judicial Remedies

Transformations of a comparable magnitude are also occurring in the Federal judiciary. The focal point in this transformation pertains to those provisions of the U.S. Constitution that contain specific prohibitions upon the exercise of governmental authority, especially with reference to the 14th Amendment and to the first eight amendments. The key provision in the 14th Amendment is the following:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

This provision is usually presumed to encompass the First Amendment, which begins: "Congress shall make no law. . . ." Its provisions are extended to the states and instrumentalities of the states, including local units of government, as well as to the national government. Similar applications occur with reference to many of the other first eight amendments to the U.S. Constitution.

The earlier presumption in constitutional jurisprudence was that an act of an official body beyond its constitutional competence did not have legal standing and was therefore null and void. The potential immunity of an official arises only from lawful action. Beginning with the school desegregation cases, the Federal courts have gone beyond the earlier forms of relief holding an offending statute or regulation to be invalid, and without legal force, to a mandatory form of relief requiring a positive program of actions to remove the offending practice and substitute a conforming remedy. Furthermore, remedies were presumed to be available for racial segregation as a de facto wrong. Affirmatively mandated programs to desegregate schools were the subject of numerous court orders.

A variety of difficulties arise under these conceptions of judicial process. First, the granting of a remedy for a de facto wrong does not establish a de jure link with regard to the proximate source of the wrong. Segregation in schools may arise as a consequence of specific school policies or regulations that have the effect of yielding segregation. These might appropriately be held null and void. It is also possible for segregation to occur in schools as a consequence of the discriminatory policies and practices of those who function as realtors in a realty market. Granting a remedy ordering the desegregation of schools to be implemented by busing students from one school to another to achieve racial balance does not address the de jure source of a wrong if that wrong arose from the collusive practices of realtors. It is possible for schools to be innocent bystanders with regard to offenses over which they had no control and for which they are ordered to provide remedies.

These circumstances yield a second but closely related issue that is fundamental to the problem being addressed by Alexander Hamilton in *Federalist 15* and *16*. Hamilton considered the application of legislation to units of government in their corporate or collective capacity to be a fundamental conceptual error that precludes justice from being done. Collective sanctions apply to all members of a collectivity. Yet, not all members of a collectivity may have offended.

Collective sanctions, thus, indiscriminately apply to innocent bystanders and offenders alike. Under such circumstances, Hamilton argues, justice cannot be done.

The mandatory remedies applied to school districts in desegregation cases and to other instrumentalities of state and local governments in other cases offend against the basic principle advanced by Hamilton. It was this principle that required a basic reformulation of the framework for the fundamental law incorporated in the U.S. Constitution in contrast to the Articles of Confederation. This principle required a new structure necessitating "an alteration in the first principles and main pillars of the fabric."[27] Applying desegregation decrees to school districts as collectivities, rather than to school officials (or others) as individuals, means that collective sanctions are being applied, and that those who are subject to the sanctions may be innocent bystanders upon whom costs are being imposed without regard to their standing as individuals. People, under such circumstances, find themselves trapped in unreasonable situations that are somehow, but ambiguously, related to basic social values of fundamental importance.

The character of the problem can perhaps be better illustrated by reference to a hypothetical example, involving a private electrical utility where a clear violation had occurred in the discharge of toxic wastes from its power plant. If such a corporation were charged with a criminal offense, the most that could be done against the corporation as a collectivity is to levy a fine. A fine can be paid from the corporate treasury, but the burden for that fine will eventually be borne by either shareholders, consumers, or a combination of both shareholders and consumers. Under these circumstances, wrong-doers are shielded from liability and the burden for the penalty is transferred to stockholders or customers as innocent bystanders. The process offends against the basic requirements of justice. The consequences that flow from the application of sanctions to collectivities may be counterintuitive for many people, but the fundamental character of the conceptual error was expounded some two centuries ago as a fundamental issue in the constitution of the American federal system of governance.

A third difficulty arises in applying mandatory remedies to collectivities such as school districts, other units of local government, and instrumentalities of state governments. Court decrees take on the task of formulating policies, establishing programs, and modifying institutional structures in particular units of government. In setting policies, establishing programs, and modifying institutional structures, courts are assuming legislative, executive, and constitutional prerogatives that properly reside with legislative bodies, executive instrumentalities, or with people as constitutional decision makers. These court orders are subject to enforcement through contempt proceedings. Judges in such circumstances function as rule makers, rule enforcers, and rule adjudicators in the application of decrees to collectivities. They violate the basic maxim of justice that no one is a fit judge of his or her own cause in relation to the interests of others. There is no easily accessible remedy when the Federal judiciary becomes a primary offender in usurping legislative, executive, and constitutional prerogatives of state and local units of government and of the communities of people who are involved.

A further difficulty arises when courts construe constitutional limits to be equivalent to positive national legislation. Ambiguities about what is forbidden, permitted, and required are resolved in the direction of expanding the domain of the forbidden and required at the cost of constraining the domain of the permitted. The effect is to unduly constrain the discretion of public instrumentalities of state and local governments and to yield a uniform application of legal standards for the nation as a whole. A standard such as equal protection of the laws is increasingly construed with reference to uniform standards of equality applied to the nation as a whole rather than to standards that are to be applied to the decisions of a particular collectivity with reference to the application of its particular statutory enactments or ordinances to people within its jurisdiction. Equal protection of the law is a standard that might be met by each collectivity and nevertheless yield considerable diversity across collectivities. The concept of the supreme law of the land does not presuppose that the general corpus of a uniform code of law applies to the United States as a whole.

A self-governing society organized within the framework of a federal system of government implies that constitutional limits apply to the exercise of discretion within the different units of government, but that discretion in terms of what is permitted under law need not be squeezed out either by prohibitions or mandated requirements. A rule of law may allow for diversity rather than requiring uniformity throughout the whole structure of a society.

The Insufficiency of Mutual Accommodations

Given the tendencies to usurp authority and shirk responsibilities that have occurred in the mutual accommodations reached by instrumentalities of the American national government, what conclusions can we reach with reference to the workings of government and a rule of law more generally? Without some fun-

damental form of constitutional jurisprudence and constitutional decision making that prevails in relation to the proper exercise of legislative, executive, and judicial processes in a limited national government, we can expect serious manifestations of institutional weaknesses and institutional failures to occur in the operation of the national government. There is no ground for believing that these weaknesses and failures will be self-correcting. "Checks and balances" do not work apart from recurrent attention to constitutional choice; they are insufficient to maintain a constitutional system. The potentials for error may interact with one another to yield tendencies toward the amplification of error in a system of rules that entrap, rather than facilitate the pursuit of productive opportunities.

One of these potentials for amplifying error is to assume that failures derive from evil men rather than in the basic way that institutions are structured in human societies. Changes in personnel or changes in leadership are assumed to be the key factor. The issue is addressed as a matter of *will* rather than one of critical understanding and awareness of the problems involved in the nature and constitution of order in human societies. More rules are fabricated as a means of outlawing this or that evil without having made a critical diagnosis of the sources of evils. People find themselves snared in traps of their own making.

Leaving the structure of government to be worked out by the mutual accommodations reached among the legislative, executive, and judicial instrumentalities of the national government, pursuing whatever opportunities become available to dominant coalitions is to rely primarily upon the exigencies of chance to prevail in the governance of society. Constitutional considerations are abandoned to calculations which presume that winning coalitions can and should prevail. These coalitions may be joined by state and local officials who trade their constitutional responsibilities for funds from the national treasury. Federal principles in a system of constitutional government are abandoned to the wheeling and dealing that is necessary to fashion winning coalitions.

As such processes come to prevail, we can expect a commensurate erosion in the rule of law and a decline in the respect for law. The latitudes of individual discretion will be increasingly narrowed by mandatory requirements of poorly conceived rules and regulations. The presumption that each individual is first his or her own governor responsible for the conduct of one's own affairs and knowing how to relate oneself to other individuals in accordance with reasonable norms, grounded in methods of normative inquiry,[28] will be increasingly abandoned for presumptions that individuals perversely pursue temptations to void moral responsibility.

People will increasingly find themselves in circumstances where reasonable options no longer prevail and begin a search for options that afford a way out of their difficulties. Temptation strategies may become the best available option, including temptations to go "underground," to avoid the mandatory requirement of rules, or to gain the acquiescence of others, including officials, in ignoring the application of troublesome rules.

Tocqueville, in his study of *The Old Regime and the French Revolution*, reports that a uniform code of law applied to diverse material, environmental, and cultural circumstances yielded an accommodation where a primary function of the French bureaucracy came to be that of waiving the rule of law. Citizens came to look upon laws as inconvenient obstacles for which one should be entitled to a waiver in his or her particular circumstances.[29] When laws become obstacles to what people view as reasonable courses of action, it is but another step to where laws become "traps for money," as Hobbes characterized unnecessary laws.[30] Thus, an erosion of law can be expected to yield pervasive patterns of corruption in any highly centralized political regime.

As the types of transformations examined above occur—increasing centralization of authority in the national government together with an increasing erosion of legislative standards, an increasing centralization of executive authority, and an increasing arbitrariness in the exercise of judicial authority—illusions of power can be expected to give way to increasing immobility in society. Centralized regimes relying upon mandatory prescriptions that constrain discretion on the part of individuals are often accompanied by processes of psychological detachment and social disengagement and a loss of initiative on the part of those who seek to minimize their individual costs of entrapment. The dynamic of individual initiatives and leadership on behalf of multitudinous efforts in a society can be throttled by the numerous impediments created by restrictive rules and regulations. Individuals can adopt free-riding, or easy-riding strategies of letting others attempt to cope with the burdens of collective action while they seek escape through mind-altering experiences. This yields immobility.

We then face a puzzling problem where those who aspire to active political leadership find that the only way to break the shackles of immobility and provoke movement in a society is by calling for a moral crusade. The way for national leadership, in such circumstances, directly to mobilize increased participation among members of society that has attained a high de-

gree of centralization is to do so through a *mass movement* that makes a strong moral appeal to each individual. Mass movements organized as moral crusades are situations that provoke the worst tensions in disparities between unlimited imaginations and limited capabilities. We observe these tendencies in calls for a war on poverty or for crusades that are the "moral equivalent of war." Wars in democratic societies are obsessive struggles where all other conditions of life are subordinated to the requirements of war. Moral crusades may be of a similarly obsessive nature. All other facets of life are subordinated to the overriding considerations of a moral crusade. Such circumstances can be immensely disruptive for the multifaceted character of life in free societies.

Much more may be at stake than an erosion of the rule of law. Appeals to moral crusades, while occasionally an important stimulant to collective action in democratic societies, pose serious threats to the survival of democratic institutions. Every system of totalitarian government has arisen in the call for a crusade or a revolutionary struggle that is the moral equivalent of war. As Hobbes has observed, the "death of democracy" occurs when people acquiesce in the usurpation of authority by those leaders who demand unlimited authority.[31]

The tendencies which I have taken into account, and the implications which I see, need to be viewed with caution. Relying upon the exigencies of historical accident, the pulling and hauling of social forces, and personal caprice to achieve mutual accommodations among the legislative, executive, and judicial instrumentalities of government can shackle people in ways that are appropriately referred to as "government traps." The trap is of our own making, and it is easy to levy an accusation that the source of evil is "the government." The Blackmun doctrine can only strengthen and reinforce the trap. Instead, we need to look at ourselves in the mirror of life and reconsider our situation. In the absence of understanding, the government trap can work to tighten its grip, but the wider range of options that are available for constituting order and creating social realities needs to be explored. The requirements of self-governing societies need not depend upon states to rule over societies. The problems of a constitutional order, which we face today, are no more difficult than problems involved with the institutions of slavery and of machine politics and boss rule. We cannot assume, however, that American society is somehow immune to despotism just because we are Americans and occupy some special place in human destiny. If something exists somewhere, it can exist anywhere in human societies if the appropriate conditions are allowed to arise. Moral crusaders who are ruthless in overriding opposition and in subordinating all other values to their overriding moral cause can create despotic regimes anywhere. They will use theories of design to create systems of government that are capable of overriding opposition and dominating the exercise of authority in a society.

CONCLUSION: CONDITIONS FOR MAINTAINING A SELF-GOVERNING SOCIETY

In light of a general theory of limited constitutions, the *Garcia* decision is an important juncture in American constitutional history. The American constitutional system as a whole can be viewed as a great experiment to construct human society on a new basis. That experiment was no less than an attempt to create a self-governing society where people might apply principles of self-government to all their political experiments. By reiterating principles of self-government in concurrent units of government that extended from villages and towns to a federal union of continental proportions, it was possible to create a self-governing society where,

> Written law exists . . . , and one sees the daily execution of them; but although everything moves regularly, the mover can nowhere be discovered. The hand that directs the social machinery is invisible.[32]

In that society, each individual as a democratic citizen was first responsible for governing his or her own affairs and working out mutually agreeable arrangements with others to govern their mutual affairs on the basis of mutual respect, willing consent, and reciprocity. Where instruments of collective action were required for the common good of larger communities of people, institutions of local government were constituted where binding decisions could be made in democratic assemblies or by representative bodies held to account by members of a local community, and people bore the burdens and costs involved in efforts to enhance their common good. These principles of constitutional self-government were subject to reiteration in the creation of counties, states, and a federal union.

Democracies are subject to strong oligarchical tendencies that are a function of size. The larger the society, the greater the dominance of oligarchical tenden-

cies. The method for resolving this dilemma in the American federal system of governance was to have recourse to multiple units of government where the advantages that accrued from institutions of self-government in the small could be reinforced by capabilities of tending to larger communities of interest, extended to a point where a society could achieve the benefits of collective action and security from aggression on a land that reached out to continental proportions. The United States could thus enjoy the peace and security of an island, upon a major continent. A self-governing society becomes possible only when people can have recourse to a multitude of different units of government, all bound by similar principles of self-government articulated as fundamental law in processes of constitutional decision making, where people control the terms and conditions of government and officials are bound by those terms and conditions as an enforceable system of fundamental law.

One way of conceptualizing this constitutional order is to view the constitution of each state and the constitutional authority of the people in each of the states as being residual. This, and not in state legislatures, is where the reserved powers reside. The U.S. Constitution is then to be viewed as a constitutional contract among the people of the several states stipulating specific delegations of authority to the government of the United States. Such a construction would imply that Federal authority is to be narrowly construed while state authority is to be broadly construed, subject to specific prohibitions and limits contained in particular state constitutions and the U.S. Constitution. In such a conception of a constitutional order, state constitutional provisions would properly determine limits upon state legislative authority and correlatively define the scope of local self-government and home rule.

The Blackmun doctrine proceeds on different presuppositions. Given the failure of the Federal judiciary to establish effective standards for delimiting the Commerce Clause in the U.S. Constitution, Blackmun asserts that no grounds exist for delimiting the substantive authority of the national government with respect to commerce and presumably with regard to similar substantive grants of authority. Thus, Blackmun proposes to rely upon the "federal" features internal to the structure of the national government as sufficient to take account of state and local interests and maintain appropriate constitutional limits in the operation of the national government.

This doctrine does not stand critical scrutiny. Electoral arrangements have only a weak influence upon the patterns of coalition formation and the way that coalitions are constituted to organize and dominate governmental decision-making processes. These provisions are, furthermore, subject to constitutional alteration by the Congress "except as to the places of choosing senators." The Congress is not bound to any particular mode for the election of members to the House of Representatives.

The Blackmun doctrine is further vulnerable if substantive limits are not applied to maintain a constitutional separation of powers. The Congress is free to extend its authority over matters that are not confined to national affairs as potentially distinguishable from state and local affairs. But this extension of legislative jurisdiction confronts limited capabilities on the part of the Congress to legislate broadly on all matters of government in American society. The substantive powers of legislation are, thus, transferred to executive instrumentalities. The substantive powers of appropriation are likely to meet a comparable fate if the Congress fails to achieve fixed deficit limits and extends general impoundment authority to the President.

Within the executive itself, command-and-control prerogatives are being centralized in the executive offices of the President, and redundant structures embodying both command and intelligence mechanisms are being developed to enhance Presidential control. These control mechanisms are also being conceptualized as giving rise to a new form of "federalism" where relationships with state and local governments will be *managed* from the executive offices of the President.[33]

The Supreme Court has itself extended the reach of judicial processes from that of holding legislation in violation of constitutional limits to have no legal standing to that of mandating programs of a remedial character. This process is subject to serious difficulties that are associated with applying sanctions to collectivities, as such, and to the usurpation of legislative, executive, and constitutional authority with regard to those collectivities as self-governing entities in a federal system of government.

Much of the treatment of structures and processes of government, devoid of reference to the relevant political communities, is metaphorically analogous to treating a head devoid of a body. The point of Hamilton's analysis in *Federalist 15* and *16* is that reference to other units of government is insufficient in the constitution of a federal system of government. The nexus of relationships must instead be extended to the persons of individuals. But this does not mean reference to individuals alone. Rather, the nexus of relationships between a limited national government and individuals also requires reference to the political nexus of relationships of individuals to instrumentalities of state

governments within each state, as well as to the nexus of relationships of individuals to other units of local government within each state. Each nexus must be taken into account in considering the relationships of structures and processes of government in the political community that is the United States of America. The United States of America is a compound republic, not a simple republic governed by a single ultimate center of authority.[34]

The elements of so-called "federal form" that are built into the structure of the national government constitute a way of taking into account the configuration of relationships that characterizes the constitution of the American political community as it is relevant to the governance of national affairs. Members of Congress, in performing legislative functions, will reflect some sensitivity to constituency relationships as these pertain to national affairs. To assume that these "federal forms" are both necessary and sufficient to take account of local and state "interests" is implausible for at least three reasons.

First, structural conditions pertaining to electoral arrangements and modes of representation do not determine outcomes in plurality-vote, collective-choice circumstances. The character of coalitional politics and the forms that party coalitions take has substantial independence as an intermediate process. It is the openness of governmental structures to diverse coalitional strategies that led Madison to generalize that any and all exercises of public authority "may be misapplied and abused."[35]

Rules, including the rules of fundamental law embodied in constitutions, operate in a configurational way rather than in a linear, causally determined way. Rules of a configurational nature are articulated in ways that bound the latitudes of discretion on more than one dimension. Rules for authorizing collective action need then to be viewed in relation to potential veto capabilities, as well as to other rules represented by an "equal-protection" clause that constrains majority coalitions from acting to benefit a majority by taking away from a minority. Instead, general rules are to have equal application in relation to the relevant community of people implicated. *The domain of discretion is defined by both rules that authorize and rules that limit.* Voting rules, veto rules, equal-application rules, and due-process rules operate in configurational ways.[36]

Second, the exigencies of collective choice apply not only to relationships among individuals in a political community but to the structure of opportunities that become available to people within the material and environing conditions of the world in which they live. The "country" that is pertinent to the United States as a national political community is different from the "country" that is pertinent to the peoples of Hawaii, Alaska, Florida, or Minnesota as political communities. The conditions of life in each countryside vary such that architectural standards, for example, appropriate to Alaska or to Minnesota are not likely to be appropriate to Hawaii and Florida. Similar principles pertain to the variability of material and environing conditions that apply differentially to Los Angeles, San Francisco, New Orleans, Minneapolis, or Chicago. A uniform code of laws applicable to semitropical or semi-arctic regions or to arid and humid regions, to identify only two climatic variables related to temperature and precipitation, are likely to yield limits to discretion that become traps for one or another community of people in these diverse circumstances.

People everywhere are likely to have water problems, but the water problems of New Orleans are quite different from the water problems of Los Angeles. Similar problems need not be common problems. The water problems of both Los Angeles and New Orleans may be affected by river systems that are interstate in character. But the way that those river systems affect the material conditions of life varies significantly between the Mississippi valley and the Colorado basin.

A federal structure permits cognizance of the diverse national, regional, and local communities of interest without presuming that national interests override all other communities of interest. The modes of representation in constituting the Congress are inappropriate for taking collective decisions that bear upon the community of interests that people in Alaska share in relation to the material and environmental conditions of the Alaskan countryside. Representatives from Arizona, California, Hawaii, Louisiana, Florida, and a multitude of other environs would then be taking decisions about environmental circumstances for which they have little understanding or sympathy.

Third, the capacity of people to function in larger political communities may depend critically upon the knowledge and skills that these same people acquire in smaller political communities. What people can learn about democratic processes of governance in their local communities may, thus, be an essential foundation for acquiring an understanding of the counterintentional and counterintuitive character of political relationships, and of learning how to relate to other human beings in the presence of disagreement and conflict. These are difficult lessons for each and every person to learn, but learning these lessons is the only way to avoid being foolishly naive and to come to appreciate the constructive place of conflict in setting the stage for communication and a more enlightened understanding of the situational context as a prelude to

conflict resolution. Options become available through processes of due deliberation that afford alternatives to mutually destructive confrontations.

Those who assume that the national government, because of its "federal form," is competent to determine all matters that pertain to the governance of American society will have neglected the limited capabilities of those occupying positions of national authority and simultaneously to have considered citizens to be "more than kings and less than men."[37] Citizens are presumed to be competent to select their national rulers, but incompetent to govern their own local affairs. The "federal form" of the national government is no substitute for a federal system of governance.

The *Garcia* decision, thus, leaves American citizens in a puzzling circumstance. The implicit rejection of the general theory of limited constitutions, where the whole system of fundamental law is connected with a core that has reference to state constitutional formulations, leaves us in a position of either abandoning constitutional government or reformulating the U.S. Constitution. That reformulation would then encompass a more extended body of constitutional limitations that explicitly take account of the diverse communities of interests that Americans share with one another in local and state systems of governance.

We shall again, however, face the problem of whether words on paper will suffice to achieve constitutional limitations. The answer is "No." We cannot avoid the strange puzzle that is inherent in all language. Words are but names for classes of events except where proper names are used. The symbols (words) in any language thus have the characteristics of operating in a one-many relationship. There comes a point where all use of language depends upon a tacit understanding about the meaning of language, i.e., the referents for the use of words.[38] No one can draft a meaningful, legal instrument without a shared common understanding of what words mean. This is why the theory used to construe language is of such fundamental importance in the constitution of systems of governance in human societies.

If we are *unwilling* to stipulate the theory we use, and how different conceptualizations about the nature and constitution of order in human societies are articulated in both an explanatory language and a juridical language, our words lose their meaning. People talk to one another, but they do not communicate their meaning to one another. They talk, but they do not know what they are talking about.

This problem can be resolved only when people come to appreciate that different conceptualizations can apply to the design and creation of different systems of governance. We can assume that there are common features to rule-ordered relationships in all human societies, but those features cannot be understood so long as political discourse focuses upon disembodied heads, upon governments apart from citizens and their place in a system of constitutional rule. Democratic societies must always be cognizant of the rulership prerogatives of citizens. Unless citizens can hold officials accountable to perform within the bounds of fundamental law, democratic societies cannot maintain control over their systems of governance. When people no longer maintain limits upon the exercise of governmental prerogatives and hold their officials accountable to fundamental law, democracy (demos = people; cratia = rule: democracy = rule of, by, and for people) no longer exists and autocracy prevails. This, however, does not prevent people from meaninglessly chattering about "democracy." *The quest is to create reasonable limits for bounding discretion at all levels of organization in a democratic society.* Whenever reasonable limits are abandoned, human beings inevitably create traps for themselves, and those traps are by no means limited to a central-government trap.

The fundamental condition for avoiding Jean-Jacques Rousseau's trap is to have a mutual respect for each other's freedom, to rest all political experiments on the capacity of mankind for self-government, and never to view oneself as the master of others. Human beings can learn to discipline their imaginations through due deliberation and reflection, to enhance their capabilities by learning to work with others, to appreciate that counterintentional and counterintuitive relationships can trap people in counterproductive relationships, and to reflect upon the exigencies of conflict situations as a means of liberating themselves from such traps and re-establishing mutually productive communities of relationships with one another. This is what it means to become a self-governing society. Those who view themselves as political masters are trapped in a vicious form of servitude that denies them access to what it means to be free.

My referent in this essay has been to the general theory of limited constitutions as formulated by Alexander Hamilton and James Madison in *The Federalist*.[39] This is a theory that was ridiculed by Jeremy Bentham in his extended note on the nature of law.[40] John Austin referred to constitutional law as positive morality, not positive law.[41] Frank Goodnow considered constitutions to be meaningless formalities.[42] Woodrow Wilson viewed what I regard as a general theory of limited constitutions as "literary theories" and "paper pictures."[43]

Twentieth-century legal and political realists have assumed that law is command and that collective action in a society depends upon a unity of command. The basic axiom in this theory, stated, as Wilson did, in the negative form, is that "the more authority is divided the more irresponsible it becomes."[44] This view must be juxtaposed to Hobbes' basic analysis that a unitary sovereign is the source of law, above the law, and not accountable to law. In the modern mode of analysis, fragmentation of authority and overlapping jurisdictions are viewed as major sources of institutional failure in the American system of government. Yet, authority must be differentiated (i.e., fragmented) if there is to be either a rule of law or constitutional government. Overlapping jurisdictions are necessary features in federal systems of governance.

Garcia requires us to rethink the foundations of our legal and political sciences before we can assess where we are and what might be done. This essay does no more than indicate some reasons for challenging the Blackmun doctrine. To explore the numerous contemporary problems that need to be addressed at a constitutional level of analysis will require many other occasions for doing so.

ENDNOTES

[1]Jean-Jacques Rousseau, *On the Social Contract*, Roger D. Masters, ed. (New York: St. Martin's Press, 1978).

[2]105 S.Ct. 1005 (1985).

[3]105 S.Ct. 1005, 1018 (1985). I have capitalized "Federal" whenever I construe the term to be used as a name for the national government. The use of a single term "federal" to refer both to a single unit of government and to a general system of governance creates needless confusion.

[4]This tradition is exemplified by Walter Bagehot's *The English Constitution*, first published in 1867, and by Woodrow Wilson's *Congressional Government*, first published in 1885. Bagehot distinguishes between the dignified and efficient parts of a constitution. The dignified parts represent the facade that conceals reality as reflected in the efficient parts of a constitution. Wilson draws explicitly upon Bagehot in advancing his thesis that Congress exercises supremacy in the American system of government.

[5]Vincent Ostrom, "Artisanship and Artifact." *Public Administration Review* 40, No. 4 (July-August 1980), pp. 309-317; and *The Political Theory of a Compound Republic: Designing the American Experiment* (Lincoln: University of Nebraska Press, 1987), chapters 1, 4, and 9.

[6]Thomas Hobbes, *Leviathan or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil.* Michael Oakeshott, ed. (Oxford: Basil Blackwell, 1960), p. 6.

[7]Alexander Hamilton, John Jay, and James Madison, *The Federalist*, Edward Mead Earle, ed. (New York: Modern Library, n.d.), p. 3.

[8]This implies that no single instrumentality of government in the American system of government exercises plenary authority. Everyone acts in agency relationships accountable for the discharge of a trust to the relevant communities of people implicated in the constitutive nature of human associations.

[9]Vincent Ostrom, *The Political Theory of a Compound Republic.*

[10]Alexis de Tocqueville, *Democracy in America,* Phillips Bradley, ed. (New York: Alfred A. Knopf., 1945), Vol. I, p. 25.

[11]*Ibid.*, p. 123.

[12]Hamilton, Jay, and Madison, *The Federalist*, p. 524.

[13]Martin Diamond, "The Federalist's View of Federalism," in George C. S. Benson, ed. *Essays on Federalism* (Claremont, California: Claremont Men's College, Institute for Studies in Federalism, n.d.) Vincent Ostrom, "The Meaning of Federalism in *The Federalist*: A Critical Examination of the Diamond Theses," *Publius*, Vol. 15, No. 1 (Winter 1985), pp. 1-21, and "Historical Circumstances and Theoretical Structures as Sources of Meaning: A Response." *Publius,* Vol. 15, No. 1 (Winter 1985), pp. 55-64.

[14]Hamilton, Jay, and Madison, *The Federalist*, p. 243.

[15]*Ibid.*, p. 246.

[16]*Ibid.*

[17]*Ibid*, p. 250.

[18]*Ibid.*, pp. 337-38.

[19]Moisei Ostrogorski, *Democracy and the Organization of Political Parties,* Volume II: The United States (Garden City, New York: Anchor Books, 1964).

[20]William L. Roirdon, *Plunkitt of Tammany Hall* (New York: E. P. Dutton, 1963).

[21]Hamilton, Jay, and Madison, *The Federalist*, p. 260.

[22]All parliamentary systems have distinguishable legislative bodies and processes. This is what the term parliament implies. Those structures and processes are deliberative in nature and are not compatible with the performance of executive functions. The linkage achieved by constituting a leadership committee in a parliament to assume ministerial responsibility for supervising the executive instrumentalities of government does not refute the existence of differentiable structures and processes of governance. Those who become ministers further differentiate themselves from their colleagues in parliament by becoming privy councilors where executive matters are subject to secrecy and, by that fact, create a realm of executive privilege that is not subject to parliamentary inquiry. Problems having to do with national security and external relationships make secrecy an essential feature in the constitution of that instrumentality of government primarily responsible for the conduct of national defense and external affairs. Ministerial responsibility mediated by the requirements of secrecy implies that executive matters are not *res publica*—public matters—but privy to the executive and confined to executive structures. The independence of the judiciary has become well established in all countries that are generally recognized as having a rule of law.

[23]Hamilton, Jay, and Madison, *The Federalist*, p. 507.

[24]See Thomas C. Schelling, *Micromotives and Macrobehavior* (New York: W. W. Norton, 1978).

[25]Vincent Ostrom, *The Intellectual Crisis in American Public Administration* (University, Alabama: University of Alabama Press, 1974), pp. 58-63.

[26]*U.S. Codes, Congressional and Administrative Laws*, 91st Congress, Second Session, 1970 (St. Paul, Minnesota: West Publishing Company, 1971), Vol. III, pp. 6, 316.

[27]Hamilton, Jay, and Madison, *The Federalist*, p. 89.

[28]Vincent Ostrom, "A Fallibilist's Approach to Norms and Criteria of Choice" in F. X. Kaufmann, G. Majone, and V. Ostrom, eds. *Guidance, Control, and Evaluation in the Public Sector* (Berlin, New York: Walter de Gruyter, 1986), pp. 229-49.

[29]Alexis de Tocqueville, *The Old Regime and the French Revolution* (Garden City, New York: Doubleday, 1955), pp. 67-68.

[30]Hobbes, *Leviathan*, p. 228.

[31]Thomas Hobbes, *De Cive or the Citizen*, Sterling P. Lamprecht, ed. (New York: Appleton-Century-Crofts, 1949), pp. 91-93.

[32]Tocqueville, *Democracy in America*, p. 70.

[33]James L. Sundquist, *Making Federalism Work* (Washington, DC: Brookings Institution, 1969).

[34]Vincent Ostrom, *The Political Theory of a Compound Republic*.

[35]Hamilton, Jay, and Madison, *The Federalist*, p. 260.

[36]Elinor Ostrom, "An Agenda for the Study of Institutions," *Public Choice* 48 (1986), pp. 3-25.

[37]Tocqueville, *Democracy in America*, Vol. II, p. 231.

[38]Michael Polanyi, *Personal Knowledge* (Chicago: University of Chicago Press, 1962).

[39]Vincent Ostrom, *The Political Theory of a Compound Republic*.

[40]Jeremy Bentham, *The Principles of Morals and Legislation* (New York: Hafner, 1948).

[41]John Austin, *The Province of Jurisprudence Determined*, H.L.A. Hart, ed. (London: Weidenfeld and Nicolson, 1955).

[42]Frank J. Goodnow, *Politics and Administration* (New York: Macmillan, 1900).

[43]Woodrow W. Wilson, *Congressional Government: A Study in American Politics*, Meridian Books edition (New York: Meridian Books, 1956).

[44]*Ibid.*, p. 77.

Chapter Five

THE CONTEMPORARY SUPREME COURT AND FEDERALISM: SYMPOSIUM DISCUSSION

Christopher Wolfe

INTRODUCTION

Federalism was one of the most important features of the Constitution designed by the founders in 1787. The subject of considerable debate and compromise within the convention, federalism emerged as one of the central issues in the ratification debates. Given the controversy over federalism, even among the framers, it is not surprising that it became one of the enduring issues of American politics. After almost two centuries of such controversy, it is also not surprising that the federalism we have today is a substantial modification of the framers' original design. Why this is not more widely understood is explained in an Advisory Commission on Intergovernmental Relations (ACIR) information report:

> The use of "federalism" both by politicians and the Court has conveniently served as a rather opaque veil behind which the states have been stripped of their autonomy piecemeal over the years. Those who watched closely saw what was going on behind the veil: federal power constantly expanded with a concomitant reduction in state latitude for independent action. We comforted ourselves that federalism was alive and well by redefining federalism from a set of constitutional limits that establish effective political constraints (*viz.* "federalism") to a process of intergovernmental "cooperation", resting in great part on national benevolence and solicitude. In short, we redefined federalism from a constitutional design concept to a set of operating principles for the day-to-day operation of the American political process, and in doing so made it possible to see federalism as perfectly consistent with the unrestrained growth in federal power.[1]

Nevertheless, defenders of federalism, however much in retreat, were not entirely routed, and in 1976 the U.S. Supreme Court struck a significant blow for their cause. In *National League of Cities* v. *Usery*[2] the Court struck down the application of federal wage and hour standards to state employees, on the grounds that they were impermissible interferences with state governments in their "integral" or "traditional governmental functions." It was the first time in decades that the Court had struck down an act of the federal government based on the Commerce Clause. At the time, it appeared that *NLC* might be the basis for developing new constitutional doctrine to provide even broader protection of state governments from federal intervention.

Those hopes were dealt a sharp blow in 1985, when the Court overruled *NLC* in *Garcia* v. *San Antonio Transit Authority*.[3] Having limited the reach of *NLC* in a series of cases over the previous few years, the Court (or, more accurately, Justice Harry A. Blackmun, who provided the swing vote between the two 5-4 decisions) concluded that the effort to define precisely which state activities should be protected was futile.

The issue is hardly dead, however. Then Associate Justice William Rehnquist, dissenting, asserted that *NLC* represented "a principle that will, I am confident, in time again command the support of a majority of this Court."[4] If President Ronald Reagan were to have a chance to replace one or more of the *Garcia* majority, that prediction is likely to be vindicated; otherwise, the status of *Garcia* is likely to be deter-

mined by future Presidential elections and Supreme Court appointments.

The issues raised in *Garcia* are of interest, not only because of the importance of federalism, but also because they intersect with another great constitutional principle—judicial review—and its relation to the question of constitutional revision. Judicial review has, for 50 years now, been identified largely with the liberal agenda in American politics—with activist judges pursuing liberal goals consistently on the Warren Court and even, though more erratically, on the Burger Court. (When the Burger Court acted more "conservatively," it was usually making adjustments—mostly marginal—of previous activist decisions, leaving more room for legislatures to act on their own, rather than entering new public policy areas to achieve conservative results.) *NLC* was one of the few cases where a good argument could be made that the more conservative Court majority of recent years was using judicial review to achieve certain (conservative) political results without a clear constitutional command. Indeed, legal realists have often cited this case as evidence that the ideal of judicial adherence to the Constitution is a myth, illustrating that justices on both sides of the political spectrum simply pursue their own political agendas.[5]

For a variety of reasons, then, *Garcia* and the issues it deals with merit careful study. It may very well turn out to be—and if not, perhaps it should be—"an intellectual crisis in American federalism," as well as a contemporary touchstone concerning the issue of judicial review.

The papers in this symposium have in common, first, a considerable respect for federalism as a constitutional principle that must be preserved and articulately defended and, second, a considerable reserve about the role of the federal courts in this process. At the same time, there are important differences among the papers about the attributes of federalism that need to be preserved and about the exact nature of the role that ought to be played by the courts.

Let me begin by trying to establish the historical framework of federalism and the courts.

FEDERALISM AND THE COURTS IN AMERICAN CONSTITUTIONAL HISTORY

No one at the Constitutional Convention of 1787 "proposed" the principle of federalism. The federalism that emerged in the Constitution was the result of laborious, often acrid, debate and eventual, reluctant compromise. This does not mean, however, that there is no intelligible "principle" that informs this part of the Constitution's design. The compromise involved the creation of a new principle that differed sharply from earlier forms of federalism, which had consisted of much more loosely united confederations. Moreover, for all the debate at the Convention, there was a very solid area of general agreement among the delegates. What emerged in the document was a victory for those who might be called "moderate nationalists." This group wanted a strong national government that would have broad powers to deal with a relatively limited number of important national issues (especially foreign affairs and the provision of a framework for the national economy), while retaining states which were strong and active (and normally autonomous) in dealing with the vast majority of day-in, day-out affairs of civil society (e.g., general regulation of property, health, safety, welfare, and morals).[6]

Among those who supported the Constitution (to whom we should primarily look in order to interpret it), the principal fear was not that the newly created government would impinge upon state prerogatives, but rather the reverse. *The Federalist* was right to point out that there was a much greater likelihood, in those times, that the state governments would use their influence to restrict the power of the national government. Their power to do so came from the attachment of the people to their states, which derived, in part, from state governments being so much closer to the people in their everyday affairs.[7] Insofar as the "spirit of the times" is an admissible element in constitutional interpretation, then, it is more likely to support a Marshallian than a Jeffersonian interpretation of the document.[8]

The development of federalism from 1789 to the Civil War was largely a working out of principles inherent in the Constitution. In this "traditional era" of American constitutional history, the plenary character of federal powers and the broad discretion of the Congress to choose means to carry them out were established, especially by *McCulloch* v. *Maryland* and *Gibbons* v. *Ogden*.[9]

The controversies that eventually brought about a shift in the nature of American federalism first arose at the end of the 19th century. The power of the federal government in domestic affairs had been relatively limited throughout the first century of our history. Regulation of interstate commerce, for instance, was important primarily as a way of *removing* the power of states to erect barriers to the free flow of

commerce, thus helping to establish a truly national economy.

With the growth of the size of corporations and the resultant increase in interdependence of the many elements of our economy, however, there arose a movement to exercise the power of federal regulation positively, taking over those functions from states that no longer were coextensive with the objects that needed to be regulated. This development led to political dispute over the exact location of the line between interstate and intrastate commerce. This dispute was exacerbated by its overlap with a general controversy over the proper extent of regulation of property by any government, whether state or federal.

From about 1890 to 1937, the Court struggled to provide adequate constitutional doctrine to govern these controversies, without much success. At times, the Court upheld broad doctrines of federal power. For example, Congress was acknowledged to have the power to regulate the interstate movement of objects even when the regulation was more like the traditional state police power (e.g., to regulate morals) than a national power to regulate economic affairs, and it was held to have the power to regulate intrastate commerce insofar as such commerce had a close and substantial relation to interstate commerce.[10] At other times, the Court was much more restrictive in its definition of federal power. On the ground that manufacturing preceded interstate commerce, the Court struck down an attempt to apply the *Sherman Antitrust Act* to acquisitions creating an oil refinery monopoly, and it overruled Congress' attempt to regulate child labor through a prohibition of interstate shipment of goods made in violation of congressional standards.[11]

When the Court drew on the more restrictive precedents to strike down significant portions of the early New Deal, it was faced with a powerful President who had great public support precisely on economic issues, which the Depression had made even more salient than usual. Not surprisingly, the Court had to back down.

From a traditional perspective on judicial review, it was good that the Court did so. It was not that the Court's concerns about federalism were invalid. Time has shown that it was abundantly justified in fearing that the doctrines adopted to justify the New Deal would lead to a substantial modification of the original constitutional design of federalism. The problem was that the Court did not have the clear constitutional commands which are required to justify judicial review as traditionally conceived.[12]

Whether, abstractly considered, there are adequate constitutional standards for distinguishing between federal and state regulation of commerce under modern economic conditions, without simply conceding to the federal government an unlimited power to regulate economic matters, is a question I will not address in this context. (Unlike most other constitutional commentators today, I regard it as a question that is not closed.) For the moment, all that I need to point out is that even if there are still genuine lines between interstate and intrastate commerce, there do not seem to be any ways of drawing those lines that can fairly be said to be *mandated* by the Constitution. (The differences seem to be largely differences of degree, with which judges, Marshall said, are peculiarly unsuited to deal.)[13]

Even if it were generally a good development for the Court to withdraw from such line-drawing after 1937, the way in which the Court withdrew was unfortunate. Rather than bow out of a very serious constitutional question on the ground that the appropriate conditions for the exercise of judicial review did not exist (i.e., a clear constitutional command), the Court simply abdicated further review of such questions *as if there were no serious constitutional issue*. The completeness of the abdication was made even clearer in contrast to the Court's increasing involvement in civil liberties at the same time, often with little or no constitutional basis for such involvement. Justifications for this double standard were unpersuasive.[14]

The net result was to leave Congress free of any judicial fetters arising from the constitutional enumeration of powers, which was the heart of the Constitution's federalism. As Hunter and Oakerson rightly point out, the Tenth Amendment has no real effect apart from provisions of the original Constitution it was intended to confirm in a more explicit way.[15] If the Tenth Amendment carries little constitutional weight today, it is because the very question of whether the national government can act *ultra vires* has ceased to be a live issue; constitutional questions are overwhelmingly concentrated upon constitutional prohibitions.[16]

To what extent this outcome is attributable to the Supreme Court is a matter of speculation. If the Court had withdrawn less abruptly and drastically; if it had indicated that the Constitution did provide some clear standards for evaluating national intrusions into reserved powers (though these did not go as far as the pre-1937 Court had argued) and that the Court would still intervene were these violated; if it had announced a trimmed-back judicial control of congressional judgments in the area of the dividing line between federal and state power, but emphatically reaffirmed that there were profoundly important *constitutional* issues of federalism for Congress and the country to debate, would any of these steps have made a difference?

The answer is not at all clear. Certainly there is evidence that Congress *can* take constitutional issues seriously, for it has done so on many occasions.[17] On the other hand, the nature of the contemporary Congress—its selection process and operational procedures—seems to lend itself less to consideration of constitutional issues than was the case in the past.[18] One can argue at least that these steps *should* have made a difference. If the United States is to remain faithful to the constitutional principle of federalism, it will not be by simple judicial fiat.[19]

While the judiciary may have a role to play, Congress, and ultimately the electorate, must shoulder much of the responsibility for maintaining our fundamental political principles. In fact, much of the reason that there has been a shift in the nature of American federalism lies precisely here. The constitutional design of the United States, like any constitutional design, can never be purely self-sustaining. However much the founders of American government tried to establish a form of government in which institutions would be the chief barrier to constitutional violations, the fact is that institutions can never be the sole reliance. One can reduce the need to rely on the predilections of the citizenry, but one cannot eliminate it entirely. As one of the authors of *The Federalist* (Madison) wrote in another place: "Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea."[20]

A truly fundamental shift in the predilections of the citizenry may very well lead to a shift in the nature of the "true constitution" of society. There have probably been at least two such shifts in American history, with regard to the national "sentiments" underlying federalism. The first, and greatest, was the Civil War. Prior to the Civil War, many Americans were able to think of themselves first as citizens of their states, then of the nation, and they were never faced with the necessity of choosing between them. The Civil War, in addition to being a straightforward northern military victory, was a catalyst in the formation of national feelings. Millions of men fought and tens of thousands (fathers, husbands, brothers) died for the cause of the Union. Such an event could not but transform national sentiment profoundly, leading citizens to identify themselves with the nation in a way that permanently and decisively subordinated the states.

The second event, perhaps more ambiguous, was the Great Depression. It was a sign of the nationalization of our society that Americans did not look primarily to their state governments to deal with what all recognized to be a national (even international) problem. They looked to the national government and especially the Presidential leadership of Franklin D. Roosevelt. Whatever one may think of the policies of the New Deal (i.e., whether they were a "success" economically), it seems beyond doubt that Americans embraced it and have never since looked back on their decision to accord ultimate control over economic decisions to the national government. There is even a likelihood that since the New Deal, a majority of Americans no longer consider the national government to be one of enumerated powers. That is, unlike the Civil War, the New Deal worked a change in the constitutional principle of federalism in the sentiments of the citizenry. Whether this change is reversible is very questionable. It may be that Americans will reject the implications of the post-New Deal centralization of government, as those implications become clearer over time. It seems very unlikely though, that the public will demand a return to a national government of enumerated powers in the strict sense.

It should not be surprising that the Congress now operates with the more contemporary theory of federalism described by the ACIR information report quoted above: federalism is now a principle of power sharing among governments, with the exact degrees of sharing to be decided by Congress on a more or less *ad hoc* basis, in the year-in, year-out operation of government.

GARCIA: AN INTERGOVERNMENTAL-IMMUNITIES CASE

The question that *NLC* and *Garcia* have raised must be examined in this historical context. But their immediate constitutional context, as it turns out, is somewhat narrower. One of the other aspects of traditional federalism (besides the division between national enumerated and state reserved powers) was the relative autonomy of federal and state governments from regulation by one other. The judiciary enforced this second principle in a variety of intergovernmental-immunities cases throughout the 19th and into the 20th centuries. These cases, too, especially insofar as they dictated limits on federal power, were more or less overturned in the New Deal, post-1937 judicial regime.[21]

What differentiates these cases from the previously discussed federalism cases is that they con-

cerned powers that are conceded by all to be within the ambit of the national government, especially taxation. They did not, therefore, raise the question of whether Congress was acting *ultra vires*. Strictly speaking, therefore, they did not involve the Tenth Amendment, which was a guarantee of reserved powers to the states correctly understood as the residuum of power left after defining legitimate federal powers.

NLC and *Garcia*, for all the talk of the Tenth Amendment, are really not Tenth Amendment cases at all. Rather, they emerge out of the same principle undergirding the intergovernmental-immunity cases: namely, the implications which flow from having a Constitution which presumes the concurrent existence and effective operation of two separate governments. Nowhere in the Constitution are the states explicitly guaranteed perpetual existence and operation, yet these are guaranteed implicitly when various constitutional provisions assume them. For example, without state governments, no senators could be chosen under the original Constitution.[22]

It was such "intergovernmental immunity" concerns in the context of a broad exercise of the commerce power that gave rise to *National League of Cities*. The Court had completely accepted the expansion of the commerce power to regulate virtually all economic affairs (on the assumption, not altogether implausible, that almost all economic affairs have a substantial effect on interstate commerce). Yet when Congress extended that regulation to state government employees, not only in the area of government "enterprises" (hospitals and schools) but also in the area of more traditional governmental functions, the Court had second thoughts. The Warren Court upheld the first set of *FLSA* amendments (relating to state hospitals, institutions, and schools) in *Maryland* v. *Wirtz* (1968); but the Burger Court, with new Nixon-appointed justices more positively oriented toward federalism (Powell, Rehnquist, Burger, and a more hesitant Blackmun), overruled *Wirtz* and struck down the application of the *Fair Labor Standards Act* to the states in *NLC*. Brennan's dissent—which offered the amusing scenario of one of the leading activists of the modern Court shrilly denouncing Court activism—tended to treat the case as if it rested on the argument that Congress may not invade the reserved powers of the states. But the Tenth Amendment, which does protect state reserved powers, was being used in a different way—as a *symbol* of what the Constitution preserves of "state sovereignty" and the implicit guarantees of state existence and operation inherent in that limited "sovereignty."[23]

That there are some such limits on Congress arising from constitutional implications seems to me perfectly obvious. Congress could not abolish the states, nor completely remove the states' power to tax, nor remove state power to regulate commerce that truly has no effect beyond a single state (though this may be a very small set). The problem—and it is a very substantial one—lies in ascertaining how far those implied limits on the national government extend. It seems to me that it is a problem which is likely to be insuperable in the context of judicial power.

Garcia overruled *NLC*, rightly noting that "[w]hat has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations."[24] The majority went on to argue (along with Jesse Choper)[25] that the judges did not need to worry about federalism, since the ordinary national political process (especially in Congress) contains adequate safeguards for the states, and that these have worked well. The evidence cited in support of this contention, however—states have gotten a great deal of federal money and exemptions from some federal regulation—proves only that states have been able to preserve some of their interests within the political process. It shows that the political process is adequate if we want to preserve federalism as it is practiced in contemporary America. What the opinion, unsurprisingly, fails to note is that those who wish to see a return to the earlier, constitutional status of federalism have no reason to hope that the ordinary political process will be an adequate forum in which to accomplish that goal.

DISCUSSION

Hunter-Oakerson

Lawrence Hunter and Ronald Oakerson have analyzed the problem and offered a set of solutions in two overlapping papers: "Reflections on *Garcia* and Its Implications for Federalism"[26] and the paper included in this symposium. Their support for *Garcia* as constitutional interpretation and rejection of it as sound constitutional arrangement, leads them to locate a fundamental flaw in the design of the Constitution. In a sense, they say, the Anti-Federalists were right—the restraints on the power of the national government were inadequate! But they rely even more on the framers themselves for the basis of their analysis. The framers considered mere "parchment barriers" to be inadequate, yet that was what they provided for in the case of the division of powers between federal and state government. A simple absence of congressional

authority is inadequate as a limit on the federal government. What is needed is some kind of correlative authority to check federal authority, and it must provide both incentives and means to do so.

The Hunter-Oakerson solution is unusual: constitutional amendment. *Provide* the constitutional limits on Congress, which the framers omitted, as the supplementary means that are necessary to effectuate the Constitution's overall intentions.

I think Hunter and Oakerson go too far when they attribute the decline of federalism to the design of the Constitution itself. In the arena of constitutional interpretation (separated, for the moment, from judicial review) there may be some genuine limits on federal power which they "give up on" too easily. For example, there are sound structural arguments for limiting federal power. (Hamilton gives one regarding the independence of the state taxing power from federal control in *Federalist 32*.) The simple fact that they may not be judicially enforceable is not necessarily a defect in the original design. It may be that the framers chose not to depend on judges (for reasons of which Hunter and Oakerson are well aware), that such responsibility was placed elsewhere, and that responsibility has not been met.

I do not think that the framers relied as much as Hunter and Oakerson believe on the explicitness of constitutional checks. (As Nagel rightly points out, the key was self-interest, whether or not a given explicit prohibition existed.) For example, the separation of powers (with which checks and balances theory of the *The Federalist* was more closely associated—as opposed to checks on government in the name of individual rights) does not rely heavily on explicit constitutional provisions. (Article II on the executive probably involves many of the most difficult constitutional questions regarding what is only implicit in the framers' design.) Hunter and Oakerson's emphasis on the Bill of Rights as a model of successful checks and balances, because they are explicit, ignores what I think is the fact that most of the framers did not place great emphasis on the Bill of Rights. They were merely declaratory statements to calm the fears of the Constitution's opponents. Moreover, what has been done with those explicit limits is mostly contrary to the intention of the framers, who would be appalled at the expansion of judicial control of legislation in the name of the Bill of Rights guarantees. In that regard, the example of the Bill of Rights is as much a warning of the danger of explicit guarantees as it is a recommendation.

Hunter and Oakerson rightly recognize the importance of checks and balances in the framers' thought, but I think they overemphasize it. As much as the framers relied on this principle, they never went so far as to believe that it was possible to maintain constitutional arrangements without the active support of the citizenry for the principles of the regime. If Americans had wanted to maintain federalism as originally understood, did the means exist to preserve it? I suspect that the framers, in their own defense, would say yes. The underlying cause for the shift in federalism, which Hunter and Oakerson deplore, is not the absence of explicit limits on Congress—it is the fundamental shift in "national sentiment" which has occurred since the Civil War and Great Depression. The expansion of the commerce power—which involved judicial approval of a legislative program with broad national support—and the ineffectiveness of the political process in employing structural arguments to protect state prerogatives merely reflect that shift in the spirit of the regime.[27]

Wherever the responsibility for the change lies, what should we do now? Should we amend the Constitution to protect the states? While there is much to be said for such an attempt, there are some problems. First, some of the proposed amendments would be unlikely to accomplish very much that could not be done without them. As Robert Nagel points out, judges with a predisposition to defend federalism will probably find adequate grounds in the Constitution now; those without this inclination will probably interpret amendments so as to neutralize them. In light of that, and of the lack of salience of state prerogatives as a public issue, could the necessary forces to bring about an amendment be mobilized? Second, given present public opinion, could enough be accomplished by an amendment (at least one that had enough support to pass) to make the effort necessary to pass it worthwhile? And then, third, there are the usual dangers of unintended or unanticipated consequences. For example, might some of the amendments turn out to hamper the national government in attempting to secure its objectives?[28]

It must also be recognized that the proposed amendments, even if they fully accomplish their intended objectives, would only be one relatively minor step in reestablishing constitutional federalism. Most would carve out a certain immunity of the state governments themselves from federal regulation, but they would do little to restore the states to the breadth of relatively autonomous regulatory power they once held. Much more could probably be done to restore genuine autonomous power to the states by the appointment of judges who would construe the Bill of Rights and the 14th Amendment reasonably than by passage of all the proposed amendments.

Let me, however, emphasize the greatest argument for an effort to use the amending process. If suf-

ficient support can be mobilized behind such efforts, then even should they fail or accomplish only limited parts of their objectives, the amendment process could be a fine occasion to educate the citizenry to the importance of federalism. If federalism is weak today in the United States (I am referring to constitutional federalism, not simple sharing of governmental functions), it is not because it has been attacked as much as that it has been ignored. There have been some legitimate grounds of attack—as Philip Bobbitt points out, the attempted use of federalism to preserve the regime of white supremacy in the south did a great deal to discredit it. By and large, though, it is the ignorance of citizens about the benefits of a constitutional division of power between state and federal governments that is the greatest danger today, and an amendment campaign—at least one strong enough to be at least respectable—might be a very useful occasion for educating the citizenry in the principles of constitutional federalism and the dangers of its demise.

Nagel

Robert Nagel offers a defense of *NLC*—but not of attempts to convert it into a developing doctrine. Examining the "mainstream" criticisms of *Garcia*, he argues that they fail, because in one way or another they try to resurrect the earlier (pre-1937) attempts to limit congressional power (e.g., *Hammer* v. *Dagenhart* and the Commerce Clause). None of these distinctions made over the years have survived, and rightly so. The legal categories, which are the conventional judicial tools, are simply inappropriate when dealing with federalism.

Nagel makes some trenchant arguments demonstrating that the constitutional inferences that judges can make in defense of federalism are no less clear than those that are regularly and routinely made in order to protect individual rights. (But there, in fact, is the rub!) There is one important difference between individual rights and federalism cases, he says. Rights cases pursue intangible objectives (e.g., "racial equality") but they also create entitlements, which leads to a focus on rules that are meant to alter the world in discrete ways. A case like *NLC* does not involve the moral imperatives associated with entitlements—it is primarily *didactic*, providing for a fluid system that needs to be maintained over time and only roughly.

Nagel's "noninstrumentalist interpretation" is a kind of *via media* between too much protection of federalism and too little. Like many other middle roads, however, I think that it will not work.

The differences between Hunter/Oakerson and Nagel stem especially from their different conceptions of federalism. Hunter and Oakerson want a constitutional federalism, which Nagel would criticize (on both interpretive and policy grounds) as too "static." For example, he is perfectly content with *Katzenbach* v. *McClung*,[29] the effort of Congress (with the unanimous support of the Court) to regulate racial discrimination under the Commerce Clause, not only because the elimination of racial discrimination has had "an enormous impact on interstate commerce" but also, it seems, because it would have been wrong to stop "the bold campaign to improve race relations in the south." Thus, Nagel views federalism as being basically alive and quite well today, despite some unfortunate extensions of federal power. He does not accept Hunter and Oakerson's contention that there has been a fundamental shift in the *nature* of American federalism. It is not surprising, then, that he is not sympathetic to suggestions for amendments. The difference between them ultimately rests on Hunter and Oakerson's argument that the federalism that exists today—at the discretion of Congress—derived from the earlier constitutional federalism and in the long-run will not be sustained without it. Nagel, more satisfied with a "fluid system" of federalism, would deny the necessity of the earlier constitutional restrictions.

One might also dispute Nagel's assumptions regarding judicial review. The argument, which is central for Nagel, is that moderate, *NLC*-type judicial review, although it is based on only one plausible view of the implications of the Constitution, is at least as legitimate as the typical exercise of judicial review we see today, in cases like *Brown* and *New York Times* v. *Sullivan*. An obvious response is that Nagel is right when he says these opinions have the same degree of legitimacy, i.e., none.[30]

For the same reason that civil liberties cases which rest on dubious, or even only plausible, interpretations of the Constitution are illegitimate, so is *NLC*. In either case, the public policy embodied in the decision might be quite unobjectionable, might be very good indeed, but is not commanded by the Constitution (at least with such clarity as is necessary for judicial review) and therefore, is not judicially enforceable.

Nagel makes a quite ingenious and plausible case for the policy laid down in *NLC*—one which I would find persuasive were I a legislator examining the constitutionality of the law at issue in that case at the time it was proposed in the legislature. But other plausible cases could be made, as he concedes.[31] Those of us who object when judges single out "plausible" policies and declare them to be the law of the land cannot approve simply because we happen to like what the majority found plausible in *NLC*.

Nagel's conception of judicial review is similar in a fundamental respect to Alexander Bickel's "passive virtues"—it is at once activist and restrained. Bickel criticized John Marshall because he said that "this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should."[32] Expanding this point beyond the narrow context in which Marshall made it, one can observe that he wanted a judge to say what the Constitution said—neither more nor less. Bickel wanted to leave a judge the options both of saying more than the Constitution itself had said (for he followed Frankfurter and Holmes in maintaining the legislative character of judicial review) and saying less than it had said (because he wanted the judges to use discretion in the exercise of their power, so as to mitigate its counter-majoritarian character).

Nagel too wants the Court to say both more and less than the Constitution says. The Court, he urges, should choose rare and opportune moments to instruct citizens and other branches about constitutional principles. The form of that instruction can include imposing what is only one plausible reading of the Constitution on the citizens and other branches—saying more than the Constitution says. Yet the Court should do this only rarely, avoiding the temptation to "doctrinalize" its teaching by working out its logic, thereby creating rules that apply to other cases—saying less than the Constitution says.

It seems to me that the only way the Court can keep the moments rare, to avoid deducing rules from a decision like *NLC*, is to cut off the application of its logic, arbitrarily. This may have some advantages, but it has a major defect too: it is incompatible with the rule of law. In effect, it means that the Court will treat differently people who are in situations that are logically the same. While federalism cases are not individual entitlement cases, still, under Nagel's approach, Joe Garcia, an employee of the San Antonio Metropolitan Transit Authority, would not get *FLSA* hours and wages under *NLC*—because that would undermine the preconditions of state existence—while many others would be subject to federal regulation (for better or for worse) that no less plausibly would undermine federalism. Of course, the hope is that *NLC* will be acted upon in Congress. But should equality under the law turn on such a hope?

Nagel's "bottom line" is a relatively restrained form of judicial review because it is deliberately saved for those rare and opportune moments. But the very ideas of the Court having the discretion to pick and choose such cases, and that it should throw off the mental habits derived from individual rights cases, show that Nagel accepts too much of the current "public law" orientation of judicial review, which is one essential facet of modern activism. Those who prefer a more traditional form of restraint would argue that the last things in the world we should ask the judges to discard are the mental habits that result, not merely from a global concern for individual rights characteristic of contemporary judges, but from a concrete concern for the particular litigant as the focus of adjudication.

The most valuable aspect of Nagel's argument—though after my last criticism it may seem paradoxical to say so—is his concentration on the judicial educative function.[33] That function has always been important, as Marshall's impact on constitutional law made clear early in our history, but it has expanded to an even larger role over time as the custom of our society has (unfortunately) accorded to the Supreme Court almost the exclusive role of authoritative interpreter of the Constitution.[34]

If federalism is not well understood today (as Hunter/Oakerson and I think), it is at least in part because the Supreme Court has not explained and defended it very well since 1937—since it has been more concerned with giving reasons for evading the limits federalism placed on the national government. I think Nagel is right that the most important role the court can play in this area is the role of educating the nation as to the meaning and implications of federalism. The question is—and it is a very difficult one—can the Court perform that function without actually striking down laws? Will the country and the legal profession pay attention to opinions that point out serious problems created for constitutional federalism by national laws, but that do not go so far as to strike them down because of the absence of sufficiently clear constitutional standards? On one hand, opinions will not carry as much weight if they seem to be "mere" admonitions, and, on the other, thoughtful opinions can clearly carry significant weight even when they do not strike down acts of the government. Where, in between these extremes, the actual result would fall is difficult to say.

Bobbitt

Bobbitt makes an interesting case that *NLC* was intended as an exercise of a "cuing" function. Analysis of post-*NLC* cases, he says, shows that *NLC* was meant as a cue to Congress, and not as a precedent for lower courts to develop and use as a judicial check. That is why *Garcia* was inevitable.

There is, however, a different and equally plausible explanation. Rather than treating the Court as a unit, we could focus more on the specific source of the shift between *NLC* and *Garcia*: namely, Black-

mun's change of vote. His original concurrence in *NLC* was somewhat hesitant on the face of it, and it may simply be that subsequent cases persuaded him that the *NLC* majority was wrong when it thought that it could articulate adequate doctrine to govern the area. The cases between *NLC* and *Garcia*, which Bobbitt interprets as efforts by the Court to avoid getting into the issue by confining *NLC* to its facts, can also be interpreted differently if one attends to the pattern of voting. Two of the cases, *Hodel* and *United Transportation Union* v. *Long Island RR Co.*, were unanimous, because even the *NLC* majority did not consider them to fall within the *NLC* principle. *Hodel* did not involve a regulation of the state itself, and *United Transportation Union* v. *Long Island RR Co.*, involved regulation of railroads, which has traditionally been an area of strong federal involvement. The other two cases, *FERC* v. *Mississippi* and *EEOC* v. *Wyoming*, both saw the *NLC* majority remain intact except for the desertion of Blackmun, which put the others into dissent. These latter cases, in particular, cast doubt on whether the *NLC* majority intended merely to exercise a cuing function.

Nonetheless, whatever the actual intentions of the Court, Bobbitt's analysis is an interesting prescription for how these cases *should* have been handled. In practical terms, Bobbitt's position is quite close to Nagel's. There are differences, the most important of which is that Nagel defends *NLC*, while Bobbitt criticizes it. But they are close to each other in wanting the Court to encourage something without actually having to do it. Nagel wants a "noninstrumentalist" interpretation, which would allow a very brief judicial incursion into the issue, with the case limited closely to the facts so that it can more or less stand on its own, without becoming a source of further doctrinal development. Bobbitt would like a similar incursion, but one even more limited. Disagreeing with Nagel, it would seem, that the Court can prevent lower court developments once it has made a substantive decision, he opts for a more indirect "cuing" of Congress. How this would be accomplished is not entirely clear. If the solution is parallel to his example of *Marbury*, then it would consist in making an argument about its view of the merits (indicating that there are constitutional limits on Congress in the facts of that case), while finding some procedural ground for not actually overruling the law at issue.[35]

The question is how well the cuing function will work if it is separated from the checking function: Will Congress get the message—or act on it—if it knows that the Court has adopted Bobbitt's approach and will not strike down the law? If the Court does strike down the law, then it has failed to prevent its entanglement in the futile chain of events that Bobbitt laments.

Presumably, the difference between Bobbitt's position and one which would simply have the Court say that there is a serious constitutional question for Congress to decide (the position I lean toward), is that Bobbitt's Court would not explicitly say that it was only expressing its opinion. The uncertainty as to whether the Court was simply cuing, or would really check as well, would give Congress an added incentive to listen. Eventually, one assumes, the Court's intention might become clear in a subsequent pattern of cases; but then again, if Congress picks up the cue there may not be subsequent cases (or at least not as many), making it easier for the Court to continue ducking the issue.

Bobbitt's position is an intriguing example of how to combine what might be called "restrained" jurisprudence with activist judging. His overall position is one of restraint, since he recognizes that Congress rather than the Court has the fundamental responsibility for enforcing constitutional limits deriving from the federal structure.[36] On the other hand, like Marshall in *Marbury* and other cases as well,[37] Bobbitt's judge would not restrict himself to the minimum that he has to say in order to resolve the case in front of him. He would actively pursue a strategy of achieving a certain broad policy result, i.e., the more effective enforcement of the constitutional design of federalism, often ignoring general rules of restraint judges have traditionally acknowledged (many of which are summarized in Brandeis' classic statement in *Ashwander* v. *TVA*[38]).

If there is anything about Bobbitt's position that makes one uncomfortable, it is the suspicion that it will only work on the basis of a certain lack of candor: namely, the suggestion that the Court intends to strike down a law (once it is presented in a proper case) which it has no intention of striking down. Such "feints" are hardly uncommon in politics, so I do not mean to say that they are always improper. At the same time, I wonder whether its benefit (providing a greater incentive for congressional action by keeping a possible sword hanging over Congress' neck, rather than throwing the issue completely and unreservedly into its lap) outweighs its dangers: first, getting involved in a "game" with a Congress that will not take the cue, and second, foregoing the opportunity to educate the nation explicitly and straightforwardly to the fact that there are some constitutional issues that are appropriate to resolve through the ordinary political process rather than through litigation—a lesson that the nation sorely needs after so many years of expanding judicial power.

Ostrom

Professor Vincent Ostrom's paper[39] rightly highlights the profound character of the change in American federalism and some of its potential dangers. At the same time, however, I think that he carries his argument too far at some points, and does not offer an adequate answer to the problem he diagnoses.

It is hard to see how one could take *The Federalist* as the basis for one's argument and conclude that the core of authority in our form of government lies in state governments and *that federal powers should be construed narrowly*. Even given its reassurances (sometimes rhetorical, sometimes not) that state power would remain strong, *The Federalist* clearly makes a very strong argument (especially in numbers 23-36) *against* construing federal powers narrowly. Ostrom seems to adopt a Jeffersonian understanding of the Constitution, contrary to a fair reading of the document itself, as John Marshall pointed out on numerous occasions.[40] The possibility that federal power may be abused is not a reason to construe it narrowly, which would amount to a different kind of abuse. (It is about as easy, and more accurate, to say that the federal government has improperly exceeded broad construction of its powers.)

Given often over-simplified assumptions about the workings of American democracy, there is certainly room to point out, as Ostrom does, that the tie between electoral arrangements and what government does is not always close. But it seems questionable whether this is the real reason that we cannot expect the political process to protect federalism. Insofar as the political process has failed to protect the prerogatives of states against an expanding central government, it has been as much due to the strength of the tie between voters and officials as to its weakness.

Ostrom himself indicates that the line of possible consequences he draws from nationalization is "conjectural" and must be "viewed with caution." In order to keep a certain perspective, one should keep in mind other phenomena of contemporary politics which tend to mitigate the centralizing tendencies about which he worries. For example, one phenomenon opposed to centralization is the movement toward deregulation, which is as impressive for its gaining support among intellectuals (who have typically been so inclined to egalitarianism) as for its political victories, which began, it should be noted, under the Carter administration. Ostrom's description of potential evils is a legitimate exercise in working out logical implications, and many of his observations have considerable substance. At the same time, one must resist the temptation to think that such logic is ineluctable, given the complexity of our political life, which is a compound of so many varying tendencies.

Having stated these qualifications, I agree with Ostrom that the prevailing understanding of federal power (especially under the Commerce Clause) is virtually unlimited (except by specific prohibitions), and that this represents a fundamental shift in our form of government, with unfortunate consequences. Even if the shift had been unambiguously good, the way in which it has been carried out—evading the constitutionally specified means for amending our fundamental law—is contrary to the principles of constitutional government.

Ostrom's skepticism about *Garcia's* sole reliance on the political process for the protection of federalism is perfectly understandable. The record of the past 50 years (or longer) does not give one confidence that a truly constitutional federalism (as opposed to a division of powers resting on the discretion of Congress) will be effectually preserved, or more accurately, restored there. But that may say as much about a shift in Americans' understanding of their different levels of government (and, in Ostrom's words, "the diverse communities of interest that Americans share with one another") as it does about a failure of the political process. It is not the process that has failed—it is just that a good process has been used to reach a decision that in many ways is unfortunate. It remains open to defenders of constitutional federalism to use the process (both the ordinary national political process and the extraordinary amendment process) to reverse the shift.

It is also understandable that a constitutional federalist would look to the Supreme Court as a kind of *deus ex machina* to undo a shift which seems both illegitimate (because it was accomplished in ways not authorized by our fundamental law) and unwise (because it undercuts one of our fundamental law's most important barriers to dangerous centralization). But, however understandable, it is mistaken. It assumes that there is greater clarity about many of the particular issues of federalism than there is, and that there are "judicially manageable standards" for dealing with these constitutional problems. But finding a clear-cut constitutional line between federal and state commerce regulation is often impossible, and there are few federalism cases which seem apt for judicial resolution. As long as judicial review is understood to be a power to say where the constitutional line is, instead of a power to say where it should be in doubtful cases, the proponents of a more traditional federalism can look to the Supreme Court for only a limited form of assistance: rare judicial decisions striking down assertions of federal power or intrusions into state preroga-

tives which are so extreme as to be clear violations of the Constitution, and opinions (in cases refusing to strike down laws) which trenchantly outline the serious constitutional issues and point to the political process (ordinary or extraordinary) as the place to resolve them.

CONCLUSION

It is unlikely, I think, (and unfortunately so) that constitutional federalism can be re-established in the American regime. The struggle today is over exactly how much of that original federalism will be maintained. Those of us who consider it an important element, especially because of the ways in which it helps to foster decentralization and to protect freedom, would like to prevent further inroads on state power and even to foster what reinvigorization is possible. How to do this is the question.

With more Supreme Court justices today sympathetic to federalism than for decades, and the possibility of more appointments of that sort, it is tempting indeed to look to the Court as a major element in the solution. Despite the short-term setback in *Garcia*, one might expect that there is reason to be optimistic that in the near future *NLC* may be revived and extended. Moreover, the Court seems to be a good prospect for securing such reform because it is freer than Congress of the necessity to balance interests by compromise, making it possible to secure the principle in a "purer" form. The "principle" of federalism (and it is a principle rather than a set merely of practical accommodations) is like "individual rights" in this respect: it is easier to secure by judicial fiat than by the ordinary political process.

Unfortunately, the price that would have to be paid is too high. Substantial judicial protection of state autonomy in cases like *NLC* requires a form of judicial legislation. Granted, it is a moderate form, in that it requires the Court only to enforce one reasonable reading of the document over others, rather than creating a new, forced reading out of whole cloth, as is the case with so much modern constitutional law. (In that respect, it is closer to the Commerce Clause cases of the "transitional era" Court from the end of the 19th century until 1937 than it is to its substantive due process cases.)[41] But even moderate judicial legislation has demerits that outweigh its advantages. Perhaps most importantly, it would be a significant blow to any emerging effort to restore *interpretation* to constitutional adjudication. The category of those who are most likely to be sympathetic to *NLC* overlaps substantially with the category of those who are more likely to be critics of contemporary judicial activism, attacking it in the name of the judicial duty to interpret the Constitution rather than revise it. *NLC* opened critics of judicial legislation to the charge that they were perfectly willing to do their own judicial legislating when their public policy preferences can be furthered. It seems to me that even one who considers *NLC* to flow necessarily from the Constitution should carefully consider the consequences of the fact that it does not appear that way to many people, and will provide useful grist for the mill of legal realists. (Perhaps this causes me to err on the side of being critical when I approach the opinion in *NLC*. If so, I can only say that I think such caution is justified.)

That is not to say there is no judicial role in the protection of federalism. With Nagel and Bobbitt, and Hunter and Oakerson too I think, I would say that there remains a very modest, but useful, role for the Court. The Court cannot set itself up as arbiter of federalism, as it once did, not just because of practical political limits (which the New Deal pressure on the Court exemplified), but also because it lacks the necessary basis of clear constitutional standards. It can, however, even in cases where it upholds federal action which many consider to impinge on state autonomy, write opinions which persuasively remind its audiences (Congress, the legal profession, opinion makers, the electorate) of the serious constitutional issues which are at stake—issues which are much more "live" issues than the Court has treated them for the last half century.

There is another area where the Court could do much more to restore federalism. That is the area of individual rights, in which the court has presided over a wholesale decimation of state power (especially the police power) over the years, on the basis of strained, or simply indefensible, readings of the 14th Amendment and the Bill of Rights. Restoring state powers in these cases, where there are clearer constitutional standards on which the Court could act, would do more than a ton of *NLC's* to restore federalism.

Beyond these roles of the Court—one modest, one substantial—the major options seem to be either fighting it out in the ordinary political process or efforts at amending the Constitution. Both could be useful. Whatever the limitations of Congress as an arena in which to defend constitutional principles such as federalism, it is clear that the ordinary political process was precisely where the founders expected many constitutional issues to be resolved. It is also an arena where Americans can learn much by struggling with constitutional issues themselves rather than relying on the d*eus ex machina* of the courts (as James Bradley Thayer's classic articles argued).[42]

Moreover, if I am right that the shift in federalism is in great part the result of a fundamental shift in "national sentiment," then the only way to mitigate that shift is to engage in a substantial public debate, trying either to create sentiment to counteract the nationalization of our politics, or, perhaps more likely, trying to show that the nationalizing shift that Americans have supported does not require some of the limitations on state autonomy which have incidentally accompanied it (e.g., public acceptance of the New Deal does not necessarily imply public demand that the *Fair Labor Standards Act* be applied to state governments).

The utility of a substantial national debate is precisely what makes the proposal of formal constitutional revision attractive. One must always hesitate to amend the Constitution, as writers old and recent have argued.[43] But perhaps the arguments against constitutional revision are attenuated when the amendment is designed to eliminate the meandering of a constitutional principle severed from its foundations. Even were the amendments able to restore only some elements of the original constitutional design (which I assume is the case), that "some" might be very beneficial.

Whatever route is taken by those who wish to maintain or reinvigorate as much of the original constitutional principle of federalism as possible, it is clear that one facet must be an effective articulation of the reasons for federalism. This will not be easy. Some of the defects of federalism are painfully obvious: perhaps nothing has so undermined it as its having been invoked (so successfully, for so long) to protect the unjust subordination of the black race in the south. It also offends what Tocqueville describes as a deep-seated desire of citizens in modern democracies for uniformity: if people are equal, why should they not have the same laws?[44]

Tocqueville also argues that democratic citizens tend to prefer equality to liberty, and many of the reasons he gives for this come down to the fact that equality's advantages are very immediate and tangible, while the benefits of liberty are relatively long-term and intangible. Likewise, federalism's defects are often fairly easy to see, while the defects of centralization become more apparent over a long period of time. (The latter defects may be immediately clear to those who are on the losing end of political battles to determine how the centralized power should be used, but it is the winners who rule.)

One of the areas where a defense of federalism and an explanation of its benefits might be most profitably made is precisely the whole question of individual rights and judicial power. The transformation of judicial power which has occurred over the last century has been justified on a variety of grounds, but none has been more salient since 1937 than the need to protect individual, especially minority, rights. Those who reject the change in judicial power from interpretation to legislation must provide an alternative explanation of how individual rights can be protected in our political system. It seems to me that there are two main arguments, despite a certain tension between them, which can be harmonized.

One alternative to modern judicial review is based upon the extended republic argument made by Madison in *Federalist 10*. What has most protected individual rights in American history, it can be argued, is not the judiciary, but our form of government and, above all, its extent: the fact that it covers a large territory, comprehending a multitude of groups with different opinions, passions, and interests. Because our government (and especially the Congress) reflects the extraordinary diversity of the nation, the only way to obtain a majority is normally to go through the moderating process of building coalitions based on considerable compromise and give and take. If this process has often been frustrating for those who want to reform the nation in important respects, and if it has arguably prevented the passage of beneficial legislation on many occasions, it has also been a remarkably effective process for preventing the passage of extreme, harsh, or oppressive laws.

The other major way to protect liberty, as an alternative to modern judicial review, is federalism. Different opinions, passions, and interests predominate in the various states of the Union (especially if states are given genuine autonomy in respect to many public policy issues). This diversity helps to protect freedom in two, somewhat different, ways: First, different states serve as bases of power for resisting the imposition of a uniform national policy which may be unjust or oppressive (*Publius* follows Montesquieu in making this argument in *Federalist 9*). Second, if policy making can be kept in the states, it provides people with an opportunity to choose to reside in states whose legislation, on the whole, seems to them to be more just or prudent. This second argument attends especially to the fact that even on questions of liberty, there are many good-faith differences among reasonable people about what proper public policy is. If there are a number of forms of libel law, for example, that reasonable people might consider just and prudent, is not liberty better protected—including both the liberty to speak *and* the liberty of communities to set appropriate limits on speech—by allowing different communities to adopt different standards? That possibility is what federalism protects, while modern judicial review facili-

tates the imposition of a single national policy, however unclear its necessity or desirability.

There is a certain tension between these two alternative arguments for rejecting modern judicial review. The assumptions underlying the extended republic argument might very well lead to a critical view of federalism, since the latter protects the power of governments whose lesser sphere makes dominance by particular opinions, passions, and interests more likely. The key response to this is that the alternative to the national majority is not a state majority, but a diversity of state majorities among which one can choose. It would overstate this position to assume perfect mobility in the citizenry, since there are so many factors in the choice of a place to reside, including often the simple fact of one's "roots." But one can argue fairly, I think, that there is sufficient mobility to address the protection of fundamental rights, which is not merely the maximization of preferences. These two arguments, are then compatible—they reinforce, rather than compete with, one another.

An understanding of these benefits of federalism, and how they are connected not simply with decentralization, but with constitutional federalism, is essential if constitutional federalism is to be reinvigorated.[45] In the end, I believe, Hunter and Oakerson are right when they argue that "[w]hat has been little understood, however, is that the benefits of cooperative federalism may in fact depend upon the Constitutional principle of federalism . . . ."[46] The danger is that the "cooperative" federalism, which is still very vigorous, may over the years degenerate, if it is deprived of the constitutional supports it once had (the remnants of the prerogatives states possessed, and the sentiments they inspired, under the older federalism).

Garcia provides an opportunity to reexamine the character of American federalism: its original form, as well as its transformation into the modified form we possess today. It would be unfortunate if it turned out to be a decision not to reflect any longer on the purposes and preconditions of federalism. A constitutional principle which ceases to be understood will lose its ultimate ground of existence. Subjected to the buffeting of political events, it will slowly erode and disappear, to be replaced by other principles. But the newer principles may be different from the old in this respect: that they are not the fruit of a justly praised effort to erect strong and free republican government, such as that of the founders. Better to act, than to leave federalism to the vagaries of chance, thereby keeping faith with *The Federalist's* hope that America will show the world the benefits of "establishing good government from reflection and choice" rather than mere "accident."

ENDNOTES

[1]U.S. Advisory Commission on Intergovernmental Relations, *Reflections on Garcia and Its Implications for Federalism*, M-147 (February 1986), p. 13.

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

[3]83 L.Ed. 2d 1016 (1985).

[4] *Ibid.*, p. 1052.

[5]For example, see Fiss and Krauthammer "The Rehnquist Court" *The New Republic*, March 10, 1982.

[6]For a more detailed analysis of the issue of federalism at the Convention, see Wolfe, "On Understanding the Constitutional Convention of 1787" *Journal of Politics* Vol. 39, No. 1 (Feb. 1977), pp. 97-118, and Zuckert, "A Gaggle of Federalisms: Toward a Reinterpretation of the Constitutional Convention" (paper presented at the American Political Science Association meeting, August 1980).

[7]There may be a temptation today to look back on the *Federalist's* arguments in light of the nationalization of American life and the expansion of the central government, and to consider its warnings about state encroachment as merely rhetorical, an artful disguise to hide the centralizing ambitions of its authors. While there is certainly truth to the contention that they wanted an even more strongly centralized government than the Constitution provided for, and wanted to make full use of the powers alloted to the national government, we should remember that their warnings about state encroachment were not mere rhetoric, but almost accurate predictions. Early American history reveals a constant effort to fight the centrifugal tendencies of our constitutional system, which ended decisively only with the Civil War itself. Marshall's "nationalist" decisions were not tactical victories in a campaign moving inevitably toward consolidated government, but necessary defenses of the Constitution's division of power in an era when the central government might have been so weakened as to make it impossible to sustain the burden of the Civil War.

[8]For a discussion of the Marshall-Jefferson differences on interpreting the Constitution's provisions for national powers and states' rights, see Wolfe, "Constitu-

tional Interpretation in the American Founding" (Ph.D. Diss., Boston College, 1978), pp. 90-101.

[9]4 Wheaton 316 (1879), 9 Wheaton 1 (1825). The Taney Court, it should be noted, while much more "states' rights" oriented, did not undo the basic constitutional foundation of broad national powers established by early government practice and articulately explained and defended by the Marshall Court.

[10]*Champion* v. *Ames* 188 U.S. 321 (1903), involving the interstate shipment of lottery tickets; *The Shreveport Rate Case* 234 U.S. 342 (1914), upholding ICC power to control intrastate railroad freight charges.

[11]*U.S.* v. *E.C. Knight* 156 U.S. 1 (1895); *Hammer* v. *Dagenhart* 247 U.S. 251 (1918).

[12]For a description of "traditional" judicial review, see Christopher Wolfe, *The Rise of Modern Judicial Review* (New York: Basic Books, 1986), chaps. 3 and 4.

[13]In *McCulloch*, Marshall gave as a reason for adopting one of his positions, the fact that "[w]e are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to an abuse of the power" 4 Wheaton 316, 430 (1819).

[14]A classic analysis of the Court's shift and critique of the double standard is Robert McCloskey's "Economic Due Process: An Exhumation and Reburial" *Supreme Court Review* (1962), p. 34. The exhumation—showing that any line of reasoning that justifies civil liberties review justifies at least some review in the area of economic regulation—is more persuasive than the reburial, which is done on the grounds that the Court needs to conserve its limited supply of institutional capital for the civil liberties areas it has increasingly staked out as its arena of action. The latter argument is also used by Jesse Choper in his *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980) to justify his proposal that most federalism and separation of powers questions be considered nonjusticiable. The obvious response is that the Court would do better to conserve its capital by cutting back sharply on the dubious policy making it has undertaken in the civil liberties area. If the Court applied a more traditional standard of judicial review across the board, it would have no problem of institutional capital being over expended.

[15]Hunter and Oakerson, p. 7. (It should be remembered that the Federalists who voted for the Bill of Rights under Madison's leadership did so largely on the view that it did not add much to the Constitution, but it was not so inconvenient as to outweigh its value in making the principle of federalism more explicit, i.e., it was a more explicit "handle" in the Constitution for those who made arguments relying on federalism as a constitutional principle. If it was a "truism", it was not a *mere* truism.)

[16]A possible exception might be the area of Presidential power. *Youngstown* v. *Sawyer* 343 U.S. 579 (1952), for example, can be viewed as a case striking down a Presidential action because it was *ultra vires*. On the other hand, a careful examination of the concurrences in that case, and a tabulation of the different votes, suggest that even in that case the majority of the Court adopted a very latitudinarian view of Presidential power.

[17]For evidence, see Donald G. Morgan's *Congress and the Constitution* (Cambridge: Harvard University Press, 1966).

[18]The overweening emphasis on short-term factors determining reelection recounted in David Mayhew's *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974) would seem likely to undermine the salience of constitutional issues, especially given the expanded influence of special interests which are primarily concerned with the immediate policy impact of representatives' votes.

[19]Naturally, I would make the same argument with respect to civil liberties. Freedom of speech, like federalism, will not last simply on the basis of judicial protection, as Hamilton argued in *Federalist 84*. Liberty of the press, he said, "whatever any fine declarations inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, as intimated upon another occasion, must we seek for the only solid basis for all our rights." Hamilton does, however, in this number, ignore the potential role of the judiciary in educating and strengthening public opinion in support of constitutional principles.

[20]Quoted in Paul Peterson "Republican Virtue and *The Federalist*: A Consideration of the Wills Thesis" (a paper delivered at the annual meeting of the American Political Science Association, 1983). As Peterson argues very well, *Federalist 10* should be read as an argument that much less "public virtue" is necessary to sustain a government than some thought (e.g., the Anti-Federalists, following their reading of Montesquieu)—but it cannot be dispensed with entirely.

[21]The origin of these cases is the second half of *McCulloch* v. *Maryland* 4 Wheaton 316 (1819), in which Marshall shows that it would be incompatible with the Supremacy Clause to permit states to tax federal instrumentalities. Later cases in the 19th century

held that federal officials' salaries were exempt from state taxation *Dobbins* v. *Erie County* 16 Peters 435 (1842) and that state officials' salaries were likewise exempt from federal taxation *Collector* v. *Day* 11 Wallace 113 (1871). Besides taxation, federal regulation of state activities became an issue, as when federal regulation of railroads was held (over state objections) to be applicable to a state owned and operated railroad *U.S.* v. *California* 297 U.S. 175 (1936). After 1937, the authority of earlier cases enforcing intergovernmental immunities was seriously eroded, as in *Helvering* v. *Gerhardt* 304 U.S. 405 (1938) and *Graves* v. *N.Y. ex rel O'Keefe* 306 U.S. 466 (1939).

As my remarks below will suggest, I think that at least some of the principles underlying intergovernmental immunities claims can arguably be found in the Constitution, especially in the implications of the structure of the government it creates. For example, the tax in *McCulloch* was certainly unconstitutional. At the same time, many of the earlier cases clearly took the principle too far (e.g., when they argued that application of a nondiscriminatory state or federal income tax to the salaries of federal or state officials was unconstitutional). The key question is whether the practice being challenged can be shown to be incompatible with either federal supremacy or with constitutionally protected state prerogatives.

[22]It would be an interesting undertaking to go through the entire Constitution and summarize all the state prerogatives and activities that are implied in it. A quickly complied list would include: (1) only a Supreme Court is established at the federal level (establishment of lower federal courts being left to Congress' discretion), yet it has appellate jurisdiction, apparently assuming the existence of lower court cases which could only come from state judicial systems; (2) the enumeration in the Commerce Clause power (foreign, among the several states, and with the Indian tribes) implies the existence of another category (logically, commerce which is internal to a state, not extending to or affecting others), which is unregulated by the federal government, and therefore is left to state regulation (the unstated premise here being that all commerce should be in principle subject to government regulation—a premise I do not think any of the founders would quarrel with); (3) state regulation of elections—its own and, in the first instance, federal elections—is assumed by Article I; (4) state collection of taxes is assumed by the provision regarding the apportionment of state taxes; (5) a state executive is assumed for purposes of issuing writs of election for vacancies in representation; (6) the states retain the power to establish and train a militia and appoint its officers; (7) possession of territory is assumed by the provision that states may cede some to the federal government to establish a capital, and by the assumption that states can make grants of land (in Article III, section 2); (8) the power to regulate migration or importation of people is assumed by the provision which says that only after 20 years may Congress override such importations; (9) states may impose imposts to pay for their inspection laws; (10) states can make gold or silver legal tender; (11) states may regulate contracts, as long as they do not impair their obligations; (12) states may engage in warfare, when actually invaded or in such imminent danger of it as will not admit of delay; (13) each state provides for the appointment of electors for the President; (14) each state is assumed to have public acts, records, and judicial proceedings; (15) states extend privileges and immunities to their citizens; (16) states are guaranteed a republican form of government; (17) states can call for a convention to amend the Constitution; (18) states can regulate the importation of liquor. With a little imagination, the list could be extended a good deal, I am sure. More importantly, however, taking what the Constitution *does* clearly assume about the states, and keeping in mind that an interpreter must assume the coherence of the document he is interpreting, the only reasonable explanation of the Constitution is that states are governments of general power, which can govern except to the extent that the Constitution limits their powers. Any attempt to abolish or reduce the states to mere administrative units of the national government would clearly violate the Constitution.

[23]Whether sovereignty can be divided, and whether therefore it is a proper term to use in regard to state prerogatives under the Constitution, is debatable, I suppose. I use the term here, not to take a side in that debate, but simply because it is the term that has long been used and it is one that the contemporary Court still uses. Likewise, when I use the term "state autonomy", it must be understood in an attenuated sense, not an absolute one.

[24]83 L.Ed. 2d 1032.

[25]See chapter four of his *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980).

[26]ACIR (M-147).

[27]I am not necessarily saying that such a shift should not be deplored. One could argue that national majorities are as bound by the requirement of amending the Constitution as any single person or group is, and that the appropriate way to change federalism would have been by constitutional amendment. If the nation really did come to a consensus acceptance of the New

Deal (and I think it did), then it should have been possible to legislate it by amendment. Further, one could argue that if the amendment process had been used, we would have have a better idea of how much exactly Americans wanted to modify the original constitutional design of federalism (instead of the abdication of serious discussion of that issue by the Supreme Court after 1937). "Acceptance of the New Deal" is, after all, ambiguous, and did not necessarily entail all the federal power which has been claimed since 1937.

[28]One proposed amendment provides: "Congress shall make no law, nor shall the courts make any ruling, requiring any state to take any action that is not otherwise required expressly and explicitly by this Constitution . . . ." While it goes on to make it clear that this does not protect state action that violates the Constitution or federal laws, I am uncomfortable with the breadth of the wording, and concerned about its implications.

[29]379 U.S. 294 (1964).

[30]I don't mean to get into a discussion here of the important—but for my purposes here the tangential—issue of whether *Brown* and *New York Times* v. *Sullivan* were or were not justified by the Constitution. My point is that most of those who support such cases—and Nagel intends them to be representative of civil liberties cases in general, it seems—do not particularly care about showing what I would consider a sound constitutional basis for those decisions.

[31]Certainly wage and hours regulation of state employees by itself is unlikely to destroy the preconditions of state governments' existence. Nagel's argument, I would guess, if extended, would involve a kind of balancing process, in which the tendency of a given law to undermine the preconditions of state government to a given extent is weighed against other factors. But he would not extend it this way in a judicial context, I think, since that would be too "instrumentalist."

[32]In *Cohens* v. *Virginia* 6 Wheaton 264, 404 (1821).

[33]While there is a tension between a "private rights" and a "public law" orientation in constitutional law (a judge cannot help but know that the consequences of his decision for society in general far outweigh the importance of its impact on the individual litigant), it is possible to insist on a private rights orientation (as the precondition for Court decisions) and still be sensitive to—and even to emphasize—the inevitable educative impact of an opinion. That is why Marshall could reject the modern public law orientation and yet obviously put great weight on the Court's function of explaining and defending the Constitution (in the context of a case) in *Gibbons* v. *Odgen* 9 Wheaton 1, 221-22 (1819).

[34]See John Agresto *The Supreme Court and Constitutional Democracy* (Ithaca: Cornell University Press, 1984) for a persuasive argument that this is not consistent with the political thought of the founders.

[35]I am not sure whether Bobbitt intends the parallel with *Marbury* to be that close, however, since he does say that *NLC* should have found a way to overrule *Wirtz* both substantively and procedurally. *Marbury* does not take the procedural approach of saying that "the judiciary will not take these cases." It takes a narrower procedural ground, while in fact saying that, in proper circumstances, it *will* take such a case.

[36]It may also be restrained in its adherence to the norm of the Constitution when arguing federalism questions. But this is not entirely clear, since his paper contains no real discussion of why *Wirtz* ought to be overruled. Is it because it violates the Constitution as it is properly interpreted, i.e., according to the fair reading of the document? Or is it because federalism is good public policy?

[37]For my argument that Marshall was an "activist" judge, not in the sense of judicial legislating, but in his judicial activity of defending and explaining the Constitution, see "John Marshall and Constitutional Law" *Polity* (Fall, 1982) especially pp.18-20.

[38]297 U.S. 288, 346-48 (1936).

[39]I make no pretense of doing justice to Professor Ostrom's wide-ranging paper. I will confine myself simply to noting some of his basic points as they provide a background for the discussion of federalism and *Garcia*.

[40]See, for example, *McCulloch* v. *Maryland*. 4 Wheaton 316 (1819) and *Cohens* v. *Virginia*. 6 Wheaton 264 (1821).

[41]Christopher Wolfe, *The Rise of Modern Judicial Review*, chapters 6 and 7.

[42]Thayer criticized the emerging "conservative activism" of the courts at the end of the 19th century, pointing out that a price was always paid in a loss of civic education—fighting an issue out in the legislature, whatever the result, fostered participation and heightened the citizenry's sense of moral responsibility. See especially his piece on Marshall in *John Marshall*, ed. Kurland (Chicago: University of Chicago Press, 1967), especially chapter 5, and "The Origin and Scope of the American Doctrine of Constitutional Law" 7 *Harvard Law Review 129* (1893).

[43]See, for example, Madison's argument in *Federalist 49*, and Gary McDowell's "On Meddling with the Constitution" *Journal of Contemporary Studies* (Fall 1982). Their arguments have special force when there is not a substantial chance of success, since in that

case you would derive some of the disadvantages of the process with little to show for it.

[44]*Democracy in America*, especially Volume II, Book One, chapter 1, and Book Four, chapter 2.

[45]Martin Diamond, one of the most insightful modern students of the American founding, came to see more clearly, I think, in the progress of his career, the necessary connection between decentralization and constitutional federalism, in practice, if not in theory. Compare his "What the Framers Meant by Federalism" in *A Nation of States* ed. Goldwin (Chicago: Rand McNally, 1961) with "The Ends of Federalism" *Publius* (Fall 1973).

[48]ACIR, M-147, pp. 36-37.

Postscript

FEDERALISM AND CONSTITUTION MAKING

Ronald J. Oakerson and Lawrence A. Hunter

This symposium has raised a number of issues that, in our view, should become the basis for on-going discussion. Moreover, as a result of the symposium, our understanding of the basic issues has been considerably deepened, and we take this opportunity to clarify and extend the argument found in *Chapter One*. Our comments are by no means intended to conclude the discussion, but only to highlight those issues that have emerged from the symposium and seem to us most critical.

STATE IMMUNITIES

Tucked into *endnote 22* of Wolfe's paper is an enlightening discussion of the implied immunities of state governments from the exercise of national authority. Perhaps Wolfe is right that *Garcia* is best viewed as an intergovernmental-immunities case, though the implications of the *Garcia* decision go well beyond this issue. The "Bill of Rights" model we discuss as a possible federalism amendment to the U.S. Constitution is an effort to write state immunities explicitly into the constitutional text. State immunities are a perfect analog of the individual liberties specified in the Bill of Rights. Perhaps certain immunities can reasonably be implied from the text as it stands. Drawing such inferences is a sterling example, following Bobbitt, of "structural argument" and its importance in judicial review of federalism issues. The *Garcia* Court, however, is unwilling to engage in this sort of inferential reasoning where applications of the Commerce Clause are at issue.

State immunities from federal action can be distinguished, as Wolfe does, from limits on the substantive powers of the federal government implied from lack of delegation. State immunities, like individual liberties, operate independently of limits implied by the delegation of enumerated powers to the national government. Yet state immunities, in Wolfe's account, are entirely a judicial construct. His argument, in a manner common to structural argument in constitutional law, concludes that state immunities *must* exist in order for the constitutional design to function. The continued existence of the states in some nontrivial role is *assumed*, but the allocation of authority for assuring their survival is not well specified. The preservation of American federalism comes to depend wholely upon judicial discretion rather than upon processes of constitution making in which the judiciary is given only a limited role. It is imprudent, in a constitutional system, to depend too much on judicial discretion.

We believe, on the other hand, that it is useful to give the judiciary explicit direction in the text of the Constitution. If state immunities are a necessary feature of a federal system, then the Constitution should make provision for those immunities. We make this argument realizing that Nagel argues persuasively, in *Chapter Three*, that alteration of the text is neither necessary nor sufficient for constitutional change. Nagel is right: a particular constitution is never a necessary or sufficient condition of any desired result or political end. This is so because more than one constitutional arrangement can yield the same result (hence no single arrangement can be considered a necessary condition), and "words on paper" can in no case be considered a sufficient condition, given the discretion accorded to human beings in any political system. The Constitution nevertheless can offer guidance in the form of criteria for the Court to apply in making specific determinations. This is what the Bill of Rights does with respect to individual liberties. While the Court must use discretion, it is helpful, in maintaining a rule of law that applies to government, to provide an explicit constitutional framework within which judicial discretion can be properly exercised. To do so is not logically necessary, nor sufficient, for the preservation of federalism, but, given the importance of federalism

in the design of American democracy, it is the prudent thing to do.

As the national government expands its scope of action, whether or not the expanded scope is in conflict with the limitations implied by the enumerated powers, the subject of state immunities arguably becomes more, not less, important. The greater the scope of national action, the more vigorous the courts ought to be in protecting the states from inappropriate interference in the conduct of their legitimate civil affairs. Lacking explicit constitutional standards of propriety, however, the courts are appropriately reluctant to substitute their own judgments.

What is needed is new constitutional text that gives the states clear constitutional standards for asserting *specific claims of immunity*. Without such standards, the courts lack a compelling basis for drawing the necessary lines to constrain the exercise of the enumerated powers vis-a-vis the states. In effect, as we argue in *Chapter One*, the states are left without the correlative authority necessary to limit the reach of federal power. To survive with any vitality, American federalism may now depend upon the development of a vigorous new tradition of adjudication as protective of state immunities as the civil rights tradition is protective of individual liberties. Unfortunately, these two traditions may be mutually exclusive under current jurisprudential thought.

Despite the unfortunate connotations associated with "states' rights," a state-immunities text can be, we think, both clear and compelling. Wolfe demonstrates the logical necessity of state immunities in the design of the U.S. Constitution. Coupled with an understanding of the political and economic advantages of a federal society—the importance of *collective* freedom to act on the part of communities where individuals share common interests—such an argument can provide solid intellectual ground upon which to rest a case for the political freedom of the states of the Union as an expression of free community among human beings. The protection of state immunities in a federal society is on equal ground with the protection of individual liberties.

We continue to agree with the conclusion of *NLC* that logically there must exist a nontrivial set of state immunities. We also persist in our conclusion that *Garcia* is correct insofar as no sound constitutional basis for drawing the distinctions (defining the immunities) demanded by *NLC* now exists. At the same time, we continue to believe that the *Garcia* opinion is profoundly wrong in its estimate of the implications of this constitutional silence for the future of American federalism.

CONSTITUTIONAL FEDERALISM

Wolfe draws attention to the useful distinction between the principle of "constitutional federalism" and the practice of federalism today, even under an *NLC* rule. (Bobbitt nicely demonstrates, in *Chapter Two*, that *NLC* had become virtually a dead letter, as a check upon national power, prior to its explicit rejection in *Garcia*.) Constitutional federalism depends upon more than state immunities; it depends upon positive state empowerment as a complement of the limits implied by the enumerated powers. Wolfe is pessimistic about the prospects of restoring "constitutional federalism," even while exhorting those of us who would seek its restoration to do so in the "ordinary political process." Although he does not dismiss the idea of constitutional amendment as a fruitful possibility, he insists that constitutional decisions appropriately can be made in the ordinary political process.

The inference that we believe to follow, though Wolfe does not draw it, is that *Garcia* is correct both in its theory of the Constitution and in its theory of federalism. When the Court tells us that the Congress is an appropriate forum for determining the limits of its own power vis-a-vis the states, Wolfe, by implication, agrees. The way, then, to restore federalism is to win the political argument in the Congress. What we cannot understand is how this would, alone, restore *constitutional* federalism.

In *Chapter Four*, Ostrom gives us a thorough account of constitutionalism, federalism, and the intersection between the two. The basic "political" process in the constitutional design of American government is the process of constitutional choice or constitution making—defined, with reference to the U.S. Constitution, by procedures for constitutional amendment. This is the basic political process because the Constitution is intended to function as fundamental law, governing the processes of government. The important role of judicial review is to maintain the integrity of constitutional choice (i.e., to protect the processes of constitution making). The Supreme Court fails in the performance of its constitutional role both when it engages in "judicial legislation" and when it fails to constrain the ordinary processes of government in accordance with the Constitution. In both cases, the authority of constitution makers to govern the processes of government is usurped.

Federalism, as Ostrom argues, was based upon a limited delegation of authority to the national government by constitution makers. To maintain both federalism and constitutionalism, the judiciary must be will-

ing to construe limits upon the authority of the national government in accordance with the enumerated powers—this before ever reaching a question of state immunities. Failure to do so is destructive of both federalism and constitutionalism.

Constitutional federalism, as a political process, was this: Whenever the Congress wanted to exercise powers beyond those enumerated in the Constitution, it had to get permission from the states. To be precise, two-thirds of both houses of Congress had to ask and obtain permission from three-fourths of the states, usually acting through their state legislatures. This was the procedure used in 1913, when the Congress wanted to enact an income tax, resulting in the 16th Amendment to the U.S. Constitution. A little more than 20 years later, however, when the Supreme Court of the United States refused to give constitutional sanction to another enormous increase in national power sought by President Franklin D. Roosevelt, he did not propose a series of thoughtful amendments to the Constitution. Instead, Roosevelt threatened to "pack" the Court. As Wolfe notes, with approval of the action but disapproval of the result, the Court backed down. If this episode did not "kill" constitutional federalism, it certainly put it into a legal "coma" from which it has never awakened.

Ostrom proposes that, in cases of doubt, the Supreme Court ought to construe the authority of Congress under the enumerated powers narrowly. Wolfe criticizes this idea as a Jeffersonian misconception of a Madisonian formula. Ostrom does not argue, however, as did Jefferson, that the enumerated powers ought to be narrowly construed as a general matter. He argues only that *in doubtful cases* a narrow construction is appropriate. (Ostrom may mislabel his argument; what he proposes is not narrow construction, but a rule for resolving doubt.) Otherwise, the limiting effect of a positive delegation of authority—so vigorously defended by Hamilton in *Federalist 84*—vanishes. If only extreme departures from established practice will provoke judicial action, incrementalism becomes an obvious and dominant strategy for beating the game. *The Federalist* posits that it is in the nature of political decision makers, as human beings, to test limits. One can test limits as well, or better, by taking small steps, as by taking giant steps. It follows that Ostrom is correct. If the enumeration of powers is to impose limits, then in doubtful cases the issue must be resolved against those who would test those limits with small steps. Otherwise, the limits must inevitably erode over time.

Substantive constitutional limits upon national power, however, as implied from the limited delegation in Article I, have almost completely disappeared. We agree with Wolfe that it is very unlikely that the limits upon national power originally implied by enumeration in the Constitution can be restored. We do not necessarily seek, however, a restoration of precisely those limits. Before we can address the issue of what those limits ought to be today, we must resolve the matter of how—by what process—any such limits can and should be effectuated. With Wolfe, we see neither political feasibility, nor desirability, in the use of judicial power to roll back the clock to a pre-New Deal federalism. It is inconceivable that the Supreme Court would declare the *Fair Labor Standards Act*, for example, unconstitutional as *ultra vires*.

On the other hand, the argument that *constitutional* federalism can be restored by congressional discretion is a *non sequitur*. In point of fact, the Congress cannot, by means of ordinary law, give back the authority it seized. This is because Congress usurped the authority of the Constitution and the constitutional process. The Congress can now, if it chooses, "decentralize" responsibility by means of load shedding, but it cannot restore limits to its own power, except by participating in the process of constitutional amendment. It is in the nature of those who presume to exercise sovereign power not to be able to limit their own authority. The ordinary political process is therefore inadequate to reinvigorate federalism as a constitutional principle.

CONSTITUTIONAL DESIGN

The underlying issue in this symposium is, we believe, the extent to which a constitution can be used as a positive instrument of institutional design, to create processes of government from "reflection and choice." For many, the idea of constitution making as a political process distinct from both ordinary legislation and judicial decision is close to preposterous. From the mainstream "constitutional law" perspective, the principle of constitutionalism has been reduced to the principle of judicial review, and constitutional choice has been made equivalent to judicial legislation. Without continued constitution making through the amendment processes, constitutional law becomes indistinguishable from common law, except that court decisions acquire an immunity from statutory interference.

The main loss that flows from this misconception of the meaning of constitutional law is a sense of institutional design. Processes of constitution making are most important for the capability they impart to a people to shape the institutions that govern them. This is not a task limited to the "founding." It recurs

throughout the history of a constitutional system. *Garcia* raises important issues of institutional design—issues that can best be addressed by means of constitutional amendment. The *Garcia* decision provides an occasion for breathing new life into the principle of constitutionalism as carried out through processes of constitution making.

We need to recognize that the constitutional bulwark of federalism—enumerated powers—has given way, and long before *Garcia*. Now, with *Garcia*, even implicit state immunities from national action are threatened, at a time when they should become more salient. Having recognized these constitutional failings, we must press on to a diagnosis: What has gone wrong? Our diagnosis in *Chapter One* is incomplete. The absence of explicit correlative authority on the part of the states, as we note, pertains clearly to the maintenance of state immunities, but not to more general limitation of the preemptive capacity of the Congress. State immunities, as Wolfe points out, apply to limits upon otherwise legitimate powers of Congress. We are still left with the question of how to protect the positive exercise of state authority from undue federal preemption. More broadly, we must solve a puzzle: how to restore a sense of constitutional limit upon the power of the national government to act within the framework of a federal system.

One possibility is to rewrite the enumerated powers, broadening the authority of the Congress to give constitutional sanction to many powers already being exercised, and then to direct the Supreme Court to resolve doubts in favor of the states. We believe, however, that this course would likely be fruitless, unless accompanied by other changes. The impossibility of formulating a positive delegation of authority so that it specifies unambiguous limits seems clear to us. The ambiguity of implied limits opens the door to testing those limits. While individual members of the Court have political independence, the composition of the Court changes in response to *national* political pressures. The method of appointing Supreme Court justices does not reinforce an expectation that those same justices, over time, will tend to use their discretion to maintain ambiguous limits upon the national political process.

Another possibility is a Court of the Union, staffed in some manner from the personnel of the supreme courts of the several states. This addresses the problem that a Supreme Court whose composition is responsive to the national political process may be unable to sustain limits on that same national political process. A Court of the Union, however, raises a number of additional problems. Would it become a new court of last resort? If so, would it contain an opposite bias, strengthening too much the centrifugal forces at work in a federal system? Perhaps we need to recognize the impossibility of achieving a fully neutral third-party resolution of disputes between the national government and the states. Perhaps this is, in part, what the *Garcia* Court is trying to tell us.

Our proposal (from *Chapter One*) is to consider amending the Constitution to allow the states to *reject* a national law, with the concurrent action of two-thirds of the state legislatures.[1] If the President is given a veto, so as not to be forced to rely solely on the judiciary to protect the constitutional integrity of the office, so also ought the states, which are much more exposed to adverse action from both the Congress and the courts, be given the political means of self-preservation. This seems to us a prudent change—concurrent action by two-thirds of the state legislatures is not easily nor idly obtained—yet one that could save the states from political humiliation, such as that associated with a national 55 mph speed limit. The speed limit is perhaps a good case in point. We can think of no general and reasonable constitutional provision delegating authority to the national government that would render the enactment of a national speed limit null and void. Yet we can think of no current issue more obvious a candidate for state-by-state resolution according to the principle of federalism.

In this sense, some issues that arise between the states and the national government are indeed nonjusticiable—are best resolved by political means. Our disagreement with the *Garcia* Court is over whether the Congress is an adequate forum for political resolution. We tend to agree with Associate Justice Lewis F. Powell, Jr., in dissent, that *Garcia* in effect makes members of Congress, collectively, the judge of their own cause. The only way out of this dilemma is to give the states, collectively, an opportunity to say, "No."

As we write, the Congress has enacted a new highway bill, over a Presidential veto, to allow states to choose higher speed limits—up to a maximum—on selected highways. Thus the Congress has accomplished with respect to this single issue a *complete inversion* of the federal relation contemplated by the Constitution. If the Tenth Amendment says nothing else, it at least makes abundantly clear that the states are not to wait upon authorization by the national government in order to act. By first preempting the states (informally, through the grant-in-aid mechanism), the Congress now proceeds to grant authority to the states to exercise their own legitimate legislative powers.

We see more clearly now that the "Bill of Rights" model for a federalism amendment and state rejection of national law (by two-thirds of the state legislatures) are best viewed as complements rather than as alter-

natives. Federalism needs both (1) an explicit constitutional basis for state immunity from otherwise legitimate national action and (2) a means by which the states can protect themselves from unwarranted or ill-considered national preemption of state policy making when the Supreme Court fails to act, or when the issue at stake is nonjusticiable. Different institutional mechanisms are appropriate for different decision-making tasks.

CONCLUSION

A process of constitution making depends upon widespread discussion and the development of a broad consensus. Changes in public opinion are a necessary condition of explicit constitutional change. It must not be assumed, however, that changes in public opinion are a sufficient condition of constitutional change. Public opinion is not the "true" constitution. A constitution consists of those rules that, in part, help to translate public opinion into concerted action. To change a constitution, one must change the rules. This is precisely what the Supreme Court has done over the years when it declines to enforce the limits implicit in the enumerated powers against the national government. Those who seek to revitalize American federalism must not think that a change in "attitudes" will be sufficient. Federalism is an institution. It can only be sustained by a set of rules, together with a common understanding of, and wide base of support for, those rules.

Constitution making entails a choice of institutions. To choose a set of institutions is to establish both a set of principles and a set of rules. To sustain the rules requires continuing attention to collateral principles. The decline of federalism in America parallels the decline of constitution making. Both derive from the decline of continued attention to institutions, including both rules of law and the principles that sustain them. Agreement on a set of principles underlies any sustained commitment to institutions. In the case of American federalism, it is both *principle and institution* that we must recover. To that end, we need to consider making some new rules.

ENDNOTE

[1]In *Chapter One*, we refer to this proposal as "collective state nullification." While nullification is an appropriate term in a technical sense, we drop it here because of its long association with the ideas of John C. Calhoun, who proposed that an individual state might properly nullify federal law within its own borders. This would destroy the Supremacy Clause and allow any state simply to opt out of national action, reducing the union of states to a voluntary association. Our proposal has little in common with Calhoun's historic argument. Unlike, Calhoun, we are advancing a form of collective choice.

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