AN INFORMATION REPORT

Reflections On Garcia And Its Implications For Federalism

Advisory Commission On
Intergovernmental Relations
Washington, DC 20575
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This report was approved by the Commission on December 4, 1985, as an Information Report.

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PREFACE

Federalism was a unique contribution of the American Constitution's Framers. The idea was to provide for American self-governance by dividing political power between a limited national government and the states. One might suppose there to be no greater concern for state and local officials and scholars of the American Constitution than the preservation of the federal arrangement.

In a recent case, Garcia v. San Antonio Transit Authority (1985), the Supreme Court withdrew from past efforts to define the boundary of authority between the national government and the states. The Court no longer will attempt to play "umpire" of the federal system, leaving a determination of the precise scope of national authority in the hands of Congress. The implications of this decision for the future of federalism in the United States are explored in this publication.

In response to Garcia, the Advisory Commission on Intergovernmental Relations conducted three regional hearings in the fall of 1985, meeting in Philadelphia, Chicago, and Salem, OR. After hearing from numerous state and local officials in addition to scholars, the Commission voted on December 4, 1985, to publish the staff analysis of the Garcia decision as an Information Report to the intergovernmental community.

The policy at issue in Garcia was application of federal wage and hour regulations to state and local government employees under the Fair Labor Standards Act. While of immediate and pressing concern, the Commission views federal wage and hour regulation of state and local employees as secondary to the Constitutional issues at stake: whether state autonomy has been sacrificed to national expedience. The staff analysis, therefore, explores the broad Consti-

tutional context of Garcia in an effort to learn what, if anything, has gone wrong in the workings of the Constitutional system with respect to the maintenance of federalism. The report concludes by suggesting both a range of possible state responses to Garcia and a variety of approaches to Constitutional reform by means of the amendment process.

The Commission takes no position on Garcia or on the broader issues raised in this report. Our purpose is rather to enter into a dialogue on the future of federalism and to make it possible for all responsible parties to contribute to its preservation and improvement. Only on the basis of such a dialogue can we expect to continue the grand experiment embarked upon 200 years ago -- creation and preservation of limited government in a self-governing society.

Robert B. Hawkins, Jr.
Chairman

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This report is the joint work of Commission staff members Lawrence A. Hunter, research director, and Ronald J. Oakerson, Senior Analyst. Hunter was responsible for the initial draft, including the core of the analysis and its recognition of a federalism contradiction. Oakerson was responsible for revisions, mainly an expansion of the discussion of weaknesses in the Constitutional design of federalism including the argument with respect to parchment barriers.

The report also benefited from the many insightful comments made by participants of three regional roundtables on Garcia sponsored by ACIR. A list of the participants is provided in the Appendix.

Many thanks are also due to Mary Dominquez, Anita McPhaul, and Lori O'Bier for their skillful typing assistance in the preparation of this report.

John Shannon
Executive Director

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EXECUTIVE SUMMARY

In a potentially far-reaching decision in February 1985, the U.S. Supreme Court decided that Congress had power under the Constitution to regulate the wages and hours of state and local government employees. The case, Garcia v. San Antonio Transit Authority, overruled the recent precedent established by National League of Cities v. Usery (1976) that provisions of the Fair Labor Standards Act did not apply to the states in areas of "traditional governmental functions." The Court now takes the position that any restraint on the power of Congress to control state and local governments is most appropriately obtained through the national political process rather than through judicial review. Reaction to the decision in Garcia has been mixed. Some applaud the Court for a correct interpretation of both the Constitution and the principle of federalism; others argue that the decision imperils the future of state autonomy, on which federalism depends, contrary to Constitutional design. Beyond seeking specific redress from Congress for the immediate effect of Garcia, believed likely to cost state and local governments $2 to $4 billion annually, state and local officials have joined with others in the intergovernmental community to open a dialogue on the future of federalism, raising fundamental issues concerning the Constitutional relationship between the national government and the states.

This ACIR staff analysis suggests the following interpretation of the present situation: (1) that the decision of the Court in Garcia may be correct in its construction of what the Constitution today requires; (2) that this construction is nevertheless inconsistent with the preservation of federalism; and (3) that there emerges, therefore, a basic contradiction between (a) the common belief that the Constitution establishes a federal system and (b) the result produced by well established conventions of Constitutional law.

The relevant constitutional provisions are found in the enumerated powers

given to Congress in Article I, particularly the commerce power together with the "necessary and proper" clause, the Supremacy Clause which makes Congressional acts the "supreme law of the land," and the Tenth Amendment, which "reserves" to the states (or to the people) all powers not delegated to the national government or prohibited to the states. Jointly, these Constitutional provisions create the following federal-state relation: while the national government exercises specific limited powers which become the supreme law of the land, thereby preempting state acts that conflict with it, the states exercise general, unspecified powers. The reserved powers of the states, being unspecified, do not create limitations on the national powers enumerated in Article I. Rather, the reserved powers are simply those which remain after the scope of national power has been defined. This analysis concludes that the Court is, therefore, correct in refusing to create special immunities for state and local governments given that regulation of wages and hours is considered a necessary and proper exercise of the commerce power.

The holding in Garcia nevertheless threatens to destroy federalism as we know and understand it. As dissenting Justices Powell and O'Connor point out, the wide latitude given Congress by judicial broadening of the commerce clause effectively makes Congress "judge of its own cause" in relation to the states. In other words, the relation between the national government and the states is determined at the discretion of the national legislature. Over time, the autonomy of the states can be expected to erode. What seems to be lacking in the U.S. Constitution is explicit protection for the freedom of the states to make essential governmental decisions, analogous to the protection afforded individuals by the Bill of Rights. The analysis concludes that the challenge posed by Garcia is to rethink the Constitutional design of American federalism, whether for the purpose of proposing legislation to Congress, carrying arguments to the U.S. Supreme Court, or contemplating possible amendments to the Constitution.

> Nothing human can be perfect. Surrounded by difficulties, we did the best we could; leaving it with those who should come after us to take counsel from experience, and exercise prudently the power of amendment, which we had provided.
>
> Gouverneur Morris
> Writing to W.H. Wells,
> February, 1815

A CONSTITUTIONAL CRISIS IN AMERICAN FEDERALISM

The Garcia Decision

In the recent Supreme Court case, Garcia v. San Antonio Metropolitan Transit Authority, (1985), the Court upheld Congress' power to set wage standards for state employees. In doing so, the Court reversed its 1976 decision in National League of Cities v. Usery (NLC), in which it had determined that Congress did not have the power to apply the minimum wage and overtime provisions of the Fair Labor Standards Act (FSLA) to the states "in areas of traditional governmental functions."

In Garcia, the Court found the criterion of "traditional governmental functions" unworkable as a means of drawing boundaries around state activities not subject to Congressional regulatory authority. But, the Court went one step further by declaring the Court's earlier effort to draw such boundaries "inconsistent with established principles of federalism." The Court went on to declare in Garcia, "the states' continued role in the federal system is primarily guaranteed not by any externally imposed limits on the commerce power, but by the structure of the federal government itself." The Court concluded, "the political process ensures that laws that unduly burden the states will not be promulgated."

The Garcia decision has prompted considerable discussion and controversy

within the intergovernmental community. Reaction to the decision has taken mainly two forms. Supporters of the decision, for the most part, agree with the theory of federalism put forth in the Court's opinion. This theory has been developing within the political science discipline and among legal scholars over a period of years. The basic tenant of the theory is normative -- enunciating what the Court should (should not) do -- and is stated succinctly in the form of a "Federalism Proposal" by Jesse Choper:

> The federal judiciary should not decide Constitutional questions respecting the ultimate power of the national government vis-a-vis the states; rather the Constitutional issue of whether federal action is beyond the authority of the central government and thus violates "states' rights" should be treated as nonjusticiable, final resolution being relegated to the political branches, i.e., Congress and the President (Choper, 1980).

In Garcia, the Court did not go so far as to accept Choper's proposed nonjusticiable status of federalism questions, but if the Court's view is accepted as doctrine, the effect of the Garcia opinion would be the same.

Most supporters of Choper's (now essentially the Court's) Federalism Proposal would also agree with the Court's observations concerning the health of the federal system. In overturning the NLC decision, the Court opined that the NLC Court had erred by "underestimat[ing] ... the solicitude of the national political process for the continued vitality of the states." The NLC decision, contended the Garcia Court, "tried to repair what did not need repair." Illustrative of this solicitude, the Court pointed out, was "the effectiveness of the federal political process in preserving the states' interest [which] is apparent even today in the course of federal legislation." To support this assertion, the Court relied mainly on the demonstrated ability of states and local governments acting collectively through their national interest groups to obtain large sums of federal aid and to exempt themselves from numerous federal statutory requirements.

The second basic reaction to the Garcia decision has come mainly from state and local officials and legal scholars who were sympathetic to the attempt in NLC to apply principles of federalism to limit the national government's power vis-a-vis states. This group has, by and large, rejected both the theory of federalism propounded in Garcia and the Court's diagnosis of the current health of the federal system, especially the Court's sanguine appraisal of the solicitude of the national political process toward state interests.

The critics of the Garcia decision divide into two nonmutually exclusive camps. The most vocal is concerned less with the long-run implication of the Garcia decision for the structure and operation of the federal system than with the immediate monetary costs it portends for state and local governments. This group of critics points out that the overall cost of Garcia to state and local governments may run $2-$4 billion annually. While most in this group would disagree with the Court's theory of federalism, theory is not what is at stake for them. At stake are potentially large increases in state and local expenditures mandated by national legislation.

Ironically, the first reaction of this group of critics is to engage the national political process exactly as the Court said the original design of federalism intended states to do -- convince Congress to pass remedial legislation exempting state and local governments from the effects of the Fair Labor Standards Act. Nine months after Garcia, the President signed into law PL 99-150, allowing state and local government employers to provide compensatory time off, at the rate of time-and-a-half, in lieu of overtime pay as originally required under FLSA. The measure reflects a negotiated agreement between organized labor and the national groups representing city and county governments. The irony is, of course, that the quick success of this legislative effort lends credence to the Court's assertion that the national political process is indeed solicitous to state interests and that "unduly burdensome laws" simply will not be

tolerated. For this reason, the second group of critics of the Garcia decision fear that the quick success in the legislative arena may actually reinforce what they perceive to be a long-run trend, capped off most recently in the Garcia decision, to erode the basic principles of federalism. If remedial legislation eliminates the short-run fiscal irritant, state and local governments may shrink from the arduous task of achieving a more permanent solution to the problem of eroding federalism.

For this group of critics, it is the perceived Constitutional principle of federalism that is at stake. They would argue that, contrary to the Court's most recent pronouncement on federalism, the judiciary has always played, and should continue to play, the role of umpire in disputes between the national government and the states. As A. E. Dick Howard has put it, "Garcia raises fundamental questions about the role of the Supreme Court as the balance wheel of the federal system. ...It is hard to escape the conclusion that the founders assumed that limiting national power in order to protect the states would be as much a part of the judicial function as any other issue" (Howard, 1985).

As with the more policy-oriented critics, those who criticize Garcia on theoretical grounds also find considerable to take issue with in the Court's practice of political science when it touts the states' efficacy in the national political process. As a result of myriad Constitutional and statutory changes over the past 200 years, these critics would contend staunchly that the political process offers states little in the way of real protection from arbitrary encroachments by the national government. They would now look to the bench for such protections, replacing Constitutional design with the wisdom of judges as the bulwark of federalism.

An Alternative Perspective on Garcia

This report suggests that a third perspective on Garcia is possible and goes on to argue that it more precisely captures the implications of the Garcia

decision for federalism in the long run. This perspective may be characterized as a hybrid of the staunch Garcia defenders' position and that of the avowed critics. Like the defenders of the decision, one who takes the hybrid position offered here is willing to accept the Court's construction of the Constitutional rules of federalism and to reject the critics' alternative construction requiring federalism to be applied from the bench as an abstract principle to protect the states. This view of Garcia suggests that the Court is acting in a manner fully consistent with its limited and proper role in a Constitutional system, declining to take on the role of Constitutional designer. At the same time, however, those holding the hybrid position would agree with critics that Garcia is inconsistent with the maintenance of federalism, viewing the Court's unvarnished faith in the solicitude of the national political process for state interests not only as naive, but actually oblivious to considerable evidence to the contrary, (ACIR, 1981, 1984).

While this hybrid perspective may appear to be a "moderate" interpretation of Garcia -- midway between its defenders and detractors -- the conclusion derived here actually differs from the conclusions drawn by both of these two camps more than they differ from each other. Both perspectives derive from a view of judicial (doctrinal) construction. For the supporters, judicial discretion has been properly exercised in Garcia and that is the end of the matter. For the critics, everything would similarly be all right, or at least self-correcting, if only the judges would do their job and properly adjudicate disputes between states and the national government. Contrary to both views, the perspective argued for here suggests that a fundamental flaw exists in the Constitutional design of federalism and cannot be corrected short of Constitutional amendment.

Justice Powell touches a sensitive nerve in his dissenting opinion in Garcia when he concludes, "indeed, the Court's view of federalism appears to rele-

gate the states to precisely the trivial role that opponents of the Constitution feared they would occupy." This report suggests that the original critics of the Constitutional formula for federalism may have been correct. Their fears have materialized. We also argue here, however, that Justice Powell and other critics of Garcia are mistaken if they contend that the Constitution's original critics adopted a view that federalism was an abstract concept that must be faithfully applied on an ongoing basis to protect the integrity of the states; quite the contrary. The so-called Anti-Federalists were in basic agreement with the Federalists on the nature of the constitution-making enterprise in which they were engaged. The idea that all embraced was to construct a system of rules that, systemically, would establish and maintain a limited national government complementary to the existing states. The framers contended they had succeeded. The critics argued, simply, they had not.

One may, of course, agree with the thrust of this analysis and still contend that the framers' original design was successful but that it was the combined effect of numerous Constitutional changes over the years that undermined the original design. Whether it was the failure of the original design or the existing design as amended, what is important is the fact of Constitutional failure currently.

Contradictions and Constitutional Crisis

Belief systems (ideologies in the nonpejorative sense) and systems of rules (e.g., constitutions) face a crisis when the set of beliefs or rules that comprise the systems produce a contradiction. If the reasoning process that derived the contradiction is valid, or if the operation of the process that created the contradictory results remained within the constitutional rules, only one conclusion is possible: one or more of the beliefs/rules is inconsistent with the others.

When a contradiction arises, either the inconsistent beliefs/rules must be

rejected or, if they are so fundamental to the ideology or constitution that they cannot be rejected without altering the basic character of the system, the ideology or constitution must give way to a new one that is consistent.

There is nothing more troubling and disquieting to the human mind than to face the fact that a set of cherished beliefs or constitutional rules leads ultimately to contradictions. In an effort to salvage the system of beliefs or constitutional rules, the human mind may for a long period tolerate contradictory possibilities and even learn to accommodate contradictory results.

A combination of techniques are familiar methods of such accommodation. The simplest is merely avoidance behavior, ignoring the potential for contradictions. Another common technique is to adopt fallacious reasoning to prevent the contradiction from appearing, i.e., adopting invalid logical arguments so intuitively compelling that the fallacy goes unnoticed. When all else fails and the contradiction must be confronted, outright self-deception may occur as contradictory occurrences are reinterpreted so that they in fact do not even appear contradictory.

The basic argument of this report is that currently the American Constitution faces a crisis of inconsistency. The crisis is readily apparent in the difference between that set of beliefs we characterize as federalism and the Constitutional rules that define it. In the following sections we explain current judicial grappling with federalism issues, as well as the arguments adopted by critics of the Court's actions, as the latter stages of defending the cherished Constitution against the unrelenting assault of contradiction. The report ends, however, on a note of optimism by arguing that the inconsistencies in the American Constitution are not so fundamental that they cannot be corrected without altering the original intent. Finally, the report identifies alternative courses of action the states might take in reaction to the Garcia decision and offers suggested amendments to the Constitution that would make it con-

sistent once more and permit federalism once again to emerge as the systemic effect of Constitutional arrangements that effectively constrain the national government as it acts in relation to the states.

> More troubling than the logical infirmities in the Court's reasoning is the result of its holding, i.e., that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their power. This result is inconsistent with the fundamental principles of our Constitutional system.
>
> Justice Powell, in dissent,
> Garcia v. San Antonio
> Metropolitan Transit Authority

THE FEDERALISM CONTRADICTION

Judicial Discretion in a Doctrinal Vise

In the epigraph to this section, Justice Powell is both right and wrong. He is correct that the result of the Court's reasoning is "inconsistent with the fundamental principles of our Constitutional system." Unfortunately, he is incorrect in ascribing this contradictory result to "logical infirmities in the Court's reasoning."

Despite its rather unfortunate forays into the practice of political science and political history, the Court has committed no logical error in drawing its conclusion. To argue so requires the critics themselves to adopt fallacious reasoning. The Court has drawn a valid conclusion that is contradictory. Ergo, the set of rules from which the conclusion derives itself is inconsistent.

In her dissent in Garcia, Justice O'Connor reveals an understanding of the nascent contradiction in the Constitution when she argues that "federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such a commerce power 'may well be negligible.'" Rather than face this contradiction squarely, however, she, like Justice Powell, contends that the contradiction is not inherent in the United States Constitution; rather, it results from fallacious reasoning by the Court's majority.

This position is difficult to maintain unless the dissenting justices are

also willing to take issue with basically the same reasoning the Court has used for almost 200 years in expanding national government authority under the Commerce Clause. What's new in Garcia is the forthright enunciation of the Court's theory of federalism. However, this theory is really incidental to the Court's basic logic, which is, in all its essentials, identical to long-standing doctrine under the Commerce Clause.

The Constitution expressly grants Congress the power to regulate commerce. The Necessary and Proper Clause grants it authority to make laws it feels it should to execute this regulatory power. With only episodic exceptions, the Court has always allowed Congress the greatest possible latitude in exercising its commerce power unless some Constitutional provision explicitly prohibited the regulatory activity under consideration. Given this history, the Garcia Court appears well within tradition when it concludes, "Congress' action contravened no affirmative limit on Congress' power under the Commerce Clause" (emphasis added). But then, this is little consolation, for as Justice O'Connor points out, there appears to be no affirmative limit on the Commerce Clause unless it comes into conflict with a specific prohibition on Congress' power, of which there are none in the Constitution with respect to the states.

What must be appreciated is that the dispute in Garcia, while carried on in the profound tones of Constitutional doctrine and grand political theory, is really quite minor. The range of state actions amenable to protection under the NLC doctrine was very limited. Indeed, many had wondered whether the doctrine could extend protection beyond the very narrow range of state employment issues or the right of the states to exist as governments. In other words, federalism with the NLC doctrine intact was for all practical purposes indistinguishable from federalism after its demise in Garcia. If one does not like the nature of federalism after Garcia, he would not have liked it prior to Garcia, unless his conception of federalism is so restricted that the minimal protection afforded

by the NLC doctrine is the extent of state autonomy believed to be required by a proper federalism.

Garcia is unlikely to go down as a landmark decision for it neither breaks new ground (federal authority was already so unconstrained by NLC that little more power was to be gained) nor does it dramatically reverse existing precedent even though it explicitly overturns a prior decision. The decision does, however, represent a watershed in American political history, because it forces on one the unavoidable conclusion that the emperor has no clothes.

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.

The NLC decision attempted to remove the veil of "cooperative federalism" and replace it with some protective clothing of Constitutional substance. Unfortunately, the best it could accomplish was a judicial fig leaf. The Court attempted to draw the outlines of federalism's protections sharply. It succeeded in covering only the bare essentials; the pretense of modesty was considerably more than the reality. The shock of Garcia, then, was more in the final act of stripping away the Constitutional fig leaf than in what was revealed after its

removal; for it had been there for all to see behind the veil prior to NLC.

The Garcia decision permits the federalism contradiction to emerge into the full light of day.

> Federalism Contradiction: The American system of government is a federal system comprised of a limited national government and sovereign states in which the national government may do anything Congress deems it should, unless the Constitution expressly forbids it from doing so; and there exist no express Constitutional prohibitions on Congress' ability to regulate the actions of the states.

The Constitutional crisis produced by this contradiction must also come to a head in the near future, because techniques used to cope with it have about run their course. To see this, consider the history of avoiding the contradiction.

Because it had been established early on in McCulloch v. Maryland, 1819, that the Constitution placed few checks on a Congress determined to take action affecting the states, during the first three-quarters of our history the courts engaged in numerous examples of fallacious reasoning to erect the abstract principle of federalism as a check on the federal government's power. Absent any other mechanism of restraint vis-a-vis the states, the temptation was overwhelming to discover that restraint in the Tenth Amendment. If constraint on the federal government's power could not be found anywhere else in the document, it was only natural that it would be discovered in the clause that presumes its existence. The most memorable of these exercises in reinterpretation occurred when the Court actually "rewrote" the Tenth Amendment to confine the national government to those powers expressly delegated to it by the Constitution (Hammer v. Dagenhart, 1918). But as powerful as this reinterpretation may have been, it could not stand up over the long run to a national government otherwise unconstrained. Eventually the Court returned to a more literal reading of the amendment (National Labor Relations Board v. Jones and Laughlin Steel Co., 1937; Steward Machine Co. v. Davis, 1937).

After giving up any illusions that the Tenth Amendment restricted the national government, the continuing growth of federal power was simply ignored or winked at behind the veil of "cooperative federalism." Fallacious reasoning had failed to exorcise the contradiction; therefore we proceeded to ignore it when possible and reinterpret it away as cooperative federalism and intergovernmental relations the rest of the time.

In the end, the contradictions became so glaring that the Court felt compelled once again to erect the abstraction of federalism as a barrier to national government activity by once more perceiving some restrictive capability in the Tenth Amendment. The result was the National League of Cities decision in which the Court attempted to craft some minimal protection for the states under the Tenth Amendment. While less blatant than earlier attempts to read into the Tenth Amendment something that was not there, this final effort was also destined to give way to the original understanding of the Tenth Amendment, as stipulated by counsel for the State of Maryland, soon after the amendment's adoption, in the famous case of McCulloch v. Maryland:

> We admit, that the Tenth Amendment to the Constitution is merely declaratory; that it was adopted ex abundanti cautela [out of extreme caution]; and that with it nothing more is reserved than would have been reserved without it.

In other words, the NLC doctrine could only stand if it could be found in the original text of the Constitution or some amendment. It could not. No such prohibition on Congress exist; and, this generates the federalism contradiction.

Finally, in Garcia the Court reveals the contradiction for all to see but then proceeds to deceive itself again into believing it is not really a contradiction at all, since, through its rose-colored glasses, the states appear really quite successful at fending off expansive forays of the national government into their domain. In short, what the Court admits is that the states govern largely at the sufferance of the national government; but the Court comforts it-

self that federalism is alive and well because the national government is quite permissive in its relations with the states. One may be skeptical that the framers intended the autonomy of the states to rest on the beneficence of the national government's elected representatives, or its judges.

The Constitutional Basis of Federalism

In drafting the Constitution, the framers embarked upon an experiment in limited government, or what might more appropriately be characterized as limited self-regulating government. Their idea was profound: accept the fallible nature of human character; construct a system of government that anticipates and channels human frailties and proclivities so that the political process becomes self-replicating and self-limiting, constrained to seek the public interest. The basic method chosen by the framers was to construct a written constitution that delegated certain limited powers from the sovereign people to a national government while leaving in place, with only a few key restrictions, the state governments and political systems that had been evolving for almost 200 years. In devising the constitutional rules of the game, the framers attempted to provide a variety of "checks and balances" -- beyond those inherent in representatives having to face the electorate periodically -- that would use the interactions of both officials and citizens as a flywheel to constrain the operation of the political process.

A constitution typically contains both descriptive and prescriptive statements. Descriptive statements are used to describe the state of affairs that the constitution's framers intend to create through some combination of prescriptive statements. If one could achieve a certain state of affairs, i.e., a constitutional objective, by simply describing it, there would be no problem of constitutional design. Constitutional aims could then be achieved by simple declaration. In fact, however, a purely descriptive constitution would merely transfer all constitutive authority to those designated to construe the meaning of the

constitutional document. In a limited constitution, descriptive statements, at most, can be treated as an aid to construction. The primary burden of constitutional delimitation must fall upon those prescriptive statements that allocate authority among designated decisionmakers.

The problem of constitutional design is, then, one of combining prescriptive statements in such a way that an intended state of affairs is created by self-interested citizens and officials acting upon those statements. Madison, writing in The Federalist No. 48, recognized this design problem in a discussion of "parchment barriers." The proposition he advances is that so-called parchment barriers are insufficient to constrain authority. His argument runs along these lines: power is of an encroaching nature and needs to be "restrained from passing the limits assigned to it." 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?" His general answer, given in The Federalist No. 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," is able to move beyond the use of parchment barriers to constrain authority effectively.

To avoid a simple reliance on parchment barriers, Madison recommends two constitutional techniques. The first, somewhat implicit in his argument, is for the correlative assignment of authority: where the authority of one decisionmaker is to end, that of another should begin. If this principle is followed in the design of a constitution, no one can exceed his authority without intruding upon the assigned authority of another. The second technique, necessary at this point to achieve the desired result, is to make each and every assignment of authority incentive-compatible, to use the modern phrase. In other words,

each decisionmaker must be given a sufficient incentive to use and protect his share of authority. If, then, this second condition holds, the correlative assignment of authority will indeed produce more than a parchment barrier. Instead of a "mere demarcation on parchment" as a limit to assigned authority, the constitutional design then offers the prospect of individual decisionmakers -- living, breathing, strategically acting human beings -- seeking to protect their own assigned authority as a constitutional means of limiting the authority of others. This is the result sought by Jefferson, whom Madison approvingly quotes in The Federalist No. 48: a government "in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by others."

Madison develops this line of reasoning mainly in a separation-of-powers context, concerned with the allocation of legislative, executive, and judicial authority among three national institutions -- Congress, the President, and the federal courts. Both constitutional techniques are apparent in the complex set of relationships among these three institutions. The limit of the Congressional power to make law is defined in part by the power of the President to faithfully execute the laws and again in part by the power of the Supreme Court to apply the law in individual cases. Congress cannot move beyond the function of making law without encroaching upon the assigned authority of correlative institutions.

Most of Madison's discussion, however, is taken up with the condition of incentive compatibility. Neither members of the judiciary nor the executive ought to be made too dependent on the legislature, in terms of subsistence or tenure of office, if judicial and executive authority is to be exercised independently of the legislative power. The converse, though of less concern to Madison, also holds. The President cannot exceed his executive powers without intruding upon the assigned authority of Congress and the courts, each with am-

ple incentive to oppose such encroachment. The same goes for the Supreme Court, though the difficulty of overturning a Supreme Court decision taken on Constitutional grounds gives to this "least dangerous branch" a hypothetical advantage in contending with the others.

In its arrangement of the "interior structure" of the national government, the Constitution, in most respects, is careful to avoid a simple reliance on parchment barriers; in other respects, however, less so. External to the institutions of the national government there are at least two sets of decision-makers whose liberty can be abridged by the exercise of national legislative power. These are, first, individual persons, and, secondly, state and local governments. Though individual persons were given little authority in the original text of the Constitution -- habeas corpus and trial by jury being the main exceptions -- the subsequent passage of the Bill of Rights greatly expanded this domain. State and local governments have only the abstract and undefined language of the Tenth Amendment. What does this absence of correlative authority in the states imply with respect to the enumerated powers of Congress as the national legislature? Is federalism predicated upon the resistance of mere parchment barriers to national encroachment upon the states?

The boundaries of the enumerated powers are defined, in the original document, in two ways: (1) the limited meaning of the words used to describe those powers and (2) the Necessary and Proper Clause. Madison argues in The Federalist No. 44 that the ambiguous quality of the boundaries thus defined is necessary: "for in every new application of a general power, the particular powers, which are the means of attaining the object of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same."

In addition to pointing out the impossibility of enumerating all powers necessary and proper, Madison further objects to any effort to enumerate the

powers not necessary or proper on the grounds that an omission would be equivalent to a positive grant of authority. Yet two centuries of Constitutional experience teach that it is precisely the latter approach -- an effort to define the limits of what is proper -- that is necessary if the boundaries of the enumerated powers are to amount to something more than mere parchment barriers. Thus the Bill of Rights endeavors to clarify the limits of what is proper with respect to actions that bear upon the persons of individuals.

Hamilton's objection to such an enumeration, found in The Federalist No. 84, that no power to invade the domain of individual rights and liberties had been delegated to the national government, is easily countered by one of The Federalist's own principles of constitutional design: any effort to limit authority solely by an absence of positive delegation is of necessity a mere "parchment barrier," lacking any correlative assignment of authority that might serve to maintain the barrier against encroachment.

The Tenth Amendment clearly does not provide correlative authority to the states comparable to that accorded individual persons in the first eight amendments. What the "reserved powers" clause does accomplish is simply to clarify that the exercise of governmental powers by the states does not require positive delegation in the federal Constitution. The position of the states vis-a-vis the federal government cannot therefore be construed in the same way as that of local governments vis-a-vis the state governments according to Dillon's Rule (Dillon, 1911). At the very least a state is authorized to act, so far as the Constitution and laws of the nation are concerned, unless and until Congress by law says otherwise. This presumption of authority to act accorded the states, however, does nothing further to define and delimit the enumerated powers of Congress. To use the reserved powers clause for this purpose it is necessary to read into it substantive content. Presumably this might be done by judicial construction; but to do so would require the court to establish a theory of fed-

eralism as doctrine. Such an effort on the part of the court would be tantamount to judicial invention of a bill of rights for individuals had the first eight amendments never been enacted.

Judicial discretion is of course unavoidable in the application of constitutional law to individual cases. No set of constitutional prescriptions can be so abundantly clear or exhaustive that judges are never required to supply meanings from context or theory. For this reason it is especially important that judges comprehend the underlying theory of constitutional design that links a particular combination of prescriptive statements with an intended state of affairs. Descriptive statements, such as the clarifying Tenth Amendment, assist in this process of judicial interpretation. Yet to trust too much to judicial discretion is to abandon the enterprise of a limited constitution.

From this line of reasoning -- first, the magnitude and seriousness of the defect in the Constitutional design of federalism and second, the imprudence of relying too heavily on judicial discretion -- the preferred remedy would be to amend the Constitution. The purpose of such an amendment is, like the Bill of Rights with respect to the authority of persons, to define the limits of what is proper for Congress to do in relation to the constituent states of a federal union. The Tenth Amendment as it stands can be regarded as a formula for the creation of a federal system inevitably followed by its subsequent erosion over time. The Constitution did thus create a federal system; what it did not adequately do was to provide for the maintenance of federalism under stress. This is why, after 200 years of history and at least several decades of erosion, it is necessary to alter the Constitutional design of federalism in order to preserve it.

Parchment Barriers in Tatters

From the standpoint of a political science, it may be useful to examine the history of the American experiment with a limited Constitution in order to

test the warrantability of Madison's proposition with respect to the ineffectiveness of parchment barriers. One might compare, for example, the maintenance of authority boundaries in the context of the separation of powers with the maintenance of federalism boundaries; or, again, compare the latter with the maintenance of the authority of persons as defined by the Bill of Rights. A cursory review suggests that nearly two centuries of Constitutional experience demonstrate both the ineffectiveness of parchment barriers, in the case of federalism, and the effectiveness of the institutional design used by the framers in other contexts to overcome this central problem of Constitutional rule.

Given the nature of the enterprise in which the framers were engaged, the Court is on good authority in Garcia when it asserts that the sovereign interests of the states were to be protected by "procedural safeguards inherent in the federal system," not by the application of some abstract principle of federalism called upon by judges to limit certain actions of the national government as unacceptable encroachments on the sovereignty of the states. For indeed, to believe the latter would be to ignore a large measure of the genius of the American Constitutional experiment. The system was designed not to depend upon the benevolence of priestly kings -- of judges or elected politicians -- and there is every reason to believe that the framers would now find the need to rely upon the beneficence of national government officials to protect the states as a vivid indication of their failure to design the system correctly, or perhaps as evidence that subsequent alterations in the system had a long-term destabilizing effect.

The Garcia Court argues that it is the structure of the federal government itself that constrains the exercise of national power vis-a-vis the states. This argument is curiously akin to the logic of the framers -- that the structure of government ought to have self-regulating properties. The problem is that no relevant self-regulating properties are to be found. The use of state boundaries

to determine units of representation in both the Senate and, more broadly, in the House is arbitrary, as well as trivial in its effect on federalism. Since direct election, the Senate can no longer be viewed as a body representative of state interests. Collective state veto is restricted to changes in the fundamental law found in the Constitution. Structurally, the protection of the states as corporate bodies in the national political process is no different from that accorded to any other interest group.

Given the sensitivity of American national politics to a variety of organized interests, the political process may at first blush appear to afford a substantial degree of protection to the states; but at the same time, it exposes the states to a need to bargain away their essential interests. As states compete within the political process with myriad other interest groups, they are tempted to enter into intergovernmental arrangements with the national government that may not be in the long-term interest of maintaining state autonomy. Moreover, once states begin the corrosive process of bargaining away their independence, in exchange for financial resources and continued national government sufferance in exercising their authority, they may become timid in resisting further encroachment by the national government.

Especially in an era of fiscal austerity, states have little to gain and apparently everything to lose as unwilling players in the game of national politics. The prediction that follows is the incremental loss of governmental prerogatives by the states as various interest groups make demands. The integrity of the states as co-equal partners in a federal system is seriously undermined. Only to the extent that the Constitution affords the states a source of leverage in contending with other interests can the political process successfully protect state interests. Unfortunately, the assertions of the Garcia Court notwithstanding, no such leverage exists within the structure of the federal government.

The irony is that while the Garcia Court rightly recognizes the inappropriateness of judges limiting national power on the basis of some judicially determined set of reserved powers for the states, it turns right around and entrusts this same responsibility of self-restraint to the Congress. This position is, however, perfectly consistent with the Court's previous inability to draw Constitutional limits around the national government's scope of activity by discovering some meaningful limitation to the enumerated powers and to the Necessary and Proper Clause. It is perfectly consistent with the Court's continuing inability to specify some operational distinction between "regulating commerce" and regulating virtually any activity that by any stretch of the imagination might conceivably come into contact with commerce.

The framers would have been appalled that any branch of the national government was to be entrusted with the responsibility of defining reserved powers. This turns the Constitutional design on its head. What was to be determined was not powers reserved to the states, but rather those powers (both express and implied) delegated to the national government. Chief Justice Marshall recognized the fundamental problem this would create for the political process as early as 1819:

> This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it ... is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist (McCulloch v. Maryland).

In Garcia the Court explicitly removed itself from the task of limiting the national government on the basis of whether the activity in question unduly encroached on the states. While never doing so explicitly, the Court has nevertheless also refused, at least since the New Deal, to limit the national government on the basis of overstepping either its enumerated powers or the Necessary and Proper Clause. The Tenth Amendment assumes that some limiting mechanism

exists within the Constitution, rather than itself providing that limiting mechanism. The real Constitutional dilemma then is not the Courts' explicit renunciation of a responsibility to define federalism under the Tenth Amendment, but rather the Court's implicit renunciation of its ability to find any limitations on the national government in the Constitution other than in its express prohibitions on Congress. Were the Court able to find a way to limit the national government beyond those express prohibitions (a result the framers clearly intended) the entire debate concerning the Court's proper role in defining federalism would be moot (as the framers would have expected). The question to be debated then is, does this inability to limit the national government derive from a failure on the part of the Court, or does it reflect a fundamental flaw in the Constitutional design of federalism?

The Original Design

In creating the national government the framers assumed that there was a limited number of powers that a civil government might legitimately exercise over man. Those powers had, in their minds, been delegated from the people of the several states to their respective state governments. Cursory examination of the state constitutions and laws of the time reveal that there was no universal consensus on the scope of those powers that should be delegated to government, since state constitutions varied widely -- some granting extensive powers to regulate religion and the press, for example.

Within this context, ratification of the Constitution represented a threefold delegation of power: a withdrawal of some of the powers of the states and a redelegation to the new national government; a concurrent delegation of some of the powers of the states to the new national government with no corresponding withdrawal of those powers from the states; and the delegation of a few new powers to the new national government that no state previously had possessed.

Federalism, as the Garcia Court intuitively grasped, comprised a set of

design principles to sustain the patterns of delegation over time, not mere operating principles. One might state these principles rather formally.

> Federalism Design Principles: The constitution should delegate power from the sovereign people to two or more geographically nested governments, each of whose scope of authority is constrained within a limited sphere and whose exercise of power within its designated sphere is further limited by explicit prohibitions; each of which has authority over some common subset (perhaps the entire set) of citizens; each of which possesses a nontrivial set of powers that it may exercise independently of the other governments in the geographic nesting; each of which possesses a nontrivial set of powers it may exercise concurrently with other levels of government in the geographic nesting; none of which may be required by any other government in the geographic nesting to take any specific action other than to cease and desist an activity that is in fundamental conflict with the actions of a government above it in the geographic nesting or with the constitution; and the constitution should make a correlative assignment of authority among levels of government and create a set of decision rules to resolve disputes, when the exercise of this authority by levels of government comes into conflict, in a manner that systematically preserves the independent and concurrent powers of each level of government in the system.

If the Court finds it necessary to go outside of the Constitution itself and appeal to some general abstraction it calls "federalism" as a means of preserving the results these design principles were meant to ensure, it is an indication that the Constitution is not providing the Court sufficient Constitutional (textual) grounds, independent of the abstract principle, to accomplish its objectives. And, if the Court finds itself making a series of decisions, each within the Constitution's provisions, that have the cumulative effect of systematically eroding one level of government's powers, then the Constitution itself must be internally inconsistent.

The framers sought simultaneously to energize and constrain the new national government. They sought to energize the government by two methods: (1) express enumeration of the government's powers; and (2) granting implied powers that were "necessary and proper" to carry the expressly enumerated powers into execution. The framers also sought to limit and constrain the national govern-

ment by two different techniques: (1) by precluding any national government activities in areas in which it was not delegated authority -- a requirement of positive delegation of authority before it would be permitted to act; and (2) by restricting the national government's exercise of power within its legitimate sphere by direct prohibitions.

It is important to appreciate that state powers were also seen as delegated powers in need of definition and limitation, though not exclusively, or even primarily, by the federal Constitution. At the time of the writing of the Constitution, the laws and constitutions of the various states were seen to delegate and limit power. In addition, the adoption of the new federal Constitution would further prohibit states from taking certain actions and make it possible for the national government to prohibit future state actions that were inconsistent with the new Constitution. The states, then, were to retain all of the powers delegated to them initially by the people, with the exception of the powers explicitly withdrawn from them by the new Constitution and were limited in the future exercise of their powers in a manner consistent with the Constitution.

There was one glaring problem with this arrangement. The entire delicate balance of power between states and the national government turned on a precise determination of what powers exactly had been positively delegated by the Constitution to the national government. What powers had been expressly delegated and what, in short, did "necessary and proper" mean?

The Source of The Federalist Contradiction

Madison claimed in a famous statement in Federalist 44, that "no axiom is more clearly established in law, or in reason, that where ever the end is required, the means are authorized." In short, Madison states baldly that the end justifies the means if the end itself is justified. Very soon after Madison penned this remark, Marshall adopted it as Constitutional doctrine in McCulloch v. Maryland (1819).

Certainly, if the father of the Constitution and its most famous chief justice both embraced this doctrine, a great deal is riding on the "if the end itself is justified" desideratum. Clearly, both men believed it was possible to distinguish between which powers had been expressly delegated (enumerated) and which powers had not. This is the only possible context in which either could have accepted the "ends justify the means" interpretation of the Necessary and Proper Clause. Unfortunately, the Court has been unable to find any objective means by which to limit the scope of the national government's reach by limiting such vaguely worded express powers as the power to "regulate commerce" and to "provide for the general welfare." The Court has found the power to regulate commerce to be the power to regulate any activity that touches commerce even tangentially. Moreover, the Court has held that the "public welfare" is basically whatever Congress says it is.

When the Court combines the lack of definition of express powers with an interpretation of the Necessary and Proper Clause in which the ends justify the means, the only possible conclusion is that the national government may do whatever Congress deems proper as long as it does not contravene some express prohibition on Congress. No such prohibitions on Congress can be found in the Constitution with respect to the states.

To understand fully the source of the federalism contradiction, it is instructive to look at the framers' defense of the original seven articles of the Constitution. In spite of Madison's interpretation of the Necessary and Proper Clause, he and the other defenders of the Constitution continued to argue that the twin restraints (requirement of positive delegation and explicit prohibitions) contained in the original seven articles would suffice to constrain the national government so it could neither tyrannize individual citizens nor encroach upon the rightful prerogatives of state governments. Although the argument is made repeatedly throughout the Federalist Papers in defending specific

sections of the new Constitution, its force and character are presented most clearly in Federalist 84 when Hamilton is defending the Constitution in its totality against criticism that it did not contain a bill of rights. In the first part of the paper, Hamilton argues that the original seven articles do in fact contain specific prohibitions (specifically Art. 1,. sec. 10.). But, even Hamilton recognized that such prohibitions were anemic, especially if compared to a bill of rights similar to that contained in the Virginia Constitution (of special significance given George Mason's prominent position in the debate over a national bill of rights). As a result, Hamilton goes on to make in classic form, the argument that so permeates the Federalist Papers:

> The truth is, ... that the Constitution [Articles 1-7] is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.

How more effectively may a government be limited, he inquires, than by prohibiting that government from acting except in those cases where the power to act has been positively delegated to it by the people? And, he goes on to reiterate an argument Madison had made repeatedly in connection with numerous separate sections of the Constitution: that the act of imposing an explicit set of prohibitions contains within it what Madison called a "negative pregnant" -- an implicit affirmation of an entire universe of activities by an explicit negation of a few.

Hamilton again in Federalist 84:

> I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausi-

> ble pretense for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive power, by the indulgence of an injudicious zeal for the bills of rights.

Similar arguments were made with respect to the prospect of the national government overstepping its delegated powers to infringe on state prerogatives. In Federalist 40, Madison argued:

> We have seen that in the new government, as in the old, the general powers are limited; and that the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.

And, Hamilton again in Federalist 32:

> ...State governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act [ratification of the new Constitution] exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of state sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the states from exercising the like authority and where it granted an authority to the Union to which a similar authority in the states would be absolutely and totally contradictory and repugnant. (Emphasis in original.)

During the ratification debate the Federalists defended the new national government as a limited government on the grounds that it required positive delegation of authority before it could legitimately take action and by the fact that certain sections of the original seven articles explicitly prohibited actions by the national government. The original seven articles were sufficient to prevent both the tyranny of individual public officials who would use power to their own ends and the tyranny of the political process in operation where a majority or powerful minority might use the political process to lead the gov-

ernment to take actions at variance with the public interest. The original seven articles were argued to be sufficient to prevent either kind of tyranny over individuals or over the state governments.

It was clear that the requirement of positive delegation was not going to limit national powers to those "expressly delegated," but rather would embrace those necessary and proper to carry the expressly delegated powers into execution. "Necessary and proper" was left undefined but clearly was meant to be interpreted as "the ends justifying the means" once the ends were established to be legitimate. The defenders clearly believed that the enumerated powers and those corollary "necessary and proper" powers comprised a limited delegation of authority to the national government. The opponents were, to say the least, skeptical.

As the ratification debate drew to a close, a substantial number of states were left unpersuaded (given such vaguely worded enumerated powers and under such an expansive definition of "necessary and proper") that the original seven articles afforded adequate protection against tyranny by the national government. A bill of rights -- both to protect individual citizens and state governments -- was a necessary condition of ratification.

After ratification, when it came time to draft a bill of rights, something curious happened. The proponents of a bill of rights, recognizing that they had lost the battle to restrict the authority of the national government to expressly delegated powers, settled for a compromise regarding individual rights. In seeking to restrain national government actions over individual citizens, a bill of particular prohibitions was put forward, this in spite of Hamilton's and Madison's warning of a negative pregnant, and accepted in very similar form. Perhaps because the most ardent proponents of the bill of rights had experienced the effects of the Virginia Declaration of Rights and were comfortable with it, the possibility of a negative pregnant raised by Hamilton in Federalist 84 did

not seem to bother the proponents. And, by including the Ninth Amendment, the proponents apparently aimed to head off the spector of the negative pregnant.

Yet, when the proponents of a bill of rights turned to protecting state prerogatives from national tampering, a bill of particular prohibitions was not put forward as an alternative to the unlimiting language of the Tenth Amendment drafted by Madison. Instead, the ardent states' rights proponents persisted in fighting once again the same battle they had just lost in the ratification debate over limiting the national government to expressly delegated powers. Not surprisingly, they lost again. Rather than a few explicit prohibitions on the national government to protect states -- that in turn eventually would (through the negative pregnant) comprise the limits of state protections -- they got a description of the initial relationship between the states and a national government constrained only by the requirement of positive delegation, on the part of national authority, and the absence of a requirement of positive delegation on the part of state authority.

The situation was worse even than might at first have appeared to be the case. In the place of a negative pregnant that at least would have afforded some specific protection, the states rights advocates got what might be termed a "sterile negative." Absent any explicit prohibitions on the national government, states were left with only the requirement of positive delegation to protect them. However, in conjunction with the "ends justify the means" version of the Necessary and Proper Clause, the requirement of positive delegation turned out to be sterile -- an implicit affirmation of an unlimited universe of activities by the inability to negate any. Without explicit correlative authority assigned to the states, they are left without any Constitutional footing from which to defend against an excessive exercise of national power. There is no Constitutional language which can be used to buttress an argument that an act of the national government is not a "proper" exercise of one or other of the

enumerated powers. The requirement of positive delegation becomes a mere parchment barrier so far as the states are concerned.

The interesting result is that such a system degenerates into precisely the same situation as does the system under the negative pregnant -- limitations on government reduce to that set of activities expressly prohibited.

There exists within the American experience a useful natural experiment that lends confirmation to the suggestion that the only effective limits on governments are express prohibitions that correlatively create authority for others. After ratification of the Constitution, prior to adoption of the Bill of Rights, both individuals and states had essentially the same protection from government: the requirement of positive delegation. With adoption of the Bill of Rights, individuals then had additional protection by a number of very explicit prohibitions. Over time, Madison's and Hamilton's warning about the negative pregnant has proved prescient. One is hard-pressed to find a recent Court decision based upon the requirement of positive delegation, i.e., asserting that Congress has overstepped its authority, not because it is explicitly prohibited from taking an action, but because it was never delegated the authority. Even with the explosion of newly created individual rights over the past 25 years, the Court has not seen fit to use the obvious source of such rights -- the Ninth Amendment. Instead, virtually all of the rights created in the recent past have been justified, no matter how tenuously, on the basis of some express prohibition on government within the Bill of Rights or the 14th Amendment.

For individual citizens (at least in the noneconomic realm), the result of the negative pregnant has been relatively benign. Even during periods of the Court when the Bill of Rights was interpreted narrowly, its wide scope of guaranteed liberties has afforded individuals very significant protection without reliance on the solicitude of the political process or the willingness of judges to grant protections on the basis of some abstract notion of "individual sov-

ereignty" analogous to federalism. One can only speculate on the outcome had the Bill of Rights consisted simply of two amendments, the Ninth and Tenth. It is not unreasonable to assume that just as in the case of state prerogatives, Hamilton's assurances about freedom of the press may have proven hollow.

Reserved Powers Under the Tenth Amendment: The Empty Set

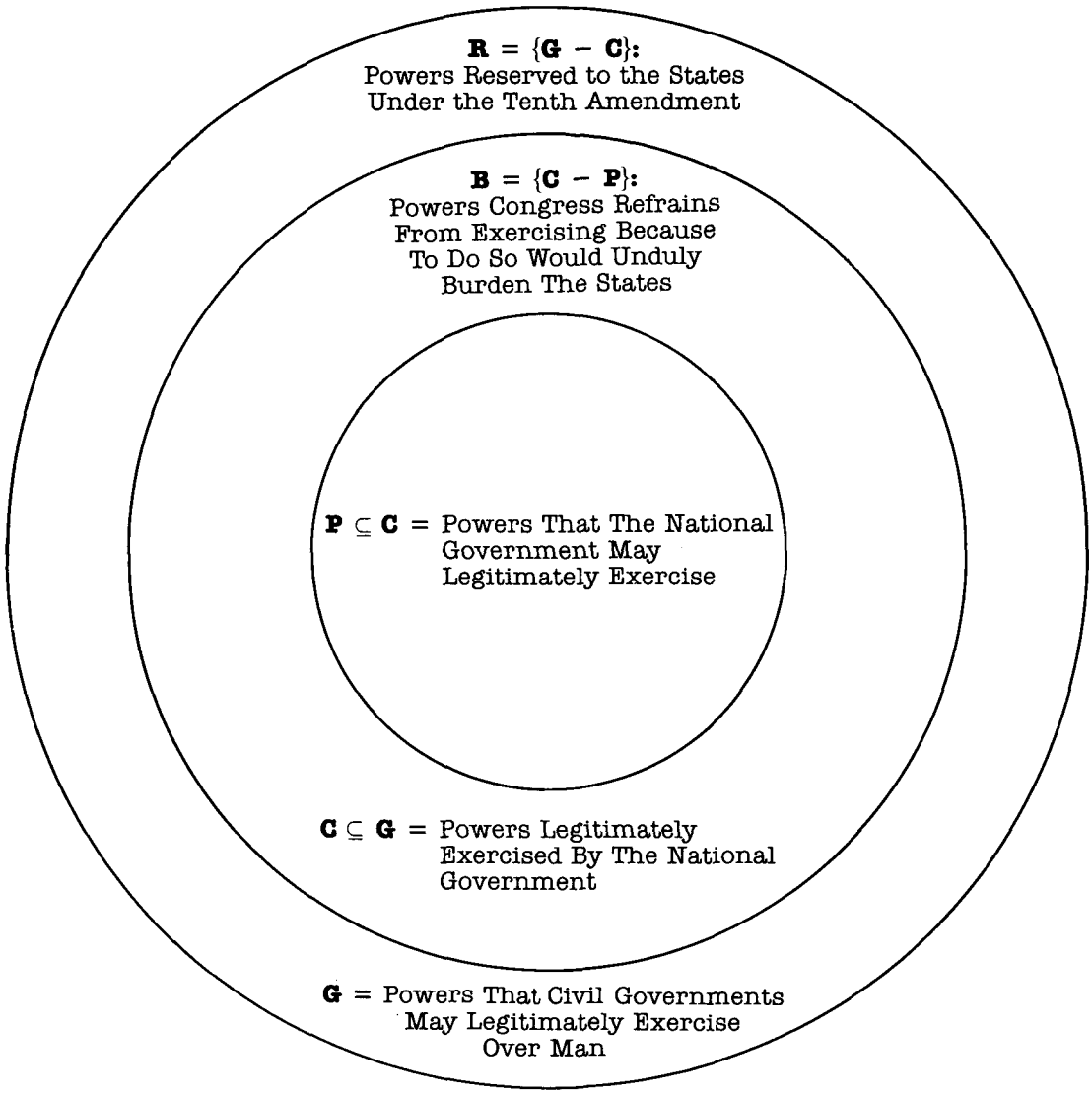
The Tenth Amendment describes a set of powers -- reserved to the states or the people -- that comprises those powers not delegated exclusively to the national government nor explicitly taken away from the states by the Constitution. Under the premise that "necessary and proper" implies that the ends justify the means, the requirement of positive delegation reduces to permission for Congress to exercise any power not expressly prohibited to it. Since there are virtually no prohibitions on how Congress may affect states, Congress is, therefore, free to do just about as it pleases. In short, unless Congress restrains its exercise of implied powers, the Tenth Amendment may come to describe an empty set.

This, in substance, is the message of the Garcia decision. The Court's logic, if not its sanguine appraisal of the status of federalism, is compelling. Its conclusion, valid though it may be, is profoundly disturbing. The Tenth Amendment merely describes a diminishing set of reserved powers and there appears no sure way to replenish that set short of Constitutional amendment.

Diagram 1 depicts the distribution of powers between the national government and the states established by the Constitution. Set {G} represents all of those powers that might legitimately be exercised over man by a civil government. In the diagram, these powers are represented by all points falling within the outermost circle. {C} is a subset of {G} and comprises the set of all powers in {G} delegated to the national government by the Constitution. The set {C} is represented in the diagram by all of those points that fall within the second most interior circle. Finally, {P} represents that subset of powers delegated to the national government that Congress finds it is prudent to exercise;

Diagram 1

Nested Powers in the Design of Federalism



Note: T ⊆ S = T is included in S

refraining from the rest of the powers contained in {C} because, in its estimation, to exercise them would impose an undue burden on state governments. In the diagram, those powers actually exercised by Congress are represented as the set of points falling within the inner most circle. {P} is obviously a subset of {C}.

These three basic sets of powers give rise to two additional subsets of powers that are important for understanding federalism. {R} consists of those powers in {G} not in {C}, i.e., those powers that are neither delegated to the national government under the Constitution nor prohibited to the states by it. {R} comprises reserved powers under the Tenth Amendment. {B} consists of that set of powers in {C} not in {P}. In other words, {B} singles out the set of powers that the national government refrains from exercising, even though it could, because to do so would pose unacceptable burdens on the states under our federal system.

One useful way to consider the meaning of these two sets of powers is that {R} captures the Constitutional principle of federalism -- that power should be divided between levels of government to avoid a monopoly of power by any single sovereign -- while {B} defines the arena of cooperative federalism -- the use of the Constitutional division of authority to achieve specific policy objectives. The benefits of cooperative federalism may include a high degree of correspondence between public policy outcomes and local preferences; extensive policy experimentation and diffusion of policy innovations in a manner that is tailored to local conditions; the encouragement of political participation, minimizing alienation, rendering citizens more informed and government more responsible and accountable than is possible under a single national government; and the provision of a responsible outlet for demands on the national political agenda to minimize the serious problems inherent in managing complex policies in a centralized manner endemic to an over-politicizing of daily life. What has been

little understood, however, is that the benefits of cooperative federalism may in fact depend upon the Constitutional principle of federalism (often called "dual federalism"). If Congress can get what it wants by ordering states about, what is the incentive for Congress to engage in cooperation? One might argue that Congress tacitly trades off the use of national prerogatives in dealing with state interests for state solicitude toward national interests. As Congress comes to understand that it doesn't need cooperation from the states, it may be less forthcoming in offering cooperation to the states.

The Garcia decision helps to sort out the federalism puzzle that continues to cause much confusion. As the Constitution is presently understood, it is the Court's responsibility to draw the boundary of {C} -- the set of powers delegated to the national government by the Constitution. This is the role of the courts, indirect though it may be, in defining and preserving the principle of federalism. The states are largely irrelevant to this exercise. The Court must fashion doctrine to determine the breadth of enumerated powers and to give operational meaning to the Necessary and Proper Clause.

Presumably, such a test would consider whether the ends of a Congressional policy were consistent with some national interest, objective, or purpose; whether the ends were achievable by exercise of a power delegated to the national government; and whether the particular action was both necessary and proper to achieve such an objective. If the policy was necessary to execute a national tax, welfare, or commerce policy, for example, then the action would be within the delegated powers of the Congress. In the absence of a national connection, the Court would presumably consider the ability to act in the area beyond the delegated powers of the national government and thereby, unless the states were expressly prohibited, within the reserved powers of the states under the Tenth Amendment. Such a doctrine would have the effect of determining what is, and what is not left in the hands of the states. However, this test is a negative

one for the states; the emphasis is on fashioning a test to assess precisely what powers have been delegated to the national government with little or no explicit consideration of the states.

The problem with attempting to protect the states' integrity by such judicial doctrine is, of course, that the Court has been unable to find any activity beyond the power of the national government unless the Constitution expressly prohibits it. In other words, the Constitution, as it is written currently, provides the Court no textual grounds, apart from the language of "necessary and proper" and the reference to reserved powers in the Tenth Amendment, upon which to fashion such a doctrine.

While the Court is to draw the boundary of {C}, and thereby preserve the principle of federalism indirectly by defining {R}, the Congress is free to enter into cooperative arrangements with the states, whenever appropriate, by delimiting {C} even further. By using its discretion and by exercising self-restraint, Congress can ensure that the national government does not unduly burden the states through an imprudent use of its enormous power under the Constitution. This exercise of prudent self-restraint gives definition to {P} through the political process. Of course, the problem is, the Court has defined the set of legitimate national government activities under the Constitution ({C}) to be virtually unbounded. In other words, the boundary of {C} and {G} become identical.

One can envision the Court having a two-fold responsibility in Diagram 1: (1) To draw the boundary of {G}, i.e., to determine the limits of state powers under their own and the U.S. Constitutions; and (2) to draw the boundary of {C}, i.e., to determine the limits of national government powers under the Constitution. Instead, the Court seems capable of defining only the boundary of {G} and letting the boundary of {C} and {G} become synonymous by default. When this happens, the set of reserved powers ({R}) equals the empty set. In Diagram 1,

imagine expanding the circle C ever larger. The donut shaped area between circles C and G gets ever smaller as C approaches G. When C reaches G, that donut shaped area ceases to exist and the set it defines -- {R} -- becomes empty.

When this happens, Congress is left, ipso facto, as the sole determinant of the limits of the national government's actions, so long as Congress remains within the confines of the outer circle G in Diagram 1, i.e., does not transgress any explicit prohibitions put on it by the Constitution. Under this situation, it is Congress who will determine what specifically comprises reserved powers, i.e., the difference between what Congress could do and what it actually chooses to do. This is the result repugnant to federalism.

One might pose a Constitutional design puzzle: how to define {R} and prevent it from degenerating into {B}. Critics of Garcia have wanted to argue that the Tenth Amendment does this, while the Court, obviously, perceives no distinction between the two sets. Both are in error. For the Court, reserved powers consist of the difference between what Congress can do and what it chooses to do. For most critics of the Garcia decision, reserved powers consist of what judges permit states to do and prohibit the national government (including itself) from interfering with. In the former instance, Congress would allocate functions and responsibilities between levels of government; in the latter, judges would make such determinations. Neither case, however, is consistent with a federal constitution.

Eliminating the Federalism Contradiction

The foregoing analysis suggests a method to define reserved powers Constitutionally by looking to the example of the first eight amendments of the Bill of Rights. For federalism to be sustainable, it is necessary to grant the states certain explicit protections, i.e., to create express prohibitions on Congress' ability to regulate the actions of states. This is no mean task if the objective is to make such prohibitions consistent with the broad powers granted Congress

in the rest of the Constitution.

It may also be necessary to fill in a serious gap in the original design of the Constitution: the omission of any significant check on the national government by the states acting as sovereign states rather than as interest groups through their national organizations within the national political process -- an omission that is conspicuous given the framers' proclivity to check and balance one institution by granting another institution on an equal footing countervailing power of some sort. The Garcia Court may be correct that some of the relationships between the nation and the states are too subtle to admit of judicial determination based upon Constitutional standards. If so, and if we are not to entrust the protection of state interests entirely to national solicitude in a manner incompatible with the American theory of constitutions, it is necessary for the states to possess some sort of veto, analogous to the executive veto, in the process of national legislation.

Whether the federalism contradiction will be removed depends on how the states choose to respond to Garcia. If the states do nothing, the contradiction may be resolved by a final withering away of federalism. A range of possible state responses is explored in the next section. Then, assuming some interest in Constitutional amendment, the concluding section considers a range of possible approaches to Constitutional reform.

WHAT TO DO?

Possible State Responses to Garcia

Several possible courses of action are open to the states as a response to the holding in Garcia. Though not mutually exclusive, these state options nevertheless reflect different approaches to the problem raised by Garcia and aim at different kinds of resolution. The choice of state response turns upon how states view the nature of the problem they face.

The states' options are:

1. Seek to Influence National Legislation. In this approach, the states enter into national politics, as any interest group, playing the political game much as the Garcia Court envisions. In the first instance states might seek systematic exemption from national economic regulation under the Commerce Clause; failing that, the states can seek specific exemptions and lobby for compensating grants-in-aid when regulations are imposed. This in fact is exactly what the majority opinion in Garcia invites the states to do.

2. Litigate. Search for the "right" cases to test the staying power of Garcia, hoping in the meantime for some assistance from a change in the composition of the Court. The aim in this approach is to persuade the Court to craft doctrine that would construe the Tenth Amendment as a limiting instrument with respect to the exercise of enumerated powers by the national government. Justice O'Connor's dissent provides an opening wedge for this doctrinal approach in arguing that "the means by which national power is exercised must take into account concerns for state autonomy." In short, the Court could, through doctrine, give life to the "proper" component of the "Necessary and Proper" clause.

3. Seek a Constitutional Amendment. This can be done in one or both of two ways: first, by lobbying Congress to propose an amendment; and/or petitioning Congress to call a Constitutional convention for that purpose.

4. Resist. Convinced that Congress has unconstitutionally intruded into a domain of legitimate state authority and responsibility contrary to the principles of federalism that underlie the Constitution, states may instruct their officers, respectfully and civilly, to disobey what in their minds is unconstitutional over-reach by Congress. Civil disobedience by state officials would aim at the creation of a Constitutional crisis demanding resolution on terms acceptable to the states.

While the four separate courses of action are not mutually exclusive, nei-

ther are they entirely compatible. Pursuit of the first option -- politics as usual -- would tend to undermine simultaneous pursuit of both litigation and amendment strategies, especially to the extent it is successful. Acceptance of the first option as a dominant strategy simply reinforces the Garcia Court's view of federalism. It is of course utterly inconsistent with a strategy of resistance.

The second and third options are also somewhat inconsistent. While a purely pragmatic orientation may argue that judicial construction is just as effective as Constitutional amendment, with less cost, thus relegating the amendment approach to the status of a back-up, it can also be argued that more can be accomplished, and more securely, by means of Constitutional amendment. The major problem, however, is that the two approaches rest on contending theoretical positions, i.e., alternative constructions of the Tenth Amendment and what the framers intended by it. It is difficult therefore to build a coherent state response on the basis of a dual litigation/amendment strategy when the elements of such a mixed-strategy derive from contradictory intellectual orientations.

The third and fourth options, on the other hand, are complementary, as are the second and fourth. Resistance is consistent with either the view that the Garcia Court has ignored the plain meaning of the Tenth Amendment (as argued by the dissenters) or the view that the design and subsequent alteration of the Constitution has progressively caused the position of the states to deteriorate, demanding a renegotiation of the federal bargain. In both instances, the case for resistance is strengthened by a coherent intellectual position underlying it.

Unfortunately, ambiguity in the guiding intellectual orientation is probably unavoidable. The best that can be done is to offer contending positions that compete, in a joint intellectual-political marketplace, to guide the response of the states.

Alternative Approaches to Constitutional Amendment

Four basic approaches can be distinguished as a means of resolving the "federalism contradiction" by amending the Constitution. Each approach assumes that reform is not well handled behind a legal facade, that nothing fundamental is being changed, and that a proper proportioning of institutional powers and responsibilities is best to be worked out in an open and deliberative process of Constitutional amendment. The approaches are arrayed below in order of their reliance on judicial discretion, from a greater to lesser role.

1. An instruction to the courts to adjudicate differences between the national government and the states. While the Garcia Court concluded that the design of the Constitution did not allow for judicial determination of limits on the power of Congress based on the Tenth Amendment, this amendment would add language to the Tenth instructing the Court to do so. This approach is essentially an amendment path to achieve the same result sought by means of litigation (above). It would simply affirm the views of the dissenting justices in Garcia. And it would do no more. The textual basis for limiting the power of Congress vis-a-vis the states would remain the same as before: reserved powers. The Tenth Amendment would then read as follows (new language underlined):

> Sec. 1. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.
>
> Sec. 2. The judicial power of the United States shall be used to decide questions of jurisdiction, that may arise between the United States and the respective states, as defined by this Constitution.

2. New language to give the Court explicit criteria for determining the limits of Congressional power vis-a-vis the states. This approach essentially mirrors that taken by the first eight amendments with respect to the protection of individual rights and liberties. Specific areas of state authority and responsibility are identified and Congress is expressly precluded from infringing

upon those areas. As in Constitutional litigation over individual rights and liberties, the courts are then required to strike a balance between the exercise of the enumerated powers and the protections accorded, in this instance, the states. One way of thinking about these substantive protections is to view them as criteria for defining the limits of what is "proper" under the Necessary and Proper Clause. Congress is then free to pursue its Constitutional ends subject to a constraint specified as a set of criteria for protecting state autonomy. Instead of assuming, as in the first approach, that the reserved powers clause offers sufficient textual guidance to the courts, this amendment provides language that clearly delineates the criteria that must guide the exercise of national power vis-a-vis the states. Again a second section is simply added to the existing Tenth Amendment:

> Sec. 2. 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. Nothing in this article shall be construed to restrict the power of the Congress to enforce the provisions of this Constitution.

The substantive areas defined by this amendment include general reference to a right of self-government and specific reference both to the necessary powers of government, i.e., provision for law and order and taxation, and to powers related to public employment (the particular subject of Garcia) and intrastate commerce. The latter is specifically referenced because most national power expansion at the expense of the states has occurred pursuant to the power of Congress to regulate interstate commerce. The courts would now be required to constrain the exercise of the national commerce power in view of the responsibility of the states for the regulation of intrastate commerce. The amendment also includes a "necessary and proper clause" in order to make clear that the substantive areas accorded protection are not to be given an unduly narrow read-

ing. Section 1, containing the "reserved powers" language, is at the same time retained, so that states are clearly not limited in their authority to act to that specified in Section 2. The purpose of the new language is simply to specify those areas of state authority not subject to national preemption. Finally, a disclaimer is added in the last sentence to make clear that Congress retains authority to enforce, by means of legislation, all Constitutional requirements made of state governments.

3. Explicit prohibition of Congressional actions that displace state powers. This approach also entails additions to the Tenth Amendment, but in the place of criteria based on substantive state powers, there appear explicit limits less dependent on judicial discretion in application. The specific limits are related to (1) national mandating of state action, (2) national preemption of state powers, and (3) national conditioning of state expenditures. As above, the present Tenth Amendment is left intact as section 1, and the following new sections would be added:

> Sec. 2. 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. This section shall not be construed to limit the power of Congress or the courts to prohibit any specific action by any state that violates the Constitution or the laws of the United States.

The purpose of this section is to prohibit Congress or the courts from requiring any positive action by any state. The national government would remain free to require any state to cease and desist any activity that is contrary to the Constitution or federal law; and this language would permit the courts to tailor equitable relief to the particular situations of individuals that arise in any suit challenging state laws or practices in the manner in which equitable relief traditionally has been granted. The ability of the national government to affect state government action is thereby limited to a negative power, i.e., a veto on state action exercised according to a rule of law.

Sec. 3. 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.

The objective of the new section above is to limit the scope of the commerce power, when Congress acts vis-a-vis the states, to those actions clearly related to the free flow of interstate commerce or to national markets of exchange. Congress could no longer regulate a state action simply because that activity might conceivably touch upon commerce as opposed to regulating the flow of commerce. The intent of this section is to leave Congress wide latitude in regulating state activities for the express purpose of preserving and strengthening national commercial activity and markets. It would, however, remove the ability of Congress to regulate state activities, which may touch on commerce, for purposes other than explicitly protecting or facilitating interstate commerce.

Sec. 4. Congress shall make no law, nor shall the courts make any ruling, pursuant to Article 1, Section 8, Paragraph 18 of the Constitution restricting the power of any state unless in the absence of such law it would be impossible to carry into execution the powers delegated to the Government of the United States by this Constitution.

The purpose of this new section is to define more precisely the meaning of "necessary" in the Necessary and Proper Clause so that, for the purpose of regulating state government activities, the contemplated national law must be absolutely necessary, not merely useful or convenient. The intent here is to force Congress to exercise its powers in the manner least burdensome to state governments when pursuing a national objective.

Sec. 5. No law enacted pursuant to Paragraph 3, Article 6, of this Constitution shall be construed to restrict the powers of any state unless such restriction has been expressly and explicitly stated in such law or unless in the absence of such a construction it would be impossible to carry such law into execution.

This section is intended to constrain judicial application of the doctrine of federal preemption and to encourage Congress to state an intention to preempt explicitly. No law is deemed to preempt state action unless Congress has stated its intention explicitly or unless the court determines that preemption is absolutely necessary to carry the law into execution. Convenience, rather than necessity in the strict sense, is insufficient.

> Sec. 6 (a). Congress shall make no law, nor shall the Courts make any ruling, placing conditions or restrictions on the expenditure of funds by any state or legal subdivision thereof on the basis of the source of such funds, unless such funds are paid directly by the United States into the treasury of such state or legal subdivision pursuant to a contractual agreement between the United States and such state, or in the case of a legal subdivision such state and legal subdivision.
>
> (b). Conditions and restrictions placed upon the expenditure of funds of any state or legal subdivision thereof enacted pursuant to subsection (a) shall apply only to those funds paid under a program authorized in law enacted after the date of enactment of such conditions and restrictions.

This new section is meant to clarify Congress' ability to control state actions by placing conditions and restrictions on federal financial assistance.

Subsection (a) restricts the definition of federal financial aid exclusively to funds paid by the national government directly into the treasuries of a state or its legal subdivisions. It requires further that such payments must be made on the basis of an explicit contract between the national government and the state, or in the case of a legal subdivision, between both the state and legal subdivision, on the one hand, and the national government on the other.

Subsection (b) prevents Congress from placing ex post conditions and restrictions on programs of federal financial aid that already exist in federal law prior to creation of new conditions and restrictions.

4. Restructuring the national political process. Another amendment strategy is one consistent with the view taken by the Garcia Court that the position of the states in the federal system is best protected by the structure of the

national political process. While the Court's view is weakened by previous Constitutional amendments that have deprived the states of a special role in national politics, especially direct election of the U.S. Senate, one possible response is to use the theory advanced by the Court (and others) to restructure the national political process giving greater weight, directly or indirectly, to state interests. Two possible revisions are considered here. One is collective state nullification of national legislation. Mirroring the Presidential veto designed to protect executive prerogative, two-thirds of the states could nullify an act of Congress signed by the President. Nullification is different from veto insofar as legislation is allowed to take effect without prior state action. Otherwise, the principle is the same. State legislatures, acting collectively, are able to protect their legislative authority by constraining the national legislature. The other revision included in this approach is a tax limitation amendment already the subject of national debate. The direct effect of this amendment would be to prevent the national government from making excessive claims on the national tax base, which must be shared with the states. Indirectly, the requirement of a federal tax limitation would shore up state authority and responsibility by constraining the national government to adhere more closely to essential national interests in making policy, allowing less budgetary discretion for invading state responsibilities.*

This amendment would require revisions and additions to Article 1 of the Constitution as shown below (new language underlined):

> Sec. 1. All legislative powers herein granted, with the exception of those powers reserved to the states in Section 11, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

*A Constitutional limitation of federal revenues would necessitate short-term reliance on deficit financing in the event of war or other national emergency, just as always has been the case. The ability to respond appropriately to crisis situations would in no way be impaired by a tax limitation amendment; yet, an effective constraint on long-term patterns of excessive growth in the national government would be created.

****

Sec. 11. The states in their collective capacity shall have the power to declare an act of Congress (or portion thereof) null and void, in which case the act shall cease to be a law, when, within any three-year period, the legislatures of two-thirds of the several states shall enact the following declaration:

"The people of the State of [ ], in their legislature assembled, join with the people, in their legislatures assembled, of no less than two-thirds of the states to declare null and void the act of Congress [official citation of the act or portion thereof to be declared null and void]."

Article I, Section 8, clause 1 of the Constitution would also be amended by striking the semicolon at the end thereof and inserting the following language:

> ... and the total revenues of the United States for any one-year period shall not exceed an amount equal to [ ] multiplied by the amount of the United States' Gross National Product in such year as such Gross National Product is defined by the United States Government in 1986;

Summary. The four amendment approaches -- instructing the courts to adjudicate federalism issues, providing criteria by which to adjudicate, explicitly prohibiting certain types of national encroachment, and restructuring the national political process to include a greater role for the states -- are obviously not mutually exclusive. An amendment package could make use of different parts of each approach. Restructuring the national political process is a reform that could complement any of the other approaches. The second approach, provision of criteria for use by the courts in refereeing national-state disputes, could be combined with elements of the third approach which explicitly prohibits specific types of federal actions. For example, the expanded Tenth Amendment as given in the second approach above, could be modified to add the following clause:

> Sec. 2. ... nor shall the legislative, executive, or judicial powers of the United States be used to require any state to take any action not otherwise expressly required by this Constitution.

At the same time, however, the four approaches delineate somewhat different ways of thinking about the problem raised by Garcia. The first approach is willing to entrust the regulation of federalism entirely to the federal judiciary, having instructed the courts on their role. The second approach adds specific language to provide a textual ground for judicial determinations, accepting the Garcia Court's contention that the Tenth Amendment presently offers no basis for judicial intervention. The third approach goes still further, trusting less to judicial discretion and more to specific Constitutional regulation. Finally, the fourth approach relies not at all on judicial discretion, but restructures the national political process to give the states greater political leverage in dealing with the Congress in a manner consistent with the Garcia Court's view of how federalism should work.

The range of possibilities for amending the Constitution to reform the institutions of federalism in the United States is quite broad. All of the approaches delineated above are consistent with the general theory of a limited constitution on which American Constitutional design rests. Underlying each approach is a basic understanding that Garcia poses a Constitutional problem that demands a Constitutional remedy. Broad questions of Constitutional design are seldom best dealt with entirely by means of judicial discretion. The result is too unpredictable, especially given the presumed mandate of judges to follow rather than originate fundamental law.

CONCLUSION

The decision of the U.S. Supreme Court in the Garcia case has prompted an adverse reaction from many state and local officials, as well as from numerous scholars of federalism. The ensuing controversy promises to open a long-needed dialogue on the adequacy of the constitutional design of federalism in America. In contradistinction to both critics and supporters of the holding in Garcia, the thrust of this Report is to advance the following argument: (1) that the decision of the Court in Garcia may be reasonably correct in its construction of what the Constitution today requires; (2) that this construction is nevertheless inconsistent with the preservation of federalism; and (3) that there emerges, therefore, a basic contradiction between (a) the common belief that the Constitution establishes a federal system and (b) the result produced by well established conventions of Constitutional law. Ordinary legal and political recourse, therefore, may not suffice to provide a solution to the federalism puzzle.

Whatever solution is forthcoming, it is essential that it reflect a new level of common understanding as to the meaning of federalism and its Constitutional requirements. This depends upon widespread discussion and debate centered around the Constitutional issues involved, not simply upon acts of Congress or the courts. Full, open, and public deliberation, informed by principles of constitutional design, is an essential process of constitutional dialogue in a self-governing society.

Appendix

PARTICIPANTS IN ROUNDTABLE MEETINGS

Three Roundtable Meetings on the effects of Garcia were sponsored by ACIR during the fall, 1985, in Salem, OR; Philadelphia, PA; and Chicago, IL. Participants in these meetings were very helpful in developing the ideas contained in this report, for which the Commission is grateful. Their names and organizations are listed below.

Salem Roundtable, October 2, 1985

Gwen Van Den Bosch, Mayor, Dallas, OR
Paget Ergen, staff member, League of Oregon Cities
Randall Franke, Board of Commissioners, Marion County, OR
Elvern Hall, Mayor, Newberg, OR, President-Elect, League of Oregon Cities
Jerry Justice, Administrative Officer, Clackamas County, OR
Jerry Martin, staff member, Oregon School Boards Association
Wes Myllenbeck, Chairman, Board of Commissioners, Washington County, OR
Jerry Orrick, Executive Director, Association of Oregon Counties
Ken Roudybush, Administrative Officer, Marion County, OR
Judith Tegger, Special Assistant to the Attorney General for Labor Relations, State of Oregon
Ken Tollenaar, Director, Bureau of Governmental Research and Service, University of Oregon
Dick Townsend, Acting Executive Director, League of Oregon Cities

Philadelphia Roundtable, October 16, 1985

Edwin Baker, University of Pennsylvania Law School
Michael Bird, Staff Director, Government Operations and Regulation Committee, National Conference of State Legislatures
Robert Connor, New Jersey Civil Service Commission
Chris Danilo, New Jersey Civil Service Commission
Curtis Kiser, State Senator, Clearwater, FL
Austin Lee, Executive Director, Bipartisan Management Committee, House of Representatives, State of Pennsylvania
James Nelligan, Deputy Secretary, Department of Revenue, State of Pennsylvania
Rose Marie Swanger, County Commissioner, Lebanon County, PA
Jeffrey Teitz, State Representative, Chairman, House Judiciary Committee, State of Rhode Island
Robert Thompson, Chairman, Board of Commissioners, Chester County, PA
William D. Valente, Villanova University Law School
Dave Wynne, Pennsylvania Economy League

Chicago Roundtable, November 4, 1985

John Amberger, Southeast Michigan Council of Governments
Roland W. Burris, Comptroller, State of Illinois
Henry N. Butler, University of Chicago Law School
Jeffrey Esser, Government Finance Officers Association
Jim Frech, Washington Office, Illinois General Assembly
Douglas W. Kmiec, University of Notre Dame Law School
Paul McCarron, Chairman, Minnesota Governor's Advisory Council on State-Local Relations
Earl Mackey, Executive Director, National Conference of State Legislatures
John Martin, Speaker, House of Representatives, State of Maine
Frank Miller, Chairman, Board of Supervisors, Kane County, IL
Lloyd Omdahl, Bureau of Governmental Affairs, University of North Dakota
Vincent Ostrom, Department of Political Science, Indiana University
Ivan L. Schraeder, Director of Labor Relations, State of Missouri
Thomas Solberg, Bureau of Local Government Services, Department of Revenue, State of Wisconsin
Mary Eleanor Wall, Elmhurst, IL

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The Advisory Commission on Intergovernmental Relations (ACIR) was created by the Congress in 1959 to monitor the operation of the American federal system and to recommend improvements. ACIR is a permanent national bipartisan body representing the executive and legislative branches of Federal, state, and local government and the public.

The Commission is composed of 26 members—nine representing the Federal government, 14 representing state and local government, and three representing the public. The President appoints 20—three private citizens and three Federal executive officials directly and four governors, three state legislators, four mayors, and three elected county officials from slates nominated by the National Governors' Conference, the Council of State Governments, the National League of Cities/U.S. Conference of Mayors, and the National Association of Counties. The three Senators are chosen by the President of the Senate and the three Congressmen by the Speaker of the House.

Each Commission member serves a two year term and may be reappointed.

As a continuing body, the Commission approaches its work by addressing itself to specific issues and problems, the resolution of which would produce improved cooperation among the levels of government and more effective functioning of the federal system. In addition to dealing with the all important functional and structural relationships among the various governments, the Commission has also extensively studied critical stresses currently being placed on traditional governmental taxing practices. One of the long range efforts of the Commission has been to seek ways to improve Federal, state, and local governmental taxing practices and policies to achieve equitable allocation of resources, increased efficiency in collection and administration, and reduced compliance burdens upon the taxpayers.

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