

# SOUNDS OF SOVEREIGNTY: DEFINING FEDERALISM IN THE 1990S

JOHN C. YOO\*

Federalism is back, with a vengeance. Not so long ago, in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>1</sup> it appeared that we had witnessed the “Second Death of Federalism,” in the words of one prominent scholar.<sup>2</sup> In that case, the Supreme Court had announced that it would no longer exercise judicial review to police the boundaries between the federal and state governments. After *Garcia*, the states were to seek protection from expansive exercises of federal power from the national political process, particularly from their representatives in the Senate.

Despite this striking declaration of judicial abdication, the Supreme Court has devoted much of its resources in the 1990s to restoring a meaningful balance between federal and state power. Beginning in 1991 with *Gregory v. Ashcroft*,<sup>3</sup> and continuing the following year with *New York v. United States*,<sup>4</sup> then with *United States v. Lopez*,<sup>5</sup> *Seminole Tribe of Florida v. Florida*,<sup>6</sup> and then with the two blockbuster cases of the 1997 Term, *City of Boerne v. Flores*<sup>7</sup> and *Printz v. United States*,<sup>8</sup> the Court has attempted to protect state autonomy both by reading federal statutes narrowly so as not to invade state policy-making spheres or by striking down legislation that regulates states themselves.<sup>9</sup> In these cases, the Court has restored federalism in three ways: it has identified certain subject matters that are to remain within the policy-making authority of the states; it has sought to protect the institutional independence of the states; and, it has placed limits on the exercise of Congress’ enumerated powers.

These recent cases have come under criticism for their failure to advance a comprehensive theory that justifies the Court’s rejuvenation of federalism.<sup>10</sup> For

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\* Acting Professor of Law, University of California at Berkeley School of Law (Boalt Hall). A.B., Harvard University; J.D., Yale Law School. I would like to thank John Dwyer, Paul Mishkin, and Ed Rubin for helpful discussions and suggestions. I also would like to thank Betsy Wilborn Malloy and Ron Krotoszynski for their generous and perceptive comments, as well as the editors of the *Indiana Law Review* and the Program on Law and State Government at the Indiana University School of Law—Indianapolis for their kind invitation to participate in this symposium. Financial support for the research was provided by the University of California at Berkeley Committee on Research and the Boalt Hall Fund.

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

2. William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

3. 501 U.S. 452 (1992).

4. 505 U.S. 144 (1992).

5. 514 U.S. 549 (1995).

6. 517 U.S. 44 (1996).

7. 117 S. Ct. 2157 (1997).

8. 117 S. Ct. 2365 (1997).

9. For a fuller analysis of the Court’s recent cases, see John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1334-57 (1997).

10. See, e.g., Edward L. Rubin & Malcom Feeley, *Federalism: Some Notes on a National*

example, many of the rationales that the Court has provided for protecting federalism are instrumental. According to this criticism, the alleged benefits that arise from federalism derive from administrative decentralization, rather than from innate value in separating national from state power.<sup>11</sup> The restoration of federalism, then, will be only fleeting because it will last as long as the benefits of decentralizing government power will outweigh its costs. Once centralization again becomes a more effective method for addressing social problems, the Court's jurisprudence will shift away from protecting the states. Federalism is not really a value of constitutional proportions, but only a tool whose value depends on its usefulness in addressing social issues.

To some extent, this criticism of the Court's recent cases is valid. Although the Court has made clear that it intends to restore the exercise of judicial review over questions involving the balance between federal and state power, it has provided little guidance concerning where the line between the two spheres of government ought to rest. Without a normative theory of federalism, the Court's jurisprudence seems destined to pursue a gradual, common-law-like evolution. This evolution will be halting, perhaps even unsuccessful, without a broader theory to guide the judiciary as it meets each new case.

This contribution to the symposium seeks to sketch out such a theory. It looks to the original understanding of federalism and of judicial review to establish the normative purposes of federalism. To be sure, protection of state rights was a political necessity to secure a new Constitution. But it was more than that. It was believed that federalism would lead to the protection of individual rights, first by creating independent governments that would create new individual liberties, and second by sustaining sovereign entities that could oppose the national government if it should oppress the people. Linked to this first justification was a second theory of federalism. Similar in purpose to the separation of power in the national government, dividing power between the federal and state governments was thought to produce an additional safety against a potentially tyrannical state. By creating competing power centers, the Constitution would safeguard liberty by ensuring that no level of government could exercise a unified authority over the people. States required institutional autonomy so they could oppose the power of the central government, and in this space free from government regulation, liberty would result.

## I. STATES AND SOVEREIGNTY

Judicial protection of the states would be of little value if the states did not play an important role in the lives of the people. As the historical evidence from the Constitutional Convention and the ratification debates indicates, the framers recognized that the states were to be a permanent feature of the national political

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*Neurosis*, 41 UCLA L. REV. 903, 907-08 (1995).

11. See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1075 (1995); Rubin & Feeley, *supra* note 10, at 914-26.

landscape. As Chief Justice White would declare for the Court in *Texas v. White*,<sup>12</sup> the United States is “an indestructible Union, composed of indestructible States.”<sup>13</sup> States existed, however, not just for the sake of existence, but for the purpose of effectuating the will of the people and for protecting their lives, liberty, and property. As James Madison wrote in *Federalist No. 46*: “The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.”<sup>14</sup>

It remains for us to discuss, however, what the framers believed those powers and purposes to be. Certainly, we could conclude that because the federal government is one of limited, enumerated powers, all powers that are not encompassed in the Constitution’s grants of power must be left to the states. As Madison wrote in *Federalist No. 45*: “The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”<sup>15</sup> This proposition would be enshrined in the Tenth Amendment, which declares that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>16</sup> But in light of the broad sweep given to the Commerce Clause<sup>17</sup> and other federal powers by the modern Court, it seems more worthwhile to identify those areas that the framers believed would remain in the control of the states, despite the Constitution’s grant of new powers to the national government.

Broadly stated, the framers understood the Constitution to grant the national government primarily those powers involving foreign relations.<sup>18</sup> The states would retain primary jurisdiction over almost all other domestic matters, such as taxation, judicial administration and law enforcement, and social and moral legislation. In defending the Constitution from Anti-federalist claims that the Necessary and Proper Clause<sup>19</sup> gave the national government unlimited powers, Madison declared that federal powers “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected.”<sup>20</sup> In contrast, state power would “extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order,

12. 74 U.S. (7 Wall.) 700 (1868) (Reconstruction Era case finding that Texas had never ceased to be a state during the Civil War), *overruled by* *Morgan v. United States*, 113 U.S. 476, 496 (1885).

13. *Id.* at 725.

14. THE FEDERALIST NO. 46, at 237 (James Madison) (Garry Wills ed., Bantam 1982).

15. THE FEDERALIST NO. 45, at 236 (James Madison) (Garry Wills ed., Bantam 1982)..

16. U.S. CONST. amend. X.

17. U.S. CONST. art. I, § 8, cl. 3.

18. *See, e.g.*, THE FEDERALIST NO. 45, at 236 (James Madison) (Garry Wills ed., Bantam 1982).

19. U.S. CONST. art. I, § 8, cl. 8.

20. THE FEDERALIST NO. 45, at 236 (James Madison) (Garry Wills ed., Bantam 1982).

improvement, and prosperity of the State.”<sup>21</sup> Given that the framers believed the nation’s new government and its isolation from Europe would render it relatively immune from the constant wars of the Continent, this meant that the federal government would not often exercise its powers.

Article I, Section 8’s grant of Commerce Clause authority constituted the only significant exception to this general division of authority between the national and state governments.<sup>22</sup> According to the Federalists, most of the other powers, such as “war and peace, armies and fleets, treaties and finance,” had already been vested in the Congress of the Articles of Confederation.<sup>23</sup> The new Constitution merely made those powers more effective by eliminating the national government’s reliance upon the states and by giving the federal government the means to act directly upon its citizens. Some, most notably William W. Crosskey, have argued that the framers enumerated Congress’ powers in Article I, Section 8 not to give them to the federal government and take them from the states, but to vest them in Congress rather than the President.<sup>24</sup> Under this strained interpretation, the federal government becomes one of general police powers with the only exceptions to its authority declared in Article I, Section 9 and the Bill of Rights. Crosskey’s work clearly misinterpreted the Constitution, the Articles of Confederation, and the British Constitution, for many of the powers in Article I, Section 8 had never belonged to the executive branch. Furthermore, providing Congress with a general legislative power would have undermined the purpose of a written Constitution.

A review of the case law, however, suggests that the Commerce Clause indeed has evolved into a virtual federal police power, *United States v. Lopez* notwithstanding.<sup>25</sup> Since the Court has experienced great difficulty in finding the outer limits of the Commerce Clause, a more useful inquiry would look to those areas that the framers understood to be wholly within state jurisdiction. This will also help us determine what the framers believed they were protecting when they placed state sovereignty under the aegis of judicial review.

In defending the Constitution, the Federalists were often quite explicit in

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21. *Id.*

22. “If the new Constitution be examined with accuracy and candour, it will be found that the change which it proposes, consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained.” *Id.*

23. *Id.*

24. WILLIAM W. CROSSKEY, 1 *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 409-508 (1953). For a modern adherent, see Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions*, 96 *COLUM. L. REV.* 2213, 2233-36 (1996).

25. *Lopez*, 514 U.S. 549 (1995), for example, did not overrule cases such as *Wickard v. Filburn*, 317 U.S. 111 (1942) (Congress may regulate purely intrastate production of wheat), or *Perez v. United States*, 402 U.S. 146 (1971) (Congress may prohibit arson that occurs only in a single state).

what areas would be off limits to the federal government. In *The Federalist No. 17*, Alexander Hamilton included the “administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature.”<sup>26</sup> Other framers declared in the state ratifying conventions that the federal government could not invade a state’s authority to establish the common law rules governing property, contracts, trusts and estates, and other local matters.<sup>27</sup> The framers never engaged in a thorough enumeration of all of the items under state control, because such a listing would have “involv[ed] a detail too tedious and uninteresting to compensate for the instruction it might afford.”<sup>28</sup> No listing was necessary, because the principle of a national government of limited powers was clear to all. Hamilton even seems to have assumed that the distinction between federal and state power was so obvious that if the federal government, for example, sought to regulate the “law of descent,” it would “be evident that in making such an attempt [the federal government] had exceeded its jurisdiction and infringed upon that of the State.”<sup>29</sup>

The framers did not want to preserve these areas of state autonomy solely for the sake of preserving state autonomy. As will be explored in more detail in the next section, the framers deeply feared that the national government would seek to burst the written restrictions on its powers.<sup>30</sup> Federal officials would do so not to help the rich and powerful, or the weak and needy, but to grab power for the institution of which they were a part. In the framers’ minds, the states were to serve as an important bulwark against this possibility. Allowing states to regulate much of the daily lives of their citizens would make those citizens more loyal to the state governments, and therefore more likely to support their states in opposing an overweening national government.

This relationship between state sovereignty, citizen loyalty, and maintaining checks on the federal government becomes clear when we examine *The Federalist’s* discussion of state law enforcement. Hamilton identified “the ordinary administration of criminal and civil justice” as one of the most important powers to be left in the hands of the states.<sup>31</sup> The justice system was so important, in Hamilton’s mind, not because states would be more efficient than the national government at law enforcement, but because “[t]his of all others is the most powerful, most universal and most attractive source of popular obedience and attachment.”<sup>32</sup> An effective protection of life, liberty, and

26. THE FEDERALIST NO. 17, at 80 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

27. See, e.g., Edmund Pendleton, Speech Before the Virginia Convention (June 5, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 40 (Jonathan Elliot ed., 2d ed., J.B. Lippincott 1836) [hereinafter ELLIOT’S DEBATES]. I have relied upon Justice Thomas’ opinion in *Lopez*, 514 U.S. at 590-91 (Thomas, J., concurring), for sources on this point.

28. THE FEDERALIST NO. 17, at 81 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

29. THE FEDERALIST NO. 33, at 157 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

30. See *infra* notes 36-42, 56-57 and accompanying text.

31. THE FEDERALIST NO. 17, at 81 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

32. *Id.*

property, Hamilton argued, “contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government.”<sup>33</sup> By allowing the states to perform effectively and win the support of their citizens, the Federalist concluded, the Constitution sought to bolster state power so as to check the national government. Wrote Hamilton:

This great cement of society which will diffuse itself almost wholly through the channels of the particular [state] governments, independent of all other causes of influence, would ensure them so decided an empire over their respective citizens, as to render them at all times a complete counterpoise and not unfrequently dangerous rivals to the power of the Union.<sup>34</sup>

In this conception, judicial review becomes necessary to protect the state’s ability to check the federal government. If the federal government is permitted to invade more and more of the jurisdiction of the states, then the states will be unable to maintain the support of their citizens. So weakened, the framers feared, the states would prove to be little obstacle to a national government intent on seizing absolute power. Sovereignty is not maintained for sovereignty’s sake, but instead is necessary to check those driven by power for power’s sake. As we will see shortly, the framers believed that maintaining state sovereignty and checking national power ultimately would lead to greater liberty for the people.

## II. STATE SOVEREIGNTY, JUDICIAL REVIEW, AND RIGHTS

The framers’ view of the role of judicial review and federalism was very much in keeping with their understanding of constitutional law, which, I would suggest, is quite different from the way most constitutional scholars view the subject. Underlying the Political Safeguards approach to judicial review is a concern over individual rights. Only by abstaining from federalism or separation of powers controversies, this theory maintains, can the Court preserve the political capital that allows it to protect individuals from an oppressive majority.<sup>35</sup> This approach is very much in keeping with the manner in which the Constitution is taught and studied, with a division between the structural elements of the Constitution and its rights-bearing provisions.

But as Akhil Amar has suggested, the framers did not understand the Constitution to embody this neat separation between structural issues, on the one hand, and individual rights, on the other.<sup>36</sup> The Bill of Rights and the structural elements of the Constitution should be viewed as a whole, and just as the

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33. *Id.* at 82.

34. *Id.*

35. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-60 (1954).

36. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991).

Constitution itself has certain protections for individuals, such as the Ex Post Facto Clause,<sup>37</sup> the Bill of Rights has much to say about federalism. Indeed, when one examines together the debates about whether to have a Bill of Rights and whether the Court should review federalism questions, it becomes clear that the Federalists and Anti-Federalists were really arguing about the same conceptual issue. Rather than federalism and individual rights, both debates were about controlling the central government. Above all, the framers were concerned not so much about whether individuals would have the unimpeded right of free expression, as they were concerned about restraining a federal government that someday might lose touch with the people and act in its own self-interest. As I have argued elsewhere in regard to the Ninth Amendment, the main purpose of the First Amendment and much of the Bill of Rights, which was added in response to Anti-Federalist demands, was simply to deny the federal government power, rather than to define the rights of the individual.<sup>38</sup>

The framers' unified understanding of federalism and rights becomes clear when the Bill of Rights and its history are briefly examined. A reading of the Bill of Rights reveals that many of its guarantees are not written as individual rights as such, but as restrictions on what the federal government may do with its enumerated powers. Thus, the First Amendment does not speak of the individual's freedom of speech or religion, as did several of the state declarations of rights at the time, but instead says that "Congress shall make no law respecting" those subjects.<sup>39</sup> The Third Amendment forbids the federal government from quartering troops;<sup>40</sup> the Fourth Amendment forbids the issuance of warrants without probable cause;<sup>41</sup> the Eighth Amendment forbids excessive bails and fines, or cruel and unusual punishments.<sup>42</sup> These amendments do not define, in positive law, the rights of the individual. Instead, they are simply a list of actions that the federal government may not take, much like those listed in Article I, Section 9.

Indeed, one need only read to the end of the Bill, when one encounters the Ninth and Tenth Amendments, to fully understand the link between federalism and the Bill of Rights. It is in these two amendments that the relationship between individual rights and federalism are expressly linked. The Ninth Amendment states that "[T]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>43</sup> Thus, the Ninth Amendment is, at a minimum, a rule of construction forbidding the expansion of federal power by negative implication,<sup>44</sup> and, as I have argued,

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37. U.S. CONST. art. I, § 9, cl. 3.

38. John C. Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 996-99 (1993).

39. U.S. CONST. amend. I.

40. U.S. CONST. amend. III.

41. U.S. CONST. amend. IV.

42. U.S. CONST. amend. VIII.

43. U.S. CONST. amend. IX.

44. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1219-23 (1990).

an explicit recognition of other popular rights, such as the right to alter and abolish government, that imposes further restraints on the operation of federal power.<sup>45</sup> The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>46</sup> The federalism aspects of this Amendment, the last of the Bill of Rights, could not be clearer. It declares expressly what the Federalists had argued was already implicit in the structure of the Constitution: The federal government would be one of delegated powers, and as such it could not act beyond those limitations.<sup>47</sup>

Furthermore, the Bill of Rights, to the extent that it protects rights rather than restricts powers, recognizes rights that belong to those in the majority, rather than the minority, to the States, rather than to individuals. Thus, the First Amendment does not give the individual a right to associate, but instead declares that Congress cannot abridge the right of “the people” to assemble or to petition the government.<sup>48</sup> The Bill of Rights’ use of “the people,” rather than the individual, emphasizes that the rights protected are those of the majority—the people’s right to keep and bear arms,<sup>49</sup> for example—against an oppressive central government.<sup>50</sup> It will be recalled that this was precisely the same concern that Federalists sought to address with their arguments concerning the political safeguards of federalism and, ultimately, judicial review. Further, the Constitution recognizes intermediate institutions whose roles are to be preserved: established state churches,<sup>51</sup> state militias,<sup>52</sup> and the jury.<sup>53</sup> All of these entities imposed substantive checks on the powers and reach of the federal government, and both the church and the militia were critical to State authority.<sup>54</sup> In fact, by including these provisions in the Bill of Rights, the framers quite consciously understood them to defend principles of federalism as much as individual rights.

Although there are no records of the state ratifications of the Bill of Rights, the records we have of its drafting indicate that its purpose was to use judicial review to check Congress.<sup>55</sup> In this sense, the Bill of Rights was significant

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45. Yoo, *supra* note 38, at 972-86.

46. U.S. CONST. amend. X.

47. See *U.S. Term Limits v. Thornton*, 514 U.S. 779, 847-50 (1995) (Thomas, J., dissenting) (arguing Article I of the Constitution solves any ambiguity in the Tenth Amendment by providing Congress with “[a]ll legislative Powers herein granted” and enumerating those powers).

48. U.S. CONST. amend. I.

49. See U.S. CONST. amend. II.

50. When state constitutions and declarations of rights used the terms “rights” of “the people,” they referred specifically to popular sovereignty rights needed to control and, if necessary, abolish the government. See Yoo, *supra* note 38, at 974.

51. U.S. CONST. amend. I.

52. U.S. CONST. amend. II.

53. U.S. CONST. amend. VI.

54. See Amar, *supra* note 36, at 1157-75.

55. See *Judicial Review, 1780-1787*, Commentary, in *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 403-05 (Bernard Schwartz ed., 1971) [hereinafter *DOCUMENTARY*].



because it gave individual rights the *same protections* that the Constitution already had given to the states. In initially debating the need for amendments, James Madison argued that “I do conceive that the constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done.”<sup>56</sup> Further, in discussing the enforceability of the Bill of Rights, Madison explicitly declared that both the federal courts and the states would ensure that the federal government would not encroach on the rights of the people:

If [these amendments] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. Besides, this security, there is a great probability that such a declaration in the federal system would be enforced; because the State Legislatures will jealously and closely watch the operations of this Government, and be able to resist with more effect every assumption of power, than any other power on earth can do; and the greatest opponents to a Federal Government admit the State Legislatures to be sure guardians of the people’s liberty.<sup>57</sup>

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

Another way to examine this point is to ask whether the framers believed that the federal courts would be the primary enforcers of individual rights. Certainly, as the dissenters in *Garcia* noted, the Political Safeguards Theory can apply to individual rights as easily as it does to federalism.<sup>58</sup> Because individuals are adequately represented in the federal government—they directly elect members of the House and Senate and indirectly choose the President—does not the Political Safeguards Theory demand that individuals rely upon the political process to safeguard their rights? As Justice Powell put it, “One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the

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HISTORY].

56. James Madison, Speech Before the House of Representatives (June 8, 1789), in DOCUMENTARY HISTORY 1025.

57. *Id.* at 1031-32.

58. *Garcia*, 469 U.S. at 565 n.8 (Powell, J., dissenting).

political process.”<sup>59</sup> During the ratification debates, the framers rarely mentioned that the federal courts would become the guardians of individual liberties. In fact, they discussed judicial review of federalism more often than they did judicial review of individual rights. With the passage of the Bill of Rights, the framers raised individual rights to the same level as federalism in terms of their importance, and, ultimately, their protection by the courts.

One final way to examine the link between state sovereignty and individual rights is to recall the framers’ understanding of the role of the former in protecting the latter. During the Eighteenth Century, the revolutionaries had come to view the state legislatures as the primary guardians of the people’s rights and liberties against the Crown and Parliament.<sup>60</sup> This understanding continued under the Articles of Confederation and the new Constitution. The framers agreed that state legislatures would play two important roles in regard to rights. First, the states would continue to bear the primary responsibility for defining and enforcing individual rights. While the national government’s powers “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce,” Madison wrote in *Federalist No. 45*, “[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people.”<sup>61</sup> This was the creative role that Justice Brennan believed states should adopt in defining individual rights more broadly than the federal government.<sup>62</sup>

In addition to creating individual rights, states also were to serve as the primary defenders of those rights against a national government that sought to exceed the boundaries of its powers. Even if parties within the national legislature failed to restrain Congress, Hamilton wrote in *The Federalist No. 26*:

[T]he state Legislature, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens, against incroachments from the Federal government, will constantly have their attention awake to the conduct of the national rulers and will be ready enough, if any thing improper appears, to sound the alarm to the people and not only to be the VOICE but if necessary the ARM of their discontent.<sup>63</sup>

In addition to blocking unwarranted federal action through their participation in the selection of the national government, state legislatures are to protect the people’s rights by organizing outside opposition to the national government.<sup>64</sup>

59. *Id.*

60. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 164-75 (1967); see also Yoo, *supra* note 9, at 1362-64.

61. THE FEDERALIST NO. 45, at 236 (James Madison) (Garry Wills ed., Bantam 1982).

62. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-504 (1977).

63. THE FEDERALIST NO. 26, at 128-29 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

64. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1492 (1994).

States performed this function not only by acting as something of a trip wire to detect illegal federal action, but also by acting as loci and organizers of resistance. As Hamilton put it, states “can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different states; and unite their common forces for the protection of their common liberty.”<sup>65</sup> Ultimately, this resistance could take a military form, as Madison argued: “the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprizes of ambition, more insurmountable than any which a simple government of any form can admit of.”<sup>66</sup>

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

This Article also shows that the framers’ understanding of state sovereignty and judicial review anticipated some of the concerns raised in recent scholarship concerning the legislative process. Public choice scholars argue that the legislative process should be conceived of as a market in which the product—legislation—is created by the efforts of organized groups to achieve their special interests.<sup>67</sup> Under this theory, congressmen further their interests by seeking to maximize their chances for re-election.<sup>68</sup> Congressmen will provide legislation to those groups that can provide the most campaign donations and political support—in other words, legislation goes to the highest bidder. Such legislation often will not further the public good, because private groups likely will seek laws that generate narrow benefits for their members at the expense of costs that are imposed on the diffuse, unorganized general public. Reaction to this thesis has been two-fold. There are those who argue that this pluralism ought to be accepted, and that courts must enforce statutes in order to give effect to the legislative bargains between interest groups.<sup>69</sup> In other words, groups

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65. THE FEDERALIST NO. 28, at 137 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

66. THE FEDERALIST NO. 46, at 242 (James Madison) (Garry Wills ed., Bantam 1982).

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

68. See FARBER & FRICKEY, *supra* note 67, at 22.

69. See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an*

should get what they pay for. Others believe that interest group theory justifies more active judicial review that prevents private groups from using the legislative process in ways that do not further the public good.<sup>70</sup>

The framers clearly anticipated the possibility that organized factions would seek to use the legislative process to the detriment of the public good. Abuse of the legislative process, after all, is not a phenomenon of the Twentieth Century. James Madison's solution, set out in *Federalist No. 10*, was to create a large republic, in which "clashing interests" would cancel each other out due to the large number of interests and the great expanses of distance and time.<sup>71</sup> Because Madison believed that "the most common and durable source of factions, has been the various and unequal distribution of property,"<sup>72</sup> his answer to the problem of interest group legislation seems limited to laws involving economic interests. In a sense, then, the framers believed that the political safeguards would work, but only when it came to economic legislation.

But what the framers emphasized during their debate over federalism appears to be unnoticed by public choice scholars. The framers would have agreed with modern thinking concerning the potential for a gap between the duty of representation and the incentives created by personal interests; in other words, they realized that the interests of legislators would not necessarily match the interests of their constituents. Under the founding generation's conception, however, legislators' interests would not naturally fall into line with those of powerful factions either. Instead, the greater fear was that the people's representatives would pursue their own *institutional* interests, and that these interests would lead them to expand national power despite the Constitution's written enumerations. The statement of the minority at the Pennsylvania ratifying convention is illustrative:

The permanency of the appointments of senators and representatives, and the controul the congress have over their election, will place them independent of the sentiments and resentment of the people, and the administration having a greater interest in the government than in the community, there will be no consideration to restrain them from oppression and tyranny.<sup>73</sup>

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*Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

70. See, e.g., MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 17-25, 31-40 (1966); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 310 (1988); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 85-86 (1985); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690-92 (1984).

71. THE FEDERALIST NO. 10, at 45-49 (James Madison) (Garry Wills ed., Bantam 1982).

72. *Id.* at 44.

73. *Dissent of the Minority of the Pennsylvania Convention*, reprinted in 1 DEBATE ON THE CONSTITUTION 526, 548 (Bernard Bailyn, ed. 1993) [hereinafter BAILYN]; see also Fair

While an interest group might seek to capture rents by paying congressmen to infringe on federalism and state sovereignty, federal legislators also might seek to expand their power for power's sake, without intentionally benefitting an interest group.

As members of the federal government, legislators would possess the driving interest to expand the power of the federal government, even perhaps if it did not benefit them in terms of political support. The founding generation feared that Congress would seek to grab more power from the states in order to enhance its own institutional power, prestige, and glory. Some public choice theorists would express this as the idea that federal legislators always would seek to expand national powers, because a broader national jurisdiction would allow them to regulate more issues, which would then allow them to attract more political support from more coalitions interested in those issues.<sup>74</sup> Others might argue, however, that under certain conditions the self-interested federal legislator would defer to state regulations, specifically when a group has made an investment in certain state laws, or when customized state law has been tailored to the needs of local interest groups, or when the federal government seeks to avoid politically risky issues.<sup>75</sup> In the framers' eyes, however, the problem extended beyond preventing the legislature from providing special benefits to organized groups. The framers chose to extend judicial review to federalism questions precisely because they did not trust legislators to pursue the interests of their constituents above their own institutional interests. The framers feared that congressmen would seek power solely for their love of power.

Legislators were not the only threat to a limited Constitution; some framers even feared that the states and their people could not be trusted to protect federalism. Congressmen might represent popular interests back home, but those popular interests might not always represent the states' long-term institutional interests. Alexander Hamilton made this point during the ratification debates in New York. During the ratifying convention, Anti-Federalist Melancton Smith proposed an amendment that in part would have allowed the state legislatures to recall their senators.<sup>76</sup> In defending the amendment, Smith argued "that as the senators are the representatives of the state legislatures, it is reasonable and proper that they should be under their controul."<sup>77</sup> Hamilton successfully defeated the amendment by arguing that, while senators did represent the states

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*Representation Is the Great Desideratum in Politics*, "Brutus" IV, reprinted in 1 BAILYN, *supra* 423, 426; *Letters from the "Federal Farmer" to "The Republican,"* reprinted in 1 BAILYN, *supra* 245, 245-59.

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

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

76. *Melancton Smith and Alexander Hamilton Debate Rotation in the Senate*, in 2 BAILYN, *supra* note 73, at 803.

77. *Id.* at 805.

in the federal government, senators were there to defend the *rights* of the state first, and its *interests* second. Said Hamilton:

[T]he [constitutional convention] certainly perceive[d] the distinction between the rights of a state and its interests. The rights of a state are defined by the constitution, and cannot be invaded without a violation of it; but the interests of a state have no connection with the constitution, and may be in a thousand instances constitutionally sacrificed.<sup>78</sup>

As Hamilton explained, it was because short-term thinking might lead a state and its people to ignore the longer-term good of maintaining the boundaries on federal power that, in part, the Constitution gave senators six-year terms. "To prevent this, it is necessary that the senate should be so formed, as in some measure to check the state government, and preclude the communication of the false impressions which they receive from the people."<sup>79</sup> Continuing Hamilton's point, we cannot be sure that either the Senate or the Congress will be full-time guardians of federalism, hence the need for a judicial role in policing the balance between federal and state powers.

A state's popular interests and a state's institutional rights became further detached at the time of the Seventeenth Amendment's ratification, which removed state legislatures from the process of selecting Senators.<sup>80</sup> State legislatures, as opposed to the people of a state, were perhaps the only institutions that had a consistent, long-term interest in protecting state sovereignty. It seems telling that since the passage of the Seventeenth Amendment, state governmental entities, such as legislators, attorney generals, and governors, have had to organize into national interest groups to make their interests known in the political process. Other institutions, such as political parties, that allow states to influence the political process have also grown in strength.<sup>81</sup> The very presence of these groups and outside mechanisms indicate that the Political Safeguards Theory has failed. States should not have to organize into *national* lobbying groups if, as the Political Safeguards Theory holds, they could pursue their interests directly through their elected representatives in Congress. One could catalogue other developments, such as the nationalizing effect of changes in technology, economics, and culture, that also have diminished the respect for local concerns in the halls of Washington.<sup>82</sup>

The widening gap between a state's popular interests and its institutional rights may explain why the federal government has been able to expand its powers so dramatically in the last sixty years. To be sure, the Supreme Court opened the door by granting Congress substantial deference in the exercise of its Commerce Clause powers, but the Court did not force Congress to run through with the speed it has. The Political Safeguards Theory predicts that Congress

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78. *Id.* at 813.

79. *Id.* at 811.

80. U.S. CONST. amend. XVII.

81. See generally Kramer, *supra* note 64.

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

will restrain itself, because the states will prevent their Senators and Representatives from invading the sovereignty of the states. Today's great mass of federal regulation, however, makes more sense when we consider the framers' insight that the momentary interests of a state and the institutional or constitutional interests of a state at times may conflict.<sup>83</sup>

Another way to understand this point is to view the relationship among the states as a competitive one, in which each state seeks to maximize the welfare of its inhabitants. A significant determinant of state welfare today is the great pool of federal funds available through a variety of national programs. Sometimes federal funds will not be available without a corresponding loss of state sovereignty. For example, in order to receive funds a state often must accept federal conditions on how the money is spent, such as with highway construction or welfare programs, or a state must transfer partial decision-making authority to federal regulators.<sup>84</sup> If the fifty states are in competition for these funds, then the states that are most willing to surrender some of their autonomy will be the ones that acquire the most federal money. Therefore, those states that are most willing to surrender some aspects of their sovereignty will be the states that maximize the welfare of their inhabitants. To borrow from a concept in corporate law, there will be a "race to the bottom" in order to attract federal funds.<sup>85</sup> But unlike the race to the bottom theory, this destructive competition arises not from state efforts to attract private commercial activity, whether it be business incorporations or industrial plants, but from state efforts to attract federal largess and support.

Judicial review provides an important check on the temptation to surrender state sovereignty voluntarily. To some extent, judicial review may guard against the threat of legislative instability predicted by Arrow's Theorem<sup>86</sup> or the possibility of unconstitutional actions taken in the states in the heat of emotion.<sup>87</sup> Just as importantly, however, judicial review prevents states that are fully informed from sacrificing their sovereignty for some greater financial gain. Put

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83. See *supra* notes 76-79 and accompanying text.

84. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (statute conditioning receipt of federal highway funds on adoption of minimum drinking age was valid use of Congress' spending power).

85. Whether such a race to the bottom exists in corporate law, or other areas of law, due to the competition among states, is open to debate. See, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Judge Ralph Winter, *State Law, Shareholder Protection and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1971).

86. Arrow's Theorem, named for its creator, Kenneth Arrow, states that "public interest" cannot be possible if it means satisfying a combination of varying preferences of voters. See FARBER & FRICKEY, *supra* note 67, at 38-62.

87. James Madison wrote in *Federalist No. 62* concerning the "propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions" and the problem of "mutability in the public councils." THE FEDERALIST NO. 62, at 315 (James Madison) (Garry Wills ed., Bantam 1982).

in public choice terms, federalism and the maintenance of a federal government of limited, enumerated powers may be a positive externality that no individual state acting individually or collectively fully internalizes. In this sense, the framers viewed federalism as a normative good which ought to be promoted despite any state's momentary interest in trading away its rights.

In this regard, the framers' decision to use judicial review to enforce federalism provides new insights for the ongoing discussion concerning the value of federalism. In recent years, there has been renewed interest in legal scholarship concerning the costs and benefits of federalism. Supporters of a rejuvenated respect for state sovereignty argue that states can bring important advantages to the execution of good public policy. First, federalism is a decentralized decision-making system that is more responsive to local interests and preferences.<sup>88</sup> States can tailor programs to local conditions and needs and can act as innovators in creating new programs.<sup>89</sup> Economists have found that under certain conditions, smaller governments can provide a more efficient allocation of resources that maximizes the well-being of their citizens.<sup>90</sup> State governments compete for households and businesses by enacting efficient policies; in the long-run this competition produces overall efficiency.<sup>91</sup> Indeed, for much of our nation's history, the states did play the primary role in developing economic programs designed to enhance their citizens' welfare.<sup>92</sup> Recent writing has also stressed that a decentralized state system enhances democracy, either by increasing political participation at the state and local level

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88. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-94 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 8 (1988).

89. See McConnell, *supra* note 88, at 1495-1500; Merritt, *supra* note 88, at 8-10. For a useful exposition of the pro-federalism arguments, see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 58-106 (1995).

90. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). I have relied upon the works of my colleague, Daniel Rubinfeld, to guide the way through the economics literature on federalism. See Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203 (1997); Daniel L. Rubinfeld, *The Economics of the Local Public Sector*, in 2 ALAN J. AUERBACH & MARTIN FELDSTEIN, *HANDBOOK OF PUBLIC ECONOMICS* 571 (1987).

91. Of course, for this to be true, a number of conditions must exist: 1) publicly provided goods and services are provided at minimum average cost; 2) a perfectly elastic supply of jurisdictions exists; 3) households and businesses have full information about each jurisdiction's policies; 4) mobility is costless; 5) no interjurisdictional externalities or spillovers exist. See Inman & Rubinfeld, *supra* note 90, at 1241-45.

92. See, e.g., Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 132 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978); Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 L. & SOC'Y REV. 57, 72-118 (1975).



or by reducing the opportunities of powerful interest groups to receive rent-seeking legislation at the national level, thereby increasing the costs of passing such legislation.<sup>93</sup>

As noted earlier, however, the framers believed that the chief role states would play in their relationship with the federal government would be the protection of the people's liberty.<sup>94</sup> Although limiting the power of the federal government might produce inefficiencies, the framers believed that this cost was necessary to guard against potential tyranny by a federal government filled with self-interested, ambitious politicians. In this sense, the framers' discussions indicated their belief that federalism brought advantages by diffusing power. To be sure, creating different power centers and decentralizing decision-making authority can be different things. Indeed, my colleagues Malcolm Feeley and Ed Rubin have argued that many of the benefits observers commonly associate with federalism are those that arise from the decentralization of power, and that states serve only as convenient administrative divisions.<sup>95</sup> No doubt they are correct on this point, but they overlook the crucial benefit that states bring because of their independent sovereignty. As separate political units, states can oppose the exercise of power by the national government, even if the national government and the people believe that centralization of power at that moment is good public policy. By allowing, or even encouraging, the federal and the state governments to check each other, the framers' Constitution seeks to create an area of liberty that cannot be regulated by either government. Dividing political power between the two levels of government appears even more effective in light of the presence of a separation of powers in both governments. As James Madison wrote in *Federalist No. 51*, "In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments."<sup>96</sup> Because of the combined force of federalism and of the separation of powers, "a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself."<sup>97</sup>

As I argued earlier, the framers did envision that individual liberties would receive protection through the competition between federal and state governments to provide rights to their citizens.<sup>98</sup> But this was not the only way, in the framers' minds, that federalism would become the shield of liberty. Freedom also would arise from the inefficiencies that the framers built into the federal system itself. The nation's governments simply would not be able to regulate all the issues of life because, even if they could overcome the internal checks created by their separation of powers, their external powers would come into conflict and cancel each other out. In a sense, this conclusion is somewhat

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93. See Macey, *supra* note 74.

94. See *supra* note 14 and accompanying text.

95. See generally Rubin & Feeley, *supra* note 10.

96. THE FEDERALIST NO. 51, at 264 (James Madison) (Garry Wills ed., Bantam 1982).

97. See *id.*

98. See *supra* Part I.

at odds with the public choice approach to federalism sketched above, because in this conception federalism does not exist purely to advance efficiency. Instead, in some cases federalism can prevent the national government from enacting policies that produce national benefits that outweigh the costs.

The framers believed this deliberate inefficiency to be necessary in order to protect liberty. An absence of judicial review over federalism questions, however, would abort the framers' design. The framers created judicial review in order to prevent any of the branches or levels of government from exceeding the written limitations on their powers. The federal courts would prevent the states from frustrating the legitimate exercise of national power, and, on the flip side of the coin, they would block the national government from infringing upon the independent sovereignty of the states. From this clashing of institutional interests, the framers hoped that liberty would result. Ironically, by creating a theory designed to protect individual rights at the expense of federalism, the advocates of the Political Safeguards Theory of Federalism may have undermined the framers' most effective mechanism for guarding individual freedom.