PUTTING THE POLITICS BACK INTO THE POLITICAL SAFEGUARDS OF FEDERALISM

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Herbert Wechsler, writing in 1954, recognized that aggressive judicial intervention to protect the states from Congress was inconsistent with original understanding and unnecessary. However, Wechsler's explanation of "political safeguards" does not explain the system of politics that has accounted for the continued success of American federalism for more than two centuries of practice. The Founders believed that any attempt by Congress to usurp state power could and would be thwarted by state officials' mounting popular political appeals. Unfortunately, no one anticipated the development of political parties which swiftly replaced republican politics and eroded what the Founders had assumed would be a natural, permanent antagonism between state and national politicians. This new politics preserved the states' voice in national councils, however, by linking political fortunes of state and federal officials. It is this system of politics which has protected federalism and which renders the current Supreme Court's aggressive foray into federalism as unnecessary as it is misguided.

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INTRODUCTION: HERBERT WECHSLER AND THE PROBLEM OF POST-NEW DEAL FEDERALISM

In January 1954, Columbia University commemorated its 200th anniversary with, among other things, a "Conference on Federalism." While doubtless not the most scintillating event of the festivities, the conference was at least topical. The full implications of the battle waged in the 1930s over the role of the national government had not been immediately apparent. The Supreme Court did not reveal—or, rather, did not discover—just how far it was willing to let Congress go until the early 1940s,[1] and the extraordinary national mobilization required to fight World War II had further postponed coming to terms with the new federalism. It was only after the war, in the late 1940s, that commentators were able to begin soberly to examine the transformation that had taken place.

While most of the commentary applauded the Supreme Court's renunciation of its role as Protector of the States and Keeper of the Spirit of '98, justifications seemed surprisingly hard to find.[2] A few commentators mentioned Congress's superior ability to deal with the complexities of modern society,[3] but others embraced the new regime more hesitantly, plainly uneasy with the Supreme Court's withdrawal from the field of battle.[4] Paul Freund refused to read the Court's decisions as abdicating all responsibility for defending state sovereignty and tried to articulate a continuing role for judges.[5] And, in the meantime, criticism of the Supreme Court's stance began to swell. Edward Corwin, a senior statesman of American constitutional law, famously mourned "the passing of dual federalism" in a 1950 article of the same title.[6] Deploring how "the Federal System has shifted base in the direction of a consolidated national power," the troubled Corwin complained that this profound metamorphosis was attributable to nothing more than a "changed attitude of the Court toward certain postulates or axioms of constitutional interpretation."[7] "In the process of remolding the Federal System" to meet modern needs, he wistfully lamented, the concept of federalism had "been overwhelmed and submerged in the objectives sought, so that today the question faces us whether the constituent States of the System can be saved for

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

2. See Noel T. Dowling & Richard A. Edwards, American Constitutional Law 153–54 (1954); Thomas Reed Powell, Vagaries and Varieties in Constitutional Interpretation 83–85 (1956); Robert L. Stern, The Commerce Clause and the National Economy, 1933–1946 (Part Two), 59 Harv. L. Rev. 883, 908–09 (1946).

3. See, e.g., David Fellman, Ten Years of the Supreme Court: 1937–1947, 41 Am. Pol. Sci. Rev. 1142, 1181 (1947).

4. See John T. Ganoe, The Roosevelt Court and the Commerce Clause, 24 Or. L. Rev. 71, 144–47 (1945); Note, Commerce Power Since the Schecter Case, 31 Geo. L.J. 201, 209 (1943).

5. See Paul A. Freund, Umpiring the Federal System, 54 Colum. L. Rev. 561 (1954).

6. Edward S. Corwin, The Passing of Dual Federalism, 36 Va. L. Rev. 1 (1950).

7. Id. at 2, 4.

any useful purpose, and thereby saved as the vital cells that they have been heretofore of democratic sentiment, impulse, and action."[8]

Enter Herbert Wechsler, who used the occasion of Columbia's bicentennial celebration and conference on federalism to address Corwin's question in a short paper entitled "The Political Safeguards of Federalism."[9] Published in volume 54 of this journal, Wechsler's brief, sixteen-page essay attempted to fill the theoretical lacuna with an account of federalism that both justified the Supreme Court's withdrawal and explained why proponents of decentralized government need not fear for the states' political health. It was, and still is, among the most important articles on federalism published in this century. The Supreme Court made Wechsler's theory the basis for its opinion in *Garcia v. San Antonio Metropolitan Transit Authority*,[10] which renounced judicial responsibility for substantively policing even acts of Congress that directly regulate state political institutions. And while *Garcia* has suffered both insult and injury in recent years,[11] its "no substantive review" position is still the rule with respect to most questions of federal power vis-à-vis the states, and Wechsler's article remains this position's chief intellectual prop. Remarkably, after nearly half a century, "The Political Safeguards of Federalism" continues to rank high on the list of most cited law review articles,[12] the best-known expression of the dominant post-New Deal theory of judicial review and federalism.

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8. Id. at 23.

9. Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954).

10. 469 U.S. 528, 550–51 & n.11 (1985). The Court also cited Jesse Choper, Judicial Review and the National Political Process 175–84 (1980), and Bruce LaPierre, The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation, 60 Wash. U. L.Q. 779 (1982).

11. *Garcia* had many defenders, but critics of the decision were unusually harsh. In a short, remarkably blunt dissent that lacked only an actuarial table to indicate how soon the Court could expect to lose its older, liberal members, Justice Rehnquist remarked that it was not necessary "to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court." 469 U.S. at 580. William Van Alstyne said of the Court's opinion that it was difficult to take Justice Blackmun's argument about political safeguards as "other than a good-hearted joke." William Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709, 1724 n.64 (1985). As for injury, the Supreme Court has recently cut back on the perceived scope of *Garcia*'s holding. See, e.g., Printz v. United States, 521 U.S. 898 (1997) (striking down the Brady Handgun Violence Prevention Act on the ground that Congress cannot "commandeer" state executive officials to carry out a federal mandate); New York v. United States, 505 U.S. 144 (1992) (holding that Congress cannot "commandeer" state lawmakers by requiring them to pass legislation dictated by Congress).

12. See Fred R. Shapiro, The Most-Cited Law Review Articles Revisited, 71 Chi.-Kent L. Rev. 751, 770 (1996) (69th most-cited article since 1956).

Today, however, Wechsler's theory is under siege. The current Supreme Court is plainly willing, perhaps eager, to rethink its position,[13] and a growing chorus of academic voices insists that the failure of political safeguards justifies and even demands more aggressive judicial intervention to protect the states.[14] So far, the Court's preliminary gropings in this direction have affected Congress's powers only at the margins, but the time is surely ripe for a reconsideration of Wechsler's analysis, and of the need for judicial review to protect the states from Congress.

Describing Wechsler's argument is easy: The title essentially says it all. Indeed, one suspects that the title may have been *too* good and that, despite the brevity of Wechsler's article, few of those who cite the piece approvingly today have actually read or thought about it very carefully. Many of the arguments are, as Wechsler's critics have long insisted and as is explained in Part I, flawed and unpersuasive. One can quibble about the extent to which this was already true in 1954. But however convincing Wechsler's reasoning may have been in its original context, subsequent experience and later developments have robbed his analysis of much, if not all, of its force.

Still, there is that catchy title—and the nagging sense so many people share that it captures something real, that there *are* "political safe-

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13. The first hint of a change came in the Court's 1992 decision in New York v. United States, 505 U.S. 144 (1992), which signaled the possible reinvigoration of a Tenth Amendment doctrine that most observers had thought dead. *New York* was soon followed by a series of remarkable decisions imposing limits on federal power in areas as divergent as the reach of the commerce clause, see United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act on the ground that it exceeded congressional authority under the Commerce Clause); the means available to enforce the Fourteenth Amendment, see City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as exceeding congressional authority under Section Five of the Fourteenth Amendment); Congress's authority to require state executive officials to enforce federal law, see Printz v. United States, 521 U.S. 898 (1997) (striking down the Brady Handgun Violence Prevention Act on the ground that Congress cannot "commandeer" state executive officials to carry out a federal mandate); and the scope of state sovereign immunity, see Alden v. Maine, 119 S. Ct. 2240 (1999) (holding that Congress cannot compel state courts to entertain federal claims against the state); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress cannot override state sovereign immunity even to advance the enforcement of federal law). Several cases currently pending before the Court may provide vehicles for further extending its new doctrine. See Kimel v. Florida Bd. of Regents, No. 98-791 (constitutionality of the ADEA); Jones v. United States, cert. granted, 120 S.Ct. 494 (1999) (No. 99-5739) (constitutionality of federal arson law); United States v. Morrison, 120 S.Ct. 11 (1999) (No. 99-5) (constitutionality of VAWA); Brzonkala v. Morrison, 120 S.Ct. 11 (1999) (No. 99-29) (same).

14. See Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 Mich. L. Rev. 752 (1995); Lewis B. Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847 (1979); William Marshall, American Political Culture and the Failures of Process Federalism, 22 Harv. J.L. & Pub. Pol. 139 (1998); H. Geoffrey Moulton, The Quixotic Search for a Judicially-Enforceable Federalism, 83 Minn. L. Rev. 849 (1999); Van Alstyne, supra note 11; John Yoo, The Judicial Safeguards of Federalism, 70 S. Cal. L. Rev. 1311 (1997).

guards of federalism" that reduce or eliminate the need for judicial oversight of Congress on behalf of states. Indeed, I will finally conclude in Part III that Wechsler's core insight is still valid: The structure of American politics does offer states considerable protection from federal overreaching, but it does so in ways quite different from those identified by Wechsler. Rather than the formal constitutional structures highlighted in Wechsler's original analysis, federalism in the United States has been safeguarded by a complex system of informal political institutions (of which political parties have historically been the most important)—institutions that were not part of the original design, but have nevertheless served to fulfill its objectives. This system may not be perfect, but its costs are probably less than those likely to follow from aggressive judicial interference in politics. The basic intuition of Wechsler's pathbreaking article thus remains sound, even if the reasons for its vitality are not those offered by Professor Wechsler himself.

In order to make this point, I will first have to refute some popular myths about how federalism was meant to work and how it found its modern shape. In particular, I will argue in Part II that judicial review formed, at most, an inconsequential part of the original understanding of how Congress's powers would be defined and fixed. The Founders' ideas about curbing a powerful central authority came from their experience in the American Revolution, which must itself be viewed against the background of colonial history and eighteenth-century beliefs about republican politics. The Founders believed that any attempt by Congress to usurp state power could and would be thwarted just as similar attempts by the King and Parliament had always been thwarted—by popular political appeals organized under the leadership of state officials. This was republican politics, as understood and experienced in colonial and Revolutionary America. Unfortunately, no one anticipated the development of parties, which emerged in the 1790s from the crucible of learning to manage politics in an extensive republic. Party politics swiftly displaced republican politics and complicated what the Founders had erroneously assumed would be a permanent and natural antagonism between state and national politicians. Within less than a decade, cross-system connections established through the incipient parties rendered the state governments unreliable watchdogs over federal activity. Yet rather than substitute a system of judicial review, this failed original understanding was replaced by the new politics, a politics that preserved the states' voice in national councils by linking the political fortunes of state and federal officials through their mutual dependence on decentralized political parties. It is this system of politics—built originally around parties but since embellished by other institutions (such as lobbies, think tanks, and the national media) that emerged as the nation matured—that accounts for the continued success of American federalism. As Part III urges, the current Supreme Court's aggressive encroachment on this system is as unnecessary as it is misguided.

I. THE POLITICAL SAFEGUARDS OF FEDERALISM ARE DEAD!

Wechsler's thesis was that "the existence of the states as governmental entities and as the sources of the standing law is in itself the prime determinant of our working federalism, coloring the nature and the scope of our national legislative processes from their inception."[15] The states do not need judicial review to protect them from Congress, and the Supreme Court is, in fact, "on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states."[16] Wechsler adduced a number of arguments to support this thesis, arguments that have seldom received a careful reading from the scholars and judges who accept his conclusion.

A. *The American Political Tradition*

The first and most important device safeguarding state interests, according to Wechsler, is a political "tradition" that imposes "a burden of persuasion on those favoring national intervention."[17] The existence of national power may be unquestioned, but still "those who would advocate its exercise must none the less answer the preliminary question why the matter should not be left to the states."[18] This is purely a product of history, Wechsler says, and of the fact of the states' continuous existence, which "set the mood of our federalism from the start."[19] Because of this "mood," federal law remains "a largely interstitial product,"[20] with national action "regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case."[21]

Far be it from me to suggest that Congress no longer hesitates before displacing state law. It unquestionably does. Indeed, by comparison with other developed nations, the most striking fact about government in the United States is how much authority is still exercised at the state and local level. Even apart from the big social welfare programs—administered for the most part by state officials, but under federal guidelines and in ways that make questions of control difficult to sort out—almost all private law (tort, contract, property) is state law, as is most of the law respecting crime, education, voting, domestic relations, commercial transactions, corporations, insurance, health care, trusts and estates, land use, occupational licensing and regulation, and more. The federal government has, to be sure, regulated some aspects of each of these fields. But most governing in America—including almost everything that really matters to people in their daily lives—is still done by state officials.[22]

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15. Wechsler, supra note 9, at 546.
16. Id. at 559.
17. Id. at 545.
18. Id.
19. Id. at 544.
20. Id. at 545.
21. Id. at 544.
22. See Moulton, supra note 14, at 891–92.

Yet while the enduring importance of the states is clear, so too is the fact that one cannot explain it by reference to some self-sustaining tradition or ideology that makes federal law the exception and state law the rule. Traditions and ideologies are not self-sustaining. They can develop momentum, sometimes weighty enough to perpetuate themselves long after the conditions that brought them into being have disappeared. But if there is pressure to change, as has been true from the start with respect to the "exceptional" and "interstitial" nature of federal law,[23] they will eventually die—unless, that is, some structural or cultural mechanism exists to replenish their vitality. If we observe that states remain important elements of American government, even if we choose to describe this state of affairs in terms of a "tradition" of relying first on state government, we must ask: what institutions or political devices have produced this outcome? The existence of the tradition Wechsler described is the fact to be explained, and cannot itself provide a source of solace to those concerned about unchecked federal growth.

B. *Structural Safeguards*

Wechsler plainly understood this concern. "If I have drawn too much significance from the mere fact of the existence of the states," he urged, "the error surely will be rectified by pointing also to their crucial role in the selection and the composition of the national authority."[24] According to Wechsler, the Framers designed the federal government's political departments to give states a say in national politics and to ensure that national lawmakers would be responsive to "local sensitivity to central intervention."[25] "The consequence, . . ." Wechsler concluded, "is that states are the strategic yardsticks for the measurement of interest and

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23. The "mood" Wechsler described came under attack long before the New Deal. The showdown between Hamiltonian Federalists and Jeffersonian Republicans in the 1790s was very much a clash over the exceptional nature of federal regulation. See Lance Banning, The Jeffersonian Persuasion: Evolution of a Party Ideology 246–70 (1978); Drew R. McCoy, The Elusive Republic: Political Economy in Jeffersonian America 166–84 (1980). States' rights advocates won that confrontation, but the Federalists' taste for national regulation and their belief in the primacy of the national government went into hibernation rather than dying. It reemerged, each time wearing a slightly different countenance, in the subsequent confrontations between Quids and Republicans before the War of 1812; between Democrats and Whigs over the Bank, the tariff, and internal improvements; and between Democrats and the second Republican Party over such issues as homestead laws and currency control, not to mention slavery and Reconstruction. With each encounter, the notion that Congress should hesitate even before exercising its acknowledged powers became more and more contestable. The principle that federal power is limited was understood and taken for granted throughout, and arguments about where those limits were located always provoked heated debate. But by the time the Civil War had ended, any presumption in favor of state law for its own sake was already beginning to crumble. Developments in this century have been merely a continuation and an acceleration of this process.

24. Wechsler, supra note 9, at 546.

25. Id. at 547.

opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics."[26]

1. *State Interests Versus State Institutions.* — Note how this last sentence conflates two rather different concerns, only one of which ultimately matters to advocates of federalism: ensuring that national lawmakers are responsive to geographically narrow *interests*, and protecting the governance prerogatives of state and local *institutions*. So far as I am aware, no one defends federalism on the ground that it makes national representatives sensitive to private interests organized along state or local lines. Rather, federalism is meant to preserve the regulatory authority of state and local institutions to legislate policy choices.[27]

This distinction matters enormously. Preferences in Congress are aggregated on a nationwide basis: However sensitive federal legislators may be to state or local interests, if interests in an area represented by a majority of these legislators concur, interests in the rest of the country will be subordinated. The whole point of federalism (or at least the best reason to care about it) is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking.[28] Federalism is a way to capture this advantage, by assuring that federal policymakers leave suitable decisions to be made in the first instance by state politicians in state institutions.

It is, of course, theoretically possible today to accommodate differences in local needs or sensibilities through non-uniform federal legislation or decentralized federal administrative agencies. Partly for this rea-

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26. Id. at 546.

27. Do not misunderstand: My claim is not that proponents of federalism do not care about the fate of state and local interests at the national level. Everyone who supports federalism would agree that Congress should respect the interests of particular groups concentrated in particular states and that it is good if federalism helps to promote this (though everyone would also agree that allowing such groups to dictate or control national policy can be hazardous and unfair). My point is simply that, for the reasons explained below, such considerations are incidental in the debate over federalism, which aims fundamentally to protect state and local interests through decentralized decisionmaking by autonomous state and local authorities rather than directly in Congress.

28. Michael McConnell illustrates the point with a simple example:

> [A]ssume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A.

Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1494 (1987). A variety of additional justifications for decentralized decisionmaking are nicely argued in David L. Shapiro, Federalism: A Dialogue 76–106 (1995). For present purposes, the important point is that all these arguments similarly turn on the preservation of state and local institutional authority.

son, some commentators have urged that federalism is obsolete.[29] But while the argument is not without force, it overlooks important differences between a federal system, in which state and local representatives derive their political authority independently of the central government, and a unitary one, in which the central government delegates authority to subaltern officials. Even if national representatives respond to state and local concerns, they will predictably be less responsive than representatives elected to serve in formally autonomous state or local governments: National representatives will worry about local interests only so far as necessary within a worldview that remains fundamentally nationalistic. It is simply naive to imagine that federal lawmakers will routinely be willing to accommodate the full range of local differences or to permit federal regulators to treat some states completely differently than others.

Moreover, even assuming that this does sometimes prove politically feasible, there is no reason to believe that the constellation of local interests that captures or shapes the views of national representatives will be the same as that which would otherwise prevail in a state or local lawmaking body. The small number of federal representatives from a state cannot possibly be as responsive to as broad a range of interests and concerns as a fully independent state or local legislature. Even if federal lawmakers make room in their enactments for some degree of local autonomy, they are likely to do so in ways that frequently differ from the choices that would be made by a state or local legislature. Federalism must be understood as a means rather than an end: an institutional strategy formulated to assure a greater degree of decentralization than is ever likely to be seen in a unitary system. Hence its advocates' focus on preserving the governance prerogatives of state and local institutions.

2. *The Failure of Structural Safeguards.* — With this distinction between state interests and state institutions in mind, the weakness and/or immateriality of the structural devices Wechsler invokes in support of his thesis becomes clear. Most are mechanisms that (possibly) give state and local interests a greater voice in national politics, but in ways that do not necessarily protect state and local institutions. Wechsler observes, for instance, that representatives in both houses of Congress are allotted by state, which, he says, ensures that the people will be represented as "the people of the states."[30] But while allocating representation on this basis may enhance the power of geographically-defined interests at the federal level, it does so in a way that is likely, if anything, to diminish the institutional role of state government. For if we assume that members of Congress elected on the basis of geography respond to state and local *interests*, does this not, in turn, give them an incentive to reduce or minimize the role of state *government*? Federal politicians will want to earn the support and gratitude of local constituents by providing desired services themselves—

29. See Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 908–09 (1994).

30. Wechsler, supra note 9, at 546 (emphasis omitted).

through the federal government—rather than giving or sharing credit with state officials. State officials are rivals, not allies, a fact the Framers anticipated and among the reasons they originally made Senators directly beholden to state legislators.

Of course, this hardly sounds like an accurate description of the relationship between state and federal lawmakers. I will suggest below that the cooperation and deference we observe between officials at the different levels of government is produced by extra-constitutional institutions that link their political fortunes—institutions that play essentially no part in Wechsler's analysis, like political parties and an interlocking administrative bureaucracy. For now, we need only to note that the states' political authority is *not* protected by the fact that Senators and Representatives are elected in districts that follow state boundaries; standing alone, that is more problem than protection for state institutions.

Wechsler turns next to the Senate, which he argues protects state interests through its provisions for equal representation by states.[31] This allocation enables a majority of states, comprising less than a majority of the population, to block legislative action. Moreover, Wechsler adds, given the dynamic nature of the legislative process, "a latent power of negation has much positive significance in garnering the votes for an enactment that might otherwise have failed."[32] But while this may be so, just why it counts as protecting states is baffling. To the extent that Senators respond to popular pressure from constituents—a product of the Seventeenth Amendment's elimination of the one feature of the Senate that really might have protected states, the power of state legislators to choose Senators[33]—the equal representation of each state distorts democratic decisionmaking. But however objectionable it may be to permit less than a majority of the people to hijack the legislative process, this in

31. See id. at 547–48.

32. Id. at 548.

33. The operative verb here is "might" because, contrary to popular belief, the power of state legislators to select Senators had lost most of its significance for federalism long before adoption of the 17th Amendment in 1913. The Senate was designed from the start to serve contradictory ends: to protect state interests, but also to be a republican analogue to the House of Lords and take the longer, more "national" view of policy. Consistent with this latter purpose, the Framers incorporated several features meant to weaken the control of state legislatures. Specifically, they eliminated the right of states to issue instructions or to recall Senators, and they gave members of Congress's upper house very long six-year terms. See Martin Diamond, As Far as Republican Principles Will Admit 174–75 (1992). Too long, as it turned out, because turnover was high in the state assemblies and the typical state legislator faced reelection annually. The theoretical accountability of Senators to state lawmakers thus turned out to be just that—theoretical. See William H. Riker, The Senate and American Federalism, 49 Am. Pol. Sci. Rev. 452, 455 (1955). Later still, party-inspired nominating conventions and primary elections made the state legislature's decision largely mechanical, particularly after states began to adopt the so-called Oregon system, which made the results of a statewide primary legally binding. See id. at 466. Ratification of the 17th Amendment merely completed and made nationally uniform a process that had been underway for more than a century.

no way means that federal lawmakers will choose not to preempt state law or not to displace the political authority of state institutions.[34]

The same confusion between protecting state interests and protecting state institutions explains why Wechsler's reliance on the Electoral College also will not do as a political safeguard for federalism. The Electoral College was originally proposed in part as an *anti*-state's-rights device by nationalists at the Convention who wanted to keep the selection of a chief magistrate out of the states' hands without, at the same time, making him beholden to Congress.[35] Still, the power of state legislators to pick electors could have given the states considerable leverage over the chief executive had the Electoral College stayed true to its original design.[36] But the emergence of the popular canvass and winner-take-all rule have deprived the College of most of its significance. It still affects presidential campaigns, of course, by forcing candidates to look for votes in enough states to win a majority of the electors. But while this geographical dispersion may have benefits (and costs) when the President sits down to define a national mandate, it does nothing to help state governments fend off preemptive federal legislation.

Wechsler plainly dislikes the Electoral College; he includes a long digression on its flaws that has little to do with the rest of the article.[37] He nevertheless offers the College's tendency to force presidential candidates to worry about constructing a national coalition as evidence that "[f]ederalist considerations . . . play an important part even in the selection of the President."[38] There might be something to this point if by "federalism" we meant the need for national politicians to worry about

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34. Perhaps the unstated assumption underlying Wechsler's assertion that equal representation of states in the Senate is "intrinsically calculated to prevent intrusion from the center," Wechsler, supra note 9, at 548, is that representatives from smaller states are more likely to be closely beholden to state interests. So far as I am aware, however, there is no evidence to suggest that voting patterns in the Senate correlate to state size or otherwise support Wechsler's thesis. If we observe that the authority of state and local officials is being protected, we must look for its source elsewhere than in the equal representation of states in the Senate.

35. See Diamond, supra note 33, at 188–89; Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 259–60 (1996) [hereinafter Rakove, Original Meanings]. Gouverneur Morris's proposal to hold a national popular election was supported by James Wilson and James Madison, but voted down because others thought the nation too large to make this workable and because southern delegates worried that the South would be a permanent minority in such elections. See id. at 259.

36. Note, however, that many of the Constitution's Framers doubted that Presidents would often be chosen by the Electoral College. After George Washington's presidency (for there was no doubt that Washington would be the first President), they expected that normally there would be too many candidates for any one to obtain a majority in the initial balloting. The Electoral College would thus serve more as a screening and nominating institution, with the final choice typically being made in the House of Representatives. See Richard M. Pious, The American Presidency 28–29 (1979); Rakove, Original Meanings, supra note 33, at 90.

37. See Wechsler, supra note 9, at 553–57.

38. Id. at 557.

the whole nation. But insofar as we are concerned with protecting the integrity and authority of state political institutions, it is hard to see that the Electoral College helps or matters much.

The only political safeguards Wechsler identifies that do not suffer from this conflating of state interests and state institutions are those he attaches to the House of Representatives, which he says are "the states' control of voters' qualifications, on the one hand, and of districting, on the other."[39] Inasmuch as these are powers actually exercised by state legislatures, they could theoretically provide a mechanism to protect the states' political authority. In practice, neither power has any impact on federalism.

As Wechsler recognizes, the power to decide who votes for members of Congress can be exercised only indirectly—by limiting the electorate in state elections.[40] Even in theory, then, this power never provided more than the most attenuated control. What little control it may once have afforded—through, say, poll taxes or the exclusion of racial minorities—has been eradicated by five constitutional amendments (Section 2 of the Fourteenth Amendment, as well as the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments), federal voting rights legislation,[41] and the Supreme Court's Equal Protection cases.[42] It is, in fact, impossible to think of anything a state could do to protect itself with this power today that would not be either unlawful or ineffective.

The same thing is true of the states' power to draw congressional districts—a power that exists only at the sufferance of Congress.[43] Even Wechsler conceded that the ability to redraw districts once a decade has scant significance for federalism.[44] Districting is always hotly contested, of course, but these are fights among competing local interests in which representing or protecting the states' political institutions in Washington is never an issue. Writing in 1954, Wechsler observed that apportionment had tended to favor rural interests and that these usually support "a more active localism."[45] If so, this coincidental protection was wiped out by *Baker v. Carr*[46] and *Reynolds v. Sims*.[47] Subsequent federal statutes and

39. Id. at 548.

40. See id. at 549; U.S. Const. art. I, § 2, cl. 1 (voters "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature").

41. See, e.g., Voting Rights Act of 1965, 42 U.S.C. §§ 1971–1974 (1994).

42. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972) (holding durational residency requirements unconstitutional); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (holding property requirements unconstitutional); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (holding poll taxes unconstitutional).

43. See U.S. Const. art. I, § 4, cl. 1 (declaring that states may determine the "Times, Places and Manner of holding Elections for Senators and Representatives," but "the Congress may at any time by Law make or alter such Regulations").

44. See Wechsler, supra note 9, at 551.

45. Id. at 552.

46. 369 U.S. 186 (1962).

47. 377 U.S. 533 (1964).

Supreme Court decisions have mopped up any lingering significance for federalism that this power might once have had.[48]

C. *The Puzzle of Federalism*

If the weakness of Wechsler's safeguards has gone unnoticed by those who share the intuition expressed in his title, the same thing cannot be said of Wechsler's critics. Opponents of political safeguards theory have long insisted that Wechsler was wrong: The Founders, they say, wanted and expected the Supreme Court to protect the states from overreaching by Congress, a role the Justices performed admirably until the late 1930s, when they mistakenly and irresponsibly abandoned this function, thereby permitting the explosion of federal regulation we have witnessed since that time.[49] Wechsler's critics may be about to carry the day, too, as the Supreme Court's opinions in cases like *Printz v. United States*[50] and *United States v. Lopez*[51] suggest that the Justices are poised to adopt the critics' version of the story.

Yet two observations made by Wechsler in the course of his discussion must give one pause before embracing this alternative account. First, we have the incontrovertible fact that the states have been and continue to be powerful and important components of American governance. Wechsler made this point in 1954,[52] but it is no less true today. The federal government is, to be sure, vastly larger now than it was in the eighteenth century, or even in the early years of the twentieth century. But those are hardly apt comparisons. Of course the national government does more today: Changes in technology, economy, and culture have thoroughly transformed the problems society faces and so the kind of governing it demands. It would be silly, worse than silly, to measure the activities of government today by the standards of the eighteenth or nineteenth centuries. State governments do more too, in part because of opportunities and funds made available by the federal government. What states do may attract less notice and media attention than the more sensational activities of the federal government,[53] but, as noted above, states do most of the actual governing in this country, and the important objects of daily life are still chiefly matters of state and local, not federal, cognizance. The central and continuing role of state government is thus a fact that needs to be explained—particularly if, as Wechsler's critics

48. See Voting Rights Act of 1965, 42 U.S.C. §§ 1971–1974 (1994); Shaw v. Reno, 509 U.S. 630 (1993); Thornburg v. Gingles, 478 U.S. 30 (1986); Rogers v. Lodge, 458 U.S. 613 (1982).

49. See authorities cited supra note 14.

50. 521 U.S. 898 (1997).

51. 514 U.S. 549 (1995).

52. See Wechsler, supra note 9, at 545.

53. Contrary to a popular assumption among legal scholars, this has always been true, and was so even in the 1790s. See Donald H. Stewart, The Opposition Press of the Federalist Period 21–22 (1969) ("local news was definitely neglected" and "[n]ational and particularly foreign items were regarded as the publisher's most prized stock-in-trade").

would have it, the states are fated to be swallowed by the federal leviathan absent determined judicial protection.

Wechsler's second observation makes this first one all the more telling: "[E]xcept for the brief interlude that ended with the crisis of the thirties," he remarked, the Supreme Court's only significant role in federalism has been protecting the federal government from the states, by maintaining "national supremacy against nullification or usurpation by the individual states."[54] This claim may sound jarring to lawyers today, who have for decades been fed a story about the Supreme Court's uncompromising stand against federal growth until Justice Roberts spinelessly caved to pressure from the Roosevelt Administration. Yet Wechsler's account is, in fact, the more accurate rendition of events.

The Supreme Court was, as Wechsler suggests, active and aggressive from the start in reviewing *state* laws to determine whether they intruded on *federal* interests—a practice that was, as we shall see below, consistent with the desires and expectations of the Founders.[55] In addition, beginning in the early decades of the nineteenth century, the Court exercised review in a handful of cases involving individual rights, especially property rights.[56] But while the Justices were establishing a role for themselves in these areas, they did nothing to restrict national power vis-à-vis the states during the entire antebellum period. Most instances in which Congress sought to extend its reach, such as Alexander Hamilton's finance schemes or Henry Clay's "American System," were never even challenged in the courts—despite the fact that federalism was *the* critical constitutional issue throughout the period and all this legislation was terribly controversial. In the few cases that did make their way to the Supreme Court during these early years—such as *Hylton v. United States*,[57] *Gibbons v. Ogden*,[58] and *McCulloch v. Maryland*[59]—the Justices consistently yielded to

54. Wechsler, supra note 9, at 559.

55. See infra notes 113–120 and accompanying text. Examples of these early cases include Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (invalidating attempts by the New Hampshire legislature to change and amend the charter of Dartmouth College); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (affirming Supreme Court's jurisdiction over the state courts); Polk's Lessee v. Wendal, 13 U.S. (9 Cranch) 87 (1815) (holding state legislature's rescission of land grants unconstitutional); and Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (same).

56. See Mark A. Graber, Naked Land Transfers and American Constitutional Development: The Consensual Foundation of Judicial Review and Fundamental Rights Jurisprudence (manuscript on file with author), who argues persuasively that the practice of judicial review first emerged and became routinized in a line of obscure cases involving land transfers and property rights.

57. 3 U.S. (3 Dall.) 171 (1796) (upholding a federal tax on carriages against the claim that it was not apportioned among the states as required by Art. I, §§ 2 and 9).

58. 22 U.S. (9 Wheat.) 1 (1824) (striking down New York's grant of an exclusive right to operate steamboats and broadly enumerating Congress's power under the Commerce Clause).

59. 17 U.S. (4 Wheat.) 316 (1819) (denying states the power to tax the Bank of the United States, created by Congress).

Congress by recognizing concurrent or exclusive federal legislative jurisdiction and leaving the question of whether to exercise it to politics.

Some of these federal acts were quite ambitious and dramatic in context, too, much more so than anything at issue in cases like *Printz* or *Lopez*. The creation of a national bank had fearful consequences for the states (or so they believed). Protective tariffs and internal improvements were much bigger and more controversial grabs for power than regulating guns near schools. In *Prigg v. Pennsylvania*,[60] the Court upheld a federal statute regulating fugitive slaves—one of the most fractious issues in American history—even though there was no explicit, or even apparent, grant of authority to Congress whatsoever. Nor were these easy cases at the time, however obvious the results may seem to us today. They presented close, controversial legal questions as to which the Justices easily could have gone either way. Yet in each instance the Court held that Congress could act, and it left the states to protect themselves in the political process.

There is, in fact, only a single instance prior to Reconstruction in which the Supreme Court stepped in to protect state sovereignty by imposing its own view of the proper limits on Congress's power: *Dred Scott v. Sandford*.[61] Often blamed for helping to speed the outbreak of civil war (a dubious claim, at best), *Dred Scott* was an institutional calamity that discredited the Court for at least a generation.

The first signs of change emerged only in the late nineteenth century. Congress became increasingly active in this period in response to the expansion of interstate markets and improvements in communication and transportation. As national lawmakers stepped up the pace of federal legislation, the Justices began for the first time tentatively to experiment with the idea that, in addition to protecting Congress from the states and policing certain individual rights, the Court might also have a role to play in setting limits on Congress's powers under Article I.

It was not as substantial a role as we have been led to believe, though. The Court did oppose some things Congress tried to do, usually in the context of statutory interpretation, but occasionally under the Constitution;[62] and some of the Court's opinions are framed in strong, uncompromising language. But if, instead of looking at what the Court said in a

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60. 41 U.S. (16 Pet.) 539 (1842) (invalidating a Pennsylvania statute punishing the kidnapping and return of slaves on the grounds that there was a federal statute in place and power to regulate fugitive slaves was exclusively federal).

61. 60 U.S. (19 How.) 393, 420, 436 (1857) (holding that Congress lacked power under Constitution to naturalize slaves or regulate slavery in territories acquired after adoption of Constitution).

62. See, e.g., Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (invalidating the first federal income tax); Trade-Mark Cases, 100 U.S. 82 (1879) (striking down federal trademark legislation). For a general discussion of the Court's jurisprudence during these years, see David P. Currie, The Constitution in the Supreme Court: The First Hundred Years 429–39 (1985); David P. Currie, The Constitution in the Supreme Court: The Second Century 14–31, 89–102, 170–81 (1990) [hereinafter Currie, The Second Century].

few opinions, we look at what it actually *did* in relation to the world around it, the Supreme Court's activity in this period is more accurately characterized as indecisive, grudging acceptance of the new order.[63]

Consider a few facts: The New Deal created eight to ten new agencies, doubling the existing number. But doubling the existing number means that there were already quite a few agencies out there. The Interstate Commerce Commission, the Federal Trade Commission, the Commodities Exchange Authority, the Food and Drug Administration, and the Federal Power Commission, for example, were all created before the New Deal.[64] Roosevelt's dramatic program, in fact, offered little that was novel from the perspective of federalism, because the national government had been regulating intrastate activities that affected interstate markets for quite some time.[65] Moreover, the Court had upheld most elements of what became the New Deal prior to 1937. *Crowell v. Benson*[66] and *Humphrey's Executor*,[67] for example, were both decided before things came to a head. And the Court approved a federal grant-in-aid program designed to promote maternal health in the early 1920s, using what amounts to the same theory a later Court would use in *South Dakota v.*

63. In commenting on earlier drafts, a number of colleagues pointed to dicta from some nineteenth- and early twentieth-century Supreme Court opinions, offering these as proof that the Court played a prominent role restraining Congress prior to the New Deal. But, one cannot measure the Court's role in policing Congress (or anything else) just by looking at the rhetoric in its opinions. It is necessary also to examine what the Court did (and did not do), and to ask how that influenced the world outside the courtroom. Sometimes the Court's decisions fall flat; sometimes they wither away; and sometimes, for a myriad of different reasons, they become focal points to which the public or the other branches respond. It is only in these latter cases that we can meaningfully say that the Court has established a constitutional doctrine or practice—something that manifestly was not true of the Supreme Court's sporadic and inconsistent pre-New Deal decisions respecting the limits of Congress's Article I powers. By viewing things from the parochial perspective of judicial opinions read in isolation, legal commentators have failed to appreciate how little the Supreme Court actually did to restrain federal power under the Constitution. Looked at more broadly, the historical record discloses relatively unimpeded federal expansion and, at most, a modest, uncertain judicial role.

64. See Congressional Quarterly Inc., Federal Regulatory Directory 5 (9th ed. 1999); Center for the Study of American Business, Directory of Federal Regulatory Agencies (3d ed. 1982).

65. See Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877–1920, at 289 (1982); Larry Kramer, What's A Constitution For Anyway? Of History and Theory, Bruce Ackerman and the New Deal, 46 Case W. Res. L. Rev. 885, 921–27 (1996); Lawrence Lessig, Translating Federalism: *United States v. Lopez*, 1995 Sup. Ct. Rev. 125, 147–54.

66. 285 U.S. 22 (1932) (upholding Longshoremen's and Harbor Workers' Compensation Act setting federal standard for recovery of workmen's compensation with limited judicial review of agency determinations).

67. 295 U.S. 602 (1935) (limiting executive control over administrative agencies).

Dole:[68] that the state had a choice about whether or not to accept the money.[69]

There were, to be sure, cases decided in this period that took a more restrictive line, famous cases like *E.C. Knight Co.*[70] and *Hammer v. Dagenhart*,[71] as well as less famous ones like the *Trade-Mark Cases*[72] and *Collector v. Day*.[73] But every *E.C. Knight* had a matching *Swift & Co.*[74] holding the opposite, and for every *Hammer v. Dagenhart*, there was a *Lottery Case*[75] holding the opposite. At most, the doctrine was unsettled, with authority potentially available both to support and to oppose further federal innovation and expansion. And the fact remains that, with the single exception of child labor, Congress was not prevented from adopting a single program that it really cared about throughout this entire period.

True, a number of federal statutes were struck down on federalism grounds, but none that had substantial political support and so none that captured the sort of attention necessary to establish the Court's position. By the time the Court struck down Reconstruction laws protecting civil rights, for example, the national parties had already agreed that such laws

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68. 483 U.S. 203 (1987) (upholding regulation of state drinking age through conditioned disbursement of federal highway funds).

69. See Massachusetts v. Mellon, 262 U.S. 447 (1923) (holding state's challenge to exercise of federal spending power non-justiciable because state had option of simply refusing to accept federal grants or participate in federal program).

70. 156 U.S. 1 (1895). While *E.C. Knight* is usually read to hold that Congress cannot regulate manufacturing under the Commerce Clause, Lawrence Lessig points out that the only question before the Court—and the only question actually addressed in the case—was whether Congress had tried to regulate manufacturing in the Sherman Act. Lessig, supra note 65, at 147.

71. 247 U.S. 251 (1918) (invalidating the Child Labor Act because it regulated production and not transportation).

72. 100 U.S. 82 (1879) (finding trademark protection limited to state regulations, except where they involve direct interstate regulation).

73. 78 U.S. (11 Wall.) 113 (1871) (holding it unconstitutional for Congress to impose a tax on salary of state judicial officer).

74. Swift & Co. v. United States, 196 U.S. 375 (1905) (permitting Congress to regulate meat dealers if behavior monopolizes single state, so long as it is also directed at commerce among states); see also Houston, E. & W. Tex. Ry. Co. v. United States (The Shreveport Rate Cases), 234 U.S. 342 (1914) (upholding power to regulate intrastate shipping rates because of its substantial relation to interstate commerce); ICC v. Goodrich Transit Co., 224 U.S. 194, 211 (1912) (upholding power to regulate internal accounting practices); Southern Ry. Co. v. United States, 222 U.S. 20, 26–27 (1911) (upholding power to regulate intrastate railroad cars); Lessig, supra note 65, at 149–51 (noting *Hammer* may be the "most extreme of the Court's cases limiting the commerce power").

75. Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903) (affirming Congress's power to regulate and prohibit activities under Commerce Clause on grounds of morality); see also United States v. Doremus; 249 U.S. 86 (1919) (allowing Congress to use its tax power to regulate sale of narcotics); Hoke v. United States, 227 U.S. 308 (1913) (upholding Mann Act under Congress's "complete power over transportation"); Currie, The Second Century, supra note 62, at 98 ("Any hopes that *Hammer* portended an era of increased protection of state prerogatives, however, were chilled by later decisions."); Lessig, supra note 65, at 151 (noting limiting of "Congress' direct interstate commerce power").

should be ignored and left unenforced.[76] Conversely, whenever the Justices tried to interfere in something that really mattered, like the railroads, Congress responded aggressively (as it did with the Hepburn Act in 1906[77]) and forced the Court to back down. And, in the meantime, the federal government kept growing and growing, maturing into a modern bureaucratic giant with 650,000 employees by 1920—a 600% increase in approximately thirty years; whereas by 1940, after the New Deal, there were only 950,000 employees, a smaller growth in both percentage and real terms.[78]

One can quibble over precisely how to characterize this record. I willingly confess to paying insufficient attention to important details of nineteenth- and early twentieth-century judicial practice, such as the expansion of the federal courts' role as administrators of the law,[79] the rise of judicial review in controlling the states and its earliest appearances in the domain of protecting individual rights,[80] and the development of the theory of dual federalism. While there is not space here to contextualize and fully explain these nuances, none of them ultimately matters for the particular question I am addressing, which is the Supreme Court's role specifically in establishing limits on Congress's powers vis-à-vis the states. As I will argue in Part III, one of the difficulties confounding debate on the subject of judicially-enforced federalism is a misguided predilection to treat judicial review as a unitary category. There are, in reality, many doctrines of review, and the fact that the Supreme Court has been actively involved in one domain does not necessarily justify, much less require, its active involvement in another. Prior to Reconstruction, and in sharp contrast to what it was doing in some other areas,[81] the Supreme Court did

76. See The Civil Rights Cases, 109 U.S. 3 (1883); Eric Foner, Reconstruction 564–601 (1988); William Gillette, Retreat From Reconstruction, 1869–1879, at 300–62 (1979).

77. See Skowronek, supra note 65, at 249–61.

78. Excluding the armed services, the federal government employed 157,442 people in 1891. This number grew to 239,476 by 1901, 388,708 in 1910, and 655,265 by 1920. On the eve of World War II, in 1939, the federal bureaucracy consisted of 953,891 people. See 2 Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, at 1102–03 (1989).

79. See Skowronek, supra note 65, at 27.

80. See Sylvia Snowiss, Judicial Review and the Law of the Constitution 121–94 (1990); Graber, supra note 56.

81. Modern commentary frequently conflates doctrines that were distinct, treating analytical lines that contemporaries saw as independent as if they were not. The Supreme Court in this period may well have held a general philosophy that was laissez-faire and anti-regulatory, and this general philosophy may well have been in the background of both its federalism and its substantive due process decisions. But federalism and due process were, nevertheless, seen and understood to be distinct problems, each with its own history and its own content. In much the same way, the current Supreme Court's decisions in such areas as the Tenth Amendment, the Eleventh Amendment, the Commerce Clause, and Section Five of the Fourteenth Amendment may all be motivated by a general background theory of federalism. These are, however, discrete problems, and the same modern commentators who lump together disparate lines of authority from the early twentieth-century have no difficulty seeing the distinctions. We would, indeed, regard anyone who

nothing to restrict Congress—despite the enactment of a not inconsiderable amount of rather aggressive federal legislation.[82] And while the Justices' unquestionably made efforts to protect the states in the late nineteenth and early twentieth centuries, these efforts were too sporadic and inconsistent either to slow changes in the national government or to establish the Court's position as an important fixture in the constitutional design for limiting Congress's power vis-à-vis the states.[83] The New Deal controversy was so momentous precisely because it was then, after decades of dillydallying, that the Court sought to draw its line in the sand. Yet while the Justices continued to review state laws aggressively after the New Deal, and while the practice of protecting individual rights flourished, the Court's effort to make itself an important guardian of state sovereignty was decisively repudiated.

Whatever one makes of this story (which understandably is open to different interpretations), the important—and I think incontrovertible—point for present purposes is simply that the extent of effective judicial intervention prior to the New Deal was *far* more modest than most of us were taught. Moreover, everyone agrees that the Court has done virtually nothing to restrain Congress during the six decades since that time (until very recently at least). Yet despite these facts, the states have more than held their own in American government—thoroughly dominating the first century and a half and remaining pivotal institutions with their hands in virtually every pie and program today. If Wechsler is wrong, if his political safeguards are ineffectual, how do we account for this?

II. Long Live the Political Safeguards of Federalism!

In order to explain how the states have managed to fare so well, despite intense pressures for greater centralization, and absent effective judicially imposed limits on Congress, we need a more refined story than has been presented by either Wechsler or his critics. It is, as we shall see, a story in which the Founding generation had a widely shared understanding of how Congress would be restrained, an understanding that (a) assigned no meaningful role to courts, (b) rested on republican politics in the simplest sense of the word, and (c) was shown during the first decade of the nation's existence to be utterly unworkable. But what replaced this original understanding was not a system of judicial review. It was, rather, a new and different kind of politics: a politics organized by and around political parties, in which the states found a surprisingly pow-

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failed to recognize these distinctions as doing poor or second-rate legal analysis. It is no less second-rate when applied to older cases: However aggressive the Supreme Court may have been in the domain of substantive due process (a point hotly disputed among modern scholars), we must be careful *not* to assume that the Court was therefore equally aggressive when it came to defining the scope of Congress's Article I powers.

82. See Frank Bourgin, The Great Challenge: The Myth of Laissez-Faire in the Early Republic (1989); supra notes 56–60 and accompanying text.

83. See supra notes 62–78 and accompanying text.

erful voice in national councils. It is this system of politics, as remodeled and refurbished over time, that explains the enduring fact of state power and provides the *real* "political safeguards of federalism."

A. *The Myth of Judicial Review*

Wechsler's antagonists say they are not surprised to learn that his theory offers little actual protection to states. The Founders, they insist, knew better than to rely on such flimsy devices. According to John Yoo, "[t]he political safeguards argument is an ahistorical one,"[84] and "the available historical evidence demonstrates that questions of state and federal power were to receive the fullest—if not the primary—attention of the Supreme Court."[85] Certainly the Founders were aware of the mechanisms Wechsler discusses, Yoo concedes, but they would never have trusted national politics to monitor federalism, because they were certain that national representatives "would pursue their own personal or institutional interests, rather than those of the states, or of the people."[86] Hence, "the Framers believed judicial review would work in conjunction with the political process to maintain the proper balance between federal and state powers."[87]

The simplicity of this construction is appealing at first glance, so much so that even opponents of judicially-enforced federalism seem guiltily to share the belief in its accuracy. After all, no one still seriously doubts that the Framers contemplated at least some form of judicial review. There is, moreover, nothing in the language of the Constitution to distinguish questions of Congress's limits from any other question of constitutional law—no reason on the face of the text to treat questions regarding the reach of federal power differently from questions regarding the reach of state power or separation of powers or the Bill of Rights. And while the Federalists were most worried about states encroaching on federal power, Anti-Federalists forced them to think about the problem of overreaching by Congress as well.[88] All that being so, is it not obvious that judicial review must have been expected to feature prominently in preserving both sides of "Our Federalism"?[89]

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84. Yoo, supra note 14, at 1357.

85. Id. at 1313.

86. Id.

87. Id.

88. See The Federalist Nos. 17, 31 (Alexander Hamilton), No. 45 (James Madison) (Jacob Cooke ed. 1961); Rakove, Original Meanings, supra note 33, at 181–88; infra notes 145–146 and accompanying text.

89. I have quoted from Professor Yoo's article because his is the most elaborate presentation of the argument that the original understanding of the Constitution reserved an important place for judicially-enforced federalism. He is hardly the only scholar to draw this conclusion, however. On the contrary, his view can fairly be characterized as conventional wisdom, shared by virtually all judges, lawyers, and legal scholars (though not by historians). See, e.g., Moulton, supra note 14, at 897–98 ("[W]hile the framers undoubtedly believed that state interests would find a voice in the national political

In a word, no. In fact, this understanding of the original design rests on an anachronistic misreading of the Founding, which turns out to have been a lot more complicated than most lawyers and judges like to believe. In particular, while some of the Founders and Framers did indeed have a notion of judicial review, their conception of the power was nested in eighteenth-century political concerns that made it qualitatively different from ours, and immensely more limited. Given their understanding of judicial review, no one in the Founding generation would have imagined that courts could or should play a prominent role in defining the limits of federal power. And no one did.

Bear in mind, experience with written constitutions and separation of powers was limited in 1789, particularly in the context of a republican system. Prior to the American Revolution, the understanding of a constitution as positive law enforceable by courts against the legislature was, in fact, entirely unknown.[90] Englishmen viewed their constitution as simply the arrangement of existing laws and practices that, literally, constituted the government.[91] This unwritten "constitution" was not binding in the sense of circumscribing legislative power. On the contrary, as Blackstone explained, the "absolute despotic power" of sovereignty resided in Parliament, which could alter or modify the nation's constitution at will.[92]

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process . . . they also viewed judicial review as an important tool for protecting the states from the nation."). I made the same mistaken assumption in earlier work. Larry Kramer, Understanding Federalism, 47 Vand. L. Rev. 1485, 1495–96, n.18 (1994) [hereinafter Kramer, Understanding Federalism].

90. See Bernard Bailyn, The Ideological Origins of the American Revolution 67–68 (enlarged ed. 1992). Americans were familiar with Sir Edward Coke's famous effort to discipline Parliament in *Dr. Bonham's Case*, 8 Coke's Reports 114 (1610), in which Lord Coke asserted that "in many cases the common law will controul acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void." Id. Insofar as Coke's dictum reflected an effort to establish judicial review, however, it was recognized as a spectacular failure rather than an affirmative precedent. See J.M. Sosin, The Aristocracy of the Long Robe (1989). By the time of the American Revolution, *Dr. Bonham's Case* had already been interpreted rather tamely to stand for the principle that a statute should be read consistently with the common law whenever possible. Id. at 56; Robert Lowry Clinton, *Marbury v. Madison* and Judicial Review 38–40 (1989).

91. In Bolingbroke's well-known formulation: "By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions, and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed." Henry St. John, Lord Viscount Bolingbroke, Letter X, in 2 The Works of Lord Bolingbroke 88 (1841); see Gerald Stourzh, Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century, *in* Conceptual Change and the Constitution (Terence Ball & J.G.A. Pocock eds., 1988).

92. See 1 William Blackstone, Commentaries *156. In his famous tenth rule of statutory construction—drawn from (among other sources) *Dr. Bonham's Case*—Blackstone recognized that judges could refuse to enforce laws that were self-contradictory or internally inconsistent, and also that they might interpret laws narrowly to avoid a clash with established principles. See id. at *91. Although later commentators have occasionally

Before the Revolution, most colonists believed that they shared the English understanding of a constitution, though their acceptance turned out to rest on the fact that Parliament had largely left them to their own devices. What political conflicts the colonies faced prior to 1765 were with King and Privy Council and called for comfortably familiar efforts to check executive power in the context of a monarchy. Partly for this reason, and partly because the colonial assemblies won most of these struggles, the colonists had no reason to question their acquiescence in the emerging eighteenth-century English notion of legislative supremacy.[93] The Stamp Act of 1765 caused such a shock in America precisely because Parliament's sudden effort to tax the colonies was perceived as an abrupt change in practice that, for the first time brought home to the colonists the reality of what English constitutional theory had become and could mean.[94]

In the decade of disturbances that followed and that led to America's formal break with England, Americans began to develop a new constitutional theory: one suited to a republican system, and one in which a written charter could establish fundamental law that restrained the government, including even its democratic parts. But "fundamental law" as it was used by Americans at this time was not "law" in the sense that we think of law today. As Sylvia Snowiss has explained, during this period

> [i]t was universally recognized . . . that it is impossible to enforce restraints on sovereign power in the routine way ordinary law is enforced. As sovereign power is by definition the strongest force in the community, it cannot be made to accede to limits it will not voluntarily accept. Fundamental law, consequently, was to be enforced by electoral or other political action. If these were insufficient, revolution or the threat of revolution was the only recourse. . . . Fundamental law contemplated unresolved controversy over contending legitimate interpretations and unlike ordinary law did not need authoritative resolution of this controversy in order to maintain its efficacy. . . . Controversy among contending legitimate interpretations was, moreover, self-evidently one of policy rightly reserved for political and popular, not judicial, resolution.[95]

This conception of fundamental law is alien to modern judges and scholars, who assume that the Founders shared our understanding of a

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misread this clear statement principle as asserting a power of judicial review, no one at the time understood it that way. See Clinton, supra note 90, at 18–20.

93. See Jack P. Greene, Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607–1788, 7–76 (1986).

94. See Edmund S. Morgan & Helen M. Morgan, The Stamp Act Crisis: Prologue to Revolution 62–63 (1953); 2 John Phillip Reid, Constitutional History of the American Revolution: The Authority to Tax 14–16, 208 (1987).

95. Snowiss, supra note 80, at 5–6; see Gordon S. Wood, The Origin of Judicial Review Revisited, or How the Marshall Court Made More Out of Less, 56 Wash. & Lee L. Rev. 787, 796–99 (1999).

constitution, which Snowiss aptly describes as "supreme ordinary law."[96] That is, today we think of the Constitution as "supreme" in the sense of its being superior to other sources of law, but otherwise "ordinary" in the sense of its being a form of positive law subject to interpretation as well as enforcement by courts.[97] In 1789, however, this modern understanding of a constitution still lay decades in the future, the end result of a transition that was just getting underway. The Founding generation held a view of constitutional law as supreme but not ordinary: a kind of law qualitatively different from other forms of positive law because its function of restraining the government complicated its political dimensions.

For our purposes, the important point is to see how this pre-modern conception of fundamental law implied a role for judges radically different from that of judges today. On the one hand, the Founders understood that the Constitution would require interpretation and explication: They understood, in other words, that a written charter would contain ambiguities and uncertainties and that these would need to be authoritatively resolved. But Americans at the Founding also believed that such questions could, and should, be settled by popular and political means, even though this might entail periods during which some questions of constitutional meaning could remain unsettled and subject to ongoing controversy. Permitting judges to resolve legitimate disagreements about the meaning of the Constitution would have violated core principles of republicanism, which held that such questions could only be settled by the sovereign people. Disputes over what the Constitution meant, in the Founders' view, had to be resolved by popular action—whether at the polls; through a process of petitioning, mobbing, and holding extralegal conventions; or by revolutionary violence.[98]

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96. Snowiss, supra note 80, at 8.

97. See id. at 10–12.

98. See Wood, supra note 95, at 795–96. A familiar example from a somewhat later date illustrates this idea (as well as its persistence after the Founding). When Alexander Hamilton first proposed a Bank of the United States in 1791, James Madison passionately disputed its constitutionality. But while nothing appears to have changed his views about the issue as an abstract matter, Madison's respect for popular constitutional decisionmaking led him to reverse his public position when he was President. Drew McCoy explains:

> [T]his belief [in the unconstitutionality of a national bank] had been superseded, in effect overruled, by the force of events. Madison understood that the Bank had been scrutinized by Congress in the early 1790s before it was established, with its constitutionality openly debated; that it had operated for the subsequent twenty years with annual recognition of its existence by Congress; that it had even been extended into new states; and above all that it had received during its operation "the entire acquiescence of all the local authorities." As president, therefore, he acknowledged what had indisputably been, by any meaningful standard, "early, deliberate, and continued practice under the Constitution." When he vetoed a bill to recharter a national bank in 1815, he did so explicitly on expedient, not constitutional, grounds . . . . And a year later he happily signed into law what he thought was a better bill, which created the Second Bank of the United States.

Where the Constitution was clear, on the other hand, or where questions of uncertainty had been authoritatively settled in the political process, a small but growing minority reasoned that the very same principles dictated that courts *could* enforce the Constitution, indeed, that the judges had a duty to do so—even if this meant refusing to enforce a legislative act.[99] Because the Constitution was "supreme" law, once its meaning was settled by the people, any legislative act contrary to clearly established principles was void *ab initio*. It followed that a court called upon to enforce such an act must decline to do so, giving effect instead to the superior dictates of the sovereign people in their constitution.

Lest a power of judicial review thus limited seem unimportant, bear in mind how necessary it still was for revolutionaries and reformers in the 1780s to repudiate the Blackstonian notion of legislative supremacy. Claiming the same powers and privileges as Parliament, a number of state legislatures had acted as if they could remake their constitutions at will and so had passed laws in direct contravention of explicit constitutional guarantees.[100] The illogic of such claims seems so obvious to us today that it may be difficult to believe this was ever a serious concern. But it was otherwise in the 1780s. Establishing that legislative supremacy would not be acceptable in the new republics of America—establishing, in other words, the sovereignty of the people over their agents—was a major development of critical importance in the Founding era, and judicial review was one of the grounds on which it was contested.[101]

Be that as it may, the resulting doctrine of review—still embraced only among a small minority that was starting to rethink the role of judges—was far narrower than the one we accept and routinely employ today, requiring courts to abstain from interpreting the Constitution and to enforce legislation unless there could be no doubt about the unconstitutionality of what the legislature had decreed. That this was the prevailing understanding is clear from the handful of cases involving constitutional challenges to legislation that were brought in state courts prior to the Constitution's adoption.[102] Reflecting the novelty of such challenges,

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> During his retirement the Bank suddenly became enmeshed once again in constitutional controversy, and Madison had to remind his countrymen—some of whom chided him for his apparent inconsistency—that precedents [meaning settled practices] must always overrule personal opinion, even that of a president. To declare a national bank unconstitutional in the 1830s, he said, was a "defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention."

Drew R. McCoy, The Last of the Fathers: James Madison and the Republican Legacy 81 (1989).

99. See Wood, supra note 95, at 798–99.

100. See Snowiss, supra note 80, at 34–38.

101. See id.

102. The concept of judicial review developed first in state courts. Because states began adopting written constitutions in 1776, immediately after the colonies renounced their formal ties to England, experimentation in crafting and implementing a republican constitution began at the state level. See Willi Paul Adams, The First American

there are fewer than ten reported cases in which an issue even arose as to whether a court could ignore or invalidate a statute on constitutional grounds.[103] Although judges apparently refused to enforce state laws in two or three of these cases, the ones in which this happened all involved questions of judicial procedure—specifically, the right to trial by jury—and, in each case, the state legislature had undeniably ignored a well-established state constitutional guarantee. Tellingly, in the few cases in which loose judicial expressions insinuated that a court might be attempting to claim a broader power, the judges were subjected to a humiliating dressing down by indignant state legislators and forced publicly to profess their incompetence.[104]

These cases, and the reaction to them, suggest that even a limited power of judicial review remained controversial in the 1780s. At the time, the most that could be said—or, rather, the most that would have been

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Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 63–98 (Rita Kimber & Robert Kimber trans., 1980). The first national constitution was not adopted until 1781, and this original charter—the flawed Articles of Confederation—failed to provide for a federal judiciary (or much else, for that matter). See Merrill Jensen, The Articles of Confederation (1940); Jack N. Rakove, The Beginnings of National Politics 133–239 (1979).

103. These cases are surveyed in William Michael Treanor, Judicial Review in State Courts Before *Marbury* 4–38 (Oct. 23, 1999) (unpublished manuscript) (on file with the *Columbia Law Review*); Clinton, supra note 90, at 48–55; and Sosin, supra note 90, at 203–26. Different scholars count the cases differently; the literature includes estimates as high as nine cases and as low as four.

104. Consider, for example, the case of *Trevett v. Weeden*, which was described in a pamphlet written by James M. Varnum, "The Case, Trevett Against Weeden: On Information and Complaint, for Refusing Paper Bills In Payment for Butcher's Meat, in Market, at Par with Specie" (John Carter, Providence, R.I.), 1787. Representing the defendants, Varnum argued to the court that Rhode Island's law requiring merchants to accept paper money at face value was unconstitutional, because it could be enforced in civil trials without a jury in violation of the Rhode Island charter as well as Magna Charta, acts of the General Assembly, and the Declaration of Independence; the court avoided the issue and dismissed for lack of jurisdiction instead. See id. at 15–18, 38. Although the judges had neither declared the law unconstitutional nor even stated forthrightly that they had the power to do so, the governor convened a special meeting of the legislature, which summoned the court to explain its action. At first, the judges refused to answer, boldly declaring that "they were accountable only to God, and their own consciences." Id. at 38. After further prodding, they explained to the assembly how they had not declared the law unconstitutional because the finding of no jurisdiction made such questions moot. The assembly nevertheless recorded its dissatisfaction and entertained a motion to dismiss the entire bench. At that point, the judges submitted a written memorial "totally disavow[ing] any the least power or authority, or the appearance thereof, to contravene or controul" the laws adopted in the legislature. Id. at 45. This appeased the assembly just long enough for the judges to keep their seats until the next election, at which point all but one were turned out of office. See Sosin, supra note 90, at 217–18. In New Hampshire, where newspapers reported that some judges were refusing to enforce a law depriving small creditors of trial by jury, the legislature similarly entertained motions to impeach and voted 44 to 14 that the law was constitutional before deciding nevertheless to repeal it. See 2 William Winslow Crosskey, Politics and the Constitution in the History of the United States 969–70 (1953); Sosin, supra note 90, at 211–12.

said—was that courts might exercise review where the legislature unambiguously violated an established principle of fundamental law.[105] Nor was a greater power than this actually sought or defended in the meager contemporary literature discussing judicial review, such as James Iredell's editorial "To the Public" or his subsequent exchange of letters with Richard Spaight.[106] The role of judicial review at this point was to aid in making clear that the English doctrine of legislative supremacy had been rejected in America: The legislature could not rewrite or revise the constitution at its pleasure. But while judges could give effect to clearly established constitutional principles by refusing to recognize or enforce contrary legislation, where the law was not plainly settled judges had no authority to define the scope or nature of any constitutional limits. That would have been to usurp a function that properly belonged to the people alone.

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105. In an interesting article-in-progress, William Michael Treanor argues that, while this narrow conception of judicial review accurately describes most of the cases, state courts had already started to espouse a more modern approach to judicial review when it came to laws regulating the courts' own practice or procedure. See Treanor, supra note 103, at 3. There is some support for Treanor's claim in that, during these years, the few cases where state laws were not enforced on constitutional grounds all involved judicial procedures. See supra text following note 103. Treanor's primary evidence, however, is that judges in these cases relied on extratextual sources and drew constitutional conclusions that were not compelled by the text. In my view, this confuses *textualism* as an approach to constitutional interpretation with the "clearly unconstitutional" rule that actually prevailed. Today, we automatically, indeed, intuitively associate textualism with the idea of judicial restraint. But Americans of the Founding generation had a broader conception of "constitution" than we do, one that gave primacy to a text but did not depend on and was not limited to one. As John Reid has demonstrated at length, the American Revolution was justified and fought on constitutional grounds—on a claim that Parliament had violated the imperial constitution—even though there was no text at all. See John Phillip Reid, Constitutional History of the American Revolution (four volumes 1986–1993). This richer understanding of customary constitutional law did not vanish with the adoption of the first texts, but continued to influence and inform constitutional decisionmaking well into the nineteenth century. See, e.g., Graber, supra note 56 (discussing cases in which statutes are struck down on general principles). It is thus not surprising to find courts in the 1780s holding a law "clearly unconstitutional" for reasons outside the written document, especially when dealing with something like the all-important common-law right to trial by jury.

Having said that, I do not want to pretend that my interpretation of the evidence is the only fair one available. This understanding of the cases may be more consonant with the overall sense of the time, but—as James Wilson's comments at the Philadelphia Convention indicate, see infra notes 118–123 and accompanying text—Treanor's interpretation was also available. In this sense, we do well to remember not only that the idea of judicial review was unformed and in transition, but also that the whole debate over this power was confined to a subset of the elite. The vast majority of Americans did not yet imagine (and would probably have been appalled to learn) that courts were thought to have *any* power to overturn legislative enactments in a republican system.

106. James Iredell, To the Public, *in* 2 Griffith J. McRee, Life and Correspondence of James Iredell 145, 145–49 (Peter Smith ed., N.Y. Lithographing Corp. 1949) (1857); Letter from Richard Spaight to James Iredell (Aug. 12, 1787), *in* 2 Id. at 168, 169; Letter from James Iredell to Richard Spaight (Aug. 26, 1787), *in* 2 Id. at 172. These and other texts from the period are insightfully analyzed in Snowiss, supra note 80, at 34–38, 45–89.

This view of judicial review obviously bears on how the Founding generation expected limits on federal power to be enforced. For while a handful of Federalists halfheartedly avowed that Article I's enumeration of federal powers was clear and unmistakable,[107] many more acknowledged that the limits of Congress's powers were not obvious and would need to be settled by practice and experience. James Madison confessed to Jefferson "the impossibility of dividing powers of legislation, in such a manner, as to be free from different constructions by different interests, or even from ambiguity in the judgment of the impartial."[108] James Wilson made the same admission in a widely publicized speech to the Pennsylvania Ratifying Convention:

> [A]s the mathematics, only, are capable of demonstration, it ought not to be thought extraordinary that the Convention could not develop a subject involved in such endless perplexity. If however, the proposed Constitution should be adopted, I trust that in the theory [that what is general is subject to federal control and what is local should be left to the states] there will be found such harmony, and in the practice such mutual confi-

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107. In Massachusetts, Rufus King and Nathaniel Gorham replied to Elbridge Gerry's charge that the powers of Congress were vague and indefinite by explaining that:

> Most of the sentences are transcribed from the present confederation, and we can only observe that it was the intention and honest desire of the Convention to use those expressions that were most easy to be understood and le[a]st equivocal in their meaning; and we flatter ourselves they have not been intirely disappointed—we believe that the powers are closely defined, the expressions as free from ambiguity as the convention could form them, and we could never have assented to the Report had We supposed the Danger Mr. G. predicts.

B. Rufus King and Nathaniel Gorham, Response to Elbridge Gerry's Objections, reprinted in 13 The Documentary History of the Ratification of the Constitution 552 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter Documentary History]. See also Anti-Cincinnatus, Hampshire Gazette (Dec. 19, 1787), reprinted in 5 id. at 489 (the Constitution "intentionally with precision defines and limits [the powers of Congress]; thus firmly and stably fixeth the boundaries of their authority"); Letter from Edmund Pendleton to James Madison (Oct. 8, 1787), *in* 10 id. at 1773 ("The line between the Foederal & State Powers, the most difficult part of the work, appears to me most happily drawn, and I much applaud that Spirit of Amity and concession which produced, and which I hope may continue to perfect it."); A Citizen of Philadelphia, The Weaknesses of Brutus Exposed (Nov. 8, 1787), *in* 14 id. at 66 ("These powers of controul by the federal head or authority, are *defined* in the new constitution, as minutely as may be, in their principle; and any detail of them which may become necessary, is committed to the wisdom of Congress.").

108. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 13 Documentary History, supra note 107, at 446. See also Madison's apology for this imprecision in The Federalist No. 37, where—after noting the difficulty in drawing lines among human faculties; within the kingdom of nature; among the creations of man; and between different bodies of law, departments of government, or jurisdictions of courts—Madison observed: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." The Federalist No. 37 (James Madison), supra note 88, at 236.

> dence between the national and individual governments, that every sentiment of jealousy and apprehension will be effectually destroyed.[109]

Even the handful of men who may have thought about judicial review, in other words, would not have expected courts to have much to say about the scope of Congress's powers under Article I, and their declarations that judges would pronounce void any law found "incompatible with the superior power of the Constitution"[110] must be read against the background of this limited understanding of review.

What is far more striking, in any event, though not surprising given the embryonic state of the law respecting judicial review, is how few such declarations were made. That judicial review received scarcely any attention at the Federal Convention is old news—and not very important news either, since it is the Ratifiers' understanding that matters most.[111] Still, the fact is at least worth noticing, particularly for what it suggests about the general sense of the time. The Convention included practically all the new nation's most sophisticated thinkers. In terms of wealth, education, and political experience, the men who gathered in Philadelphia were, in the words of one historian, "an elite of the American elite."[112] If this body was uninterested in the role courts might play enforcing the Constitution against Congress, the likelihood that others were out ahead on the topic is remote.

The subject of judicial review did come up in Philadelphia, but in connection with the problem of controlling the states, not Congress. Preventing "[e]ncroachments of the States on the general authority"[113] was of paramount concern to constitutional reformers in the 1780s. "Examples of this are numerous," Madison recorded in his famous *Vices* memorandum, "and repetitions may be foreseen in almost every case

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109. Speech by James Wilson (Nov. 24, 1787) (Alexander J. Dallas version), *in* 2 Documentary History, supra note 107, at 344; see also Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 14 Documentary History, supra note 107, at 195 ("On this point we may expect men will differ: the general convention acknowledged the difficulty of drawing with precision the line between those rights which must be surrendered, & those which may be reserved.").

110. Remarks of James Wilson at the Pennsylvania Convention (Dec. 1, 1787), *in* 2 Documentary History, supra note 107, at 451.

111. To treat the intent of the Framers as authoritative is like relying on the understanding of the speech writer who wrote the President's State of the Union Address or the lobbyist who was solicited by a member of Congress to formulate proposed legislation. See Larry Kramer, Fidelity Through History—And Through It, 65 Fordham L. Rev. 1627, 1642–51 (1997); Charles A. Lofgren, The Original Understanding of Original Intent?, 5 Const. Commentary 77 (1988); Yoo, supra note 14, at 1374. While not binding in any formal or legal sense, the Convention debates nevertheless are often informative because many of the concerns that occupied the nation at large were discussed in Philadelphia.

112. Clinton Rossiter, 1787: The Grand Convention 144 (1966).

113. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 13 Documentary History, supra note 107, at 445.

where any favorite object of a State shall present a temptation."[114] Madison wanted to handle the problem by giving Congress a negative over state laws "in all cases whatsoever"[115]—a nervy solution that the other Virginia delegates were willing to incorporate into their initial proposal to the Convention only in the watered-down form of a veto over "all laws passed by the several states, contravening in the opinion of the National Legislature the articles of Union."[116]

Even this, as it turned out, was too much for the Convention's small state delegates, who countered in the New Jersey Plan with a proposal to make the laws and treaties of the United States "the supreme law of the respective States" and to provide that "the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding."[117] Here, as Jack Rakove has convincingly argued, lie the seeds of judicial review as an element of the Federal Constitution.[118] For the Convention eventually compromised by spurning New Jersey's weak scheme in favor of the nationalist Virginia Plan, but without Madison's negative, which was replaced by a strengthened Supremacy Clause that could be enforced by national courts.[119]

The inclusion of the Supremacy Clause indicates that the Framers believed courts could play a role enforcing the Constitution against the states. This does not mean that the Framers' theory of judicial review was broader than the one described above, merely that they thought the power might be called more frequently into play against state legislatures. As previously noted, the states had a bad history of ignoring both the Articles of Confederation and their own state constitutions, a tendency

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114. Vices of the Political System of the United States (April, 1787), *in* 9 The Papers of James Madison 345, 348 (Robert A. Rutland et al. eds., 1975) [hereinafter Papers of Madison]. To illustrate his concern, Madison listed "the wars and Treaties of Georgia with the Indians—The unlicensed compacts between Virginia and Maryland, and between Pena. & N. Jersey—the troops raised and to be kept up by Massts." Id. at 348–49.

115. See Letter from James Madison to Thomas Jefferson (March 19, 1787), *in* 9 Papers of Madison, supra note 114, at 318. For the leading study of the development of Madison's proposed negative, see Charles F. Hobson, The Negative on State Laws: James Madison, the Constitution and the Crisis of Republican Government, 36 Wm. & Mary Q. 215 (3d ser. 1979).

116. The Virginia Plan Randolph Resolutions (May 29, 1787), reprinted in 3 The Records of the Federal Convention of 1787, 593, 593. (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand].

117. Remarks of William Patterson at the Federal Convention (June 15, 1787), *in* 1 Farrand, supra note 114, at 245.

118. See Jack N. Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 Stan. L. Rev. 1031, 1046–48 (1997) [hereinafter Rakove, Judicial Review].

119. See id. The New Jersey Plan's version of the Supremacy Clause was unacceptable in two respects: It failed to mention the national Constitution as a source of law superior to state law, and it omitted state constitutions from the final clause resolving conflicts of law in favor of the national authority. See id. at 1047 n.69.

many of the Framers had come to regard as endemic to state politics.[120] The exercise of judicial review was made easier in this context, moreover, by the fact that it would be a national court enforcing the national Constitution against the legislature of a single state.

Be that as it may, the possibility of judicial review as a device to protect the states from Congress received no similar attention. During almost four months of deliberation, a judicial check on Congress was, in fact, mentioned only once, and then but briefly and indirectly, in connection with the Convention's decision to reject a proposed "Council of Revision." This Council, which would have joined federal judges with the executive to review and possibly veto federal legislation, was quickly voted down during the early debates in the face of objections from a slew of delegates that it "involved an improper mixture of powers."[121] On July 21, as the Convention was swiftly completing its formulation of general principles, James Wilson moved to reconsider this decision. Conceding that the proposition "had been before made, and failed," Wilson explained that he was nevertheless "so confirmed by reflection in the opinion of its utility, that he thought it incumbent on him to make another effort."[122] A Council of Revision was needed, according to Wilson, because

> [t]he Judiciary ought to have an opportunity of remonstrating agst projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet

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120. By the time of the Convention, Madison viewed this as a problem of size, which he believed destined small republics to political instability (an argument he submitted to the public in the tenth essay of *The Federalist*). See also Larry D. Kramer, Madison's Audience, 112 Harv. L. Rev. 611, 623–36 (1999) [hereinafter Kramer, Madison's Audience]. Though few, if any, of the other Framers had penetrated the problem this deeply, on a more prosaic level they shared his disenchantment with the populism of state government. See id. at 674–75; Gordon S. Wood, Interests and Disinterestedness in the Making of the Constitution, *in* Beyond Confederation 69, 76 (Richard Beeman et al. eds. 1987).

121. Remarks of John Dickinson at the Federal Convention (June 6, 1787), *in* 1 Farrand, supra note 114, at 140; see Remarks of Elbridge Gerry at the Federal Convention (June 4, 1787), *in* 1 Farrand, supra note 114, at 98; Remarks of Rufus King at the Federal Convention (June 4, 1787), *in* 1 Farrand, supra note 114, at 98; Remarks of Charles Pinckney at the Federal Convention (June 6, 1787), *in* 1 Farrand, supra note 114,at 139. Interestingly, during the course of this discussion, Elbridge Gerry observed, with what Gordon Wood has fittingly described as "a sense of awe and wonder," see Wood, supra note 95, at 796, that "[i]n some states the Judges had actually set aside laws as being agst. the Constitution. This was done too with general approbation." Remarks of Elbridge Gerry at the Federal Convention (June 4, 1787), *in* 1 Farrand, supra note 114, at 97. But Gerry made nothing of the point at the time, and neither did anyone else.

122. Remarks of James Wilson at the Federal Convention (July 21, 1787), *in* 2 Farrand, supra note 114, at 73.

> not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.[123]

The proposed Council was again defeated, this time after a somewhat fuller exchange in which a variety of arguments were offered for and against the idea.[124] During the course of the discussion, two other delegates came back to Wilson's point about judicial review. Luther Martin reiterated the objection that, because "the Constitutionality of laws . . . will come before the Judges in their proper official character," putting them on a Council of Revision would give them "a double negative."[125] George Mason then repeated Wilson's rejoinder that, in their official character:

> [The judges] could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course.[126]

Even the most determined advocate of judicial review must concede the considerable ambiguity in this debate. Wilson's speech seems to assume that judicial review would reach only laws that encroach on judicial functions, a plausibly narrow understanding given the handful of state cases in which a law had actually been struck down.[127] Read in context, Martin's and Mason's comments are consistent with Wilson's, though viewed in isolation their exchange could also be interpreted more broadly; Mason's cryptic reference to the fact that judges could impede the operation of a law "in one case only," in the meantime, is impossibly enigmatic. Note, too, that many delegates who supported the Council of Revision apparently did so because they believed that no other check would exist once a law had been enacted and that the executive would be insufficiently strong to stand up to Congress without the judiciary's aid.[128]

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123. Id.

124. See id. at 73–80 (discussing objections to proposed revisionary power). For a catalogue of objections to the Council, see Rakove, Judicial Review, supra note 118, at 1058.

125. Remarks of Luther Martin at the Federal Convention (July 21, 1787), *in* 2 Farrand, supra note 114, at 76.

126. Remarks of George Mason at the Federal Convention (July 21, 1787), *in* 2 Farrand, supra note 114, at 78.

127. See supra notes 102–104 and accompanying text. But see Rakove, Judicial Review, supra note 118, at 1058 (arguing that this reading of Wilson is too narrow because courts would have been seen as too unthreatening for anyone to worry that they would be targeted by Congress).

128. See Remarks of Gouverneur Morris at the Federal Convention (July 21, 1787), *in* 2 Farrand, supra note 114, at 75–76.

With a record consisting only of these isolated references after an entire summer of discussion, it seems indisputable that judicial review was a trivial aspect of the Framers' thinking. A few delegates had begun to ponder the courts' role in enforcing the Constitution, but their ideas were still hazy and undeveloped, and a much larger number of their associates were not thinking about the issue at all. This was particularly true when it came to judicial review of congressional legislation—a finding that is hardly surprising and easily explained. As suggested above, under the narrow theory of review just beginning to emerge in 1787, courts would not have been expected to have much to say about the appropriate scope of Congress's powers under Article I. Moreover, given experience under the Articles of Confederation, an overreaching Congress was the least of the Framers' worries. They were desperately hoping to create a national government strong enough to resist the states' relentless encroachments and capable of acting on its own. The fear that Congress might pose a serious threat *to* the states would have seemed remote—particularly once various structural compromises were made in the Constitution to protect states. After that, as Rakove notes, the Framers had "little reason to worry that Congress would enact or the president approve constitutionally improper statutes that the federal judiciary would feel compelled to overturn."[129]

In any event, thoughts expressed by the Framers behind closed doors in Philadelphia matter less than the public debate that took place during Ratification. But the evidence from this quarter is even harder to square with the idea that the Constitution assigned courts responsibility for defining the limits of federal power. To begin with, only a single exchange on judicial review can be described as anything other than cursory, that between Brutus and Publius in the New York press. The Anti-Federalist Brutus sparked the dispute by publishing three essays in the *New York Journal* in which he declared that "[p]erhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial."[130] Blending the prophetic with the fallacious, Brutus charged that, by conferring jurisdiction on the Supreme Court to decide cases in law "and equity," the Framers had authorized the Justices to expound the Constitution "not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and

129. Rakove, Original Meanings, supra note 33, at 175.

130. Brutus XV, New York Journal (March 20, 1788), reprinted in 16 Documentary History, supra note 107, at 434; see also Brutus XI, New York Journal (January 31, 1788), reprinted in 15 Documentary History, supra note 107, at 512–17 (discussing nature and extent of American judicial power); Brutus XII, New York Journal (Feb. 7 & 14, 1788), reprinted in 16 Documentary History, supra note 107, at 72–75, 120–22 (discussing the extent of judicial power). Brutus's discussion of judicial review is part of a larger critique of the federal judiciary that encompassed his final five essays.

intention of it."[131] Add to that the Court's independent status and the finality of its judgments, which meant that "[t]he power of this court is in many cases superior to that of the legislature," together with the bias a national body must be expected to hold in favor of the federal government, and one could reliably predict that the Supreme Court would "extend the limits of the general government gradually, and by insensible degrees."[132]

Alexander Hamilton answered for Publius in the now-famous *The Federalist No. 78*.[133] Hamilton's essay is usually presented as staking out an aggressively nationalist position on judicial review, an understandable misreading given Hamilton's general beliefs and the tenor of his other contributions as Publius. In fact, Hamilton was attempting to refute Brutus, by rejecting Brutus's suggestion that the Constitution conferred so sweeping a power on judges and defending the more limited power that had begun to find acceptance in a few corners during the 1780s.

There is no need to recount the details of Hamilton's familiar argument, which is routinely tendered to show the "original understanding" of judicial review—as if Hamilton were presenting a standard Federalist view, widely shared among supporters of the Constitution. In truth, hardly anybody saw either Hamilton's or Brutus's essays at the time. Brutus was well-regarded enough among a small circle of the most intellectual participants in Ratification, but he was not widely circulated or read. Of Brutus's three essays on judicial review, two were not reprinted anywhere—not even in New York—while the third was reprinted only twice.[134] Publius's audience was hardly larger, the canonical status of *The*

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131. Brutus XV, New York Journal (March 20, 1788), reprinted in 16 Documentary History, supra note 107, at 433 (discussing supremacy of judiciary); Brutus XI, New York Journal (Jan. 31, 1788), reprinted in 15 Documentary History, supra note 107, at 515.

132. Brutus XV, New York Journal (March 20, 1788), reprinted in 16 Documentary History, supra note 107, at 433–34. The Federal Farmer made a similar observation about the threat posed to states by the authority to decide cases "in equity," though he did not tie his point to the power of judicial review. See Letters from the Federal Farmer to the Republican (May 2, 1788), reprinted in 17 Documentary History, supra note 107, at 341 (questioning the definition of "equity").

133. See The Federalist No. 78 (Alexander Hamilton), supra note 88, at 521. In obvious reference to Brutus, Hamilton introduced the subject of judicial review by observing:

> Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

Id. at 524. Hamilton then proceeded to lay out the emerging understanding of judicial review that had been developed in the years following the American Revolution. See Snowiss, supra note 80, at 77–83; supra notes 90–106 and accompanying text.

134. Brutus XI and XII were not reprinted; Brutus XV was reprinted in the Boston *American Herald* (after Massachusetts had ratified) and in the Providence *United States*

Federalist most definitely being a post-Ratification phenomenon.[135] This is particularly true of *The Federalist No. 78*, which was not included in the original newspaper series and first saw the light of day only upon publica-

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Chronicle. See 15 Documentary History, supra note 107, at 517 n.1; 16 Documentary History, supra note 107, at 75 n.1, and 435 n.1. Reprintings were a critical measure of influence in the campaign to secure the Constitution's adoption. Eighteenth-century printers ran a crude news service among themselves, exchanging copy and reprinting items freely, often without attribution. Reprinting thus became a crucial mechanism for disseminating ideas, and it serves as a useful proxy for contemporary pertinence and importance. See Preface, *in* 13 Documentary History, supra note 107, at xviii; William H. Riker, The Strategy of Rhetoric: Campaigning for the American Constitution 26–28 (1996). In this light, compare Brutus's poor record of reprintings with that of such influential items as James Wilson's October 24 Courthouse Speech (38 reprintings), Elbridge Gerry's objections to the Constitution (43 reprintings), George Mason's objections to the Constitution (30 reprintings), and James Wilson's November 24 Speech at the Pennsylvania Ratifying Convention (40 reprintings). See 13 Documentary History, supra note 107, at 593, 595; 14 Documentary History, supra note 107, act 532; Saul A. Cornell, The Other Founders: Anti-Federalism and the Dissenting Tradition in America 25–26 (1999).

135. Only 24 numbers of *The Federalist* were reprinted at all outside New York City, and these in but a few places each. See Editorial Note to Publius, The Federalist No. 1, *in* 13 Documentary History, supra note 107, at 486, 490; Elaine F. Crane, Publius in the Provinces: Where Was The Federalist Reprinted Outside New York City?, 21 Wm. & Mary Q. 589, 590 (3d Ser. 1964). John and Archibald M'Lean published volume one of *The Federalist*, which included an unsigned introduction by Hamilton together with the first 36 newspaper essays, on March 22, 1788. Although this could have been early enough to play a role in Virginia and New Hampshire, as well as in New York, only 500 copies were printed; a second volume, containing the remaining essays, was not published until May 28, by which time eight states had ratified and the New Hampshire and Virginia Conventions were about to begin. Allowing the necessary time for copies to make their way into these states, one cannot but credit the judgment of Alexander Contee Hanson (himself the author of a well-received pamphlet under the pseudonym "Aristides") that "the Federalist was not completed until almost every state in the Union had decided on the Constitution; and therefore, be its excellence what it may, it could have had little weight." Aristides, Remarks on the Proposed Plan of a Federal Government (Jan. 31–Mar. 27), reprinted in 15 Documentary History, supra note 107, at 521. Many of Publius's contemporaries as well as some later commentators have shared this assessment. See 13 Documentary History, supra note 107, at 494 (quoting Archibald Maclaine of North Carolina saying that Publius was not "well calculated for the common people" and French chargé d'affaires Otto saying that *The Federalist* "is not at all useful to educated men and it is too scholarly and too long for the ignorant"); Albert Furtwangler, The Authority of Publius 19–23 (1984); Letter from Rufus King to Jeremiah Wadsworth (Dec. 23, 1787), *in* 15 Documentary History, supra note 107, at 71 (noting that "'the Landholder' will do more service our way, than the elaborate works of Publius"); Dennis J. Mahoney, A Newer Science of Politics: The Federalist and American Political Science in the Progressive Era, *in* Saving the Revolution: The Federalist Papers and the American Founding 250, 251 (Charles R. Kesler ed., 1987) [hereinafter Saving the Revolution]; James G. Wilson, The Most Sacred Text: The Supreme Court's Use of The Federalist Papers, 1985 B.Y.U. L. Rev. 65, 108. In fairness to Publius's many fans, *The Federalist* assumed its position in the front rank of sources to consult in interpreting the Constitution soon after Ratification. See Jack N. Rakove, Early Uses of The Federalist, *in* Saving the Revolution, supra, at 234, 235. But that had much to do with the role of its authors in the new government, which raises a different question from its reliability as a guide to understanding the views of those who ratified the Constitution.

tion of the second volume of *The Federalist* at the end of May, 1788—too late to influence any ratifying convention except (possibly) that of New York.[136]

No one else discussed the nature, importance, or role of judicial review in anywhere near the same depth as Brutus and Hamilton. Indeed, only a handful of other Federalists mentioned the power at all.[137] In some instances, the references were too fleeting or obscure to attract attention. Fabius sought to quell fears of federal overreaching by showing that the Framers took "the strongest cautions against excesses":

> In the *senate* the *sovereignties* of the several states will be *equally* represented; in *the house of representatives*, the *people* of the whole union will be *equally represented*; and in the *president*, and the federal independent *judges*, so much concerned in the execution of the laws, and in the determination of their constitutionality, the *sovereignties* of the several states and *the people* of the whole union, will be *conjointly* represented.[138]

In other instances, the argument offered was somewhat more pointed and substantive, though in no case was it developed at length or presented as anything other than one among numerous safeguards. The most elaborate presentation of this sort was made by James Wilson in one of his less celebrated speeches at the Pennsylvania Ratifying Convention. Responding to Anti-Federalist charges of consolidation, Wilson cited the protections afforded to states by separation of powers, bicameralism, the structure of the Senate, and the power of election. In the midst of this rebuttal, he added:

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136. See supra note 135. Publius's final eight essays (nos. 78–85) were written for this second volume to deal with issues that had been overlooked or slighted in the newspaper series.

137. The power of judicial review also received glancing references from a few Anti-Federalists in addition to Brutus. See Luther Martin, Genuine Information X, reprinted in 16 Documentary History, supra note 107, at 8 (suggesting that whether laws passed by Congress are contrary to the Constitution "rests *only* with the judges, who are *appointed* by Congress" and so cannot be trusted to protect state interests); Patrick Henry, Speech at the Virginia Ratifying Convention, *in* 10 Documentary History, supra note 107, at 1219 (questioning whether federal judges would have the same "fortitude" to oppose unconstitutional laws as had been demonstrated by judges in Virginia); George Mason, Speech at the Virginia Ratifying Convention, *in* 10 Documentary History, supra note 107, at 1361 (arguing that the new Congress would be unable to pay off debts incurred under the old government because this would require Congress to devalue outstanding notes, something the Supreme Court would not allow under the ex post facto clause).

138. Fabius IV, Pennsylvania Mercury (Apr. 19, 1788), reprinted in 17 Documentary History, supra note 107, at 182. See also Aristides, Remarks on the Proposed Plan of a Federal Government, (Jan. 31–Mar. 27, 1788), reprinted in 15 Documentary History, supra note 107, at 531 (arguing that those who fear Congress "may reflect however, that every judge in the union, whether of federal or state appointment, (and some persons would say every jury) will have a right to reject any act, handed to him as a law, which he may conceive repugnant to the constitution"); George Nicholas, Speech at the Virginia Ratifying Convention, *in* 10 Documentary History, supra note 107, at 1327 ("If they exceed these powers, the Judiciary will declare it void.").

> I say, under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. This I hope, sir, to explain clearly and satisfactorily. I had occasion, on a former day, to state that the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void.[139]

A few other speakers made the same claim, albeit less emphatically than Wilson. Rapidly ticking off responses to the many objections raised against the Constitution by Patrick Henry at the Virginia Ratifying Convention, John Marshall came to what he characterized as Henry's claim that "the Government of the United States [has] power to make laws on every subject." Not so, retorted Marshall, for federal lawmakers cannot go beyond their delegated powers. "If they were to make a law not warranted by any of the powers enumerated," Marshall explained, "it would be considered by the Judges as an infringement of the Constitution which they are to guard:—They would not consider such a law as coming under their jurisdiction.—They would declare it void."[140] Statements to the

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139. James Wilson, Speech at the Pennsylvania Convention (Dec. 1, 1787), *in* 2 Documentary History, supra note 107, at 450–51. See also James Wilson, Speech at the Pennsylvania Convention (Dec. 7, 1787), *in* 2 Documentary History, supra note 107, at 517 (Wilson repeating that "[i]f a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void.") Wilson's speech actually provoked a response from the opposition—the only such instance in any of the recorded debates—and an unnamed speaker apparently suggested that any judge who dared to do such a thing would be impeached. "The judges are to be impeached because they decide an act null and void that was made in defiance of the Constitution!" cried an indignant Wilson, "What House of Representatives would dare to impeach, or Senate to commit judges for the performance of their duty?" James Wilson, Speech at the Pennsylvania Convention (Dec. 4, 1787), *in* 2 Documentary History, supra note 107, at 492. The exchange received a brief mention in the *Pennsylvania Herald*, again the only apparent example of newspaper coverage of an exchange on judicial review. James Wilson, Speech at Pennsylvania Convention (Dec. 7, 1787), *in* 2 Documentary History, supra note 102, at 524–25.

140. John Marshall, Speech at the Virginia Convention (Jun. 20, 1788), *in* 10 Documentary History, supra note 107, at 1431. Marshall referred back to the point a moment later in explaining why the provision conferring jurisdiction on federal courts in cases arising under the Constitution reflected no disrespect to state courts. It is the purpose of courts, Marshall said, to resolve controversies in a way that avoids bloodshed. "To what quarter will you look for protection from an infringement of the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." Id. at 1432.

same effect were made by John Stevens, writing as "Americanus," and by Oliver Ellsworth in the Connecticut Ratifying Convention.[141]

These quotes should sound familiar: They are the same ones regularly trotted out to show how the new plan of government anticipated judicial review, particularly on questions of federalism. It bears repeating that these statements must be read in context, and that, so read, they mean something quite different—and less momentous—than we have been led to believe. But that is less interesting than the really extraordinary fact that this paltry collection of quotations literally exhausts the discussion of judicial review.

Few issues in American history have engrossed public attention like the debate about whether to adopt the Constitution. For more than nine months, from the middle of September 1787 until at least the following July, the public was "wholly employed in considering and animadverting upon the form of Government proposed by the late convention"[142] and "attentive to little else."[143] Roger Alden joked to brother-in-law Samuel William Johnson that

> the report of the Convention affords a fruitful subject for wits, politicians and Law-makers—the presses, which conceived by the incubation of the Convention are delivered from the pangs of travail, & have become prolific indeed—the offspring is so numerous, that the public ear has become deaf to the cries of the distressed, and grow impatient for the christening of the first born.[144]

At the very heart of this debate, moreover, was the question of "consolidation": whether the Constitution was calculated to annihilate state sovereignty and "ultimately to make the states one consolidated government."[145] This was "the main substantive issue" for both sides in the ratification campaign, a point raised and argued at every turn and in every

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141. See John Stevens, Jr., Americanus VII, New York Daily Advertiser (Jan. 21, 1788), reprinted in 2 The Debate on the Constitution 60 (Bernard Bailyn ed. 1993) [hereinafter Debate on the Constitution] ("the Constitution itself is a *supreme law of the land*, unrepealable by any *subsequent law*: every law that is not made in conformity to *that*, is in itself nugatory, and the Judges, who by their oath, are bound to support the Constitution as the *supreme law of the land* must determine accordingly"); Oliver Ellsworth, Speech at the Connecticut Convention (Jan. 7, 1788), *in* 3 Documentary History, supra note 107, at 553 ("If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, that national judges, who are to secure their impartiality made independent, will declare it to be void.").

142. Letter from George Washington to Sir Edward Newenham (Dec. 25, 1787), *in* 15 Documentary History, supra note 107, at 91.

143. Letter from James Madison to Thomas Jefferson (Feb. 16, 1788), *in* 16 Documentary History, supra note 107, at 143.

144. Letter from Roger Alden to Samuel William Johnson (Dec. 31, 1787), *in* 15 Documentary History, supra note 107, at 188–89.

145. Federal Farmer, Letters to the Republican (Letter I), reprinted in 14 Documentary History, supra note 107, at 24; see Rakove, Judicial Review, supra note 118, at 1049–50.

forum.[146] And because virtually every Anti-Federalist offered the threat to state sovereignty as one of the best reasons to reject the Constitution (the absence of a Bill of Rights being the other), practically every Federalist was forced to refute this claim by showing how the states were safe. Yet in all the flood of pamphlets and essays and editorials that poured from the presses—enough to fill many volumes—and in all the voluminous records of debate in the state ratifying conventions, there is only this smattering of references to courts and judicial review. This is completely understandable given the immature state of the law respecting judicial review and its limited role at the time of the Founding, but it utterly discredits any notion that federal courts were an important element of the design to protect state sovereignty.

B. *Republican Politics*

So how *did* the Founders expect Congress to be restrained? If not by courts exercising judicial review, how *did* they think limits on federal power would be preserved? As one might expect from a debate of this length and magnitude, involving as it did the whole nation, a variety of replies were forthcoming. A surprising number of Federalists simply denied that states were threatened. "You have eyes," A Freeman urged the people of Connecticut:

> use them for yourselves—employ your own good sense—read and examine the Constitution—trust not to others to do it for you—narrowly inspect every part of it. Then, you will be convinced that the objection is wholly groundless, having no existence but in imagination. Believe for once that many who pretend to be so tender for your rights, and are so deeply concerned for your liberties, and on all occasions boast of their love and veneration for liberty, only mean to dupe you.[147]

North Carolina lawyer-planter Archibald Maclaine, writing as Publicola, made the charge of Anti-Federalist duplicity even more explicitly:

> I find some people are so strangely infatuated, as to think that Congress can, and therefore will, usurp powers not given them by the states, and do any thing, however oppressive and tyrannical. I know no good grounds for such a supposition, but this, that the legislative and judicial powers of the state have too often stepped over the bounds prescribed for them by the constitution; and yet, strange to tell, few of those, whose arguments I am now considering, think such measures censurable—The conclusion to be drawn here is obvious—The objectors hope to enjoy the same latitude of doing evil with impunity, and they are

146. Riker, supra note 134, at 32.

147. A Freeman, To the People of Connecticut, Connecticut Courant (Dec. 31, 1787), reprinted in 3 Documentary History, supra note 107, at 519.

fearful of being restricted, if an efficient government takes place.[148]

Of course, most of the Constitution's friends felt obliged to offer reasons why state sovereignty was not imperiled by the new system.[149] A few agreed with the Reverend Samuel Stillman that "the general government cannot swallow up the local governments" because it undertook in Article IV to protect them by guaranteeing the states a republican form of government.[150] A few more agreed with Alexander Hamilton, speaking as Publius in *The Federalist No. 17*, that because "regulation of the mere domestic police of a State" would "hold out slender allurements to ambition," the federal government would have no desire "to absorb in itself those residuary authorities, which it might be judged proper to leave with the States for local purposes."[151] A variant of this argument, urged by

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148. Publicola, An Address to the Freemen of North Carolina, State Gazette of North Carolina (Mar. 20, 1788), reprinted in 16 Documentary History, supra note 107, at 440. See also A.B., Hampshire Gazette (Jan. 2, 1788), reprinted in 5 Documentary History, supra note 107, at 599 ("Can Brutus himself, with all his good sense, believe these groundless assertions? does he think any man, not utterly void of reason, can believe them?"); A Citizen of Philadelphia, Remarks on the Address of Sixteen Members (Oct. 18, 1787), reprinted in 13 Documentary History, supra note 107, at 301 ("I take it that this objection [that the Constitution will annihilate state sovereignty] is thrown out (merely *invidiae causa*) without the least ground for it."); Letter from George Nicholas (Feb. 16, 1788), *in* 8 Documentary History, supra note 107, at 369 ("We have already shewn you that Congress will have no powers but what are expressly given to them . . . all powers which are now vested in the state legislature will after the adoption of this government still belong to them.").

149. A few blunt Federalists agreed that state sovereignty would disappear and celebrated the point. Remarker urged that "[t]he idea of seperate [sic] independent sovereignties hath been the canker worm of this union," Remarker, Independent Chronicle (Jan. 17, 1788), reprinted in 5 Documentary History, supra note 107, at 739; while Benjamin Rush observed that "[t]his plurality of sovereignty is in politics what plurality of gods is in religion—it is the idolatry, the heathenism of government." Remarks of Benjamin Rush at the Pennsylvania Convention (Dec. 3, 1787), *in* 2 Documentary History, supra note 107, at 457. Comments of this ilk were rare, however.

150. Samuel Stillman, Speech at the Massachusetts Ratifying Convention, *in* 2 Jonathon Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 168 (1888); see Jasper Yeates, Speech at the Pennsylvania Ratifying Convention (Nov. 30, 1787), *in* 2 Documentary History, supra note 107, at 437; A Jerseyman, To the Citizens of New Jersey, Trenton Mercury (Nov. 6, 1787), reprinted in 3 Documentary History, supra note 107, at 149 ("As to the danger of our state governments being annihilated, the fourth section of the fourth Article declares that 'the United States shall guarantee to every state in the Union a republican form of government."); Cassius VI, Mass. Gazette, (Dec. 25, 1787), reprinted in 5 Documentary History, supra note 107, at 512 ("Does not the abovementioned section provide for the establishment of a free government in all the states?"); A Native of Virginia, Observations upon the Proposed Plan of Federal Government (Apr. 2, 1787), reprinted in 9 Documentary History, supra note 107, at 692.

151. The Federalist No. 17 (Alexander Hamilton), supra note 88, at 105; see Oliver Ellsworth, Speech at the Connecticut Ratifying Convention (Jan. 9, 1788), *in* 3 Documentary History, supra note 107, at 548 (Congress "will not take away that which is necessary for the states. They are the head and will take care that the members do not perish."); Samuel Huntington, Speech at the Connecticut Ratifying Convention (Jan. 9,

some of the Constitution's supporters, held that Congress would not usurp state power because national lawmakers would be concerned only with regulating general matters of benefit to all.[152]

Quite a few Federalists made Wechsler's argument that state sovereignty was protected by the states' role in the composition and selection of the national government. Wechsler had asserted an originalist pedigree, but he cited only an 1830 letter from James Madison to Edward Everett (written for the public and meant to deflate the pretensions of the South Carolina nullifiers).[153] The point was nevertheless a common motif in the original debates, with many of the Constitution's backers pointing to the same structural features as Wechsler and insisting that state government was safe because "the general government depends on the state legislatures for its very existence."[154] In contrast to his perfunctory treatment of judicial review, James Wilson developed this argument at some length in the Pennsylvania Ratifying Convention.[155] The inference that state governments are threatened was, Wilson noted dryly, "rather unnatural," inasmuch as no government would endanger that "upon the very existence of which its own existence depends."[156] Pointing to the House of Representatives, Wilson argued that the Framers had taken care to ensure that "even the popular branch of the general government cannot exist unless the governments of the states continue in existence" by leaving control over "the important subject of giving suf-

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1788), *in* 3 Documentary History, supra note 107, at 556 ("While I have attended in Congress, I have observed that the members were quite as strenuous advocates for the rights of their respective states as for those of the Union. I doubt not but that this will continue to be the case, and hence I infer that the general government will not have the disposition to encroach upon the states."); A Citizen of Philadelphia, The Weaknesses of Brutus Exposed (Nov. 8, 1787), reprinted in 14 Documentary History, supra note 107, at 68–69 (the good character and reputation of federal officials, together with the fear of God, will ensure that they "give law, justice, and right to the States").

152. See Harrington, American Herald (Oct. 15, 1787), reprinted in 4 Documentary History, supra note 107, at 78–79; William Barton, On the Propriety of Investing Congress with Power to Regulate the Trade of the United States, *in* 13 Documentary History, supra note 107, at 52.

153. See Wechsler, supra note 9, at 558–59 (quoting Letter from James Madison to Edward Everett (Aug. 28, 1830), *in* 9 The Writings of James Madison 383, 395–96 (Galliard Hunt ed., 1910)).

154. Increase Sumner, Speech at the Massachusetts Ratifying Convention (July 25, 1788), *in* 2 Elliot, supra note 150, at 63–64. Sumner explained:

> The President is to be chosen by electors under the regulation of the state legislature; the Senate is to be chosen by the state legislatures; and the representative body by the people, under like regulations of the legislative body in the different states. If gentlemen consider this, they will, I presume, alter their opinion; for nothing is clearer than that the existence of the legislatures, in the different states, is essential to the *very being* of the general government.

Id.

155. See James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 2 Documentary History, supra note 107, at 400–06.

156. Id. at 400.

frage" in the hands of state legislators.[157] As for the Senate, Wilson remarked sardonically, "[i]n the system before you, . . . those tyrants that are to devour the legislatures of the states, are to be chosen by the state legislatures themselves. Need anything more be said on this subject?"[158] The Electoral College was similarly arranged to protect states, by requiring that the President be chosen "by Electors appointed in the different states, in such manner as the legislature shall direct."[159] Feigning insult, Wilson concluded by rebuking his opponents for their suspicions:

> But, sir, it has been intimated, that the design of the Federal Convention was to absorb the state governments. This would introduce a strange doctrine indeed, that one body should seek the destruction of another upon which its own preservation depends, or, that the creature should eat up and consume the creator. The truth is, sir, that the framers of this system were particularly anxious, and their work demonstrates their anxiety, to preserve the state governments unimpaired—it was their favorite object; and perhaps, however proper it might be in itself, it is more difficult to defend the plan on account of the excessive caution used in that respect, than from any other objection that has been offered here or elsewhere.[160]

Wilson's long speech is but one example among many, as speaker after speaker made the same points in response to Anti-Federal charges that state sovereignty was threatened—all without mentioning courts or judges or judicial review.[161] Note, too, that while many Federalists fol-

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157. Id. at 400–01.

158. Id. at 401.

159. Id.

160. Id. at 404–05. The belief that there was less risk of overreaching by federal authorities under the Constitution than of continued encroachments by states was widespread among Federalists. See Letter from Edward Carrington to Thomas Jefferson (Oct. 23, 1787), *in* 8 Documentary History, supra note 107, at 93, 95; Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 13 Documentary History, supra note 107, at 446; Alexander Hamilton, Speech at the New York Ratifying Convention (June 24, 1788), *in* 2 Elliot, supra note 150, at 304–05. This was, in fact, a recurrent theme in *The Federalist*, mentioned in essays by both Hamilton and Madison. See The Federalist Nos. 17, 31 (Alexander Hamilton), No. 45 (James Madison).

161. See e.g., Wat Tyler, A Proclamation, Pennsylvania Herald (Oct. 24, 1787), reprinted in 2 Documentary History, supra note 107, at 203 (satire); Thomas McKean, Speech at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 2 Documentary History, supra note 107, at 412; Demonsthenes Minor, Gazette of the State of Georgia (Nov. 22, 1787), reprinted in 3 Documentary History, supra note 107, at 246; Oliver Wolcott, Speech at the Connecticut Ratifying Convention (Jan. 9, 1788), *in* 3 Documentary History, supra note 107, at 558; Richard Law, Speech at the Connecticut Ratifying Convention (Jan. 9, 1788), *in* 3 Documentary History, supra note 107, at 559; Poplicola, Massachusetts Centinel (Oct. 31, 1787), reprinted in 4 Documentary History, supra note 107, at 181; Virginia Independent Chronicle (Nov. 28, 1787), reprinted in 8 Documentary History, supra note 107, at 177–78; Henry Lee, Speech at the Virginia Ratifying Convention (June 5, 1788), *in* 9 Documentary History, supra note 107, at 949; James Madison, Speech at the Virginia Ratifying Convention (June 11, 1788), *in* 9 Documentary History, supra note 107, at 1150–51; Edmund Pendleton, Speech at the Virginia Ratifying

lowed Wilson in describing an array of devices that guaranteed states a voice in the national government, most appreciated that the Senate had been particularly designed with this concern in mind. A considerable number thus singled out the upper chamber to highlight its role in safeguarding the interests of state governments.[162]

It may seem tempting at this point simply to declare Wechsler the winner, at least with respect to the original understanding, and move on. Yet that would be to miss something crucial about the Founders' conception of federalism and republican government. For viewed in their full

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Convention (June 12, 1788), *in* 10 Documentary History, supra note 107, at 1192, 1199; James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), *in* 13 Documentary History, supra note 107, at 341–42; An American Citizen IV: On the Federal Government, reprinted in 13 Documentary History, supra note 107, at 436–37; Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 13 Documentary History, supra note 107, at 445–46; Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 14 Documentary History, supra note 107, at 196; A Landholder IV, Connecticut Courant (Nov. 27, 1787), reprinted in 14 Documentary History, supra note 107, at 231, 234; The New Roof, Pennsylvania Packet (Dec. 29, 1787), reprinted in 15 Documentary History, supra note 107, at 184–85; A Freeman I, Pennsylvania Gazette (Jan. 23, 1788), reprinted in 15 Documentary History, supra note 107, at 457–58; Aristides, Remarks on the Proposed Plan of a Federal Government (Jan. 31–Mar. 27, 1788), reprinted in 15 Documentary History, supra note 107, at 517, 545; Fabius IV, Pennsylvania Mercury (Apr. 19, 1788), reprinted in 17 Documentary History, supra note 107, at 180, 182; Francis Dana, Speech at the Massachusetts Convention (Jan. 17, 1788), 2 Elliot, supra note 150, at 37, 37; Gen. E. Brooks, Speech at the Massachusetts Ratifying Convention (Jan. 24, 1788), 2 Elliot, supra note 150, at 99, 99–100; Rev. Samuel Stillman, Speech at the Massachusetts Ratifying Convention (Feb. 6, 1788), 2 Elliot, supra note 150, at 162, 168; James Iredell, Speech at the North Carolina Ratifying Convention (July 25, 1788), 4 Elliot, supra note 150, at 52, 53; William Davie, Speech at the North Carolina Ratifying Convention (July 25, 1788), 4 Elliot, supra note 150, at 58, 58–59; Archibald Maclaine, Speech at the North Carolina Ratifying Convention (July 29, 1788), 4 Elliot, supra note 150, at 180, 180–81.

162. See, e.g., Oliver Wolcott, Speech at the Connecticut Ratifying Convention (Jan. 9, 1788), *in* 3 Documentary History, supra note 107, at 557–58; Americanus II, Virginia Independent Chronicle (Dec. 19, 1787) reprinted in 8 Documentary History, supra note 107, at 247; Ezra Stiles Diary (Dec. 15, 1787), *in* 15 Documentary History, supra note 107, at 57; A Freeman II, Pennsylvania Gazette (Jan. 30, 1788), reprinted in 15 Documentary History, supra note 107, at 510; A Freeman III, Pennsylvania Gazette (Feb. 6, 1788), reprinted in 16 Documentary History, supra note 107, at 50–51; Letter from George Cabot to Theophilus Parsons (Feb. 28, 1788), *in* 16 Documentary History, supra note 107, at 249–50; Gazette of the State of Georgia (Mar. 20, 1788), reprinted in 16 Documentary History, supra note 107, at 445; Fabius II, Pennsylvania Mercury (Apr. 15, 1788) reprinted in 17 Documentary History, supra note 107, at 122; Fabius VIII, Pennsylvania Mercury (Apr. 29, 1788), reprinted in 17 Documentary History, supra note 107, at 248–49; Letter from Edmund Pendleton to Richard Henry Lee (Jun. 14, 1788), *in* 18 Documentary History, supra note 107, at 181; Theophilus Parsons, Speech at the Massachusetts Ratifying Convention (Jan. 1, 1788), *in* 2 Elliot, supra note 150, at 26–27; Fisher Ames, Speech at the Massachusetts Ratifying Convention (Jan. 18, 1788), *in* 2 Elliot, supra note 150, at 46; Rufus King, Speech at the Massachusetts Convention (Jan. 19, 1788), *in* 2 Elliot, supra note 150, at 47; James Iredell, Speech at the North Carolina Ratifying Convention (July 25, 1788), *in* 4 Elliot, supra note 150, at 38; William Davie, Speech at the North Carolina Ratifying Convention (July 25, 1788), *in* 4 Elliot, supra note 150, at 42–43; The Federalist No. 59 (Alexander Hamilton), No. 62 (James Madison).

context, these Wechslerian arguments about constitutional structure emerge as mere auxiliary features of a more fundamental point.

That point was politics. Not politics in the sense of Wechsler's tidy, bloodless constitutional structures, but real politics, popular politics: the messy, ticklish stuff that was (and is) the essence of republicanism. When Anti-Federalists insisted that Congress would disregard its limits and destroy state government, Federalists invariably responded that any effort to do so would run smack into opposition from the people. Let Congress try to misuse its powers, they said over and over again, and federal lawmakers would find themselves facing formidable resistance from local leaders—leaders who could, and would, drum up outrage and opposition among the people, establish committees of correspondence with like-minded leaders in other states, and force federal lawmakers to back down through protest and remonstrance or by actively campaigning to oust unsatisfactory representatives.

Arguments along these lines dominate the others in terms of both pervasiveness and emphasis. Scarcely any Federalist responding to charges of federal overreaching failed to make a point about popular control, and the other arguments described above were offered as subsidiary elements of this more fundamental reply.[163] We can start here with Publius, whose position I will present in considerable detail because on this issue it so perfectly exemplifies Federalist thinking. Using *The Federalist* to gauge the perceptions of other participants in the Founding can be problematic, and it is sometimes misleading to rely too heavily on this one source. On almost every issue, Publius's reasoning was more complex and nuanced, his logic more novel and striking, than that of anyone else. In some instances, Madison's and Hamilton's arguments were simply over the heads of the other Federalists.[164] But not on the question of federalism. On this issue, what Publius had to say was no different from what everyone else was saying, just more clearly and fully articulated.

References to federalism are pervasive in *The Federalist*, but Publius's principal discussion of the subject is in a series of eight essays, numbers 39–46, all written by Madison.[165] Madison began his investigation by

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163. Even John Stevens, Oliver Ellsworth, and George Nicholas immediately followed their references to judicial review by emphasizing that power and responsibility to resolve disputes between the general and the particular governments ultimately rested with the people. See Americanus VII, Daily Advertiser (Jan. 21, 1788), reprinted in 2 Debate on the Constitution, supra note 141, at 60; Oliver Ellsworth, Speech at the Connecticut Ratifying Convention (Dec. 11, 1787), *in* 3 Documentary History, supra note 107, at 553; George Nicholas, Speech at the Virginia Ratifying Convention (June 16, 1788), *in* 10 Documentary History, supra note 107, at 1327.

164. See Kramer, Madison's Audience, supra note 120, at 615–16 (arguing that almost no one understood, much less accepted, Madison's argument about faction in *The Federalist No. 10*).

165. My discussion of *The Federalist* on federalism has benefited greatly from Jack Rakove's insightful analysis of the subject. See Rakove, Original Meanings, supra note 33, at 161–202.

showing in the 39th essay how the design of the new system was neither "national" nor "federal" (in the eighteenth-century sense, which today we would call confederal), but was rather "a composition of both."[166] This was then followed by five essays recounting the reasons for bestowing each of the powers conferred on the national government. Finally, in *The Federalist No. 45*, Madison reached the critical question: whether, assuming "no one of the powers transferred to the federal Government is unnecessary or improper, . . . the whole mass of them will be dangerous to the portion of authority left in the several States."[167] Madison's answer, in this essay and the next one, epitomizes basic Federalist convictions and is critical to understanding how the Founders imagined federalism working.[168]

After testily reminding Anti-Federalists that the question whether the states were threatened was relevant only if and insofar as their existence is "essential to the happiness of the people of America,"[169] Madison laid out his reasons for concluding that states were safe in the new system—that, indeed, "the balance is much more likely to be disturbed by [their] preponderancy" than by that of the general government.[170] In any test of

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166. The Federalist No. 39 (James Madison), supra note 88, at 257.

167. The Federalist No. 45 (James Madison), supra note 88, at 308. Madison had adverted briefly to this question in No. 39, and then again near the end of No. 44, where he noted that the success of any federal usurpation "[i]n the first instance . . . will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort, a remedy must be obtained from the people, who can by the election of more faithful representatives, annul the acts of the usurpers." The Federalist No. 44 (James Madison), supra note 88, at 305; The Federalist No. 39 (James Madison), supra note 88, at 256–57. It is unclear whether Madison meant these passing references to the judiciary to indicate judicial review or merely the power of judges to construe federal statutes narrowly, along the lines of Blackstone's tenth rule of statutory construction. See supra note 90. The latter interpretation is more plausible given Madison's language and his lifelong lack of trust in the capacity of courts successfully to oppose a republican legislature. See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787, Nov. 1, 1787), *in* 13 Documentary History, supra note 107, at 446. In any event, even if Madison was referring to judicial review in these fleeting passages, he gave the point little emphasis while writing at great length about how and why states could rely on "the last resort" of popular politics.

168. See Rakove, Original Meanings, supra note 33, at 193–201.

169. The Federalist No. 45 (James Madison), supra note 88, at 309. In an uncharacteristically overwritten passage, Madison asks,

> [W]as the precious blood of thousands spilt, and the hard earned substance of millions lavished, not that the people of America should enjoy peace, liberty and safety; but that the Governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty?

Id. "It is too early," he huffed,

> for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people is the supreme object to be pursued; and that no form of Government whatever, has any other value, than as it may be fitted for the attainment of this object.

Id.

170. Id. at 310.

strength, Madison conjectured, the states would always have the political wherewithal easily to defeat the national government:

> The State Governments will have the advantage of the federal Government, whether we compare them in respect to the immediate dependence of the one or the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other.[171]

In *The Federalist No. 46*, Madison made explicit what is here only implicit: that because efforts by either side to extend its reach would depend on the ability of officials at each level to gain popular support, the Constitution's allocation of authority was controlled by the people themselves:

> Notwithstanding the different modes in which [the state and federal governments] are appointed, we must consider both of them, as substantially dependent on the great body of the citizens of the United States. . . . The Foederal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrouled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone; and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expence of the other. Truth no less than decency requires, that the event in every case, should be supposed to depend on the sentiments and sanction of their common constituents.[172]

With this fundamental postulate established, Madison dedicated the remainder of these two essays to demonstrating the states' greater capacity to protect themselves through appeals to the "common superior." No mention was made of courts or judicial review, and only a single paragraph was spent describing the states' role in the composition of the federal government.[173] Instead, Madison devoted twelve pages to cataloguing the states' political advantages "with regard to the predilection and support of the people."[174]

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171. Id. at 311.

172. The Federalist No. 46 (James Madison), supra note 88, at 315–16.

173. See The Federalist No. 45 (James Madison), supra note 88, at 311.

174. The Federalist No. 46 (James Madison), supra note 88, at 315. See The Federalist Nos. 45–46 (James Madison), supra note 88, at 312–23.

These advantages are, he said, considerable. To begin with, the states will employ many more people than the federal government, and the relationships these state officials form with their constituents will give them substantial influence in the event of a contest with the federal government.[175] Adding to this influence is the different nature of the powers exercised by the respective governments. It was in this connection that Madison made his oft-quoted remark about how "[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined" while those that remain to the states "are numerous and indefinite."[176] His point was less to appease anxieties about whether the federal government was too powerful than it was to establish the basis for his claim that "the first and most natural attachment of the people will be to the governments of their respective States."[177] Because the limited powers delegated to the national government would "be exercised principally on external objects" and were likely to be important only "in times of war and danger," the operations of the federal government would rarely touch the lives of most citizens.[178] "The powers reserved to the several States," in contrast, "will 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, improvement, and prosperity of the State."[179] And because state officials would thus be responsible for "all the more domestic, and personal interests of the people,"[180] it would be

> [w]ith the affairs of [the state governments that] the people will be more familiarly and minutely conversant. And with the members of these, will a greater proportion of the people have ties of personal acquaintence and friendship, and of family and party attachments; on the side of these therefore the popular bias, may well be expected most strongly to incline.[181]

Given these advantages, it was fatuous to say that the states had anything to fear from Congress. Indeed, because "the prepossessions of the people on whom both will depend, will be more on the side of the State governments, than of the Foederal Government,"[182] it was likely that the members of Congress would, if anything, worry too little about national

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175. See The Federalist No. 45 (James Madison), supra note 88, at 312:
The members of the legislative, executive and judiciary departments of thirteen and more States; the justices of peace, officers of militia, ministerial officers of justice, with all the county corporation and town-officers, for three millions and more people, intermixed and having particular acquaintence with every class and circle of people, must exceed beyond all proportion, both in number and influence, those of every description who will be employed in the administration of the federal system.

176. Id.

177. The Federalist No. 46 (James Madison), supra note 88, at 316.

178. The Federalist No. 45 (James Madison), supra note 88, at 313.

179. Id.

180. The Federalist No. 46 (James Madison), supra note 88, at 316.

181. Id.

182. Id. at 317.

concerns. "A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the Legislatures of the particular States,"[183] leaving federal lawmakers "disinclined to invade the rights of the individual States, or the prerogatives of their governments."[184]

But suppose that Congress were to overreach, Madison queried, suppose it were to stretch its powers "beyond the due limits."[185] The states "would still have the advantage in the means of defeating such encroachments."[186] The greater sympathy of the people for their state governments, in conjunction with the superior capacity of state officials to rally support, would ensure that Congress failed:

> [S]hould an unwarranted measure of the Foederal Government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people, their repugnance and perhaps refusal to co-operate with the officers of the Union, the frowns of the executive magistracy of the State, the embarrassments created by legislative devices, which would often be added on such occasions, would oppose in any State difficulties not to be despised; would form in a large State very serious impediments, and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the Foederal Government would hardly be willing to encounter.[187]

Nor did measures such as these exhaust the states' political resources in combatting federal usurpation, for state officials could coordinate their efforts to force Congress to repeal the offending legislation:

> But ambitious encroachments of the Foederal Government . . . would not excite the opposition of a single State or of a few States only. They would be signals of a general alarm. Every Government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combination in short would result from an apprehension of the foederal, as was produced by the dread of a foreign yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case, as was made in the other.[188]

In truth, Madison was quick to add, matters never would reach the extreme of armed conflict because, unlike in the showdown with England, the two contending sides were controlled by the same master, the

183. Id. at 318.
184. Id. at 319.
185. Id.
186. Id.
187. Id. at 319–20.
188. Id. at 320.

people of the United States. The suggestion of military confrontation was a "visionary supposition," not to be taken seriously. "[W]hat would be the contents in the case we are supposing?" Madison wondered, "Who would be the parties? A few representatives of the people, would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter."[189]

Of course, such a clash, if it did somehow come about, would not be close; as "[t]hose who are best acquainted with the late successful resistance of this country against the British arms" would attest, the states and their multitudinous militia would easily prevail.[190] But fretting about this sort of nonsense was pointless, a waste of time. The states had nothing to fear because the regulation and control of political power at both levels of government is in the people's hands. The point was decisive:

> Either the mode in which the Foederal Government is to be constructed will render it sufficiently dependant on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State Governments; who will be supported by the people.[191]

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189. Id.

190. Id. at 321.

191. Id. at 322. While *The Federalist Nos. 45–46* constitute the most elaborate presentation of the argument that states would control the federal government less through their role in its selection and composition than by outside agitation, it was a pervasive theme in the writings of Publius. Discussing the tax power, Alexander Hamilton sought to allay fears of federal overreaching 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 Foederal 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.

The Federalist No. 26 (Alexander Hamilton), supra note 88, at 169. Hamilton elaborated in *The Federalist No. 28*:

> It may safely be received as an axiom in our political system, that the state governments will in all possible contingencies afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men as of the people at large. The Legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power and the confidence of the people, they 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.

The Federalist No. 28 (Alexander Hamilton), supra note 88, at 179–80. Arguments along the same lines also feature in *The Federalist Nos. 17, 25, 31, 32, 55,* and *84.*

Madison's argument has two related parts, each echoed by a multitude of Federalist speakers. The first is that the national government will not exceed its limits because, as A Jerseyman wrote to his fellow citizens, "[e]very two years the people may change their Representatives if they please; and they certainly would please to change those who would act with so much baseness and treachery."[192] An exasperated George Washington complained to his nephew Bushrod about the unwillingness of Anti-Federalists to face this axiomatic point:

> The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own chusing; and whenever it is executed contrary to their Interest, or not agreeable to their wishes, their Servants can, and undoubtedly will be, recalled.—It is agreed on all hands that no government can be well administered without powers—yet the instant these are delegated, altho' those who are entrusted with the administration are no more than the creatures of the people, act as it were but for a day, and are amenable for every false step they take, they are, from the moment they receive it, set down as tyrants—their natures, one would conceive from this, immediately changed—and that they have no other disposition but to oppress.[193]

Particularly with a proper scheme of separation of powers in place, the basic republican nature of American society would provide its own security from abuse. "[I]f we cannot entrust [the necessary powers of government] in the hands of our own citizens," wrote Publicola, "persons of our own choice, and whom we may remove at stated, and short periods, we must be contented to live without any effective government."[194]

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192. A Jerseyman, To the Citizens of New Jersey, Trenton Mercury (Nov. 6, 1787), reprinted in 3 Documentary History, supra note 107, at 148.

193. Letter from George Washington to Bushrod Washington (Nov. 10, 1787), *in* 8 Documentary History, supra note 107, at 154.

194. Publicola, An Address to the Freemen of North Carolina, State Gazette of North Carolina (Mar. 20, 1788), reprinted in 16 Documentary History, supra note 107, at 437. For additional examples of this argument, see Anthony Wayne, Marginal Note at the Pennsylvania Convention, reprinted in 2 Documentary History (Nov. 28, 1787), supra note 107, at 411; Remarks of Thomas McKean at the Pennsylvania Convention, *in* 2 Documentary History, supra note 107, at 414; Remarks of James Wilson at the Pennsylvania Convention (Dec. 7, 1787), *in* 2 Documentary History, supra note 107, at 515; Remarks of Thomas McKean at the Pennsylvania Convention (Dec. 10, 1787), *in* 2 Documentary History, supra note 107, at 538; Philanthrop, To the People, American Mercury (Nov. 19, 1787), reprinted in 3 Documentary History, supra note 107, at 468; A Citizen of New Haven, Connecticut Courant (Jan. 7, 1788), reprinted in 3 Documentary History, supra note 107, at 524; The Republican, To The People, Connecticut Courant (Jan. 7, 1788), reprinted in 3 Documentary History, supra note 107, at 528; Remarks of Oliver Ellsworth at the Connecticut Convention (Jan. 7, 1788), *in* 3 Documentary History, supra note 107, at 553; Cassius VI, Massachusetts Gazette (Dec. 25, 1787), reprinted in 5 Documentary History, supra note 107, at 512; Remarker, Independent Chronicle (Dec. 27, 1787), reprinted in 5 Documentary History, supra note 107, at 529; "A.B.," Hampshire Gazette (Jan. 9, 1788), reprinted in 5 Documentary History, supra note 107, at 671; Massachusetts Centinel (Jan. 26, 1787), reprinted in 5 Documentary History, supra note 107, at 805;

The second theme in Madison's argument pertains specifically to how republican politics would work under the Constitution to safeguard federalism, by enabling state officials to exploit their inherent political strength to rouse popular support against doubtful federal legislation. As Edmund Randolph explained to the Virginia Ratifying Convention, if Congress "attempt such an usurpation, the influence of the State Governments, will stop it in the bud of hope. I know this Government will be cautiously watched. The smallest assumption of power will be sounded in alarm to the people, and followed by bold and active opposition."[195]

Virginia Independent Chronicle (Nov. 28, 1787), reprinted in 8 Documentary History, supra note 107, at 179; An Impartial Citizen VI, Petersburg Virginia Gazette (Mar. 13, 1788), reprinted in 8 Documentary History, supra note 107, at 497; Remarks of George Nicholas at the Virginia Convention (June 4, 1788), *in* 9 Documentary History, supra note 107, at 927–28; Remarks of Edmund Randolph at the Virginia Convention (June 7, 1788), *in* 9 Documentary History, supra note 107, at 1024–25;, Remarks of James Madison at the Virginia Convention (June 11, 1788), *in* 9 Documentary History, supra note 107, at 1149; Remarks of Edmund Pendleton at the Virginia Convention, reprinted in 10 Documentary History (June 12, 1788), supra note 107, at 1197; Remarks of George Nicholas at the Virginia Convention (June 16, 1788), *in* 10 Documentary History, supra note 107, at 1327; Poughkeepsie Country Journal (Oct. 3, 1787), reprinted in 13 Documentary History, supra note 107, at 309; Letter from Edmund Pendleton to James Madison (Oct. 8, 1787), in 13 Documentary History, supra note 107, at 355; A Citizen of Philadelphia, The Weaknesses of Brutus Exposed, (Nov. 8, 1787) reprinted in 14 Documentary History, supra note 107, at 68–69; Uncus, Maryland Journal (Nov. 9, 1787), reprinted in 14 Documentary History, supra note 107, at 79; A Countryman II, New Haven Gazette (Nov. 22, 1787), reprinted in 14 Documentary History, supra note 107, at 173–174; Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), reprinted in 14 Documentary History, supra note 107, at 196, 201, 203; A Landholder IV, Connecticut Courant (Nov. 26, 1787), reprinted in 14 Documentary History, supra note 107, at 234; A Landholder V, Connecticut Courant (Dec. 3, 1787), reprinted in 14 Documentary History, supra note 107, at 337; A Countryman IV, New Haven Gazette (Dec. 6, 1787), reprinted in 14 Documentary History, supra note 107, at 356–57; Draft Letter from Roger Sherman (Dec. 8, 1787), reprinted in 14 Documentary History, supra note 107, at 386–87; America, New York Daily Advertiser (Dec. 31, 1787), reprinted in 15 Documentary History, supra note 107, at 195–97; Hugh Williamson: Speech at Edenton, N.C., New York Daily Advertiser (Feb. 25–27, 1788), reprinted in 16 Documentary History, supra note 107, at 203; Fabius IV, Pennsylvania Mercury (Apr. 19, 1788), reprinted in 17 Documentary History, supra note 107, at 181; Fabius IX, Pennsylvania Mercury (May 1, 1788), reprinted in 17 Documentary History, supra note 107, at 263–64; A Patriotic Citizen, Pennsylvania Mercury (May 10, 1788), reprinted in 18 Documentary History, supra note 107, at 10; Remarks of J.C. Jones at the Massachusetts Convention (Jan. 16, 1788), *in* 2 Elliot, supra note 150, at 29; Remarks of Increase Sumner at the Massachusetts Convention (Jan. 22, 1788), *in* 2 Elliot, supra note 150, at 63; Remarks of Christopher Gore at the Massachusetts Convention (Jan. 22, 1788), *in* 2 Elliot, supra note 150, at 64–65; Remarks of James Bowdoin at the Massachusetts Convention (Jan. 23, 1788), *in* 2 Elliot, supra note 150, at 85–88; Remarks of Josiah Smith at the Massachusetts Convention (Jan. 25, 1788), *in* 2 Elliot, supra note 150, at 103–04; Remarks of Samuel Stillman at the Massachusetts Convention (Feb. 6, 1788), *in* 2 Elliot, supra note 150, at 167; Remarks of Alexander Hamilton at the New York Convention, *in* 2 Elliot, supra note 150, at 252; Remarks of James Iredell at the North Carolina Convention (July 26, 1788), *in* 4 Elliot, supra note 150, at 98; Remarks of Archibald Maclaine at the North Carolina Convention (July 29, 1788), *in* 4 Elliot, supra note 150, at 161–62, 172.

195. Remarks of Edmund Randolph at the Virginia Convention (June 10, 1788), *in* 9 Documentary History, supra note 107, at 1102.

Closely tracking the argument of his co-author Madison, Alexander Hamilton reminded the New York Ratifying Convention why "the natural strength and resources of state governments . . . will ever give them an important superiority over the general government":

> If we compare the nature of their different powers, or the means of popular influence which each possesses, we shall find the advantage entirely on the side of the states. This consideration, important as it is, seems to have been little attended to. The aggregate number of representatives throughout the states may be two thousand. The personal influence will, therefore, be proportionately more extensive than that of one or two hundred men in Congress. The state establishments of civil and military officers of every description, infinitely surpassing in number any possible correspondent establishments in the general government, will create such an extent and complication of attachments, as will ever secure the predilection and support of the people. Whenever, therefore, Congress shall meditate any infringement of the state constitutions, the great body of the people will naturally take part with their domestic representatives. Can the general government withstand such a united opposition? Will the people suffer themselves to be stripped of their privileges? Will they suffer their legislatures to be reduced to a shadow and name? The idea is shocking to common sense.[196]

The result, Hamilton said, and many other Federalists reiterated, was "a complicated, irresistible check, which must ever support the existence and importance of the state governments."[197]

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196. Remarks of Alexander Hamilton at the New York Convention (June 28, 1788), *in* 2 Elliot, supra note 150, at 304.

197. Id. at 304–05. This argument was a particular favorite of Hamilton's, and he pressed it repeatedly both in his essays as Publius and at the New York Convention. See supra note 191 (citing essays in *The Federalist*); Remarks of Alexander Hamilton at the New York Convention (June 2, 1788), *in* 2 Elliot, supra note 150, at 253; Remarks of Alexander Hamilton at the New York Convention, *in* 2 Elliot, supra note 150, at 353–55. For examples of others making the same arguments, see A Citizen of New Haven, Connecticut Courant (Jan. 7, 1788), reprinted in 3 Documentary History, supra note 107, at 525; Responses to An Old Whig I, Massachusetts Centinel (Oct. 31, 1787), reprinted in 4 Documentary History, supra note 107, at 181; Massachusetts Centinel (Jan. 26, 1788), reprinted in 5 Documentary History, supra note 107, at 805; An Independent Freeholder, Winchester Virginia Gazette (Jan. 25, 1788), reprinted in 8 Documentary History, supra note 107, at 326–28; Alexander White, Winchester Virginia Gazette (Feb. 22, 1788), reprinted in 8 Documentary History, supra note 107, at 405–06; Alexander White, Winchester Virginia Gazette (Feb. 29, 1788), reprinted in 8 Documentary History, supra note 107, at 439; An Impartial Citizen VI, Petersburg Virginia Gazette (Mar. 13, 1788), reprinted in 8 Documentary History, supra note 107, at 497–500; Remarks of George Nicholas at the Virginia Convention, *in* 9 Documentary History, supra note 107, at 926–27; Remarks of James Madison at the Virginia Convention, *in* 9 Documentary History, supra note 107, at 997–98; Remarks of James Madison at the Virginia Convention, *in* 9 Documentary History, supra note 107, at 1151–52; An American Citizen VI: On the Federal Government, reprinted in 13 Documentary History, supra note 107, at 436–37; Virginia Independent Chronicle (Nov. 28, 1787), reprinted in 14 Documentary History, supra note 107, at 244; Draft Letter from Roger Sherman (Dec. 8, 1787), reprinted in 14

That the Founders expected problems of federalism to be handled in this way is hardly surprising. Their history, their political theory, and their actual experience all taught that popular pressure was the only sure way to bring an unruly authority to heel. We seem to forget that the Founding took place against the background of the Glorious Revolution and the American Revolution, not the civil rights movement. The colonial experience in opposing King and Parliament provided the model from which the Founders drew their inferences. They had, in fact, more than a century of experience in a federal system, the British Empire, and the Revolution itself, beginning with the Stamp Act protests, provided their blueprint for opposing a central government that exceeded its constitutional authority. This is why courts and judicial review were so rarely invoked during Ratification: Members of the Founding generation had a different paradigm in mind, and the idea of depending on courts to stop a legislature that abused its power simply never occurred to the vast majority of participants in the debates.

Constitutional structures like those emphasized by Wechsler, in contrast, surely were part of the Founders' model, but more as auxiliary devices than a front-line defense. Having misjudged the utility of such devices in the wave of romantic enthusiasm that swept the country upon declaring independence from England, America's leadership relearned the hard way during the 1780s why it was necessary to fragment and separate power within the government.[198] Yet we must be careful not to misstate the nature of their reaction by imposing a too-modern sensibility on eighteenth-century minds. The Federalist "counterrevolution" was not a rejection of republicanism so much as it was an effort to save republicanism from itself, and the Federalists' ideas about constitutional reforms were embedded in a political ideology that took for granted a vision of the people's role in politics that was altogether different from our own.

Today, we tend to think of our Constitution and government as a complex but largely self-regulating machine. The vivid images in Madison's *The Federalist No. 51*—of "supplying by opposite and rival interests, the defect of better motives" and "so contriving 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"[199] have captured our imaginations and saturated our political grammar. Because expressions like these seem to describe government as we experience it, we slide easily into accepting at face value the idea of a self-correcting system of checks and balances whose fundamental operations all take place from within the government itself.

Documentary History, supra note 107, at 387; Remarks of Thomas Thacher at the Massachusetts Convention, *in* 2 Elliot, supra note 150, at 145–46; Remarks of Charles Pinckney in the South Carolina Legislature, *in* 4 Elliot, supra note 150, at 259.

198. This, of course, is one of the central theses in Gordon S. Wood, The Creation of the American Republic, 1776–1787 (1969) [hereinafter Wood, Creation].

199. The Federalist No. 51 (James Madison), supra note 88, at 347–48; id. at 349.

This perception rests to a large extent on the fact that modern politics is managed through a robust network of mediating institutions: political parties, lobbies, public interest organizations, the media, and so forth. As a result, and with rare exceptions, most Americans experience politics as a remote, passive activity. We read newspapers or watch TV; we talk politics with friends; we vote and maybe give some money to a party or other organization.[200] But apart from that, we leave the management of our political affairs to others working in a businesslike manner in or closely with government agencies. We will return below to the significance of these mediating institutions for federalism. For present purposes, the important point is simply that there were no such organizations in eighteenth-century America: no institutions formed to advance political agendas standing between the governors and the governed.[201] When the Founders spoke of popular sovereignty, they had in mind

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200. Sidney Verba et al., Voice and Equality : Civic Voluntarism in American Politics 506–07, 531 (1995).

201. Voluntary associations were not unknown in America before the Constitution's adoption. There were the churches, of course, as well as militias and a handful of philanthropic, fraternal, or benevolent societies. These were exceedingly rare prior to the Revolution, however, and even after 1776—when voluntary associations first began to emerge in appreciable numbers—forming a society or club for political purposes remained taboo. See Richard D. Brown, The Emergence of Voluntary Associations in Massachusetts, 1760–1830, 2 J. Voluntary Action Res. 64 (1973); see also Oscar Handlin & Mary Handlin, The Dimensions of Liberty 89–112 (1961) (describing the development of voluntary associations in America, from colonial times to the 1950s, as a key element in the cultivation of American liberty). "Such a combination bespoke faction; it seemed to stand as a challenge to the constituted agencies, authorities, and procedures of government; and it remained, in some elusive sense, outside the community's control." Stanley Elkins & Eric McKitrick, The Age of Federalism 455 (1993). One sees this attitude clearly in a letter written by George Washington to his nephew Bushrod in the fall of 1786. Bushrod had excitedly written Washington about his involvement in organizing a local "Patriotic Societ[y]," to consist of "sensible and respectable gentlemen" who would meet for the purpose of discussing public affairs and communicating their views to the public. Glenn A. Phelps, George Washington and American Constitutionalism 80 (1993). Expecting praise from his famous uncle, Bushrod received a stern lecture instead:

> To me it appears much wiser and more politic to choose able and honest representatives, and leave them, in all national questions to determine from the evidence of reason, and the facts which shall be adduced, when internal and external information is given to them in a collective state. What certainty is there that societies in a corner or remote part of a State can possess that knowledge, which is necessary for them to decide on many important questions which may come before an Assembly? What reason is there to expect, that the society itself may be accordant in opinion on such subjects? May not a few members of this society, more sagacious and designing than the rest, direct the measures of it to private views of their own? May this not embarrass an honest, able delegate, who hears the voice of his country from all quarters, and thwart public measures?

Letter from George Washington to Bushrod Washington (Sept. 30, 1786), *in* 11 The Writings of George Washington 70–71 (Worthington C. Ford ed., 1891); see Phelps, supra, at 79–84. It was not until the 1790s, under the pressure of national politics, that political societies and "pressure groups" of any sort formed, and it took several decades more for them to become respectable.

something much more active and immediate than we do.[202] Still operating within a system in which traditional patterns of deference prevailed, they nevertheless saw the energy of the people as the force directly responsible for driving the system.

Supporters of the Constitution doubtless hoped and believed that their new scheme for checking and balancing power would provide greater security than previous systems. But they never imagined that such structures were self-regulating, or even especially safe. If anything was clear from the political philosophers that the Founding generation read—Harrington, Bolingbroke, Shaftesbury, Hoadley, Trenchard and Gordon, Priestley, Burgh, and all the other English opposition writers who were popular in America—it was that complex systems are delicate and easily perverted.[203] This was a lesson that both history and personal experience had unfailingly corroborated, from the English Civil War to the Glorious Revolution, from the corruption of Walpole and of George III to the apparent failure of their own state constitutions. Preserving liberty demanded a constitution of government whose internal architecture was carefully arranged to check power, but structural innovations were merely a tool to make possible the preservation of a constitutional order. They could supply neither the energy nor the direction to protect liberty; that, ultimately, came from the people themselves.

C. *Party Politics*

The Founders relied on what might be called a colonial or revolutionary model of federalism: "revolutionary" because of the way it drew on their experience opposing centralized authority before or during the American Revolution and under the Articles of Confederation. Forced to explain how states could withstand the formally superior *legal* power of the national government (reflected most conspicuously in the Supremacy Clause of Article VI), Federalists pointed to the realistically superior *political* power of the states and argued that state governments would have potent advantages in any boundary disputes with Congress.

This solution presupposed a durable and enduring political competition between state and federal officials, a zero-sum game in which the

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202. To get a feel for this sense of popular sovereignty, one can hardly do better than Gordon Wood's chapter on "Conventions of the People" in *The Creation of the American Republic.* Wood, Creation, supra note 198, at 306–43; see also Pauline Maier, From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765–1776, 3–48 (1974) (describing traditions of 18th century America regarding popular movements); James Gray Pope, Republican Moments: The Role of Direct Popular Power in the American Constitutional Order, 139 U. Pa. L. Rev. 287, 325–39 (1990) (describing Founders' views on importance of expressions of popular sovereignty).

203. On the popularity of these sources in Revolutionary America, see Bailyn, supra note 90, at 22–54; useful studies of their ideas are found in Isaac Kramnick, Bolingbroke and His Circle (1968); J.G.A. Pocock, The Machiavellian Moment 333–552 (1975); and Caroline Robbins, The Eighteenth-Century Commonwealthman (1959).

successful assumption of power by politicians at one level would be perceived as a loss, and so opposed, by politicians at the other. Given the Founding generation's history and experience (both with England and under the Articles of Confederation), this was a perfectly reasonable assumption to make. But federalism was not the only issue to confront the Framers in drafting the Constitution. They also had to worry about the problem of representation: If the new Congress was going to make laws directly applicable to individual citizens, particularly laws affecting their property rights, it was essential that the people be directly represented.[204] This had been *the* major source of contention leading to the break with Britain,[205] and the Framers addressed it by creating a national government in which the people were either directly or indirectly represented in every branch but the judiciary.

What the Framers failed to appreciate was how their solution to the problem of representation would sabotage their solution to the problem of federalism—hardly a surprise, since the effect is not obvious even in hindsight. Making state and national leaders accountable to the same constituents transformed politics by making it politically advantageous to build alliances across formal institutional boundaries. As political parties began tentatively to form during the Washington Administration, national leaders reached out for support to leaders at the state and local level. The "natural" fault line between state and federal officials was soon bridged by cross-cutting attachments based on ideology and party affiliation, and the most important anticipated source of protection for states was promptly rendered ineffective. As the discussion below elaborates, the unexpected emergence of political parties turned out also to provide a solution to the problem they created. Rather than judicial review, it was the party system itself that supplied the desideratum necessary to protect the states and make federalism functional.

The Founders had not anticipated, or even imagined, the formation of political parties in the modern sense of the term, though they undoubtedly would have been appalled by the prospect had they thought of it.[206] When men of the eighteenth century spoke of "parties" and "factions," the traditional bogeymen of Enlightenment political philosophy, they had in mind something more closely akin to what we today call inter-

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204. See Rakove, Original Meanings, supra note 33, at 428, 431, 437; see also Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 8 Documentary History, supra note 107, at 250 (praising the Constitution's provision for popular elections to the House of Representatives because it "preserv[es] inviolate the fundamental principle that the people are not to be taxed but by representatives chosen immediately by themselves"); Charles Pinckney, Speech to the South Carolina Legislature, *in* 4 Elliot, supra note 150, at 282–83 (stating that, because "we have found it necessary to give very extensive powers to the federal government both over the persons and estates of the citizens, we thought it right to draw one branch of the legislature immediately from the people").

205. See Morgan & Morgan, supra note 94, at 76–81, 288–89; John Phillip Reid, Constitutional History of the American Revolution 45–48 (abr. ed. 1995).

206. See E.E. Schattschneider, Party Government 7–8 (1942).

est groups.[207] No one envisaged extensive organizations with a general ideology that would act to coordinate political campaigns and organize the government to facilitate the implementation of a popular program; such a thing had never before existed.[208]

But times were changing, and the United States was something genuinely new in the world. Its political foundations rested firmly and self-consciously on popular sovereignty, in a society that spurned hereditary orders—the historic republican experiment of which the Revolutionary generation was so proud (albeit only by overlooking the odious exception of slavery).[209] Its economy, while still overwhelmingly agrarian, was dynamic and market driven; according to Gordon Wood, the United States was already "perhaps the most thoroughly commercialized nation in the world."[210] But most significant was its size. Anti-Federalists had shrieked that republican government on the scale proposed by the Federalists was unthinkable, ferociously insisting that representatives in a nation so large and diverse could never secure "the confidence of the people."[211] Interestingly, Federalists did not counter this wholly reasonable anxiety with the now-famous argument in Madison's *The Federalist No. 10*; almost nobody understood what Madison was talking about, and the few who did understand either rejected or underestimated the force of his logic.[212] Instead, they promised to solve the problem with better laws and a better government. "The confidence of the people," Alexander Hamilton had

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207. See Richard Hofstadter, The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780–1840, 9–16 (1969); Wood, Creation, supra note 198, at 58–59; Paul F. Bourke, The Pluralist Reading of James Madison's Tenth *Federalist*, 9 Persp. in Am. Hist. 271 (1975). For classic statements of the eighteenth-century view of parties, see David Hume, Of Parties in General, *in* Essays: Moral, Political, and Literary 54 (Eugene F. Miller ed., rev. ed. 1985); The Idea of a Patriot King, *in* 2 Works of Bolingbroke, supra note 91, at 401.

208. See Richard P. McCormick, The Second American Party System: Party Formation in the Jacksonian Era 19–20 (1966).

209. See Gordon S. Wood, The Radicalism of the American Revolution 5–8 (1992) [hereinafter Wood, Radicalism].

210. Id. at 313. See generally Thomas C. Cochran, Frontiers of Change: Early Industrialism in America 50–77 (1981) (comparing state of industrialization in Europe and the United States during early Republic); The Economy of Early America: The Revolutionary Period, 1763–1790 (Ronald Hoffman et al. eds., 1988) (collecting essays analyzing regional economies during early Republic).

211. Herbert J. Storing, What the Anti-Federalists Were *For* 15–16 (1981); The Antifederalists xxxix–xliii (Cecelia M. Kenyon ed., 1985). For examples of this Anti-Federalist argument, see The Impartial Examiner III, Virginia Independent Chronicle (June 4, 1788), reprinted in 10 Documentary History, supra note 107, at 1576–78; Brutus IV, New York Journal (Nov. 29, 1787), reprinted in 14 Documentary History, supra note 107, at 297, 299–301; The Federal Farmer, An Additional Number of Letters to the Republican (Letter VII) (Dec. 31, 1787), reprinted in 17 Documentary History, supra note 107, at 265, 281–82.

212. See Kramer, Madison's Audience, supra note 120, at 664–71.

assured the New York Ratifying Convention, "will easily be gained by a good administration. This is the true touchstone."[213]

But political stress cannot be deflected or relieved by "good government" when it is precisely whether the government is "good" that is in dispute, and the first decade of experience under the Constitution tended to corroborate the Anti-Federalists' fears. The early Republic was convulsed by precisely the sorts of tensions they had predicted, as the United States immediately found itself wracked over contentious problems of finance and foreign policy. The 1790s brought an unremitting succession of political crises—each more divisive than the last, each leaving still more of the community estranged from the new national government.[214]

After a promising start, the first major controversy erupted in 1790 over Hamilton's plans to have the federal government assume the states' Revolutionary War debt; it brought the new government to a standstill until a shaky compromise was worked out involving the location of the capital.[215] No sooner had this controversy subsided then Hamilton provoked another with his plans for a national bank and for aggressive federal support of manufacturing and commercial development.[216] This was followed by discord over whether to support England or France (and uncertainty about how to support neither) after the French Revolution took a radical turn and war broke out in Europe.[217] In the meantime, national leaders were struggling with a wide range of contentious issues in the

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213. 2 Elliot, supra note 150, at 254. See also The Federalist No. 27 (Alexander Hamilton), supra note 88, at 172 ("I believe it may be laid down as a general rule, that [the people's] confidence in and obedience to a government, will commonly be proportioned to the goodness or badness of its administration."); Letter from George Washington to John Armstrong, Sr. (Apr. 25, 1788), *in* 9 Documentary History, supra note 107, at 758, 759 (predicting that the government will succeed so long as those chosen to administer it "pursue those measures which will best tend to the restoration of public and private faith").

214. The best one-volume accounts of political events during the Washington and Adams Administrations are Elkins & McKitrick, supra note 201; John C. Miller, The Federalist Era: 1789–1801 (1960); and James Rogers Sharp, American Politics in the Early Republic: The New Nation in Crisis (1993). The points made in the following two paragraphs are based generally on these sources in addition to the authorities cited below.

215. For accounts of Hamilton's finance strategy, see E. James Ferguson, The Power of the Purse 292–97, 306–07 (1961); Forrest McDonald, Alexander Hamilton 163–88 (1979). On the alleged agreement to settle the question of assumption by locating the capital on the banks of the Potomac, see Jacob E. Cooke, The Compromise of 1790, 27 Wm. & Mary Q. 523 (1970); Kenneth R. Bowling, Dinner at Jefferson's: A Note on Jacob E. Cooke's "The Compromise of 1790," reprinted in The Congress of the United States: Its Origins and Early Development 189 (Joel H. Silbey ed., 1991).

216. On Hamilton's national bank scheme, see Bray Hammond, Banks and Politics in America From the Revolution to the Civil War 114–43 (1957); on Hamilton's plans for commercial development and the controversy they provoked, see McDonald, supra note 215, at 231–61.

217. See Harry Ammon, The Genet Mission (1973); Albert Hall Bowman, The Struggle for Neutrality (1974); Dumas Malone, Jefferson and the Ordeal of Liberty 68–131 (1962).

West: how to manage the Indian war into which the Washington Administration had blundered, how to compel Spain to open the Mississippi for American trade, how to pry the British from their forts in the Northwest, and how generally to secure the still-doubtful loyalty of westerners.[218] Tensions with England brought the new nation to the brink of a second war just as opposition to Hamilton's excise tax ignited the Whiskey Rebellion in Pennsylvania, the "single largest example of armed resistance to a law of the United States between the ratification of the Constitution and the Civil War."[219] Resentment over these incidents was beginning to subside when John Jay returned home from England with his notorious treaty, precipitating yet another round of intense political combat that included the stoning of Alexander Hamilton and a savage attack on the previously untouchable reputation of Washington himself.[220]

John Adams was elected President in 1796 after a closely fought campaign, only to see his entire presidency overshadowed by yet another war crisis, this time with France.[221] Efforts to negotiate differences with America's former ally produced the XYZ affair, which in turn spawned an ominous and alarming war fever. On the seas, American ships began dueling the French in a quasi-naval war.[222] At home, hefty new taxes were imposed to fund the creation of an oversized army; opposition to these efforts was equated with treason and used to justify the oppressive Alien and Sedition Acts.[223] By 1798, talk of disunion and even civil war was starting to spread, and the American experiment in popular government was once again in jeopardy.[224]

The new nation weathered the crisis, due in large part to the emergence of the first form of political parties.[225] With each new controversy,

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218. An excellent discussion of issues presented in the West is found in Richard H. Kohn, Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783–1802, at 91–189 (1975).

219. Thomas P. Slaughter, The Whiskey Rebellion 5 (1986).

220. See Jerald A. Combs, The Jay Treaty 162 (1970); Samuel Flagg Bemis, Jay's Treaty xii–xiv (1962).

221. See Stephen G. Kurtz, The Presidency of John Adams 307–33 (1957).

222. See Alexander DeConde, The Quasi-War 36–73 (1966).

223. On the creation and conflict surrounding the army, see Kohn, supra note 217, at 193–255. On the controversy surrounding the Alien and Sedition Acts, see Malone, supra note 217, at 359–409; John C. Miller, Crisis in Freedom (1951); James Morton Smith, Freedom's Fetters (1956).

224. This last point is argued particularly well in Sharp, supra note 214, at 187–225.

225. As discussed below, infra notes 240–242 and accompanying text, a body of recent work challenges whether we can talk properly about "political parties" in the 1790s. This is important work, but we must be careful lest it lead us to overlook the important changes that occurred in the conduct of politics during this decade. The debate among historians over whether there were parties in the early republic tends to be waged against a set of background assumptions—invariably left implicit—about what a political party "is." Measured against such preconceived standards, the fledgling organizations of the 1790s may fall short (or they may not, depending on the standards). For present purposes, the problem is immaterial. What matters here is that, as explained below, under the pressure of national politics, politicians in the 1790s experimented with and developed new ways to

even as the emerging Federalist and Republican parties exacerbated popular discontent, they helped simultaneously to channel that discontent back into the system. Parties grew alongside the escalating series of political controversies—extending their organization and refining their programs in a competitive effort to gain control of the foundering ship of state.[226] When disgruntled citizens began murmuring about secession and civil war, party leaders were able to encourage them instead to turn to the polls by offering supporters a national organization capable of formulating positions, managing election campaigns, and arranging the government to insure that the party's program was implemented.[227]

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coordinate their actions in order to define issues, shape public awareness, wage election campaigns, and organize government on a continental scale. Along the way, they successfully created a workable machinery to manage national politics—a machinery the participants themselves called a "party" (albeit sometimes as an epithet and almost always with discomfort or guilt). My use of the term "party" or "parties" below refers to this machinery, without any explicit or implicit representations about the extent to which these early formations prefigure or anticipate the rather different political organizations of a later age.

226. The literature on the development of parties after 1789 is enormous. The most useful treatment remains Noble Cunningham, The Jeffersonian Republicans, The Formation of Party Organization, 1789–1801 (1957) [hereinafter Cunningham, The Jeffersonian Republicans], which carefully delineates the early gropings for organizational form. Useful collections of essays on the first American political parties are found in The First Party System: Federalists and Republicans (William Nisbet Chambers ed., 1972); and The Federalists vs. The Jeffersonian Republicans (Paul Goodman ed., 1967). The best way to understand the dynamics of early party formation, however, is by examining developments at the state level, a task aided by numerous excellent studies of the process in individual states. See James M. Banner, Jr., To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789–1815 (1970); Paul Goodman, The Democratic-Republicans of Massachusetts: Politics in a Young Republic (1964); George R. Lamplugh, Politics on the Periphery: Factions and Parties in Georgia, 1783–1806 (1986); Richard P. McCormick, The History of Voting in New Jersey, 1664–1911 (1953); Lisle A. Rose, Prologue to Democracy: The Federalists in the South, 1789–1800 (1968); Harry Marlin Tinkcom, The Republicans and Federalists in Pennsylvania, 1790–1801: A Study in National Stimulus and Local Response (1950); Alfred F. Young, The Democratic Republicans of New York: The Origins, 1763–1797 (1967); Bernard Fay, Early Party Machinery in the United States: Pennsylvania in the Election of 1796, 60 Penn. Mag. Hist. & Bio. 375 (1936); Norman K. Risjord & Gordon DenBoer, The Evolution of Political Parties in Virginia, 1782–1800, 60 J. Am. Hist. 961 (1974). The discussion below draws generally on these sources.

227. See, for example, Thomas Jefferson's correspondence with John Taylor of Caroline in the late spring of 1798. Depressed by the apparent inability of Republicans to dislodge the Federalists from power, Taylor had apparently written to some third party that "it was not unwise now to estimate the separate mass of Virginia and North Carolina, with a view to their separate existence." Letter from Thomas Jefferson to John Taylor of Caroline (June 1, 1798), *in* 7 The Writings of Thomas Jefferson 263 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1896). Upon seeing this, Jefferson took it upon himself to write Taylor to advise patience and a turn to the polls, which would soon end "the reign of witches." Id. at 265. See also the pamphlet published by George Nicholas of Kentucky in January, 1799, to assure critics that the Kentucky Resolves did not mean that the people of Kentucky were contemplating either secession or improper opposition to federal laws. Frank M. Anderson, Contemporary Opinion of the Virginia and Kentucky Resolutions, 5

It was the replacement of traditional forms of politics with the new rituals of partisan elections that made constitutional democracy on a large scale functional.[228] The emergence of party politics gave public debate on a continental scale the structure and coherence necessary to create tolerable consensus on an agenda, while offering citizens opportunities to participate that facilitated their acceptance of the system and its laws. The rudimentary parties that emerged by 1800 by no means guaranteed stability to the young republic, but they did mark a dramatic change in the structure of constitutional government—answering the Anti-Federal challenge by providing the institutional support needed to sustain republican government on an extended scale.[229]

The initial impetus for party development came from the center: Treasury Secretary Hamilton began as early as 1790 to forge connections among the members of Congress and between Congress and the Treasury in order to obtain passage of his program for economic development; Madison and Jefferson countered by mimicking Hamilton's efforts in order to defeat his plans.[230] As the competition grew more heated, both sides found it necessary to reach out to the countryside for support.[231] Given the lingering hierarchical structure of eighteenth-century political society, and the still primitive state of the media, this naturally meant appealing to state and local political leaders to build a stable following.[232] None of this was done with the idea of establishing political parties, of course, but with each successive controversy, these tentative contacts grew firmer and eventually a stable ideology and internal identity evolved.[233] Particularly after the election of 1796, fledgling party managers looked for ways to organize and coordinate campaigns: writing the first party

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Am. Hist. Rev. 225, 237–38 (1899) (quoting A Letter from George Nicholas of Kentucky to His Friend in Virginia (1799)).

228. This is the thesis of William Nisbet Chambers's classic, Political Parties in a New Nation: The American Experience, 1776–1809 (1963). See also Clinton Rossiter, Parties and Politics in America 1 (1960) ("No America without democracy, no democracy without politics, no politics without parties, no parties without compromise and moderation."); Paul Goodman, The First American Party System, *in* The American Party Systems: Stages of Political Development 61–64 (William Nisbet Chambers & Walter Dean Burnham eds., 1967) ("By providing orderly means of determining the majority's will and enabling conflicting forces to settle their differences peacefully, the first political parties authenticated government's claims to represent the people.").

229. See Larry Kramer, After the Founding: The Constitutional Role of Political Parties (manuscript on file with author).

230. See William Nisbet Chambers, Party Development and Party Action, *in* The First Party System, supra note 226, at 48–53; John Zvesper, Political Philosophy and Rhetoric: A Study of the Origins of American Party Politics 75 (1977).

231. See J.R. Pole, Political Parties and the Right to Vote, *in* The Federalists vs. the Jeffersonian Republicans, supra note 226, at 85–86.

232. See id.; Roland M. Baumann, Philadelphia's Manufacturers and the Excise Taxes of 1794: The Forging of the Jeffersonian Coalition, 106 Pa. Mag. Hist. & Biography 3, 4 (1982); Noble E. Cunningham, Jr., John Beckley: An Early American Party Manager, 13 Wm. & Mary Q. 40, 47–50 (1956).

233. See Cunningham, The Jeffersonian Republicans, supra note 226, *passim.*

tickets and party platforms, imposing the first weak forms of party discipline, and making the first uses of patronage. The result was a loosely integrated network of state and local alliances that linked politicians at these levels to politicians in the federal government working to advance a shared agenda.[234]

With this development, the Founders' vision of federalism self-destructed. We see the effects clearly in the controversy over the Alien and Sedition Acts, the paramount crisis of the early Republic. At the time, these Acts were thought to pose problems of states' rights and federalism as much as individual liberty, particularly insofar as Congress had asserted authority to replace the general common law of seditious libel.[235] Madison and Jefferson responded to the threat by doing precisely what Madison had urged in *The Federalist Nos. 45–46*, precisely what Virginians had done when Parliament adopted the Stamp Act in 1765, precisely what Americans had *always* done when faced with an overreaching central government: They turned to their state legislatures to rally the opposition. Yet despite the fact that these federal laws plainly intruded on states' rights, and despite the fact that they were enacted for the purpose of crushing opposition to a federal administration that seemed determined to maintain itself in power at all costs, the Virginia and Kentucky Resolves did not signal a "general alarm"; "[e]very Government" did not "espouse the common cause."[236] A correspondence was indeed opened, but it was one in which the legislatures of ten other states told Virginia and Kentucky to mind their own business, while the remaining four took no action at all.[237] The reason was simple. The Virginia and Kentucky Resolves excited no support from legislatures in the other states because these legislatures were controlled or dominated by Federalists.[238] Political parties had frustrated the Founders' expectations by making the state legislatures unreliable watchdogs.

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234. See id. at 115.

235. See Kentucky Resolutions of 1798 and 1799, *in* 4 Elliot, supra note 150, at 540; Madison's Report on the Virginia Resolutions, *in* 4 Elliot, supra note 150, at 546; Sharp, supra note 214, at 193–97.

236. The quoted phrases are from The Federalist No. 46 (James Madison), supra note 88, at 320 (quoted supra text accompanying note 188).

237. See Elkins & McKitrick, supra note 201, at 726; Sharp, supra note 214, at 200; Answers of the Several State Legislatures, *in* 4 Elliot, supra note 150, at 532–39.

238. Federalist control of the state legislatures is not the whole story, of course. Tempers—and rhetoric—were running very high (as is always the case during a war fever), making it easy for Federalists to portray the Virginia and Kentucky Resolves as acts of disloyalty and to fasten the label "traitor" on anyone who supported them. Outside the Jeffersonian strongholds of Virginia and Kentucky, Republicans had to tread cautiously when objecting to the Alien and Sedition Acts. See Anderson, supra note 227, at 45–63, 225–37. The abject failure of the Resolves is, nevertheless, mainly a product of Federalist domination of the state legislatures, and even the muffling of Republican dissent outside Virginia and Kentucky resulted from the Federalists' ability successfully to employ the language of treason.

But if parties were a problem for federalism as the Founders had conceived it in 1788, they were also a solution. Realizing that state representatives could no longer necessarily be counted on to champion the cause of the states, Republican leaders changed strategies. They abandoned the effort to check Congress through the agency of formal state institutions and turned instead to the fledgling Republican Party—using the Virginia and Kentucky Resolves (together with objections to high taxes, big government, weak foreign policy, corrupt finances, and the Federalists' aristocratic style) as propaganda to galvanize support in a successful national election campaign.[239]

Thus was born a new kind of federalism, an unplanned-for system that mediated disputes respecting the authority of state and federal governments through institutions and institutional arrangements that had not been imagined when the Constitution was ratified. The key feature of this new federalism was the unique American system of decentralized national political parties, which linked the fortunes of federal officeholders to state politicians and parties and in this way assured respect for state sovereignty.

A note of caution: We must not exaggerate the extent to which these early parties functioned as political organizations. A lingering sense that parties were evil, combined with lack of experience and the residue of eighteenth-century norms of honor and deference, retarded the emergence of fully professionalized modern party formations for many years.[240] In terms of corporate structure, these first parties turn out in hindsight to have been a transitional phase on the road to modern parties—something between an informal affiliation of like-minded gentlemen and the institutionalized structures of a later day.[241] Accidental creations that were not designed to serve the purposes they ended up serving (that, indeed, were not precisely "designed" at all), the Federalist and Republican parties were nevertheless sufficiently cohesive to organize

239. The best account of the Republican campaign of 1800 is Cunningham, The Jeffersonian Republicans, supra note 226, at 144–229.

240. See M.J. Heale, The Making of American Politics, 1750–1850 79 (1977); Major Wilson, Republicanism and the Idea of Party in the Jacksonian Period, 8 J. Early Republic 419, 419–21 (1988).

241. This important qualification has been most powerfully developed in the work of Ronald Formisano. See Ronald P. Formisano, Federalists and Republicans: Parties, Yes—System, No, *in* The Evolution of American Electoral Systems 33, 33–35 (Paul Kleppner et al eds., 1981); Ronald P. Formisano, Deferential-Participant Politics: The Early Republic's Political Culture, 1789–1840, 68 Am. Pol. Sci. Rev. 473 (1974). Recent work has deepened our understanding of the critical differences between the organizations that emerged in the 1790s and the more familiar parties that emerged during the Jacksonian period. See Joanne B. Freeman, The Election of 1800: A Study in the Logic of Political Change, 108 Yale L.J. 1959, 1968–82 (1999); Joanne B. Freeman, Affairs of Honor: Political Combat and Character in the Early Republic (1998) (unpublished Ph.D. dissertation, Univ. of Virginia) (on file with author); Jeffrey L. Pasley, "Artful and Designing Men": Political Professionalism in the Early American Republic, 1775–1820 (1993) (unpublished Ph.D. dissertation, Harvard University) (on file with author).

politics in an extensive republic, and to do so in a way that gave state and local governments a powerful voice in national politics.[242]

The first parties were not long-lived.[243] The Federalists never recovered from their defeat in 1800, and, unable to remove the stain of treason associated with the Hartford Convention, the Federalist Party disintegrated after 1817. Republicans, in the meantime, lacking effective competition and handicapped by James Monroe's misguided quest for party reconciliation, degenerated into squabbling factions and ceased to function as an effective national organization a few years later. Within a decade, however, a second party system—this one considerably more structured than the first—had begun to emerge, reassuming the functions of its predecessor as a device for organizing American politics.[244]

Like the first party system, this second system was highly decentralized: a loosely integrated coalition of state and local organizations knit together by a shared interest in the outcome of national (and especially presidential) elections.[245] As had been true under the first system, then, it was through party politics and party competition that questions of federalism were contested and resolved. The extent to which the new system replicated and meliorated the old one is most clearly visible in the contrast between the two major controversies of the early Jacksonian era: the battle over tariffs and the clash over the national bank. Neither conflict was resolved by judges. The tariff question was never even presented for judicial determination, and when the bank issue finally forced its way before the Supreme Court, the Justices held that Congress had the power to create a national bank and shoved the issue back into the domain of politics.[246] Leaders of the anti-tariff movement resorted to the Founders' model and sought to mobilize support through the state legislatures. But South Carolina's nullification proclamation was even less successful than the Virginia and Kentucky Resolutions, in large part because anti-tariff forces were operating outside the newly emergent party system.[247] Interests aligned against the Second Bank of the United States, in contrast,

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242. See William Nesbit Chambers, Political Parties in a New Nation: The American Experience, 1776—1809, 14–16 (1963) (describing how parties developed in the early years of the republic to make politics manageable); Kramer, Understanding Federalism, supra note 216, at 1522–30 (describing how the structure of American parties gave state and local officials power to protect state governments from federal overreaching). For further developments in party organization in the years after the election of 1800, see Noble E. Cunningham, Jr., The Jeffersonian Republicans in Power: Party Operations, 1801–1809 (1963).

243. On the demise of the first party system, see McCormick, supra note 208, at 22–31; Goodman, supra note 228, at 85–89.

244. See McCormick, supra note 208, *passim*.

245. See McCormick, supra note 208, at 329–56; William G. Shade, Political Pluralism and Party Development: The Creation of a Modern Party System, 1815–1852, *in* The Evolution of American Electoral Systems, supra note 241, at 84–98.

246. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

247. The two best studies of the nullification controversy are William F. Freehling, Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836 (1966)

worked successfully for its demise through the Democratic Party.[248] A new system of federalism had matured.

III. Federalism American Style

A. *The* Real *"Political Safeguards" of Federalism*

The political system of federalism into which the United States stumbled during these first decades has proved to be remarkably durable and effective. For most of our history, the decentralized American party systems completely dominated the scene and protected the states by making national officials politically dependent upon state and local party organizations. These organizations provided the institutional framework for managing politics at every level of government, and, by linking the fortunes of officeholders at different levels, they fostered a mutual dependency that induced federal lawmakers to defer to the desires of state officials and state parties.

Obviously this system failed spectacularly at least once, and the significance of the Civil War should in no way be minimized. But no institutional structure could have handled the intense political stress produced by slavery, and just as noteworthy as the breakup of the Union in 1861 was the almost seamless resumption of party politics after Reconstruction. Sectional conflict produced both the War and a major realignment in party coalitions, but it scarcely disturbed the basic organizational pattern of party government. Indeed, while causes of the Civil War were many and complex, the most important event precipitating the actual outbreak of hostilities was probably the 1860 rupture in the Democratic Party, which deprived the nation of its only remaining institution capable of cobbling together a national governing coalition.[249] As significant as the Civil War was in expanding the powers potentially available to Congress, it left intact (and remarkably unaffected) the basic political process through which any exercise of these powers was determined.

I have explored how political parties mediate federalism in prior work and so will only summarize (with some modest updating) the results of that earlier study here.[250] Two critical features of American parties, both relatively constant across historical party systems, have shaped the parties' role in federalism. First, American parties are not especially programmatic, which is to say they are more concerned with getting peo-

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and Richard E. Ellis, The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis (1987).

248. For studies of the so-called bank war, see Hammond, supra note 216, at 326–450; Robert V. Remini, Andrew Jackson and the Bank War (1967). While radically different in their explanation of the underlying political dynamics that drove this controversy, the role of party is pronounced in both accounts.

249. See Roy F. Nichols, The Disruption of American Democracy (1948).

250. See Kramer, Understanding Federalism, supra note 89, at 1520–42.

ple elected than with getting them elected for any specific purpose.[251] Party platforms are seldom taken seriously, and successful candidates abandon or ignore controversial planks with relative ease. The parties must stand for something, of course, because otherwise they would have no appeal whatsoever for voters. But what they stand for is broad enough and flexible enough to leave room for enormous disagreement, and when ideology conflicts with electoral success, it is usually ideology that yields. Second, American parties are basically non-centralized: confederations of national, state, and local cadres whose most conspicuous features are flabby organization and slack discipline. In comparison to the degree of central control and party discipline one finds among European parties, Morton Grodzins quipped, the United States has virtual "antiparties"—like antimatter to matter, the very opposite of a party.[252]

This curious combination of characteristics—traits that make American parties unique in the world—has created a political culture in which members of local, state, and national networks are encouraged, indeed expected, to work for the election of candidates at every level.[253] This, in turn, promotes relationships and establishes obligations among officials that cut across governmental planes. The expectation of aid and support exists even in the face of quite serious disagreements about policy, which the party encourages setting aside in the interest of winning.[254] Nor does the obligation to support party candidates end on election day, for staying in power constrains successful candidates to work with their counterparts at other levels. A member of Congress, even a President, will need to help state officials either as a matter of party fellowship or in order to shore up the willingness of state officials to offer support in the future; the same thing is true in reverse. The whole process is one of elaborate, if diffuse, reciprocity: of mutual dependency among party and elected officials at different levels; of one hand washing the other. It is this party-fostered system of mutual dependency that explains the success of American federalism despite the historical absence of judicial protection and the failure of other constitutional devices meant to protect state institutions.

The most important setting in which these relationships are formed is, naturally, during elections. For much of our history (from at least Thomas Jefferson's time until the late 1960s), getting elected to federal office was simply impossible without the enthusiastic backing of state and

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251. See Paul Kleppner, Critical Realignments and Electoral Systems, *in* The Evolution of American Electoral Systems, supra note 241, at 3, 3–4 (arguing the parties' "preoccupation with the tasks of subgroup integration and coalition management has virtually excluded any sustained concern by parties for policy articulation").

252. Morton Grodzins, The American System: A New View of Government in the United States 254, 284 (1966).

253. See William H. Riker, The Development of American Federalism 84–85 (1987); Rossiter, supra note 228, at 11.

254. See Leon D. Epstein, Political Parties in the American Mold *passim* (1986); Kramer, Understanding Federalism, supra note 89, at 1524–28.

local party officials.[255] Learning what people wanted and what issues mattered to them demanded a kind of presence in the community that only state and local parties possessed. Campaigning was a labor-intensive activity, requiring nothing so much as bodies to hand out pamphlets; to canvass door-to-door; to stage rallies and torch-light parades; and to make stump speeches in parks, on corners, or near polling places. Few candidates could muster the resources necessary to conduct this sort of campaign on their own, and national party organizations were equally incapable of delivering such services. Only state and local parties had the requisite community contacts, and only these parties were capable of furnishing sufficient numbers of volunteers through their extensive patronage systems. This, in turn, gave state and local politicians and party leaders—who were and still are typically one and the same—enormous influence in Washington.[256]

Successive waves of reform maimed and nearly killed this system over the course of the twentieth century's first six decades. Progressive reformers succeeded in instituting civil service systems to curtail the use of patronage, and they reduced party control over candidate selection by mandating primaries for state and federal offices and by making most local elections formally nonpartisan.[257] The New Deal further weakened the party system by creating government bureaucracies to assume the social welfare functions that had formerly been handled by parties at the community level.[258] A third and still more devastating blow was delivered by technology: the invention and spectacular growth of television, of computer-based survey techniques, and of direct mail and other sophisticated means of reaching voters with minimal manpower.[259] These innovations, in turn, created a market for independent professional consultants, enabling candidates for the first time to hire their own public

255. See Barbara G. Salmore & Stephen A. Salmore, Candidates, Parties and Campaigns: Electoral Politics in America 19–38 (2d ed. 1989); Gil Troy, See How They Ran: The Changing Role of the Presidential Candidate (1991).

256. State and local parties also exerted influence over federal administration through spoils rotation, providing personnel to staff local federal post offices, land offices, and customhouses. National officials were, in effect, representatives of state party machines, and federal patronage appointees became the ether connecting national government to the states. See Skowronek, supra note 65, at 25.

257. See Epstein, supra note 254, at 124–40.

258. During the period of mass parties in the nineteenth century, patronage meant more than government jobs. State and local parties also managed private welfare networks: In exchange for loyal support, the ward boss or precinct captain would help constituents find jobs in the neighborhood or arrange for them to receive food and shelter during a bad stretch. The creation of a governmental welfare bureaucracy rendered these services obsolete. See Xandra Kayden & Eddie Mahe, Jr., The Party Goes On: The Persistence of the Two-Party System in the United States 45–46 (1985); Ruth K. Scott & Ronald J. Hrebenar, Parties in Crisis: Party Politics in America 98–100 (1979).

259. See Scott & Hrebenar, supra note 258, at 173–82; Robert J. Huckshorn & John F. Bibby, State Parties in an Era of Political Change, *in* The Future of American Political Parties, 70, 84–90 (Joel L. Fleishman ed., 1982).

relations experts, pollsters, advertising specialists, spin doctors, and the like.[260] Finally, every aspect of the campaign process was profoundly affected by changes in election financing, which enabled candidates to raise large sums of money outside the party and without its aid.[261]

By the 1970s, the cumulative effect of these changes (together with internal party reforms designed to democratize party processes) had pundits and political scientists alike ready to declare the parties dead.[262] But the assumptions underlying their predictions turned out to be faulty, and the consensus today is that parties are not dying after all—that they have, in fact, come back strong, albeit in a somewhat different guise.[263] More voters than ever call themselves "independent," but most actually cast their ballots in ways that are indistinguishable from voters who consider themselves to be Democrats or Republicans.[264] And no one (or so few as to be practically the same thing) runs for office at either the state or the federal level without being attached to one of the two major parties.[265]

The parties redeemed themselves by changing what they could offer candidates to make themselves useful in modern campaigns.[266] They established permanent headquarters and hired professional staff to organize fundraising efforts, coordinate spending by PACs, and assist candi-

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260. See Scott & Hrebenar, supra note 257, 164–70; Huckshorn & Bibby, supra note 258, 84–90.

261. See Epstein, supra note 254, at 273–94; Frank J. Sorauf, Inside Campaign Finance: Myths and Realities 5–6 (1992).

262. See David S. Broder, The Party's Over: The Failure of Politics in America 180–84 (1972); Walter Dean Burnham, The Current Crisis in American Politics 100–15 (1982); Gerald M. Pomper, The Decline of the Party in American Elections, 92 Pol. Sci. Q. 21, 23 (1977).

263. See, e.g., Epstein, supra note 254 at 346 (parties "have developed significant . . . roles within the candidate-centered pattern"); Gary C. Jacobson, The Politics of Congressional Elections 71–77 (3d ed. 1992) (describing various important functions performed by parties); Malcolm E. Jewell & David M. Olsen, American State Political Parties and Elections (Dorsey Press rev. ed. 1982) (comparing state political parties and election systems); Kayden & Mahe, supra note 258; Cornelius P. Cotter & John F. Bibby, Institutional Development of Parties and the Thesis of Party Decline, 95 Pol. Sci. Q. 1 (1980) (arguing that parties continue to influence state and local organizations). But see Martin P. Wattenberg, The Decline of American Political Parties, 1952–1994 (5th ed. 1996) (defending the thesis that party decline continues).

264. See Bruce E. Keith et al., The Myth of the Independent Voter 60–75 (1992).

265. Even in technically nonpartisan local elections, where party affiliation does not appear on the ballot, successful candidates are invariably associated with one of the two major parties. See Epstein, supra note 254, at 127–28.

266. The developments described in this paragraph are discussed in Epstein, supra note 254, at 200–25; Jacobson, supra note 263, at 79–86; and Kayden & Mahe, supra note 258, at 74–93. While these changes began at the national level, state party organizations quickly caught on, in many instances using "soft money" funneled to them from the national party organization. See Cornelius P. Cotter et al., Party Organizations in American Politics 13–39 (Gerald M. Pomper ed., 1984); Robert J. Huckshorn, Party Leadership in the States 54–57, 254, 263–66 (1976); Kayden & Mahe, supra note 258, at 94–122; Timothy Conlan et al., State Parties in the 1980s: Adaptation, Resurgence and Continuing Constraints, 10 Intergovernmental Persp., Fall 1984, at 6, 23 (1984).

dates in advertising and polling; they purchased computers for candidates to use for everything from word processing and accounting to analyzing survey data and donor information. They compiled up-to-date intelligence on voter attitudes, using modern market-research techniques, and assembled mailing lists and other information needed to reach voters. They began to manage get-out-the-vote drives, organize voter education programs and mount issue-advocacy advertising campaigns. Candidates could, perhaps, do some of this work on their own, but few fail to accept substantial assistance from one of the parties, even though this means surrendering some of their independence. Add to this the need for membership in a party if one wants to accomplish anything while in office (because true independents must expect bad committee assignments and low priority on any queue for introducing new legislation), and the parties' continuing importance becomes entirely understandable.

No one doubts that party politics has changed a lot during the past century. Yet while parties and campaigns are vastly different enterprises than they were fifty or a hundred years ago, the changes have not been so important from the perspective of federalism. After all, American parties have been historically important for federalism because of their *weakness.* There never was a controlling clique sitting atop the party pyramid, smoking cigars in back rooms and self-consciously brokering federal-state relations; no one made and imposed deliberate decisions about how to allocate power. The parties influenced federalism by establishing a framework for politics in which officials at different levels were dependent upon each other to get, and stay, elected. Candidates may need the parties somewhat less than they used to; state parties may be somewhat less powerful than they were formerly; but there is no doubt that political parties continue to play a crucial role in forging links between officials at the state and federal level. The political dependency of state and federal officials on each other remains among the most notable facts of American government.[267]

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267. Elections and narrow self-interest are not the only factors making state and federal officeholders dependent on each other. More broadly, the parties produced and have nourished a political culture in which fellow party members feel obliged to aid and work with each other. Party affiliation creates an affinity that is partly constituted by the threat of sanction or promise of gain but that transcends particular calculations of individual interest. Members share a sense of what John Kingdon has called intraparty "compatriot feeling" that makes working together natural. John W. Kingdon, Congressmen's Voting Decisions 122 (2d ed. 1981). Democrats give other Democrats a consideration they deny to Republicans just because they are Democrats; Republicans do the same. These feelings are, to be sure, far from absolute. American parties are, as noted above, notoriously lax in their discipline, and everyone understands that members will not always toe the party line. Nevertheless, on most matters most of the time—and especially when it comes to the nitty gritty business of daily administration—party affiliation matters a great deal and remains the most important single predictor of voting behavior. See Epstein, supra note 254, at 62–69; Kingdon, supra, at 120–23. The importance of party in fostering these informal working relationships is not limited to officials on the same plane

Moreover, while the parties' effectiveness in safeguarding state government may have been compromised to some degree by twentieth-century developments, these same developments have yielded new "political" safeguards that assure and in some respects may even strengthen the states' voice in national politics. The New Deal weakened the parties, but it also spawned a bureaucratic structure that plays a prominent supporting role in federalism. We have long recognized how the interdependence of the legislative and administrative processes gives administrators a voice and a role in lawmaking.[268] Because the federal government depends on state administrators to oversee or implement so many of its programs, states have been able to use their position in the administrative system to protect state institutional interests in Congress.[269]

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of government; like other party-inspired bonds, it cuts across tiers. Cf. Eric L. McKitrick, Party Politics and the Union and Confederate War Efforts, *in* The American Party Systems, supra note 228, at 117–51 (demonstrating how the Republican Party enabled Lincoln to work with state governors in a way that Jefferson Davis could not match in the partyless South and that contributed strongly to the success of the Union war effort).

268. Most statutes are sufficiently flexible to give administrators room to interpret, and so to change meaning and make law. New legislation is often generated, and just as often killed, from within the administrative process itself. Lawmakers and administrators work together on a regular basis: Administrators report to Congress; they do favors for members of Congress (helping lawmakers do favors for constituents); they participate in an annual or biannual budget process that involves extensive negotiations. Contacts like these engender long-term relationships that promote familiarity and necessarily command a certain amount of respect and attention.

269. Back in the 1960s, Morton Grodzins coined the phrase "marble-cake federalism" to describe his conclusion that "[n]o important activity of government in the United States is the exclusive province of one of the levels, not even what may be regarded as the most national of national functions, such as foreign relations; not even the most local of local functions, such as police protection and park maintenance." Grodzins, supra note 252, at 8. He and his students offered numerous examples and case studies to support this conclusion. See id. *passim*; Daniel J. Elazar, American Federalism: A View From the States 51–80 (3d ed. 1984) (summarizing the literature with citations to many of the major studies).

Subsequent work has raised substantial questions about the effectiveness and efficiency of these intergovernmental programs, though the most frequent criticism is that federal officials find it difficult to control how state officials administer federal funds. See, e.g., Eugene Bardach, The Implementation Game: What Happens After a Bill Becomes a Law 98–141 (1977) (discussing inherent obstacles to centralized control over local agents); Martha Derthick, New Towns In-Town: Why a Federal Program Failed 83–91 (1972) (arguing that failure to implement federal housing programs in the 1970s can be attributed to limited ability of federal officials to control local ones); Jeffrey L. Pressman & Aaron Wildavsky, Implementation: How Great Expectations in Washington Are Dashed in Oakland 87 (3d ed. 1984) (attributing failure of business loans program to "inherent administrative antagonism between federal agencies, and the uncertainty of local action"); Martha Derthick, Professional Fiefdoms Appraised: The Case of Social Services, 6 Publius, Spring 1976, at 121 (addressing generalist as compared to specialist administration of government function). More recent work suggests that, over time, this system may have developed into something more durable and dependable than these earlier studies suggested. See Paul E. Peterson et al., When Federalism Works 9 (1986). In any event, this debate over the efficiency of intergovernmental programs, if not beside the point being made here, tends to strengthen it—the point being that the mixed structure of modern

Obviously, the federal government is senior partner in this joint venture, and many scholars have therefore assumed that state and local officials have no real power—that they participate as lowly functionaries subject to unrestricted supervision (or funding withdrawal) from federal superiors.[270] Realistically, however, Congress can neither abandon politically popular programs nor "fire" the states and have federal bureaucrats assume full responsibility for them. The federal government needs the states as much as the reverse, and this mutual dependency guarantees state officials an influential voice in the lawmaking and budgetary processes.[271]

The interlocking nature of both the political parties and the administrative bureaucracy has, in addition, contributed to the development of a broader political culture that in various ways favors the states in national politics. State governments did not sit idly by while organized private interest groups and lobbies proliferated after World War II; they formed associations of their own to lend weight and focus to the states' voice in

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bureaucratic federalism affords state officials significant opportunities to protect themselves in and from national politics.

At one time, it was popular to argue that the rise of the administrative state strengthened federalism in yet another way: by increasing the reliance of government generally on various sorts of professional expertise. Because technocrats at one level typically find it easier to work with counterparts at a different level than with legislative or executive officials at their own, the bureaucratic culture of specialization was thought to fortify the interdependency of state and federal administration. See Samuel H. Beer, The Modernization of American Federalism, 3 Publius, Fall 1973, at 49, 75; Samuel H. Beer, Political Overload and Federalism, 10 Polity 5, 9–10 (1977). This tendency was said to be reinforced by competition among programs at each level for funds, jurisdiction, and political support, because this induces experts at different levels to band together and support one another. Federal, state, and local housing officials, for example, will work to see that housing gets more money than, say, hospitals or schools. The resulting network was called "picket-fence" federalism, a reference to the way in which vertical connections between programs at different levels cut across horizontal connections among programs at the same level. See Terry Sanford, Storm Over the States 80 (1967); Deil S. Wright, Revenue Sharing and Structural Features of American Federalism, 419 Annals 100, 109–110 (1975). A substantial body of recent work questions these assumptions, arguing that bureaucratic specialization may foster close cooperation among experts at the state and federal level, but in a way that undermines the power of elected officials at both levels. This concern was first raised by Samuel Beer, an early proponent of the picket fence. See Samuel H. Beer, Federalism, Nationalism, and Democracy in America, 72 Am. Pol. Sci. Rev. 9 (1978). It has since been echoed and supported by a substantial body of research. See Timothy Conlan, From New Federalism to Devolution 2 (1998); David B. Walker, The Rebirth of Federalism 284–97 (1995).

270. See Vincent Ostrom, The Meaning of American Federalism 115 (1991) (arguing that the transfer of authority to executive instrumentalities weakens control); Richard B. Stewart, Federalism and Rights, 19 Ga. L. Rev. 917, 963 (1985) (arguing that the administrative system "circumvents many of the political safeguards . . . that are supposed to make national policies sensitive to state and local concerns").

271. See Donald F. Kettl, Government by Proxy: (Mis?) Managing Federal Programs 50–54 (1988); Donald F. Kettl, The Regulation of American Federalism 37–38 (1983).

politics. The influence of this "intergovernmental lobby" is, in fact, widely acknowledged and respected in Washington.[272]

More important, states have remained the primary training ground for federal officials. A very high percentage of employees in all three branches of the federal government began their careers working for states. Many rose to elected positions high in state government before moving to the federal system. Fully half of the members of the House of Representatives, for example, began their careers as state legislators, and men and women recruited and trained at the state level are found throughout the federal bureaucracy.[273] With views shaped by this background and experience, these former state officials remain aware of and sympathetic to the concerns of state institutions—a feeling undoubtedly reinforced by continuing ties to friends and former colleagues still in the state system. This sort of connection, for example, probably accounts for the intergovernmental lobby's record of success.

In measuring the overall effectiveness of these numerous safeguards—political parties, the administrative bureaucracy, the intergovernmental lobby, states as recruiting and training grounds, etc.—it is important to recognize the extent to which they overlap and reinforce one another. Recruitment for state government is accomplished primarily through state and local parties; the men and women thus enlisted make connections and establish friendships with others inside and outside the party administering both state and federal programs. State politicians can earn reputations in the party by doing work for intergovernmental lobbies or favors for congressmen and other federal officials. Ambitious bureaucrats seek advancement through the party as well as within civil service ranks. And so on. Each facet of the system is intertwined with others, creating an intricate web whose tangled threads join to ensure its long-term durability, and in which states remain a powerful locus of political and lawmaking authority.

The Founders envisioned a political system that was, by modern standards (though not by the standards of their own century), exceedingly

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272. The most important associations established by state and local officials in the post-New Deal era include the Council of State Governments, the National Governors Association, the National Conference of State Legislators, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, and the International City Management Association. See Wright, supra note 269, at 110–11. Many commentators credit these organizations with having considerable power and influence in Congress. See Totton James Anderson, Pressure Groups and Intergovernmental Relations, *in* Cooperation and Conflict: Readings in American Federalism 553, 553–62 (Daniel J. Elazar et al. eds., 1969); Elizabeth Garrett, Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995, 45 U. Kan. L. Rev. 1113, 1120–28 (1997); Wright, supra note 269, at 113. For a particularly useful analysis, together with an empirical study of the ability of state political actors to protect state interests in Washington, see John Douglas Nugent, Federalism Attained: Gubernatorial Lobbying in Washington as a Constitutional Function (1998) (unpublished Ph.D. dissertation, University of Texas (Austin)) (on file with author).

273. See Elazar, supra note 269, at 256; Jacobson, supra note 263, at 75.

simple. When it came to federalism, they expected Congress to be kept in check through the direct political agency of the states, using the same techniques that had been successfully employed against Parliament and the Continental Congress. What they got instead was a system reliant on parties to serve as a kind of political circulatory system, connecting and breathing life into the skeletal framework created in the Constitution. Yet as much as this system differed from the one conceived by the men who wrote and ratified the new frame of government, it preserved one crucial property: It protected the states by ensuring their ability to influence national politics. Two centuries of evolution have made the system vastly more complicated still, but this indispensable attribute has endured. The states remain safe within a political system that is fundamentally structured to ensure their long-term political vitality.

It has not hurt that for much of our history—most of the nineteenth century and a considerable part of the twentieth—the dominant political party was self-consciously dedicated to a states' rights philosophy. But parties adopt this philosophy for a reason—namely, that it has had, and continues to have, popular appeal. Keith Whittington argued in a recent article that the historically alternating centralizing and decentralizing trends in American government are a product of shifts in political values and the socioeconomic environment.[274] This is undoubtedly true, and it accounts in large part (as Whittington explains) for the post-1980 trend to restore authority to the states. Yet is not the success of American federalism as an institution precisely that it has always been, and still is, capable of responding to these shifts? American federalism "works," in other words, because it is able to channel power up or down, as the people choose. The states do not need an untouchable domain of judicially protected jurisdiction; they need only the capacity to compete effectively for political authority, something the structure of American politics guarantees.

In *The Federalist No. 46*, Madison wrote:

> If therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result, from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.[275]

And so, too, the opposite case: If the people prefer, they should equally be able to "give their confidence" to their state governments. And so they have, as both history and recent events confirm; for "the people" have changed their mind on this issue from time to time, and the

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274. See Keith E. Whittington, Dismantling the Modern State? The Changing Structural Foundations of Federalism, 25 Hastings Const. L.Q. 483, 483–84 (1998).

275. The Federalist No. 46 (James Madison), supra note 88, at 317.

political system has responded—without any help from the courts, though sometimes over their interfering opposition.

B. *The Supreme Court's Game of Blind Man's Bluff*

So what should the Supreme Court do about federalism? To begin with, in thinking about the Court's proper role, we should avoid the mistake of speaking about "the" doctrine of judicial review, as if there were only one. We seem predisposed to think of judicial review in monolithic terms, as if courts either do or do not exercise review, and as if exercising review always means interpreting the Constitution to strike down any laws that the Justices believe are inconsistent with its provisions. This is a key argument for advocates of judicially enforced federalism, who invariably note that the Court aggressively reviews laws when it comes to separation of powers or individual rights, and say there is no reason to treat federalism as an "exception" subject to "second-class status."[276]

It takes only a moment, however, to realize that there is no single doctrine of judicial review. From "political questions" to rational basis review to weak and strong forms of intermediate scrutiny, from the Necessary and Proper Clause to the Equal Protection Clause to the Contracts and Takings Clauses and Section Five of the Fourteenth Amendment, constitutional law is filled with doctrines that require the Justices to defer in varying degrees to other decisionmakers acting in the realm of ordinary politics.

We tend to minimize the importance of these doctrines by ignoring their significance in theoretical discussions of the Court's role or by describing them as "exceptions" to some normal "rule" of judicial review, when the reality is simply that there are many doctrines of review—differing from one another depending upon the particular question or clause at issue and its particular history. Because the text says nothing about judicial review, doctrine here has evolved as a matter of customary constitutional law, which, not surprisingly, has yielded a multifaceted practice. Certainly the idea of judicial review has been enlarged since the Constitution was adopted. Yet to say that the Constitution limits power is not the same thing as saying that courts are responsible for enforcing the limits, and the Supreme Court has historically varied the scope of its responsibilities from context to context. There are areas in which the Court has exercised an aggressive brand of judicial review, as in policing state laws that arguably intrude on federal turf or efforts by Congress to extend its powers at the expense of the other branches. And there are areas in which the Court has historically exercised no or virtually no effective review, of which patrolling the limits of Congress's powers vis-à-vis the states has been perhaps the foremost example throughout our history.

Even apart from their functional justifications, the appearance of such differences is entirely natural. The Framers of the Constitution ex-

276. Yoo, supra note 14, at 1313.

pected, and may even have hoped, that judges would be active in reviewing the constitutionality of state legislation without at the same time anticipating a similar role for judges when it came to acts of Congress.[277] The same thing was true in other areas as well: Thomas Jefferson told Madison that he favored a Bill of Rights partly because of "the legal check which it puts into the hands of the judiciary," though Jefferson neither favored judicial review in general nor expected to see it in other areas.[278] Such disparate expectations for what courts should do when it came to different sorts of questions naturally shaped the early practice, which in turn affected subsequent developments.[279] As in every area of doctrine, different traditions and conventions evolved, and independent lines of authority branched and diverged. We need to recognize that there is nothing unusual or exceptional about this fact, which means, however, that the scope of judicial review in areas like separation of powers or individual rights may have little relevance when it comes to assessing the Court's practice in the historically distinct domain of federalism.

The current Supreme Court seems determined to become actively and aggressively involved in setting limits on Congress's power vis-à-vis the states. Thus, in recent decisions on a wide range of issues, the Court has apparently made protecting the states from Congress one of its top priorities,[280] a trend that shows no signs of abating.[281] The question is, why? The practical difficulties of working out the limits of Congress's power through litigation are depressingly familiar, having been reproduced

277. See supra notes 111–129 and accompanying text.

278. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* 14 The Papers of Thomas Jefferson 659 (Julian P. Boyd et al. eds., 1958). See David N. Mayer, The Constitutional Thought of Thomas Jefferson 258–65 (1994). Madison apparently had not thought about the role of the judiciary in enforcing individual rights during the ratification campaign, though Jefferson's argument persuaded him to offer the ability of judges "to resist every encroachment upon rights" as an additional reason to support amendments in the First Congress. James Madison, Speech in the House of Representatives (June 8, 1789), *in* 12 Papers of Madison, supra note 114, at 206–07. Jack Rakove notes that "however attractive this prospect seemed in the abstract, Madison did not expect the adoption of amendments to free judges to act vigorously in defense of rights—at least over the short run." Rakove, Original Meanings, supra note 33, at 335. On the emergence of judicial review in the area of individual rights generally, see Gordon S. Wood, The Origins of Vested Rights in the Early Republic, 85 Va. L. Rev. 1421 (1999).

279. Thus, Sylvia Snowiss argues persuasively that the first move in the development of modern judicial review—the move from a constitution as supreme "fundamental law" to our Constitution as "supreme ordinary law"—took place during the decades after 1810, in challenges to state laws under the Contracts Clause. Snowiss, supra note 80, at 172–75; see also supra notes 90–98. And she and others have charted the growth of judicial review in different contexts in the middle and late years of the nineteenth century. See Clinton, supra note 90, at 1–3; Snowiss, supra note 80, at 176–94; Christopher Wolfe, The Rise of Modern Judicial Review 3–11 (1994); Graber, supra note 56.

280. See supra note 13 and accompanying text.

281. Lower courts seem to have gotten the Court's message, and challenges to a huge number of additional laws are now making their way through the system. See Antony Barone Kolenc, Commerce Clause Challenges After *United States v. Lopez*, 50 Fla. L. Rev. 867, 931 (1998).

each time the Supreme Court has tried its hand at the problem. Inflexible divisions between what is national and what is local ceased long ago to make sense, a product of profound cultural, economic, and technological changes.[282] Theoretically, it may be possible for the Court to replace rigid lines that establish a fixed domain of exclusive state jurisdiction with more fluid tests that turn on some notion of functionality. But governing a modern society is much too complicated for the Court's preferences about where or how to draw the line to inspire much confidence.[283] And, so, from *Dred Scott* to the New Deal to *National League of Cities*, the Justices' rare efforts to impose their views of the proper limits of federal power have been controversial failures that accomplished little other than to damage the Court's reputation. It is still too early to measure this most recent bid, but surely there is no reason to expect a better outcome now than in the past.[284]

So, again, we must ask: Why is the Court doing this? The answer undoubtedly turns first on the legal philosophies and ideological predispositions of the Justices—but in this case, we are dealing with philoso-

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282. See Herbert Hovenkamp, Enterprise and American Law, 1836–1937, 171–82 (1991); Lessig, supra note 65, at 158–65.

283. The problem of dividing legislative competencies among government authorities is different from, and vastly more complicated than, the problem of defining individual rights and placing certain actions beyond the reach of any unit of government. To establish a successful federation, it is not enough just to divide power. It is also essential to place the various powers in question at whichever level of government can use them more beneficially for the people. But the optimal level at which to do things depends on complicated circumstances that change over time.

It follows, first, that the domain of concurrent legislative jurisdiction must be broad enough to permit authority to be allocated and reallocated. But it also follows that courts are poorly situated to make (or second guess) the difficult judgments about where power should be settled and when it can be shifted advantageously. It seems banal, but no less true for that, to observe that judges lack the resources and institutional capacity to gather and evaluate the data needed for such decisions.

Lopez is instructive in this regard. Conservatives saw the Gun-Free School Zones Act as an easy and obvious example of federal excess. But it is hard to see how the Supreme Court (or any court, for that matter) could decide whether they were right without creating and then evaluating the kind of record a legislature would build and evaluate—something judges are manifestly unequipped to do.

Of course, the Gun-Free School Zones Act was not the kind of law likely to arouse significant controversy, particularly given other federal regulation and the willingness of states to fill any gap. Laws like the Violence Against Women Act, 42 U.S.C. § 13981 (1994)—now before the Supreme Court, see United States v. Morrison, 120 S. Ct. 11, granting cert. to Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc)—will surely be more contentious should the Justices decide to substitute their views for those of Congress on the significance of gender-motivated violence for commerce.

284. At least one commentator, who is generally sympathetic to the need for a judicially enforced federalism, has concluded that we *can* measure the Court's latest effort and that it should already be branded "a failure." Moulton, supra note 14, at 851. See also Frank B. Cross, Realism About Federalism, 74 N.Y.U. L. Rev. 1304, 1304–06 (1999) (arguing that recent attempts by the Court to emphasize notions of federalism are misplaced).

phies and ideologies fortified by misperceptions about history. Maybe the Court's conservative members would be doing the same things no matter what they believed about the original design and past practice. Most of my colleagues seem to think so, though I am not so sure. In any event, the present Court's zeal for intervening on behalf of states is clearly animated by the conviction that, in doing so, it is acting virtuously to recapture the "real" Constitution. Put in other words, a majority of the Justices seem genuinely to believe that the Framers of the Constitution wanted and expected them to protect the states from an overreaching national legislature, that the Court took this responsibility seriously for the first century-and-a-half of its existence, and that the present Court is thus merely resurrecting and restoring a legal duty that it erroneously abandoned in the years after 1937.

If this Article accomplishes nothing else, I hope it at least puts this myth to rest. *Active judicial intervention to protect the states from Congress is consistent with neither the original understanding nor with more than two centuries of practice.* It is a posture, a pose, backed by nothing except formal adherence to a fictitious concept of monolithic judicial review that is wholly abstract and that does not square with the original practice, reason, or subsequent experience. One can still make the formal argument and pretend, all evidence to the contrary notwithstanding, that judicial review means judicial review means judicial review. But to what end? Active judicial intervention to secure the authority of the states is obviously not inherent in the nature of a constitutional system: Both we and the world's other democracies have gotten along very well without it. So if we also eliminate original intent and past practice as plausible justifications, what remains other than stubborness or blind ideology? At the very least, those who would persist in defending judicial intervention need to explain why institutional arrangements that have worked for more than two centuries have suddenly ceased to do so, and why we should embark on what is, in fact, a radical experiment in judicial activism.

The stakes are high. So far, the Justices have managed to avoid provoking a constitutional crisis by confining their activities to the peripheries of congressional power. But that could change quickly if the Court continues along its present course. With due respect, I think the Justices have little idea what they are doing when they intrude this way—no clear picture how their decisions affect governmental operations beyond the particular statutes they invalidate, no hint whether they have made government better or worse. When the Court strikes down a law, at least when it does so in a high-profile case, it does much more than merely invalidate a particular statute. It sends a pulse into the lawmaking process that can have pervasive effects on a wide range of legislation, and it creates a rhetorical tool that can be used to great effect by ideologically motivated politicians and legislators. The judges who do this, and those who support their decisions, may think the Court is doing a good thing by reining in Congress. But matters are not so simple, for the effects of judi-

cial intervention can be unpredictable. *Printz* is a perfect example: If, as I argued above, the interlocking state-federal structure of the administrative bureaucracy is one of the devices safeguarding state sovereignty, a judicial mandate that restricts Congress's authority to administer federal programs through the states may weaken rather than strengthen the very values the Court thought it was protecting.

One might be willing to tolerate such decisions, for better or worse,[285] were there a clear constitutional mandate demanding judicial intercession. But there is no such mandate, and more than two centuries of successful federalism without the aid of an aggressive judiciary suggests that no such intercession is needed. Not that the immediate repercussion of the Court's recent decisions are necessarily bad. I have no idea whether the effects on lawmaking are good or bad; but neither do the Justices. And, to be blunt, their willingness to wade blindly into the complex processes of government, wielding the power of review as if they knew the consequences of what they were doing, is reckless in the extreme—irresponsibly so, I would say. Stripped of what turns out to be a phony originalist justification, the Court has no excuse for continuing to stumble around the United States Code, heedlessly striking down federal laws in what amounts to a treacherous game of blind man's bluff with the Constitution and American government.

What should the Court do? It should continue to follow what had been its practice—formally since the New Deal, as a practical matter before that—of applying rational basis scrutiny to questions regarding the limits of Congress's power under Article I. All the conventional justifications for deferential review are applicable. The text is unclear, and there is little guidance from history or prior practice with which to formulate intelligible legal tests. That is why the Court's efforts to draw lines—from the "commerce versus manufacture" line of *E.C. Knight* to *Lopez*'s test of "substantiality" and proximate causation to the obscure "commandeering" principle of *New York v. United States*—have been so unsatisfactory and so controversial. At the same time, as I have shown, the political process is structured in a way that entitles Congress's decisions to a great deal of deference.

The specific limits of federal power envisaged by the Founders in 1789 are gone, and any effort to roll back federal power to what it meant at the Founding would be foolish as well as utterly impractical. Even the harshest critics of New Deal jurisprudence acknowledge that changes in society, culture, and the economy require a different kind of national authority today, both practically and as an interpretive matter. Hence, notwithstanding any purported claims of fidelity to original intent, the limits on Congress proposed by today's advocates of judicially-enforced

285. There are, of course, arguments that can be made in favor of *Printz*'s outcome as a matter of general policy. See, for example, Roderick Hill's quirky, creative defense in The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 U. Mich. L. Rev. 813 (1998).

federalism in fact look nothing like any limits that existed when the Constitution was adopted.[286] The question thus becomes, which process should determine the appropriate revised allocation of authority between the federal government and the states: constitutional politics or judicial edict? Mesmerized by the mantra "our Federal government is one of limited powers," the Justices assume that it necessarily falls on them to define new limits—some limits, any limits, even if those limits bear no resemblance to anything imagined by the Founders or observed in the past. But imposing novel judicially-defined limits just for the sake of having judicially-defined limits is an ill-conceived formalism. In a world of global markets and cultural, economic, and political interdependency, the proper reach of federal power is necessarily fluid, and it may well be that it is best defined through politics. Certainly, as we have seen, this is more consistent with the original design than the Court's new made-up limits-for-the-sake-of-limits. Embracing the hurly-burly of politics while paying attention to how states protect themselves in that domain is a much "truer" interpretation of our Constitution.

Put another way, many theories of federalism make the mistake of assuming an underlying ideal, permanent division of authority between the national government and the states: a substantive allocation that stands apart from and independent of the process by which this division is to be implemented. The judicial review question is thus cast as an inquiry into whether courts or politics is "better" at preserving this predetermined allocation. Most modern theorists are willing to concede that the fixed boundaries of federal power, whatever they may be, leave a large field for legislative discretion, and so would confine the scope of judicial intervention to what they view as relatively extreme and obvious cases. Nevertheless, they insist, there are boundaries out there, boundaries abstractly fixed and permanent.

In fact, the substantive content of any normative theory of federalism can never be other than open-ended and contestable. All we have are a set of broadly-defined powers and a set of very general principles that, in any given context at any given time, can lead reasonable people to reach very different conclusions about the proper limits of federal authority. Hubris may be the greatest peril when it comes to federalism, for it is too easy to assume that one's intuitions about what "obviously" goes too far are indisputable. They never are. A proper normative theory of federalism must necessarily incorporate a procedural component: a judgment

286. See Martin H. Redish, The Constitution as Political Structure 23–61 (1995); Ann Althouse, Enforcing Federalism After *United States v. Lopez*, 38 Ariz. L. Rev. 793, 817–22 (1996); Donald H. Regan, How to Think About the Federal Commerce Power and Incidentally Rewrite *United States v. Lopez*, 94 Mich. L. Rev. 554, 555 (1995); William Van Alstyne, Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court, 26 Am. Crim. L. Rev. 1740, 1741 (1989). See also Moulton, supra note 14, at 868–90, 899, 913–17 (reviewing both the Supreme Court's decisions and academic commentary to show how these positions were not contemplated by the Founders).

about *to whom* arguments over the limits of Congress's powers should be addressed. For the Founders, this was an easy call: such arguments were to be addressed to the people, through politics. And the wisdom of their judgment in this respect has been ratified in practice throughout more than two centuries of American history—leaving as the real puzzle here just why these judges feel compelled to countermand that decision and substitute their own.

CONCLUSION: WECHSLER'S LEGACY

It has been many pages since I last mentioned Wechsler, yet his presence remains. Federalism has consistently been the most contested, most controversial issue of constitutional law throughout American history. For much of the twentieth century, the debate has centered on the problem of judicial review: a tense struggle between those who favor a more intrusive judicial presence and those willing to hazard the vicissitudes of politics. Wechsler deserves much of the credit for shaping this encounter. The Court may have acted, but it was Wechsler who justified its actions, and the power and perspicacity of his reasoning were sufficient to carry the issue for more than a generation. Changing circumstances and a relentless assault by critics took their toll, and the lesson Wechsler taught seemed to lose its power. But while agreeing with the criticisms of Wechsler's particular arguments, my object, and my hope, in this article has been to resurrect his more fundamental point by shifting the grounds on which it rests. Wechsler's central insight remains valid: There *are* "political safeguards" of federalism, safeguards that have a longer pedigree and a stronger claim to constitutional legitimacy than the current Supreme Court's clumsy bid to impose its will on Congress. Supporters of judicial intervention have a greater burden than they seem to realize if they want to make their position legally and intellectually respectable.