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Federalism, Separation of Powers, and the Legacy of Garcia

Rex E. Lee

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I. INTRODUCTION

Among the world's leading powers, the United States is relatively young. The United States Constitution, however, is the oldest of functioning, written constitutions. It is also by far the most successful. The United States Constitution is often characterized as fulfilling two functions. First, the Constitution protects individual rights. In the amendments and in the original text, the Constitution guarantees individual liberties such as the familiar freedoms of speech, religion, association, and press; due process; equality; protection of criminals; and the free flow of commerce among the states, with foreign countries, and with Indian tribes. Second, the Constitution distributes governmental powers. It divides authority horizontally among the three branches of the national government, and vertically between the federal and state governments.

While this bifurcated view of the Constitution is functional, the more accurate view is that the Constitution accomplishes one purpose through two means. The Constitution's purpose is to protect the freedom of the individual. The Constitution accomplishes this end through (1) specific guarantees of individual liberties and (2) the division of power. The purpose of constitutional distribution of power then extends beyond merely providing an organization. If this were its only objective, the arrangement could claim only to have achieved

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* Rex E. Lee (1935-1996) served as Solicitor General of the United States from 1981 to 1985. His nationally recognized appellate practice included 59 oral arguments before the U.S. Supreme Court. He was the founding dean of the J. Reuben Clark Law School at Brigham Young University and served as president of Brigham Young University from 1989 to 1995. This article is based on a keynote address given at a symposium entitled "The Dilemma of American Federalism: Power to the People, the States, or the Federal Government?" held at Brigham Young University, October 1995.

inefficiency by pitting three branches and at least two levels of government against each other in the exercise of governing power.[1] Instead, the constitutional division of authority can rightfully claim to protect the governed from governmental overreaching and arbitrariness. As James Madison explained:

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments . . . controul each other; at the same time that each [is] controuled by itself.[2]

In short, by checking the exercise of governmental powers, the constitutional division of authority serves—perhaps even more effectively than the specific liberty guarantees—to protect the rights of the individual.[3]

In addressing the division of governmental authority in the Constitution, I recognize that much has been said on the

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1. *See* Bowsher v. Synar, 478 U.S. 714, 722 (1986) ("That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.").

2. THE FEDERALIST No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

3. *See* Mistretta v. United States, 488 U.S. 361, 380 (1989) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1985) (Powell, J., dissenting) ("[T]he constitutionally mandated balance of power between the States and the Federal Government [is] a balance designed to protect our fundamental liberties."); THE FEDERALIST No. 47, at 325-26 (James Madison) (Jacob E. Cooke ed., 1961) ("'[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.' . . . Again 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul . . . . Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.'" (quoting Montesquieu)); Alan N. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1021 (1988) ("The demise of federalism ultimately will threaten individual rights because centralization eventually leads to regulation without adequate representation."); A.E. Dick Howard, Garcia *and the Values of Federalism: On the Need for a Recurrance to Fundamental Principles*, 19 GA. L. REV. 789, 795 (1985) ("[I]nstitutional rights, under our Constitution, are a form of individual rights. . . . Federalism is linked with individual liberty and with the health of the body politic.").

subject. I do not purport to expound a new theory of separation of powers or federalism, but to present a clear view of these protections[4] and to observe how these protections fare under current precedent, particularly *Garcia v. San Antonio Metropolitan Transit Authority*.[5] I also wish to note several ways we may strengthen the status of federalism and separation of powers as we approach the twenty-first century.

II. THE CONSTITUTIONAL DIVISION OF AUTHORITY

First, a brief primer on the constitutional apportionment of power. The Constitution, as mentioned, divides authority along two planes. The horizontal division of power is termed separation of powers, while the vertical distribution is deemed federalism.

A. Horizontal Division of Power

In separating governmental powers, the Constitution vests in each of the three branches an important primary governmental responsibility. Each branch exercises supreme authority over its area of responsibility. For Congress, it is lawmaking; for the President, law enforcement; and for the courts, interpretation of the laws, including the Constitution. This does not mean, however, that the separateness is complete.[6] Indeed, it

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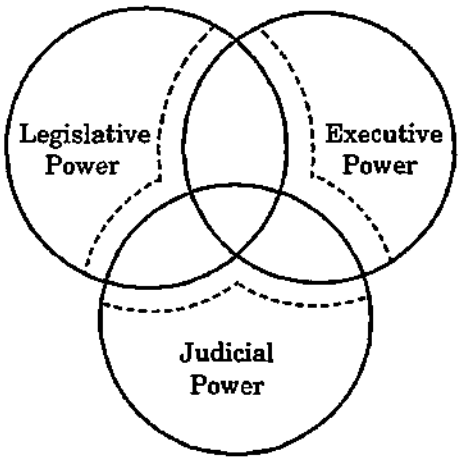
4. I recognize that *federalism* has been defined many ways. As Karl Manheim noted, "[S]tates-rightists . . . see federalism as protecting states from overreaching by the federal government[while s]upporters of a strong national government . . . use [the term] to describe the supremacy of national over state interests." Karl Manheim, *New-Age Federalism and the Market Participant Doctrine*, 22 ARIZ. ST. L.J. 559, 560 n.1 (1990). In this article I will explain what I believe *federalism* means—which is what I believe the Framers thought it meant.

5. 469 U.S. 528 (1985).

6. Throughout this article, as in the foregoing passage, I have drawn heavily from my book, A LAWYER LOOKS AT THE CONSTITUTION (1981), and from an address I gave at the Western States Summit II (May 19, 1994). Though I have relied on those two sources, I do not cite to them in this article. For additional support for the foregoing passage, see *Mistretta*, 488 U.S. at 381 ("[O]ur constitutional system imposes upon the Branches a degree of overlapping responsibility . . . ."); Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam) ("[T]he Constitution by no means contemplates total separation of each of these three essential branches of Government. [For example, t]he President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress. [Similarly, t]he Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President."); THE FEDERALIST No. 47, *supra* note 3, at 325-26 (Madison argues that Montesquieu did not suggest that the branches of government "ought to have no *partial agency* in, or no controul over the acts of each other . . . [but only] that where the *whole* power of

would not be accurate to conceptualize the three branches' spheres of authority as completely isolated from each other. Rather, the more accurate depiction would be of three interlocking circles, as illustrated in the diagram below.[7]



In areas where there is no overlap of authority, each branch has exclusive power. In areas of overlap, however, the power is shared. The Sherman Antitrust Act of 1890 illustrates this principle.[8] Through that Act, Congress, pursuant to its lawmaking power, prohibited certain restraints on interstate and foreign commerce.[9] The executive and judiciary then began making law as they identified and interpreted trade restraints pursuant to their powers of enforcement and interpretation. Of course, if Congress did not agree with the policies created by the executive or judiciary, it could exercise its legislative supremacy to enact a corrective statute.

As the branches operate in the overlapping areas of authority, they inevitably overstep their bounds, as represented by the broken lines in our diagram.[10] The courts must determine whether the questioned exercise of authority properly corresponds to the acting branch. Thus, in the impoundment

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one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.").

7. *See* LEE, *supra* note 6, at 45.

8. 15 U.S.C. §§ 1-7 (1994).

9. *Id.* § 1.

10. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 951 (1983) (recognizing "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power").

cases, Congress appropriated money for certain purposes and President Nixon refused to spend it. The courts were forced to determine whether the President was properly exercising (or not exercising) his law-enforcement power or whether he was usurping Congress' authority to make law.[11] Many other cases could be cited to illustrate the separation of powers dynamic in areas of shared powers.[12] Of course, the most sensitive area of interbranch power overlap lies in the center of the three circles, the confluence of powers. Disputes in this area are rare, but when they arise they are usually of "nerve-center constitutional significance."[13] They involve judicial efforts to resolve issues concerning the competing claims to power of the other two branches. Probably the most famous case involving the confluence of power is *Youngstown Sheet & Tube Co. v. Sawyer*,[14] the steel seizure case. During the Korean War, President Truman, without authorization from Congress, seized most of the nation's steel mills in order to prevent an impending strike

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11. The courts generally have concluded the latter. "By 1974, plaintiffs succeeded in reversing impoundment of funds in more than 50 cases. The courts upheld presidential impoundment in [only] four cases." Cathy S. Neuren, Note, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693, 697 n.24 (1984) (citations omitted) (listing impoundment cases).

12. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 734 (1986) ("By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act [the Gramm-Rudman-Hollings Act] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion."); *Chadha*, 462 U.S. at 951-59 (holding that Congress cannot circumvent presidential review of legislation through a one-house veto of immigration deportation decisions); Buckley v. Valeo, 424 U.S. 1, 140-41 (1976) (per curiam) (holding that Congress may not delegate enforcement and interpretive powers to the Federal Election Commission without satisfying the requirements of the Appointments Clause); United States v. Nixon, 418 U.S. 683, 705 (1974) ("[I]t is the province and duty of this Court[, and not the President,] 'to say what the law is' with respect to the claim of [executive] privilege . . . ." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))); United States v. Klein, 80 U.S. (1 Wall.) 128, 146-48 (1871) (determining that Congress may not legislate, under its power over federal jurisdiction, that the courts reach a certain decision in cases over which the courts have jurisdiction, and that Congress cannot dictate the meaning of a presidential pardon). *But cf.* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 433-37 (1992) (upholding the constitutionality of a statute that specifically mentioned and affected the outcome of two pending cases because the statute "compelled changes in law, not findings or results under old law"); Mistretta v. United States, 488 U.S. 361, 383-412 (1989) (rejecting a challenge to Congress' delegation to a judicial commission of the authority to create sentencing guidelines).

13. United States v. American Tel. & Tel. Co., 551 F.2d 384, 394 (D.C. Cir. 1976).

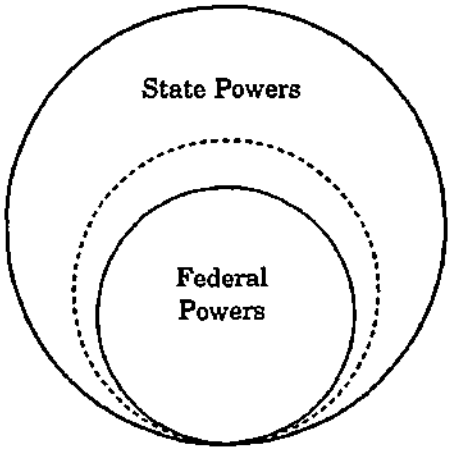
14. 343 U.S. 579 (1952).

from adversely affecting the war effort.[15] The Supreme Court held the seizure unconstitutional.[16] According to the Court, the President's action represented a policy decision, not a policy decision concerning the enforcement of the laws—which is the rightful responsibility of the President—but a substantive decision as to what policy alternative was in the best interest of the country.[17]

The beauty of the separation of powers dynamic, as illustrated by the above cases, is that when one branch trespasses on the jurisdiction of another, the invaded branch or the courts are typically quick to respond. Over the long run, each branch's power remains limited, preventing any one branch from arbitrarily exercising the power of the whole.

B. Vertical Division of Power

The vertical division of governmental authority in the Constitution—federalism—similarly checks arbitrariness and overreaching by the federal government.[18] In our federalist system, the national and state governments possess powers that differ in scope and nature. This relationship of federal and state power may be depicted by two concentric circles, as illustrated in the diagram below.[19]



15. *Id.* at 582-83.
16. *Id.* at 588-89.
17. *See id.* at 588.
18. *See supra* note 3.
19. *See* LEE, *supra* note 6, at 57.

Theoretically at least, the circle of state authority extends farther than that of federal authority. State power, sometimes called *police power*, extends to all subjects with which it is proper for a government as government to deal: matters of health, safety, morals, and welfare.[20]

The scope of federal power, by contrast, is limited. The federal government may exercise only those powers specifically enumerated in the Constitution.[21] While the scope of federal power is limited, the force of federal authority is preemptive.[22]

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20. State power is, of course, circumscribed by such far-reaching constitutional provisions as the Commerce Clause and the Fourteenth Amendment. The Commerce Clause gives Congress power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. For examples of how the Commerce Clause limits state power, see C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1683 (1994) (explaining that under the Commerce Clause "[d]iscrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest") and Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (summarizing the general rule "for determining the validity of state statutes affecting interstate commerce . . . as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits").

The Fourteenth Amendment similarly places wide-ranging constraints on state power. In relevant part, the Amendment reads, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. For examples of how the Fourteenth Amendment limits state power, see McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1514 & n.1, 1524 (1995) (noting that "[t]he term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States" so that Ohio could not forbid "the distribution of anonymous campaign literature"). In addition, see Roe v. Wade, 410 U.S. 113 (1973) (holding that a state is severely limited in enacting restrictions on the performance of first trimester abortions) and its progeny, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (recognizing that "the Constitution places limits on a State's right to interfere with a person's . . . decisions about family and parenthood").

21. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); THE FEDERALIST No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.").

22. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("The Federal Govern-

Thus, though the state circle of power is larger than that of the federal government, federal power is supreme and preempts state power within the area covered by the smaller circle. If the circle of federal power is expanded, as shown by the broken line, the nonpreempted portion of the state's power circle—and therefore the effective area in which states may govern—is correspondingly diminished. This is in fact what has happened on a rather continuous basis through our nation's history, through such vehicles as the Commerce,[23] Taxing,[24] and Spending Clauses.[25]

Many support this expansion, finding little or no value in protecting states' power.[26] Yet, as mentioned, the value of lim-

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ment holds a decided advantage in this delicate balance: the Supremacy Clause. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. . . . This is an extraordinary power in a federalist system." (citation omitted)).

23. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 113-15, 118-29 (1942) (upholding Congress' power under the Commerce Clause to regulate the production of wheat that never leaves the grower's farm); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30-32 (1937) (sustaining Congress' power to regulate, through the National Labor Relations Act, labor relations affecting interstate commerce); Stephen Chippendale, Note, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 458-66 (1994) (surveying the proliferation of federal criminal law under the Commerce Clause). *But see* United States v. Lopez, 115 S. Ct. 1624, 1629-30, 1634 (1995) (identifying "three broad categories of activity that Congress may regulate under its commerce power[:] . . . the use of the channels of interstate commerce[,] . . . the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . [, and] those activities having a substantial relation to interstate commerce," but holding that the Gun-Free School Zones Act exceeded Congress' commerce power because the possession of a gun in or near a school is not an activity that falls within one of these categories). For a brief historical overview of commerce power, see Greenspan, *supra* note 3, at 1022-38. For a more detailed history of the commerce power's development, see PAUL R. BENSON, JR., THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970 (1970).

24. *See, e.g.*, United States v. Kahriger, 345 U.S. 22 (1953) (upholding Congress' power under the Taxing Clause to impose a 10% tax on wagers made in gambling and to require persons engaged in wagering to register with the Internal Revenue Service); Sozinsky v. United States, 300 U.S. 506 (1937) (upholding Congress' power to impose an annual license tax on firearms dealers under the Taxing Power).

25. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (upholding the power of Congress to condition federal highway funds to the states on the states' having a minimum legal drinking age of 21 years old as proper under the Spending Clause); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (sustaining as a valid exercise under the Spending Power provisions of the Social Security Act that pressured states to create state unemployment compensation funds and managed the state funds thus created). For a general survey of the constitutionality of imposing conditions on federal grants, see Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987).

26. *See, e.g.*, Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on*

iting the federal government lies not in protecting state and local governments alone, but in providing a tension that will safeguard individual rights.[27] It is to maintain this vertical safeguard that federal powers must remain limited.

III. THE LEGACY OF *GARCIA*

About twenty years ago, the United States Supreme Court took the most significant step to date toward remedying the overextension of federal power. Appropriately, the Court took that step under the banner of the Constitution itself. In *National League of Cities v. Usery*,[28] the Court addressed the constitutionality of the 1974 Fair Labor Standards Act amendments which "extended the [Act's] minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions."[29] In assessing the constitutionality of these congressional enactments, the Court recognized that the Tenth Amendment and

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a National Neurosis, 41 UCLA L. REV. 903, 908-09 (1994) (arguing that federalism does not provide the advantages typically claimed, that the Supreme Court should never void a statute on federalism grounds, and that states are convenient, but not necessary, means of securing the benefits of the truly beneficial arrangement of decentralization).

27. *See* New York v. United States, 505 U.S. 144, 181 (1992) ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals."); Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serves [sic] to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty."); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 48-50 (1973) (discussing the benefits of local control of education); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1877-79 (1995) (noting that state authority over family law "erects a structural defense against the potentially tyrannous consequences of moral lawmaking on a uniform national scale" because families that feel oppressed by a particular state regime can relocate to another state); Mark F. Kirschke, Comment, *Private Parties and State Action Immunity to the Sherman Anti-Trust Act After* Southern Motor Carriers Rate Conference, Inc. v. United States: *The Two-Prong* Midcal *Test as an Effective and Adequate Alternative to* Goldfarb's *Compulsion Requirement*, 24 HOUS. L. REV. 311, 359 (1987) ("To see examples of the benefits of allowing states to experiment, one need only examine the initiative and referendum, workmen's compensation laws, women's suffrage, declaratory judgments, and various forms of liquor control, all of which were first tried on the state level . . . ."); *see also supra* note 3 and accompanying text.

28. 426 U.S. 833 (1976).

29. *Id.* at 836; *see also id.* at 852.

the entire constitutional structure place "limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce."[30] The Court thus concluded "that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3."[31]

The *Usery* decision vindicated the views of federalism and separation of powers diagrammed above. The decision emphasized that (1) the federal government is a government of enumerated powers, (2) federalist principles in the Constitution impose limits on the federal government's authority, and (3) those limits are to be enforced by the courts. The *Usery* opinion thus did much to strengthen the Constitution's structural safeguards of individual rights.

The principles laid down in *Usery* were not, however, unanimously accepted. The vote in *Usery* split as closely as is numerically possible on the nine-member Court. Four Justices[32] vigorously attacked the holding, while four others[33] stood staunch in its defense. The swing vote belonged to Justice Blackmun,[34] who concurred with the original majority in the basic principles of *Usery*, but who adopted a balancing test.[35] Federalism cases following *Usery* were decided with Blackmun's balancing approach, based on factors present in the individual cases.[36]

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30. *Id.* at 842; *see also id.* at 842-45.

31. *Id.* at 852.

32. Justices Brennan, White, Marshall, and Stevens. *See id.* at 856, 880.

33. Chief Justice Rehnquist and Justices Burger, Stewart, and Powell. *See id.* at 834.

34. *See id.* at 856.

35. *Id.* ("[I]t seems to me that [the Court] adopts a balancing approach, and does not outlaw federal power in areas . . . where the federal interest is demonstrably greater and where state . . . compliance with imposed federal standards would be essential. With this understanding on my part of the Court's opinion, I join it.").

36. *Hodel v. Virginia Surface Mining & Reclamation Ass'n* elaborated on Blackmun's balancing test. *Hodel* identified four factors that had to be satisfied to succeed on "a claim that congressional commerce power legislation is invalid under the reasoning of [*Usery*]":

> First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." . . . [T]hird, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of

The watershed was reached in *Garcia v. San Antonio Metropolitan Transit Authority*,[37] in which Justice Blackmun abandoned his case-by-case balancing approach and authored an across-the-board rule. Since this holding overruled *Usery*, the four *Usery* dissenters solidly agreed with Blackmun.[38] To be sure, the Court in *Garcia* "continue[d] to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position."[39] Yet the Court held that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[40] Thus the Court essentially abandoned judicial vindi-

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traditional governmental functions."

. . . .

. . . [Finally,] the federal interest advanced may [not] be such that it justifies state submission.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-88 & n.29 (1981) (citations omitted) (quoting *Usery*, 426 U.S. at 845, 852, 854); *see also* EEOC v. Wyoming, 460 U.S. 226, 236-39 (1983) (applying the *Hodel* factors and concluding that Congress could impose the Age Discrimination in Employment Act on states); FERC v. Mississippi, 456 U.S. 742, 758-71 (1982) (sustaining, in the face of a Tenth Amendment challenge, the Public Utility Regulatory Policies Act of 1978 that required the states to enforce federal rules, consider implementing certain ratemaking standards, and conform to specific procedures); United Transp. Union v. Long Island R.R., 455 U.S. 678, 684-86, 690 (1982) (identifying the "traditional governmental functions" prong as the critical prong of the *Hodel* test and upholding application of the Railway Labor Act to states, because "operation of a railroad engaged in interstate commerce is not an integral part of traditional state activities"). For a more detailed discussion of the cases following *Usery* and leading to *Garcia*, see Bryan H. Wildenthal, *Judicial Philosophies in Collision: Justice Blackmun, Garcia, and the Tenth Amendment*, 32 ARIZ. L. REV. 749, 759-66 (1990).

37. 469 U.S. 528 (1985). *Garcia* addressed the constitutionality of the Labor Department's opinion that the San Antonio Metropolitan Transit Authority (SAMTA) did not qualify for immunity from the Fair Labor Standards Act under *Usery*. *See id.* at 533-34. The Court concurred with the Department's opinion. *See id.* at 554.

38. *See id.* at 557.

39. *Id.* at 556.

40. *Id.* at 552; *see also id.* at 554 ("[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'" (quoting EEOC v. Wyoming, 460 U.S. at 236)); William A. Isaacson, Garcia v. San Antonio Metropolitan Transit Authority: *Antifederalism Revisited*, 21 U. TOL. L. REV. 147, 193-202 (1989) (arguing that judicial review of federalism is fruitless because the framers of the Constitution purposefully did not establish definite limits on congressional power vis-a-vis the states).

cation of state sovereignty and left protection of states' rights to the political process, a process through which states could allegedly protect themselves.[41]

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41. *See Garcia*, 469 U.S. at 550-54; *see also id.* at 556 ("The political process ensures that laws that unduly burden the States will not be promulgated."); Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577, 586 (1994) ("Since *Garcia*, the record of the states' ability to secure their vital interests against federal encroachments without the aid of judicial review has been consistent with their earlier successes."); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-59 (1954) (concluding, based on an analysis of the states' participation in and influence over the national political process, that that process "is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states" and that "[f]ederal intervention as against the states is . . . primarily a matter for congressional determination in our system as it stands") (Wechsler's article was cited by the *Garcia* majority. *See Garcia*, 469 U.S. at 551 n.11.); John E. DuMont, Comment, *State Immunity from Federal Regulation—Before and After* Garcia: *How Accurate Was the Supreme Court's Prediction in* Garcia v. SAMTA *That the Political Process Inherent in Our System of Federalism Was Capable of Protecting the States Against Unduly Burdensome Federal Regulation?*, 31 DUQ. L. REV. 391, 396-400 (1993) (concluding, based in part on the 1985 amendments to the Fair Labor Standards Act, that the federal political process in many cases functions effectively to protect states' interests). *But see Garcia*, 469 U.S. at 564-66 & nn.8-9 (Powell, J., dissenting) ("[T]ho view that the structure of the Federal Government suffice[s] to protect the States" is illogical and inconsistent with current political reality.); *id.* at 584 (O'Connor, J., dissenting) ("[R]ecent changes in the workings of Congress, such as the direct election of Senators and the expanded influence of national interest groups . . . may well have lessened the weight Congress gives to the legitimate interests of States as States. As a result, there is now a real risk that Congress will gradually erode the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic."); Laurence J. Aurbach, *Federalism in the Global Millenium*, 26 URB. LAW. 235, 236 (1994) ("The decisions about federal and state roles are within the Washington apparatus, placing state and local governments in a permanently subservient role."); Robert H. Freilich & David G. Richardson, *Returning to a General Theory of Federalism: Framing a New Tenth Amendment United States Supreme Court Case*, 26 URB. LAW. 215, 221-23 (1994) (documenting the increase in federal mandates and the attendant financial burden placed on state and local governments); Paul Gillmor & Fred Eames, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 HARV. J. ON LEGIS. 395, 404 (1994) ("[J]udicial review is the only element of the structure of government that can effectively prevent destruction of the states[] . . . ."); Carl R. Massey, *Etiquette Tips: Some Implications of "Process Federalism,"* 18 HARV. J.L. & PUB. POL'Y 175, 179 (1994) (Under the Court's "process federalism" jurisprudence, "[t]he [state] sovereignty that is left is solely the product of congressional grace. . . . In the extreme, process federalism leaves the state legislatures with little more true sovereignty than a high school model United Nations. Ultimately . . . process federalism is reduced to a set of etiquette tips for foxes entrusted with the job of guarding the henhouse. The hens may all be missing in the morning, but so long as the fox has observed the proper protocol nobody will inquire of the bulge in the fox's stomach."); Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 15 (1988) ("*Garcia*'s central assertion that the structure of federal politics protects

The *Garcia* opinion radically altered the state of separation of powers[42] and federalism[43] in America. In essence, the *Gar-*

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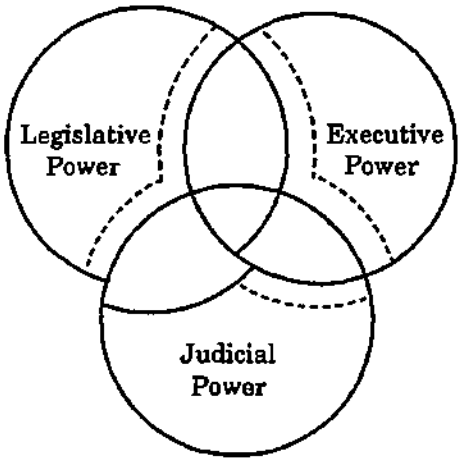
the autonomy of state governments is simply wishful thinking.").

42. The alteration of separation of powers wrought by the *Garcia* majority was recognized by Justice Powell. *See Garcia*, 469 U.S. at 567 & n.12 (Powell, J., dissenting) ("More troubling than the logical infirmities in the Court's reasoning is the result of its holding, *i. e.*, that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power. This Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process."). Others have similarly noted *Garcia*'s impact on separation of powers. *See* Greenspan, *supra* note 3, at 1037 ("Since the time of *Marbury v. Madison*, the role of the Supreme Court has been to measure congressional action against the yardstick of the Constitution. *Garcia* goes against nearly two hundred years of constitutional jurisprudence by adopting a policy that allows federal officials to be the sole judges of the limitations of their own power." (footnotes omitted)); Howard, *supra* note 3, at 790-91, 796 ("The Court in *Garcia* abdicates a function that history, principle, and an understanding of the political process strongly argue that the federal judiciary should undertake. . . . A basic tenet of Anglo-American constitutionalism is that no branch of government should be the ultimate judge of its own powers. . . . In refusing to enforce the tenth amendment—to play the role they regularly undertake in respect to other provisions of the Bill of Rights—the *Garcia* majority leaves an important constitutional sentry post unmanned."); William A. Van Alstyne, Comment, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1731-32 (1985) (arguing that by abdicating judicial review of federalism controversies the Court has made "a mistake of historic proportions" and left the political branches to determine the meaning of part of the Constitution). *But cf.* Thomas H. Odom, Comment, *The Tenth Amendment After* Garcia*: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657, 1663-65 (1987) (opining that the Court in *Garcia* did not entirely abandon judicial review of federalism issues but assumed a role as the "secondary protector of the states," requiring "that the justification for judicially imposed limitations on congressional action under the commerce power . . . be process-oriented rather than substantive").

43. *Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting) ("If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States."); *see also* Van Alstyne, *supra* note 42, at 1720 (declaring that if "[t]he Constitution is deemed to fix the principal locus of tenth amendment adjudication in Congress[,] . . . then indeed we have witnessed the second death of federalism"). *But see* Odom, *supra* note 42, at 1661-62 (observing that "*Garcia*'s rejection of substantive federalist limitations" applies only to exercises of the commerce power regulating states and thus does not affect federalism as broadly as might be assumed); *but cf.* Choper, *supra* note 41, at 577-80, 590-91 (regretting that the Court did not go further in adopting the author's Federalism Proposal which leaves federal-state relations to the political process); Isaacson, *supra* note 40, at 154-93 (arguing that the view of federalism advanced by the *Garcia* dissenters is the very view advocated by the Anti-Federalists and rejected by the Constitution); Manheim, *supra* note 4, at 560 (noting that *Garcia* has engendered a "[n]ew-age federalism," which casts "Congress [as] the guardian of state sovereignty [because] . . . federal courts are not institutionally competent to resolve claims of congressional encroachment on state autonomy").

cia Court authorized congressional usurpation of some of the judiciary's interpretive powers, thus enlarging Congress' power sphere at the expense of the judiciary, as depicted in the modified diagram below.[44]



This consensual, judicial reapportionment of authority reveals a weakness in the separation of powers dynamic. When the legislative or executive branch consents to an invasion of its authority, the judiciary may restore the constitutional power distribution by declaring the invasion unconstitutional. For example, in *INS v. Chadha*[45] the Court declared unconstitutional a statutory, one-house legislative veto that bypassed the presidential veto power, in spite of the fact that the President had endorsed the legislation.[46] The problem illustrated by *Garcia* arises when the judiciary abdicates its duty to interpret the Constitution in favor of Congress. The executive has no authority to directly reverse the power shift, nor is Congress likely to remedy the invasion since Congress benefits from expanded powers. Thus, when the judiciary transfers interpretive powers to Congress, as in *Garcia*, the constitutional division of authority is skewed until the judiciary reassumes its role.

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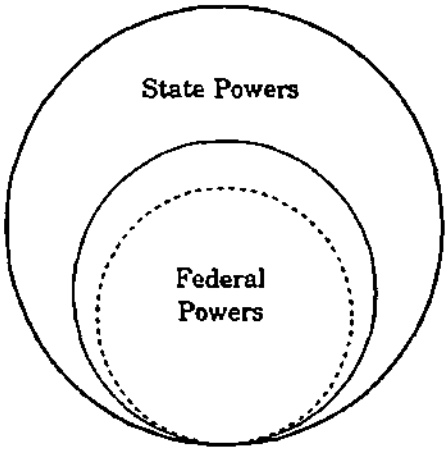
44. *Cf.* LEE, *supra* note 6, at 45.

45. 462 U.S. 919 (1983).

46. *See id.* at 931, 951-54; *see also* Buckley v. Valeo, 424 U.S. 1, 140-41 (1976) (per curiam) (similarly declaring provisions of the Federal Election Campaign Act unconstitutional as congressional infringements on executive authority even though the President had at least impliedly consented to the provisions).

Garcia not only disturbed the constitutional separation of powers, but also fundamentally altered the constitutional federalist structure outlined above. By effectively removing the constraints imposed by the Tenth Amendment and the underlying federalist structure of the Constitution, the *Garcia* Court enlarged the circumference of the federal power sphere as illustrated in the modified diagram below.[47]



Consequently, while the Court will continue to decide the limit of Congress' Commerce Clause power,[48] that limit will consistently lie beyond the pre-*Garcia* boundary. Essentially, the Tenth Amendment and federalist principles will no longer constrict the exercise of federal power, at least under the Commerce Clause.[49]

In addition to expanding the circle of federal authority, *Garcia* cast the political branches of the federal government as the watchdogs of state sovereignty.[50] In effect, the Court inverted the solid and broken boundaries of federal authority in my diagram, as depicted above. Before *Garcia*, federal exercises of power that extended beyond the boundary of national authority set by the Tenth Amendment and federalist principles undergirding the Constitution were unconstitutional. Now that

47. *Cf.* LEE, *supra* note 6, at 57.

48. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624, 1626, 1634 (1995) (holding that the Gun-Free School Zones Act exceeded Congress' Commerce Clause power).

49. *See Garcia*, 469 U.S. at 560 (Powell, J., dissenting) ("[T]oday's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.").

50. *See id.* at 550-52.

the Court has expanded the scope of federal authority, the original broken line representing unconstitutional federal encroachments has been replaced by the solid boundary of federal authority. The smaller broken line in the new figure represents the political will of Congress and the executive. The broken line lies within the solid line, because Congress now determines whether it will restrict its authority to the boundary set by *Usery*'s interpretation of the Tenth Amendment and constitutional principles of federalism (the former solid line), or whether it will exert its authority to the extent sanctioned by *Garcia* (the present solid line). This new configuration treats state sovereignty as a matter of legislative grace, not constitutional law;[51] it leaves the states to curry congressional favor in order to protect their constitutional sovereignty.[52] It thus also leaves individual rights largely unprotected by the federalist safeguard the Framers established.

Post-*Garcia* cases have provided some hope for federalism and separation of powers.[53] In *South Carolina v. Baker*,[54] the Court noted that *Garcia* did not foreclose "the possibility that extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment."[55] While the Court did not define "extraordinary defects," it did suggest that a state might establish a Tenth Amendment claim by alleging "that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless."[56] The Court thus recognized that the Tenth Amendment may support a judicially enforceable claim, albeit under narrow circumstances.

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51. *See id.* at 567 (Powell, J., dissenting).

52. Telephone Interview with LeVarr Webb, Deputy for Policy, Utah Governor's Office (July 12, 1995).

53. *See* Freilich & Richardson, *supra* note 41, at 223-27, 234 (reviewing recent cases that have provided "windows of opportunity" for reviving "federalism and . . . the Tenth Amendment"); Nicholas J. Johnson, *EPCRA's Collision with Federalism*, 27 IND. L. REV. 549, 557-58 (1994) (suggesting that *Usery* and the more recent New York v. United States, 505 U.S. 144 (1992), share the same fundamental principles); Ronald A. Giller, Note, *Federal Gun Control in the United States: Revival of the Tenth Amendment*, 10 ST. JOHN'S J. LEGAL COMMENT. 151, 161 (1994) (recognizing the renewed protection of federalism *New York v. United States* provides).

54. 485 U.S. 505 (1988).

55. *Id.* at 512.

56. *Id.* at 513.

In *Gregory v. Ashcroft*,[57] the Court recognized another limit on Congress' commerce power over states. The Court explained that in order for the federal courts to enforce a statute that "would upset the usual constitutional balance of federal and state powers," congressional intent to intrude on the states must be clear.[58] Because the Age Discrimination in Employment Act did not clearly apply to state judges, the Court concluded that it did not so apply.[59] Thus, the Court conscripted a clear-intent rule to protect federalism.[60]

Finally, in *New York v. United States*,[61] the Court ruled that Congress could not "'commandeer' state governments into the service of federal regulatory purposes" by "'compelling them to enact and enforce a federal regulatory program.'"[62] The Court thus invalidated the take-title provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 as "inconsistent with the federal structure of our Government established by the Constitution."[63] While these cases suggest that the Court recognizes a judicial role in enforcing federalist limits on national power, they alter the *Garcia* regime but little.[64] *Garcia* remains strong precedent.[65]

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57. 501 U.S. 452 (1991).

58. *Id.* at 460-61, 464, 467.

59. *Id.* at 467.

60. *See id.* at 464 ("'[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480 (2d ed. 1988)) (alteration in original)); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959 (1994) (discussing the Court's limitation of *Garcia* and protection of federalism through clear statement requirements).

61. 505 U.S. 144 (1992).

62. *Id.* at 175, 176 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

63. *Id.* at 177; *see also id.* at 173-77, 188.

64. *See id.* at 157 ("[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power."); Massey, *supra* note 41, at 192, 195 ("Almost from the moment that *Garcia* was decided, the Court set about devising doctrines to limit the discretion given Congress to invade some zone of state autonomy. . . . [T]he notion of 'extraordinary defects' in the political process [and] the plain statement rule . . . are an attempt to preserve some modicum of legally enforceable federalism for the Court."). According to Massey, under the Court's current jurisprudence, when Congress regulates both private citizens and states, "the validity [of the legislation] is largely consigned to the national political process . . . . [W]hen the federal legislation impinges only upon the activities of the States," however, the Court imposes a judicial restraint: "Congress may not command the States to enact and enforce a

IV. RESTORING FEDERALISM AND SEPARATION OF POWERS

In their *Garcia* dissents, Chief Justice Rehnquist and Justice O'Connor predicted that the Court would one day reassume its constitutional duty to monitor federalism and would readopt the principles of *Usery*.[66] While their prediction may well be realized, we cannot afford to simply wait until that occurs. We must work now to restore the constitutional separation of powers and federalism that *Garcia* altered, remembering that not just state and local autonomy, but individual rights, are at stake. What can we do?

First, we can take more seriously the practical implications of the very opinion we seek to counteract. In dictum in *Garcia*, Justice Blackmun reasoned that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[67] He did not say that there are no constitutional protections of state sovereignty. Rather, he concluded that those protections are found not in the courts, but in the national political process through which the states exert influence over federal lawmaking and enforcement.[68] Regardless of its legal merit, Justice Blackmun's dictum has far-reaching practical implications—namely, that we must require our senators and representatives to truly represent their state constituencies and thus their states. Not only are representatives and senators national policy-makers, but under *Garcia* they are also protectors of state sovereignty. We must discover their views on federalism before we elect them. And once we elect them, we must demand that they advocate the cause of their home states rather than solely what they perceive to be in the national interest. Their responsibility embraces more than just acquiring water projects or preventing base

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particular regulatory scheme." *Id.* at 197. The Court's approach thus maintains some limit on Congress' ability to invade state sovereignty.

65. *See* Note, *supra* note 60, at 1965 ("[T]he recent clear statement decisions [do not] mark an unequivocal aea change in the Court's approach; *Garcia* continues to furnish the dominant model.").

66. *See Garcia*, 469 U.S. at 580 (Rehnquist, C.J., dissenting) (The *Usery* principle "will, I am confident, in time again command the support of a majority of this Court."); *id.* at 589 (O'Connor, J., dissenting) ("I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share JUSTICE REHNQUIST's belief that this Court will in time again assume its constitutional responsibility.").

67. *Id.* at 552.

68. *See id.* at 550-57.

closures. It includes enacting laws consistent with federalist principles and using the power of the congressional office to scrutinize and reform the expansive activities of independent regulatory agencies.

Second, we should selectively use the courts to eventually overturn *Garcia* and to remedy excesses imposed by district courts, some of which have sought to micromanage state institutions such as prisons.[69] States need not always be the defendants in these suits, nor need states wait for someone else to initiate the suits. Instead, states may bring suit[70] advancing new theories,[71] as well as the principles expounded in *Usery*, to strengthen state sovereignty. Well-chosen actions may both reform the current state of federalism and persuade the courts to reassume their role as guardian of our federalist system.

Third, we must wisely select our president. If *Garcia* is ever to be overruled, it will require the precise combination of the right case and the right makeup of the Court. Of the nine Justices who sat on the *Garcia* Court, only three remain,[72] two of whom dissented.[73] Whom we elect as president will

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69. According to Justice Thomas, "[t]here simply are certain things that courts, in order to remain courts, cannot and should not do. There is no difference between courts running school systems or prisons and courts running executive branch agencies." Missouri v. Jenkins, 115 S. Ct. 2038, 2071 (1995) (Thomas, J., concurring).

70. *See* Troy P. Foster, Legislative Review, *The Constitutional Defense Council*, 27 ARIZ. ST. L.J. 355 (1995) (reviewing an Arizona statute that creates and empowers a council to challenge federal laws that breach the Tenth Amendment and infringe on Arizona's sovereignty).

71. *See* Odom, *supra* note 42, at 1666-94 (finding that *Garcia* "calls for the development of new theories of federalism-based limitations on the commerce power" and exploring possible procedural and institutional limitations on that power); *see also* New York v. United States, 505 U.S. 144, 183-86 (1992) (reviewing the sparse history of the Guarantee Clause and discussing, without deciding, whether states may bring federalist challenges to national legislation under that Clause); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 330-33 (1993) (arguing that the Sweeping—Necessary and Proper—Clause provides a constitutional basis for adjudication of federalism issues); Massey, *supra* note 41, at 216-25 (noting possible substantive limits on federal power that could bolster the Court's current "process federalism" approach); Merritt, *supra* note 41, at 1 (presenting the Guarantee Clause, rather than the Tenth Amendment, as an effective, albeit modest, constitutional check on federal overreaching).

72. Justices Rehnquist, O'Connor, and Stevens.

73. Justices Rehnquist and O'Connor dissented. Justice Kennedy's recent concurrence in *United States v. Lopez* indicates that Justice Kennedy would support the principles of *Usery*. *See* United States v. Lopez, 115 S. Ct. 1624, 1634-42 (1995) (Kennedy, J., concurring). Justice Kennedy agreed that "the political branches [have] . . . the sworn obligation to preserve and protect the Constitution

eventually determine whether the Court will sustain an attack on *Garcia*.

Fourth, and most ambitious, we should consider the possibility of a constitutional amendment.[74] The greatest advantage of a constitutional amendment is that it is very difficult to alter. The greatest drawback, of course, is that constitutional amendments are very difficult to enact. Since the addition of the first ten amendments, which in a very real sense resulted from the same process that yielded the original Constitution, over 5000 amendments have been proposed.[75] Only seventeen have been adopted. All these have been adopted by a two-thirds vote of both houses of Congress and, except for the Twenty-First Amendment, by ratification of three-fourths of the state legislatures,[76] though other procedures are available.[77] If the

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in maintaining the federal balance . . . in the first and primary instance," but added that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Id.* at 1639. When Congress seeks to exercise its commerce power over activities lacking a commercial character or nexus, he explained, the Court "at the least . . . must inquire whether the exercise of national power seeks to intrude upon *an area of traditional state concern*." *Id.* at 1640 (emphasis added). If the congressional act "intrude[s] upon an area of traditional state concern[,] . . . [the Court has] a particular duty to insure that the federal-state balance is not destroyed." *Id.*

Justice Thomas's concurrence in *Lopez* indicates that he will support the principles of *Usery*. *See id.* at 1642-43 (Thomas, J., concurring). Justice Thomas focused on the scope of Congress' commerce power, not on federalism, but noted that "there are real limits to federal power." *Id.* at 1642. He also observed the need to "rafash-ion[] a coherent test that does not tend to 'obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Id.* at 1643 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

By contrast, Justice Breyer's dissent, joined by Justices Stevens, Souter, and Ginsburg, suggests that these four Justices would adhere to the rule of *Garcia*. *Id.* at 1657 (Breyer, J., dissenting). Justice Souter noted that "the notion that the commerce power diminishes the closer it gets to customary state concerns . . . has been flatly rejected" and that "[t]he commerce power . . . is plenary." *Id.* at 1654.

Apparently, the swing vote now belongs to Justice Scalia.

74. *See* Thomas E. Baker, *Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a "Republican Veto,"* 22 HASTINGS CONST. L.Q. 325, 330-56 (1995) (advocating the use of the constitutional amendment procedure to overturn Supreme Court decisions). Short of enacting an amendment, the states may claim a role in interpreting the Constitution and contributing to constitutional dialogue. *See* Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENTARY 315 (1994).

75. *See* Baker, *supra* note 74, at 337 ("Since 1789, more than 10,000 bills have been introduced in Congress to amend the Constitution. Of these, only thirty-three received the necessary two-thirds votes in both houses and proceeded to the states . . . .").

76. *Id.* The states enacted the Twenty-First Amendment through conventions,

proposal is controversial, as any attempt to strengthen federalism would be, approval by a supermajority of both houses of Congress and of the state legislatures would be particularly difficult.

The proposed amendment could be modest, however, and enjoy a higher probability of enactment. For example, an amendment might confer a sunsetting power on the states, whereby a federal statute would be repealed if a majority in each of the legislatures of a certain percentage of states so voted.[78] Repeal would be difficult, but the possibility of repeal might persuade Congress to alter federal statutes that are particularly offensive to federalism.[79] In any event, a constitutional amendment provides a potential avenue of reform that may be both necessary and realistic to pursue.

V. CONCLUSION

Other means of strengthening federalism and separation of powers certainly exist.[80] These must be discovered and explored. The costs of inaction and the rewards of success are high, for no less than the individual liberty safeguarded by the structure of our Constitution is at stake. May we therefore unite to restore the structures of separation of powers and federalism that they will more fully be, in the words of Madison, "a double security . . . to the rights of the people."[81]

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not state legislatures. *Id.*

77. *See* U.S. CONST. art. V.

78. Telephone Interview with LeVarr Webb, *supra* note 52. An amendment could also bolster state sovereignty by prohibiting unfunded federal mandates. *See* Gillmor & Eames, *supra* note 41, at 395 (suggesting "a constitutional amendment as the only way to solve the many difficulties [(including the weakening of federalism)] resulting from the glut of [unfunded amendments]").

79. Telephone Interview with LeVarr Webb, *supra* note 52.

80. *See* Freilich & Richardson, *supra* note 41, at 227-30 (surveying other means through which federalism may be revived, such as strengthening local governments' rights and powers and enacting federal legislation).

81. THE FEDERALIST No. 51, *supra* note 2, at 351.