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Five Views of Federalism: “Converse-1983” in Context

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In 1987, I published an overly long article in the *Yale Law Journal* entitled *Of Sovereignty and Federalism*.¹ In it, I advanced a “converse-1983” model of federalism—a model that highlighted the ways in which *state* laws can provide remedies when *federal* officials violate federal constitutional rights. For example, prior to the 1971 landmark of *Bivens v. Six Unknown Federal Agents*,² citizens whose Fourth Amendment rights had been violated by federal officers had no clear federal cause of action; but state trespass law often provided a remedy, and enabled citizens to recover when their “persons, houses, papers, [or] effects” had been unreasonably searched or seized by federal officials.³ The point, I suggested, was generalizable. State remedies could often protect citizens against unconstitutional behavior by federal officers, just as federal remedies—such as Section

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1. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L. J.* 1425 (1987).

2. 403 U.S. 388 (1971).

3. U.S. Const., Amend. IV.

1983—could often protect citizens against unconstitutional behavior by state officials. Rightly understood, “federalism” should protect citizens and limit government abuse—in contrast to the Supreme Court’s regular invocation of “Our Federalism” to deny citizens full remedies for constitutional wrongs.⁴ Concretely, I argued in 1987 that states should adopt “converse-1983” statutes that might invoke and invert the language of section 1983 as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of [*the United States*], subjects or causes to be subjected, any citizen of [*this state*] or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the [United States] Constitution, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.⁵

The first draft of this overly long 1987 article was even longer still. Early on, I sketched out four competing models of federalism as foils for my own “converse-1983” model. Eventually, I decided to omit this entire section for space reasons. I put the out-take in a drawer.

And there it sat, collecting dust, until Barry Friedman phoned to invite me to participate in this symposium on “Federalism’s Future.” I fished the out-take from my drawer, dusted it off, and re-read it. What I read seemed precisely relevant to federalism’s future—especially because of certain post-1987 developments in the Supreme Court that lead me to hope that the Court is moving in directions congenial to “converse-1983.”

In Part I of what follows, I shall present—with only minor emendations—my original out-take from *Of Sovereignty and Federalism*, contrasting the “converse-1983” model with competing conceptions of federalism. In Part II, I shall describe the post-1987 developments in Supreme Court case law that lead me to hope that “converse-1983” can indeed play an important role in federalism’s future.

I. FOUR VIEWS OF FEDERALISM

One’s view of federalism often hinges on how one conceptualizes states. Each of the four perspectives below focuses on one par-

4. See, for example, Amar, 96 Yale L. J. at 1425-26 & nn.3-6 (cited in note 1).

5. *Id.* at 1513 (emphasis added).

ticular attribute of American states. The first views states as constitutional wrongdoers; the second, as experimental and educational laboratories; the third, as decentralized political competitors; and the fourth, as guardians of legal rights. Each of these views is true in some ways. States are all of these things. And yet each perspective is importantly incomplete—as incomplete as the report of each fabled blind man describing what an elephant is “truly” like. After considering each view as thus far developed in case law and scholarly commentary, we will stand in a much better position to recognize certain features of federalism that none of these views seems to capture fully.

A. The “Nationalist” Perspective: States as Wrongdoers

In challenging the Supreme Court’s misguided invocation of state sovereignty at the expense of individual constitutional rights, foes of government misconduct often slip into some version of the following “nationalist” argument:

States pose serious threats to the constitutional liberty of citizens but the federal government stands as the special protector of these liberties. At least that much was established at Appomattox, if not at Philadelphia—by the Civil War Amendments, if not by the Federalist No. 10. Thus, the way to maximize constitutional liberty is to strengthen federal power and suppress ‘states’ rights.⁶

There is some truth in the nationalist argument; but its perspective is skewed. The nationalist correctly notes that a strong national government, by policing state compliance with constitutional norms, can reduce and remedy state threats to individual liberty. Section 1983 looms as a towering example. Indeed, the entire Federalist effort to establish a stronger and more stable central government in the late 1780s drew much of its inspiration from the widely perceived need to create a secure bulwark protecting individual rights against abusive state governments. In this respect, the Reconstruction amendments simply fortified the ideological foundations of the original Constitution. Yet a strong national government also poses threats to constitutional liberty. Who will stand guard against *these* threats?

The nationalist’s answer is quick and sure: the national judiciary. Once again, there is much truth here, but the picture is incom-

6. The work of my teacher, friend, and colleague, Owen Fiss, comes to mind here.

plete. We also need to see how the very existence of states and state-created legal remedies can help police the national government's compliance with constitutional norms. Obliterating "states' rights" would ultimately weaken *individual* constitutional remedies against the national government.

Ironically, both the nationalist and the Supreme Court (in its "Our Federalism" line of cases) commit similar mistakes. Each adopts too pessimistic a view about the state's capacity to respect constitutional norms. By undermining the ability of national courts to enforce state compliance with the Constitution, the Supreme Court winks at state lawlessness and trivializes state governments. The ultimate image of state sovereignty is a degraded one; sovereignty is invoked to defend judicial passivity when the state has done what no sovereign state may permissibly do—namely, violate the federal Constitution. It is exactly this degraded image of state governments that the nationalist shares and reacts against. But the nationalist overreacts. By accepting the Supreme Court's implicit assumption that state sovereignty is ultimately at war with the full enjoyment of individual constitutional rights (for if it were not, how could "states' rights" and "state sovereignty" plausibly be marshaled to defeat such rights?) the nationalist overlooks the promising strategy of enlisting the states in a campaign to promote constitutional rights by "checking" the national government's abuses of power.

Thus, the nationalist meets the Supreme Court's sloppy slogan of "state sovereignty" with the ringing cry of "national supremacy." Yet the nationalist has misdrawn the battle line. In the end, both mottos miss the central message of the Constitution: neither the state nor the nation can be supreme, because both must be subordinated to the ultimate supremacy of the ultimate law—the Constitution itself. Both "states' rights" and "national rights" exist to promote, and must ultimately yield to, citizens' rights that the Constitution creates or declares. Both sets of limited sovereigns must be kept within the limitations imposed on their sovereignty by the ultimate Sovereign—We the People of the United States who ordained and established those limitations. Indeed, we need to see how the Constitution contains various mechanisms by which both states' rights and national rights may be pressed into the service of citizens' constitutional rights.

*B. The "Laboratory" Perspective: States as
Experimenters and Educators*

Let us next consider what I shall call the "laboratory" perspective, a perspective closely associated with Felix Frankfurter and Louis Brandeis. In 1930, Frankfurter (then still a Harvard Professor) offered the following critique of overzealous judicial enforcement of substantive due process against state economic regulation:

Opportunity must be allowed for vindicating reasonable belief by experience. The very notion of our federalism calls for the free play of local diversity in dealing with local problems. . . . [J]udicial nullification on grounds of constitutionality stops experimentation at its source, and bars increase to the fund of social knowledge by scientific tests of trial and error⁷

Two years later, Justice Brandeis echoed this theme, and explicitly introduced the "laboratory" metaphor, in his now-famous dissent in *New State Ice Co. v. Liebman*:

Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.⁸

More recently, Justice O'Connor has attempted to develop the laboratory model in greater detail in her dissent in *Federal Energy Regulatory Commission v. Mississippi*:

[T]he 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote. That novel idea did not bear national fruit for another 30 years. Wisconsin pioneered unemployment insurance, while Massachusetts initiated minimum wage laws for women and minors. . . .

In addition to promoting experimentation, federalism enhances the opportunity of all citizens to participate in representative government. Alexis de Tocqueville understood well that participation in local government is a cornerstone of American democracy If we want to preserve the ability of citizens

7. Felix Frankfurter, *The Public and Its Government* 49-50 (Yale U., 1930).

8. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also Justice Holmes' 1921 dissent in *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (stating, "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states . . .").

to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems.⁹

As developed in these texts, the laboratory perspective yields a vivid set of images and metaphors highlighting two critical components of American federalism. First, federalism permits pragmatic testing of novel policy proposals. State laboratories are *practical* and *empirical*. In effect, innovative states can conduct controlled legislative "experiments" whose results can be monitored and interpreted by "scientific policymakers." Data may be collected and compiled, comparisons (both spatial and temporal) performed, hypotheses tested, and sound policy conclusions derived and applied elsewhere, if appropriate. The apparent linkage between the laboratory perspective and American Progressivism is unsurprising, given the perspective's parentage.

Second, federalism operates to edify and engage the citizenry. State laboratories are *educational* and *participatory*. They offer citizens clinical seminars in democratic self-government. If the first view of state laboratories may be deemed Progressive, this second view may conveniently be classified as Populist. The Progressive conceives of the laboratory as a testing ground for professional policymakers; the Populist views the laboratory as a training ground for ordinary citizens. For the Progressive, state and local governments are *policy* laboratories; for the Populist, *political* laboratories.

The linguistic contrast between Professor Frankfurter and Justice Brandeis on one hand, and Justice O'Connor on the other, is noteworthy here. Professor Frankfurter speaks of "vindicating reasonable belief by experience" (that is, empirically testing plausible hypotheses), and of the need to "increase . . . the fund of social knowledge by *scientific* tests of trial and error."¹⁰ Similarly, Justice Brandeis explicitly, if somewhat loosely, declares a "right to experiment."¹¹ Both men are primarily concerned with protecting states' "social and economic" legislation from the superimposition of judicial policy preferences cloaked in the rhetoric of due process and

9. 456 U.S. 742, 788-91 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part).

10. Frankfurter, *The Public and Its Government* at 49-50 (emphasis added) (cited in note 7).

11. *New State Ice Co.*, 285 U.S. at 771 (Brandeis, J., dissenting). Note also the clear scientific motif sounded by Justice Holmes' reference in *Truax* to experimentation in "insulated chambers." *Truax*, 257 U.S. at 344 (Holmes, J., dissenting).

dormant Commerce Clause doctrine. Justice O'Connor's opinion has a different flavor. To be sure, she does not abandon the Progressive insight—she, too, seeks to encourage local “experimentation” and points to successful “social” and “economic” experiments—but she garnishes the insight with a colorful assortment of Populist images. She adds the word “political” to Justice Brandeis’ duo of “social and economic”; she recounts Wyoming’s extension of political participation rights to women; she associates state laboratories with political “ideas”; she summons up a vision of “citizens” learning “democratic processes through participation in local government”; and she explicitly invokes Alexis de Tocqueville.¹²

Consider also the dissenting remarks of Justice Powell in *Garcia v. San Antonio Metropolitan Transit Authority*: “It is at . . . state and local levels—not in Washington as the Court so mistakenly thinks—that ‘democratic self-government’ is best exemplified.”¹³ In other passages, Justice Powell appears to weave Progressive and Populist strands together by arguing that state laboratories are more efficient precisely because state officials are more accessible and democratically responsive than federal officials.¹⁴

Like the nationalist perspective, however, the laboratory perspective distorts even as it illuminates. If the nationalist slights the role of the states in “checking” the nation, the laboratory perspective simply reverses the skew by ignoring the role of the nation in policing the states. Indeed, the laboratory perspective fails to offer any affirmative account whatsoever of national legislation. At best, it leaves us with a weak negative implication that in some areas local experimentation may be inappropriate. (But why?)

The perspective’s emphasis on the virtues of state experimentation also argues for a narrow understanding of constitutional limitations on state power. It argues for judicial restraint in policing the Fourteenth Amendment. The only individual “rights” the perspective vaguely champions are majoritarian rights of political participation. The perspective devotes little attention to protecting other federal individual rights *against* “experimentation” by local and perhaps temporary majorities. Of course, all this should not be surprising given the perspective’s provenance—its articulation in response to

12. *Federal Energy Regulatory Commission*, 456 U.S. at 788-91 (O'Connor, J., concurring in the judgment in part and dissenting in part).

13. 469 U.S. 528, 577 (1985) (Powell, J., dissenting).

14. See *id.* at 575-76.

vigorous judicial review under the Due Process Clause—and its obvious intellectual connection to the Progressive and Populist movements, neither of which is closely associated with countermajoritarian individual rights or judicial review.¹⁵ By contrast, the Madisonian view exemplified by “converse-1983” has a rather different intellectual lineage.

*C. The “Political Market” Perspective: States
as Decentralized Competitors*

Closely connected with the laboratory perspective is what I shall label the “political market” perspective. In the passage immediately following her invocation of de Tocqueville, Justice O’Connor writes:

Finally, our federal system provides a salutary check on governmental power. As Justice Harlan once explained, our ancestors “were suspicious of every form of all-powerful central authority.” . . . To curb this evil, they both allocated governmental power between state and national authorities, and divided the national power among three branches of government.¹⁶

Justice Powell argued in a similar vein in *Garcia*: “The Framers believed that the separate sphere of sovereignty reserved to the states would ensure that the states would serve as an effective ‘counterpoise’ to the power of the federal government.”¹⁷

Both of these passages focus on how federalism diffuses and decentralizes political power. One virtue of decentralization is diversity: states can generate a wide range of legislative policies that can accommodate sharply divergent local needs and political preferences. (Recall in this regard Frankfurter’s observation that “federalism calls for the free play of local diversity in dealing with local problems.”)¹⁸

15. For an interesting illustration of the possible tension between the judicial restraint and the states’ rights components of the laboratory model when dealing with congressional legislation challenged on federalism grounds, compare *Garcia*, 469 U.S. at 546 (Blackmun, J.) (citing Brandeis’ dissent in *New State Ice* for the principle of judicial restraint) with *id.* at 568 n.13 (Powell, J. dissenting) (citing the *New State Ice* dissent for the principle of state autonomy and criticizing the majority’s invocation of Brandeis’ “laboratory” language).

16. *Federal Energy Regulatory Commission*, 456 U.S. at 790 (O’Connor, J., concurring in the judgment in part and dissenting in part).

17. *Garcia*, 469 U.S. at 571. See also Justice Powell, writing for the Court, in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 (1985): “The Framers believed that the states played a vital role in our system and that strong state governments were essential to serve as a counterpoise to the power of the Federal Government.”

18. See text accompanying note 7.

That diversity, in turn, offers citizens a true "choice of laws": individuals may "domicile shop" for the place with the most appealing bundle of local laws, customs, and attitudes. Citizens willing to shoulder heavier taxes in exchange for better streets and schools may choose to live in State A; others may opt for State B. A centralized regime of one-size-fits-all national uniformity denies federalism's rich diversity and its corresponding possibilities for citizen choice and self-selection. The image of centralized government is one of an unhappy compromise that leaves everyone somewhat dissatisfied: some will condemn "inadequate" public services, while others will curse "oppressive" taxation.

This self-selection feature of federalism is not explicitly developed by Justice O'Connor, but seems implicit in her overall argument. Indeed, the 1890 Wyoming suffrage law she invokes nicely illustrates federalism's opportunities for "domicile shopping." Perhaps Wyoming extended the franchise to women in order to induce more women to immigrate there. By allowing them to vote with their hands, Wyoming encouraged them to vote with their feet.

These observations lead to the central insight of the political market perspective: federalism structures competition between governments. At one level, states compete against the national government. States operate as "an effective 'counterpoise' to," and a "salutary check on," federal power. As Justice O'Connor suggests, there is a useful analogy here between separation of powers and federalism—the two great structural principles of the Constitution. By dividing national power among three separate and equal branches, the Constitution sets up competing political institutions whose political jealousy serves to diffuse power and prevent "[t]he accumulation of all powers . . . in the same hands[, which is] the very definition of tyranny."¹⁹ A similar dynamic of political jealousy operates in the structure of federalism. The very existence of states counters the perhaps otherwise irresistible gravitation of all power toward Washington, D.C. The classic formulation of the point, of course, is James Madison's Federalist No. 51:

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract

19. Federalist No. 47 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 300, 301 (Mentor, 1961).

ambition. . . . [Y]ou must first enable the government to control the governed; and in the next place oblige it to control itself. . . .

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. . . . [T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. . . .

. . . 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 will control each other, at the same time that each will be controlled itself.²⁰

The parallels between Madison's model of political competition and Adam Smith's (then recent) model of economic competition are both self-conscious—witness Madison's reference to "private as well as public" incentive systems—and powerful. Both models rely on overarching incentive structures to harness individual self-interest (whether personal political ambition and jealousy or the desire for profit) in a way that promotes some larger public good (whether "public rights" or consumer welfare). Both models depend on *competition* to further liberty and forestall undesirable concentrations of power (whether tyranny or monopoly).

Competition also operates *among* the states. The political market theorists do not dwell on this point. Frankfurter's phrase about the "*free play* of local diversity"²¹ is perhaps suggestive, but, once again, it seems implicit in the political market vision. The counterpart of citizen choice and self-selection is state competition for the allegiance of citizens: if Wyoming wanted to win women over, it in effect had to compete for them by bidding them away from other states. Indeed, the political market model's account of legislative diversity and citizen self-selection closely tracks the microeconomist's account of product differentiation under conditions of imperfect competition, as the very metaphor of "domicile shopping" suggests.

In the end, the political market perspective on federalism is powerful but, once again, incomplete for our purposes. Although the perspective begins to focus attention on the competition among states, the mechanisms and full implications of this feature of federalism remain somewhat obscure. In particular, we need to understand

20. Federalist No. 51 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 320, 321-23 (Mentor, 1961).

21. Frankfurter, *The Public and Its Government* at 49 (cited in note 7) (emphasis added).

more clearly how "horizontal" interstate competition can exert important pulls on the vectors of "vertical" state-national competition.

The political market perspective's focus on "vertical" competition is sharper. Justice O'Connor's suggestion that federalism "provides a salutary check" on the power of the national government points us in exactly the right direction. Even more promising is her explicit analogy between federalism and separation of powers.

Yet, once again, the promise of the perspective is only partially fulfilled. Justices O'Connor and Powell give us some notion of how federalism's diffusion of political power serves to promote liberty, but this is only a part of the complete picture. Madison, after all, suggests that the government's structure will create incentives to protect "the *rights* of the people" and "control" against governmental "encroachments."²² His point seems crisper and more precise than the simple suggestion that diffusion of political power will generally prevent tyranny. Rather, his Federalist No. 51 implies that the Constitution's structure of government will help assure compliance with the specific *legal rights* established in that same document.²³

Indeed, it is exactly here that the analogy between separation of powers and federalism invites more careful attention than Justice O'Connor affords, for separation of powers plainly has a legal as well as a political dimension; it establishes structures and institutions—like judicial review—whose very purpose is to assure governmental compliance with the individual legal rights embodied in the Constitution. A "converse-1983" model helps us see how federalism has similar structural features that promote individual constitutional rights.

Finally, the political market model—at least in these passages from Justices O'Connor and Powell—seems slanted, though less so, perhaps, than its laboratory counterpart. Whereas the two justices

22. Federalist No. 51 (Madison) at 322-23 (cited in note 20) (emphasis added).

23. See also Federalist No. 48 (Madison):

[P]ower is of an encroaching nature and . . . ought to be effectually restrained from passing *the* limits assigned to it. After discriminating, therefore, in theory, the several classes of power . . . the next and most difficult task is to provide some practical security for each, against the invasion of the others. . . . [It is not] sufficient to mark, with precision, the *boundaries of these departments in the constitution* of the government, and to trust to *these parchment barriers* against the *encroaching* spirit of power. . . . [T]he powers of government should be so divided and balanced among several bodies of magistracy as that no one could *transcend their legal limits* without being effectually checked and restrained by the others.

Federalist No. 48 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* 308, 308-11 (Mentor, 1961) (emphases added).

stress state "counterpoise[s]" to, and "salutary checks" against, the "all-powerful central authority" of the national government, Madison's Federalist No. 51 speaks more symmetrically of the "different governments . . . control[ing] each other."²⁴

D. The "Safeguard" Perspective: States as Guardians of Legal Rights

A somewhat different perspective emerges from two classic articles, one penned by Professor Herbert Wechsler²⁵ and the other by Justice William Brennan.²⁶ Each author describes how federalism can safeguard certain legal rights—for Professor Wechsler, states' rights guaranteed by the federal Constitution; for Justice Brennan, individual rights protected by state constitutions. The two articles address different issues, and travel down different paths. Nevertheless, for our purposes here, we may usefully consider the two back-to-back, under the general rubric of the "safeguard" perspective.

1. Professor Wechsler's "Political Safeguards"

Renovating the analysis of various Federalist Papers, Professor Wechsler's classic article on "the political safeguards of federalism" refocuses attention on the role of states in constituting the national government's political branches. Under the provisions hammered out at Philadelphia, state legislators would directly select Senators, and each state would receive equal representation qua state. In the House, apportionment of Representatives would be by state—with each state entitled to at least one seat, regardless of size—and electoral qualifications would mirror those defined by state law for state legislatures. Moreover, the Constitution gave state legislatures the power to prescribe the relevant voting and districting regulations in the first instance, subject to Congressional revision. Finally, state legislators could choose the electoral college that would select the President; in the absence of an electoral college majority for any candidate, the choice would devolve upon the state delegations in the House, with each state delegation given one vote. In short, the states were built into the very structure of the national government;

24. Federalist No. 51 (Madison) at 323 (cited in note 20) (emphasis added).

25. 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).

26. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

they were made "constituent and essential" components of the new nation's political branches.²⁷

Of course, the structure of national office-holding today departs from Madison's blueprint in important respects. A system of nationwide parties has taken shape; the people of each state vote directly for Senators and Presidential electors; and much election law has been constitutionalized. Nevertheless, Wechsler argued that:

Madison's analysis has never lost its thrust. . . .

The point is so clear in the Senate that, as Madison observed of the equality accorded to the states, it "does not call for much discussion." . . .

. . . [T]he composition of the Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control.

Even the House is slanted somewhat in the same direction, though the incidence is less severe. . . .

Federalist considerations [also] play an important part even in the selection of the President, although a lesser part than many of the Framers must have contemplated.²⁸

Several conclusions follow from this line of analysis. First, in the political competition between state and national officials, state and local interests enjoy a built-in competitive advantage. The very composition—the constitution—of national offices creates strong political incentives for national office-holders to attend to state and local concerns:

[T]he states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics. . . .

. . . Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states.²⁹

Thus far Wechsler's argument builds upon the political market perspective's emphasis on both political competition and diffusion of political power. He offers a clear account of exactly how the Constitution's structural incentive mechanisms translate the former

27. Wechsler, 54 Colum. L. Rev. at 546 (cited in note 25) (quoting Federalist No. 46 (Madison)).

28. *Id.* at 546-48, 557 (citations omitted).

29. *Id.* at 546, 558.

into the latter. He moves beyond the suggestive language of "counterpoises" and "checks," and into a structural analysis of political incentives.

Yet Wechsler's argument contains an even more important move for our purposes here. He does not stop with an account of how federalism diffuses political power, but goes on to suggest that the Constitution's federal structure also helps to enforce that instrument's legal clauses limiting national power:

It is in light of this inherent [centrifugal] tendency, reflected most importantly in Congress, that the governmental power distribution clauses of the Constitution gain their largest meaning as an instrument for the protection of the states. Those clauses, as is well known, have served far more to qualify or stop intrusive legislative measures in the Congress than to invalidate enacted legislation in the Supreme Court.³⁰

Any national attempt to legislate beyond the Constitution's enumerations of national power will likely meet fierce political opposition within the national government itself. Wechsler thus explains how the federal structure furnishes built-in political safeguards for the constitutionally-protected residuary rights of state governments.

As with the other perspectives we have canvassed, however, Wechsler's argument fails to develop fully certain important implications of federalism that I mean to highlight with my "converse-1983" model. Wechsler shows how the structure of federalism can vindicate the states' rights against the national government—rights embodied in what Wechsler calls the "distribution clauses" of the Constitution (like the Commerce Clause)³¹—but fails to suggest how federalism might protect various *citizens'* rights embodied in other clauses limiting national power. Once again, we must recall Madison's words in Federalist No. 51, which speak not of the rights of states, but rather of "the rights of the people."³²

Moreover, Wechsler's argument seems almost as imbalanced as the O'Connor/Powell political market model; we get a far richer account of the way that states can keep the national government in constitutional check than vice versa. The "political safeguards" argument also echoes the laboratory perspective's plea for judicial restraint. Because states generally can protect their rights through the

30. *Id.* at 558.

31. *Id.*

32. Federalist No. 51 (Madison) at 323 (cited in note 20).

political process, "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress."³³

To be sure, there is a vital difference between the laboratory perspective's argument for judicial restraint in policing states and Wechsler's argument for judicial restraint in protecting them. In both cases, however, the focus on the political branches tends to slight the constitutional role of Article III courts. Politics tends to displace adjudication—as most graphically illustrated by the neo-Wechslerian arguments of Dean Jesse Choper that the judiciary should treat constitutional limitations on national power in the "distribution clauses" as nonjusticiable.³⁴

In sum, Wechsler's major breakthrough is in pointing us to a more precise parallel between federalism and separation of powers: both serve not only to diffuse political power but also to protect enumerated constitutional rights. Yet the "political safeguards" argument tends to present federalism and separation of powers as mutually exclusive structural devices to enforce different constitutional clauses. The federal structure protects the legal rights of states, while judicial review protects the legal rights of individuals. The suggested specialization of labor is powerful and elegant, but the picture is nonetheless incomplete. We need to see how the political competition of federalism also supports judicial review's protection of individual rights. Political competition can generate the legal remedies and causes of action that enable individual citizens to vindicate their federal constitutional claims in courts of law.

2. Justice Brennan's "Double Source of Protection"

The final view of federalism to be considered is also associated with a classic article: Justice Brennan's *State Constitutions and the Protection of Individual Rights*.³⁵ Justice Brennan begins by noting that state constitutions often contain provisions with wording similar, or even identical, to the phrasing of "counterpart" provisions of the

33. Wechsler, 54 Colum. L. Rev at 559 (cited in note 25).

34. See generally Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review*, 86 Yale L. J. 1552 (1977). Compare *Garcia*, 469 U.S. 528 (1985).

35. Brennan, 90 Harv. L. Rev. 489 (cited in note 26).

federal Bill of Rights.³⁶ Yet state judges, Justice Brennan notes, need not construe these state constitution provisions identically to the Supreme Court's construction of their federal counterparts. Of course, the federal Constitution, as interpreted by the Supreme Court, establishes a minimum baseline—a floor—that state judges must respect upon penalty of reversal. But the floor need not become a ceiling. State courts are free to go “beyond” the federal minimum by interpreting state constitutional provisions “as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.”³⁷

Justice Brennan notes a nascent trend among state judiciaries in this direction—perhaps, he suggests, in response to the Burger Court's retrenchment of federal constitutional rights in the areas of due process, equal protection, criminal procedure, and free speech.³⁸ He celebrates this state trend in the name of federalism:

State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. . . .

This pattern of state court decisions puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights. . . . [P]rior to the adoption of the fourteenth amendment, these state bills of rights, independently interpreted, were the primary restraints on state action since the federal Bill of Rights had been held inapplicable. . . .

Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts.³⁹

In some respects, Justice Brennan's argument simply restates the laboratory perspective, but alters the emphasis. The laboratory perspective argues for a narrow understanding of federal constitutional restrictions on states; Justice Brennan merely adds that given this (Burger Court) perspective on federal constitutional rights, states should feel free to experiment by going beyond the federal minimum. Precisely because one size of rights does not fit all states, the Burger Court's limited reading of federal rights should not be understood as fixing a maximum as well as a minimum.

This celebration of federalism seems rather weak. By appearing to accept the underlying premises of the laboratory perspective

36. *Id.* at 495.

37. *Id.*

38. *Id.* at 495-98.

39. *Id.* at 491, 501-02.

(perhaps for tactical reasons), all Justice Brennan seems to be saying is that states need not necessarily be as oppressive to citizens as the federal government and federal constitution allow them to be. The nationalist might counter by pointing out that if state power were abolished altogether—or at least, if the national courts enforced federal constitutional rights against states with appropriate vigor—individuals would not need additional state-created rights and remedies against the abusive exercise of state power. Alas, Justice Brennan's theory offers no strong *affirmative* case for states.

Thus, while Professor Wechsler shows how federalism safeguards the *federal* constitutional rights of *states*, Justice Brennan adds that federalism also safeguards the *state* constitutional rights of *individuals*; yet neither offers a fully satisfactory account of how federalism also safeguards the *federal* constitutional rights of *individuals*. A "converse-1983" model of federalism tries to color in this blank patch of canvass.

Even with its limited scope, however, Justice Brennan's thesis is noteworthy. First, by welcoming the development of state constitutional rights against the state itself, Justice Brennan champions individual interests that may well be countermajoritarian. His emphasis on "*individual liberties*," on "*restraints on state action*," and on state constitutions above ordinary state laws, represents an important shift in tone from the seeming statism of the laboratory perspective. Justice Brennan also offers a strong defense of judicial activism—at least for the state judiciaries. (Indeed, he goes so far as to offer his state court sisters and brothers a detailed recipe for insulating their activist decisions from Supreme Court review. Consider also his blunt citation of an article entitled *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*.)⁴⁰ Once again, this represents an important shift in tone.

Most important for our purposes is Justice Brennan's recognition that "our federal system . . . provides a double source of protection for the rights of our citizens."⁴¹ Justice Brennan is obviously thinking here of rights against states. But his recognition that a federal system offers citizens two sets of laws that restrain abuses of state power invites us to ask whether federalism also involves any "double source of protection" against abuses of power by the *national* government. Indeed, Justice Brennan goes on to note that "state

40. Id. at 500-01 & n.76.

41. Id. at 503.

courts can breathe new life into the federal due process clause by interpreting their common law, statutes, and constitutions to guarantee a 'property' and 'liberty' that even the federal courts must protect."⁴² Once again, Justice Brennan seems to be thinking primarily of rights against states. His allusion to "the federal due process clause" apparently refers to the Fourteenth Amendment's restrictions on state power.

But another "federal due process clause"—the Fifth Amendment's—restricts the national government from abusively exercising power. Thus, a state law creating a property interest also triggers important restrictions on national officials. Again, the question arises whether there are any other mechanisms by which state laws can protect citizens' constitutional rights against the national government. To answer this question, we need to rethink sovereignty and federalism.

II. FEDERALISM'S FUTURE: "CONVERSE-1983"?

"We need to rethink sovereignty and federalism. . . ." So I wrote some years ago in an unpublished out-take; and, since then, the Supreme Court, lo and behold, has begun to rethink sovereignty and federalism. (Perhaps I should consider nonpublication more often.) Although the Court's rethinking is still in its early stages and could yet go awry, I hope that some Justices may be beginning to pivot—at least rhetorically—in the right direction.

My Exhibit A is the 1991 case, *Gregory v. Ashcroft*,⁴³ in which the Court, per Justice O'Connor, built powerfully on precisely those passages of her *FERC* dissent that I found most intriguing and promising in my unpublished out-take.⁴⁴ The facts of *Gregory* are rather far afield from my immediate concerns and from my more general interest in a "converse-1983" model of federalism. Far more important for my purposes here is what the Court, per Justice O'Connor, said about federalism. And federalism today appears to have real bite, for in *Gregory*, federalism values generated a powerful clear statement rule narrowing a Congressional statute; and, in a later case, *New York v. United States*,⁴⁵ the Court actually struck down an

42. *Id.*

43. 501 U.S. 452 (1991).

44. See notes 9, 16 and accompanying text.

45. 112 S. Ct. 2408 (1992).

act of Congress on federalism grounds—for the first time in over fifty years⁴⁶—in an O'Connor opinion that repeatedly invoked *Gregory*.

In light of *Gregory*'s possible importance, I shall quote from it at length:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. . . .

Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . Just as the separation and independence of the coordinate Branches of the Federal Government serves 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. Alexander Hamilton explained to the people of New York, perhaps optimistically, that the new federalist system would suppress completely "the attempts of the government to establish a tyranny":

"[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress." *The Federalist* No. 28, pp. 180-181 (C. Rossiter, ed. 1961).

James Madison made much the same point:

"In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. 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 will control each other, at the same time that each will be controlled by itself." *Id.*, No. 51, p. 323.⁴⁷

Justice O'Connor (for the Court) begins this extraordinary passage of *Gregory* exactly where Justice O'Connor (in dissent) left off in *FERC*, with what I have called the "laboratory" and "political market" models. She invokes images of states as both Populist and

46. Not counting, of course, *National League of Cities v. Usery*, 426 U.S. 833 (1976), which *Garcia* overruled.

47. *Gregory*, 501 U.S. at 458-59.

Progressive laboratories—"increas[ing] opportunity for citizen involvement in democratic processes" and allowing for more "innovation and experimentation"—and sharpens the domicile shopping idea of "decentralized" states "in competition for a mobile citizenry" in ways that "will be more sensitive to [citizens'] diverse needs."⁴⁸

But then Justice O'Connor breaks off to begin a new idea—perhaps a new model of federalism. "*Perhaps the principal benefit of the federalist system is a check on abuses of government power.*"⁴⁹ Exactly so. And what follows is a precisely drawn and self-conscious analogy between separation of powers and federalism: both are designed to "reduce the risk of tyranny and abuse."⁵⁰ This, too, is just right. Note also how the asymmetric vision of the *FERC* dissent has flowered into symmetry: federalism is designed, says the Court, to reduce the risk of government abuse "*from either front*"—that is, from both central *and* state government.⁵¹

Finally, and most remarkably, we come to the Court's powerful quotations from, and juxtaposition of, key passages from the Federalist Nos. 28 and 51. Both passages make clear that federalism is indeed symmetric, and exists to protect citizens' legal rights against governments. "If their rights are invaded by either [government], they may make use of the other as the instrument of redress."⁵² "Hence a double security arises to the rights of the people."⁵³

The Court, in my view, has chosen exactly the right passage of the famous Federalist No. 51 to highlight, and has juxtaposed it with precisely the key words of the much less well known Federalist No. 28. Indeed, in the final version of my 1987 essay I quoted and juxtaposed these same two passages as the cornerstones of my proposed "converse-1983" model. I described the language of Federalist No. 28 as "seldom-quoted"—as indeed it then was; before 1987, no court and no law professor, to my knowledge, had ever quoted or paid much heed to this passage.⁵⁴ But now the United

48. *Id.* at 458.

49. *Id.* (emphasis added).

50. *Id.*

51. *Id.*

52. *Id.* at 459 (quoting Federalist No. 28).

53. *Id.* (quoting Federalist No. 51).

54. In the opening chapter of his pathbreaking 1978 treatise on the Constitution, Professor Laurence Tribe did feature an important sentence from Federalist No. 28, outside the passage featured in *Gregory* and my 1987 article, but in harmony with this passage. Laurence H. Tribe, *American Constitutional Law* 3 n.6 (Foundation, 1978). In the political science literature, the key words from Federalist No. 28 were quoted and discussed in a highly incisive

States Supreme Court has—in dictum, to be sure—featured this passage as a central text of American federalism.

What remains, of course, is for the Supreme Court to take that dictum seriously, and to begin the real work of building a new model of federalism, a model that I call "converse-1983" and that I have tried to elaborate at length elsewhere, a model that builds on the Federalist No. 28 idea that if either government invades the citizen's constitutional rights, the citizen can use the other government as the instrument of redress. In that idea lies federalism's original intent, and—let us pray—federalism's future.

