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Understanding Federalism

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Understanding Federalism

Larry Kramer*

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Talking about federalism feels a bit like joining the proverbial blind men trying to describe an elephant. It's such a big topic, one can't possibly hope to grasp more than a small part of the beast. There are, for example, huge literatures on how—depending on one's take—federalism either improves government or impedes progress, enhances freedom or permits racism, fosters participatory democracy or entrenches local elites, facilitates regulatory diversity or creates races to the bottom, protects individual liberty or encourages tyranny, promotes responsible fiscal policy or generates inexorable pressures to expand government, and on and on. Reading only the work on James Madison could occupy most of an academic career. And after one absorbs Madison and his interpreters, there still remains a library full of books and articles exploring other theories of federalism, describing what federalism looks like, and explaining how power is (or should be) distributed in most any and every area of law and life.

* Professor of Law, New York University. I received an unusually large amount of helpful advice on this Article, which is the first part and introduction to a much larger project. While I cannot thank everyone whose thoughts have contributed to the final product here, I am especially grateful to Rebecca Brown, Richard Bernstein, Guyora Binder, Jesse Choper, David Currie, Chris Eisgruber, Sam Estreicher, Richard Fallon, Dan Farber, John Ferejohn, Martin Flaherty, Barry Friedman, Don Herzog, Jon Macey, Dan Meltzer, Paul Mishkin, Bill Nelson, Eric Pierson, Rick Pildes, Richard Posner, Martin Redish, Judith Resnik, Ricky Revesz, David Richards, Dan Richman, Terry Sandalow, David Shapiro, Mark Snyderman, Dick Stewart, Bill Stuntz, Mark Tushnet, William Van Alstyne, and participants in the New York University Legal History Colloquium and in workshops at Buffalo and Fordham for particularly helpful comments on earlier drafts.

One thing that emerges from surveying even a portion of this literature is the unsurprising point that what federalism "is," what it "means," looks different depending on the area examined and the question asked. For lawyers, the area of greatest interest has been the role of courts, and the question most frequently asked has been to what extent should judges regulate the allocation of power between state and national governments? And the usual answer, in recent years at least, has been "hardly at all." Probably the best known statement to this effect is in *Garcia v. San Antonio Metropolitan Transit Authority*,¹ where the Supreme Court said that it would no longer strike down federal statutes for intruding on "traditional functions" of state government, because "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."²

Garcia's holding remains controversial, and subsequent developments suggest that the Court may still be willing to review statutes aimed exclusively at state governments.³ But the power of Congress

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

2. *Id.* at 550.

3. As Justice Rehnquist made clear in his remarkably blunt dissent in *Garcia* (an opinion lacking only a footnote attaching an actuarial table to indicate how soon the Court could expect to lose its older, liberal members), some of the justices remained anxious to restore *National League of Cities v. Usery*, 426 U.S. 833 (1976). It took this faction only six years (after some of the anticipated changes in personnel) to find a majority willing to reconstitute the holding of *National League of Cities* as a clear statement rule for interpreting federal legislation. See *Gregory v. Ashcroft*, 501 U.S. 452 (1991). By applying this rule aggressively, the Court could restore a lot of the protection states supposedly lost after *Garcia*; Congress is not, after all, renowned for the care of its drafting and seldom seems to take judicial rules of this sort adequately into account. Whether that will happen remains to be seen, however, and in the meantime, *Gregory* neither challenges nor seriously undermines the explicit constitutional holding of *Garcia*.

The Court's most recent decision in this area may pose a more serious threat to *Garcia*. In *New York v. United States*, 112 S. Ct. 2408 (1992), the Court struck down provisions of a federal law requiring states either to accept ownership of radioactive waste or to take other actions dictated by Congress. Writing for the Court, Justice O'Connor reasoned that to allow the federal government to "commandeer" state legislative processes this way would obscure the lines of political accountability and impair the capacity of states to function as independent regulatory alternatives to Washington. *Id.* at 2420, 2424.

Most commentators apparently read *New York* as putting the Court back in the business of enforcing substantive limits on federal legislation. See, for example, Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 *Hastings Const. L. Q.* 489 (1994) and Martin H. Redish, *Doing It With Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 *Hastings Const. L. Q.* 593 (1994). This is, to be sure, a plausible way to read *New York*, but there is another interpretation, one more consistent with *Garcia*. Bear in mind that *Garcia* did not say that questions of federalism are non-justiciable: It shifted to a process-based approach that abandons the effort to articulate substantive limits on what Congress can do and looks instead to ensure the integrity of the process through which

to single out state governments for special treatment isn't all that important anyway, because the vast bulk of what the federal government does involves private activity. The important step was thus taken at the time of the New Deal, when the Court recognized that Congress could regulate private activity to practically the same extent as states could, and this, more than anything else, accounts for the diminished role of courts in the area of federalism.⁴

Of course, the New Deal decisions expanding federal power to regulate private conduct share *Garcia's* critical assumption: States don't need judicial protection because they can protect themselves in the political process. True, only *Garcia* makes the point explicitly, but the New Deal Court must have similarly assumed that withdrawing judicial protection would not harm states unduly. In any event, whether self-conscious or not, this combination of decisions has left us with a system of federalism that depends overwhelmingly on the political process to ensure an appropriate balance between state and federal governments.

The viability of such a process-based approach to federalism depends on answers to certain vital questions, like what exactly *is* the "process" of federalism, and *how* does it protect state and federal interests? These are hardly obscure questions. After all, how can we evaluate whether the Court was right to abandon the field to a process that we do not understand? But there are more important reasons for wanting to understand better the process by which power is distributed. Federalism is exceedingly popular these days. Efforts to establish working federations are everywhere—from the former Soviet Union, to the European Community, to the new governments in Eastern Europe, South Africa, Eritrea, and countless other places

such choices are made. See 469 U.S. at 556. See also Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 364-65; Thomas H. Odom, Comment, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. Pa. L. Rev. 1657, 1660-67 (1987). It follows that, under *Garcia*, federal action may be invalid if it interferes unduly with the process by which states compete for political power. Seen in this light, the *New York* Court's concern that Congress had adopted legislation that obscured the lines of political accountability makes sense: Congress was not just regulating states directly, it was doing so in a way that risked distorting the process through which states are able to gain political capital. One may, of course, still disagree with *New York* on these grounds, but the decision need not be seen as undercutting *Garcia*.

4. The Court recently granted certiorari in a case challenging an exercise of the commerce power. See *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (1994) (holding that a law prohibiting possession of guns within fixed distance of a schoolyard exceeded Congress' power under the Commerce Clause). It's possible that the justices will take this opportunity to impose some new limit on federal power, but even if they do, they're not likely to curtail it in any significant way.

around the globe. These efforts have generated a cottage industry among American legal scholars and political scientists, each flying to his or her favorite spot to recommend a scheme like ours, unquestionably the most durable, successful federation in history. But before advising other nations to adopt "Our Federalism," we should be certain that we understand how and why it works, for surely the success of American federalism is not solely attributable to the formal legal structure created by the Constitution. And without understanding the complete process of federalism—including its culture and politics—we can't begin to guess what that structure will produce in another country.⁵

It is, in fact, difficult to find a satisfying discussion of the process by which power is allocated between state and federal governments. The *Garcia* Court's efforts are certainly unsatisfying (to say the least). The Court tells us, for example, that states are protected by the limitation of federal powers to those enumerated in Article I, stunningly ignoring that the practical effect of this enumeration has been all but obliterated in the years since the New Deal. More important, the Court continues, states are able indirectly to influence the House of Representatives and the Presidency through their control over voter qualifications and their role in the Electoral

5. I should take a moment to clarify what I mean by "federalism." A federal system is one in which political power is divided between central and subordinate authorities. That describes any decentralized system, of course, but a federal system is distinguished from other decentralized setups by the additional fact that leaders in its subordinate units don't depend on the central government for their political authority. Most definitions of federalism assume further that the subordinate units possess enclaves of jurisdiction that cannot be invaded by the central government. See, for example, Walter Bennett, *American Theories of Federalism* 10 (U. of Alabama, 1964). But so long as the subordinate units are able successfully to obtain some share of governmental power, it's not important that their jurisdiction be fixed over any particular area. Rather, the critical feature of a federal system is that officials of the subordinate units are not appointed, and cannot be fired, by officials of the central government.

Federalism in the United States is multilayered. There is, of course, the federal government, with nationwide jurisdiction, and, below it, the states. But each state is a federation itself—with subordinate units like counties, cities, school districts, etc., established in state constitutions. To keep an already too complex topic manageable, this Article will deal primarily with the relationship between the federal government and the states, though much of its analysis is applicable to relationships between local authorities and state or federal officials.

I must emphasize one other feature of federalism: Federalism is a theory of institutions. The assumption is that distributing power among governmental institutions at different levels will provide various benefits to the polity, and the question is always what these institutions can or should be able to do. To say that "states" are protected, as I sometimes do for ease of exposition, thus means that space is created for state political institutions to make decisions about whether or how to regulate. Similarly, when I ask how federalism "works" or what its "process" is, I'm asking about how authority is distributed between the political institutions of state and federal governments.

College. And most important of all, states have direct control over the Senate through their equal representation in that body and because each Senator was to be selected by the legislature of his or her state. True, the Court acknowledges, there have been changes in the structure of the federal government since 1789, "not the least of which" is the Seventeenth Amendment providing for direct election of Senators, and, yes, these changes "may work to alter the influence of the states in the federal political process."⁶ No matter, the fundamental limitation on the power of Congress vis-à-vis the states is still to be one of process rather than result. After all, a substantial portion of state budgets consists of federal dollars, which shows how effectively the states are able to use the federal government. (Here the Court ignores a literature arguing that the conditions accompanying grant-in-aid programs have provided a principal means for Congress to make the states its vassals.)⁷ Besides, Justice Blackmun adds, the Framers wanted a system based on process, and what was good enough for James Madison and James Wilson in 1789 ought surely to be good enough for us today.⁸

In fairness to the justices, the Court decides lots of cases in lots of areas, and while they certainly could have done better than they did in *Garcia*, it really is too much to expect a treatise on government. Nor is the point that states are not adequately protected in the national political process or that federalism cannot work without legal barriers enforced by courts. The point is, rather, as Andrzej Rapaczynski observed in his splendid essay on *Garcia*, that we still don't know very much about the process in question.⁹ Unfortunately, because Rapaczynski was concerned primarily with developing "a general theory of political processes that would allow us to understand why the Constitution concentrates as heavily as it does on the protection of the integrity of processes and institutions,"¹⁰ he did not attempt to provide an account of how our particular process actually works.

6. *Garcia*, 469 U.S. at 554.

7. See Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 L. & Soc'y Rev. 663, 669-75 (1980). On grant programs generally, see Daniel J. Elazar, *American Federalism: A View From the States* ch. 4 (Harper & Row, 3d ed. 1984).

8. *Garcia*, 469 U.S. at 554.

9. Rapaczynski, 1985 Sup. Ct. Rev. at 372 (cited in note 3).

10. *Id.*

No one else has done it either. Justice Blackmun borrowed his arguments from the classic sources for relying on "political safeguards"—Wechsler¹¹ and Choper¹²—while also citing Bruce La Pierre's interesting, if overly long, piece elaborating similar themes.¹³ As we shall see below, however, the accounts of how federalism works offered by these writers are no more satisfying than *Garcia's*, and the truth is that we know amazingly little about the politics of allocating power between state and national governments.

This point bears emphasizing because it highlights a surprising gap in the literature on federalism. There is an impressive body of work on the *value* of federalism—on why, as a theoretical matter, it may be good to have independent state and national governments competing for regulatory authority (because this creates a market in government services, promotes participatory democracy, prevents tyranny, and the like).¹⁴ There is, similarly, abundant writing on what the outcome of this competition ought to be in particular areas at particular times (be it banking or environmental regulation or consumer protection or whatever). There is, however, very little on how to get from Point A to Point B—little, that is, on the conditions needed for this competition to flourish and so to achieve the ends sought. Little on how federalism really works.

Filling that gap is an enormous task, one I can't possibly hope to accomplish here. So my ambitions for this paper are more modest: to begin the larger assignment by identifying and describing the chief structural, political, and cultural factors responsible for shaping the allocation of power between the national government and the states. A number of themes emerge along the way. First, responding to concerns that a national government would be too powerful, the Framers of the Constitution tried to protect states by giving them a voice in the national political process (using devices like the Senate

11. See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, in *Principles, Politics, and Fundamental Law* 49 (Harvard U., 1961).

12. See generally Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (U. of Chicago, 1980).

13. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 Wash. U. L. Q. 779 (1982).

14. A recent article by Edwin L. Rubin and Malcolm Feeley argues that it is possible to obtain many of the benefits of federalism through intelligent decentralization. See *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903 (1994). While much of what they have to say is persuasive, I agree with the classic argument that the political independence of state and local officials strengthens and enhances the likelihood that the benefits of decentralization and federalism will be realized.

and the Electoral College). Second, their strategy may have been sensible, but the mechanisms that make it work, that actually give states this voice, are wholly different from those established in the Constitution. Instead, as has so often been the case, unanticipated developments frustrated the original plan, and a different arrangement emerged to replace it. Third, in the case of federalism, the replacement consists of an assortment of unplanned structures that link the political fortunes of state and federal officeholders—creating a mutual dependence that obliges politicians at each level to pay attention to politicians at the other.

I don't mean this to sound Whiggish. That other institutions emerged while the original ones failed is a fact. But this didn't have to happen, and the forces propelling change were often fortuitous and just as often prompted by events having nothing to do with federalism. Nor is my position that the resulting institutional arrangements are ideal, or even adequate. That depends on a normative theory of how power should be distributed, while my project is largely descriptive: to understand the process by which power is distributed. At the same time, I don't believe it's possible to develop a normative theory (not a good one anyway) without a firm grasp on how federalism works, for any theory that fails adequately to take actual political experience into account isn't likely to be worth much. First let's learn what makes federalism tick. Then we can start developing, and exporting, theories.

The discussion below begins with the role of courts, mostly because of what they *don't* do. Judges could play an active role in federalism, since an aggressive judiciary could simplify the problem of allocating power by assigning competences to different levels of government as a matter of law. There was, in fact, a time when the Supreme Court flirted with the idea of establishing absolute, mutually exclusive domains for the state and federal governments.¹⁵ But the Court never came close to realizing this ambition in practice, and there has always been a fairly substantial realm in which jurisdiction was concurrent and power was allocated through politics. As noted above, this terrain grew immensely after the New Deal, as judges made themselves bit players in the process of allocating political power. Part I reviews why this happened.

15. See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, 172-83, 204-06, 222-36, 330-42, 403-16 (U. of Chicago, 1985).

Most commentators aren't particularly troubled by the withdrawal of the judiciary, assuming (along with the Court in *Garcia*) that states are adequately protected by other constitutional mechanisms. Parts II and III examine the efficacy of these other mechanisms. Part II surveys structural protections included in the Constitution itself, using the same sources cited by Justice Blackmun in *Garcia*: the influential work of Herbert Wechsler and Jesse Choper, and a more recent essay by Bruce LaPierre. As we shall see, a variety of legal, political, and social changes have robbed these devices of any real efficacy.

Part III looks beyond formal structures to the expectations and understanding of the founding generation. The people who wrote and ratified the Constitution undoubtedly hoped that its structural provisions would suffice to protect states, but they didn't count on it. Rather, as Part III explains, they relied ultimately on the ability of state legislatures to rally political and military opposition to an overreaching federal government. But while this strategy may have worked effectively against Great Britain, things were different in the new United States. Most important, its national leaders were elected by the same citizens as state officials, and this transformed politics by making it politically desirable to build connections and create organizations bridging formal institutional divisions. The natural fault line between state and federal governments was thus replaced to a considerable degree by fissures based on ideology and party affiliation. State legislatures no longer could be counted on to watch over the federal government, and a new system emerged to mediate disputes respecting the authority of state and federal governments—one dependent on different sorts of institutions and institutional arrangements.

Part IV begins the task of describing this new system. It deals first with what may be the most important (and certainly is the most overlooked) institution of federalism, the political party. Parties influence federalism in an unexpected way. They don't actively broker state/federal relations or make self-conscious decisions about how to allocate power, because they're neither centralized nor strong enough to play such a role. Rather, it's the *weakness* of American parties that makes them important for federalism. American parties are loose confederations of national, state, and local organizations—a structure they maintain through a form of coalition politics characterized by flexible programs, minimal discipline, and no more than a casual commitment to implementing particular policies. Ideology

plays a role, but winning elections comes first. The party culture is one in which members are expected to put aside ideological differences and help the party's candidates get elected. Candidates at each level thus depend on aid from party organizations at other levels and cultivate party-based relationships with candidates at these other levels. This, in turn, affects what they do in office.

States are also protected by the structure of the post-New Deal bureaucracy. We have long recognized that the interdependence of legislative and administrative processes gives administrators a voice in lawmaking. And since state officials play a significant role as administrators of federal law, they have a voice in the national lawmaking process. The federal government is, of course, senior partner in this joint venture. But Congress can't realistically shift full responsibility for administering federal law to federal bureaucrats. So the federal government needs states almost as much as the reverse, and this mutual dependence guarantees states officials a voice in the lawmaking process.

Parties and administrative sharing are probably the most important institutions of federalism, but they don't exist in a vacuum. Rather, the extent to which the political lives of state and federal officials are interdependent is affected by other structural, professional, and cultural features of American politics—features like the growth of technocracy, the persistence of grass roots movements, the nature of political coalitions, and so forth. Part IV discusses a number of these factors as well, assembling a fairly elaborate list of relevant considerations.

The task that remains is to provide an account of how these factors fit together. That's the most difficult problem, particularly since the operation and importance of each factor changes over time and in relation to other factors. While I cannot provide such an account here, Part V proposes a strategy for doing so, suggesting that we use the two-hundred-year history of federalism to explore how the factors identified in this paper work together and what happens to them under different conditions. We need a picture of the evolution of American federalism over time—a narrative account of conflicts that arose and how they were resolved, of shifts in power and what motivated them, of how different institutions adapted to changing circumstances and what the consequences of those adaptations were. The theme of this Symposium is federalism's future. My argument is that we can't begin to understand its future unless first we understand its past.

I. JUDICIAL WITHDRAWAL

It's necessary to begin with considering the sort of judicially-enforced federalism rejected in *Garcia* and to consider why the Court rejected it. According to this view of federalism, the Constitution leaves certain substantive affairs exclusively to the states, and what matters is making sure that states can regulate these without federal interference. So long as this domain is protected, the political significance of states is assured and federalism is secure. The federal government can, if it chooses, take charge of all those matters as to which state and federal authority is concurrent—though Congress will find this harder to accomplish when faced with the states' enhanced ability to muster political support. In any event, the key to a viable federalism is said to be the guarantee of judicially-enforced substantive limits on national authority.

We begin with this approach to federalism because, while courts may not resolve every conflict between state and national authorities, they can simplify such problems by delimiting the sphere in which power is allocated through politics. And, indeed, many commentators believe the Supreme Court was wrong to abandon the task of defining a protected sphere of exclusive state jurisdiction.¹⁶ After the surrender of 1937 and after *Garcia*, they say, federalism is "dead," Congress is free to run berserk, and it's only a matter of time until the states lose what little political clout they have left and are rendered superfluties by a relentless federal juggernaut.

We can say one thing for sure: The problem with judicially enforced federalism is *not*, as Justice Blackmun suggests in *Garcia*, that the Framers didn't want courts enforcing limits on national authority. Making statements about the Framers' intent is, of course, always hazardous. Because the relevant decision makers were the people who ratified the Constitution,¹⁷ deciding what the Constitution

16. An impressive list of commentators takes this view. See, for example, Martin H. Redish, *The Constitution as Political Structure* ch. 2 (Oxford U., 1994); Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1 (1950); Philip B. Kurland, *Politics, The Constitution, and the Warren Court* (U. of Chicago, 1970); Michael P. Reagan, *The New Federalism* (Oxford, 1972); William Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709 (1985). Compare with Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 Sup. Ct. Rev. 81.

17. See Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 Const. Comment. 77, 77-78 (1988). The attention devoted to what went on in Philadelphia in the summer of 1787 has always seemed wrongheaded to me, because the Convention had no power to enact and the precise course of its deliberations was largely unknown by those who did. Indeed, some of the Philadelphia delegates (including key figures like Madison, Hamilton, and

was intended to mean is as quixotic as interpreting election returns—too many people chose among too few options for too many reasons (most without telling us those reasons) to draw firm conclusions. And, of course, these particular “returns” are more than two centuries old and so that much more difficult to interpret. Still, there does seem to have been wide consensus on a few issues, among them that the powers of the national government were to be limited and that courts would play a role in policing the limits.¹⁸

Wilson) took different positions during the ratification debates, tailoring their arguments as needed to persuade critical audiences, with little compunction about being inconsistent. See Robert H. Wiebe, *The Opening of American Society: From the Adoption of the Constitution to the Eve of Disunion* ch. 2 (Knopf, 1984). What was said in Philadelphia is relevant to the extent that it became known and played a role in subsequent public discussion or at state ratifying conventions (like the Federalist Papers and other documents involved in the public debate over ratification). Beyond that, the Philadelphia debates are relevant only insofar as they can be shown to reflect the general understanding of contemporaries about particular issues. The detailed parsing of early drafts of the Constitution, however, has no place in interpretive legal discourse today.

18. These points are so well established that they require little elaboration. Certainly the argument that Congress was given limited power is uncontroversial. This was, after all, one of the critical compromises that made the Constitution possible. Even the ardent nationalist James Madison conceded that “[t]he 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.” Federalist No. 45, in Clinton Rossiter, ed., *The Federalist Papers* 288, 292 (Mentor, 1961). See also *id.*, Nos. 14, 39. Madison was, to be sure, overstating his case—deliberately claiming that the national government would be weaker than he really believed in order to defuse opposition claims that it was too strong. Much of the ratification debate has this flavor, with each side hoping to secure victory by claiming that the other got too much, and this gives the record an ironic, often confusing, twist. But apart from a few marginal voices, even antifederalists who opposed the Constitution on the ground that the proposed national government was too strong did not argue that its formal powers were unlimited; they argued, rather, that the limits included would be ineffective in practice. See Bernard Bailyn, ed., *The Debate on the Constitution* (Library of America, 1993) for a representative sampling of the innumerable citations available to establish this point. See also Vincent Ostrom, *The Political Theory of a Compound Republic: Designing the American Experiment* 110-11, 136-38 (U. of Neb., 2d ed. 1987); William E. Nelson, *The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws*, 62 *Publications of the Colonial Soc’y of Mass.* 419, 464-65 (1984).

This brings me to the second point—courts were supposed to enforce limits on national authority through the power of judicial review. That judicial review was anticipated also seems uncontroversial by now. See Charles A. Beard, *The Supreme Court and the Constitution* (MacMillan, 1912); Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, 453-63 (Chapel Hill, 1969) (arguing that judicial review followed logically from developments in political theory in the 1780s, especially the rejection of legislative for popular sovereignty); M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Clarendon, 1967) (arguing the same, with a focus on separation of powers). The issue is discussed throughout the course of the ratification debates (see, for example, Federalist No. 78 (Hamilton), in Clinton Rossiter, ed., *The Federalist Papers* 464; 1 *The Debate on the Constitution* at 823 (James Wilson), 883 (Oliver Ellsworth); Albert J. Beveridge, 1 *The Life of John Marshall* 452 (Houghton Mifflin, 1919)), and while many antifederalists disputed the desirability or effectiveness of judicial review, few denied its existence. See, for example, essays XI, XII, XIV, and XV by “Brutus” in Part II of

Not that the Constitution established a completely dual system in which state and federal governments were to operate in mutually exclusive, non-overlapping spheres. Rather, while each government was to have exclusive jurisdiction within a limited domain, there was also a realm in which their authority was to be concurrent—where state law would govern unless and until displaced by positive federal enactment. The scheme was rough, to be sure, and many issues were left unresolved. The boundaries, especially, were unclear. This new type of federalism was, after all, an experiment, and there was considerable uncertainty about exactly how state and federal governments would relate in practice.

There were, however, supposed to be boundaries—areas outside the reach of federal law. Those boundaries have almost disappeared today. True, one still hears the occasional judicial murmur about how federal powers are limited by the enumeration in Article I. But as a practical matter, the enumeration ceased to do any real work long ago. And while there is evidence that some of the Constitution's drafters and leading proponents may have expected power to become increasingly centralized over time¹⁹ (certainly many of its opponents did so), it seems doubtful that anyone in 1789 really anticipated a day when the federal government would have general legislative jurisdiction broad enough to preempt most of what states would otherwise do.

The story of how and why this came to pass is well known. The Civil War expanded Washington's authority, discredited "state sovereignty" arguments, and led to the adoption of three amendments giving the federal government important new powers. Reconstruction and the problems associated with gearing down a war-time economy forced Congress to exercise these and other powers, producing a further increase in federal regulation. For what it's worth, the magnitude of this increase was less than is sometimes suggested; the real

Bailyn, ed., *The Debate on the Constitution* at 129, 171, 258, 372. More important for present purposes, most of this discussion explicitly describes judicial review as a device for protecting state governments, and no one debating the issue drew a distinction between acts of Congress that exceeded grants of power in Article I and acts that violated specific prohibitions elsewhere in the Constitution. See Nagel, 1981 Sup. Ct. Rev. at 99-109 (cited in note 16).

19. See Martin Diamond, *As Far as Republican Principles Will Admit* 126-33 (AEI, 1992) (stating that "even in the arguments which are most calculated to mollify opposition to the Constitution, *The Federalist's* real expectation is that centripetal rather than centrifugal forces will tend to predominate").

growth in federal power was fueled by post-War economic and technological developments.²⁰

To begin with, between the Civil War and World War I the economies of the separate states became functionally integrated. By 1930, practically everyone consumed or produced goods bought and sold in other states. Improvements in transportation and communication accelerated this process, as wire services and radio (not to mention telegraph and telephone) made events around the country immediately accessible. Other states became less distant, and what happened there was of considerable importance. These developments, in turn, made national solutions necessary for problems that had previously been handled at the state level. As product, labor, and capital markets became nationally integrated, state regulation ceased to work; in many instances it became part of the problem. Distinctions like "commerce versus manufacture," "direct versus indirect," or "local versus interstate" no longer made sense in a nation where effects necessarily rippled across state lines.²¹

Matters came to a head with the economic crisis of the 1930s, which proved beyond the competence of states to deal with individually. FDR's New Deal called for federal regulation on an unprecedented scale. After a brief but spirited effort to hold the line, the Supreme Court capitulated in a series of well known decisions rendered between 1937 and 1942.²² The federal government acquired

20. See Lawrence M. Friedman, *A History of American Law* 655-62 (Simon & Schuster, 2d ed. 1985). Robert Kaczorowski has argued to the contrary that the self-consciously understood, central purpose of the Fourteenth Amendment was to establish the primacy of national power to determine and secure the rights of American citizens. See generally Robert J. Kaczorowski, *The Nationalization of Civil Rights* (Garland, 1987); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863 (1986). He may be right, just as it may be true that Congress exercised these powers to a considerable extent in the early years of Reconstruction. But such efforts were largely confined to protecting the rights of freedmen and Republicans in the South, and they were largely abandoned after 1873 before vanishing entirely in the years after 1877. My claim is not about legal seeds that may have been planted by the victorious Northern Republicans, but about what was actually done, and the significant extension of federal regulation came about later.

21. See Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Harvard U., 1991); Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933* (Harvard U., 1990); Edward A. Purcell, *Litigation and Inequality* 148-76 (Oxford U., 1992).

22. The conventional wisdom has long held that a conservative, formalistic Supreme Court suddenly reversed course in the 1937 decisions of *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Recent work by Barry Cushman challenges this understanding. See Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine From Swift to Jones & Laughlin*, 61 Fordham L. Rev. 105 (1992). According to Cushman, the Court's treatment of the commerce power was relatively consistent (and considerably more flexible than commentators have

vastly expanded power to regulate private activity, and for all practical purposes the era of judicially enforced federalism came to an end.²³

From the vantage of 1994, this abandonment of limits on federal power appears inevitable and irresistible. It does not follow, however, that judicially enforced federalism also had to be abandoned. Modernization may have made it impossible to maintain an exclusive preserve of state law, fixed and invariant, but national solutions are not needed in every area at all times. Courts could acknowledge that the federal government may potentially need to legislate on any subject while still requiring Congress to overcome legal hurdles and justify particular legislation in federalism terms before displacing state law.

Think of it this way: The original allocation of authority was not arbitrarily conceived. It was based on some carefully considered and rather sophisticated (albeit politically motivated) arguments.²⁴ Hence, state regulation was defended as a means of adapting law to local conditions and tastes, while national regulation was thought necessary to prevent mutually disadvantageous attempts by states to impose costs on each other ("externalities" in the language of economics). State government was also said to protect liberty, because state governments are smaller and closer to the people, hence more democratic and constitutive of popular self-government. Proponents of national government pointed out that being smaller makes state and local governments more susceptible to capture by a local majority that can use the power of the state to oppress a minority. But as Madison was quick to explain, this is why we want a compound republic in

acknowledged) throughout the period from the late nineteenth century to the early 1940s. The real "revolution" in constitutional law came in *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942). For my purposes, this particular debate is of no consequence: one way or another, "by 1942, the Court was thinking about the federal commerce power (and the role of the Court in policing exercises of that power) in ways that were fundamentally at odds" with how such issues had previously been treated. Cushman, *Legal Consciousness*, 61 *Fordham L. Rev.* at 160.

23. Though the Court may be getting ready to revisit the issue. See *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (1994) (holding that, in passing the Gun-Free School Zones Act, Congress exceeded its power under the Commerce Clause). The Court also may still play a role in reviewing federal legislation that regulates states directly—the issue in *National League of Cities*, *Garcia*, and *New York v. United States*—but as noted above, this is a minor squabble of little practical significance. Even after *New York*, moreover, *Garcia* remains good law in cases that involve general legislation applicable to both public and private entities. Since this describes most federal legislation, judicial interference will remain exceptional even when it comes to laws regulating "states *qua* states."

24. These arguments are nicely catalogued in Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 *U. Chi. L. Rev.* 1484 (1987).

which “two distinct governments . . . control each other.”²⁵ Finally, though the argument is of more recent vintage, state regulation is sometimes justified on the ground that it encourages regulatory innovation, the idea being that state and local governments have incentives to experiment with regulatory policy to attract capital and taxpayers—acting, in Justice Brandeis’ famous phrase, as “laboratories” of democracy.²⁶

With the possible exception of the argument about individual liberty,²⁷ these claims remain valid today. Each could, therefore, provide the basis for a constitutional principle that courts might use to review federal legislation. With only a slightly cynical eye to what the federal government does (i.e., employing a modest form of heightened scrutiny), courts could, for example, require Congress to show that federal legislation is needed to reduce or eliminate an externality. Or they could refuse to permit Congress to adopt new or radically innovative programs without showing either a pressing need or that states have had an adequate opportunity to experiment. Or they could require Congress to show that legislation was needed to protect consistently excluded minorities from domination by established local majorities.

These rather casual formulations may be flawed, but they suffice to illustrate my general point, which is that just because it’s no longer possible to maintain a *fixed* domain of exclusive state jurisdiction it’s not necessarily impossible to maintain a *fluid* one. The arguments used to carve out categorical protection in 1789 can be used to provide qualified protection today. Courts have moved from prophylactic categories to case-by-case standards in a variety of areas, and, in theory at least, nothing prevents them from doing so in the area of federalism.

25. Federalist No. 51 (Madison), in Rossiter, ed., *The Federalist Papers* 320, 323 (cited in note 18).

26. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

27. See McConnell, 54 U. Chi. L. Rev. at 1501 (cited in note 24):

After *Brown v. Board of Education* and the various civil rights acts, after the revolution in criminal procedure fostered by federal law and federal courts, after the imposition of uniform federal standards for basic liberties under the Bill of Rights, and after the proliferation of novel statutory “rights” arising from the interventions of the welfare-regulatory state, it is the federal government, not the states, that appears to be our system’s primary protector of individual liberties. This seems to be the premise of the Fourteenth Amendment and of much of New Deal legislation.

I say this is a *possible* exception, for states may still have an important role to play in protecting individual rights. Consider, for example, recent developments in the area of gay and lesbian rights, where states have been very active (on both sides) in the face of federal diffidence.

In theory, perhaps, but not in practice. The Court has, in fact, tried to establish limits on federal power several times since the New Deal—from early attempts to hold the line on commerce at “substantial” effects to the fumbling effort to implement *National League of Cities*. That these attempts failed is understandable. To establish a successful federation, it’s not enough just to divide power. It’s also essential to place that power at whichever level of government can use it more beneficially for the people. The problem is that the optimal level at which to do things depends on complicated circumstances that change over time. Decentralized decision making may be preferable, for example, if there is general agreement on objectives but local variation in the problems that make meeting these objectives difficult. If disagreement on objectives develops, however, decentralization may lead to externalities that require national regulation. Or the market in a particular product may be local, making national regulation wasteful and unnecessary. But if the market grows, interstate competition may produce a race to the bottom that justifies regulation at the national level. Technological developments may make local regulation desirable at one time, national at another, local at still a third (as may be happening now in the swiftly developing communications industry). And so on.

It follows, as noted above, that the domain of concurrent legislative jurisdiction must be broad enough to permit authority to be allocated and reallocated. But it also follows—and here we come, finally, to the crux of the argument against judicially-enforced federalism—that courts are poorly situated to make (or second guess) the difficult judgments about where power should be settled or when it can be shifted advantageously. Judges lack the resources and institutional capacity to gather and evaluate the data needed for such decisions. They also lack the democratic pedigree to legitimize what they do if it turns out to be controversial. But most of all, courts lack the flexibility to change or modify their course easily, an essential quality in today’s rapidly evolving world. Stare decisis is still a major force guiding judicial decision making—a quality we should be loath to surrender, but one that most definitely impedes the ability of courts to abandon previous holdings.²⁸ And so from *Dred Scott* to the *Civil*

28. On the force of stare decisis generally, see, for example, *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791 (1992); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). For examples of the Court’s unwillingness to modify earlier precedents rendered obsolete by technological development, see, for example, *Red Lion*

Rights Cases to the New Deal, judicial efforts to interfere with the allocation of authority between state and federal governments have turned out to be problematic.

Several colleagues read earlier versions of this Article and told me, in the polite way we do just before telling someone they're wrong, that it was "very interesting." And sure enough, they went on to say, "but it's completely beside the point because the Constitution requires the Supreme Court to enforce limits on the power of Congress." Now my first reaction was to assume that I had dealt with this argument above and let it go at that (particularly since I am more interested in understanding how federalism works without courts than in debating whether courts should do more). But the perfunctory dismissal of what the Court has done as not just wrong, but wholly illegitimate, warrants some further remarks.

To say that the Constitution requires the Supreme Court to confine Congress' powers within narrower substantive limits than it currently recognizes is, of course, a perfectly respectable position. But where did those who hold it get the idea that it's the only position consistent with the Constitution? The limits proposed by most contemporary advocates of judicially-enforced federalism bear little resemblance to those established in 1789,²⁹ which is just as well since rolling federal power back to what it was at the founding is utterly impractical. So far as I can tell, then, we have a choice between two alternatives to an original scheme that no longer makes sense, each a plausible effort to deal with profound changes that have taken place in the intervening years.³⁰

Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (holding that content regulation of broadcast media is justified by scarcity); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) (applying test for live performances to radio broadcasts).

29. See, for example, Redish, *The Constitution as Political Structure* at ch. 2 (cited in note 16); William Van Alstyne, *Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 Am. Crim. L. Rev. 1740 (1989). But see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987) (arguing that the commerce power should be limited to "interstate transportation, navigation and sales, and the activities closely incident to them. All else should be left to the states").

30. Bear in mind that the alternative to what I have called "judicially-enforced" federalism is not complete judicial abdication. *Garcia* does not hold that questions of federal authority vis-à-vis the states are non-justiciable. Rather, as explained in note 3, *Garcia* shifts the Court's role to defining and sustaining a political process that will safeguard state interests in the national policymaking arena. This means that legislation still can be challenged in court on at least two grounds: (1) that it interferes with or obstructs the constitutional process for allocating power between state and federal governments (as was arguably the case in *New York v. United States*); and (2) that the process failed for some reason to work properly in a particular case. John Hart Ely demonstrated nearly fifteen years ago the considerable degree to which constitutional law

The Court's critics nevertheless insist that there's no room for choosing here, that we're committed to judicially-enforced federalism because that was the original scheme. But just because federalism in 1789 worked by imposing substantive limits on federal power doesn't mean that imposing *different* limits today shows greater fidelity to the original plan than a process-based approach (assuming, of course, that fidelity to the original plan is the proper test). There are, after all, two sides to federalism: not just preserving state authority where appropriate, but also enabling the federal government to act where national action is desirable. The best interpretation is one that accommodates both goals and faithfully transposes them onto modern circumstances.³¹ Even the Court's harshest critics acknowledge that changes in society, culture, and the economy require broadening national authority, both practically and as an interpretive matter (since changing the circumstances transforms the meaning of the original grants of federal power). That being so, imposing new limits just for the sake of having limits is a useless and dangerous formalism. On the contrary, replacing the old scheme with one that embraces the need for broad national authority and gives attention to helping states protect themselves may be the "truer" interpretation—even in originalist terms. It depends on what the alternatives mean in practice.

consists of just such process-based arguments, see John Hart Ely, *Democracy and Distrust* (Harvard U., 1980), and whatever one thinks of Ely's effort to bring the rest of the field under the same rubric, it's ridiculous to treat this form of judicial review as illegitimate or to argue that it counts for nothing.

In fact, *Garcia's* process-based approach is not even necessarily incompatible with the existence of judicially-enforceable substantive limits on what Congress can do. *Garcia* is, after all, of a piece with other post-New Deal decisions delineating the scope of federal power—decisions like *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942); and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). *Garcia* starts with the broad definition of federal authority established in these decisions, a definition adopted to serve national needs, and holds that the Court need not restrict this authority in the name of protecting state sovereignty because states can protect themselves in the political process. But while federal power has indeed been made very broad, it's not yet limitless. Whatever Congress does must still be justified by reference to the text of the Constitution, and anyone with imagination can probably think up legislation that only the most deeply committed post-modernist would argue fits the text as presently interpreted. Even after *Garcia*, one should still be able to challenge such legislation as unconstitutional.

Of course, critics of *Garcia* aren't likely to be placated by the argument that there's still room to defend some extreme hypothetical limit on congressional power. The truth is that Congress has enough power under existing law to do practically anything that it (realistically) wants to do. For opponents of *Garcia*, the prevailing interpretation of federal authority is already too broad, too underprotective of states, and it's no answer to say that states can protect themselves in the political process.

31. This understanding of interpretation is more fully developed in Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993).

Put another way, the test for federalism today can't turn on which approach looks more like the original scheme in some crude, surface-like manner. It must be: Which approach does a better job of finding the appropriate balance between state and federal authority in today's world? If there is an argument for truncating federal power in the face of changes necessitating broad national authority, it must be that we need strong states too, and a modified form of judicial enforcement is better than none in protecting states without needlessly impairing federal power.

Experience gives us reason to doubt this argument, however, for our experience with judicial enforcement in the Twentieth Century hasn't been good. And the discussion above explains why: judges lack the resources, know-how, and flexibility to make dependable decisions about the level at which to govern in today's complex and rapidly evolving world. Hence the non-role of courts in federalism and the need to study the political process through which power is allocated.

II. THE POLITICAL SAFEGUARDS OF FEDERALISM

The withdrawal of the judiciary removes one device for allocating power between the state and federal governments and leaves a question about what protects states from the (legally and practically) more powerful federal government. According to *Garcia*, the safeguards of federalism lie "in the structure of the Federal Government itself," which was "designed in large part to protect the States from overreaching by Congress."³² Justice Blackmun doesn't spend much time explaining what these safeguards are or how they work, referring readers to the secondary literature instead. In particular, Blackmun cites Herbert Wechsler's famous essay coining the "political safeguards" phrase, together with a portion of Jesse Choper's book on judicial review making similar arguments and Bruce La Pierre's article revisiting the same themes.³³ So far as I can tell, moreover, even today this pretty much exhausts the legal scholarship in this area—a remarkable fact given how thin the arguments turn out to be upon examination.

32. *Garcia*, 469 U.S. at 550-51.

33. *Id.* at 551 n.11 (citing Wechsler, *The Political Safeguards of Federalism* (cited in note 11); Choper, *Judicial Review and the National Political Process* at ch. 4 (cited in note 12); La Pierre, 60 Wash. U. L. Q. 779 (cited in note 13)).

Wechsler and Choper may be dealt with together, since their arguments are closely related. Wechsler does make one claim that Choper, writing a quarter of a century later, chooses not to resurrect. According to Wechsler, the states' most important protection is a constitutional tradition that makes national action "exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case."³⁴ The few commentators who even pay attention to this portion of Wechsler's essay regard it as having been already weak in 1954 and much more so today.³⁵

The argument *is* unpersuasive, but not because (as critics of *Garcia* sometimes suggest)³⁶ state law has become exceptional in a world dominated by federal legislation. The federal government is, to be sure, vastly larger today than it was in the eighteenth century, or even the early years of the twentieth century. But that's hardly a pertinent comparison. Of course the national government does more today: changes in technology, economy, and culture have transformed the problems society faces and so the kind of governing it needs. State governments do more too (in part because of new opportunities and funds made available by the federal government). In fact, by comparison with other developed nations, it's striking how much authority in this country is still exercised at the state level. Put aside the big social welfare programs—administered for the most part by state officials, but under federal guidelines and in ways that make the question of control difficult to sort out. Even apart from these, almost all private law (tort, contract, property) is state law, as is most of the law respecting crime, education, domestic relations, commercial transactions, corporations, insurance, health care, trusts and estates, land use, occupational licensing and regulation, and more. The federal government has, of course, regulated some aspects of some of these areas, but most governing in this country is still done at the state level and by state officials. Let me put that more strongly. The law that most affects most people in their daily lives is still overwhelmingly state law—except perhaps law professors, for whom it is easier to study one federal system than many state systems, and who may, therefore, have a somewhat warped perspective.

34. Wechsler, *The Political Safeguards of Federalism* at 52 (cited in note 11).

35. See, for example, John O. Pittenger, *Garcia and the Political Safeguards of Federalism: Is There a Better Solution to the Conundrum of the Tenth Amendment?*, 22 *Publius* 1, 3 (1992). A number of the arguments below are found in this useful review of the "political safeguards" literature.

36. See, for example, *id.*

Be that as it may, Wechsler's claim that states are protected because Congress must overcome a heavy "burden of persuasion" before displacing state law won't bear much weight. Bear in mind that the argument is one of political culture—a claim about the shared understandings of political actors. It doesn't turn on the actual proportion of state to federal law, but on the perceptions of politicians about when they can or should act (though these perceptions may be influenced by actual proportions). Wechsler's claim is that states are protected because federal lawmakers *believe* that, even apart from other political or structural constraints, our constitutional tradition requires them to have special justification before displacing state law.

Clearly this belief is not an important part of the political scene in Washington today (though it does carry some vestigial significance in a few areas of traditional state dominance). We can argue about exactly when it died; most students of federalism say the 1960s, though some mark the date as early as the New Deal. Both dates are, in fact, significant, because the belief that federal law is not particularly "exceptional" in nature did not arise in a day. On the contrary, while the "mood" Wechsler describes (and that's his word)³⁷ surely existed at the founding, it began a long, slow fade soon thereafter. There was, of course, a sense that federal powers were limited, and arguments that those limits may have been exceeded provoked heated debate. But by the time the Civil War started, Congress already exhibited much less reluctance about exercising its powers. That's one reason ambitious politicians migrated to Washington rather than pursuing careers in state government. Indeed, a great irony of the Jacksonian states' rights movement is that by shifting the argument for localism from idealistic grounds (it makes better citizens) to pragmatic ones (it leads to greater prosperity), the Jacksonians opened the door for a subsequent expansion of federal authority on these same pragmatic grounds.³⁸ A variety of

37. Wechsler, *The Political Safeguards of Federalism* at 51 (cited in note 11).

38. One of my colleagues, a legal historian, commented next to this paragraph on an earlier draft that "It's precisely big and UNDOCUMENTED assertions like these that leave historians bewildered and disgusted by the work of legal scholars." For what it's worth, the assertion in text is based on secondary literature, most especially Charles Grier Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (Oxford, 1991); Leonard D. White, *The Jacksonians: A Study in Administrative History, 1829-1861* (Macmillan, 1957); Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (Hill & Wang, 1990); Harry L. Watson, *Jacksonian Politics and Community Conflict* (L.S.U., 1981); Robert H. Wiebe, *The Opening of American Society* (Knopf, 1984); Merrill D. Peterson, *The Great Triumvirate*:

other factors may have kept Congress in check for a time (including the fact that, except in times of revolution, political boundaries tend to expand gradually), but any presumption in favor of state law for its own sake had begun to lose its strength by the mid-nineteenth century, and developments in this century have merely been a continuation (and acceleration) of this process. Tradition alone thus furnishes little protection for state institutions from federal expansion.

"If I have drawn too much significance from the mere fact of the existence of the states," Wechsler goes on to say, the error may be rectified by considering "their crucial role in the selection and the composition of the national authority."³⁹ Choper stresses the same theme: that states are protected by institutional arrangements that guarantee them a place in the national political process. These arrangements consist of the following: representation in Congress is allotted by states; qualifications to vote in federal elections are determined by state law; Representatives are elected in districts drawn by the states; each state has equal representation in the Senate through Senators chosen by the state's legislature; and presidential candidates must obtain a majority in the Electoral College.⁴⁰

These are, on their face, rather flimsy devices for safeguarding the institutional interests of state governments vis-à-vis the federal government. Take, for example, the power to decide who votes for members of Congress—a power that can be exercised only indirectly by limiting the electorate in state elections.⁴¹ Even in theory, this never provided more than the most attenuated control. And what little control it may once have afforded—say through poll taxes or the exclusion of racial minorities—has been eradicated by five

Webster, Clay, and Calhoun (Oxford U., 1987); and Bray Hammond, *Banks and Politics in America, from the Revolution to the Civil War* (Princeton U., 1957). None of these sources makes exactly my claim, however, because no one has posed my particular question, and so considerable primary research still needs to be done. I believe that I can support this claim (as well as some others made below). But I want the present essay to be suggestive of the kind of work that needs to be done and what it might reveal. In terms of historical research, I don't purport to make the case definitively for anything more than that history may provide important insights about the evolution of federalism. I have chosen to indicate some provisional impressions and conclusions to provoke thought, but nothing turns on whether I am right or wrong here. Even if I'm wrong, knowing why will mean knowing more than we do now.

39. Wechsler, *The Political Safeguards of Federalism* at 54 (cited in note 11).

40. *Id.* at 54-78; Choper, *Judicial Review and the National Political Process* at 176-81 (cited in note 12).

41. See U.S. Const., Art. I, § 2 (stating that voters "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature").

constitutional amendments (section 2 of the Fourteenth Amendment, as well as the Fifteenth, Nineteenth, Twenty-fourth and Twenty-sixth amendments), federal voting rights legislation, and the Supreme Court's Equal Protection cases.⁴² It is, in fact, impossible to think of anything a state could do to protect itself with this power today that would not be either unlawful or ineffective.

The same thing is true of the states' power to draw congressional districts—a power that exists, by the way, only at the sufferance of Congress.⁴³ Even Wechsler concedes that the ability to redraw districts once a decade has scant significance for federalism.⁴⁴ Districting is always hotly contested, of course, but these are fights between competing local factions in which representing or protecting state institutional interests in Washington simply isn't an issue. Writing in 1954, Wechsler observed that apportionment had tended to favor rural interests and that these usually support “a more active localism.”⁴⁵ If so, this coincidental protection was wiped out by *Baker v. Carr*⁴⁶ and *Reynolds v. Sims*.⁴⁷ And subsequent federal statutes and Supreme Court decisions have nopped up any lingering significance for federalism this power might have had.⁴⁸

Changes in law and practice have similarly eroded whatever protection states may once have found in the Electoral College and the Senate. The Electoral College began, ironically enough, as an “an anti-states-rights device” developed by centralizers at the Convention to keep presidential selection out of the state legislatures.⁴⁹ Still, the power of state legislators to choose electors could have given states considerable leverage over the executive had the Electoral College worked out as planned. But the emergence of the popular canvass and winner-take-all rule have deprived the College of most of its

42. See, for example, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (holding property requirements unconstitutional); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (holding durational residency requirements unconstitutional).

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

44. Wechsler, *The Political Safeguards of Federalism* at 63 (cited in note 11).

45. *Id.*

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

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

48. See, for example, Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1974 (1988 & Supp. 1992); *Thornburg v. Gingles*, 478 U.S. 301 (1986); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Karcher v. Daggett*, 462 U.S. 725 (1983); *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

49. Diamond, *As Far as Republican Principles Will Admit* at 188-89 (cited in note 19).

significance. It still affects presidential campaigns, of course, by forcing candidates to look for votes in enough states to win a majority of the electors. But while this geographic dispersion may have benefits when the president gets down to defining a national mandate, it does nothing to help state governments fend off preemptive federal legislation.

With respect to the Senate, two things only need be said (though this won't stop me from saying a few more): First, it seems clear that direct representation in this body was the chief protection afforded to state institutions in the original plan of the Constitution. (It's not called the "Great Compromise" for nothing.) Second, it seems equally clear that this protection basically evaporated with the adoption of the Seventeenth Amendment in 1913.⁵⁰ Astonishingly, Wechsler gives this amendment only a passing nod and Choper ignores it entirely—as if it made little difference. They are right, in a sense, but not because shifting to direct elections didn't affect the ability of state legislatures to control this house of Congress. They are right because that control had been waning from the start and especially in the years after the Civil War.

The Senate was designed to serve contradictory ends. On the one hand, it was supposed to protect states by giving state legislatures an effective veto over federal policy. On the other hand, it was also supposed to serve as a republican analogue to the aristocratic House of Lords by taking the longer, more "national" view of policy. Consistent with this latter purpose, the Framers incorporated several features intended to weaken the control of state legislatures. Specifically, they made the term a very long six years (long because most state legislators had to stand for reelection either every year or every other year), and they eliminated the right of recall that states had under the Articles of Confederation.⁵¹

These attributes greatly impaired the power of state legislatures to instruct their Senators how to vote.⁵² A state could still send instructions, of course, but its ability to exact a price for disobedience was limited. State legislators could refuse to reelect, which happened

50. See Richard B. Bernstein with Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?*, 122-28, 217-18 (Times Books, 1993).

51. Martin Diamond, *As Far as Republican Principles Will Admit* at 174-75 (cited in note 19).

52. Except where otherwise indicated, the discussion of this issue is based on William H. Riker, *The Senate and American Federalism*, 49 *Am. Pol. Sci. Rev.* 452 (1955).

occasionally in the early years, as when North Carolina refused to reelect Samuel Johnston after the First Congress (when terms were shorter to create the necessary staggering effect). But the length of a Senator's term and the distraction of other issues in intervening state elections made this sanction unreliable except in extreme cases. Several efforts were made to constitutionalize the power to instruct, but these failed.⁵³ For a time, states occasionally were able to force a disobedient Senator to resign as a matter of personal honor by censuring or otherwise embarrassing him. But this sanction only ever worked sporadically, and its overuse by Andrew Jackson, who contrived to have Democrat-controlled state legislatures issue humiliating instructions to prompt Whig opponents to resign, combined with the waning of an honor-based culture (especially in the North), and the growing prestige of being a Senator, gradually killed the device. By 1860, instructions were no longer significant.

The states did not lose their say altogether with the decline of instructions. Direct control was greatly diminished, but the state legislature remained the relevant electorate for anyone with ambitions of becoming, or remaining, a Senator. And while the six-year term weakened this constituency's voice, the need to maintain the good graces of state legislators still had an effect. But that effect, too, was dissipated by nineteenth century political developments—here the emergence of nominating conventions and primary elections as devices for choosing Senators. Beginning in the 1830s, but especially after the well-publicized Lincoln/Douglas campaign of 1858, it became customary for state political parties to hold conventions to endorse candidates for election to the Senate. Each candidate had a pledged slate of electors (who were to be state legislators), and it was understood that the prevailing party would select its candidate to go to Washington. Beginning in 1888, and driven largely by Progressive complaints about corruption in the selection of Senators, this convention system was rapidly replaced by primary elections. Within a few decades well over half the states selected their Senators this way.

53. The House refused by a large majority to add "the right to instruct" to the First Amendment, see 1 *Annals of Cong.* 733-47 (1789), and an amendment proposed after several Senators ignored instructions and voted "not guilty" at Samuel Chase's impeachment trial was quickly tabled, see 14 *Annals of Cong.* 1214 (1805). Many state constitutions guaranteed the right to instruct, see Kenneth Colegrove, *New England Town Mandates*, 12 *Publications of the Colonial Soc'y of Mass.* 411, 443 (1920), but these had little effect because they were not recognized by Congress.

Of course, state legislatures were not formally bound by the results of these primaries; the dominant party could, and occasionally did, ignore election results in choosing a Senator. But Progressive reformers found a way to close even this gap in popular control with the invention of the Oregon system in 1909, which called for a direct contest between candidates selected in party primaries and bound the state legislature to vote for the popularly elected candidate as a matter of state constitutional law. Other states were just beginning to copy this system when further development was rendered supererogatory by passage of the Seventeenth Amendment.⁵⁴

Democratization of the Senate has left Senators in the same position as Representatives when it comes to protecting state interests. Wechsler maintains that the Senate still offers greater protection because each state is equally represented and so Senators representing only a fraction of the nation can block legislation. Whether this counts as protecting states is questionable. To the extent that Senators now respond to popular pressures from constituents rather than to state legislators, the equal representation of each state simply distorts democratic decision making—allowing the preferences of less than a majority of the people to hold up the legislative process. One can, I suppose, call this protecting state government inasmuch as it means less federal law. But such protection is incidental at best and not within the control of state legislatures themselves, and it works only if the same coalition that persuaded a Senator to vote against federal legislation has less success at the state level.

This leaves only the argument that states are protected because representation is allotted state by state. As just noted, allocating representation on this basis may enhance the power of geographically defined interests at the federal level. But it does so in a way that seems likely, if anything, to diminish the institutional role of state government. For if we assume that members of Congress elected on the basis of geography respond to state and local *interests*, doesn't this, in turn, give them an incentive to reduce or minimize the role of state and local *government*? Federal politicians will want to

54. It's worth noting that federalism issues were of secondary importance in the debate over the Seventeenth Amendment, which focused on Progressive themes of fighting corruption in the Senate. It's also noteworthy that passage of the amendment was stalled for a time by opposition in the Senate, which eventually went along partly as a result of pressure from state legislatures calling for a constitutional convention. See Bernstein, *Amending America* at 122-28 (cited in note 50); Roger G. Brooks, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 Harv. J. L. & Pub. Pol'y 189, 200-08 (1987).

earn the support and affection of local constituents by providing desired services themselves—through the federal government—rather than to give or share credit with state officials. State officials are rivals, not allies, a fact the Framers understood and the reason they made Senators directly beholden to state legislators in the first place.

Nor can we say that federalism doesn't matter so long as members of Congress are adequately responsive to state and local interests. Preferences in Congress are aggregated on a nationwide basis: If interests in an area represented by a majority of federal representatives concur, interests in the rest of the country will be subordinated. Yet the best argument for federalism is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decision making. Mike McConnell illustrates the point with a simple example:

[A]ssume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A.⁵⁵

It doesn't follow that all decisions should be made at the state level, for there are a variety of countervailing reasons (economies of scale, externalities, protecting individual rights, preventing a race to the bottom) to adopt national legislation in appropriate circumstances. What we need, then, is a device to ensure that federal policymakers leave suitable decisions to the states. Legal barriers enforced by courts provided one such device. I will suggest below that, even without judicial participation, a similar effect is produced by institutions that link the fortunes of federal and state officials, of which the most important is political parties. For now, we need only note that such protection is *not* provided by the fact that Senators and Representatives are elected from the states; standing alone, that is more problem than protection for state institutions.

55. McConnell, 54 U. Chi. L. Rev. at 1494 (cited in note 24). This intuitive point is supported by modern public choice theory. See Wallace E. Oates, *Fiscal Federalism* 11-13, 54-63 (Harcourt Brace Jovanovich, 1972); Gordon Tullock, *Federalism: Problems of Scale*, 6 Pub. Choice 19 (1969).

Unlike Wechsler and Choper, Bruce La Pierre (the third source cited in *Garcia*) does not rely on formal constitutional mechanisms to explain how states are protected in the national political process. Instead, he offers two new structural checks on federal overreaching: first, that states have the benefit of virtual representation from private interests because "nationally determined substantive policy" also applies to private activity; second, that the federal government is constrained because it must lay out the "financial and executive resources to administer and enforce national policy."⁵⁶

Note that these checks work only if we enforce certain limits on what Congress can lawfully do: Congress cannot discriminate between public and private institutions, and it cannot use state resources to fund implementation and enforcement. Neither of these conditions is presently required or always met, and La Pierre's main point is that they should be. But even granting such protection—we could, after all, make these part of the process safeguarded by *Garcia*, which is where the Court may be headed after *New York v. United States*⁵⁷—La Pierre's argument is unpersuasive.

The reason is that La Pierre asks the wrong question. He is looking only for political safeguards to insulate states from federal legislation that directly cripples or impairs their ability to function. Thus he argues that his first check is effective because if Congress tried to put the states out of business by, for example, making them pay excessively high wages, "the affected private interests would prevent the establishment of a minimum wage that would destroy both private enterprise and state government."⁵⁸ This check isn't fool-proof, because Congress can circumvent the private sector and regulate only "the organization and structure of state and local governments" by using conditional grants of money. But here La Pierre's second check becomes relevant inasmuch as "the revenues required for national grants must be raised by taxes levied on the national electorate," which "can hold its representatives answerable for the general level of national taxes and expenditures."⁵⁹

There are many reasons to question the efficacy of these safeguards: The same regulation may affect private and public institutions differently; Deficit spending makes it possible for Congress to

56. La Pierre, 60 Wash. U. L. Q. at 988-89 (cited in note 13).

57. See note 3.

58. La Pierre, 60 Wash. U. L. Q. at 1001 (cited in note 13).

59. Id. at 1004.

bribe states while raising taxes only enough to cover interest payments; Washington can seduce states with large grants and then reduce these once the states are, as a practical matter, committed to the federal approach.⁶⁰ But that's all beside the point really, because La Pierre's whole analysis begs the question. The question is not whether the states will survive as functioning independent entities—their survival has never been seriously threatened, and *Garcia* is willing to offer judicial protection for that anyway. The question is whether, *assuming* the survival of states, they will have anything to do.

I should take a moment to emphasize this point and make sure the issue is clear. Simply dividing power serves some goals of federalism to some extent, goals like securing liberty, enhancing participation, and creating a market for services. But there's more to it than that, for power can be divided in lots of different ways, and some are better than others. It's just as important to make sure that power is allocated properly. Good government requires the provision of many services—more today, obviously, than in the eighteenth century. Some of these services can be provided more effectively or efficiently at the national level, while others may be furnished better through state or local government. If we're concerned with protecting states, it is also—in my view mostly—so that they may serve this purpose. In Federalist No. 45, Madison sneered at antifederalists who seemed to forget this point:

Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the old world, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the new, in another shape—that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of

60. Pittenger, *Garcia and the Political Safeguards of Federalism*, 22 *Publius* at 8-9 (cited in note 35).

government whatever has any other value than as it may be fitted for the attainment of this object.⁶¹

The problem of federalism is, above all, a problem of *allocation*: Once we constitute state and national governments and secure their independent existence, how is power to be distributed between them? The Framers did this by establishing partly separate domains that they hoped would be fixed and relatively permanent. For reasons explained above, this arrangement broke down when confronted with modernization and economic integration. A second option is to have courts protect states by testing the functional justification for federal legislation, but (as also explained above) this approach calls for judges to make decisions that exceed their institutional capabilities. So the Court has chosen still a third approach: to leave the allocative decisions to the political process. Critics complain that, without the judiciary as guardian for the states, Congress will relentlessly extend its authority. In the short run, they say, this means bad policy, as too much is done at the federal level. In the long run, federal expansion may permanently cripple the states, rendering them incapable of regulating effectively even when Congress is willing to let them do so.

The question, then, is whether the political process distributes power in an effective or desirable manner. La Pierre takes the efficacy of the process on faith—assuming that if we guarantee the states minimal administrative independence, politics will take care of the rest. Practically every other commentator who agrees with *Garcia* makes the same assumption.⁶² Yet no one has examined this process to see whether it offers anything better than the weak structural devices discussed by Wechsler and Choper.⁶³ Consequently, we don't really know how it works, much less whether there is any reason to believe that it protects states and state institutions.

61. Federalist No. 45 (Madison), in Rossiter, ed., *The Federalist Papers* 288, 289 (cited in note 18).

62. See, for example, Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 78 (1988) (arguing that process-based protections like those defended by the Court in *Garcia* and *New York v. United States* can be provided under the Guarantee Clause and that this will "preserv[e] the benefits of federalism for a third constitutional century").

63. Andrzej Rapaczynski recognizes the problem but does not actually explore the process. Instead, he reexplains the Framers' arguments about how independent state and national governments may create a market for government services, increase participation, and the like—now using the language of economics and the theory of public goods. See generally Rapaczynski, 1985 S. Ct. Rev. 341 (cited in note 3).

III. FRAMING VISIONS

Interestingly enough, the people who wrote and ratified the Constitution did not put all their faith in the structure of the national government to protect state interests. Yes, they tried to establish a system in which certain matters were simply off limits to the federal government. And, yes, they hoped that a combination of judicial review and the structural mechanisms identified by Wechsler and Choper would secure those limits.⁶⁴ But the boundaries were too uncertain, the stakes too high, for the anxious founders to believe that matters would be settled easily. They understood that the position of the states in the federal system must ultimately rest on a more complex, political process. This Part examines their understanding of that process, which, unfortunately, turns out to have little relevance today.

Alexander Hamilton summarizes the understanding of the founding generation in Federalist No. 26:

[T]he State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.⁶⁵

State legislatures will control the federal government, in other words, not through their role in its selection and composition, but by outside agitation. Even today commentators routinely reiterate this argu-

64. Contemporary scholars treat judicial review as something separate and distinct from other "political" safeguards in the structure of government. This distinction would have sounded foreign to members of the founding generation. For them, the argument that sovereignty was in the people was still fresh, and it had a tangibility that's lost to us today. As far as they were concerned, Congress, the President, the courts were *all* agents of the people—all to be feared and controlled, but also all to be relied upon if properly checked and confined. Judicial review was simply part of this process, just one aspect of a complex arrangement of institutions that they hoped would accomplish their goal.

65. Federalist No. 26 (Hamilton), in Rossiter, ed., *The Federalist Papers* 168, 172 (cited in note 18). My discussion of the founding generation's thoughts in this area is based on *The Federalist Papers* because (as on so many issues) Madison and Hamilton made the best and most widely accepted arguments. Other arguments were made. James Wilson, for example, believed that conflict between the state and federal governments could be avoided by codifying the law, and he offered to do it himself. See Stephen A. Conrad, *Metaphor and Imagination in James Wilson's Theory of Federal Union*, 13 L. & Soc. Inquiry 1, 60 & n.258 (1988). But the arguments in *The Federalist Papers* are more representative of the prevailing view.

ment, as if it makes sense and should quiet our fears.⁶⁶ But while it may sound comforting to say that states will watch for abuse and rally the people if the central government strays, what does it *mean*? How would the states do this? Hamilton continues in Federalist No. 28:

It may safely be received as an axiom in our political system that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information. They can discover the dangor at a distance; and possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.⁶⁷

Most of the time, we are told, the mere clamor of this opposition should suffice to thwart federal ambition. This is because, as Hamilton explains in Federalist No. 31, "strength is always on the side of the people, and as there are weighty reasons to induce a belief that the State governments will commonly possess most influence over them, the natural conclusion is that such contests will be most apt to end to the disadvantage of the Union. . . ."⁶⁸ The "weighty reasons" to believe that the people will usually follow their states, by the way, are essentially two: first, state government will be staffed by influential and important leaders in the local community; and second, states will provide the services most valued by citizens and will therefore earn more of their affection and support.

Madison pushes these themes still further and tells us what will happen if verbal protest proves insufficient in Federalist No. 46:

[S]hould an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repug-

66. See, for example, Diamond, *As Far as Republican Principles Will Admit* at 135-36 (cited in note 19); Ostrom, *The Political Theory of a Compound Republic* at 121-32 (cited in note 18); Nagel, 1981 Sup. Ct. Rev. at 105 (cited in note 16); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1494-1503 (1987).

67. Federalist No. 28 (Hamilton), in Rensselaer, ed., *The Federalist Papers* 178, 181 (cited in note 18).

68. Federalist No. 31 (Hamilton), in Rensselaer, ed., *The Federalist Papers* 193, 197.

nance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

But ambitious encroachments of the federal government on the authority of the State governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other.⁶⁹

And should it come to a test of arms, Madison concludes (in what must, in retrospect, be counted as one of the quaintest passages in these essays) there really can be very little doubt who will prevail:

The highest number to which, according to the best computation, a standing army can be carried in any country does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late successful resistance of this country against the British arms will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.⁷⁰

Just for a moment, clear away the irritating, sentimental mist that seems to accompany most readings of the Federalist Papers: doesn't this sound naive? Understandable perhaps, but nevertheless naive? It's understandable because Hamilton and Madison really had no idea how a functioning federation would work. So they looked back

69. Federalist No. 46 (Madison), in Rossiter, ed., *The Federalist Papers* 294, 297-98.

70. Id. at 299.

to the only experience they had with a powerful central government attempting to overawe its political subunits: the experience of the colonies under England. And, indeed, the predictions in these essays about what would happen if the federal government started overreaching basically track the events leading up to the American Revolution.⁷¹

But the situation of the states vis-à-vis the central government under the Constitution never really resembled that of the colonies under British rule. For one thing, "the conduct of politics [in the early Republic] often depended on habits of deference or subordination on the part of voters toward established notables . . . who were recognized as natural leaders,"⁷² and many of the nation's most notable leaders went straight to the federal government.⁷³ More important, the new federal government, unlike the British Empire, was founded on principles of actual representation, and this revolutionized political dynamics between central and peripheral governments. Within a short time, an established group of national leaders with popular support existed alongside state politicians. This, in turn, created a complex interplay of private interests and an equally complex overlay of partisan politics that intertwined state and national allegiances in such a way as to render implausible the simple "us/them" division implicit in the vision of the Federalist Papers.⁷⁴

71. While Madison and Hamilton may genuinely have believed their arguments, it's worth remembering that Publius was trying to influence an election. Certainly the authors must have been aware of the propaganda benefits of invoking the Revolution as security.

72. William Nisbet Chambers, *Party Development and the American Mainstream*, in William Nisbet Chambers and Walter Dean Burnham, eds., *The American Party Systems* 3, 5 (Oxford U., 1967).

73. Washington and Jefferson are obvious examples, but there were many others. As Jack Rakove urges in his study of politics at the beginning of the Republic:

By any criterion, including those criteria that contemporaries would have applied, the victors in the first federal elections were a distinguished group. The roster of the First Congress included twenty members of the Federal Convention—among them Madison, Elbridge Gerry, Rufus King, Reger Sherman, William Samuel Johnson, Oliver Ellsworth, William Paterson, and Robert Morris—as well as a number of other men who had held prominent military or political positions during the war, such as Philip Schuyler, Elias Boudinot, Jeremiah Wadsworth, John Langdon, Richard Henry Lee, and Egbert Benson.

Jack N. Rakove, *The Structure of Politics at the Accession of George Washington* in Richard Beeman, Stephen Botein, and Edward C. Carter II, eds., *Beyond Confederation* 261, 276 (Chapel Hill, 1987).

74. See generally, for example, Stanley Elkins and Eric McKittrick, *The Age of Federalism* (Oxford U., 1993); John Chester Miller, *The Federalist Era* (Harper, 1960). I should say a word here about the Civil War, which appears on a very superficial reading to bear out the predictions of the Federalist Papers. I can't possibly give a full account of the causes of that war, but I can say that it was *not* fought to put down an overreaching federal government. Not

The 1790s were filled with contentious political disputes between state and national governments. These were resolved with more or less success until the first really major clash arose in the controversy over the Alien and Sedition Acts.⁷⁵ True to his word, Madison (now allied with Jefferson and against Hamilton) did precisely what he had recommended in Federalist No. 46—he turned to state legislatures to rally the opposition. Kentucky and Virginia issued their famous resolutions and . . . nothing happened. Despite the fact that the Alien and Sedition Acts were about as clear an example of unconstitutional legislation as one could find, despite the fact that they were enacted for the sole purpose of quashing opposition to a federal administration that seemed determined to maintain itself in power, and despite the fact that there was real uncertainty about the possibility of a peaceful transition, the Virginia and Kentucky Resolves did not signal a “general alarm”; “every government” did not “espouse the common cause.” A correspondence was indeed opened, but it was one in which the legislatures of ten other states told Virginia and Kentucky to mind their own business and leave the constitutionality of these acts to a Supreme Court that everyone knew was solidly packed with Federalists predetermined to uphold them. (The remaining four states took no action at all.)

Fortunately, Madison and Jefferson were also exceptionally gifted politicians. So they did what gifted politicians do—they changed strategies. Abandoning the effort to check the federal government through the agency of state legislatures, they turned to the fledgling Republican Party (which they had helped organize during the Washington Administration), used it to galvanize nationwide opposition to the Adams Administration, got Jefferson and other supporters elected to federal office, and undid the damage

only had the federal government done no overreaching, but the Senate and Supreme Court had consistently protected Southern interests. Did fears of a coming federal “tyranny” under Lincoln and the “Black Republicans” play a role in secession? Absolutely. But so much more than this was involved that to reduce the conflict to these simplistic terms is caricaturish.

75. For more detailed accounts of the controversy over the Alien and Sedition Acts and the so-called revolution of 1800, see Elkins and McKittrick, *The Age of Federalism* at 691-754; Noble E. Cunningham, *The Jeffersonian Republicans: The Formation of Party Organization, 1789-1801* (Chapel Hill, 1957); John Chester Miller, *The Federalist Era, 1780-1801* 228-77 (Harper, 1960); James Morton Smith, *Freedom's Fetters* (Cornell U., 1956); Adrienne Koch, *Jefferson and Madison: The Great Collaboration* (Oxford U., 1964).

themselves.⁷⁶ And thus, as the next section suggests, was born modern federalism.⁷⁷

IV. THE POLITICS OF FEDERALISM

The discussion in Parts II and III challenges most of the conventional arguments about how our federal system preserves a balance between state and federal governments. The structural protections identified by Wechsler, Choper, and company are marginal at best; one leading (and generally sympathetic) commentator calls them the "the least effective way" for states to influence federal policy.⁷⁸

76. I'm not suggesting, by the way, that the Virginia and Kentucky Resolves were not important documents. Together with Madison's Report of 1800 elaborating the arguments, they were indeed important in the campaign to elect a Republican administration. But their importance in 1800 was based more on what they said than on the fact that they were issued by state legislatures.

77. These historical points need to be elaborated, something I plan to do in subsequent work. For the moment, a brief aside will have to suffice to clarify the nature of my argument here. In thinking about federalism, we must address two questions: Is it a good idea? How can we make it work? The Framers had many useful things to say about the first of these questions, which has also been the focus of most legal scholarship in the area. The second question is just as important, however, and here (apart from settling the thorny but wholly theoretical problem of dual sovereignty) the Framers were less helpful. Indeed, much of what they said was soon shown to be wrong. The text above suggests that this is because they based their views on the experience with England and so overlooked significant differences between the British Empire and the new government they created. I refer in particular to the shift from a system based on virtual representation (the notion, made famous by Burke, that the collective membership of Parliament shares and so adequately represents the interests of Englishmen everywhere) to one based on actual (albeit sometimes indirect) representation. In most respects, of course, the Framers were acutely conscious of the significance of representation. It was, after all, a subject heatedly debated in the years before the American Revolution. See Bernard Bailyn, *The Ideological Origins of the American Revolution* 162-75 (Harvard U., enlarged ed. 1992). But the Framers failed to appreciate how representation would affect relations between central and provincial governments—hardly a surprise, since the effect isn't obvious even in hindsight. As suggested in text, having state and national leaders elected by the same citizens transformed politics by making it politically desirable to build connections and create organizations bridging formal institutional divisions. The natural fault line between state and federal governments was thus replaced to a large extent by cross-cutting fissures based on ideology and party affiliation. As Jefferson and Madison learned from the response to the Virginia and Kentucky Resolves, state legislatures no longer could be counted on to watch over the federal government. Instead, a whole new system emerged to mediate disputes respecting the authority of state and federal governments, one dependent on different sorts of institutions and institutional arrangements (the most important of which are described below). The transformation did not occur in a day, though the main components were in place by the time Andrew Jackson used the Democratic Party to destroy the Second Bank of the United States.

78. Elazar, *American Federalism* at 185 (cited in note 7). Less sympathetic commentators have been, well, less sympathetic. William Van Alstyne, perhaps the *least* sympathetic

And the people of Arizona or Colorado aren't about to start a Second American Revolution to protest growth in the federal bureaucracy.

Still, it's hard to escape the feeling that Wechsler's basic insight was right and that *something* is acting to perpetuate the role of the states. Choper spends six pages recounting anecdotes to show that states are able successfully to protect their authority,⁷⁹ and while one can certainly quarrel with some of his examples, the evidence taken as a whole amply supports his conclusion. States remain powerful and important institutions in American life; as I argued above, most of the law that really affects people, that really matters, is still state law. So if the institutions relied on by the Framers don't do it, what are the mechanisms that make this happen?

Jonathan Macey provides a starting point for answering that question: "Congress will delegate to local regulators," he says, "only when the political support it obtains from deferring to the states is greater than the political support it obtains from regulating itself."⁸⁰ At first blush, this statement seems obvious to the point of banality. But it shifts the focus in an important way: from formal institutional arrangements (à la Wechsler and Choper) to a more explicit concern with the incentives of lawmakers, that is, to politics.

Macey identifies three sets of circumstances in which Congress can be expected to defer to states: where private interests have a profitable relationship with state regulators that will be upset by federal regulation; where the optimal legal regime differs markedly from jurisdiction to jurisdiction; and where legislation is likely to be exceptionally controversial.⁸¹ Here Macey is on shakier ground, because it's easy to think of situations in which Congress has left matters to the states even though none of these conditions existed and

commentator out there, scoffs that it's difficult to take the argument about structural safeguards as "other than a good-hearted joke." 83 Mich. L. Rev. at 1724 n.64 (cited in note 16).

79. Choper, *Judicial Review and the National Political Process* at 184-90 (cited in note 12).

80. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 Va. L. Rev. 265, 267 (1990). The "Congress" in this statement must be understood to refer to whatever portion of that body is needed to act or to prevent action—which, depending on the matter in question, can be anything from a majority of both Houses plus the President to the chairman of a single committee. Similarly, the verb "delegate" should not be read too literally. It would be more accurate to say that Congress leaves matters to states, since states will usually have jurisdiction absent pre-emptive federal action. I assume that Macey wants to emphasize the fact that Congress has power to take over most areas. Inertia may account for its failure to act across the board, but we still need to understand the selection process that leads to federal regulation in some areas but not others.

81. *Id.* at 274-76.

even easier to think of situations in which Congress acted despite the existence of one of them.

The problem is that Macey's analysis is too simplistic. Working from some of the crudest premises of public choice theory, Macey assumes that elected officials act only to maximize the electoral and financial support they can obtain from private interest groups. Certainly this is something that politicians care about, deeply even. But lawmakers don't just sit around counting votes and dollars. They care about other psychic and social rewards too: good press, the praise of friends, a sense of having done the right thing, etc. And they worry about a host of subsidiary associations: relations with leaders in the legislature (e.g., will this vote cost me a good committee assignment?), relations with political allies back home (e.g., will this vote cost me their support in helping constituents who want favors?), relations with colleagues and staff (e.g., will this vote affect my working relationships on other matters?), and so on. Moreover, these relationships are all ongoing, which means that legislators must evaluate today's vote against a background of past and future votes and in light of continuing obligations to competing groups and institutions.

The point is simply that the incentives of lawmakers are shaped by the political culture in which they live and the intermediate institutions through which they work. So if we really want to understand when or why a federal legislator might leave something to the states, we need to examine this culture and these institutions and ask how they affect or constrain what government officials do. The discussion below begins this project, identifying some of the factors and processes that influence lawmakers to take the interests of state officials and state institutions into account. With these we can begin to construct a more complete picture of the politics of federalism and to ascertain how the federal balance is maintained. My list is by no means complete; nor is it intended to be. My goal is, rather, to identify critical ingredients in order to stimulate thinking and to provide a starting point for further research.

A. Political Parties

Over the course of American history, the principal institution in brokering state/federal relations—the one around which others

developed, the one that in fact steered their development for the most part—has been the political party.⁸² Parties have done this by linking the fortunes of officeholders at state and federal levels, fostering a mutual dependency that protects state institutions by inducing federal lawmakers to take account of (at least some) desires of state officials. That parties play such a crucial role should come as no surprise. Even under dual federalism, the process of allocating power between state and federal governments is a matter of politics in the first instance, and as one astute commentator observed, in America there is no politics without parties.⁸³ Being central to American politics generally, it was only natural that parties should come to occupy a central place in the politics of federalism as well.

A detailed examination of how political parties affect federalism is beyond the scope of this paper. The topic is large and complex, not least because the parties change constantly—as do their methods of operation, their relationships with voters, their ideological bent, and countless other traits relevant to the inquiry.⁸⁴ For present pur-

82. See Morton Grodzins, *The American System: A New View of Government in the United States* ch. 10 (Rand McNally, 1966); William Riker, *Federalism: Origin, Operation, Significance* 91-101, 136 (Little, Brown, 1964); Daniel J. Elazar, et al. eds., *Cooperation and Conflict: Readings in American Federalism* 515-80 (F.E. Peacock, 1969); Theodore Lowi, *Party, Policy, and Constitution in America*, in Chambers and Burnham, eds., *The American Party Systems* at 238-76 (1967) (cited in note 72). Riker makes a comparative claim as well as an historical one, arguing in his characteristically bold fashion that the shape and success of the federal bargain in every country with a federal form is determined above all by the nature of its political parties. *Federalism* at 129-36.

83. Clinton Rossiter, *Parties and Politics in America* 1 (Cornell U., 1960). See also E. E. Schattschneider, *Party Government* 1 (Farrar and Rinehart, 1942) (stating that "[t]he political parties created democracy and . . . modern democracy is unthinkable save in terms of the parties").

84. Historians and political scientists investigate party politics in the United States by reference to five distinct "party systems," corresponding to major shifts in the structure of political alignments. These are: (1) the Federalist/Republican system, which emerged with ratification of the Constitution and lasted until about 1816 or 1820; (2) the Democratic/Whig system, which developed around the Jacksonian movement between 1824 and 1836 and lasted until the 1850s; (3) the first Democratic/Republican system, born of the sectional crisis of the mid-1850s and lasting well past Reconstruction into the mid-1890s; (4) the Democratic/Republican system of 1896, which was sparked by the depression of 1893 and lasted until the New Deal; and (5) the modern party system, which formed around the New Deal and may still be with us. See generally Chambers and Burnham, eds., *American Party Systems* (cited in note 72); Paul Kleppner, et al., *The Evolution of American Electoral Systems* (Greenwood, 1981). Commentators are divided on the question of whether a new party system began to emerge with the collapse of the "solid South" and the election of Ronald Roagan or whether we are in fact witnessing the end of party politics altogether. There is also a dispute about whether party systems are produced by "critical elections" that recur at thirty to forty year intervals or whether elections play a less crucial role and party systems evolve more gradually. See, for example, Allan J. Lichtman and Ken DeCell, *The Thirteen Keys to the Presidency* (Madison Books, 1990); Samuel P. Huntington, *American Politics: The Promise of*

poses, it suffices to identify two features of American parties that have been relatively constant across party systems and have fundamentally shaped the role of parties in the politics of federalism. The two features are, first, that American parties are nonprogrammatic; and, second, that they are noncentralized. Although other elements of the parties' structure or operation may affect details—details that are, certainly, very important—the way parties have influenced federal/state relations is mostly a product of these two features.

Start with “non-programmatic.” This refers to the fact that our parties are concerned more with getting people elected than with getting them elected for any particular purpose. In contrast to, say, their European counterparts, political parties in the United States have tended to limit themselves to what Theodore Lowi called “constituent” functions—working to constitute and install governments without really trying to control what those governments do.⁸⁵ Paul Kleppner explains:

The dominant American political parties have never been internally homogeneous—socially, ideologically, or in any other important way. They have instead been constituent, or coalitional, parties, entities that have united a wide variety of disparate groups into a single, but limited, system of action.

... The constituent character of American parties has had significant implications for the electoral process. First, the problems of building and maintaining electoral coalitions have been in the forefront of party concerns. Uniting diverse and sometimes latently antagonistic population subgroups into a single and successful voting coalition has required subordinating intergroup tensions to party objectives. . . . This preoccupation with the tasks of subgroup integration and coalition management has virtually excluded any sustained concern by parties for policy articulation.⁸⁶

Putting aside (for now) the complicated question of why American parties developed this way,⁸⁷ it's hard to deny that they did.

Disharmony (Belknap, 1981). Whichever view is right, party practices evolve continuously in ways that are pertinent to understanding federalism.

85. Theodore Lowi, *Party, Policy, and Constitution in America*, in Chambers and Burnham, eds., *The American Party Systems* at 239 (cited in note 72).

86. Paul Kleppner, *Critical Realignments and Electoral Systems*, in Kleppner, ed., *The Evolution of American Electoral Systems* at 3-4 (cited in note 84).

87. Lowi offers the following hypotheses to explain the difference between American and European parties: (1) Europe's feudal past meant that European nations “entered modernity faced with class structures, class consciousness, class politics, and the immediate need for centralized and coercive public policies”; (2) the early presence of programmatic socialist parties in Europe impressed this form of political organization on other parties; (3) most European parties arose from the masses and were based on social movements with a strong ideology,

Clinton Rossiter described the Democratic and Republican parties as "vast, gaudy, friendly umbrellas under which all Americans, whoever and wherever and however-minded they may be, are invited to stand for the sake of being counted in the next election."⁸⁸ And so it has (almost) always been. Hence, party platforms are seldom taken seriously, and successful candidates abandon or ignore controversial planks with relative ease. Hence, parties switch positions from election to election and have made dramatic ideological turnabouts over time. Hence, factions within each party often disagree fundamentally on important issues and frequently hold very different views of the world in general.⁸⁹

Party members everywhere do share one concern, though: they want to win elections. As William Riker has observed:

All factions of a party, no matter how bitter their squabbles, are agreed at least on the preservation of the party itself. The fact that they continue to associate themselves with it sufficiently indicates that, for example, even the most disaffected Republicans would rather be Republicans than Democrats. In short, intraparty squabbles are moderated by the understood compact to preserve the party in a way that conflicts between parties are not.⁹⁰

whereas American parties were created by established elites to satisfy "the mutual needs of existing oligarchs for self-defense and re-election"; (4) most European nations began with multiparty systems; and (5) government in the United States is based on separation of powers and officials are chosen in single-member, winner-take-all districts. Lowi, *Party, Policy, and Constitution in America*, in Chambers and Burnham, eds., *American Party Systems* at 240-41 (cited in note 72). Not all these explanations are persuasive. For example, Lowi's contrast between class politics in Europe and America seems exaggerated, and there were lots of small parties in the United States prior to the emergence of a mature two-party system in the 1840s (as well as periodic third-party challenges since). Nonetheless, this list conveys a sense of the kinds of factors that may have contributed to giving American parties their unique form. The full story is undoubtedly more complex (such stories always are), but the details aren't important for purposes of this essay. See also Leon D. Epstein, *Political Parties in the American Mold* 124-34 (U. of Wisc., 1986).

88. Rossiter, *Parties and Politics in America* at 11 (cited in note 83). Rossiter adds: "It would be hard to imagine a political association more motley than the Democratic party of the United States. The Republicans, for all their apparently sterner commitment to principle and respectability, are not much less of an army with a hundred different banners. They, like the Democrats, are a vast enterprise in 'group diplomacy.'" *Id.* at 12. Pretty much the same thing could be said, moreover, for the Federalists, National Republicans, and Whigs of earlier eras.

89. See generally Epstein, *Political Parties in the American Mold* (cited in note 87); Theodore J. Lowi, *Incomplete Conquest: Governing America* (Holt, Rinehart & Winston, 2d ed. 1985); Xandra Kayden and Eddie Mahe, Jr., *The Party Goes On: The Persistence of the Two-Party System in the United States* (Basic Books, 1985); Richard Hofstadter, *The American Political Tradition and the Men Who Made It* (Knopf, 1973); Rossiter, *Parties and Politics in America* at 11-12.

90. William H. Riker, *The Development of American Federalism* 84-85 (Kluwer Academic, 1987).

Rossiter and Riker overstate the case somewhat. Party leaders do occasionally switch allegiance; factions do sometimes break off and attach themselves to other parties or form third parties; there are frequent schisms within each party, as well as efforts by some blocs to gag or ostracize others. Indeed, open fighting among factions within each party provides much of what is most entertaining, if also most frustrating and infuriating, about American politics. But the parties generally work hard to minimize ideological strife to the extent necessary to win, and by election time the ranks have usually closed (more or less). There are, to be sure, factions within each party that offer only lukewarm support or even sit an election out altogether. But active opposition is unusual, except during the infrequent convulsions that signal the emergence of a new party system, and even then the reformed parties return quickly to their familiar brand of consensus-building, coalition politics.

Not that American parties have no ideology at all. They must stand for something or they wouldn't have any appeal for voters. But what the parties stand for is broad enough and flexible enough to leave room for enormous disagreement, and when ideology conflicts with electoral success, it's usually ideology that yields. Ideological commitments have occasionally proved damaging to one party or the other, as in the elections of 1896, 1964, or 1972. But even in these elections the parties didn't stray far from their centrist leanings, and they soon bounced back. Put simply, as one commentator chided with accurate wit, our parties stand for "flag, home, mother, virtue, liberty, and progress—in a word, for victory."⁹¹

I said above that American parties are also "non-centralized," and this term, too, requires brief elaboration. The classic portrait of a political party has a small coterie of powerful leaders acting behind the scenes to decide who gets elected. In popular depictions, these leaders command a host of kept politicians, bought newspaper editors, and loyal rank-and-file—all prepared to follow orders from the top by making sure that favored candidates win and that upstarts are squashed like bugs.

The image is undoubtedly overdrawn, particularly its insinuation that party and corruption always go together, but it nevertheless captures the sense many people have of parties as tight-knit, disciplined organizations. There may even once have been parties

91. Rossiter, *Parties and Politics in America* at 175 (cited in note 83).

that fit this description; indeed, it may still describe state or local parties in a few places (though, speaking as a former Chicagoan, the old machines sure don't seem to work as well as they used to). But the national parties have never fit this image of order and control. On the contrary, the flabby organization and lack of discipline that has historically characterized parties at this level led Morton Grodzins to call them "antiparties"—like antimatter to matter, the very opposite of a party. It seems farcical, Grodzins said, to give the label "political party" to an organization

that controls a majority of the Congress but cannot formulate and by its own votes pass a program; that stands together only, and not always then, for national elections, for matters of patronage, and for the organization of the legislative business; that in convention chooses a leader and presidential candidate by unanimous vote and then, in Congress, forces that leader as President to depend upon defections from the other side.⁹²

In this, at least, Grodzins is plainly correct: there is no central cabal controlling national party politics in the United States, no *chèque* sitting atop the party pyramid, smoking cigars in back rooms, and dictating candidates and policies to the nation. For most of our history there have been only loose confederations of interdependent, semi-autonomous state and local organizations. Every four years, leaders of these organizations would get together to choose a presidential candidate, but otherwise they pretty much went their own way.⁹³ This structure has changed in recent years, as state and local parties have lost strength and national party committees have assumed greater control over party operations. The implications for federalism of this and other developments in the party system are considered below, but it seems safe to say that even today American

92. Grodzins, *The American System* at 254 (cited in note 82). See also *id.* at 284.

93. Writing in 1965, Austin Ranney observed that "[m]any commentators . . . regard the national parties as little more than coalitions of state parties formed intermittently to capture the presidency." Austin Ranney, *Parties in State Politics*, in Herbert Jacob and Kenneth N. Vines, eds., *Politics in the American States* (Little, Brown, 1965). See also Lowi, *Incomplete Conquest* at 196-97 (cited in note 84); Epstein, *Political Parties in the American Mold* 123 (cited in note 89); Rossiter, *Parties and Politics in America* at 12-13 (cited in note 83); Daniel J. Elazar, *Federalism and Intergovernmental Relations*, in Elazar, et al., eds., *Cooperation and Conflict* at 9 (cited in note 82); Elazar, *American Federalism* at 48 (cited in note 7); Riker, *Federalism* at 91 (cited in note 82); Samuel P. Hays, *Political Parties and the Community-Society Continuum*, in Chambers and Burnham, eds., *American Party Systems* 152, 157 (cited in note 72); Richard E. Dawson, *Social Development, Party Competition, and Policy*, in *id.* at 203, 204; Jonathan R. Macey, *The Role of the Democratic and Republican Parties as Organizers of Shadow Interest Groups*, 89 Mich. L. Rev. 1, 13 (1990).

parties are markedly decentralized in comparison to parties elsewhere in the world.

This combination of unique characteristics—a general commitment to victory over ideology, and the absence of centralized management—has shaped the parties' role in federalism. It has done so by creating a political climate in which members of local, state, and national chapters are encouraged, indeed expected, to work for the election of party candidates at every level—creating relationships and establishing obligations among officials that cut across government planes. This expectation of aid and support exists, moreover, even in the face of quite serious disagreements about policy, which the party encourages putting aside in the interest of winning. Nor does the obligation to support party candidates end on election day, for staying in power constrains successful candidates to work with their counterparts at other levels. A member of Congress, even a President, may sometimes need to help state officials either as a matter of party fellowship or in order to shore up their willingness and, more important, their ability to offer support in the future. And vice-versa. The whole process is one of elaborate, if diffuse, reciprocity; of mutual dependency among party and elected officials at different levels; of one hand washing the other.

Let me try to make the story a bit more concrete. Bear in mind that anything less than a detailed historical account is necessarily incomplete, and to that extent inaccurate, because the particulars have changed so much over time. The discussion that follows, unfortunately, is of the broad-brush variety, and it presents a fairly stereotyped picture of parties. But stereotyped isn't the same as wrong, and while a more thorough rendering is needed to fill out our understanding of parties and federalism, what follows is sufficient to illustrate the basic process.

Of the many reasons elected officials have to care about political parties, two are particularly important for federalism: first, parties offer tangible aid to help candidates get elected; second, parties provide a fraternal connection among officials that helps expedite the day-to-day affairs of governing.⁹⁴ (These considerations are obviously

94. Among the other reasons politicians might have for caring about parties, several obviously weigh more heavily in the decision to join. For example, because party networks are so well established, they offer most aspiring politicians the quickest route into politics and the easiest way to establish political legitimacy. Similarly, a party label attracts voters who assume that the party's candidate will share their general preferences. But even if such considerations help explain why virtually all elected officials join parties, they are important for federalism

related inasmuch as tangible aid feeds the perception that party affiliation matters, while the perception that the party matters increases the likelihood that such aid is forthcoming.) These factors matter for federalism because they work across levels of government. That is, candidates at one level accept aid from party organizations at other levels and cultivate party-based relationships with candidates at these other levels. And this, in turn, affects what they do in office.

Consider first the role that parties play in helping candidates get elected. For much of our history (from, say, Andrew Jackson's time until the late 1950s), getting elected to federal office—be it Congress or the Presidency—was impossible without the backing of state and local parties and officials. Campaigning was labor intensive activity, requiring nothing so much as bodies to do a lot of time-consuming legwork. Learning what people wanted, for example, or whom they favored, or what issues mattered to them, could be done only through face-to-face encounters, a method of intelligence gathering that called for extensive contacts in the community. And once the campaign began in earnest, a candidate needed supporters to hand out pamphlets, canvass door-to-door, stage rallies and torch-light parades, and make stump speeches in parks, on corners, or near polling places.⁹⁵

Few candidates could muster the resources to conduct a successful campaign of this sort on their own, and there were no national party organizations to speak of. So state and local parties filled the gap. They had the necessary community contacts and, what's more, could furnish volunteers galore through their extensive patronage

only to the extent that parties themselves are important. The reasons in text, by contrast, explain why parties are important for federalism.

95. The quickest way to get a sense of nineteenth century campaigning is by reading accounts in biographies of the candidates. See, for example, Merrill Peterson's vivid descriptions of presidential campaigns from 1824 through 1848 in *The Great Triumvirate* (cited in note 38), or the accounts of the McKinley/Bryan campaign of 1896 in Wayne Cullen Williams, *William Jennings Bryan* (G.P. Putnam's Sons, 1936), and Herbert David Croly, *Marcus Alonzo Hanna: His Life and Work* (Macmillan, 1912). For more general discussions of campaign tactics and financing in this period, see Gil Troy, *See How They Ran: The Changing Role of the Presidential Candidate* (Maxwell Macmillan Int'l, 1991); Barbara G. Salmore and Stephen G. Salmore, *Candidates, Parties, and Campaigns: Electoral Politics in America* ch. 2 (CQ Press, 2d ed. 1989). Of course, then as now, campaign practices changed constantly. For example, candidates assumed a more active role after the Civil War, and the blatantly partisan newspapers of the mid-19th century were eventually replaced by independent papers that used wire services to reach large audiences quickly. But these developments do not affect my basic point, which is simply that campaigning in these years depended heavily on manpower.

systems.⁹⁶ (Patronage in this period included more than government employment, by the way. State and local parties also managed private welfare networks: in exchange for loyal support, the ward boss or precinct captain would help constituents find jobs in the neighborhood or arrange for them to receive food and shelter during a bad stretch.) The endorsement and active backing of state and local officials and party leaders was thus crucial to win election, giving these officials and leaders substantial influence in Washington.

Reforms that would weaken and ultimately destroy this system were already beginning to appear in the late nineteenth and early twentieth centuries, though it took several generations more for their full effects to be felt. Many innovations were deliberately aimed at weakening the parties. Progressive reformers succeeded in instituting civil service systems to curtail the use of patronage, and they reduced party control over candidate selection by mandating primaries for many state and federal offices and by making most local elections nonpartisan.⁹⁷ Other changes, though not specifically aimed at parties, affected them profoundly nonetheless. The most important example here is probably the New Deal, which weakened the party system by establishing government bureaucracies to assume the social welfare functions formerly performed by the parties.⁹⁸

The more profound and, from the parties' standpoint, more threatening developments occurred after World War II. The litany of causes for the alleged decline of political parties is old hat by now.⁹⁹

96. See, for example, Samuel J. Eldersveld, *Political Parties in American Society* (Basic Books, 1982); Charles Edward Merriam, *The American Political System* (McMillan, 1949); Ari Arthur Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement* (U. of Ill., 1961).

97. See, for example, Epstein, *Political Parties in the American Mold* 124-40 (cited in note 87); Kayden and Mahe, *The Party Goes On* at 36-45 (cited in note 89); Robert J. Huckshorn and John Bibby, *State Parties in an Era of Political Change*, in Joel L. Fleishman, ed., *The Future of American Political Parties* 70, 72-74 (Prentice-Hall, 1982). As of 1960, parties were off the ballot in more than 70% of American cities with populations of 25,000 or less. E. C. Lee, *City Elections: A Statistical Profile* 80, table 7 (1963).

98. Kayden and Mahe, *The Party Goes On* at 45-46 (cited in note 89); Huckshorn and Bibby, *State Parties in an Era of Political Change*, in Fleishman, ed., *Future of American Political Parties* at 74; Ruth Scott and Ronald Hrebenar, *Parties in Crisis* 99-100 (Wiley, 1979). As explained below, however, because the bureaucracies that were created depend on cooperation from state and local officials, they have provided a substitute mechanism for states to protect their interests. See notes 139-42 and accompanying text.

99. A sample of well known titles includes David S. Broder, *The Party's Over: The Failure of Politics in America* (Harper & Row, 1972); Norman H. Nie, Sidney Verba, and John R. Petrocik, *The Changing American Voter* (Harvard U., enlarged ed. 1979); Walter Dean Burnham, *The Current Crisis in American Politics* (Oxford U., 1982); William Crotty, *American*

To begin with, there was an apparent drop in the partisanship of voters, evidenced by a sharp increase in the number who call themselves independent and say they are willing to vote a split ticket.¹⁰⁰ This decline in dependable voters, in turn, is said to have weakened the parties by making it harder for them to turn out the vote and by forcing them to compete on an office-by-office and election-by-election basis.¹⁰¹ To make matters worse, the attack on patronage continued apace, bolstered in recent years by Supreme Court decisions holding the practice unconstitutional on First Amendment grounds in most circumstances.¹⁰² Together with the decreasing partisanship of voters, this made it all but impossible for parties to maintain large active memberships. They became what political scientists like to call "cadre" parties: skeletal structures with leaders but no dependable followers, like armies with officers but no privates to fill the ranks.¹⁰³

A second set of developments involve internal party reforms. Since the 1950s, both parties (but especially the Democrats) have adopted rules to democratize candidate selection and, in doing so, have weakened the power of party elites.¹⁰⁴ These reforms include the expansion of presidential primaries and the reduction of state and local autonomy in selecting delegates to national conventions (most notably, by prohibiting discrimination on the basis of race and sex). Most of these changes pertain only to the process of nominating a presidential candidate, but since that tends to be the parties' great unifying event, the effects may not be so limited.

A third set of developments is technological in nature.¹⁰⁵ Here I refer to things like the transformation and spectacular growth of the

Parties in Decline (Little, Brown, 2d ed. 1984); and Martin P. Wattenberg, *The Decline of American Political Parties, 1952-1980* (Harvard U., 1984).

100. See, for example, Nie, Verba, and Petrocik, *The Changing American Voter* at 47; Martin Wattenberg, *The Decline of American Political Parties, 1952-1980* ch. 3.

101. See, for example, H.G. Nicholas, *The Nature of American Politics* 57 (Oxford U., 1986).

102. See, for example, *Elrod v. Burns*, 427 U.S. 347 (1976) (holding that patronage dismissals of non-civil-service employees violated the First and Fourteenth amendments); *Branti v. Finkel*, 445 U.S. 507 (1980) (holding that patronage dismissals of assistant public defenders violated the First and Fourteenth amendments); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (extending the rule in *Elrod* and *Branti* to promotion, transfer, recall, and hiring decisions).

103. Epstein, *Political Parties in the American Mold* at 144-48 (cited in note 87); Frank J. Sorauf, *Party Politics in America* 59-86 (Little, Brown, 5th ed. 1984).

104. Kayden and Mahe, *The Party Goes On* at 60-69 (cited in note 89); Charles Longley, *Party Nationalization in America*, in William J. Crotty, ed., *Paths to Political Reform* 167-98 (Lexington Books, 1980); Epstein, *Political Parties in the American Mold* at 208-14 (cited in note 87).

105. See Huckshorn and Bibby, *State Parties in an Era of Political Change* in Fleishman, ed., *Future of American Political Parties* at 84-90 (cited in note 97); Nelson W. Polsby, *The News*

mass media, particularly television, and the increasing reliance placed by voters on news programming, talk shows, and other sources of information independent of parties. Of equal importance is the invention of computer-based survey techniques and sophisticated methods of reaching voters with minimal manpower (like direct mail). These developments, in turn, created a market for independent professional consultants: campaign advisors, public relations specialists, pollsters, advertising experts, spin doctors, and so on.¹⁰⁶ And this potent combination of technology and professional nonpartisan help made it possible, for the first time, to campaign without party resources.

Finally, every aspect of the campaign process was profoundly affected by changes in election financing.¹⁰⁷ Former Speaker of the House Tip O'Neill once remarked that "there are four parts to any campaign. The candidate, the issues of the candidate, the campaign organization, and the money to run the campaign with. Without the money you can forget the other three."¹⁰⁸ Well, the money has changed: more is needed than ever before, and the ways of getting it are different. The most significant development here has to be the dramatic increase in organized private interests on the prowl for candidates to buy—and able to use TV, direct mail, and other new technologies to raise money for the purpose. The importance of this development is magnified by federal campaign finance laws restricting what parties can give.¹⁰⁹ As originally enacted, there were similar

Media as an Alternative to Party in the Presidential Selection Process, in Robert A. Goldwin, ed., *Political Parties in the Eighties* 50-66 (American Enterprise Institute for Public Policy Research, 1980); Scott and Hrebener, *Parties in Crisis* at 6-7, 173-82 (cited in note 98). There is a close connection between primaries, which increase the cost of campaigning, and technology, which enables candidates to reach more voters for less money than traditional campaign tactics. See id. at 155-58.

106. See Kayden and Mahe, *The Party Goes On* at 109-10 (cited in note 89); Huckshorn and Bibby, *State Parties in an Era of Political Change* in Fleishman, ed., *The Future of American Political Parties* at 84-90 (cited in note 97).

107. The issues discussed in this paragraph are more fully developed in Frank Sorauf, *Inside Campaign Finance: Myths and Realities* (Yale U., 1992); Epstein, *Political Parties in the American Mold* at 273-94 (cited in note 87); Scott and Hrebener, *Parties in Crisis* at chs. 6-7 (cited in note 98); Gary C. Jacobson, *Campaign-Finance Regulation: Politics and Policy in the 1970s*, in Crotty, ed., *Paths to Political Reform* 239-70 (cited in note 104).

108. Quoted in Jimmy Breslin, *How the Good Guys Finally Won: Notes from an Impeachment Summer* 14-15 (Viking, 1975).

109. See Federal Election Campaign Act ("FECA") of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended by FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976). Under these laws, each national and state organization may spend up to \$10,000 for candidates in House general election campaigns, \$20,000 or 2 cents per vote (whichever is greater) for candidates in Senate

restrictions on contributions by private individuals and organizations, but the Supreme Court held these unconstitutional insofar as they limited spending in support of a candidate (as opposed to direct contributions to the candidate).¹¹⁰ The resulting loophole could have had the practical effect of allowing unlimited private campaign contributions. Surprisingly, only a small percentage of the money spent on campaigns takes this form: of the \$495 million spent on congressional campaigns in 1990, for example, only \$24 million consisted of independent expenditures. This is because the major private interests have found a better way to evade federal limits on direct contributions: by establishing numerous, ostensibly independent "political action committees" (the notorious PACs), each able to contribute up to \$5,000 per candidate. In 1990, for example, PACs contributed a whopping \$151 million to candidates for Congress.¹¹¹ Moreover, the amount of private money available for congressional races has been increased by the provision of public funding for presidential elections.¹¹²

These are, no doubt, significant changes. But what is their significance for federalism? For a while, political scientists (and other pundits) were forecasting the imminent demise of political parties altogether, including some who prophesied in rather desperate terms that the death of parties could spell the end of democracy itself.¹¹³ Most of these dire predictions were made in the 1970s, influenced by the turbulent '60s and the first wave of quantitative work suggesting a substantial decline in voter attachment to parties. Moreover, they came (for the most part) from champions of "responsible party government"—a school of thought emphasizing the need for parties to play an active role in shaping government policy.¹¹⁴ Even at their best, American parties were never particularly effective in this re-

general election campaigns, and approximately \$3 million in general elections for the presidency. 2 U.S.C. § 441a(d). These amounts are only a tiny fraction of what it takes to run a modern campaign. See Gary Jacobson, *The Politics of Congressional Elections* 71-77 (Harper Collins, 3d ed. 1992).

110. *Buckley v. Valeo*, 424 U.S. 1 (1976).

111. Sorauf, *Inside Campaign Finance* chs. 1, 4 (cited in note 107).

112. Scott and Hrebenar, *Parties in Crisis* at 206 (cited in note 98).

113. See, for example, Gerald M. Pomper, *The Decline of the Party in American Elections*, 92 Pol. Science Q. 21 (1977); Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* 131-34 (Norton, 1970); authorities cited in note 99.

114. See Epstein, *Political Parties in the American Mold* at 18-37 (cited in note 87); Gary Orren, *The Changing Styles of American Party Politics*, in Fleishman, ed., *The Future of American Political Parties* 4, 6-31 (cited in note 97).

gard, so it's not surprising that changes making them even less so could appear altogether calamitous.

Be that as it may, legal scholars—especially those critical of a *Garcia*-type approach—took these prognostications pretty much at face value, pointing to the “death of parties” literature as further evidence that we can't depend on the political process to safeguard federalism. Lewis Kaden was first to make the point, in his defense of *National League of Cities*.¹¹⁵ He was also last really, since subsequent commentators have done nothing more than cite Kaden and repeat his assertion that the political safeguards of federalism are undercut by the decline of parties.¹¹⁶

The problem is that Kaden was writing in 1979, when the outlook for parties seemed bleakest, and substantial work done since then rejects the claim that parties are dying. Mark Twain's overused witticism about exaggerated rumors comes to mind. For the consensus today is that political parties aren't dying after all, that they have come back strong—albeit in a somewhat different form.¹¹⁷ In part, this change results from a closer look at some of the assumptions underlying the death of parties claim. It turns out, for example, that rather than the thirty to forty percent of the electorate that some commentators said no longer cared about parties, the number of true independent voters peaked at approximately fifteen percent in the mid-1970s before sliding back to the ten percent level of the 1950s (when parties were still relatively strong). It is true that, when asked, a much larger proportion of voters say they are independent, but most concede on follow up questions that they lean toward one party or the other, and their actual voting behavior is for all practical purposes indistinguishable from that of voters who explicitly identify themselves as Democrats or Republicans.¹¹⁸ (This raises the interesting question of why so many people are reluctant to describe them-

115. Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 862-67 (1979).

116. See, for example, A. E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 Ga. L. Rev. 789, 793 (1985); Merritt, 88 Colum. L. Rev. at 16 (cited in note 62).

117. A sample of titles here includes Malcolm E. Jewell and David M. Olson, *American State Political Parties and Elections* (Doesey, rev. ed. 1982); Bruce E. Keith, et al., *The Myth of the Independent Voter* (U. of Cal., 1992); Epstein, *Political Parties in the American Mold* (cited in note 87); Kayden and Mahe, *The Party Goes On* (cited in note 89); Fleishman, ed., *The Future of American Political Parties* (cited in note 97); Jacobson, *The Politics of Congressional Elections* (cited in note 109); Cornelius P. Cotter and John F. Bibby, *Institutional Development of Parties and the Thesis of Party Decline*, 95 Pol. Science Q. 1 (1980).

118. See Keith, et al., *The Myth of the Independent Voter* at 13, 17 (cited in note 117).

selves as supporters of a party even though they act like one, but that's a subject for a different paper.)

These observations may explain a striking fact that proponents of the "dying parties" thesis seem consistently to ignore: that at both state and federal levels, no one (or so few as to be practically the same thing) gets elected without being attached to one of the major parties. If the parties really were dying, or even declining to a substantial degree, one would expect to see an increase in the number of successful third-party or independent challenges. Yet such challenges remain impossibly rare. Even in nonpartisan local elections, where party affiliation doesn't appear on the ballot, successful candidates are invariably associated with one of the two major parties.¹¹⁹ There may be other ways to explain this phenomenon, but the most logical explanation would seem to be that voters do still identify with the parties, which therefore remain powerful and important institutions in American politics.

Nor are claims about declining partisanship the only ones to have suffered from closer inspection or the passage of time. Internal party reforms, for example, had some effect, but not the profound one anticipated by earlier commentators. So while primaries opened up the presidential selection process a bit, a candidate still needs support from party regulars to have a chance of winning. Moreover, as in the earlier Progressive era, the period of reform was followed by a period of partial retrenchment as new rules were adopted to help restore the voice of party elites (such as Democratic provisions creating "superdelegates").¹²⁰ The parties similarly found ways to preserve a role for themselves in fundraising and campaign financing, through techniques like general ads and coordinating PAC spending.¹²¹

There is, in other words, no question that parties remain important in contemporary politics and political campaigns. At the same time, it would be naive to pretend that things haven't changed. Both parties and campaigns are vastly different enterprises than they were fifty or one hundred years ago. The question is whether these changes affect the parties' role in federalism. Most political scientists working in the area are concerned with measuring whether parties are strong enough to have a substantial effect on activities like candi-

119. See Epstein, *Political Parties in the American Mold* at 127-28 (cited in note 87).

120. See *id.* at 102-05.

121. Kayden and Mahe, *The Party Goes On* at 69-93 (cited in note 89). This issue is discussed below.

date selection or policy formation. My thesis, in contrast, is that it's the *weakness* of American parties that has made them important for federalism. The parties haven't self-consciously brokered federal/state relations; no one made deliberate decisions about how to allocate power and required officials to abide by them. Rather, the parties influenced federalism by establishing a framework for politics in which officials at different levels were dependent on each other to get (and stay) elected.¹²² So the question is whether the parties have changed in ways that affect this aspect of politics. Two developments in particular seem important.

First, campaigning is more "candidate-centered" today than it used to be.¹²³ Candidates run their own campaigns using their own organizations paid for with money raised to a larger extent than in the past from sources outside the party.¹²⁴ The emergence of candidate-centered campaigns results from the congruence of several developments discussed above. To win a primary election, a candidate must build a campaign organization early and earn a degree of popular support that makes it risky to depend exclusively on state and local leaders (who may themselves be split among the contestants). At the same time, the availability of professional consultants, mass media, and independent funding makes it possible to run for office without the party's help. Consequently, serious aspirants for federal office today create their own campaign organizations and operate to a large extent as individual political entrepreneurs. The parties still make valuable resources available,¹²⁵ but candidates

122. Morton Grodzins made a similar claim, though rather than assign the parties a strong affirmative role, he emphasized their weakness as something that kept them from centralizing and so *interfering* with the sharing of power between state and federal governments. Morton Grodzins, *The American System* at 284-89 (cited in note 82).

123. For more detailed discussions of candidate-centered campaigns, see, for example, Wattenberg, *The Decline of American Political Parties* at 90-91 (cited in note 99); Epstein, *Political Parties in the American Mold* at 70-78, 95-113 (cited in note 87); Huckshorn and Bibby, *State Parties in an Era of Political Change*, in Fleishman, ed., *The Future of American Political Parties* at 84-90 (cited in note 97). See generally Jacobson, *The Politics of Congressional Elections* (cited in note 117); Robert Agranoff, *The Management of Election Campaigns* (Holbrook, 1976).

124. This development has, in turn, changed the content of campaigns: modern candidate-centered campaigns emphasize a candidate's own ideas and positions more than his or her party affiliation (though affiliation still remains important to voters, who associate it with certain general proclivities on the issues). See authorities cited in note 123.

125. See Epstein, *Political Parties in the American Mold* at 77 (cited in note 87); Kayden and Mahe, *The Party Goes On* chs. 3-4 (cited in note 89); Jacobson, *The Politics of Congressional Elections* at 71 (cited in note 117). This point is conceded, albeit somewhat reluctantly, even by commentators who view the parties as still declining. See, for example, Scott and Hrebennar,

make their own decisions about whether (and on what terms) to accept them.

Second, what resources the parties do make available come to a greater extent than before from the national organization.¹²⁶ This is an accidental (and, as we shall see below, possibly temporary) by-product of the way in which parties responded to the challenge of the twentieth century. The initial diagnosis of party decline rested to a large extent on an assumption that they had become obsolete: that candidates no longer needed the parties or their dwindling armies of volunteers in the age of television and direct mail. So the parties responded by changing what they had to offer and made themselves useful for modern campaigns as well. They established permanent headquarters and hired professional staff to organize nationwide fundraising efforts, coordinate spending by PACs, and assist candidates in advertising and polling; they purchased computers for candidates to use for a broad range of functions, everything from word processing, accounting, and complying with public disclosure laws, to political targeting, processing survey information, maintaining mailing lists, and preserving donor information; they compiled up-to-date information on voter attitudes in every section of the country, using modern market research techniques. Partly for reasons of convenience, but more because of foresighted leadership by national party chairmen (especially Republican William Brock), most of these efforts were begun at the national level, giving national party committees a new voice and renewed prominence.

Changes like these obviously could affect the parties' role in federalism by making them less effective vehicles for protecting state and local interests. To the extent that candidates for federal office rely less on the party to get elected, they have less reason once in office to worry about what party organizations at any level want. And to the extent that what support the parties do provide comes from national committees rather than state and local organizations, the state and local officials who are the primary clients of these organizations will have that much less influence in Washington.

Nonetheless, it's too soon to start writing obituaries. Maybe candidates can build their own organizations capable of running a

Parties in Crisis at 155 (cited in note 98). The kinds of resources provided by parties today are described in the next paragraph.

126. The nationalization of American parties is discussed in Epstein, *Political Parties in the American Mold* at 200-38; Longley, *Party Nationalization in America*, in Crotty, ed., *Paths to Political Reform* at 167-98 (cited in note 104); Kayden and Mahe, *The Party Goes On* at 59-93.

modern campaign, but few have the time or the resources to keep those organizations intact between elections. Instead, candidate organizations "must usually be built from scratch for each election,"¹²⁷ making it necessary for candidates to rely on the parties' permanent facilities for vital services and information.¹²⁸ For this same reason, party aid is often indispensable between elections as well. Bear in mind, moreover, that the parties began this process of modernizing only recently, and there is every reason to believe that candidate reliance on party resources will increase as the parties improve the quality and quantity of services they provide.

A similar story can be told about the apparent nationalization of American parties. Power flowed to the national level because national committees took the lead in modernizing and updating party operations. As with government operations, however, where reform at the state level was triggered by federal expansion and consisted largely of mimicking federal structures, state political parties have finally begun to respond. Recent literature documents this catching-up process, as more and more state parties copy the national organization by establishing permanent headquarters of their own to offer candidates services similar in quantity and quality to those offered by the national party.¹²⁹ Local parties may be dead, but state parties have begun, apparently with some success, to reassert their place in the campaign process.

The point, of course, is not that candidates need parties as much as they ever did or that state parties are just as important as they ever were. Given the immensity of the changes and the recency of the response, it's much too soon to tell. But too soon either way: which means it's also too soon to say, as some commentators have,¹³⁰ that parties no longer serve an important role in federalism. The most one can say at this point, though one can say this with a great deal of confidence, is that we don't know enough to draw any firm

127. Jacobson, *The Politics of Congressional Elections* at 79-81 (cited in note 117).

128. See authorities cited in note 126. As one leading commentator observed, no other single actor can match the resources that the party can make available to a candidate. Kayden and Mahe, *The Party Goes On* at 92 (cited in note 89). So while a candidate strongly committed to campaigning outside the party apparatus may be able to do so, this requires a lot more work than most candidates are willing to undertake.

129. See, for example, Robert J. Huckshorn, *Party Leadership in the States* 54-57, 254, 263-66 (U. of Mass., 1976); Cornelius Cotter, et al., *Party Organizations in American Politics* ch. 2 (Praeger, 1984); Timothy Conlan, Ann Martino, and Robert Dilgar, *State Parties in the 1980s: Adaptation, Resurgence and Continuing Constraints*, 10 *Intergovernmental Perspective* 6 (1984); Kayden and Mahe, *The Party Goes On* ch. 4.

130. See authorities cited in notes 115-16.

conclusions. At a minimum, however, it seems clear that parties will continue to play at least a strong supporting role in forging links between officials at the state and federal levels.

Pretty much the same thing may be said with respect to the second way in which parties influence federalism: by creating a culture in which fellow party members feel obliged (as opposed to being formally obligated) to help each other out. Party affiliation is, in a way, like membership in a club or fraternity. It creates a connection, an affinity, that is partly constituted by the threat of sanction and promise of gain but that, at the same time, transcends particular calculations of individual interest. Members share a sense of comradeship, of what John Kingdon called "intraparty compatriot feeling,"¹³¹ that makes working together easier. Democrats give other Democrats a consideration they deny to Republicans—just because they *are* Democrats. Republicans do the same.

This consideration is an important aspect of party politics. It facilitates the business of governing by inhibiting competition between institutions and reducing the indifference one department might otherwise show to another. Democratic mayors can expect a kind of cooperation from a Democratic police commissioner or head of sanitation that they could not expect if these officials were Republican, even if they are independently elected. Democratic Presidents want a Democratic Congress because they know this will make it easier to get their programs adopted.

As this last example makes clear, feelings of "intraparty compatriotship" are anything but absolute. Recall that American parties are different in this respect from political parties anywhere else in the world.¹³² Discipline is lax, and everyone understands that members will not always toe the party line. The pundits who hailed President Clinton's election because it would end "gridlock" in Washington may be disappointed, but they shouldn't be surprised. Clinton's difficulty in taking advantage of his party's majority in Congress is hardly unusual, as Presidents from Martin Van Buren forward could attest.

But just because party affiliation doesn't absolutely determine behavior does not mean that it's irrelevant. On most matters most of the time, and especially when it comes to the nitty gritty business of

131. John W. Kingdon, *Congressmen's Voting Decisions* 116 (Harper & Row, 1973).

132. See notes 84-93 and accompanying text. Also noted above is the fact that the desire to change American parties by making them more disciplined is a dominant strain in academic work in this area. See note 114 and accompanying text.

daily administration, party affiliation matters a great deal.¹³³ Like other "soft" influences, it may be ignored if an official feels strongly about something or when other political considerations become paramount (as was the case, for example, in the recent vote on NAFTA), but it's always present, always a factor to be taken into account. Hence, even today, "party remains the most important single cue for roll-call voting of representatives and senators."¹³⁴

The importance of party affiliation in creating an informal obligation to work with other party members is not limited to officials on the same plane of government. Like other party-related considerations, it cuts across tiers, establishing a similar duty between state and federal officials. Perhaps the easiest way to illustrate the point is with an example drawn from history. One striking difference between the North and the South during the Civil War was that the South had no political parties. For a time historians assumed that, in this respect at least, the Confederacy had the advantage—that Lincoln's ability to govern was hampered by the partisan behavior of extremists within his own party as well as of Democrats, while Jefferson Davis did not suffer this particular handicap.

Eric McKittrick demolished this assumption in his fascinating study of the role of parties in the Civil War, showing how the existence of political parties (including a loyal opposition) benefitted the North while the absence of such institutions impeded the Southern effort.¹³⁵ Having tied their fortune to that of the party, political actors at every level, from the lowest functionaries to the cabinet, worked to ensure its success—not just because this led to material reward, though that certainly was part of the reason, but also because it was expected.¹³⁶ And the area in which parties made the greatest differ-

133. Kingdon, *Congressmen's Voting Decisions* at ch. 4 (cited in note 131); Epstein, *Political Parties in the American Mold* at 62-69 (cited in note 87).

134. Epstein, *Political Parties in the American Mold* at 63. Evidence that parties were becoming less cohesive in Congress was once offered as further proof of their decline. See, for example, Barbara Hinckley, *Stability and Change in Congress* 204, 207 (Harper & Row, 1983); William J. Keefe, *Parties, Politics, and Public Policy in America* 139-40 (Dryden, 1976); Walter Dean Burnham, *Insulation and Responsiveness in Congressional Elections*, 90 *Pol. Science Q.* 411 (1975). More recent data suggest that these claims, too, may have been exaggerated and that there has been at most only a very slight decline in the tendency of party members to vote together. See Epstein, *Political Parties in the American Mold* at 63 (citing an unpublished study by Frank Feigert); Randall B. Ripley, *Congress: Process and Policy* 211-12 (Norton, 3d ed. 1983).

135. Erik L. McKittrick, *Party Politics and the Union and Confederate War Efforts*, in Chambers and Burnham, eds., *The American Party Systems* 117-51 (cited in note 72).

136. McKittrick illustrates the point with particular examples. Whereas Lincoln's Vice-President, Hannibal Hamlin, supported Lincoln's reelection and made himself useful in other

ence, in which, according to McKitrick, their presence in the North contributed most to the war effort, was that of state/federal relations:

In both [North and South] there was a set of natural fault-lines, inherent in a federal structure, between the state and national governments. In the Confederacy, these cracks opened ever more widely as the war went on. Toward the end, indeed, some states were in a condition of virtual rebellion against the Confederate government. In the North, the very opposite occurred. The states and the federal government came to be bound more and more closely in the course of the four years, such that by the end of that time the profoundest change had been effected in the character of their relations.¹³⁷

McKitrick demonstrates how political parties facilitated the war effort by comparing Northern and Southern effectiveness in recruiting and controlling troops and in dealing with disaffection and disloyalty. Northern governors, almost all of whom were Republican, worked with the Lincoln Administration; potential conflicts between state and national authorities were thus moderated by a shared desire to see the war successfully prosecuted so as to ensure a Republican victory at both levels in upcoming elections. Lacking any comparable institution to mediate conflicts, Southern governors viewed themselves as rivals of the central government and sought jealously to protect their own prerogatives. They held up troops and munitions, granted exemptions from service, pardoned men accused of desertion and disloyalty, and generally obstructed the Richmond government's efforts to manage the war. McKitrick concludes:

The chief mechanism that prevented such centrifugal tendencies from developing in the Northern states . . . was the Republican Party. It was the energy of the Republican Party that established the political structure with which the North began the war, and through which the war was prosecuted to the end. More specifically, the governors of every Northern state in 1861 had been put there through the efforts of that party, and these men represented

ways even after he was unceremoniously dumped from the ticket in 1864, Davis' Vice-President, Alexander Stephens, spent his time venomously attacking his own government. Similarly, Lincoln's chief rival for the presidency, William Seward, served faithfully as Secretary of State, whereas Davis' rival, Robert Toombs, resigned from the cabinet and joined Stephens in unrelenting warfare on the administration. Indeed, while there were plenty of cabinet intrigues in the North, McKitrick shows how Lincoln was able to use the party to resolve or avoid them in a way that Davis could not, so that the Union cabinet was practically a study in smooth sailing compared to the Confederacy's. *Id.* at 121-33. Nor can these differences be explained on the ground that Stephens and Toombs were ambitious in a way that Hamlin or Seward were not. Seward, at least, was plenty ambitious, as were Chase and many other powerful figures in the Republican Party. But the ambitions of these men were channeled and controlled by the culture of their party.

137. *Id.* at 133.

both the state organizations and the national coalition responsible for bringing a Republican administration to Washington.¹³⁸

This example illustrates a phenomenon that is generally applicable: party connection establishes a bond that encourages government officials to pay attention to each other's needs and interests. The difficult problem comes in trying to say something useful about the strength of the effect. How important is party affiliation to federal officials in dealing with their state and local counterparts? As noted above, this sense of obligation is constituted in part by the rewards that flow from party membership. After a while, the obligation may take on a life of its own, but enduring changes in the party's reward structure must surely affect it. So the same twentieth century developments that lessened the parties' centrality to campaigns and thereby reduced their value to candidates may similarly have eroded the strength of any informal obligation generated by party membership. May have. As with campaign support, however, it's impossible to know how important this factor is today without knowing a lot more about how important it was historically and about the devices that helped nurture it. In any event, and, again, as with campaign support, party culture surely remains significant in forging links between officials at the state and national levels.

B. Administration

Political parties may be the chief institution connecting state and federal governments, but they are not the only one. Another important link is established through the structure of the administra-

138. *Id.* at 139. The rift between state and national authorities in the South was intensified by the fact that the Confederate government was founded specifically on principles of state's rights; having just seceded on this ground, the Southern states were especially sensitive about the scope of their power vis-à-vis the central government.

In one sense, this may not seem like an ideal example for my thesis that parties protect state and local interests. For as McKittrick points out, the end result of smoother political relations in the North was an enormous expansion of the power of the national government. (Indeed, the much touted growth of federal power during Reconstruction pales by comparison to what took place during the war.) But the crisis of the Civil War called for an exercise of national power, and the failure or inability of the Confederate government to match the North in this respect surely contributed to its defeat. It's not as if federalism works only if states always win. On the contrary, as noted above, the demands of modern society necessitated the twentieth century expansion of federal power. See text accompanying notes 20-23. Federalism "works" if we have a system that is flexible enough to respond to the needs of the day—which, as also noted above, is one of the strongest arguments in favor of a system based on politics rather than judicial enforcement. See text accompanying notes 27-28.

tive apparatus, which plays an important, and underappreciated, supporting role in federalism. We have long recognized that administering law is as important as enacting it. This is so for at least two reasons. First, most statutes are sufficiently flexible to give administrators room to interpret, and so to change meaning and make law. Second, new legislation is often generated—and just as often killed—from within the administrative system itself. Lawmakers and administrators work together on a regular basis: administrators report to Congress, providing information on how a law is working and what its beneficiaries need; they do favors for members of Congress, like helping lawmakers do favors for constituents; they participate in an annual or biannual budget process that is frequently characterized by extensive negotiations and horse trading. In other words, they establish long-term relationships that promote familiarity and command a certain amount of attention and respect.

If the interdependence of legislation and administration gives administrators a voice in the lawmaking process, consider how much federal law is administered by state officials and, consequently, what kind of voice this gives state institutions in the federal lawmaking process. This is the whole point of Morton Grodzins' work on "sharing" and "marble-cake federalism." According to Grodzins, "No important activity of government in the United States is the exclusive province of one of the levels, not even what may be regarded as the most national of national functions, such as foreign relations; not even the most local of local functions, such as police protection and park maintenance."¹³⁹

Grodzins goes on to present examples that show how sharing responsibility for administering federal law with state and local officials gives them both a degree of control over policy and a voice in Congress; his students and followers have added to this work, offering additional case studies in support of the same proposition.¹⁴⁰ Many of their examples—such as law enforcement, housing, welfare benefits, and health care—are already familiar to lawyers. Yet despite this rather impressive body of evidence, the conventional wisdom in the legal academy remains that the rise of administrative bureaucracy weakened federalism and hurt the states. Dick Stewart, for example, argues that in the "micropolitics" of the modern regulatory state

139. See Grodzins, *The American System* at 8 (cited in note 82).

140. See Elazar, *American Federalism* at 51-80 (cited in note 7) (summarizing the literature, with citations to many of the major studies).

battles among factions are resolved not on the floors of Congress but in the hallways of bureaucracies and, ultimately, the chambers of federal judges. This system of policymaking circumvents many of the political safeguards that are supposed to make national policies sensitive to state and local concerns.¹⁴¹

The implicit assumption in this argument is that state and local officials cannot protect their interests in the administrative process, presumably because they participate in it as mere functionaries subject to supervision (or funding withdrawal) from federal superiors. The research cited above suggests that this may be wrong, that it oversimplifies the complex nature of bureaucratic relations. But anyone who has ever been a manager knows that: whatever a boss's formal powers may be, there are always significant limits on his or her practical authority. Only a very bad manager fails to consider the needs and interests of subordinates or to consult them before making significant policy changes.

This consideration is especially pertinent in the administrative context, because the federal government depends so heavily on state officials to help administer its programs. Realistically speaking, Congress can neither abandon these programs nor "fire" the states and have federal bureaucrats assume full responsibility for them. The federal government needs the states as much as the reverse, and this mutual dependency guarantees state officials a voice in the process. Not necessarily an equal voice: because federal law is supreme and Congress holds the purse strings, the federal government is bound to prevail if push comes to shove. But federal dependency on state administrators gives federal officials an incentive to see that push doesn't come to shove, or at least that this happens as seldom as possible, and that means taking state interests into account.¹⁴²

141. Richard B. Stewart, *Federalism and Rights*, 19 Ga. L. Rev. 917, 963 (1985). See also Vincent Ostrom, *The Meaning of American Federalism: Constituting a Self-Governing Society* 115 (ICS, 1991) (arguing that the transfer of authority to executive instrumentalities weakens control).

142. Since Grodzins did his work in the mid-1960s, the federal government has shown greater willingness to take matters into its own hands and administer without help from the states. Elazar recognizes the threat posed by this development, but concludes that it has not yet altered the fundamental nature of the federal/state partnership. Elazar, *American Federalism* at 252-57 (cited in note 7). Others disagree, believing that such post-Great Society developments have profoundly altered the role of the states. See, for example, Michael D. Reagan and John G. Sanzore, *The New Federalism* (Oxford U., 1981). My sense is that the truth lies somewhere in the middle, that in some areas (like occupational safety) states have been bypassed, but that in many others (like housing and welfare) their cooperation remains essential. So while this particular safeguard may not be sufficient, standing alone, to protect the interests of state institutions, it would be a mistake to assume that it counts for nothing. It

Grodzins points to still another source of protection for states in the administrative process, which he labels "public-private influence." According to Grodzins, overlapping state and federal administration creates "channels of sharing" that give private citizens multiple "cracks" at getting what they want.¹⁴³ This process, in turn, provides additional protection for state and local institutions—not, as La Pierre argues, because of virtual representation, but because private groups develop working relations with state and local officials and are willing to go to Congress to see that those relations are not disturbed.

The existence of public-private influence strengthens the hand of state institutions in two ways. First, it adds force to lobbying efforts by state officials working to forestall or avoid undesirable legislation in Congress. Second, it provides states with additional protection from federal administrators, since these administrators are beholden to members of Congress who can be prevailed upon to intervene on behalf of the states. Grodzins and his students documented this process of congressional interference in administration. Some intervention is formal and takes place in oversight hearings or the annual budgeting process. More often, the interference is informal: a member of Congress, contacted by constituents or officials from his or her home district, intervenes to prevent or facilitate administrative action. According to one researcher, "a well-established or institutionalized system of interference" has evolved that "can be described in terms of significant volume of activity, specialization of personnel functions, and well-understood standards of operation."¹⁴⁴ Grodzins elaborates:

The widespread, consistent, and in many ways unpredictable character of legislative interference in administrative affairs has many consequences for the tone and character of American administrative behavior. From the perspective of this study, the important consequence is the comprehensive, day-to-day—even hour-by-hour—impact of local and state views on national programs. No point of substance or procedure is immune from congressional scrutiny. No point of access is neglected: from phone calls to regional offices to conferences with chiefs of the Bureau of the Budget; from cocktail conversations to full committee investigations. A very large portion of the entire weight of this impact is on behalf of individual constituents, group

certainly counts for something, and probably counts for a lot in all those areas where state participation still remains essential.

143. Daniel J. Elazar, *Editor's Introduction to Grodzins, The American System* at v-vi (cited in note 82).

144. Keuneth E. Gray, *Congressional Interference in Administration*, in Elazar, et al., eds., *Cooperation and Conflict* 521-42 (cited in note 82).

interests, and state and local governments. It is a weight that can alter procedures for screening immigration applications, divert the course of a national highway, and amend a social security or flood control law to accommodate local practices or fulfill local desires.¹⁴⁵

Congressional interference, or maybe just its mere threat, protects states in still another way: by impelling federal administrators to make alliances with state and local political leaders.¹⁴⁶ Administrators need to protect their flanks (in both senses of the term), and they want as much influence as possible with Congress. Because state and local political leaders frequently have some influence, they are a group worth cultivating. The result is to add still another strand to the crisscrossing network of relations among federal administrators, members of Congress, state officials, and private interest groups.

My claim, by the way, is not that we don't need to worry about federalism because these sharing mechanisms exist. That was Grodzins' claim, and he probably overstated the case. My claim is only that the fact of sharing and the role of states in administration is an aspect of federalism that needs to be considered in deciding what we do need to worry about.

C. Structure

I have to this point mostly denigrated the importance of formal structure in protecting state institutions. But while the mere existence of states may not protect states in the way suggested by Wechsler, it still matters. Daniel Elazar explains:

American politics is formally organized around units of territory rather than economic or ethnic groups, social classes, or the like. The nation is divided into states and the states are divided into counties, the counties into townships or cities or special districts and the whole country is divided into election districts of varying sizes ranging from congressional districts to precincts. This means that people and their interests gain formal representation in the councils of

145. Grodzins, *The American System* at 269 (cited in note 82). See also Elazar, *American Federalism: A View From the States* at 178-79 (cited in note 7). True, members of Congress often lack strict, formal control over the agencies—a problem made more acute since *INS v. Chadha*, 462 U.S. 919 (1983), eliminated the legislative veto. But even so, federal bureaucrats recognize the need to avoid alienating members of Congress, whose support they may need in the future, and this provides a significant degree of practical control.

146. Grodzins, *The American System* at 270-74; Elazar, *American Federalism: A View From the States* at 180.

government through their location in particular places and their ability to capture political control of territorial political units.¹⁴⁷

The simple existence of independent states within the larger nation affects the dynamic of American politics, in other words, by encouraging political movements to develop along state lines and to utilize the machinery of state government to achieve their goals. Experience bears this out, as shown by movements from abolitionism to populism, progressivism, and the tax revolt of the 1970s, and even more by the structure of our enduring political party organizations.

Andrzej Rapaczynski provides a theoretical framework to explain this process in his essay on *Garcia*. Borrowing a page from Mancur Olson's standard work on collective action, Rapaczynski observes that Madison may have been right to say that a majoritarian interest will find it difficult to dominate the federal government, but by the same token the federal government "may be a more likely subject of capture by a set of special minoritarian interests, precisely because the majority interest of the national constituency is so large, diffuse, and enormously difficult to organize."¹⁴⁸ Equally problematic—and more likely—is the risk that a multitude of minoritarian interests will be denied access to federal lawmakers because they "suffer under all kinds of organizational disadvantages."¹⁴⁹ Such groups, Rapaczynski observes, may have better luck on the state level, where the difference in scale makes organizing more feasible. These groups can then use the machinery of state government to obtain tangible benefits and increase their political strength, slowly building a coalition capable of demanding federal attention.

Rapaczynski's account is incomplete, since we need to specify a number of additional conditions before we can say which groups can or will utilize state processes this way. Rapaczynski has, however, identified a route to power that might be available to some groups

147. *Cooperation and Conflict* at 9 (cited in note 82).

148. Rapaczynski, 1985 Sup. Ct. Rev. at 386 (cited in note 3). See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard, 1971).

149. Rapaczynski, 1985 Sup. Ct. Rev. at 387-88. Dick Stewart provides a slightly different explanation of this problem, emphasizing the expansion of decentralized administration at the federal level:

But in the Great Republic of today, authority has become functionally redispersed at the national level, creating the danger of irresponsible power being wielded by economic and ideological factions that are nationally organized but no less parochial, and potentially more powerful, than the local factions feared by Madison. Madison's solution to factional subversion of republican government has become Madison's Nightmare.

Stewart, 19 Ga. L. Rev. at 921 (cited in note 141).

from the mere existence of states. Of course, this means only that states may be good for the political system—a point already made ad nauseam in the literature. Nothing in Rapaczynski's discussion explains how or why this process gives states any strength to compete with the federal government for political authority. On the contrary, Rapaczynski points to the danger that whichever interests control the federal government will push for preemptive legislation to prevent rivals from using the state institutions to gather political momentum. Even after *Garcia*, he urges, this "process failure" may require courts to review what Congress does to keep the process open and healthy.¹⁵⁰

Rapaczynski could be right about the need for judicial protection here, though his inability to say anything useful about what this sort of review would look like is troubling. More to the point, Rapaczynski overlooks other ways in which states may be protected. In part, this is because he makes the same mistake as Macey, assuming that state and federal officials act independently of each other and respond only to private interests. But even if we think about politics as nothing more than a fight among private interest groups buying influence over elected officials panting for a buck or a vote, the process Rapaczynski describes should still strengthen the voice of state government in Congress. After all, groups that have gained a foothold in the states are unlikely to want to give it up or see it weakened too much. Even after these groups gain access to federal lawmakers, they presumably will want to preserve the strength and efficacy of the state institutions that harbored and supported them. This inclination will be strengthened, moreover, by whatever personal relationships and loyalties have developed in the meantime.

Paul Peterson's *City Limits* describes an entirely different sort of structural constraint on how power is allocated between state and national authorities; one that limits the kinds of policies governments at different levels can be expected to pursue.¹⁵¹ Peterson builds on the familiar insight that the mobility of people and capital affects substantive policy.¹⁵² In a system with independent states, the argument goes, individuals can protect their interests by exercising a right

150. Rapaczynski, 1985 Sup. Ct. Rev. at 391-95, 414-19.

151. Paul E. Peterson, *City Limits* (U. of Chicago, 1981). Unless otherwise indicated, the discussion below is drawn from chapter four, "Toward a New Theory of Federalism."

152. Obligatory citations here would be to Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Declines in Firms, Organizations, and States* (Harvard U., 1970), and C. M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956), though the point is much older.

of "exit," that is, by moving themselves or their assets to a state whose policies are more to their liking. This, in turn, sets up a competition among states whereby people with different preferences can sort themselves into communities of like-minded individuals. Of course, lots of other factors affect where people live—which is why Beaver Cleaver's Mayfield doesn't exist anywhere but on TV. But just because no community achieves the ideal hypothesized by Tiebout doesn't mean that exit rights are irrelevant. On the contrary, there is abundant evidence suggesting that the possibility of exit affects the general drift of policy in many areas.¹⁵³

Peterson points out that the federal government can regulate exit rights in ways that states cannot, thus curbing their impact on national policy. States are open systems—constitutionally prohibited by the Commerce Clause, the Privileges and Immunities Clause, and the right to travel from interfering with the movement of people or property across state lines. Washington faces no such restrictions: Federal control over immigration lets Congress regulate who takes advantage of attractive U.S. policies, and the federal government can restrict the movement of capital into or out of the country with tariffs, quotas, exchange rates, deficit spending, taxation, and the like. At the same time, it's harder to escape federal policy by relocating. Moving to another state is obviously no help, and the personal costs of actually leaving the country and embracing a foreign culture make the exit option very dear indeed.

Peterson shows how these differences affect policy. The fact that states are open systems, he argues, severely limits their ability to pursue redistributive policies, since these tend to attract the poor and drive away wealthy taxpayers. "To maintain their local economic health, [local governments] must maintain a local efficiency that leaves little scope for egalitarian concerns."¹⁵⁴ The national government, in contrast, faces this constraint to a much lesser degree. It too, obviously, must worry about economic efficiency. But the ability to limit immigration, coupled with the power to regulate the economy,

153. See, for example, Oates, *Fiscal Federalism* at 224-25 (cited in note 55). See generally Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 *J. Pol. Econ.* 957 (1969); Matthew Edel and Elliot Sclar, *Taxes, Spending, and Property Values: Supply Adjustments in a Tiebout-Oates Model*, 82 *J. Pol. Econ.* 941 (1974); Harvey S. Rosen and David J. Fullerton, *A Note on Local Tax Rates, Public Benefit Levels, and Property Values*, 85 *J. Pol. Econ.* 433 (1977).

154. Peterson, *City Limits* at 69 (cited in note 151).

makes it easier for Congress to take equity into account alongside efficiency. As a result, political pressures for redistribution tend to get channeled to the national level—a movement seen today in areas like taxation, welfare benefits, health, and even education.

Peterson describes a number of other ways in which the differential ability of state and federal governments to restrict the flow of people and capital affects policy; I'll mention just one here. The same pressures that limit the ability of states to redistribute, Peterson observes, affect the success of "cooperative" federalism (i.e., joint state/federal programs):

Where the national policy is developmental, local and national goals will overlap and the policy will be executed with a good deal of cooperation and mutual accommodation. But where the central government is pursuing a more redistributive objective, its goals are likely to conflict with those of local governments. The national interest in equity will conflict with the local interest in efficiently developing its local economy. As a result, the process of implementing the national program will be considerably more complicated.¹⁵⁵

Peterson makes this point by comparing two education programs. Under the National Defense Education Act of 1958,¹⁵⁶ adopted shortly after Sputnik was launched, the federal government agreed to provide matching funds for state and local expenditures on math and science instruction. Since better schools increase a community's attractiveness, there was no conflict between state and federal goals; implementation was "a model of cooperation and mutual reinforcement" requiring almost no federal supervision.¹⁵⁷ Compare with this the Elementary and Secondary Education Act of 1965,¹⁵⁸ adopted at the height of the civil rights movement to help learning-deficient children from low income families. At first, Peterson reports, the federal government left the states relatively unsupervised.

But before the end of the first year, the Office of Education became increasingly concerned about the substantial divergence of state programs from the objectives stated in the . . . legislation. In order better to achieve the redistributive goals of the Act, the Office began to limit the amount of expenditures on structural renovation, new equipment, and other "hardware"; required that the money be concentrated in schools with large numbers of children from

155. *Id.* at 82-83.

156. Pub. L. No. 85-864, 72 Stat. 1580 (repealed 1970).

157. Peterson, *City Limits* at 83 (cited in note 151).

158. 20 U.S.C. § 2701 et seq. (1988).

low-income families; and specified that within these schools the monies be spent on children with learning deficiencies.¹⁵⁹

According to Peterson, friction was inevitable given the built-in conflict between the federal goal of aiding the poor, on the one hand, and pressure on state and local officials to keep their communities attractive to middle and upper-middle class citizens, on the other.

Peterson assembles some impressive data to support his conclusions. He slips only in assuming that the constraints he has identified are fixed and insurmountable—often talking as if state and local officials can never favor equity over efficiency and will always act to frustrate redistributive programs. That's an exaggeration; these are, after all, *political* pressures. The spectre of exit may make it difficult for state and local governments to do certain things, but political forces on the other side can become strong enough to overcome even these obstacles. In any event, Peterson is surely right in pointing to *relative* differences in the likelihood that lawmakers at different levels will pursue certain policies.

D. Culture

A few words are needed, finally, on the importance of what we can call the "culture" of federalism—that is, on the way federalism is understood and experienced by participants. Whatever the limits *might* be, however power *could* be allocated, the way authority actually *is* distributed depends to a considerable extent on the customs, ideas, beliefs, experiences, and practices of the people involved. Recall, for example, Wechsler's claim that the states' best protection is a belief on the part of federal officials that state law should be displaced only in extraordinary circumstances. One may not be inclined (as I am not) to give this argument much weight. Nonetheless, there are other common experiences, attitudes, and beliefs that shape the practices of government officials in ways that affect federalism. I will touch on a few of these here.

One set of considerations involves professional culture—that is, ways in which the training or working environment of state and federal officials affects how they deal with each other. For example, a high percentage of officials in all three branches of the federal government (including the administrative agencies) began their careers

159. Peterson, *City Limits* at 84 (cited in note 151).

working for states, and many rose to elected positions as high as governor before moving to the federal government.¹⁶⁰ With views shaped by this background and experience, these former state officials remain sympathetic to the concerns of state institutions, a feeling undoubtedly reinforced by continuing ties to friends and former allies still in the state system.

A few scholars dismiss this consideration, pointing to a decline in the proportion of federal officeholders who once held high positions in state government.¹⁶¹ The decline is reported only in the proportion of former governors serving in Congress, however, and even that may be just a temporary aberration. In fact, fully half of the members of the House of Representatives began their careers as state legislators, and people recruited and trained at the state level are found throughout the federal bureaucracy.¹⁶² So as things stand today (and have stood for more than two hundred years), former state officials remain a highly visible presence in both Congress and the executive branch, assuring a reservoir of sympathy for state institutions and establishing still another link between those institutions and the federal government.

It's worth mentioning in this connection the so-called intergovernmental lobby—a loose confederation of associations established by state and local officials in the post-New Deal era to give weight and focus to the states' voice in the political arena. There are far too many organizations to mention them all here. The most important ones—nicknamed “the Big Seven” by one commentator¹⁶³—are the Council of State Governments, the National Governors Association, the National Conference of State Legislators, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, and the International City Management Association. These groups develop and promote proposals of interest to state and local government, acting as experts, advisors, or pressure groups as the occasion requires. A number of commentators credit them with having consider-

160. See Choper, *Judicial Review and the National Political Process* at 178 (cited in note 12); Grodzins, *The American System* at 256 (cited in note 82).

161. See Merritt, *The Guarantee Clause and State Autonomy*, 88 *Colum. L. Rev.* at 16 (cited in note 62); Kaden, 79 *Colum. L. Rev.* at 865 (cited in note 115).

162. Jacobson, *The Politics of Congressional Elections* at 75 (cited in note 117); Elazar, *American Federalism: A View From the States* at 256 (cited in note 7) (stating: “The role of the states as recruiters of political participants and trainers of political leaders has in no way diminished . . .”).

163. Deil Wright, *Revenue Sharing and Structural Features of Federalism*, 419 *Annals* 110, 111 (1975).

able power and influence.¹⁶⁴ Among other things, the intergovernmental lobby plays a critical role in coordinating action by state and local officials, thereby adding strength and coherence to their views.¹⁶⁵

I mention the intergovernmental lobby at this point because I suspect that much of its influence comes from informal connections of the sort described above. The Council of State Governments can develop a brilliant argument in opposition to a new federal program, but why should a member of Congress pay attention to it? The mere force of the argument may have weight, but logic alone will often pale in significance next to the votes or dollars of a well-funded, nationally organized private lobby. (I said above that members of Congress don't spend all their time counting votes and dollars, which is true; but let's be honest: they do spend a lot of time doing this.) And while it's obviously hard just to ignore an organized statement from the states, something else is needed to give these intergovernmental associations real influence, something like the mechanisms discussed above: the ability to help members of Congress meet constituent demands, the promise of political support in subsequent elections, cronyism, and so forth. Members of several intergovernmental associations confessed to me in informal interviews that when the time comes to seek support in Congress, a state or local official from the same district as the targeted members of Congress is dispatched to make the pitch; the reasoning behind this tactic isn't too hard to figure out.

A somewhat less obvious, but possibly more important aspect of professional culture that has affected federalism is the rise of technocracy. The need for professional expertise in government is, of course, as old as bureaucracy itself. But developments in the last half century—especially the increasing complexity of the knowledge used to analyze and solve problems—have measurably increased our dependence on experts. This, in turn, has altered the practice of politics. Samuel Beer explains:

The political importance of this new direct relation of science to public policy arises from the fact that it shifts the initiative in government from the

164. See, for example, Totton James Anderson, *Pressure Groups and Intergovernmental Relations*, in Elazar, et al., eds., *Cooperation and Conflict* at 553-62 (cited in note 82); Elazar, *American Federalism: A View from the States* at 194-95 (cited in note 7); Choper, *Judicial Review and the National Political Process* at 180-81 (cited in note 12); Wright, 419 *Annals* at 113.

165. *New York v. United States* is a good example: The National Governors' Association helped Congress put together a complex nationwide plan in the incredibly difficult, controversial area of toxic waste disposal. See 112 S. Ct. at 2436-38 (White, J., dissenting).

economic and social environment of government to government itself. The old pressure group model that found the origin of laws and programs in demands arising outside government does not hold of technocratic politics. In technocratic policymaking the pressures and proposals arise *within* government and its associated circles of professionals and technically trained cadres. In a democratic country, of course, the electorate must be informed and its consent won, but in recent times it tends less and less to be the source of policy initiatives.¹⁶⁶

An incidental effect of the rising political importance of professional bureaucrats is to give states yet another "in" with federal policymakers. In part, this is simply a matter of getting along and feeling comfortable: technocrats at one level often find it easier to work with counterparts at a different level than with legislators or executive officials at their own. But alliances among officials on different levels are also fostered by the competition among programs at each level for funds, jurisdiction, and political support. Federal, state, and local housing officials, for example, will work together to see that housing gets more money than, say, hospitals or schools. The resulting network has been aptly described as "picket-fence" federalism, a reference to the way in which vertical connections between programs at different levels cut across horizontal connections among programs at each level.¹⁶⁷

Beyond the realm of professional or bureaucratic culture lies a variety of subtler influences stemming from the more general political culture of the United States. There is, for example, a long standing tradition of grass-roots democracy that gives political organizers an incentive to build movements from the ground up and helps keep them beholden to local leaders. Probably this tradition began as a matter of necessity—a necessity that disappeared with the advent of radio, TV, direct mail, and other computer-age technologies that make top-down organizing feasible. Yet grass roots development remains part of American politics, and the new technology often seems just to accelerate the process by which local organizations confederate or merge. A successful political movement still requires paying attention to local concerns and local leaders. Take Ross Perot's 1992 run for the presidency: Perot got into trouble by trying to centralize

166. Samuel H. Beer, *The Modernization of American Federalism*, 3 *Publius* 49, 75 (Fall 1973). See also Samuel H. Beer, *Political Overload and Federalism*, 10 *Polity* 5, 9-10 (1977).

167. See Terry Sanford, *Storm Over the States* 80 (McGraw-Hill, 1967); Wright, *Revenue Sharing and Structural Features of American Federalism*, 419 *Annals* at 109-10 (cited in note 163).

authority in what began as a grass roots movement. Rank-and-file supporters cried betrayal because the value of the movement in their eyes stemmed largely from the fact that it *was* a grass roots movement, and all the technology in the world couldn't change that. Development from the bottom up was felt to be purer, less corrupt.

The attachment to grass-roots organization in the United States has significance for politics, and particularly for federalism, because it influences the tactics used by political organizers and because local leaders are often closely connected to (or are members of) state and local government.¹⁶⁸ But its importance is tenuous and indirect, especially when it comes to day-to-day policy. Other aspects of political culture have a more profound, immediate impact. Samuel Beer identifies one such factor. According to Beer, it is "the formation of coalitions to influence the action of government . . . that provides the intervening link between interdependence and centralization. Such political action itself, however, is shaped by the structural features of the growing networks of interdependence."¹⁶⁹ What Beer means, I think, is that because the allocation of power between the federal government and the states is a matter of politics, it depends on the nature of the political coalitions that drive the system. Different kinds of coalitions form in response to different problems, and the structure of these coalitions may have ramifications for federalism.

Beer goes on to offer a typology of coalitions, a depiction of political formations that have existed across U.S. history. He names these formations in ways that pretty well reveal their nature: A "porkbarrel" coalition is an alliance among one group of people to get something for themselves at the expense of others. A "spillover" coalition is a faction established to fight some sort of externality. "Class" coalitions are made up of people with a shared sense of their place in the economic order who want to use government to redistribute wealth. And "technocratic" coalitions consist of alliances between private interests and the technical experts who constitute what Beer (paraphrasing Eisenhower) calls the "professional-bureaucratic complex."¹⁷⁰

168. See Douglas St. Angelo, *The "Broker Role" of Local Political Parties and Federal Administration*, in Elazar, et al., eds., *Cooperation and Conflict* at 543-52 (cited in note 82).

169. Beer, *The Modernization of American Federalism*, 3 *Publius* at 57 (cited in note 166).

170. *Id.* at 58-90.

Beer suggests that these coalition-types emerge in a predetermined historical order, each with different consequences for federalism. Porkbarrel politics comes first, when the economy of a nation is largely unintegrated. The independence of disparate interests gives rise to a market-like competition that is ultimately decentralizing, because the competing factions eventually compromise by leaving each other as much freedom as possible. The other three kinds of politics, Beer continues, are centralizing. Spillover coalitions emerge in the early stages of economic integration as state regulation becomes a source of externalities in the increasingly interdependent economy and affected interests turn to the central government for relief. Class coalitions emerge still later, when the inequitable distribution of wealth produced by economic growth gives rise first to class consciousness and then to pressures for redistribution by the central government. Finally, technocratic politics emerges from a combination of technological evolution and bureaucratic growth. Technocratic coalitions are centralizing, according to Beer, because experts typically attach less importance to values like diversity than to implementing their version of the optimal regulatory scheme. Once a consensus develops within the professional community, it tends quickly to become a uniform national solution.

Beer is quite correct to direct our attention to the structures that channel political pressure, though his analysis is problematic. In the first place, the notion of a natural historical progression isn't supported and seems highly implausible. Furthermore, the division of politics into four specific (and rather narrow) categories is too simplistic: Beer fails to consider the possibility of hybrid formations, for example, and there are other sorts of coalitions that don't make his list (ideologically-oriented public interest coalitions spring immediately to mind). Most important, the implications of these political formations for federalism are more ambiguous than Beer recognizes. To take just one example, technocratic politics can be decentralizing as well as centralizing because policy experts are often jealous of their jurisdiction, and because disagreement among them may create pressures to experiment at the state or local level. Still, the way in which a coalition formed with particular substantive concerns in mind can directly or indirectly affect the distribution of power between the

national government and the states is an important point, one that deserves further study.¹⁷¹

Behind all these factors, exerting a pervasive influence, are general public perceptions about the relative competence and significance of state and federal governments. The extent to which citizens identify with and trust each of these governments has, of course, changed dramatically over the years. Most Americans today think of themselves as citizens of a single nation—the United States—and they turn to Washington to solve many of their problems. At its inception, however, the United States looked a lot more like Western Europe. State citizenship was an important constituent of individual identity, and voters responded to arguments that extending national control was dangerous, inefficient, and an affront to the dignity of their states. Antebellum descriptions often refer to “these” United States.¹⁷²

Various factors helped to make national identity more important than state identity. A partial list (illustrative of the kinds of

171. Grant McConnell's well-known work on how private interests operate is relevant in this regard. McConnell offers a rather pessimistic account (characteristic of work done in the mid-1960s when southern intransigence to civil rights was still strong) of how the fragmented structure of American politics enables private interests to subvert the public good. He supports his thesis with detailed case studies of state and local governments captured and national policies manipulated. Along the way, McConnell discovers that interest group politics differs from state to state, and does so in predictable ways. So, he tells us, different interest groups are powerful in different states, and “the interest group structure of politics [in a state] is simple to the degree that the state itself is simple and undiversified.” Grant McConnell, *Private Power and American Democracy* 180 (Knopf, 1966). If those seem like fairly obvious conclusions, McConnell also makes some less obvious findings—such as that private interest groups are strong when parties are weak (and vice-versa); that where parties are weak interest groups often substitute in organizing the legislature and promoting political careers; and that parties are likely to be weak where there is a lack of diversity of interests in the state. *Id.* at 166-82.

172. This sense of the states as separate nations is amusingly suggested by a well-known passage of Benjamin Franklin's autobiography in which he tells of his first arrival in Pennsylvania from Massachusetts. It took Franklin three days to make the journey, and from his description it sounds like a trip abroad. The clothing was different, the accents were different, the money was different. Franklin relates how he

ask'd for Bisket, intending such as we had in Boston, hut it they seems were not made in Philadelphia, then I ask'd for a threepenny Loaf, and was told they had none such: so not considering or knowing the Difference of Money and the greater Cheapness nor the Names of his Bread, I bad him give me three peimy worth of any sort. He gave me accordingly three great Puffy Rolls. I was surpriz'd at the Quantity, but took it, and having no room in my pockets, walk'd off, with a Roll under each Arm, and eating the other.

Leonard W. Larabee, et al., eds., *The Autobiography of Benjamin Franklin 75-76* (Yale U., 1964). It's comical to picture the great statesman wandering around Philadelphia, dressed all wrong, unsure where he was or how to ask, clutching two huge loaves of bread under his arms while munching on a third. But the image says much about the relationship among the states in the eighteenth century.

things that played a role) includes the fact that the South lost the Civil War; the development of mass media and the emergence of a national culture; improved transportation; the growth of public education and the teaching of "American" history and "American" values in school; the expanded role of the federal government; the central place of the United States in world politics; and war. War deserves special mention because it's so often overlooked. Yet battle has almost always excited an outburst of nationalism that (together with the nationwide mobilization of resources required to fight) has increased the prominence of the federal government in daily life. The War of 1812, the Civil War, both World Wars, and the Cold War were each accompanied by a spurt of activity at the federal level.

The growth has not been all in one direction. States' rights movements have arisen between these wars, shifting power back to the states in varying degrees. Decentralization in the 20th century has, to be sure, been animated more by dislike of federal objectives than by devotion to the states or a belief in their intrinsic worth as such. But whatever the motives of politicians, the fact remains that states' rights rhetoric remains part of American political consciousness and still has power to affect policy in appropriate circumstances.

Last but not least, the allocation of power between state and federal governments is influenced by public attitudes on matters transcending the specific problem of federal versus state power—matters like the nature of politics and the proper role of government generally. Daniel Elazar has done indispensable work here.¹⁷³ Elazar differentiates among political settings by reference to three general political subcultures, which he labels the individualistic, the moralistic, and the traditionalistic.

Individualistic political culture corresponds to what most academics think of as classic liberalism: private concerns and private activities are central, and government is viewed as a source of services for private ordering. Politics is treated like a business in which good management skills are what matter, and politicians engage in the profession to earn status and economic rewards. Moralistic culture, in contrast, corresponds to what legal scholars today talk about as republicanism. It is a commonwealth conception: Politics is a positive good, a way for people to improve themselves and their society, and government has a responsibility to improve the lives of the

173. Elazar, *American Federalism* at chs. 5-6 (cited in note 7).

citizenry and promote the general welfare. Good government is measured by the degree to which it serves this purpose and in terms of the honesty, selflessness, and commitment to the public good of those who govern. Finally, traditionalistic culture shares with moralistic culture a sense of the state as commonwealth, but filters this commitment through an ideology that is more elitist and paternalistic; the positive role of government in such communities is thus directed more toward maintaining an existing social order than improving it.

While Elazar sometimes writes imprudently as if there were actual communities that fit these descriptions, each of his categories is best understood as an archetype—a model that captures a set of typically related attitudes toward politics and government. They are like primary colors from which a spectrum of intermediate shades is derived. The political culture of any given state or locality consists of a synthesis of all three subcultures with different accents in the mixture from place to place.

Elazar traces a number of general patterns in American political culture, which he attributes to streams of immigration, settlement, and migration over the course of American history. Not surprisingly, the South tends to have the most traditionalistic attitudes toward politics, while New England and the North tend to be moralistic, the Central Atlantic and corn belt states mix the moralistic with a heavy dose of individualistic culture, and the West shows elements of all three. But I'm less interested in a precise mapping of political cultures than in developing a general awareness of the differences that exist. We cannot chart this without grossly oversimplifying, and attitudes toward politics evolve constantly in a society as dynamic as ours anyway. The important point is to recognize that people think differently about politics in different parts of the country and at different times, and these differences affect what people expect from government and where they turn to get it. The attitudes that are dominant at a particular time or in a particular place can play an important role in shaping federal/state relations—sometimes directly, but often in more subtle ways, as by shaping the nature of political parties.¹⁷⁴

174. According to Elazar, because individualistic culture treats politics as a business designed to serve private interests, it tends to see political parties as essential for proper management. Order and discipline within the parties is emphasized, and loyalty and service to the party count for more than following one's conscience to do the right thing. In contrast, because

V. BACK TO THE FUTURE

In Federalist No. 51, James Madison observed that to secure liberty and good government “[a]mbition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”¹⁷⁵ Here, surely, is one of the more profound (albeit familiar) insights of these essays. But ambitions and interests don’t exist in the abstract. They are formed by institutions and cultures. No one is born with a desire to expand federal power or protect state government. That’s learned behavior. And like the rest of us, politicians learn how to act in the institutions where they work and the culture in which they live.

Madison understood this. Speaking about federalism in particular, he argued that state interests would be safe under the new Constitution because the institutions and political culture of America promoted an inherent localism that could be depended on to prevent federal overreaching.¹⁷⁶ As explained above, however, and notwithstanding the efforts of commentators like Wechsler to argue that Madison’s case still holds, the institutions and culture on which Madison based this conclusion have long since passed away.¹⁷⁷

It doesn’t follow that federalism is dead. What follows is that we need to look past Madison to *our* culture and *our* institutions and to ask whether these serve the purposes of federalism. That is the task I have begun here. The discussion above identifies the major structural, administrative, cultural, and political forces affecting the

moralistic culture treats politics less as a profession than as a means to improve society, political parties tend to be seen as useful devices but not valued for their own sake. Party regularity is therefore less important and party ties can be abandoned with relatively greater ease than in individualistic culture. Finally, political parties are of minimal importance in traditionalistic culture except to the extent that they can be used to preserve the status quo and to recruit officeholders. See *id.* at 114-22.

175. Federalist No. 51, in Rossiter, ed., *The Federalist Papers* at 322 (cited in *note* 18).

176. See, for example, Federalist Nos. 45, 46 in Rossiter, ed., *The Federalist Papers* at 288-300.

177. See text accompanying notes 34-55. Consider also Mark Tushnet’s self-defeating effort to show that Madison’s argument remains valid in the contemporary context in *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 UCLA L. Rev. 1301, 1328-34 (1978). Despite his earnest desire to support Madison’s reasoning, Tushnet is forced to acknowledge weaknesses at each step of the argument. In the end, he can do no better than to say that while “there may be no knock-down arguments on Madison’s side, those who would reject it have a burden of persuasion that has not been carried. . . .” *Id.* at 1334. Tushnet’s problem, in my view, is that he’s trying too hard to make a case on Madison’s terms. As I have tried to show throughout, while states may still be protected in national politics, the source of their protection is in places that Madison either did not contemplate or, as in the case of political parties, explicitly disapproved.

allocation of power between state and federal governments and shows how these pattern relationships and create incentives in ways that may protect state institutions. But while identifying the relevant factors is a start, it's not enough. We need also to understand how these factors change, grow, and work together to obtain a realistic picture of federalism.

In my view, the best (though surely not the only) way to do this is to study how the politics of federalism has evolved over time. Obviously political institutions can't be investigated by anything like scientific method, but it's still useful to see what happens to them under changing circumstances, and history provides a way to do that. Other sorts of comparisons might also be useful. We could learn a lot about federalism in the United States, for example, by comparing it to federalism in Australia or Canada. But we can learn as much—more I suspect—by examining how American federalism has unfolded and observing the forces within our own society that have shaped it. Institutions, like ideas, after all, are partly constituted by their past.

A daunting task, to be sure. But without doing this work, we can't really claim to understand federalism, and it is irresponsible to advise other nations to copy our Constitution for their new governments. For if this preliminary study suggests anything, it's that the success (or failure) of federalism in the United States is a product of institutions that are neither part of the formal constitutional structure nor necessitated by it.

