From Sovereignty to Process: The Jurisprudence of Federalism after Garcia

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ANDRZEJ RAPACZYNSKI

FROM SOVEREIGNTY TO PROCESS:
The Jurisprudence of Federalism After Garcia

I. INTRODUCTION

On February 19, 1985, the Supreme Court, in Garcia v. San Antonio Metropolitan Transit Authority,1 overruled its 1976 decision in National League of Cities v. Usery.2 Although the continued vitality of National League of Cities had been in question in recent years,3 the Court's abrupt repudiation of the very principle announced in that case4 is an event of considerable significance, beyond showing, one more time, that the rule of stare decisis has a limited application in the Court's modern constitutional adjudication.5 Garcia's impor-

Author's Note: I wish to express my gratitude to my colleagues, Professors Henry Monaghan, Peter Strauss, Alan Farnsworth, and Alfred Hill for their comments on an earlier draft of this paper. I owe a special debt to Professor Bruce Ackerman for encouraging me to write this article and for his insightful comments at all stages of the writing process.

1 105 S.Ct 1005 (1985).
4 At one or another point between 1976 and 1985 all nine Justices declared their overt adherence to the National League of Cities decision. See the cases cited in the preceding note.
tance lies, above all, in revealing the absence of anything approaching a well elaborated theory of federalism that would provide a solid intellectual framework for an articulation of the Justices' divergent views on state-national relations. Three dissenting members of the Garcia Court state in no uncertain terms that they are prepared to reverse the course again in the near future. It is very important, therefore, for the scholarly community and the profession to conduct a thorough inquiry into the theoretical foundations of federalism before the Court embarks on further adventures.

The position of federalism in our constitutional law is peculiar. On the one hand, next to separation of powers and individual rights, federalism is clearly one of the three main branches of our constitutional structure. On the other hand, judicial enforcement of any limits on national power that the concept of federalism might entail has a rather unfortunate history and, at least insofar as the limitations on national commerce power are concerned, seems to have been abandoned in the Garcia case in favor of what Professor Wechsler has called "the political safeguards of federalism." More than in any other area of constitutional adjudication, the Court's attempts to impose federalism-related limitations on the national government have been, throughout history, frustrated by the political process, resulting three times in constitutional amendments. The Court's decision in the Dred Scott case that slavery was a municipal institution outside federal control, was "overruled" by the Civil War Amendments. The decision in Pollock v. Farmers' Loan and Trust Co. that "the boundary between the Nation and the States . . . would have disappeared" if the national taxing power had been extended to taxing income from real estate, led to the enactment of the Sixteenth Amendment. The Court's attempts to

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6 Garcia v. San Antonio MTA, 105 S.Ct. at 1033 (Justice Rehnquist dissenting) and 105 S.Ct. at 1038 (Justice O'Connor, with whom Justice Powell and Justice Rehnquist join, dissenting).

7 Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954). Garcia v. San Antonio MTA, 105 S.Ct. 1018 ("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").

8 19 How. 393 (1857).

9 157 U.S. 429 (1895).

10 157 U.S. at 583.
give meaning to the Tenth Amendment by limiting national regulation of private activities under the Commerce Clause\textsuperscript{11} were instrumental in precipitating the "constitutional crisis" of 1937 and led to a wholesale judicial retreat.\textsuperscript{12} As recently as 1970, the Court's decision in \textit{Oregon v. Mitchell},\textsuperscript{13} holding that Congress lacked the power to enfranchise eighteen-year-olds in state elections, resulted in passing the Twenty-Sixth Amendment, which it took the country only three months to ratify.

It is important to inquire into the reasons for this rather dismal record of judicial intervention.\textsuperscript{14} The most common explanation, seemingly adopted by the \textit{Garcia} Court, is that federalism is essentially a political arrangement and that the policing of it is, for one reason or another, unsuited to the \textit{modus operandi} of the judicial department.\textsuperscript{15} The extreme version of this argument is exemplified by Professor Choper's claim that the Court is most needed and most effective in protecting individual rights against governmental encroachments and that its reservoir of legitimacy is only dissipated if the Court intervenes in the distribution of institutional competences among governmental entities.\textsuperscript{16} Whatever merit this view may have, it is clearly not shared by the Court, which has not shied away from highly charged, controversial issues of institutional competence in the area of separation of powers, most recently in \textit{Immigration and Naturalization Service v. Chadha}.\textsuperscript{17} Instead, the Court's reasoning in \textit{Garcia} singles out the federalism-related limita-

\textsuperscript{11} Art. I, Section 8, of the Constitution. See cases listed in notes 38, 43 infra.
\textsuperscript{12} See cases listed in note 45 infra.
\textsuperscript{13} 400 U.S. 112 (1970).
\textsuperscript{14} According to Professor Choper, "there is virtually no states' rights decision of any note that retains current meaningful force." Choper, Judicial Review and the National Political Process 170 (1980). The exception made by Choper in 1980 for the \textit{National League of Cities} case, \textit{ibid.}, is no longer necessary.
\textsuperscript{15} While stressing the "political safeguards of federalism," the Court's opinion in the \textit{Garcia} case stops short of declaring outright that federalism-related limits on the national commerce power present a nonjustifiable political question ("... we need to go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision." 105 S.Ct at 1020). Indeed, I shall argue later in this article that \textit{Garcia} should be understood as calling for a new jurisprudence of federalism.
\textsuperscript{16} Choper, note 14 infra. For a critique of Choper's views on federalism, see Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 Supreme Court Review 81.
\textsuperscript{17} 462 U.S. 919 (1983).
tions on the national power as peculiarly unsuitable for judicial resolution. We are not really told, however, what distinguishes federalism from the separation of powers in this respect: it is certainly not the absence of the “political safeguards” of the latter, for the Constitution abounds in provisions guaranteeing that at least the Congress and the President have ample means to protect themselves in the political arena. More likely, the reason for singling out federalism is to be found in the absence from the Constitution of any affirmative state-rights limitations on the scope of national powers, beyond those that specify the role of the states in functioning of the federal institutions.

But is unlikely that this reason could be genuinely decisive. To begin with, many, if not most, hard cases in the area of separation of powers do not deal with any straightforward violation of affirmative constitutional limitations. From the very beginning, the Court’s most important decisions have often proceeded from what came to be called the “structure” of the Constitution. It is not unreasonable to state that all constitutional interpretation, even when a specific affirmative provision is at issue, requires a background understanding of the general institutional framework of governmental bodies and an appreciation of the context within which they operate. In this connection, the centrality of the concept of federalism within the structure established by the Constitution does not admit of serious question. In setting up the national government, the Framers worked against the background of already existing state institutions, and, unlike in the case of the federal authorities established by the Constitution, they were not conferring any new powers on the states. While they undoubtedly

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18 The one-House veto, for example, is nowhere explicitly prohibited in the Constitution, and such a prohibition cannot be inferred from the bicameralism and Presidential veto provisions without assuming the doctrine of nondelegation which is nowhere to be found in the Constitution. INS v. Chadha, ibid. See also Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Presidential removal power, at issue in Myers v. United States, 272 U.S. 52 (1926), Humphrey’s Executor v. United States, 259 U.S. 602 (1935), and Wiener v. United States, 357 U.S. 349 (1958), is not subject to any explicit Constitutional provision. The Congressional power over Presidential papers, Nixon v. Administrator of General Services (Nixon II), 433 U.S. 425 (1977), as well as the matter of executive privilege, United States v. Nixon (Nixon I), 418 U.S. 638 (1974), are equally unmentioned. Indeed, judicial review, Marbury v. Madison, 1 Cranch 137 (1803), is not governed by any explicit provision.

chose broad language in describing the competence of the national government, their assumption of the continued existence and vitality of state governments is visible throughout the Constitution. Thus, the absence of affirmative limitations on the national power, especially in the light of the enumeration technique in Article I, Section 8, cannot be viewed as preclusive of a judicial enforcement of the principles related to the federal structure of our government.

The most plausible explanation of the repeated frustration of judicial intervention in the area of state-national relations is the failure of judges and scholars to produce a viable theory of federalism that would help to develop workable principles for the judicial resolution of federalism-related disputes. To begin with, rather than focusing on a functional analysis of the role of the states in the federal system—an analysis that would parallel the Court’s jurisprudence in the area of separation of powers—the basic intellectual inquiry has been concentrated on the concept of state sovereignty and its implications for the limitation of national authority. Furthermore, it was in the light of the idea of state sovereignty that the constitutional doctrine of the enumeration of federal powers was interpreted, which led to the conclusion that the enumeration implied some reserved area of exclusive state control. Despite the fact that this view of the intergovernmental division of competences had always created some tensions, as long as the actual exercise of the federal commerce power was relatively restricted, the inadequacy of the concept of sovereignty for analyzing the role of the states in the federal system was not immediately apparent. Nevertheless, even after the massive shift toward national regulation of economic and social life has revealed that the enumeration doctrine provided no viable standards for the protection of the states, the constitutional defense of state rights has continued to rely on the concept of state sovereignty. No serious attempt has been made to go beyond the few standard shibboleths associated with this way of thinking. It is also possible that a political disinclination toward the state-rights doctrine, stemming from the Civil War divisions and the intellectual ascendancy of the New Deal, further contributed to the neglect of a theory of federalism. But the past failures should not be taken to preclude the possibility of future success. Indeed, even if the protection of the federal structure of the United States is to rest ultimately with the political process, and not the courts, the actors

20 See Frankfurter, Commerce Clause under Marshall, Taney, and Waite (1937).
in that process, no less than judges, must have some idea of the basic purposes of federalism and the reasons behind their constitutional protection. A new theory of federalism is thus necessary to allow us a more comprehensive understanding of the American institutions. In the following pages I shall attempt to clear the ground for such a theory of federalism and point in the directions in which I think it should develop.

II. FEDERALISM AND THE DOCTRINE OF STATE SOVEREIGNTY: A CRITIQUE

The rhetoric of state sovereignty is responsible for much of the intellectual poverty of our federalism-related jurisprudence. No assignment of meanings to the words of a language is sacred, and words can be made to serve different purposes. It is thus possible, of course, to preserve the use of the word "sovereignty" in speaking of American federalism by making it stand for the precise assortment of characteristics possessed by the states in our constitutional system. But the price for doing so is quite high, for the word carries with it an array of traditional meanings, and I will try to show that none of these meanings make much sense when used in the American context. Thus, while the use of the word "sovereign" with respect to the states may have carried a welcome implication of some dignity attributable to state governmental institutions (and I doubt that much more by way of a clear meaning could be assigned to its use in the conventional legal discourse of federalism outside the area of state sovereign immunity21), the confusion resulting from this usage far outweighs any of its advantages and the word should be abandoned.

Even in political philosophy, where the term originated, "sovereignty" does not have any clear, undisputed meaning. In most of its classical formulations, however, it was used to identify the peculiar kind of authority that only a state could possess. The concept, as originally introduced by Bodin,22 was designed to strengthen the hand of the French king in his struggle against the nobility and to

21 The state's sovereign immunity is, by and large, irrelevant to the problems of federalism since the states are not immune to suits by the United States or by other states. Monaco v. Mississippi, 292 U.S. 313 (1934).
assert the necessity, as well as the legitimacy, of a single source of authority in the political realm. Bodin himself did not deny that the sovereign was constrained by the higher principles of natural law and the divine commandments, and he understood the concept of sovereignty as pertaining to the King’s ultimate and exclusive authority to lay down the principles of positive law. Nevertheless, within a legal or institutional context, the concept was designed to deny the legitimacy of any opposition to royal authority. It is this feature of the concept of sovereignty that made it attractive to legal positivists for whom it provided a seemingly sound basis for explaining the binding force of legal norms. From Hobbes to Austin, the idea of sovereignty came to stand for an ultimate source of authority, capable of enacting laws binding on everyone else, but not itself bound by any laws and capable of changing them at will.

The precise status of the theory of sovereignty has never been entirely clear. It could be understood as a descriptive theory claiming that in every actual political society there exists de facto an ultimate source of authority, legal or political, and that the task of a political scientist is to identify it. But it could also be understood as a normative theory claiming that in each political society there ought to be such an authority, for otherwise instability or illegitimacy would ensue. And finally, the theory could be understood as axiomatic, simply spelling out a condition that must necessarily be satisfied for a society to be recognized as “political” or as forming a “state.” But what constitutes the common core of the theory is the claim that only a state could be sovereign, so that the term is not applicable to individuals or institutions of another kind. To be sure, sovereignty implies such things as “autonomy,” “dignity,” “freedom,” “power,” “authority,” and so on. But if the term does not simply duplicate one or more of these things, it means something more than that, and this “something more” only a state can possess.

There are essentially three components defining the differentia specifica of sovereignty: (1) A sovereign must be sovereign (have authority) over someone and something (that is, there must be subjects and a domain over which the sovereign rules); (2) the authority of a sovereign over the subjects within the sovereign’s domain must be of a political nature (that is, at a minimum, the types

of commands issued by the sovereign must be capable of acquiring a legal status and be backed by an appropriate enforcement mechanism), and (3) the authority of a sovereign must be final (that is, the sovereign cannot in turn be dependent on another person or institution, and there is no further recourse for subjects who are not prepared to obey the sovereign's commands).

It follows immediately from these postulates that it is impossible to be a sovereign and a subject at the same time, at least with respect to the same command. For if the subject must obey the sovereign, while the sovereign is always free to change his mind, then it cannot be said, in a literal sense, that one is both the subject and the sovereign or that one is a sovereign over oneself. 25

The power of the theory of sovereignty is considerable. If one accepts it, the mere location of the sovereign in a given community allows one to deduce some very important attributes of the person or institution in question. Thus, for example, if the English courts are persuaded that Parliament is the British sovereign, then it immediately follows that, like the most absolute of monarchs, it "can do no wrong," that is, it must be treated as a source of all legal norms and never a subject of any of them. 26 If it does not permit suits against itself, no one can challenge its decrees. If it tramples on even the most cherished British traditions, it may perhaps cause a revolution, but nothing short of that will release the courts from their duty to enforce its commands.

Simply to state the proposition that the American states are sovereign in this sense is to refute it. The problem is not so much that the states have written constitutions that limit the powers of their

24 The requirement that the sovereign's commands must be able to acquire a legal status may appear circular if the concept of sovereignty is then used to explain the binding force of legal commands. But there is more to law than merely its binding force, such as, for example, the general character of its commands or a standard mode of enforcement.

25 This poses some problems for the idea of popular sovereignty. They can perhaps be overcome by distinguishing the people as a collective body from private individuals and such must be the sense of Rousseau's distinction between the general will (volonté générale) and the wills of particular individuals, even when the particular wills perfectly coincide (the will of all or volonté des tous). Similarly, the Kantian idea of autonomous sovereign individuality presupposes a distinction between the agent as a purely rational will and as an empirical consciousness driven by inclinations. Even so, Austin believed that all such uses of the term "sovereignty" were at best metaphorical. Austin, The Province of Jurisprudence Determined 255 (1954).

26 In practice a legal fiction is maintained that it is the "King in Parliament" that is the British sovereign, but nothing hinges on this here. Cf. Austin, note 23 supra, at 230–33.
governments, for one may perhaps look to the bodies that can change these constitutions as the true sovereigns and view the state governments as their delegates or representatives. The problem rather is that the federal Constitution imposes a variety of limits on the states that are clearly incompatible with the absolute authority entailed by state sovereignty in this strong sense. 27

The reason why this obvious fact does not by itself preclude viewing the American states as sovereign in some weaker sense is that, even for the most ardent positivist, the concept of a sovereign cannot refer exclusively to a divinelike entity that has an absolute power over everyone and everything everywhere. The least problematic case of sovereignty is that of an independent state viewed from outside, in the domain of foreign relations, where the domestic division of authority is largely ignored and the person representing the state is viewed as empowered to speak without any limitation for the country as a whole. Clearly, even in this case, to say that a state is sovereign is an abbreviated way of saying that its sovereignty is limited to some domain. This domain is defined geographically by the territory of the country, and the state’s authority is restricted to power over the state’s own citizens or those citizens of other countries who are within its territory. 28 Whether we view these limitations of sovereignty as a matter of power alone, or of some voluntary agreement on the part of the sovereign, or of some higher law (the law of nations or of nature) does not seem to

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27 The Supremacy Clause, Art. VI, Section 2, not only assures the supremacy of federal over state laws but also forces state judges to apply federal law in appropriate cases. Art. IV, Section 1 obliges state courts to give full faith and credit to public records and judicial proceedings in other states as a matter of duty and not of comity. Art. IV, Section 2 limits the power of the states to give preference to their own residents and thus takes away much of their power to determine their citizenship. Art. IV, Section 3 limits the power of the states to control their geographical boundaries. Art. IV, Section 4 limits the states’ right to choose their own form of government by obligating the United States to assure that each state government is “republican.” Art. I, Section 10 prohibits the states to conduct foreign policy (including entering into compacts or agreements with other states and engaging in war), to conduct an independent monetary policy, impose export duties, impair obligations of contract, grant titles of nobility, pass bills of attainder or ex post facto laws. Judicial decisions subordinated state courts to federal review. Martin v. Hunter’s Lessee, 1 Wheat. 304 (1816); Cohens v. Virginia, 6 Wheat. 264 (1821). Art. 3, Section 2 has been interpreted to imply no sovereign immunity for the states in suits by other states or the United States. Monaco v. Mississippi, 292 U.S. 313 (1934).

28 There is also in some cases more questionable jurisdiction over foreigners abroad or on the high seas, see Leech, Oliver, & Sweeny, Cases and Materials on the International Legal System, Part I (1973), but these complications need not detain us.
destroy the usefulness of the concept in international relations.\(^{29}\)

One way or another, the existence of many states implies a division of sovereignty (or at least of sovereigns), while at the same time the dominion of each state within its boundaries may still be seen as in principle absolute.

The use of the concept of sovereignty in analyzing the relation between the states and the federal government most likely derives from an analogy to this least problematic case of international relations. If sovereignty may be parceled out among various nations, the argument seems to run, why couldn't it be parceled out somewhat differently in the case of the United States. At this point, a story is usually told that runs something like this: After the separation of the colonies from Great Britain, the American states became independent and sovereign within their boundaries. The Articles of Confederation were essentially akin to an international compact since their efficacy depended on the voluntary cooperation of the states. The Constitution of 1789 changed this situation in important respects because it allowed the federal government to operate directly on the people in the states and imposed binding restrictions on state power. Still—the story continues—the powers of the federal government are not general but limited to those enumerated in the Constitution. Since that leaves a residuum of powers not delegated, the states, which have existed continuously throughout this period, have remained sovereign, although their sovereignty has become limited to the residuum of the powers not delegated to the United States. Thus, it might be argued, even if the sovereignty was parceled out between the states and the federal government in a way that is different from its division among the many nation states, the remaining areas of state and federal competence are nevertheless partially exclusive, and this exclusiveness allows for an absolute (sovereign) authority of each government in its own sphere.

Put in this way, the idea of state sovereignty is not self-refuting. To be sure, a positivist purist would immediately point out that any limitation of a sovereign nation's power in international relations is due exclusively to the sovereign's own voluntary agreement—the idea of international law being, for such a positivist,

\(^{29}\) The case becomes more problematic if some international body has the authority to enforce the norms of international law.
incompatible with national sovereignty—while the limitations of the American states' power comes from the federal Constitution over which the states have only a very limited authority. But we need not be detained by this objection, for so long as some domain of exclusive state power can be meaningfully identified, even if a state is not itself free to change it, the idea of state sovereignty does not lose all its utility. The real problem is that even a moderately searching scrutiny of the powers of the federal government shows that the alleged existence of a residual category of exclusive state powers over any private, nongovernmental activity is in fact illusory. This does not mean, of course, that the idea of federalism, with its notion of independent state governments, is also illusory. It may very well be, for example, that state governments are not merely local branches of the United States government anymore than the League of Women Voters is such a branch and that state governments enjoy a panoply of immunities by virtue of the principles of federalism. But the idea of sovereignty implies at a minimum that the sovereign must be the ultimate source of legal authority over someone other than himself, so that not every immunity which allows for some person or institution to have his or its own sphere of autonomy amounts to carving out a new sovereign domain. It is not surprising, therefore, that the history of the American idea of state sovereignty turns out, on closer inspection, to be the story of a succession of vain attempts to define some substantive domain over which exclusive and ultimate state authority could be confidently asserted.

A simple comparison with nation states reveals that the American states lack a domain defined in precisely those terms that make the notion of national sovereignty relatively unproblematic. The domain in which national governments are sovereign can be easily delimited by their geographical boundaries. The case of the American states is different because, although state jurisdictions are geographically determined, their sovereignty over their territory is vitiated by the geographically coextensive reach of the federal gov-

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30 It is only if the concept of autonomy (self-determination) is thoroughly confused with the concept of sovereignty (control over others) that one can still maintain that the American states are "sovereign." While it is, of course, impossible to forbid anyone to use the word in this way, doing this will also entail calling individuals, private associations, and single branches of the federal government "sovereign," for they also have their own spheres of autonomy within our constitutional order.
ernment. Neither can the sovereign domain of the American states be defined in terms of their authority over their people, for it is the same people who are also subject to the jurisdiction of the federal government. Faced with this, the attempts to carve out a sphere of exclusive state authority have traditionally proceeded to define it in terms of some substantive fields of regulation, such as production versus commerce, social versus economic regulation, local versus interstate commerce, and so forth. It is, of course, not \textit{a priori} impossible to make such distinctions. By a peculiar hypertrophy of logic over reality, one may separate commerce from production, for example, by a set of rigid definitions and enforce such distinctions regardless of practical consequences. It is scarcely worth considering such an alternative, however, for it would be a prime example of putting the cart before horse: instead of thinking of state sovereignty as a way of ensuring the viability of federalism, this approach can only explode the concept of federalism to save the fiction of state sovereignty.

A defensible use of the concept of state sovereignty presupposes that the domain over which a state exercises supreme authority corresponds to some reality, that is, that the areas cordoned off from federal interference have some practical separateness from the point of view of the purposes of good government. The reason why the idea of sovereignty retains some significance in the area of international relations does not lie in pure philosophy but precisely in the fact that most actual states constitute relatively viable social, economic, and cultural units. People united by a long-standing tradition, speaking a distinctive common language, living within boundaries that roughly correspond to the relevant economic market, can be grouped into a political unit that exercises ultimate authority over all the matters that concern them. When these independently unifying factors are missing, such as in the case of some states created by artificial colonial lines, or in the case of artificially small states, or in the case of countries tied to their neighbors by increasing economic, social, and cultural interdependence, even the traditional concept of geographically defined sovereignty becomes an increasingly artificial construct, reversing the natural order of

\begin{itemize}
\item \textsuperscript{31} See notes 38–44 \textit{infra} and accompanying text.
\item \textsuperscript{32} The free city of Danzig in the period 1920–39 comes to mind here.
\end{itemize}
dependence between the needs to be served by political authority and purely political organization. In such situations, politics begins to exert an entirely autonomous influence over social and economic life to the detriment of unhampered development. In some (rather fortunate) cases, the political organization collapses under the weight of its own irrelevance and new, more viable units are formed. In other cases, politics comes out victorious over reality, but only at the cost of repression and the ultimate stifling of the vitality of those who have the misfortune to be the subjects of the artificial sovereign. In only rare cases can a viable socio-economic-cultural unit be created by purely political means.\(^3\) In the area of international relations, where the concept of sovereignty constitutes one of the few barriers against anarchy and constant interference of some states in the "internal affairs" of other countries, the emergence of an artificial and unviable sovereign may nevertheless dictate a restraint on the behavior of other members of the international community. In the case of state-federal relations, however, no such justification exists. The original impetus behind the enactment of the United States Constitution was precisely to avoid the loss of welfare inherent in the recognition of state sovereignty.\(^3^4\) The Commerce Clause in particular reflected a widespread recognition of the economic interdependence of the states. The fact that even under the Articles of Confederation, the United States represented a unit insofar as foreign relations were concerned means that state sovereignty had never been taken very seriously in this area.\(^3^5\) The Constitution of 1789 made this even more clear by entirely excluding the states from participation in foreign affairs and by omitting any reference to state sovereignty.\(^3^6\) The very recognition

\(^3\) This, I presume, would be the happy outcome for some postcolonial entities now in existence.


\(^3^5\) Rakove, The Beginnings of National Politics: An Interpretive History of the Continental Congress, 173 note (1982). See also United States v. Curtiss-Wright Co., 299 U.S. 304, 315-19 (1936), although the historical accuracy of Justice Sutherland’s claims may be questioned.

\(^3^6\) Article II of the Articles of Confederation stated: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." By contrast, even the Tenth Amendment speaks only of "powers" not delegated to the United States as remaining in the States (if not prohibited to them by the Constitution.)
of the existence of the American nation and the creation of the United States as the expression of its political will mean that the Framers recognized the degree of real interdependence among the states that made thinking of them in terms of sovereignty largely inappropriate. States may have rights, powers, and immunities within the federal compact, but they cannot be conceived as staying outside of it.

The shape ultimately taken by the structure of governmental authority under the United States Constitution was one of compromise between the social, economic, and international realities and some more purely political desiderata. The power represented by the states had to be reckoned with and indeed was welcome insofar as it could be harnessed into the complex structure of divided authority that was to be the main protection against what the Framers called "tyranny"—a rather amorphous term referring to most forms of governmental oppression. But at the same time the Framers wanted to ensure that the federal government would be unquestionably independent and superior in all matters of national importance. Only "local" matters were to be left in the hands of the states.

Had the compromise of 1787 clearly left it to the federal government to determine what issues were or were not "local" (by, for example, making such determinations largely political), the question of state sovereignty would have become meaningless then and there. But the Constitution appears to go further and attempts to define negatively the scope of state power by the enumeration of the powers of the national government. This could be, and often was, interpreted as an effort to give an ahistorical definition of what is "local." The enumeration technique of Article I, Section 8, thus appears to constitutionalize the issue of state sovereignty by proposing a rigid, a priori distinction between the separate domains of the two governments, instead of a more practical, ad hoc determination of their appropriate law-making functions.

37 Proposals of this kind were, indeed, before the Convention. The Virginia plan proposed that "the National Legislature ought to be empowered ... to legislate in all cases, to which the separate States are incompetent or in which the harmony of the United States may be interrupted by exercise of individual legislation." The Convention voted on two occasions for similar general formulations. See Farrand, I Records of the Federal Convention of 1787 47, 53 (1911); II id. at 21. The present scheme of enumeration emerged in the Committee of Detail. See Gunther, Cases and Materials on Constitutional Law 83 (11th ed. 1985).
If the matter of determining whether the Constitutional enumeration of the powers of the federal government implied a substantively defined domain of state sovereignty had arisen here for the first time, an extensive discussion of all relevant considerations would have been necessary. But the matter seems so definitively settled by historical experience and the Supreme Court’s decisions that to rehearse once more the vicissitudes of the Commerce Clause disputes would be an improvident expenditure of energy. In case after case, the distinctions drawn by the courts that were supposed to insure state supremacy over some substantive fields of regulation have proved to be unworkable. In part, these efforts were designed to map what the Court perceived as the political desiderata of federalism onto the contours of economic life and to translate the concept of dual sovereignty into the language of economics by separating commerce from production. Whatever validity a distinction between production and external commerce may have in the case of international relations, one look at the supermarkets in New York and California is enough to convince one of its inappropriateness in the context of the United States economy. Within the American federal system, state boundaries have long lost most of their economic significance, and as early as the distinction between commerce and production appeared, the Court was forced to modify it by the introduction of the concept of the “current” or “flow” of commerce and to draw another, economically irrelevant, distinction between “direct” and “indirect” effects of the regulated activity on interstate commerce. Similarly unsuccessful were the Court’s efforts to correlate the concept of dual sovereignty with a distinction between the regulation of economic and social activities. It was rightly observed that, in the absence of other limitations, the power to regulate commerce could obviously be

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41 Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); Northern Securities Co. v. United States, 193 U.S. 197 (1904). These two decisions prevented a total emasculation of the antitrust laws by the Sugar Trust Case.
used to reach most activities related to morals and social, rather than purely economic, concerns. Given the centrality of the states' police powers to their function as independent governments, the Court, after a period of relative toleration of federal social legislation,\textsuperscript{42} attempted to reserve for the states the exclusive authority to regulate general welfare by restricting federal regulation to the "improvement" or "facilitation" of commerce (so that Congress could prohibit commerce only in the case of intrinsically "harmful" objects),\textsuperscript{43} and interpreting the Article I, Section 8 delegation as specifying not the permissible areas, but the permissible purposes, of federal regulation.\textsuperscript{44}

All these efforts, designed to preserve some exclusive domains of state authority, have by and large collapsed with the New Deal changes.\textsuperscript{45} The cases since then have oscillated between the language requiring a "substantial effect" of the regulated activity on interstate commerce as a condition of the federal power to regulate it\textsuperscript{46} and a virtual repudiation of any judicial authority to place limits on the Congressional power to determine the meaning of "local" activities.\textsuperscript{47} No decision, however, has in principle exempted any substantive field from federal regulation. Also, even if some new constitutional jurisprudence were to call for some limits on the federal power over the private sector, an articulation of such limits would require an essentially pragmatic analysis of the national and local effects of the regulated activities and a search for solutions that

\textsuperscript{42} See Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (upholding the Pure Food and Drug Act of 1906); Hoke v. United States, 227 U.S. 308 (1913) (upholding the Mann Act).

\textsuperscript{43} Hammer v. Dagenhart (The Child Labor Case), 247 U.S. 251 (1918).

\textsuperscript{44} See Bailey v. Drexel Furniture Corp. (The Child Labor Tax Case), 259 U.S. 20 (1922); United States v. Butler, 297 U.S. 1 (1936).


\textsuperscript{46} National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

are the most adequate for the national welfare. The concerns of federalism would not, of course, be irrelevant for this analysis, but they would have to be viewed in terms of the values and functions to be served by the states within the federal system and the a priori concept of state sovereignty would have no role to play in such an inquiry.

As a matter of fact, the usefulness of the idea of sovereignty in discussing the governmental system of the United States at any level, be it state or federal, is also quite limited. To be sure, in terms of the relations between the United States and foreign countries, the Framers thought of the national (but not state) government, insofar as it represented the American people, as fully equal to other powers and entitled to the same respect as any "sovereign" nation. But in terms of domestic relations, the structure of government established by the Framers, with its written Constitution, tripartite division of powers on the national level, decentralization of authority involved in the federal system, and constraints imposed on the governments at all levels in favor of individuals and private institutions, makes the positivistic concept of sovereignty of questionable value both as an analytical tool and as a norm defining a desirable feature of political organization. The very legitimation of political authority in the United States seems to rest on a theory that views unfavorably the location of sovereignty in any well-defined institution, preferring instead a dispersion of power and authority as a mode of increasing political accountability. Even with respect to the national government, therefore, it would be impossible to point to a single body that "could do no wrong" as a matter of principle and spread the protective mantle of sovereignty to insulate itself in an a priori fashion from some superior form of control.

If the Framers thought of anyone as "sovereign" in the United States, they thought this of the people in whose name they purported to write the Constitution. The idea of popular sovereignty had, of course, enjoyed widespread acceptance in the progressive thought of the eighteenth century, and I am not prepared to discount the usefulness of such a conceptualization. What is characteristic, however, of the Framers' idea of the people, as it is spelled out in the Constitution, is its complexity, if not amorphousness: the Constitution neither defines the term in any unitary fashion nor
considers its meaning self-evident. 48 Rather, the Constitution admits of a whole set of voices with which the people may speak, and each of these voices is identified with one or another institutional arrangement. It may be a set of conventions or a mixture of the federal and state legislatures (in the case of constitutional amendments), or the Congress and the President acting together (in the case of ordinary laws), or the Supreme Court (in the case of constitutional interpretation), but at no point, short of some violent revolutionary changes that would sweep away the present constitutional order, does the Constitution envisage the people speaking directly or with a voice that would trump all other voices by a simple fiat. 49

The complexity of the concept of the people, as spelled out in the Constitution, makes the idea of popular sovereignty very difficult to work with and, in any case, useless for a defense of the a priori notion of state sovereignty. For the voices with which the “people speak” are always delegated. Even if some of them are institutionalized in the organs of the states, the whole difficulty lies in identifying precisely those occasions on which the states exercise the sovereign capacity that is delegated to them. It is, in fact, enough to put it in this way to see that the word “sovereign” does not add anything to what we must already know in order to apply it. In the context of the positivist theory of sovereignty, a mere identification of some person as the sovereign would allow one to learn something one would not have necessarily known without it, such as that the authority of that person is final not only in this particular instance but also in all other instances of his actions on his subjects. But if the sovereign authority is simply delegated, then we must know the extent of the delegation. If we know this, however, we learn nothing more by saying that the representative speaks for the sovereign. When speaking of the states, therefore, the task is to articulate some independent grounds for saying that some of their decisions are immune from federal interference, and not to call the states “sover-

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48 I have derived much enlightenment on the meaning of the term “the people” in the Constitution from my colleague, Bruce Ackerman. See his Storrs Lectures, Discovering the Constitution, 93 Yale L.J. 1013 (1984).

49 Even in its capacity to amend the Constitution, the people are limited by the nonamendability of the states’ suffrage in the Senate. That the process of legislation is limited by the requirement of constitutionality is obvious. The same is in principle true of the Supreme Court’s decisions, even if only an amendment can in practice overrule them.
eign" in order to deduce anything from that. At the very least, then, the idea of state sovereignty is of no help in elaborating a theory of federalism.  

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III. PROCESS JURISPRUDENCE: AN ALTERNATIVE APPROACH

A. GARCIA AND NATIONAL LEAGUE OF CITIES

The rejection of the label of "sovereignty" as inapplicable in any meaningful sense to the American states does not mean that the American federal system does not differ very significantly from other well known systems of government, centralized or decentralized. Neither does it mean that the problems of federalism lack a constitutional dimension, so that judicial review of federalism-related limitations on the authority of the Congress or the Executive is necessarily inappropriate. My only point so far is that the idea of state sovereignty is not useful in elaborating a respectable theory of federalism and, a fortiori, in devising the adequate standards of judicial enforcement.

Seen in this light, the Supreme Court's decision in *Garcia v. San Antonio MTA*, coming down rather hard on the notion of state sovereignty, should be viewed as the last logical step in a long evolution of the sovereignty-based jurisprudence of federalism. The bitter historical experience of the Supreme Court in trying to apply the sovereignty-based limitations on national legislative powers, leading to the constitutional crisis of 1937, had long ago convinced the Court and most commentators that the Article I enumeration of national powers provided no helpful ground for judicial

50 Very similar conclusions would follow if one were to look to the more recent discussions of sovereignty by such political scientists as Leon Duguit (*Souveraineté et Liberté* (1922)), Hugo Krabbe (*The Modern Idea of the State* (1922)), and Harold J. Laski (*Studies in the Problem of Sovereignty* (1917), *Authority in the Modern State* (1919)). The upshot of these discussions is that the traditional concept of sovereignty simply obfuscates the fact that actual authority in the modern states resides in an often shifting configuration of political, economic, and social groups, with the state being only one of the contenders. In view of these theories, which also blur the distinction between various kinds of de facto authority possessed by extragovernmental interests and the control over legal forms possessed by governmental institutions, to say that the American states are sovereign would be patently false. At most, one could say that the states should be counted among the various groups that constitute the pluralistic sovereign that is the United States, but the same could be said of the Congress, the President, or even the Democratic Party. And to say this would, again, mean no more than that the states in fact exercise some influence over the political and legal decisions in the United States but would not make it any easier to determine what this influence is or should be.
intervention in the national political process, so that the courts were left with only an ultraminimal role in this area, if any. Quite significantly, however, the rhetoric of the Court's decisions did not fully reflect what appeared to be the practice of Commerce Clause adjudication: despite the fact that since 1937 no private activity has ever been found in principle beyond the reach of the Commerce Clause legislation, the "substantial effect" standard,\(^51\) tied as it was to the idea that the regulation of purely local activities was reserved exclusively to the states (and thus potentially to the notion of the states' sovereign domains), was upheld in theory and a certain amount of unease, occasionally rising to the level of a dissent, could be detected in the pronouncements of various justices with respect to the absence of any genuine judicial check on real or hypothetical encroachments on state prerogatives by the federal government.\(^52\) Although the Garcia decision does not in its terms overrule the "substantial effect" standard and although its own language is not entirely free from the rhetoric of state sovereignty,\(^53\) its main thrust is to reject the usefulness of the sovereignty-based analysis and to replace it with a focus on the nature of the political process responsible for making the federalism-related decisions. Consequently, Garcia stresses the fact that the Constitution "divested" the states of "their original powers" and that it is futile to try to "identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on a priori definitions of state sovereignty."\(^54\) Instead, the decision proposes to

\(^{51}\) Congress has the power to exercise control over activities that have "close and substantial relation to interstate commerce." NLRB v. Jones & McLaughlin Steel Corp., 301 U.S. 1, 37 (1937); see also Wickard v. Filburn, 317 U.S. 111, 125 (1942); Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964).

\(^{52}\) A good example of such unease may be found in Justice Black's dissent in Daniel v. Paul, 395 U.S. 298, 315 (1969). Another, and quite interesting, expression of the same unease may be found in Justice Jackson's opinion in United States v. Five Gambling Devices, 346 U.S. 441 (1953). Cf. Justice Rehnquist's concurrence in Hodel v. Virginia Surface Mining & Recl. Ass'n., 452 U.S. 264, 307 (1981), where he states that the idea that Congress's power to reach private activities is limited is "one of the greatest 'fictions' of our federal system."

\(^{53}\) Justice Blackmun's opinion affirms that while "the sovereignty of the States is limited by the Constitution," 105 S.Ct. at 1017, "[t]he States unquestionably 'retain a significant measure of sovereign authority. . . .' to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." Id. Similar statements appear throughout the opinion, and its ultimate holding is that the contested provisions of the FLSA are not "destructive of state sovereignty." 105 S.Ct. at 1020.

\(^{54}\) 105 S.Ct. at 1016.
rely primarily on the political safeguards of federalism\(^\text{55}\) and to ground any future judicial intervention not in a defense of state sovereignty but in the idea of compensating for possible failings in the national political process.\(^\text{56}\)

The only exception to the steady move away from the sovereignty-based jurisprudence of federalism since 1937 seems to have been the 1976 *National League of Cities* decision, overruled in *Garcia*. Justice Rehnquist's opinion for the Court in *National League of Cities* drew very heavily on the "fact" that the immunities enjoyed by the states derived from their "sovereignty"\(^\text{57}\) and the main holding of the case was anchored in his observation that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ to carry out their governmental functions."\(^\text{58}\) The subsequent reformulation of the holding of *National League of Cities*, given in Justice Marshall's opinion for the Court in *Hodel v. Virginia Surface Min. & Recl. Ass'n*, \(^\text{59}\) made the concept of state sovereignty into the focal point of its three-pronged test\(^\text{60}\) and it was this focus that shaped the *Garcia* response.

It is an important question, however, whether *National League of Cities* really needed to rely on the idea of state sovereignty to justify its holding and, if it did not, whether the *Garcia* response was not, at least in part, inapposite.

The first point to note in this context is that the principle announced in *National League of Cities*, namely, that the states should be immune from federal interference in structuring their own governmental operations, was significantly different from the previous

\(^{55}\) See note 7 supra.

\(^{56}\) *Garcia v. San Antonio MTA*, 105 S.Ct. at 1019–20: "[A]ny substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of [the] basic limitation [the Constitution imposes to protect the states], and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'"

\(^{57}\) 426 U.S. at 833, 843 n.14.

\(^{58}\) 426 U.S. at 845.


\(^{60}\) "[A] claim that congressional commerce clause legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional function.' " *Ibid.*
attempts to protect state rights that had concentrated on assuring the states' supremacy in regulating substantive, private activities supposedly outside the enumerated powers of the national government. The significance of this difference lay precisely in the fact that the immunity granted to the states by the National League of Cities, like most other limitations imposed on the authority of the national (or, for that matter, state) government—by the Bill of Rights, for example—did not have to derive from the displacement of the federal power by another sovereign but could rather be conceptualized as yet another check on the concentration of power in general, for the sake of protecting certain forms of life or preventing arbitrary and tyrannical imposition by some interests upon others. To say that the federal government cannot unduly interfere with the states' ability to structure their governmental operations or that it cannot destroy their "separate and independent existence" need, in and of itself, no more rely on the concept of state sovereignty than the prohibition of state interference with the membership of a private association must recognize that association's "sovereignty" or the protection of the Episcopalians' right to associate and exercise their religion must imply the "sovereignty" of the Episcopal Church. What seems rather to be true in all of these cases is that the very principle of sovereignty, wherever located, is circumscribed by the Constitution, in favor of the idea of limited government. It is the case, of course, that the holding of National League of Cities attempted to protect governmental, and not private, institutions. This fact is not without significance, but the decision did not protect the states as governmental institutions in the sense—crucial for the preservation of state sovereignty—of assuring their ability to impose the ultimate rules of conduct in any given area of extragovernmental activities. In interpreting the Tenth Amendment, the National League of Cities Court did not rely on any "residue" of nondelegated state powers; the opinion straightforwardly admitted that the regulation of wages at issue in the case was "undoubtedly within the scope of the Commerce Clause." The exception carved

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61 National League of Cities v. Usery, 426 U.S. at 845 (citing Coyle v. Smith, 221 U.S. 559, 580 (1911)).
63 426 U.S. at 841.
out from the federal powers pertained exclusively to the immunity of internal state governmental processes, and nothing in the opinion even remotely implied that the federal government could not reach any private activity. Whatever sovereign power (in the sense of an ultimate power to control the activities of third parties) was therefore seen as vested in any governmental body in the United States was squarely seen as vested in the national authorities, all the rhetoric of "state sovereignty" notwithstanding.

This aspect of *National League of Cities* was not sufficiently appreciated in the subsequent decisions of the Court. For example, Justice Blackmun, in his opinion for the majority in *FERC v. Mississippi*, 64 intimates that the existence of the federal power to preempt state utilities regulation justified, or at least mitigated the constitutional problems with, federal interference with state regulatory processes in the area. 65 If this argument were to be taken seriously, then it either rendered *National League of Cities* meaningless long before its ultimate overruling (for, given universal preemptibility, it left no state governmental function immune from federal interference) or conditioned its continued vitality on the existence of some areas of regulation reserved exclusively to the states. But if the latter interpretation were to be chosen, the novelty of *National League of Cities* had to disappear since it no longer could be viewed as protecting merely the structural integrity of state governments and required the continuation of the old sovereignty-based analysis. Thus interpreted, *National League of Cities* would have indeed deserved to be overruled.

In fact, however, putting aside the unfortunate references to state sovereignty in *National League of Cities* and its progeny, there is a certain jurisprudential affinity between the approaches taken in *Garcia* and in the 1976 decision. While the practical chances of any

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65 Strictly speaking, Justice Blackmun stopped short of finding that the possibility of preemption justified direct federal control of state instrumentality since he also found that the state was free to withdraw from the field of utilities regulation altogether if it did not wish to submit to the federal commands. Nevertheless, Justice Blackmun himself saw that the possibility of state withdrawal was no more than theoretical, especially in view of the Congressional failure to provide for any alternative regulatory mechanism. 456 U.S. at 766. For all practical purposes, therefore, the argument amounted to legitimizing federal control over the state regulatory processes in all preemptible fields. It must be noted, however, that the question of when a federal action on the states amounts to coercion was one of the fundamental issues not sufficiently addressed by the *National League of Cities* and its progeny.
future invalidation of national legislation on the grounds of conflict with the requirements of federalism appear to be small for the time being, in theory at least Garcia leaves the door open for a certain amount of judicial supervision of the national political process. The safeguards of federalism, according to the Garcia majority, lie primarily "in the structure of the Federal Government itself,"66 which guarantees to the states a certain amount of influence on the national level. Clearly, should the constitutionally required composition of the federal government be directly infringed on (for example by decoupling the choice of the Senators from the state electoral base), the Court would be obliged to intervene. But Garcia goes significantly further, for it does not preclude the possibility that even a properly composed national authority may insufficiently protect the interests of the states. All that Garcia, on its face, requires is that a justification of any federalism-related limitation on the national government be one of "process" (rather than relying on the alleged existence of some "'sacred province of state autonomy'") and that the process failure, required for judicial intervention, be on the national level.67 But while the justification of the "restraint on the exercise of Commerce Clause powers" must be one of "process," the restraint itself may be "substantive,"68 that is, need not be limited to assuring the proper amount of state influence on the federal level but may instead address itself directly to the problem of national overreaching.

Viewed from this perspective, the gist of Garcia's holding lies not in ruling out as nonjusticiable all matters of federalism-related limitations on national power, but rather in formulating an approach to the elaboration of the judicial standards of review. This approach has much in common with the "process jurisprudence" originating in the famous footnote four of the Carolene Products decision69 and subsequently elaborated in the scholarly literature.70 The assumption of this approach is that the Constitution largely confines the outcomes of governmental action to the political process and that

66 105 S.Ct. at 1018.
68 Ibid. (emphasis added).
judicial review should, with a few exceptions related to very concrete substantive provisions in the Constitution, be directed toward preserving the integrity of the political process, keeping open the channels of political change, and so on. In elaborating this theory of judicial review, however, process jurisprudence does not limit the scope of judicial intervention to explicitly procedural remedies or to the enforcement of specifically procedural principles. It aims rather at an elaboration of judicial standards, the justification of which does not rely on the desirability of specific substantive results but rests instead on the identification of some defects in the political process that prevent it from operating in accordance with the function assigned to it in the Constitution. Thus, for example, in reviewing governmental actions that may inhibit free speech or discriminate against certain minorities, a court sympathetic to the tenets of process jurisprudence will feel free to elaborate the standards of review that will directly address the substantive issues of free speech or minority rights, but it will justify them not so much in terms of the autonomous values of speech or equality as in terms of their role in the properly functioning democratic process and will attempt to identify some distortions in that process that account for its presumably abnormal results. Seen in this light, the protection of free speech will be related, say, to the idea of informed consent as a basis of democratic legitimation, while discriminatory legislation will be viewed, say, as an outcome of restricted access by discrete and insular minorities to the trade-offs and compromises that are supposed to prevent systematic exploitation of minority interests in a well-functioning democratic society. 71

In the context of federalism, the process jurisprudence endorsed by Garcia, if I interpret it correctly, does not imply, therefore, an unconditional rejection of even the specific principle of the protection of the integrity of state governmental operations put forth by the National League of Cities so long as this principle is not rooted in

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71 By giving these examples, I do not mean to suggest that they represent the correct applications of the principles of process jurisprudence. For a critique of the reasoning underlying the protection of minority rights indicated in the text, see Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713 (1985). I also recognize that it may be impossible to specify the characteristics of a well-functioning political process without anchoring them in a theory of substantive values that the process is supposed to realize. See Brest, The Substance of Process, 42 Ohio St. L.J. 131, 134–37 (1981); Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1072–77 (1980). This last issue will be considered further in section B infra.
the assumption of state sovereignty. Should it turn out, for example, on the basis of a well-grounded analysis of the significance of local politics for the proper functioning of the national political process, that certain systemic characteristics of the national government make it prone to fail to recognize the interdependence between its own health and the robustness of political life in the states, the Court might view with suspicion federal interference with the integrity of some vital governmental operations of the states, in much the same way as it applied its “strict scrutiny” analysis to governmental actions involving race-based classifications.  

Moreover, if one can abstract from the rhetoric of sovereignty in National League of Cities and some of its progeny, the ideas of process jurisprudence are not entirely absent from their analyses and could profitably be further developed. Thus, for example, much of Justice Rehnquist’s opinion in National League of Cities is not directed to the problem of state sovereignty but rests on an analysis of the impact of the 1974 FLSA Amendments (requiring that minimum wages be paid to state employees) on the states’ ability to structure their internal operations and the relation between the need to preserve this ability and the role assigned to the states within the federal system. Posing the issue in this way implies that the principles of National League of Cities derive from the structure of government set up under the Constitution, rather than from some preexisting immunity of the states, due to their status as sovereigns that the Constitution could not or did not abrogate. This is even more clear in the elaboration of the principles of National League of Cities given by Justice O’Connor in her dissent in FERC v. Mississippi. After making a questionable statement that “each State is sovereign within its own domain, governing its citizens and providing for their general welfare,” Justice O’Connor proceeded to analyze the statute at issue in terms of its impact on the states’ ability to func-

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72 See Korematsu v. United States, 323 U.S. 214 (1944).
73 456 U.S. 742, 775 (1982). Justice O’Connor’s dissent in FERC was joined by Justice Rehnquist and Chief Justice Berger, both of whom were in the majority in National League of Cities. Additionally, Justice Powell, another member of the National League of Cities majority, expressed his agreement with the “wisdom” of “Justice O’Connor’s evocation of the principles of federalism.” FERC v. Mississippi, 456 U.S. at 775 (Justice Powell, concurring and dissenting).
74 Id. at 777.
tion within the federal system and pointed to the values to be served by state autonomy under our constitutional scheme. Among these values and functions, Justice O'Connor listed the enhancement of the political accountability of officials, the function of the states as "laboratories for the development of new social, economic, and political ideas,"75 the enhancement of "the opportunity of all citizens to participate in representative government,"76 and the provision of "a salutary check on governmental power."77

No special attempt was made in most of these statements to relate the protection of the integrity of state governmental operations to any specific analysis of the failure of the political process on the national level, as eventually required by Garcia, since the protection of state interests was presumed by Justice O'Connor to be constitutionally required by the principles of federalism, independently of the specific guarantees of local representation on the national level. But it might not be very difficult to relate the concerns of the National League of Cities's proponents to the problems inherent in the national government as it has developed in the post-Civil War period, and particularly in the last fifty years and to point out the effect of those changes on the political protection of the interests of the states as envisaged by the Framers.78 What is more important, however, than the question of where the protection of the states is textually anchored in the Constitution (in the provisions specifying the composition of the federal government or in the Tenth Amendment) is the elaboration of a constitutional theory of federalism in terms of the functions assigned to the political processes envisaged by the Constitution and the relation between those functions and the actual operation of governmental institutions. In this respect, both Garcia (insofar as it leaves room for a judicial review of the federalism-related implications of national action) and National League of Cities (insofar as it may have grounded its holding in a functional analysis of the role of the states within the federal system) are on the right track. They both recognize the special role

75 Id. at 788.
76 Id. at 789.
77 Id. at 790.
78 An argument of this kind is indicated in Part B of Justice Powell's dissenting opinion in Garcia. 105 S.Ct. 1025-27; see particularly footnote 9. Among scholarly contributions, of particular importance in this context is Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847 (1979).
of the analysis of institutional arrangements and processes set up by the Constitution for the judicial evaluation of the substantive outcomes that these arrangements and processes engender. But both these cases fail to move beyond the programatic stages in the formulation of the analysis they require and proceed to a conclusory resolution of complex problems of federalism: National League Cities by laying down a blanket prohibition on the interference with the vaguely defined "traditional governmental functions" of the states,79 Garcia by simply relegating the protection of unspecified state interests to an insufficiently analyzed national political process.

B. THE NATURE OF PROCESS JURISPRUDENCE AND ITS MISCONCEPTIONS

1. Substantive values and process jurisprudence. To develop a theory of federalism along the lines of process jurisprudence, we must have a fairly good idea of the nature of the political processes envisaged by the Constitution and the functions that the document assigns to them. On this point the opinions in both Garcia and National League of Cities are most deficient. National League of Cities, in laying down its principle of the protection of state governmental processes, simply stated that the protection extended to governmental functions and activities that were termed "traditional,"80 "integral,"81 "typical,"82 "important," "essential" or "required,"83 without explaining how and why these terms related to the basic values of federalism. Garcia, on the other hand, seized on the lack of clarity in these criteria and declared that the values of federalism are "more properly protected by procedural safeguards inherent in the federal system."84 The opinion of the Court lists a series of constitutional provisions assuring to the states a role in the operation of the national government,85 but it never attempts to specify

79 426 U.S. at 851, 852, 855.
80 Ibid.
81 Id. at 851, 852, 854 n.18, 855.
82 Id. at 851.
83 Id. at 845, 846, 847, 850, 851.
84 105 S.Ct. at 1018.
85 Ibid.
what the protected values are or how they are related to the pro-
cedural safeguards referred to by the Court.

The other sources inspired by the ideas of process jurisprudence
are not of much help either. To begin with, the issue of federalism
is simply absent from the list of problems that the Carolene Products
footnote\textsuperscript{86} identified as potentially enhancing the level of judicial
scrutiny, and the issue rarely appears in the further elaborations of
its doctrine.\textsuperscript{87} But more importantly than that, even though the
idea that constitutional adjudication is primarily concerned with
protecting the integrity of the political process, rather than some
substantive outcomes or entitlements, has been much in vogue for a
while, the legal profession has been rather slow in developing a
sophisticated theory of political processes or in applying the results
available from political science to the problems of constitutional
interpretation. The basic problem with the concept of process, as
understood by the exponents of process jurisprudence, is its narrow
focus on representative political institutions and their function of
expressing the will of the majority.

The crudest version of the process theory would look something
like this: The Constitution is a democratic document, which means
that the decisions of the majority of the representatives freely
elected by the majority of the people should not be upset, and
judicial intervention—which always raises a prima facie presump-
tion of countermajoritarianism—should be limited to cases in
which something in the process suggests that the decision deviates
from the majority's will.

While this version of the theory may look too simplistic, the
more sophisticated versions seem to proceed from it as a starting
point in order to add a few refinements. This is done by Ely, for

\textsuperscript{86} Note 69 supra.

\textsuperscript{87} Some efforts at applying the footnote's ideas to the review of state legislation that might
conflict with the "dormant" federal Commerce Clause powers were made by Justice Stone in
South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177, 184 n.2 (1938),
and Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 n.2 (1945), where he explained that
the usual deference to state legislative judgments is suspended in cases when such legislation
may discriminate against out-of-state interests because of the absence of the representation
(even in the virtual sense) of those interests in the state legislature. The idea of "virtual
representation" is further picked up by Ely in his Democracy and Distrust, note 70 supra, at
82–87. While no explicitly process-oriented work approaches the subject of federalism-
related limitations on the national authorities, of great value in this context is Kaden, note 78
supra.
example, by concentrating on two aspects of the majoritarian rule: (1) assuring that the selecting process is truly responsive to the interests of those who are represented and (2) protecting minority interests from systematic exploitation by the majority due to the majority's "simple hostility or a prejudiced refusal to recognize commonalities of interest." The first of these considerations yields such normative postulates as guaranteeing the right to vote, assuring the proper dissemination of information, and facilitating the expression and advocacy of citizens' interests. The second type of consideration (as well as those aspects of the first that guard against the evils of ignorance) introduces a certain modification into the premise of unqualified majoritarianism. Majority rule is not perhaps a good per se but rather a system in which every interest has a chance to succeed some of the time in the political world of the trade-offs and compromises that are necessary to form a majority in a universe of diverse interests. The ultimate justification of major- ity rule is thus its basic fairness, but this would be undermined if some groups were to be systematically excluded from the political give-and-take because other people are either uninformed or motivated by irrational hostility, and this gives rise to the jurisprudence of "suspect classifications."

Something along the lines of this version of the process theory must have been at the bottom of the famous state reapportionment cases, which laid down the blanket rule of "one man, one vote" as the logical conclusion of the majoritarian democratic theory. What is rather amazing about it, however, is that the theory, without more (indeed, much more), is incapable of giving any account of most of the processes and structures set up by the federal Constitution, be they related to the separation of powers or (in particular) to the representative imbalance characteristic of the federal system. Ely himself does not believe that the "one man, one vote" conclusion is ineluctable and explains it with reference to administrative

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88 Ely, note 70 supra.
89 Id. at 103.
90 See Korematsu v. United States, 323 U.S. 214 (1944).
concerns,93 but neither does his book contain any explanation of the peculiarly procedural provisions unrelated to, or deviating from, the principle of majority rule that occupy the bulk of the Constitution.94 To be sure, Ely does say that deviations from the “one man, one vote” principle are not inherently irrational,95 but what passes in silence is that the rationality of such deviations cannot, in most instances, be judged with reference to some exclusively procedural principles.96 Even a genuine legitimation of majority rule calls for some further substantive justification, such as the Rousseauean theory of popular sovereignty or the Madisonian (and Ely’s) theory of fairness resulting from pragmatic accommodations. But in a system as complex as that of the American government, the dominance of any one principle of legitimation (such as the democratic concept of popular sovereignty or fairness in the distribution of governmental favors) is very unlikely to provide a good explanation of the whole structure of governmental institutions. Even a cursory reading of the Constitution and the work of those who wrote it or participated in the ratification debates will immediately show the crucial role of such values as individual autonomy, citizen participation, the sanctity of property, secularism, economic growth, the fostering of civic virtues, and so on. And it is even more doubtful that this plurality of substantive values underlying the constitutional order could find its expression in a single dominant procedural feature, such as majority rule. As a matter of fact, the


94 The only facet of the separation of powers that receives a plausible justification in Ely’s book (and indeed is its basic leitmotif) is, ironically, the one not explicitly mentioned in the text of the Constitution: judicial review.

95 Ely, note 70 supra, at 121.

96 Ely, ibid., mentions in this context that the Equal Protection Clause often allows for unequal treatment if it is “rationally explainable.” But this remark, while relevant to the Court’s ostensible grounding of the reapportionment cases in the Equal Protection Clause, is inapposite in the context of the underlying Republican Form of Government Clause that he admits is also relevant here. The mere rationality of some decision is a far cry from its legitimacy: a lot of perfectly abhorrent laws might be rational and still unacceptable. What legitimizes most laws challenged under equal protection, on Ely’s own terms, is that they have been passed by a democratically legitimate legislature, with rationality being an only minimal additional component. But in the case of a decision that disenfranchises (or dilutes the votes of) a part of the population or, even more clearly, that results from such a disenfranchisement (or dilution), the usual democratic legitimation is precisely absent and some other form of legitimation is necessary. It seems to me very doubtful that an ultimately satisfying form of legitimation (even in the same degree as a simple reference to majority rule may be satisfying) of such decisions could be purely procedural.
Constitution reveals many clearly antimajoritarian features that are probably incomprehensible without a reference to some of the substantive values just mentioned.

2. Process jurisprudence and individual rights. Where does this leave us with respect to the utility of process jurisprudence for the formulation of the effective standards of judicial review, particularly in the area of federalism? Doesn't the account given here, by requiring an explanation of the procedural features of political institutions in terms of the substantive values underlying the political process, negate the whole enterprise of process jurisprudence and lead us back to evaluating the outcomes of the political process in terms of some substantive "fundamental values" that the whole approach was designed to avoid?

The answer is that the idea of process jurisprudence need not be abandoned simply because the theory must admit of the existence of some substantive values, but rather that the purpose and the methods of process jurisprudence must be further clarified and its ambitions somewhat scaled down. The primary aim of a process theory, which may have been widely misconceived, is not to eliminate the idea of substantive values from constitutional interpretation or to reduce them to purely procedural terms but to understand the specific role played by institutions in the realm of social and political life. And in this context, to say that an institution has a particular function that must be accounted for in terms of some substantive values the institution is supposed to serve does not mean that the peculiar process-related characteristics of the institution do not acquire independent significance or that one may ignore its internally generated interests and purposes. What I take to be the most promising aspect of Garcia's endorsement of the process-analysis approach to the problem of federalism is not, therefore, its arguable reduction of the meaning of federalism to a few purely procedural arrangements through which the states have some voice in national politics, but rather its implicit call for a complex account of the nature of the federalist institutions. Even to begin to vindicate Garcia's promise in this respect, one must, above all, have the rudiments of 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 rather than directly on the substantive values these processes and institutions are supposed to serve. Armed with such
a general theory, one may then apply it to explain the functioning of a particular institutional arrangement, such as federalism, and its possible pathological distortions. The process-oriented analysis of federalism would thus not deny that the federalist institutions do indeed serve further substantive purposes, such as the preservation of individual freedom or citizen participation in government, but it would also not stop at a mere identification of such purposes. Instead, it would proceed to show how respect for the integrity of the federalist political process might more effectively promote the very substantive values federalism is supposed to serve than any attempt to enforce those values directly. It would also identify those features of the federalist institutions that might be susceptible to pathological developments.

We must begin, then, by outlining the general considerations that explain the importance of focusing on the inner dynamic of political processes. The reason why, without deeper reflection, it is easy to miss the point of a theory of political institutions that entails the idea that political structures and processes have their own, self-generated claims to autonomy is that most of us simply assume that government should serve the people. On this assumption and the one that the “people” is not a mystical, abstract entity but rather the sum of the individuals concerned, it can easily be shown that the well-being of individuals is the ultimate justification of any governmental arrangement or institution. It is only a step from this, in turn, to an approach that neglects the analysis of the structures of political life and concentrates on assuring that the individuals are protected against governmental abuse through a system of rights. Nevertheless, without ever questioning the self-evident proposition that governments are ultimately supposed to serve the people, it is not the case that all constitutional principles concerning institutional arrangements can be translated directly into the language of individual rights. Everyone, or at least every lawyer, seems to understand this when, say, a question concerning separation of powers is raised. Clearly, separation of powers was designed to prevent the oppression of individuals. Nevertheless, there exists no individual right, inhering in United States citizens as such, to have a government composed of the three branches listed in the Constitution. Indeed, separation of powers seems to have been conceived as an institutional arrangement precisely because it was thought unrealistic to expect that any system of individual rights
would be sufficient to guarantee that the government would respect those rights and that what the framers called “tyranny” would not ensue. The creation of some stronger interest than an individual one was deemed necessary for this, and supraindividual (institutional) bodies were created to watch over each other to forestall the rise of an oppressive government. The Framers seem in fact to have had such confidence in this institutional approach that they at first neglected to provide the alternative guarantees of individual rights, and many argued that the Bill of Rights was unnecessary. But even the enactment of the Bill of Rights did not change the fact that the two approaches—the institutional one and the one promoting individual rights—are profoundly distinct and that the foundation of the institutional approach derives from an acknowledgment of the autonomy of supraindividual bodies within any well-conceived constitutional theory. It is tempting, indeed, under the guise of avoiding mystification or through simple ignorance, to view political and institutional phenomena through the prism of individual relations. Quite sophisticated politicians are not unknown to have argued that budget deficits are bad because a family that goes too deeply into debt is bound to face disastrous consequences. Nevertheless, such a reductionist approach misses one of the fundamental verities of the political theory underlying much of our constitutional law.

In explaining why an institutional or group-oriented approach is a necessary complement to the individual-rights-oriented approach to protecting individuals, we do not have to rely exclusively on the insights of the Framers, valuable as they are, because there are also some very important data of more recent vintage that throw new light on many of the old problems. I have particularly in mind the achievements of the so-called theory of public goods, developed by modern economics and social science, which allows us to explain some peculiar features of institutional arrangements.

A “public good” is something that many people consider desir-

97 President Roosevelt is reported to have made this argument in this first presidential campaign.

98 The following discussion is heavily influenced by Olson’s The Logic of Collective Action (1965). Olson’s theory, which has potentially enormous implications with respect to many legal issues, has been rarely used by lawyers outside the law and economics area. For a summary of more recent research on the subject, see Hardin, Collective Action (1982).
able and would be willing to pay for but which has the following two characteristics: First, the good is of such a nature that once it is available it is not possible to discriminate between those who actually paid for it and those who did not by making the good available only to the former and not the latter. Thus, clean environment and living in a democratic society are examples of public goods, because once the environment has been cleaned up it benefits both those who paid for the clean-up and those who did not, and once a democratic government is installed it is not possible to take away most of its benefits from those who did not vote. Second, because a large number of contributors, each of whose contributions is relatively small, is necessary for the achievement of the good, no individual contribution "matters" by itself, that is, no individual's contribution can be said to be decisive with respect to whether or not the good will in fact be made available. Thus, for example, since almost no election is decided by one vote, it is extremely unlikely that any individual's voting or not voting will significantly affect the outcome of a large election.

The problem posed by the existence of public goods is that each self-maximizing individual has an incentive to "free ride" on the contributions of others in the achievement of any goods of this kind. Imagine, for example, that a contribution of no more than one dollar from each consumer of automobiles would be more than enough to organize a lobby that would successfully persuade the legislature to pass antitprotectionist laws that would lower the price of automobiles and benefit each consumer at least $100. Nevertheless, each self-interested consumer is tempted by the following reasoning: "If a sufficiently large number of other consumers contribute $1.00 each, the legislation will pass and I will gain $100 even if I don't contribute anything. If, on the other hand, a sufficiently large number of other consumers do not make their contributions, then even if I contribute $99.99 (the largest amount that it could still make sense for me to contribute), the legislation will not pass anyway and I will have simply lost my money. One

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99 By "willingness to pay" I understand the willingness to contribute not only a monetary payment but also any expenditure of time or energy that an individual may be ready to make to obtain the good in question. Thus, the time and effort required to go to the polls, for example, is something that an individual must "pay" for the exercise of his or her voting rights.
way or the other, therefore, I am better off by not contributing at all." As a consequence of such perfectly rational behavior it is clear that in a society composed of self-maximizing individuals, the provision of public goods will be inherently suboptimal: some, if not most, such goods will not be made available, even though each individual will be made worse off as a result. 100

It should be quite obvious—though the consequences of this fact are rather complex—that most benefits derived from a democratic government, and in particular freedom from governmental oppression, are public goods. It is, of course, possible for a government to discriminate among its subjects by conferring some benefits—including political or civil rights—on some people and not others, but at least insofar as the groups targeted for oppression are concerned, the availability of civic and political rights to some individuals is inextricably linked with their availability to others. Indeed, it is a well-known strategy of many oppressive governments to maintain their power over everyone by a policy of pitting their opponents against each other. And insofar as our views of freedom may link it to a certain amount of basic equality of rights among the citizens—surely a view congenial to the American constitutional tradition—the possibility that some, but not all, can be free may even be theoretically unsound.

At a minimum, then, success in protecting individual rights against a tyrannical government is a public good and its achievement may be seriously frustrated by the free-rider phenomenon. For while republican rhetoric often claims that to die in the struggle for freedom is an honor and a privilege, only a very few subjects of tyrannical governments seem to covet this distinction. Despite the claims made by such governments that the lack of resistance is a sign of popular support, the more plausible explanation is that individual acts of heroism, in the absence of some assurance that one's fellow citizens are going to join the resistance in sufficient

100 Note that the realization on the part of the free riders that this is indeed so is not sufficient to change anything. Thus, the common objection to free riding—"If everyone were to behave in this way (say, refuse to contribute $1.00 to consumer legislation), we would all be worse off"—is based on a fallacy since the free rider grants the truth of this statement but adds that, since his contribution is insignificant and since whether or not others contribute does not depend in any way on whether or not he contributes, it by no means follows from the objection just raised that he should contribute. It is important to understand that the free rider's answer is not a gimmick but rather expresses a real conflict between private and collective interests.
numbers to offer at least a chance of success, are perceived as wasted efforts. Those who are willing to pay the greatest price for regaining their freedom turn in such situations to organizing their fellow citizens rather than to overt acts of disobedience.

A theory of organization as the most effective weapon in defeating the free-rider phenomenon is thus, not surprisingly, one of the most important aspects of the public-goods theory. In general, the free-rider phenomenon can be overcome, in the absence of significant moral or other altruistic motivations, only by a modification of the incentives of some or all the potential beneficiaries. Outright compulsion—in the form of a threat of violence or other retaliation for noncontribution—is one form in which such incentives are modified. Peer pressure, in cases in which the fact of noncontribution is known and exposes the noncontributor to disapproval of those with whose opinions he must reckon, is another. Tying one's contribution to those of others, as when, for example, a donor to some cause promises to match the contributions of other donors, is also a way of diminishing the incentive to free ride. Finally, a creation of some additional benefit, other than the public good, that a contributor may derive from his contribution (such as the availability of a special insurance offered only to dues-paying union members) is sometimes an effective way of overcoming the free-rider phenomenon. But if the group of potential beneficiaries is large and diffuse enough for peer pressure not to have great significance, the employment of all these incentive modifications can be effective only when the group is organized.

To begin with, an organization with some financial means at its disposal is able to hire a group of persons who, being paid, have a special incentive to devote much more time and energy to the cause of achieving the public good in question than would be rational for any individual with only limited stakes (such as the consumer of automobiles who can gain at most $100 from antiprotectionist legislation). Second, once an organization with established links to the group members exists, the cost of identifying all potential contributors and of disseminating information among them is greatly reduced and this is often the single most important cost involved in

101 Thus, the state, by providing criminal penalties, modifies the incentive not to pay taxes; a labor union, by threatening violence, modifies the incentives of strike breakers.

102 See Olson, note 98 supra, at 72–73.
bringing a collective effort to fruition. Third, the existence of special benefits to modify the incentives of individual contributors is very often already implied in an existing organization, as when the approval of church authorities is an important factor in the motivation of individual members, and the devising of new special benefits of this kind is greatly facilitated. Finally, while the threat of violence with respect to noncontributors may be prohibited by law, a whole host of sanctions may be available to an organization the members of which derive some independent benefits from their membership.

While the existence of an organization is the single most important factor in enhancing the effective achievement of a public good, it is at the same time the most difficult to bring about. Not only are the initial costs of organizing the highest, but also the incentives of any member of an unorganized group to incur them are the lowest. Once an organization is in place, on the other hand, it tends to develop a set of incentives, both for the leadership and the rank-and-file members, to perpetuate and expand the existing structure, so that the efficacy of collective action is radically improved. And it is this set of factors that explains why an institutional approach to protecting the well-being of individuals is a necessary complement to an individual-rights approach. For, if most benefits of democracy are public goods, and if organization is necessary for their effective defense, it is logical, in structuring a constitutional order, to make sure that in addition to any protection of individual rights, an institutionalized framework is always available for the protection of the collective interest of the individuals who might find themselves threatened with exclusion and exploitation. In fact, the solutions adopted by the Framers are best analyzed in light of this consideration.

But while the process-oriented approach to constitutional law confers an independent status on institutional arrangements and does not permit a direct translation of the talk about institutions into a language of individual rights, it is also incorrect to say, as

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103 It is to be noted, however, that even the individual-rights approach, insofar as it does not simply confer entitlements on individuals but rests on a creation of a judicial machinery of enforcement, contains an important element of institutional support. It was, however, the inherent weakness of judicial institutions, when not backed up by more complex political arrangements, that made the Framers look beyond them.
some commentators have argued\textsuperscript{104} and as the Garcia Court sometimes implies with respect to federalism, that the Framers' choice of a primarily institutional approach to the protection of constitutionally significant values and interests renders those values and interests inherently "political" and, in the absence of specific constitutional provisions in favor of individuals, unsuitable for judicial enforcement. In fact, an argument of this kind would constitutionally degrade those very objectives and purposes which, while peculiarly incapable of conceptualization in terms of judicially enforceable individual rights, may lie close to the core of constitutional government. For the very essence of the process-oriented approach is that certain fundamental values cannot be sufficiently protected by a conferral of entitlements on individuals, either because their enforcement would be inefficient or because the courts would lack any manageable standards of adjudication. But precisely because the values at stake are fundamental, if some institutional arrangements can be devised to protect them indirectly, such arrangements may themselves become a part of the constitutional structure and their protection (insofar as it does not raise the difficulties related to the enforcement of a corresponding individual right) might be vested in the judicial department rather than left to the vagaries of momentary political expediency.\textsuperscript{105} Thus, while the courts would, for the most part, respect the outcomes of the political process, they would also police it by making sure that the process does not distort

\textsuperscript{104} See note 16 \textit{supra} and accompanying text.

\textsuperscript{105} According to two prominent scholars, such was indeed the reason why \textit{National League of Cities} protected the integrity of state governmental institutions. Tribe, Unraveling \textit{National League of Cities}: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065-1104 (1977); Michelman, States' Rights and States' Roles: Permutations of 'Sovereignty' in \textit{National League of Cities} v. Usery, 86 Yale L.J. 1165-1195 (1977). It was the claim of Tribe and Michelman that the immunity granted to state governments in \textit{National League of Cities} should be understood not as deriving from the federalist concerns of the Tenth Amendment but as a roundabout way of protecting an individual right to governmental services provided by the states and threatened by federal action in the absence of a separate national commitment to the provision of such services by officials accountable to local constituencies. For an argument that an individual right to essential services might be implied by the Constitution, see also Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969). But both Tribe, \textit{supra} at 1092, and Michelman, States’ Rights, at 1178, 1183, admit that any judicial effort to enforce the right to essential services would encounter great difficulties. Thus, even if one were to accept their claim that one of the main functions of federalism is to assure the provision of services to individuals, it would be more appropriate to view Tribe's and Michelman's defense as a second-order theory of federalism, rather than an argument for the existence of an individual right to essential services.
the functions assigned to it by the Constitution. And it is very much in this light that, in the wake of the *Garcia* decision, we should look at the function of the states within the federal system.

IV. THE FUNCTION OF THE STATES WITHIN THE FEDERAL SYSTEM

Having developed the general idea of process jurisprudence endorsed in the *Garcia* case, I shall now move to a more concrete discussion of the functions assigned to the states in our constitutional system. My purpose is not to come up with some entirely new rationale behind the federal structure of American government, but rather to examine its oft-mentioned justifications in the light of the process-oriented approach and to clarify the way in which federalist institutions were designed to serve the fundamental values envisaged in the Constitution. What will, I hope, emerge from my discussion is that the intellectual agenda endorsed in the *Garcia* case, when properly carried out, is by no means inimical to the protection of the integrity of state political processes recognized in *National League of Cities*, despite the seemingly contradictory holdings in these two cases. In examining the most important functions of the states within the federal system, we should keep in mind the two prongs of inquiry necessary to bring out the full implications of *Garcia*: the identification and analysis of the political processes by which federalism protects important constitutional values and the identification of potential failures or shortcomings in the national political process which may endanger the vital role of the states in the constitutional scheme.

A. TYRANNY PREVENTION

1. *Governmental pathologies and the role of the states*. Perhaps the most frequently mentioned function of the federal system is the one it shares to a large extent with the separation of powers, namely, the protection of the citizen against governmental oppression—the "tyranny" that the Framers were so concerned about.

The fear expressed rather generally at the time of the adoption of the Constitution was that the central government, ruling over a large territory and population, would be far removed from the people and would rely on a caste of bureaucrats and politicians,
wielding an enormous governmental machine that could be turned against the interests of individuals and used to build a Romanlike empire. The odds of such a turn of events did not appear incon siderable in light of historical experience. The history of Rome was, after all, not a bad analogy. Like the American colonies, Rome was essentially a small country when the republican system was installed. Like America, the republican Rome was a rapidly expanding country, with respect to both territory and population. The new wealth, the need for an enormous military and administrative machine, the disintegration of traditional communities and of the old class structure, the rapid growth of external cultural influences—all these factors, which were ultimately responsible for the decay of the Roman Republic and the birth of the Empire, also seemed a fair prospect for the United States. More recent, and equally unhappy, experience was also available—since in all European countries (except for England) in which governmental centralization had been successfully accomplished, its concomitant was the development of absolutist royal authority. Finally, shortly after the adoption of the Constitution, the experience of the French Revolution, with its bloody transition to the Napoleonic system, provided quick confirmation of the possible dangers of centralized authority.

As I have explained, the Framers did not believe that a bill of rights was a sufficient guarantee against the danger of “tyranny,” and they insisted in the first place on institutional rather than individual-rights-oriented solutions. Some of these institutional arrangements were quite specific, such as the provision for civilian control of the military, but most had a more general purpose of fragmenting governmental authority and of creating special interest groups. In this category, next to the separation of powers, federalism plays the most important role.

106 Bailyn et al., The Great Republic 335-36 (1977); Storing, What the Anti-Federalists Were For 15-23 (1981). For the hold of antiquity on the Revolutionary generation, see Wood, note 34 supra, at 48-53.
107 See text preceding note 97 supra.
108 Art. I, Section 8, prohibits appropriation of money to raise and support armies for a longer term than two years; Art. II, Section 2, makes the President Commander-in-Chief of the armed forces; Art. I, Section 6 prohibits persons holding office under the United States to be members of either House of the Congress or (per Art. II, Section 1) presidential electors.
There are three somewhat different scenarios of governmental oppression that the Framers seem to have had in mind when they spoke of the danger of "tyranny." First, they were clearly concerned that a small minority might be oppressed by a sufficiently homogeneous majority. Second, they were concerned with the danger that a few powerful minority interests might gain ascendency over the political process and exploit the rest of society. And third, they were afraid that a powerful central government may itself develop its own separate interest and oppress the citizenry.

With respect to the first two scenarios, Madison, the most profound and influential thinker among the Framers, believed that the very size of the population subject to the national government made it less likely that oppression would result.\(^\textit{109}\) Madison's point was rather straightforward: if you increase the number of people involved, there will be a greater variety of interests and, consequently, a lesser chance of one faction acquiring a monopoly on political power or of a sufficiently large number of interests entering into a viable and stable coalition. At first sight, Madison's reasoning is not without problems, especially in the light of some modern developments. There is a rather old argument that in a large state a great number of people are removed from direct participation in politics and that the absence of active citizenship makes great masses of people susceptible to political demagoguery.\(^\textit{110}\) Whatever the historical truth of this observation, it seems to acquire additional support in the light of the more recent phenomenon of "mass society." If it is indeed true that technological progress is a great leveler and that it eliminates a great number of traditional, regional, and professional differences among people, then the resulting uniformity, unknown in the smaller societies of old, may contradict Madison's optimistic reliance on the diversity of factions in a large state. Nevertheless, the public goods theory comes to shore up the Madisonian point to some extent. In a large society, regardless of the uniformity of interests, there is a lesser chance that any one interest large enough to aspire to the monopoly of power can achieve an effective level of organization. Since the more numerous the interest group the more difficult and costly it is

\(^{109}\) The Federalist Papers, No. 10.

\(^{110}\) The argument goes as far back as Plato's Republic, 564c–566d. For a modern version, see Sartori, Democratic Theory (1962).
to organize, small interests have a natural advantage over large ones and the "mass society" phenomenon is to some degree counteracted by the very size of the masses involved. Thus, despite the perhaps greater uniformity of modern societies, numerically small interest groups that possess a high degree of cohesion or whose members are easily identified are not particularly threatened by majoritarian oppression.\footnote{As Professor Ackerman has pointed out, note 71 supra, this indicates a serious flaw in the argument, based on the \textit{Caroleene Products} footnote, that racial minorities deserve special legal protection because they are "insular and discrete." While I do not, of course, wish to imply that these minorities do not deserve special protection, their discreteness and insularity, given that it helps to assure their political representation, tends to argue against, rather than for, such special solicitude. This might also be the reason why judicial protection of individual rights is relatively effective in preventing the oppression of discrete minorities. Given the difficulty of forming stable and cohesive majorities in a large society, oppression of small, better organized groups is likely to be exceptional and sporadic. The courts, which may have difficulties in resisting systematic majority policy, can, without undermining the perception of their legitimate role, correct such sporadic excesses.}

If this were the whole story, one could say perhaps—along with many liberal thinkers—that the primary means of preventing the oppression of some interests by others consists not so much in devising an elaborate structure of government as in making sure that extragovernmental, social organisms are allowed to grow undisturbed and watch over each other. By simply assuring that the access to the machine of government remains open to those who want to influence its policies, one will then also assure that those policies will reflect a wide range of interests and that no significant majority will be systematically excluded from the benefits the government provides. By adopting the principle of majority rule, therefore, one would in fact endorse the reality of genuine pluralism.

But unfortunately, this is not the whole story, and the most important complications arise because of the disparity between the short- and long-term dynamics of social growth and because of the role that the government itself can play in this development. While the public-goods theory tells us that, all things being equal, small interests are easier to organize than larger ones, it also tells us that existing organizations have a definite advantage over still unorganized interests and that even originally weak organizations have a tendency to grow and become stronger if they can devise mechanisms, such as a hierarchical structure, individualized incentives,
and so on, to counteract the free-rider phenomenon. This, in turn, means that the social structure of a large state tends, in the long run, to ossify into a relatively small number of powerful interests that come to dominate the political scene.\footnote{\textsuperscript{112} For the tendencies of social structures to ossify, see Olson, The Rise and Decline of Nations: Economics and Growth, Stagflation and Social Rigidities (1982).} This phenomenon is quite disturbing in itself since it undermines our confidence in the ultimate representativeness of a government, which is in fact beholden to a few powerful interests. The phenomenon also decreases the likelihood of needed reforms that may be in the general interest of the community at large but not of those groups that are most powerfully entrenched in the status quo. Even more disturbing is the prospect that a small number of powerful interests may derive their strength not so much from having their wishes disproportionately reflected in governmental policies as from using the machine of government, specifically designed to defeat the free-rider phenomenon through its power to coerce, to reinforce their own internal cohesion or to prevent the competing interests from effective organization.

But while the threat of the government’s being used by a few powerful interests (or perhaps even one) to oppress the rest of society was very much in the minds of the Framers, of even more importance in our own time is the third scenario of governmental oppression they envisioned, that of the government itself becoming the most powerful special interest, which can devour those whom it is supposed to serve.\footnote{\textsuperscript{113} For a view that this third scenario was also the most prominent in the thought of Madison, see Carey, Separation of Powers and the Madisonian Model: A Reply to Critics, 72 Am. Pol. Sci. Rev. 151 (1978).} At any time, a government is more than a merely passive vessel through which flows the diversity of private interests. Like any large organization, it has many members who have a special interest in their own position within the organization as well as in the power of the organization itself. And while any organization tends to develop its own institutional interests and cohesion independent from the interest of the individuals it is supposed to represent, the more amorphous the organization’s constituency the more likely is this tendency to grow. The government machine, being very hierarchically structured, possessing an enormous ability to strengthen its own cohesion, having the most amor-
phous constituency of all (citizens in general), and having a virtual monopoly on coercion, is more than likely, in the absence of other centrifugal forces, to be a potential threat in any society. The threat intensifies, however, when the traditional liberal policy of restricting the government to a few limited tasks is no longer feasible and the expansion of the "activist state" is necessary to accomplish a whole gamut of tasks that can no longer be entrusted to an unregulated private sector. Not only does the government then become a primary dispenser of some of the most valuable resources\textsuperscript{114} but also the variety of competing private interests, on which the liberal model so heavily depended for the prevention of governmental oppression, becomes increasingly dependent on government policies for their survival and subject to often minute governmental regulation.\textsuperscript{115} One needs no reminder of the horrors of totalitarianism to realize the dangers that this process entails if the wheels of the modern governmental machine were to turn against the individual members of the community.

How is federalism related to the Framers' objective of preventing the three-headed specter of tyranny? Many American liberals tend to look with skepticism on the states as the protectors of individual freedom and they point to a whole host of situations in which the states, much more than the federal government, have engaged in practices violative of individual rights. Quite apart from the special problem of racial discrimination, which is historically tied to the regional character of slavery in the United States, there are in fact good reasons to believe that the states represent a more direct threat than the national authorities to the rights of small minorities and that the states have only a secondary role to play in protecting such minorities—so long as these minorities are not geographically defined. The explanation for this lies in the fact that local constituencies are much more homogenous and cohesive than the national one, both because their members share more common interests and values and because, the constituencies being less numerous, stable majoritarian interests are more likely to exist within

\textsuperscript{114} For the role of the government-dispensed largesse and the concomitant transformation of the type of resources on which the livelihood of individuals depends in contemporary America, see Reich, The New Property, 73 Yale L.J. 733 (1964).

\textsuperscript{115} For the role of the state in running the corporate America, see Berle, Property, Production and Revolution, 65 Colum. L. Rev. 1 (1965).
them and to be easier to organize. Consequently, at least insofar as the first of the Framers' scenarios of governmental oppression is concerned, state governments are more likely than the national one to be captured by powerful majoritarian interests and to oppress small minorities with little power to resist. In this light, the Civil War Amendments, with their emphasis on the federal protection of individual rights, acquire a justification independent of the particular circumstances of their adoption. For the federal government, being less likely to be dominated by one majoritarian interest, seems better suited than any political forces within the average state to guarantee the basic equality of treatment to state citizens (most commonly by the enforcement of the federal Bill of Rights).\footnote{It is significant in this context that the federal action under the Fourteenth Amendment was not subject to the limitations imposed in the \textit{National League of Cities} on the exercise of the Commerce Clause powers. \textit{City of Rome v. United States}, 446 U.S. 156, 179 (1980).}

But if the liberal mistrust of the states' power is partially justified in this way, the more comprehensive neglect on the part of liberals of the importance of the states for the prevention of governmental oppression is somewhat myopic. To begin with, while the states are more easily captured by relatively undifferentiated majoritarian interests intent on suppressing small minorities, 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. The problem that this raises is not only that those particular interests that are shared by the majority (such as the interest of the consumers, for example) may be systematically underrepresented on the federal level, for there may be few such interests in a country as diverse as the United States. A more disturbing prospect is that the ossification of the social structure may result in a virtual exclusion of quite a large number of diverse interests that suffer under all kinds of organizational disadvantages but which together constitute a majority the federal government is supposed to serve. And here the existence and vitality of local governments may provide an important counterbalance to the constellation of forces on the national level.

It is quite easy to see how a system weighted in favor of local interests (either through the importance of state institutions or through a regional representation on the national level) will provide
an institutional support to geographically defined groups that may be subject to exclusion or exploitation by the more powerful regions. But it is no less important to see that the existence of a strong system of local government may also modify those divisions between the potential ins and outs that are essentially social in nature (such as between the traditional and new industries, organized and unorganized labor, producers and consumers, and so on) rather than primarily geographically determined. As I have noted, the very scale on which an organization must succeed before it gains meaningful access to the political process and can use the machine of the government to improve its position vis-à-vis other groups is very often decisive with respect to whether an effective collective action takes place. It is thus quite likely that an effort to exclude certain groups may be more successful on the federal than on the state level and that maintaining the domination of an already existing power elite is much more difficult on the local level. Insofar, then, as a large proportion of governmental benefits is dispensed on an independent local level or as the constellation of forces on the local level determines the influence on the national level, the danger of minoritarian oppression is significantly diminished.

A simple example might bring this out. Suppose that an existing union movement, which is very well entrenched on the federal level, is committed to supporting traditional industries, where its leadership has the greatest power base, and systematically neglects the interests of a newer type of employee, mostly white collar and working in the service sector. In a situation of this kind, the likelihood of successful organization of the white-collar workers is rather small, even on the local level, if the only reward to be expected is a certain measure of influence over one or two federal politicians. If, however, independently of any influence on the federal level, a local white-collar organization can expect to influence in a significant manner a great number of state legislators, then the possibility of effective collective action increases because the resulting state legislation will immediately deliver tangible benefits to the new union as well as strengthen its organizational status (by, for example, outlawing some employer practices or allowing closed-shop

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117 In elaborating this example, I want to make a general point. I will consequently ignore the complexities that would be introduced if one were to consider the impact of actually existing federal labor legislation.
contracts). Given this incentive modification, it is much more likely that the new union will be successful in an increasing number of states and ultimately will make itself felt on the national level.

There are at least three important lessons that may be drawn from this example. First, the existence of effective local authorities is an independent factor in allowing certain vital interests to organize. Second, the health of the national government crucially depends on the preservation of those local authorities, for otherwise the national government is much more seriously threatened with ossifying into a mouthpiece of a few powerful special interests. And third, if federal legislators are primarily tied to the constituencies that elect them (that is, in practice, to the already—often nationally—organized interest groups in their districts), then they do not have any special incentive to strengthen the state governmental machinery which may be the most important factor in readjusting the local configuration of forces that in turn influences the actions of the national representatives. In fact, the already established national interests, threatened by their new competitors on the local level, may look to their still unbroken power on the national level to remove their competition by a federal preemption mechanism or by causing the national authorities to interfere with the state governmental operations and prevent the victory of their opponents on the local level.118

But the most influential protection that the states offer against tyranny is the protection against the special interest of the government itself. For the fact that the federal government may be less likely than the states, in what we may call "normal times," to oppress small minorities whose mode of life offends a homogeneous majority does not mean that it is never likely to oppress them as well as to deprive the citizenry as a whole of their legitimate voice in running the national affairs. Should the federal government ever be captured by an authoritarian movement or assert itself as a special cohesive interest, the resulting oppression would almost certainly be much more severe and durable than that of which any state would be capable. In such a situation, both private individuals and private-interest groups prepared to defend their rights would face very grave organizational obstacles and could not provide any-

thing even approaching in effectiveness the resistance that may be offered by a governmental institution, endowed with the power of coercing those who may lack a sufficient individual motivation to contribute (if even only financially) to the common good. It is precisely because the states are governmental bodies that break the national authorities’ monopoly on coercion that they constitute the most fundamental bastion against a successful conversion of the federal government into a vehicle of the worst kind of oppression.119

Viewed from this perspective, freedom from federal interference enjoyed by state governmental machinery, and especially by those of its organs that potentially provide the easiest means by which the citizenry can organize itself against a tyrannical movement on the national level, turns out to be a value quite independent from any limitation of the federal power to regulate any substantive field of private activity. While traditional liberal doctrine relied quite heavily on the exclusion of government from most private activities and hoped to guard us in this way from tyrannical overreaching, the realization of the pervasiveness of market failures in a complex, advanced society has made the doctrine of laissez-faire of less use under modern conditions. Similarly, the increasing interdependence of social and economic problems on the national scale makes

119 Despite all the differences between the American and German federal systems, an interesting lesson supporting our conclusions may perhaps be drawn from the experiences of Germany around the time of the Nazi takeover. In post-Bismarckian Germany, the state of Prussia constituted two-thirds of Germany's territory and three-fifths of its population, and it had its own police force of close to 90,000 men. In 1932, when the Nazi threat was very clear and the German Right embarked on its fateful policy to tame Hitler—the policy that was ultimately to lead to the Nazi seizure of power—the Prussian government was controlled by the Social Democrats intent on entrenching their own power and keeping the Nazis from taking over. Faced with this, the Right, which controlled the central, Reich, government, placed Prussia under martial law, removed the state government, and appointed a special Reich Commissioner to rule by decree. The Prussian government appealed the constitutionality of this move and, after a celebrated trial, the Staatsgerichtshof, despite an apparently Solomonic ruling, failed to preserve the Prussian autonomy. As a consequence, the confidence in Weimar institutions was drastically undermined, the Social Democrats lost the real control of Prussia, and a few months later the Prussian police, under the control of Hermann Goering, was instrumental in the Nazi intimidation of political opposition and enabled Hitler to establish himself as a dictator in Germany. One of his first acts was to destroy the remaining state governments. For the account of the trial, see Bendersky, Carl Schmitt—Theorist for the Reich, 175ff. (1983); for the whole episode, see Grund, "Preussenschlag" und Staatsgerichtshof im Jahre 1932 (1976); for its effect on the Weimar Republic, see Bullock, Hitler: A Study in Tyranny, 214–15 (1964); for the lessons drawn by Germany after World War II, see Fromme, Von der Weimarer Verfassung zum Bonner Grundgesetz, Tübinger Studien zur Geschichte und Politik, 142–43 (1960).
it unrealistic to expect that the federal government can be kept away from regulating the ever increasing details of what had previously been thought to be essentially local activities. In this situation, when it is no longer an option simply to resist most forms of federal involvement in the private sector, the federalist idea of the separation of the national and local governmental institutions acquires more, and not less, significance for the prevention of governmental oppression. For the independence of the very process of state government, without seriously hampering the national authorities in regulating most private activities, assures the existence of an organizational framework, more efficient than any private institution could provide, that may always be used as an effective tool for bringing together otherwise defenseless individuals with some stakes in resisting the overreaching of the national government. The value of this organizational apparatus thus lies not so much in any of its concrete regulatory activities that the national government could not do as well (or better), as in the very fact that it eliminates the national monopoly on the power to coerce. Moreover, it is this feature of the federal system that distinguishes it most clearly from other forms of decentralization. An intelligently structured unitary national government can probably accommodate the need for local experimentation by giving its local branches a degree of discretion in applying national policies. Such a government may also perhaps draw on local talent or involve many local interests in the formulation of the national policy. But only in a system in which some forms of governmental authority exist independently from one another, and not as emanations from a single source of legitimate power, is the monopoly on coercion truly broken. It seems not unreasonable therefore to see this break as the essence of the American federal system and to acknowledge its

120 The vertical separation characteristic of the federalist system may become even more important under modern conditions, given the evolution of the separation of powers on the national level. For the complexity of the national government's task in contemporary America necessitates a far greater degree of cooperation between the three branches of the national government and often requires that the day-to-day task of regulation be conferred on a whole host of agencies that combine legislative, administrative, and judicial functions. Without denying the continued importance of maintaining the constitutional lines of division between the three branches as well as those between the federal government and the states, the tendency of all governmental institutions to interlock requires an increasingly fine tuning of the constitutional theory to preserve the balance required to avoid governmental oppression. In this situation, the continued neglect of the federalist ideas among constitutional lawyers may be more dangerous today than ever before.
constitutional status, not subject to the vagaries of ordinary political arrangements.

2. The failures of national representation. The idea that the independence of state political processes is an essential feature of American federalism was, of course, at the heart of *National League of Cities*, although it was largely obfuscated by being draped in the mantle of state sovereignty. And, despite the explicit overruling of *National League of Cities* by *Garcia*, the recognition of the states’ role in preventing governmental oppression can not only withstand, but is in fact strengthened, by the process-oriented analysis endorsed in *Garcia*. The extent, however, to which a judicial enforcement of federalist concerns can be incorporated into the *Garcia* rationale depends on how the Court will interpret *Garcia’s* focus on failures of the political processes at the national level as the exclusive justification of any future judicial intervention.121

What is exactly meant by a “process failure” that *Garcia* makes into a condition of judicial intervention? The easiest answer would be to say that the national political process functions flawlessly, from the constitutional point of view, when the states’ formal role in choosing the national representatives (their role in the Senate, in drawing the boundaries of Congressional districts, or in choosing Presidential electors) is not impaired, and that only such an impairment would give grounds for judicial intervention. But this answer—which would simply amount to a repudiation of judicial responsibility in the area of federalism—would represent a very poor application of process jurisprudence, unless one were also to show that there could be no other features of the national political process that could seriously endanger the constitutional function of the states within the federal system. In fact, however, it is rather easy to show that there are very serious incentives built into the very system of national representation that would make the exclusive reliance on the mere composition of the national government for the protection of the states’ tyranny-prevention functions quite misplaced. A brief analysis will bring this to light.

The tyranny-prevention functions of state governments that we have identified are, roughly, three (in increasing order of import-

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121 “Any substantive restraint on the exercise of Commerce Clause powers ... must be tailored to compensate for possible failings in the national political process.” 105 S.Ct. at 1019–20.
The protection of geographically defined minorities; the facilitation of the expression of those interests that face organizational disadvantages if they have to succeed on a very large scale; and the provision of an organizational framework for resisting a wholesale attack on individual freedoms by the federal government. The question then is whether the role assigned to the states in the composition of the national government is by itself sufficient to prevent those forms of federal interference with state governmental processes that may impede the states in performing the three functions identified.

The least problematic aspect of concentrating on the composition of the federal government is the reliance on the local representation on the federal level for the protection of geographically defined interests. Even if state governments were not available to give expression to such interests, the American system of representation, unlike proportional representation or the British party system, makes the link between a representative and his district into the strongest determinant of his voting behavior. But already with respect to the facilitation of the expression of those interests that are not local in nature, but which may face organizational obstacles if they must succeed over wide geographical areas, the simple fact of local districting will likely not suffice for those interests to make themselves heard. For, as I have argued earlier, large and well-established interests have a definite advantage on the national level, and it is primarily the possibility of using state governmental machinery as a counterweight to the federal government that gives the less well-organized interests their fighting chance. It is therefore not only insufficient for newer interests to count on their capture of a few national representatives to realize their goals but also there are good reasons to believe that the very challenge by newer interests on the local level provides an incentive for the older interests to use their influence on the federal level in order to weaken state governments and thus to disarm their opponents.

This does not mean, of course, that the state governmental ma-

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123 See text supra at note 112. See in particular the example given in text following note 117 supra.
chinery, with its capacity to propel aspiring politicians to power or its ability to influence the shape of congressional districts, does not have a considerable impact on the behavior of national politicians. Nevertheless, ever since the adoption of the Seventeenth Amendment (providing for direct election of Senators), and in particular during the last thirty years, there has been a marked decrease in the dependence of the national representatives on the processes of local governments and an increase in their reliance on both national and local private interests. There is also, perhaps not accidentally, a radical increase in the federal government's tendency to regulate the states themselves, either through a system of commands or conditional spending, which makes the very operations of state governments increasingly dependent on federal decisions. Faced with this situation, it would be quite fatuous to rely on the mere composition of the federal government as a sufficient defense against a minoritarian ossification on the national level.

Many of the same reasons counsel against the hope that the mere composition of the federal government would protect the states in their role of providing an organizational framework for resisting a potential tyranny by the federal government itself. To be sure, the primary constituencies of the national representatives, along with most of the citizenry, probably have an interest in preventing authoritarian oppression, and, in extraordinary circumstances of a direct authoritarian assault on the constitutional system, those national representatives who might be inclined to resist would also try to lean on state governments for support. But it is also the case that in normal times, in which most of the pressure to erode the independence of the states is exerted, the primary constituencies of the national representatives may, as we have seen, be precisely those that advocate an extension of the federal power to the disadvantage of the states. As one scholar observed, "[N]o one expects Congress to obliterate the states in one fell swoop. If there is any danger, it

124 See Kaden, note 78 supra, at 857-68. Among the factors listed by Kaden as influencing this change are: the role of mass media, the decreasing role of the states in shaping electoral districts, the increasing importance of incumbency, the decreasing role of the party machine, the changes in campaign financing, and the increasing role of the federal government.

125 For a review of this process as well as the empirical studies of it, see ACIR, Regulatory Federalism: Policy, Process, Impact and Reform (1984). The ruling of National League of Cities, when still in effect, had only a limited impact of this tendency. Id. at 38ff.
lies in the tyranny of small decisions."

126 which may over time remove the states as a force to reckon with in the national politics and prepare the ground for a tyrannical assault. It is thus clear that the national government, even when it operates "normally" and the states' role in its composition is not impaired, is capable of endangering the values underlying the federalist system. But if in all this the national government operates "normally," in what sense can a judicial defense of state interests still be viewed as correcting for a "failure" of the national process, rather than as imposing an external constraint on this process (a constraint rooted, for example, in the Tenth Amendment)?

I have said127 that it does not strike me as extremely important whether the constitutional protection of federalism is textually rooted in the Tenth Amendment or in the main body of the Constitution. What is more important is that it be anchored in a comprehensive theory of the governmental processes set up by the Constitution and that it provide intelligible standards of adjudication. But with this caveat, it is by no means inappropriate to speak of a "failure" of the national government when its operation undermines the constitutional role of the states. The primary reason for saying this is that, in undermining the states, the federal government at the same time undercuts those very features of the national political process as a whole (both on the state and national level) on which its own health crucially depends. To repeat, the main thrust of the states' tyranny-prevention function is to guard against the minoritarian ossification of the national government and the possibility of its tyrannical degeneration. On both these counts, the very representativeness of the federal government and its own robustness depends on whether the states are afforded adequate protection.

To be sure, the "process failure" that I have identified is not a result of any simple "mistake" on the part of the Framers. It rather reflects an inherent tension in our constitutional system between the desire to assure the independence of the federal government from the states and at the same time to preserve the states as vital protectors against national overreaching. It was inadvisable to strengthen the link between the federal representatives and the

127 See the text following note 78 supra.
state governments, for this would impair the necessary power of the national authorities, but it was also impossible to rely on the composition of the national government as an exclusive remedy against a federal assault on the states. Still, even if the composition of the national government is inherently biased against important interests of the states, it would be in the name of keeping the federal political process open and healthy that the judiciary would oversee its policies toward the states.

Finally, it should be noted that the more sophisticated concept of process failure under examination is in full accord with the general trend of American process jurisprudence. A comparison that comes to mind would be a judicial decision to scrutinize closely an outcome of the political process that impairs the channels of communication necessary for its own future health or discriminates against minorities that face organizational obstacles in getting a fair share of governmental benefits. In both these cases, as in the case of a federal action endangering the states, it would be impossible to say that, as long as the formal requirements of representation are satisfied, the courts should stay out of the conflict because the process did not fail. For in all such cases, the responsible governmental authorities—designed to fulfill a great variety of tasks and not geared to any one of them exclusively—may occasionally fail with respect to an aspect of their constitutional mission. It is to be hoped therefore that Garcia's focus on the political process at the federal level will not be misunderstood and undermine its promise of a new jurisprudence of federalism. 128

B. PROVIDING A SPACE FOR PARTICIPATORY POLITICS

The value of citizen participation in governmental operations has often been stressed in legal literature and its enhancement has often

128 Garcia itself clearly accepts the possibility that the process failure required for judicial intervention may be of the kind we have identified, for its statement that "[a]ny substantive restraint on the exercise of Commerce Clause powers . . . must be tailored to compensate for possible failings in the national political process" is made in response to (and acknowledgment of) the argument that the "changes in the structure of the Federal Government . . . since 1789, not the least of which . . . the adoption of the Seventeenth Amendment . . . may work to alter the influence of the States in the federal political process." 105 S.Ct. at 1019-20. If the only cognizable process failure were to consist in depriving the states of their formal representation required by the Constitution, it would be, of course, impossible to argue that the adoption of the Seventeenth Amendment (which is an integral part of the Constitution) could lead to any process failure in this restrictive sense.
been viewed as one of the most important purposes of federalism. But the objectives of citizen participation are usually seen as clustered around such things as the facilitation of the flow of information between the citizens and the government, improving the efficiency of governmental decisions, and the enhancement of the accountability of public officials or of the public acceptance of governmental decisions. Viewed in this way, citizen participation appears, above all, as a means of strengthening the representativeness of governmental institutions and enhancing the perception of its legitimacy. This view has much to recommend it and fits quite well with the general inclination of the proponents of process jurisprudence to focus on the role of undistorted representation for the expression of the will of the majority; nonetheless, the view ignores the independent significance of citizen participation that may have been one of the controlling considerations in the Framers’ thinking about federalism. In this context, citizen participation is understood as a separate process of direct self-government, quite distinct from the very idea of representative democracy.

1. Representation-enhancing participation. Even in arguing that citizen participation strengthens and legitimizes the representativeness of governmental institutions—that is, in viewing participation primarily as a means rather than the end of political life—the legal literature remains most often at a common-sense, largely anecdotal level of analysis that tends to ignore much of other disciplines’ (above all, political science’s) learning on the subject and is likely to miss some of the less obvious problems with its arguments. The


130 See, e.g., ACIR, Citizen Participation, at 2, 62–64.

131 It is in this way that the concept of participation functions in Ely’s version of the process theory. Ely defines the goals of participation as those of the “broadened access to the processes and bounty of representative government.” Ely, note 70 supra, at 74. See also id. at 75, footnote. An exception to such an instrumental view of participation in legal literature may be found in Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1057 (1980).

132 The level of sophistication of the legal literature on the subject is not, however, uniformly low. Thus, for example, the ACIR study on Citizen Participation, while making little use of the more theoretical sources, contains a wealth of interesting data and insightful analyses. But no effort is made in the ACIR study to relate this to the constitutional dimension of federalism. The constitutional problems of federalism are to some extent addressed in another ACIR study, Regulatory Federalism: Policy, Process, Impact and Reform (1984), but with little attention to the issue of participation.
operative assumption in most of these discussions is, again, that the government should serve the interests of the people and that the "closer" it remains to the people, the better it is likely to succeed. Citizen participation being the method of involving the people directly in the affairs of the government, it must be a good idea.

Undoubtedly, there is much truth in these observations but also much that is problematic. Even if we do not question the assumption that the interest of the "people" is ultimately identical to the interest of individuals, it is by no means clear that individuals themselves are best able to articulate the types of considerations that will most affect their interests or identify the decisions that will maximize them. In fact, one of the basic tenets of the classical theory of representation is that it is both wasteful and dangerous for the masses to busy themselves with the complex matters of policy making that may be better handled by professional politicians who choose this as their full-time occupation. Naturally, a certain element of outside control on the political process is necessary for preventing its authoritarian degeneration, but what the required level of such control is and who will best exercise it are matters of considerable complexity. While there is not much controversy among political scientists that the electoral process plays an important role in this respect, even on this score there is much evidence that the extent of popular participation in elections is not necessarily a sign of the government's political health or legitimacy. There are also persuasive arguments that too much electoral control may in some situations unproductively divert the efforts of the legislators or make them systematically ignore those issues that

133 For the problematic nature of the concept of the "people," see, e.g., Schumpeter, Capitalism, Socialism, and Democracy 250ff. (1947).

134 Ibid.


137 Lipset, Political Man: The Social Bases of Politics, 216–19. Chapter VI, at 179–219, contains a wealth of data on this issue. These data are not entirely unambiguous and do not mean, of course, that disenfranchisement, as opposed to actual nonparticipation, does not lead to the neglect of the interests that cannot make themselves felt at the polls.

138 For evidence that Congressmen spend a staggering portion of their time on reelection concerns, see Mayhew, Congress. The Electoral Connection (1974), passim.
do not provide an immediate payoff at the polls—even though they may have an ultimately greater impact on the electorate's welfare. Moreover, many electoral systems that seemingly provide a more adequate and more direct representation to a greater variety of interests in fact lead to less governmental stability, decreased efficiency, and shakier long-term legitimacy. Finally, it is not difficult to conceive of situations in which a competent bureaucrat, operating in a clear hierarchical structure in which he expects to make his career, may do a much better job at serving the public than a politician directly responsible to the electorate.

If even with respect to the electoral process, the degree of citizen participation is subject to much controversy, there are still more serious doubts as to other forms of citizen involvement. The basic problem with many forms of direct citizen involvement is that while we may accept the individuals' welfare as the ultimate object of good government, the identification of the "people" with the sum of the individuals composing it is too simplistic. In the same way as I have argued that only the proper appreciation of the special role of political and governmental institutions can allow us to understand the design of our constitutional system, it can also be argued that the extragovernmental social fabric crucially depends on a variety of structures or processes that may have a more or less concrete institutional existence but which all have their own interests and claims that must be taken into account. Unions, corporations, churches, families, educational institutions, consumer organizations, and others simply cannot be reduced to the individuals who compose them for the very reason they are often formed is because the interests they represent and the functions they fulfill cannot be adequately pursued by uncoordinated individuals. One of the most influential trends in political science has been to think of

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139 Ibid. See also infra note 175 and accompanying text.
140 Lipset, note 137 supra, at 45–46, 179ff.
141 Lawyers often make arguments of this kind against the elective judiciary. But the problem is equally apparent in other areas and does not depend only on the need for expertise. See also text at note 17 infra.
142 See Part III.B.2 supra.
143 We have considered the reasons why institutions are necessary for the achievement of public goods. See text at notes 101–3 supra. A classic work explaining the particular significance of the institutions mentioned in the text is Tocqueville's Old Regime and the French Revolution (1955).
society as a collection of groups, rather than of individuals, vying for political influence, and it is the pressure of those groups that is often seen as the most effective form of outside control of governmental abuse.¹⁴⁴ But if this view is seriously considered, the problem of assuring the representativeness of political institutions is by no means solved by uncritically striving for increased citizen participation. For while some forms of outside influence and control (and hence participation) must be assured for the government to be legitimately representative, it is clear that the direct involvement of individual citizens is not always, or even most often, the best way of achieving this. It would be at least not surprising if many of the basic institutional concerns, on which the individuals’ welfare ultimately depends, were to be in fact neglected or diluted within the framework of directly participatory politics.

2. Participation as an independent value. All the foregoing complexities concerning the relation between participation and representation are no more than that—complexities that must be taken into consideration, but that do not in a wholesale fashion invalidate the idea that citizen participation has an important role to play in the process of representative democratic politics and that the governmental decentralization characteristic of the American federal system may be one of the principal constitutional means of assuring the desired level of citizen involvement. But in order to transform this idea into a full-fledged argument, the legal profession would have to conduct a much more detailed inquiry into the way in which the political institutions set up by the Constitution are supposed to accommodate the participatory elements of the political process and to establish how the Constitution resolves the tension between the disruptive and the constructive aspects of participation in a representative democratic system.

While the task just mentioned is beyond the ambitions of this paper, citizen participation may also be viewed quite independently from the mechanics of representation. This view is directly related to the ideas of federalism.

The model of representative politics rests on the idea that the main task of political institutions consists in providing a method of selecting a social policy that reflects in a fair and acceptable manner

the preferences and interests of those groups or individuals who are members of a given political society.\footnote{For a comprehensive argument that the very concept of representation, so understood, may be quite problematic on its own terms and that every widely used method of aggregating individual preferences into social choices underdetermines the ultimate outcome and lends itself to extensive manipulation, see the seminal work of Arrow, Social Choice and Individual Values (1951). Arrow’s work in turn gave rise to a very extensive literature that has unfortunately had only a minimal impact on the legal profession. For a review of some of that literature, see Barry & Hardin, Rational Man and Irrational Society? (1982), Part II.} What is distinctive in this model is its essentially atomistic conception of society in which the basic interests of social actors do not derive from their being members of the political community and in which the government serves an essentially instrumental function of aggregating the actors’ primary preferences into social policies.

Against this representative model, the model of participatory government, which goes as far back as Aristotle, views political activity not as instrumental toward achieving a proportionate share in the distribution of available resources, to be used in a variety of private pursuits, but rather as a good in itself, something essentially implicated in the very concept of human freedom. This way of thinking, which stresses the role of the community in the very shaping of the “interests” of its members and in infusing their lives with a sense of purpose, was by no means absent from the thought of the Founding Fathers. To be sure, the Framers were very strongly influenced by the liberal theories of Locke and de Montesquieu, which placed a high value on the individualistic ideal of liberty understood as freedom from politics that would allow men to focus on the private pursuit of happiness and salvation. This, and the Founders’ realization of the difficulty of devising meaningful and workable participatory institutions in a modern society, operating on a very large, national scale, are clearly responsible for their choice of the representative model as, by and large, the most appropriate form of government on the federal level. As we have seen, they also thought of the representative federal model as a way of checking the potentially illiberal tendencies of the more homogenous political life on the local level (an area in which the federal government has been particularly active since the adoption of the Civil War Amendments)\footnote{For a discussion of the differential impact of the state and federal authorities with respect to the protection of individual rights, see text following note 115 supra.} and as a check on the danger of balkani-
zation inherent in local autonomy. But it does not take very much effort or perspicacity to notice that the Founding Fathers did not look forward to a society reduced to atomistic pursuits of individual well-being, nor did they, like many liberals, see the extragovernmental sphere of "civil society" (such as private associations, churches, and interest groups) as the exclusive locus where the social aspirations of individuals are realized. On the contrary, their ever present concern with what they called public, civic, or "republican" virtue testifies clearly to their belief that the "good life," as Aristotle would have termed it, involves a commitment to a political community and participation in a process by which individuals shape in common the mode of life they are going to share. Not only is it not unlikely that the Framers were familiar with the extremely influential work of Rousseau and not only did they aspire to recreate some of the features and glory of the ancient republics (which had relied much more on participation than representation) but also the most indigenous American political tradition, especially but not exclusively in the North, was inextricably linked to the idea of direct popular control over the matters involving the life of each locality. 147 It should then be by no means surprising if, given the limited possibility of direct participation on the national level, the Framers envisaged the states, and particularly their subdivisions, as the most fertile ground for the development of the alternative political processes, responsive to the need for participatory forms of political life. 148

The tie between the idea of federalism and that of preserving the public space of participatory politics cannot, however, rely exclusively on the Framers' assumptions, but must also correspond to the realities of contemporary American politics. Even a cursory look at the modern political scene is enough to convince one that state governments are very different from the Greek agora or the forum of the early republican Rome and that representation is a standard feature of each state's political life. There have even been some arguments that it is the states, rather than the federal government, that have most interfered with those local bodies, such as

147 See Frug, note 131 supra, at 1095ff., and the sources cited therein.

148 The most radical expression of the Framers' endorsement of local participatory politics may be found in Jefferson's famous proposal for the "ward system." See his letter to Samuel Kercheval of July 13, 1816.
municipal governments, in which participatory politics could still be realistically envisaged in the modern world. Nevertheless, these observations do not necessarily undermine the link between federalism and participatory ideals.

First of all, if there is some genuine room for noninstrumental participation in American political life, it can realistically exist only on the local level. There have been some efforts to devise new means, using modern communications technology, of reviving participatory politics on a large scale, but the dominant view is that the optimum size of a political body that can afford significant citizen participation is nowhere near the size of the modern nation state or even of its main provincial subdivisions. Whatever else may be obscure, it also seems clear that within our political structure, practically all the local political bodies that may be suitable for the development of participatory politics function under the umbrellas of state governments. Even if these bodies are often hampered by state governments run on a representative model, the remedy for this cannot come at the federal constitutional level (though at the state level, constitutional as well as political solutions may be sought). Thus, if the protection of the participatory political processes does indeed rise to the federal constitutional level, it must take the form of limiting federal interference with the governmental operations run under the auspices of the states, although it might be focused on checking particularly those forms of federal action that interfere with the institutions run on the participatory model.

Secondly, the existence of participatory politics on the state level and on the level of state subdivisions is by no means a fiction. From

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149 Frug, note 131 supra, at 1059.
150 See Barber, Strong Democracy: Participatory Politics for a New Age (1984), esp. at 261 et seq. and the sources cited therein.
152 It might be noted in this context that however faulty was the identification of the governmental processes protected by the rule of the National League of Cities, the immunity established in that case was extended not only to the highest organs of state governments but also to their local emanations, such as townships and municipalities. 426 U.S. at 855 n.20. Had the Court decided this issue primarily on the ground of state “sovereignty,” it would have been likely to track more closely the Eleventh Amendment jurisprudence, which refused to extend sovereign immunity to the local units on the county and municipal level. See Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 277–79 (1977); Lincoln County v. Luning, 133 U.S. 529 (1980).
a comprehensive study, based on a number of empirical surveys, by the Advisory Commission on Intergovernmental Relations, there emerges a picture of interlocking participatory institutions at all levels of government, with a particular success on the local level. To begin with, the study shows, the most traditional American mechanism of participatory democracy—the town meeting—is very much alive in a large section of the country, extending significantly beyond New England. The levels of attendance at these meetings are quite high, especially where they have a significant role in the budgetary process and school matters. Further, throughout the country, there is significant citizen involvement in the local planning process, school boards, the budget process, and other governmental functions. Among the techniques used to foster participation are a set of hearing mechanisms, volunteer programs, conferences, opinion-polling mechanisms, open meeting and records laws, drop-in centers, hot lines, as so on. Finally, a special role of the most powerful tool of direct government on a larger scale—the referendum—must be mentioned. The referendum exists in some form in forty-two states, of which thirty-eight allow referenda on the local level. Most of these states leave room for citizen-initiated referenda, and in seventeen states the state constitution may be amended through this process (other states requiring citizen-approved conventions). In thirty-nine states statutory laws are, or may be, subject to popular ratification. In a large measure, these referenda were designed (mostly during the Progressive era) to permit direct citizen involvement in the governing process, and, in addition to allowing the bypassing of the representative system, offer an important incentive for the citizens to keep abreast of the substantive issues in the political life of their communities. While the federal government is by no means always hostile to some forms of citizen participation, its own attempts at creating more room for it are, by and large, much less successful than the practices of the states and largely rely on the opportunities provided by state institutions.

153 ACIR, Citizen Participation, passim, but see esp. chs. 3, 5.
154 Id. at 238–39. Town meetings are used in portions of twenty states, principally in New England, mid-Atlantic and midwestern states.
155 Id., esp. at 65.
156 Id. at 247–49.
157 Id. at 3–6 and ch. 4.
If one of the primary functions, within the federalist framework, of state-run institutions is to provide the public space for participatory politics, then from this point of view federalism does not conceive the division between the state and national governments as a way of parceling out "sovereignty"—the control over substantive fields of regulation—but rather as a way of preserving alternative modes of decision making. Naturally, the vitality of the participatory state institutions depends in part on the types of substantive decisions that are left for the states. Should the federal government preempt them from most fields that touch directly on the life of local communities, the states would become but empty shells within which no meaningful political activity could take place. But whatever the effect of preemption, the principles of federalism provide an important and independent reason for protecting the autonomy of the political processes of local governments, and this not just in the name of democratic control (for the federal government is also subject to such control), but also in the name of protecting a different form of political space that the national government is very unlikely to provide.

Viewed from this perspective, federalism is not entirely of one piece with liberal individualism and its ideology of privacy and individual rights.\(^{158}\) To be sure, the fear of national power, unchecked by local authority, was inextricably linked in the Framers' mind with the fear of what they called "tyranny"; federalism, like separation of powers, was one of the whole panoply of institutional devices to protect individual rights.\(^{159}\) Yet it is not correct to view federalism as nothing more than yet another expression of the American commitment to pluralism. On the contrary, federalism seems to be at least partially inspired by an ideal of a tightly knit community of persons who share each other's values and concerns and for whom politics does not resolve to a periodical exercise of voting rights but rather stands for the most general expression of their common aspirations. For this reason, it should come as no surprise that throughout the course of postrevolutionary American history the banner of "state rights" was more often than not raised in opposition to the individualistic ideology of traditional liberal-

\(^{158}\) For a discussion of the conflict between liberalism and the idea of participatory democracy within our political system, see Frug, note 131 supra.

\(^{159}\) See supra, section IV A.
ism. It was populism, rather than liberalism, as well as the defense of a peculiar, provincial mode of life that found the ideology of federalism useful and congenial. This fact is more than a coincidence, for a protest against the centralization of political authority, far from being a liberal monopoly, has been a standard feature of most conservative as well as romantic or populist ideologies opposed to the impersonal character of modern states. The Constitution is not an exclusively liberal product, however; its greatness and durability may in fact lie in finding a way to accommodate a variety of values and political visions that have exploded many other societies.

3. *Judicial enforcement.* As in the case of the states’ tyranny-prevention function, Garcia’s focus on the national political process makes the future of any judicial protection of the states’ role as providers of a space for participatory politics depend on whether it can be conceptualized as a correction of some process failure on the federal level. There is, again, no doubt that the structure of the national government manifests an unavoidable and intentional bias that makes it unlikely to do justice to the constitutional importance of participatory politics. The federal government was clearly designed to channel the pluralist interest politics through a system of representation, and its ability to accommodate the need for citizen participation is quite limited. Insofar as participatory local institutions also have a representation-enhancing function and aid in legitimizing governmental institutions in general, there is, of course, some pressure on the national government to maintain them. Also, as I have shown, the different mechanics of representation on the state and national levels result in the two governments having different constituencies whose interests are, from time to time, likely to clash. Consequently, the more established interest groups, which are usually more influential on the national level, may very well view favorably a federal policy of fostering direct participatory institutions on the state level since that may

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160 As opposed to the more explicitly political uses of federalism, the judicial enforcement of state rights, in such cases as those cited in notes 43 and 44, was often viewed as motivated by *laissez-faire* liberalism. See Corwin, The Commerce Power versus States’ Rights (1936).

161 For a discussion of the dangers that the ideal of a tightly knit community may represent for individual rights and the role of the federal government in protecting them, see text at note 116 *supra*.

162 See text following note 116 *supra* and text at notes 122–26 *supra*. 
generally diminish the effectiveness with which any special interest groups may use the state apparatus for their own purposes and thus decrease the competition for the groups well entrenched on the federal level.163 But, on the whole, it would be too much to expect that such factors would be enough to make the federal government properly attuned to the needs of local participation. The requirements of long-term legitimacy are more than likely to be sacrificed for the perceived efficiency of short-term measures inimical to local autonomy. It is equally likely that an intermittent special-interest pressure would result in federal solicitude for participatory citizen involvement in the least appropriate aspects of local politics.¹⁶⁴ Consequently, the protection of the participatory processes of local government must come in part at least from judicial supervision over the outcomes of national politics.

It may be possible to characterize the inability of the national political process to protect fully the participatory function of local government as a "failure" of this process. It is much harder, however, to claim that the aim of scrutinizing the outcomes of the national process in this area is to protect the health of the federal government itself. Insofar as citizen participation can be said to have a representation-enhancing role, an argument of this kind could be quite persuasive. But insofar as citizen participation is an independent constitutional value, it would be somewhat disingenuous to try to argue for it in the same way. An alternative justification would thus probably be more appropriate.

I have said that the federalist concern with state participatory institutions is not of one piece with the liberal ideology underlying other parts of the Constitution. There is, however, one point that the two views share—the idea of limiting the sovereignty of the national government in favor of the associational rights of individ-

¹⁶³ This will be so because participation, understood as a form of direct self-government, relies on an unimpeded access of individuals to the political process and thus dilutes the advantage that any organized groups enjoy in a representative system. Thus, to go back to my previous example, if the organizers of a new white-collar union hope to strengthen themselves by capturing a state agency dealing with labor issues, the employers and the old union can, by transforming the agency into a wide-open participatory institution (for example, through pressing the federal government to "open up the machine-dominated state bodies") significantly lessen the agency's value to the new union. What this shows, incidentally, is that the states' participation-enhancing function may sometimes be in conflict with their tyranny-prevention function.

¹⁶⁴ See the immediately preceding note.
uals. While it has been a rather common tendency in our legal system to think of institutions on the model of individuals and to neglect the peculiar character of collective entities, there is nevertheless a significant body of constitutional law derivatively protecting private associations from governmental interference that could destroy those institutions. Liberals consider this jurisprudence to be particularly important not only for aiding resistance to governmental oppression but also for leaving sufficient room for individuals to develop the forms of life they consider meaningful. Perhaps because liberals have traditionally viewed governmental bodies as playing no more than an instrumental role and because they usually associated them with a threat to—rather than a forum for—the realization of individual aspirations, no corresponding body of constitutional law has ever developed for the protection of the associational values that may inhere in public, governmental institutions, especially when they are not protected by the usual mantle of state sovereignty. Thus, if the shibboleth of state sovereignty is finally discarded, as it should be, there is a distinct need to revitalize those aspects of the Bill of Rights that may be used to protect the autonomy of state political processes. Whether such need may be best accommodated through a reading of the First or the Tenth (or even the Ninth) Amendment is not of particular importance. But an additional benefit of doing this may be a development of a body of law geared to the peculiar claims to process integrity that institutions in general could raise within our constitutional system, rather than dealing with all limitations of national sovereignty through the prism of individual rights.

If what I have said so far is accepted, then certain features of the National League of Cities decision acquire a very special significance not sufficiently brought out in that case. The rule formulated there singles out the very integrity of the political processes of local governments as a value quite independent of any outcomes that these processes generate, and the rationale of that rule need no longer depend entirely on the type of protection of which only governmental institutions could avail themselves in the past. Instead, it brings the federalist ideas within the general orbit of a theory of limited representative government and points to the special role of associational values in the political structure of American democracy. In this context, one of the basic purposes of federalism is to assure that, insofar as politics is per se an indispensable communal
component of the good life, the nationalization of political decision making does not deprive the communities and individuals of an essential sphere of their self-realization. Freedom to participate in government, rather than freedom from government, is the issue at stake. The meaning of some activity's being "local" does not lie in its being "reserved for the states" or apt to be more efficiently handled by a local authority but in the fact that, unlike most national issues, it is being handled by a participatory institution.

C. LABORATORIES OF EXPERIMENT

Courts as well as commentators are very fond of repeating Justice Brandeis's dictum that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."\(^{165}\) While the context of Justice Brandeis's remark had nothing to do with protecting the states from Congressional interference\(^{166}\) and while his point concerned only an "incident" of the federal system, the claim that the states constitute "national laboratories of experiment" came to be viewed by many as a cornerstone of the federalist thinking and has quickly become one of the least examined verities of constitutional theory. Only recently has there been some scholarly effort to assess the accuracy of this claim,\(^{167}\) and the most that can be said is that the jury is still out.

The importance attached by many to the states' function as laboratories of experiment is at least in part exaggerated and, in any case, of little significance for constitutional adjudication. This is true for three reasons. First, whether a strong protection of the states' autonomy would actually contribute to the efficiency of the American government is a very complex question that does not admit of an easy answer. In fact, there are many arguments to the contrary. Second, insofar as there is something to the laboratory-of-experiment argument, a unitary government could avail itself of

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166 At stake in Liebman was a due process claim by an individual against the state of Oklahoma.
167 A list of the most important works on the subject may be found in Mashaw & Rose-Ackerman, Federalism and Regulation, in The Reagan Regulatory Strategy: An Assessment 111–52 (Eads & Fix eds.) (1984).
the same advantages by a partial delegation of authority to its local branches, so that there may be nothing in the laboratory rationale that is peculiarly related to the federal structure of American government. Finally, even if it turns out that decentralization does contribute to governmental efficiency, the analysis necessary to determine which aspects of local governance should be protected from central interference is of a very complex and largely pragmatic nature and thus unsuitable either for elevation to the constitutional level or for judicial assessment. In sum, then, in developing their federalist jurisprudence, the courts should concentrate on the other, more fundamental state functions within the federal framework: the protection against tyranny and the provision of a space for participatory politics.

We should begin with the observation that if the laboratory-of-experiment argument were fully accepted, it would be hard to limit its conclusions to the protection of the internal mode of state governmental operations, as proposed by National League of Cities, and not to apply them to the states' control over the private sector. After all, to take the facts of National League of Cities as an example, the imposition of minimum-wage requirements for private hospitals reduces the possibility of state experimentation (to say nothing of private experimentation) in this area no less than in the case of public hospitals. Indeed, the very possibility of federal preemption of the regulation of any field of private activity decreases the possibility of state-introduced innovation. Thus, unless we are seriously prepared to consider reversing the long tradition of the Commerce Clause jurisprudence and go back to the idea of preserving some areas of exclusive state regulation, the laboratory-of-experiment argument proves too much.168

168 It is, of course, possible to say that direct regulation of state governmental processes not only affects the possibility of experimentation in one area but also depletes state resources that could be used to experiment elsewhere. See Justice O'Connor's argument in her dissent in FERC v. Mississippi, 456 U.S. 742, 786–87 (1982). But quite apart from the fact that, to the extent that any inefficient regulation is bound to decrease the tax base of the state, the same also seems to be true in the case of federal regulation of private activities, it is also true that, so long as the federal government is prepared to back its commands with some monetary incentives, the states are free to move their previously committed financial resources elsewhere and the federal government may acquire less control over local behavior by trying to use the state administrative machinery for its own programs than in the case of an outright preemption. See Rose-Ackerman, Cooperative Federalism and Co-optation, 92 Yale L.J. 1344, 1347 (1983).
On closer scrutiny, however, the laboratory-of-experiment argument may turn out to prove not too much but too little. It is, of course, quite intuitive and largely true that a locally made decision, in the absence of countervailing factors, has a good chance of being better adapted to local conditions. Similarly, when there are many independent centers of decision and no countervailing factors, chances are that this very fact may increase the probability of an innovative solution being adopted somewhere that may then be taken over by others. But the caveats about there being no countervailing factors present are important. Both theoretical and empirical studies show that Justice Brandeis's offhand confidence that the states may engage in interesting experiments "without risk to rest of the country" \(^{169}\) may be quite unfounded. There are, in fact, a number of different considerations that have only rarely been taken into account in assessing the laboratory-of-experiment argument but without which its validity cannot be ascertained. The following list is probably incomplete, but it may suffice to force a reconsideration:

\(a\). If, as has been argued, the states are political units that may have their justification in history but do not necessarily correspond to the economic and social realities of contemporary America, \(^{170}\) then the forces that determine the direction of local policies may be much less than ideally suited to foster the most efficient governmental solutions. A central government possessed of a power to reshuffle the boundaries and powers of its territorial subdivisions could perhaps produce much better (more efficient) local administration.

\(b\). State regulation is often likely to have spillover effects on other states and produce inefficient solutions by ignoring the costs borne by outsiders. Again, a central government may tailor its delegations of regulatory powers to jurisdictions designed to minimize such externalities. \(^{171}\)

\(c\). States will often compete with one another for various resources, such as capital, which can move relatively easily to those

\(^{169}\) See note 165 supra.

\(^{170}\) See note 39 supra.

\(^{171}\) Rose-Ackerman, Does Federalism Matter? Political Choice in a Federal Republic, 89 J. of Pol. Econ. 152–65 (1981). The spillover effects Rose-Ackerman talks about arise when one state adopts a policy that imposes costs on other states or creates differential costs of doing business in different states and causes a migration of capital from one state to another.
jurisdictions that offer them the most favorable conditions. As a by­
product of this rivalry, however, states may have to forgo many
redistributive and social programs that make the cost of doing busi­
ness higher. 172 These programs, in addition to being otherwise
socially desirable, may also in the long run raise productivity and
contribute to better business efficiency, but no state may be able to
afford them in the short run and all will be reduced to the lowest
common denominator. 173 A central government capable of devising
national solutions can afford to be much more innovative in such
situations.

d). The costs involved in certain types of innovative regulatory
activity (such as the costs of collecting and transmitting information
or administering a program) may be too high for a local government
to bear, but economies of scale on the national level may make
regulations more cost effective. 174 Of particular importance here is
the comparative quality of state and federal officials, bureaucrats,
and administrators. The increased cost of competence, which may
be too high for a state agency, may result in much more innovative
solutions on the federal level. The lower quality of local bureau­
crats may also contribute to their greater corruptibility.

e). Related to the previous point is the question of incentives that
local elective politicians may have, as compared to a professional
looking to improve his career prospects in a national bureaucratic
hierarchy. 175 While many are prepared to manifest a knee-jerk pref­
erence for a politician subject to electoral control over a “faceless
bureaucrat,” the former’s incentives to innovate are significantly
reduced by his desire for reelection. First, unlike a competitive
economic market, the federal system does not allow a local official
to “sell” his product (i.e., to gain additional votes) outside his juris­
diction, and this limits his incentive to innovate. Second, the fact
that beneficiaries of governmental innovation do not, as a rule,

172 Mashaw & Rose-Ackerman, note 167 supra, at 117–18.
173 Problems with local child-labor laws under the regime of Hammer v. Dagenhart, 247
U.S. 251 (1918), and the resulting clamor for a constitutional amendment, are a good
historical example of these drawbacks of local control.
174 Mashaw & Rose-Ackerman, note 163 supra, at 118.
175 For a more complete discussion of this subject see Rose-Ackerman, Risk Taking and
reader may have by now observed how much the author owes to the work of Professor Susan
Rose-Ackerman.
move from one jurisdiction to another, so as to find the one in which the government’s willingness to take risks matches their own preferences, the politician’s “portfolio” of governmental projects will tend to cater to the risk preferences of those around the population median (rather than gravitating toward more risky innovations). Third, the possibility of free riding on the innovative solutions of other jurisdictions further reduces a politician’s incentive to take new and more risky paths. Compared to that, a career bureaucrat, looking to the approval of his superiors and the effects of his work in a well-designed national hierarchy of administrators may (though, of course, only may) have a system of incentives more favorable to innovation.

f). Finally, the advantages of uniformity may often outweigh the benefits of local innovation, even if some local solutions may have more intrinsic merit.176 Thus, for example, all states, except for Louisiana, have recognized the advantages of adopting the Uniform Commercial Code. But similar advantages to commerce could perhaps accrue from a uniformity in at least parts of tort or insurance law. Again, a central government, not subject to local political or constitutional constraints, could probably be much more efficient in this respect.

The considerations just listed do not, of course, mean that the function of the states as the laboratories of experiment is entirely illusory.177 They do mean, however, that the question of how to structure the division of competences among different levels of government to achieve the most desirable degree of innovation and efficiency is a very complex one and that the answer to it hinges on a variety of empirical and constantly shifting factors. It is thus quite likely that some forms of unitary government, with a flexible system of delegation that would not be limited by constitutional provisions concerning the structure of local authorities, could accommodate much better the demands of governmental efficiency than our own federal system. It is, of course, possible that the question of

176 See Mashaw & Rose-Ackerman, note 163 supra, 118–20.
177 Nor does the list given here pretend to be complete. On a more general level, for example, it has been argued by one commentator that federalism simply delayed national regulation of business in the United States and helped perpetuate racist acts but had no long-run impact on the character of national legislation. Riker, Federalism in 5 Handbook of Political Science 154–56 (1975).
governmental efficiency may have its constitutional dimensions. The basic structure of government, which determines the nature of the political pressures to which a government is primarily responsive, is also decisive as to whether the operations of that government will produce efficient results. But what seems doubtful is that governmental efficiency is among the primary functions of our constitutional division of authority between the states and the federal government. Quite the contrary, if my analyses of the role to be played by the states in protecting the citizens from the dangers of governmental oppression and in providing a public space for participatory politics are correct, then the protection of these constitutional functions of the states requires that a certain price be paid for them in terms of a degree of governmental inefficiency. To the extent that the federal structure of government also allows for state experimentation that may prove beneficial, this fact is, as Justice Brandeis said, "one of the happy incidents of the federal system" rather than its basic justification.

There is, moreover, a significant price to be paid for misjudging the role of governmental efficiency in the process of federalism-related constitutional adjudication. As in every complex area of constitutional adjudication, the text of the Constitution does not by itself unambiguously control the outcome of judicial decisions—an interpretation of the text is always necessary to resolve the questions presented. But if the laboratory-of-experiment argument becomes a basic tool for interpreting the federalism-related provisions of the text, the resulting harm will not be limited to the neglect of the more important functions of the states within the federal system. First, it is unlikely that the courts could really collect all the relevant information and make the cost-benefit analysis necessary for striking a proper balance between the advantages of decentralization and the need for intergovernmental coordination. They will therefore more likely resort to abstract legal rules that would ignore the complex empirical factors involved and ultimately harm more than help the very cause of governmental efficiency. Second, while the political process may be far from flawless in responding to the demands of efficiency, the legitimacy of judicial intervention is usually at its lowest when the courts occupy themselves with primarily economic concerns. In fact, the very perception that the Supreme Court was involved in such policy choices was a signifi-
cant factor in the resistance to much of its federalism-related jurisprudence.178 Third, even if the courts were able to do justice to the complexities of the cost-benefit analysis of decentralization, it is doubtful that considerations of this kind should be allowed to rise to the constitutional level, for the shifting nature of most of the factors involved makes the decisions at hand more a matter of ad hoc managerial accommodation than one of a principled resolution that could endure over time. To be sure, even in the process of constitutional adjudication, the courts cannot be entirely blind to the question of the efficiency of the policies they scrutinize. But as in other areas of constitutional adjudication, the courts should largely defer to legislative assessments of such matters and focus on other, more properly judicial concerns.

V. FUTURE DOCTRINAL DEVELOPMENTS

The outcome of my discussion is that the process-oriented analysis of the constitutional functions of federalism, endorsed but not really carried out in the Garcia decision, leads to a more affirmative procedural role of the states within the federal system than suggested on the face of Justice Blackmun's opinion. Also, two important functions of the states—tyranny prevention and the provision of a space for participatory politics—are likely to be endangered by the national government and warrant a close judicial scrutiny of federal interference with state and local governmental operations. To some extent, then, my analysis confirms the accuracy of the insights implicit in National League of Cities by showing that its insistence on the protection of the political process of local governments, rather than on a guarantee of some exclusive state controls over the private sector, responded to the most fundamental desiderata of federalism, while also showing that some of these insights need not be viewed as incompatible with the Garcia approach.

Nevertheless, developing a constitutional theory of federalism does not automatically translate into a clear judicial doctrine specifying a set of genuinely manageable standards of review. In fact, it is the problematic character of such standards that occupies the bulk of the Court's opinion in Garcia and the unmanageability

178 See, for example, Corwin, The Commerce Power versus States' Rights (1936).
of the "traditional governmental functions" test laid down by *National League of Cities* seems to have been one of the main reasons for its overruling. What needs to be seen is whether the theory of federalism I have articulated can provide more reliable guidance for judicial application.

A full-fledged elaboration of the doctrinal implications of the process-oriented approach to federalism would probably be premature at this point. Given the collapse of *National League of Cities*, my aim has been to show that the process jurisprudence endorsed in *Garcia* does not signify an utter abandonment of a judicial role in this area. Nevertheless, a few preliminary observations on doctrinal matters may be in order.

To begin with, the delimitation of the protected processes of state governments with reference to traditional state functions—the road chosen by *National League of Cities*—is indeed deeply unsatisfactory. It is, of course, not a priori precluded that the traditional functions of state governments are also the very ones that are the most important from the point of view of the federalist concerns, although it is not clear why this should be so. On closer inspection, the traditional functions are much more likely to be a product of the historical role of the states in regulating the private sector and they are much more likely to have been shaped by outdated notions of state sovereignty and more modern ideas of governmental efficiency than by the more properly constitutional concerns with tyranny prevention and political participation.

At the same time, *Garcia*’s merciless critique of the criterion of tradition seems to evince a desire for watertight, mechanical tests of protected governmental functions that simply cannot be had in an area as complex as that of federalism. Constitutional adjudication is not, after all, a field in which simple standards predominate, and there can be no substitute for a painful case-by-case refinement and elaboration. Still, there are a number of ways in which the concerns of federalism may be intelligibly used as a guide for judicial review.

First, there are some state governmental functions so directly related to the federalist concern with preventing tyranny that they present rather easy cases for judicial intervention (though perhaps

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179 The criterion of "tradition" had been criticized by scholars prior to the *Garcia* case. See Tribe, note 105 *supra*, at 1072–74; Kaden, note 78 *supra*, at 887; Alfange, Congressional Regulation of the "States qua States": From *National League of Cities* to *EEOC v. Wyoming*, 1983 Supreme Court Review 215, 233ff.
they are also, at this moment, the least likely to meet with serious interference). Under any approach, for example, federal interference with the agenda of the highest state legislative and executive organs is likely to undermine the overall autonomy of the political processes in the states and eliminate their constitutional role within the federal system. Similarly, an interference with the state electoral processes, insofar as it is not clearly related to the protection of individual rights but threatens to gerrymander the local districts in order to change the configuration of political forces in favor of the nationally powerful interests, would be clearly beyond the pale. A gradual subordination of state police forces to a federal command structure would cripple the states' ability to enforce their basic choices and resist tyrannical pressures from above. A radical limitation of the states' ability to tax would make their fiscal solvency a matter of federal grace and ultimately make a mockery of the federalist concerns.

It may be a little harder to come up with equally clearly unconstitutional instances of federal interference with the states' function of enhancing participation, especially since, as I have noted, it is mostly not the state governments themselves but rather their local emanations that provide the primary locus of direct citizen involvement in the political life in America. Even here, though, there may be clear enough cases. For example, given the special participatory mode in which school boards operate in most states, a federal education law that would attempt to transform those boards into an extension of the federal bureaucratic machinery would strike at the very core of participatory politics in the United States.

Furthermore, it would be a mistake to think that cordoning off some areas of state governments from federal interference is the only possible method of implementing the principles of federalism. After all, if it is not the protection of state sovereignty that is at stake here but rather the basic functions of the states within the federal system, it is quite likely that the nature of the central intervention itself should be more determinative of its constitutionality than the local activity interfered with. Thus, for example, many federal laws that depend on state governmental machinery for their

180 See text at notes 149–52 supra.

181 Even in the area of the enforcement of individual rights, where the courts have been quite willing to interfere with local control over schools to promote racial integration, they have stopped short of a radical transformation of the very structure of local school districting. Milliken v. Bradley, 418 U.S. 717 (1974).
implementation attempt, though usually with only very modest success, to assure that the states open the administrative process to citizen involvement.\textsuperscript{182} Insofar as such programs attempt to open up state politics to citizen participation, without undermining those aspects of local representative systems that may be important to preventing tyranny, they may be subject to a looser form of control than laws that have the opposite effect. Similarly, federal laws that provide reimbursements for costs imposed on local governments may be more acceptable than those that constitute a serious drain on state fiscal resources.\textsuperscript{183}

Finally, although \textit{National League of Cities} concentrated exclusively on federal interference through a system of direct commands to local governments, federalist concerns also have some implications with respect to national action under the spending power. The common issue that is bound to arise in both contexts, but which was left unanalyzed by \textit{National League of Cities} and its progeny, is the question of when the states are unconstitutionally induced by the national government into something that may impair their ability to fulfill their constitutional functions. In the context of the Commerce Clause, the question arose in \textit{FERC v. Mississippi} as a result of Justice Blackmun's intimation that if the federal government had the power to preempt the states from the field of utility regulation, it could also condition its permission for the states to engage in the regulation of utilities on their acceptance of federally mandated standards and procedures.\textsuperscript{184} The ostensible explanation was that since the states were free to withdraw from the field altogether, they were not coerced by the federal requirements. Justice O'Connor's dissent in \textit{FERC} disputed this approach but gave no real criteria for distinguishing incentives from coercion. It is this issue that becomes central when \textit{National League of Cities}' concern with the federal coercion of the states is carried over to spending power legislation,\textsuperscript{185} which constitutes the national government's main tool of securing state compliance with its demands.\textsuperscript{186} The reason why federalist concerns are usually ignored

\textsuperscript{182} For examples of such legislation, see ACIR, Citizen Participation, ch. 4.
\textsuperscript{183} The Garcia Court mentioned this aspect of the federal legislation at issue there but discounted its relevance in a footnote. 105 S.Ct. at 1020 and \textit{id.} n.21.
\textsuperscript{184} See note 65 \textit{supra} and accompanying text.
\textsuperscript{185} The issue was specifically left open in \textit{National League of Cities}, 426 U.S. 833, 852 n.17.
\textsuperscript{186} See ACIR, Regulatory Federalism, passim, but see esp. the table at 19–21; Kaden, note 78 \textit{supra}, at 871ff.
in the judicial review of spending power legislation is primarily related to the claim that the states are free to refuse to participate in the federal spending programs and thus are not really coerced into anything.\footnote{This doctrine was spelled out in Steward Machine Co. v. Davis, 301 U.S. 548 (1937). Somewhat paradoxically, the Court elaborated its doctrine concerning the states' unconditional freedom at about the same time as it started to doubt old \textit{Lochner} wisdom that regulating hours of work was an abridgement of the workers' freedom of contract.} Nevertheless, while emphasis on the consent given by the states to the various conditions in federal grants (often quite unrelated to the purposes of the grant itself)\footnote{See note 186 supra.} may comport quite well with the idea of state sovereignty, the states' consent is often likely to be free in a rather Pickwickian sense.\footnote{ACIR, Regulatory Federalism, at 39ff.; Kaden, note 78 supra, at 871ff.} Even apart from coercion, the emphasis on consent may sometimes raise serious questions under the process analysis developed here. Even if the states should "consent" to measures that weaken their organizational capacity to resist tyrannical pressures from the national government or their ability to protect local participatory institutions, it is not clear that the Constitution allows the federal government to undermine its own democratic character by proposing such measures.

Clearly, the prospect of increased judicial control over the federal spending power raises problems of its own, and they are beyond the scope of this article. To recognize, however, the need for judicial concern, based in a well-thought-out theory of constitutional interpretation, does not necessitate an overly active judicial posture. Particularly in those areas in which the determinations required to assess the validity of federal enactments cannot, for some reason, be confidently made by the judiciary, it is always open for the courts to assume a more deferential posture to legislative assessments but to try to assure at the same time that the legislators themselves pay more attention to the factors that judges view as constitutionally important. This has been done in fact by the Court in some areas of Commerce Clause adjudication where judicial deference to a Congressional determination that a given activity concerned interstate commerce was conditioned on the Congress's explicit statement to this effect or a requirement of a series of specific findings.\footnote{See United States v. Five Gambling Devices, 346 U.S. 441 (1953) (registration and
confidence in political accountability, deserves more sustained consideration.

VI. CONCLUSION

The historical reasons why our federalist jurisprudence has been for so long so barren of new thoughts are not very difficult to fathom. While the Framers had been very much aware that they were creating a new type of government, it was the sterile idea of state sovereignty, basically more appropriate to the old Confederation than the new Union, that came to dominate the thinking about the states. The Civil War, further shifting the balance of the federal system, and the New Deal, which relied so heavily on building up a national bureaucracy, made the old theories even more inadequate. At the same time, however, the best legal minds had little incentive to shore up the jurisprudence of federalism. "Progress" seemed to lie with centralization and chipping away at state rights; the defense of the states seemed to have too many reactionary and racist overtones.

It is time, however, to think again about federalism. Practically all the barriers that federalism once posed for the efficient national regulation of private activities have by now been swept away. One of the positive effects of Garcia was to put to rest the old ideas of state sovereignty. In the long run, however, unless we reassess the meaning of our dual system of government, we may not have any more federalism as we know it. This is not to say, of course, that the states will cease to exist altogether, but only that if the message of Garcia is misunderstood, the separateness of the state and national bureaucracies may be gradually undermined by ever more complex forms of national control over the local agencies of government. The era of weak national governments is clearly behind us. But for this very reason we should think twice before leaving behind us the era of strong local government as well. It is to be hoped that Garcia will come to be seen not as the last word on the subject of federalism but as the new and clean slate on which to inscribe the future jurisprudence of state-national relations.