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I. INTRODUCTION

Until the Nixon Administration, federalism was not talked about much in the United States in the post-New Deal period and was not taken seriously as an intellectual matter. Increasingly, however, federalism has become an important domestic[1] and a critical worldwide[2] issue. It may not be an exaggeration to say that federalism has indeed become *the* pervasive legal/political issue around the world.

In this Article I will make four points. First, by way of background and overview, I will conclude that the goal of federalism is and should be to encourage and facilitate geographically-based political autonomy without placing at risk the interests of minorities within those autonomous areas.

Second, I will examine federalism as a civil rights paradigm. My thesis is that federalism, as a political principle and as an institutional structure, is an important form of decentralization in decision making in the cause of autonomy, democracy, and freedom. There is, therefore, an essential complementarity between the principles of federalism and traditional principles of civil rights. At the same time, there is an inherent tension between those principles. The traditional civil rights paradigm protects individual liberties by resort to universalistic principles such as equal treatment regardless of race, religion, or gender. Federalism may protect minorities based not on universal-

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1. During the Reagan and Bush administrations, federalism became an important domestic ideological agenda issue. During the Reagan Administration, a Justice Department-based interagency task force (The Working Group on Federalism), under the leadership of Charles Cooper, Assistant Attorney General (Office of Legal Counsel), recommended that federal policy be more sensitive to federalism concerns. As a result of the work of that task force, an executive order directing executive departments and agencies to adhere to principles of federalism was subsequently promulgated, Exec. Order No. 12,612, 3 C.F.R. § 252 (1988), and its implementation was taken seriously. When I was nominated in 1990 as Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget, which had administrative oversight responsibility for enforcing Executive Order 12,612, I was struck by how seriously the OIRA office staff—the civil servants in that office—regarded the federalism questions that surrounded substantive policy initiatives of the federal agencies. There was a determination at OIRA and at the Department of Justice to allow states the freedom to do things that officials of the Bush Administration believed to be misguided. Apparently, the United States Advisory Commission on Intergovernmental Relations concluded that the federalism executive order was "given perfunctory treatment" by the line federal agencies charged with its initial implementation, U.S. Advisory Commission on Intergovernmental Relations, *Federal Regulation of State and Local Governments: The Mixed Record of the 1980s* 35 (1993), and "failed te produce the significant changes in federal agency decision making expected by most state and local government officials." Id. at 2.

2. See generally George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Colum. L. Rev. 332 (1994); J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L. J. 2403 (1991).

istic norms, but upon ascriptive criteria such as geography or ethnicity.

Through political structure and the allocation of political authority, federalism seeks to empower geographically-based minorities in a political manner. This political empowerment insulates, to some extent, geographically-based minorities from political subordination at the hands of majoritarian national constituencies and institutions. Through use of the legal/constitutional process, traditional principles of civil rights seek to protect categorically-defined minorities, by use of the legal/judicial system, from the potential tyranny of the political majority.[3]

As mentioned, while there is an essential complementarity between the politically-based principles of federalism and legally-based principles of civil rights, there also is an inherent tension. Federalism is group-oriented. It is also geographically-based. And it protects the interests in political hegemony of the majorities among those geographically-based groups. In that sense, it is a tool for redefining in a jurisdictional sense the scope of majoritarian control at a sub-national level. That group focus, which often is associated with empowerment of a particular regional group through a majoritarian sub-national process and structure, is in tension with the traditional civil rights focus on an individual's right to be liberated from majoritarian control.

Third, I will show that there is a threat to federalism from expanding federal power. The "federalism deal," as I will call it, empowers local communities, but part of the deal is also that local power with regard to civil rights issues be constrained.[4] The requirement of national protection and national control of civil rights, however, can undermine the legal foundation of federalism; I will argue that that has occurred in the United States. This suggests the need for affirmative protection of federalism vis-à-vis national power in other areas where national interests are more attenuated.

In this country's post-New Deal constitutional history, the scope of federal power has expanded dramatically, typically under expansive Supreme Court interpretations of the commerce power.[5]

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3. For discussion of transforming traditional civil rights protections into a political framework, see Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (Free, 1994).

4. For further elaboration of these themes, see Federalist No. 9 (Hamilton) in Clinton Rossitor, ed., *The Federalist Papers* 71 (Mentor, 1961); Federalist No. 10 (Madison) in Rossiter, ed., *The Federalist Papers* 77.

5. See, for example, *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). The Commerce Clause, part of Article I, Section 8 of the Constitution,

This expansion has undermined the original assumption of the constitutional framers regarding a federal government of enumerated and delimited powers. Expansive federal power under the Commerce Clause has shifted the scope of federal power from limited to plenary.

Initially, two types of issues were confronted when the federal government purported to exercise authority: (1) whether an appropriate source of authority existed that warranted the exercise of federal authority; and (2) whether the exercise of federal authority violated some affirmative limitation on the exercise of federal governmental power. The expansive interpretation of the reach of federal power under the Commerce Clause has meant that reliance on the lack of a constitutionally-based source of authority as a limit on federal power has not proven to be a workable means of limiting federal power. Only the existence of affirmative limitations—for example, the Bill of Rights—has restrained the scope of governmental authority. Some form of affirmative constraint on federal authority—an institutional design akin to the Bill of Rights paradigm—is probably necessary to give substantive effect to the fundamental precepts of federalism.

Fourth, I will examine how this broad framework fits the American experience. In this regard I will consider *Gregory v. Ashcroft*,[6] a post-*Garcia*[7] case that adopted the "plain statement" rule as a vehicle of statutory interpretation for limiting the application of federal law to the states. I also will discuss *New York v. United States*,[8] which ruled on Tenth Amendment grounds that the federal government cannot force a state to implement a federal policy as state law. In addition, I will consider, in a paradigmatic context, two other doctrines, one statutory[9] and one common law,[10] that establish affirmative limits on the scope of federal power. For example, the McCarran-Ferguson Act basically vests regulatory authority for insurance issues in the states. The Supreme Court has interpreted McCarran-Ferguson as eliminating any dormant Commerce Clause claims against state regulation of insurance,[11] even in the context of

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reads: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

6. 501 U.S. 452 (1991).

7. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

8. 112 S. Ct. 2408 (1992).

9. The statutory example is the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1988), which conferred on states regulatory and taxing authority with regard to the business of insurance.

10. See, for example, *Parker v. Brown*, 317 U.S. 341 (1943).

11. See *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648 (1981).

facial discrimination against interstate commerce.[12] In a real sense, then, the McCarran-Ferguson Act can be viewed as an anti-supremacy clause provision, an act of federal self-abnegation in which Congress renounces federal authority and statutorily establishes a defined area of state political/jurisdictional hegemony.[13]

Similarly, the so-called state action antitrust doctrine originally announced in *Parker v. Brown*[14] establishes through common law an institutionalized respect for federalism values by creating a state-based affirmative limit on the scope of the federal antitrust laws. *Parker* confers on the states permanent authority to countermand federal antitrust policies in areas of state choosing. This authority takes the form of immunity for the states themselves, but it is not so limited. The doctrine has been construed to authorize states to confer antitrust immunity on private actors as well,[15] provided that the state clearly articulates a policy to substitute regulation for competition and actively supervises the private actor's implementation of that state policy.[16] The McCarran-Ferguson Act and the *Parker* doctrine provide important paradigms of affirmative, self-imposed[17] limitations placed on the scope of federal power.

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12. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

13. Historically, Congress' willingness to have states regulate insurance accounted for the origin of the McCarran-Ferguson legislation. In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the Supreme Court had held that the business of insurance was interstate commerce and therefore subject to the strictures of the negative Commerce Clause. This ruling also indicated that federal regulation would be sustained. McCarran-Ferguson's enactment was a step of federal self-restraint, delegating these issues to state authorities. See generally notes 203-13 and accompanying text.

A constitutional parallel was the Twenty-first Amendment, which repealed Prohibition. States were explicitly authorized to regulate liquor, and the scope of federal power was thereby circumscribed by an express conferral of authority on states. Section 2 provides: "The transportation or importation into any State, Territery, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const., Amend. XXI, § 2.

14. 317 U.S. 341 (1943).

15. See, for example, *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985).

16. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

17. These limitations are self-imposed in that the federal government has authority to legislate but, in the exercise of that authority, chooses to re-allocate that power to the states. The early liquor prohibition experience, in which the Supreme Court disallowed a state ban on the importation of alcoholic beverages but validated such a ban after authorizing federal legislation, is useful as an example of this type of federal role. Compare *Leisy v. Hardin*, 135 U.S. 100 (1890) (invalidating, in absence of federal legislation, a state ban on the sale of beer imported from another state), with *In re Rahrer*, 140 U.S. 545 (1891) (upholding state prohibition laws, when authorized by federal statute, as applied to liquor shipped in interstate commerce).

II. THE IMPORTANCE OF FEDERALISM AND THE FEDERALISM DEAL

The break-up of the Soviet Union into the Commonwealth of Independent States and Yugoslavia's painful and prolonged self-destruction are good examples of the point that federalism is perhaps the overarching worldwide legal/political issue of the '90s. The thrust for autonomy in Croatia and Bosnia-Herzegovina and the peaceful break-up of Czechoslovakia into the Czech Republic and Slovakia exemplify the problems and consequences of unsuccessful nation-states that have failed to solve the challenges of federalism. An impetus toward self-determination and independence or secession, to use the term with a poignant American connotation, is a natural and predictable outcome of a failed federalism.

In the face of geographically-based ethnic or religious regional tensions, self-determination and independence reflect an alternative to a successful pluralistic accommodation within the framework of a nation-state. Principles of federalism are designed to reflect and accommodate these tensions within a broader polity. Nationalism that results in the formation of new, smaller nation-states is a response to a national entity that does not give adequate recognition or self-governing autonomy to local or regional interests. That fragmentation is of particular concern when those local or regional separationist interests do not coincide with prevalent patterns of political power in the nation-state as a whole. In short, the sovereignty solution, which is reflected in the movement toward self-determination and independence, is often a manifestation of a more fundamental failure—the promise of limited sovereignty within a pluralistic nation-state has inadequately protected quasi-nationalistic claims of autonomy by geographically identifiable minority groups.[18]

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18. Viewed in this way, federalism is an ascriptive principle at odds with traditional democratic norms of universalism. In giving vent to geographically-based feelings of quasi-nationalism, federalism recognizes that interests among groups diverge. The focus is away from the individual and toward the group. That sense of group cohesiveness breaches traditional democratic universalistic norms. Those norms place emphasis on transcendent values attaching to personhood, not to ascriptive criteria such as membership in a particular group.

In turn, the communitarian or tribal nature of localism raises a legitimate concern about the treatment of minorities within the autonomous local area. Group-oriented conduct can result in exclusion of those who do not share group characteristics. This rights-oriented concern is typically voiced in universalistic terms—for example, opposition to discrimination based on certain traits, such as race, religion, or gender. Thus, while the objectives of the federalism paradigm and the civil rights paradigm have much in common, their implementation strategies are in considerable tension. It is this ascriptive or tribal dimension to federalism that often has led universalists toward unsympathetic stances regarding federalism.

The formation of new nation-states has its own set of problems. Newly independent states can face significant economic obstacles. For example, when Bangladesh split off from Pakistan, it was widely viewed as an economic basket case. It still has one of the lowest per capita GNPs in the world.[19]

New nations create problems of trade, fragmentation of markets, and administrative inefficiencies. The lack of trade barriers and the availability of a large market for the purchase and sale of goods and services have contributed to the success of the American common market experiment[20] now being emulated in Western Europe.[21] Administratively, the break-up of nation-states can be costly because of the loss of economies of scale for such things as national defense and governmental and economic infrastructure. Independence can necessitate inefficient and excessive expenditures on national defense and can result, as in Bosnia, in increased nationalistic tensions which enhance the need for even greater levels of military expenditures.

New nations, exercising autonomy, also pose human rights risks. Balkan scholar Robert Kaplan recently put it this way: "Self-determination is only a good deal if your group happens to be in the majority."[22] That is, as independence or secession transfers political power, new risks to freedom and liberty come into existence.[23] New

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19. In 1992, Bangladesh had a per capita GNP estimated at $220 U.S. dollars, one of the lowest in the world. The World Bank, *The World Bank Atlas 1994* 18 (1994). See also The Xinhua General Overseas News Service, *Backgrounder: Updated World Development Indicators* (June 19, 1994) (naming Bangladesh as one of the ten poorest countries in the world based on 1992 per capita GNP).

20. For a particularly eloquent statement of this peint, see *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949).

21. The need for taking seriously "[t]he notion that action should be taken at the lowest level of government at which particular objectives can adequately be achieved" is also an important factor in forging supra-national entities that seek te take advantage of the benefits of larger economic and pelitical marketplaces. Bermann, 94 Colum L. Rev. at 338 (cited in note 2). See id. at 338-44.

22. See Georgie Anne Geyer, *Self-determination Sees 1 Ethnic Group Oppress Another, Often Violently*, Nashville Banner 9 (January 26, 1994).

23. James Madison recognized that an important source of friction and injustice was what he described as "the mischiefs of faction." Federalist No. 10 (Madison) at 78 (cited in note 4). Madison defined "faction" as a group of citizens "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." Id. Madison expressed concern about local tyranny by entrenched factions. "The smaller the society, . . . the more frequently will a majority be found of the same party; and the smaller the number of individuals compesing a majority, . . . the more easily will they concert and execute their plans of oppression." Id. at 83.

Madison was pessimistic about the possibility of remoning the causes of faction and instead sought out "means of controlling its effects." Id. at 80 (emphasis deleted). He argued that, by extending the political community beyond the confines of a particular state, a nation-state makes it "less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or . . . to act in unison with each other." Id. at 83. Thus, Madison fully

groups of minorities are subject to local laws and potentially to localized tyranny. The absence of recourse by these new groups of minorities to national institutions or to a nationally enforced rule of law is a critical drawback of the political movement toward self-determination and the creation of new mini-states.[24] Resort to the international community for human rights protections is theoretically available as an alternative to recourse to pluralistic nation-states, but international institutions for the protection of human rights are notoriously ineffective and not much to be trusted in Bosnia, Cambodia, Somalia, Rwanda, or elsewhere.

In the American case, secession by the states of the Confederacy risked even greater oppression for blacks without the potential restraining influence of, appeal to, and recourse from a national constituency. We can gain important lessons in this regard from our own national experience—the Revolution, the Articles of Confederation, ratification of the Constitution, the Civil War, and the modern civil rights movement—and from experiences elsewhere. It is useful to draw on some of these lessons.

Strong national institutions are important for economic progress and national security, and, under democracy, to reassure various geographic and other minorities of basic human rights.[25] Independence and self-determination movements result from centrifugal forces stemming from unresolved geographically and ethnically-based claims and grievances against central majority-driven institutions. Independence and self-determination can lead to a proliferation of mini-states, as we have seen around the world, and to the reversal of nineteenth-century trends toward the development of nation states. This results in economic inefficiency and threats to human rights.

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understood the risk to liberty from excessive decentralization through the formation of mini-states; he saw the nation-state as an antidote, a safeguard to the risks of majoritarian tyranny in local decision-making units. Compare with Clint Bolick, *Grass Roots Tyranny: The Limits of Federalism* 39 (Cato Institute, 1993) (stating that the "occasional tendency of states to succumb to majoritarian tyranny was one of the motivations to create a stronger national government" with adequate powers to protect individual liberty).

24. In supporting the ratification of the United States Constitution, Alexander Hamilton in the Federalist Papers argued that "[a] firm Union will be of the utmost moment to the peace and liberty of the States as a barrier against domestic faction and insurrection." Federalist No. 9 (Hamilton) at 71 (cited in note 4). Hamilton saw an important value of Union in the ability of the nation to protect against political oppression and abuses in the states—that is, "the tendency of the Union to repress domestic faction and insurrection." Id. at 75. See generally id. at 71; Federalist No. 10 (Madison) at 77 (cited in note 4).

25. See generally Bolick, *Grass Roots Tyranny* at 178-83 (cited in note 23).

Thus, developing successful regimes of federalism is an important goal.[26] This requires sensitivity to geographically-based subnational majorities when those majorities are out of sync with national majorities.[27] The goal, as indicated earlier, is to encourage geographically-based political autonomy without placing at risk the interests of political, racial, religious, or ethnic minorities within those quasi-autonomous areas.[28] This strategic linkage of federalism—to protect subnational political autonomy—with nationally enforced norms of civil rights—to enforce principles of nondiscrimination based on race, religion, and gender—is what I call the "federalism deal."

III. FEDERALISM AS A CIVIL RIGHTS PARADIGM

I now focus on federalism as a civil rights paradigm. Federalism as a political principle and as an institutional structure is an important form of decentralization in the cause of autonomy, democracy, and freedom.[29] In this regard, there is an essential complementarity between the principles of federalism and traditional principles of civil rights. At the same time, there is also an inherent tension between those norms. The traditional civil rights paradigm protects individual liberties by resort to universalistic principles such as equal treatment regardless of race, religion, or gender. Federalism may protect minorities, but its mode of protection is not based on an embrace of universalistic norms—which is the approach of the civil rights paradigm—but upon ascriptive criteria such as geography or ethnicity.

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26. For an argument that similar values (subsidiarity) are important as part of the structure of the European Community, see Bermann, 94 Colum. L. Rev. at 338-66 (cited in note 2).

27. Daniel Elazar, who has written extensively on federalism, says that "[i]t is rather like wanting to have one's cake and eat it too." Daniel J. Elazar, *Exploring Federalism* 33 (U. of Ala., 1987). That is, "[f]ederalism has to do with the need of people and polities to unite for common purposes yet remain separate to preserve their respective integrities." Id.

28. See generally Bolick, *Grass Roots Tyranny* at 42 (cited in note 23) (stating that the goal of the Framers was "to accommodate three disparato and often competing goals: creating a national government with powers sufficient to govern; preserving to the greatest possible extent the powers of state governments; and protecting individual liberty").

29. "*Federalism* can be defined as the mode of political organization that unites separate polities within an overarching political system by distributing power among general and constituent governments in a manner designed to protect the existence and authority of both." Daniel J. Elazar, *American Federalism: A View from the States* 2 (Harper & Rew, 3d ed. 1984).

A. The Nature of Federalism

Federalism provides a vehicle for allowing geographically defined constituencies, especially geographically defined minorities, to have a measure of self-rule within the political framework of a broader nation-state. Federalism responds to very real majoritarian tensions in pluralistic societies. It serves as a tool for assuring limited self-government to a geographically-based minority group. It is an accommodation to such a group whose political interests might be persistently submerged if all political decisions were to be made at the national level using the model of a unitary nation-state.

Understood in this way, federalism is a means for preserving majoritarian political processes in subnational areas. It is a way of assuring political minorities that they will control their everyday lives without pushing them to independence or secession. That is, federalism preserves the nation-state but allows the regions to operate on their own to some degree. And, of course, that's the rub—to what degree?[30]

Federalism is a compromise. Unlike structures such as the unitary state model, in which power is centralized, a federalist structure limits central power but also asserts national hegemony over local interests where national interests override.

Federalism is thus a rights-conferring doctrine. But the rights conferred are geographically-based in nature. They are institutional in that they relate to political structure and jurisdiction and to the allocation of political power between or among different units of government. Of perhaps greatest significance, the rights conferred through federalism are typically group-based—that is, they are often linked to the autonomy of a regionally-based group or set of groups within a larger political structure. But within the decentralized unit, the commitment to majoritarianism remains intact. Indeed, at the subnational level, majoritarianism is the tool of empowerment of the regional group or set of groups.

The individual rights-oriented set of values that we associate with our Bill of Rights can be viewed as countermajoritarian in character. It is premised on the existence of pluralism and the desirability of protecting that pluralism from the tyranny of fleeting majority sentiment. The civil rights paradigm is designed to insulate minorities from unfettered majoritarianism, which can be manifested in its

30. For a description of varying forms of federal structures, see Elazar, *Exploring Federalism* at 38-64 (cited in note 27).

extreme form as nationalism or, some would say, tribalism. Thus, while federalism shares with the civil rights paradigm a concern with unrestrained majoritarianism at the national level, its tenets and underlying assumptions are in considerable tension with the traditional universalistic principles of a rights-based, pluralistic, countermajoritarian legal regime.

Federalism recognizes and gives succor to different views and different values that characterize geographically-defined groups. It shields from unconstrained majoritarianism, but its technique is political and group-focused—oftentimes single-group focused. Civil rights principles are similarly aimed at guarding against rampant majoritarianism, but the technique of protection is legal and universalistic in character and individual-rights focused—embracing a pluralistic vision.

Federalism protects group political interests of majoritarian control. Under federalism, local political majorities and their priorities prevail even when on a national scale the locally empowered group would be outvoted. This suggests that the local polity or political entity may choose a different balance between majoritarian interests on the one hand and individual rights on the other. For example, a state might choose to require its judges to retire at a certain age despite general federal anti-age-discrimination legislation that would strike a different balance between the values of non-discrimination based on age and the desirability of mandatory retirement.[31]

Thus, the group rights model of federalism can bump into an individual rights model. Local autonomy can lead to group oppression of insular political minorities within the local territorial area. Local passions and prejudices can result in the denial of liberty through the empowerment and hegemony of geographically-based regional factions. This highlights the tension that arises when a national government delegates majoritarian control to a decentralized constituency, and that localized delegated power is exercised in a way that cuts against the political culture of the national majority. The national constituency has a strong claim for taking measures aimed at preserving bona fide national economic interests. As part of the federalism deal that provides for political power delegation, the national government also has a strong interest in restricting discrimination on the basis of race, religion, and gender within a state.

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31. See *Gregory*, 501 U.S. at 473.

B. *Federalism and Civil Rights: Voting Rights as a Case Study*

The voting rights area is worthy of some discussion because it provides a good example of: (1) the elements of the federalism deal; and (2) the tensions between the federalism and the civil rights paradigms.

1. Voting Rights as Part of the Federalism Deal

Race discrimination in voting was made expressly unconstitutional in the post-Civil War period by the Fifteenth Amendment.[32] Yet, "in 1965, 95 *years* after ratification of the Fifteenth Amendment extended the right to vote to all citizens regardless of race or color, Congress found that racial discrimination in voting was an 'insidious and pervasive evil which has been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'"[33] The Voting Rights Act of 1965[34] reflected a "strong commitment to the nondiscrimination principle in voting" and was an effort "to root out sophisticated as well as overt discrimination."[35]

The Voting Rights Act has been acclaimed as "the most effective tool for protecting the right to vote,"[36] and as the "most important legislation in the Nation's history relating to voting rights."[37] It was "primarily designed as a remedial device to overcome a history of obstructionist resistance to the enfranchisement of blacks"[38] and was born out of the "conviction that aggressive enforcement [of minority voting rights] is a proper function of the federal government."[39]

Under Section 5, a jurisdiction with a history of racial discrimination (a "covered jurisdiction")[40] may not change any "standard,

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32. The Fifteenth Amendment provides in relevant part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV.

33. *City of Rome v. United States*, 446 U.S. 156, 181-82 (1980) (emphasis in original) (quoting *Katzenbach v. Morgan*, 383 U.S. 301, 309 (1966)).

34. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973 et seq. (1988 & Supp. 1992).

35. See James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 637 (1983).

36. H.R. Rep. No. 227, 97th Cong., 2d Sess. 37 (1982).

37. Staff of Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess., Report on S. 1992, 20-21 (Comm. Print 1982).

38. See Blumstoin, 69 Va. L. Rev. at 677 (cited in note 35).

39. Id. at 678.

40. "Section 4, [42 U.S.C. § 1973b (1988)], established the mechanism for determining which states or subunits of a state" were to be covered by the "special remedial provisions of the Act" contained in Section 5. Id. & n.217 (cited in note 35).

practice, or procedure with respect to voting"[41] without preclearance by the United States Attorney General or by the United States District Court for the District of Columbia. The burden of demonstrating compliance with Section 5 rests with the covered jurisdiction.[42] "In essence, the preclearance technique freezes the political environment as of a specific date."[43] The underlying assumption of the freezing principle was that, given the historical pattern of disenfranchisement,[44] some independent review of voting changes was necessary as a "prophylactic measure"[45] to guarantee that "old devices for disenfranchisement [will] not . . . be replaced by new ones."[46]

The federalism implications of the Voting Rights Act are substantial. Covered states and covered subdivisions of states are unable to make electoral changes without approval by the federal government, and the burden of proof lies with the petitioning jurisdiction. Although the provisions of Section 5 were originally set to expire at the end of five years in 1970, the preclearance procedure has been extended to 2007.[47] Critics of the preclearance provisions of Section 5 such as Justice Black argued that "covered jurisdictions" were treated as "little more than conquered provinces."[48]

From a federalism perspective, the preclearance mechanism is surely stiff medicine. In 1965, when the preclearance review proce-

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41. 42 U.S.C. § 1973c. While the coverage of Section 5, and thus the preclearance procedures, expressly applied only to a new prerequisite, standard, or procedure regarding voting, the Supreme Court has extended the coverage beyond the registration and voting process te encompass the entire electoral process, including "any state enactment which altored the election law of a covered [jurisdiction] in even a minor way." *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969). See also *Georgia v. United States*, 411 U.S. 526 (1973) (holding legislative reapportionment subject to preclearance); *Perkins v. Matthews*, 400 U.S. 379 (1971) (holding annexations subject to preclearance).

42. See *Beer v. United States*, 425 U.S. 130, 140-41 (1976). In *Beer*, the Supreme Court held that the standard governing preclearance was the "nonretrogression principle"—that is, the goal of Section 5 was "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Id. at 141. The Court rejected the view expressed in dissent by Justice White that Section 5 required that districts be drawn, to the extent practicable, to afford minorities an opportunity to achieve roughly proportional representation. Id. at 143-44 (White, J., dissenting). For an argument that the Justice Department has largely ignored the *Beer* standard and instead has applied in preclearance proceedings the standard that Justice White advocated in his *Beer* dissent, see Abigail M. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 173 (Harvard U., 1987) (stating that "[t]he Supreme Court's test for discriminatory effect [nonretrogression] is often simply openly ignored"). See also id. at 143-44, 151, 157-91.

43. See Blumstein, 69 Va. L. Rev. at 679 (cited in note 35).

44. See generally *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

45. See Blumstein, 69 Va. L. Rev. at 679 (cited in note 35).

46. See S. Rep. No. 417, 97th Cong., 2d Sess. 6, reprinted in 1982 U.S.C.C.A.N. 177.

47. Pub. L. No. 97-205, 96 Stat. 131 (1982), codified at 42 U.S.C. §§ 1971 et seq. (1988).

48. *South Carolina v. Katzenbach*, 383 U.S. at 360 (Black, J., dissenting).

dure was enacted, there was a documented disenfranchisement problem of major proportions, which the Supreme Court referenced in upholding the validity of the Voting Rights Act.[49] When up for renewal in 1982, Section 5 was extended for a period of twenty-five years based on Congressional belief that the problems of disenfranchisment and vote dilution were still present in the covered jurisdictions. In the face of such findings, even stiff medicine such as Section 5 is warranted under the federalism deal to assure fair access to the franchise and nondiscriminatory electoral and representational practices.[50] It is a legitimate and important national interest, as part of the successful federalism deal, to assure nondiscrimination on the basis of race in the electoral process. Section 5 of the Voting Rights Act provides an example of strong federal intervention, in tension with principles of state autonomy, in the name of civil rights protection. But such intervention is necessary to preserve the legitimacy of the system,[51] to protect against unconstitutional racial discrimination, and to maintain the integrity of the federalism deal.

Enforcement of the preclearance procedures and nonretrogression principles of Section 5 of the Voting Rights Act illustrates the tension between the elements of the federalism deal. On the one hand, it demonstrates the important role that aggressive civil rights enforcement can play in making good on the federalism deal, safeguarding nondiscrimination, and providing, through national institutions, recourse for discrimination at the subnational level. On the other hand, federal enforcement of principles of nondiscrimination in voting constrains and thereby impinges to some degree on the autonomy of states to establish their own electoral processes and structures.

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49. See id. at 308-15.

50. On the "substantive meaning [of Section 5] apart from its prophylactic role of protecting against hard-to-detect discriminatory conduct," see Blumstein, 69 Va. L. Rev. at 687-88, & n.269 (cited in note 35). See also Thernstrom, *Whose Votes Count?* at 236 (cited in note 42) (approving Section 5 review to guard against purposeful discrimination and against "backsliding - attempts to undermine the effectiveness of . . . enfranchisement . . .").

51. Voting has been labeled a fundamental interest, see *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969), because it is "preservative of all rights." See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

2. The Tensions Between the Federalism and Civil Rights Paradigms: Voting Rights as an Example

Racial gerrymander[52] and vote dilution litigation[53] provide an example of another tension—between different approaches toward protecting the interests of citizens within a state, between principles underlying federalism and those undergirding traditional civil rights protections.

Principles of federalism have a certain common ground with our tradition of geographic districting for legislative elections, which allows a geographically-defined area to elect a representative of its own to a political body. Establishing a legislative district is a way of providing representation in governance to political interests that might otherwise be submerged if winner-take-all at-large elections were the norm. Geographic legislative districting assures residents of that region of majoritarian empowerment within their own defined yet delimited piece of the legislative world.[54]

Geographic legislative districting, especially at the local level, reflects a balancing among values. So-called "good government" critics of geographic districting, particularly in local governments, have argued that such geographically elected representatives have a parochial perspective because of their dependence for re-election on only a small component of the entire constituency. These representatives, so the argument goes, should have an orientation that is focused on the entire community. That broader, more inclusive community-wide perspective can only come if representatives are accountable to the total community. That, in turn, would suggest a shift from a district-based system of representation to an at-large approach.[55]

The at-large system has come under fire because it allows a single constituency to determine the outcome of all elections within a local government. The relevant "community" is a majority of the entire community, and that group, if politically cohesive (a "faction"),[56]

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52. See *Shaw v. Reno*, 113 S. Ct. 2816, 2819 (1993).

53. This can occur under Section 2 of the Voting Rights Act, as amended, see *Johnson v. De Grandy*, 114 S. Ct. 2647, 2651 (1994), or under the Equal Protection Clause of the Fourteenth Amendment, see *Davis v. Bandemer*, 478 U.S. 109 (1986).

54. See *Rogers v. Lodge*, 458 U.S. 613, 616 (1982).

55. See *Mobile v. Bolden*, 446 U.S. 55, 70 n.15 (1980) (stating that "[i]t is noteworthy that a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years age as a praiseworthy and progressive reform of corrupt municipal government").

56. See note 23.

can tyrannize the minority, with minority voters receiving very little or no voice within the counsels of government.[57]

This tension between the desire for a community-wide perspective and the desire to provide some basis for sharing political power intensifies the importance of the criteria used in district line-drawing. If districts are composed of politically coherent majorities out of sync with the broader community, they can exacerbate the centrifugal impetus of factionalism. District representatives must sit in a deliberative body and participate in the deliberative legislative process; overall stability is advanced to the extent that these representatives must seek political support from a coalition of political elements within their districts. Nonresidents of a district have some hope for influence when a representative must stand for re-election in a competitive constituency that might comprise "interest surrogates" for nonresidents who are potentially affected by legislative decisions within a jurisdiction of which that district is a part.[58]

The policy agenda of some advocates for minority voting rights in the United States would seek a politically assured district drawn along race-conscious lines.[59] Although not commonly defended on this basis, these efforts may have some common ground with the underlying rationale of federalism. The goal seems to be to vouchsafe for the minority community a piece of the political action by guaranteeing the ability of the minority community to elect its preferred candidate. Much voting rights advocacy and scholarship now is designed to achieve for an identified minority the type of political assurances that geographically-based groups receive under federalism.[60]

The debate that has swirled around the desirability and propriety of consciously establishing districts controlled by minority voters (or similar surrogates to replicate those structures, such as cumulative voting) reflects the tensions between the federalism and civil rights paradigms. Professor Lani Guinier has described "three generations of voting rights issues."[61] The first focuses on ballot access issues; the second "aims to create majority black single-member

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57. See *Rogers*, 458 U.S. at 616 (stating that "[a]t-large voting schemes . . . tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election").

58. James Madison saw a risk of oppression in small homogeneous groupings that were under the control of a faction. See note 23.

59. For a brief description of the assumptions underlying this strategy, see Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 Cardozo L. Rev. 1135, 1151-52 (1993).

60. See generally Guinier, *The Tyranny of the Majority* (cited in note 3).

61. See Guinier, 14 Cardozo L. Rev. at 1151 (cited in note 59).

districts"; and the third focuses on "meaningful black participation in governance."[62] What has shifted between the first and second stages is a redefinition of the objectives. It is not a progression along a single continuum, but rather a fundamental change in concept and strategy—that is, a shift in paradigms.

Access to the ballot through enforcement of the nondiscrimination guarantees of the Fourteenth and Fifteenth Amendments is consistent with a civil rights approach. It emphasizes individual claims of injustice based on universalistic principles of racial nondiscrimination, and it uses legal/constitutional claims of countermajoritarian rights for protection from discriminatory majoritarian practices established by subnational governments.

Dissatisfaction with the results of nondiscriminatory processes, traditionally viewed, has led some advocates to seek out minority control over districts, and has led to questioning whether the district itself is an appropriate unit in which to express the political interests of racial minorities.[63] The focus of analysis has shifted to the kinds of group-based and structural concerns that underlie federalism, and away from the kinds of universalistic considerations customarily associated with the civil rights paradigm.

For example, Professor Guinier has advocated the objective of "proportionate interest representation"[64] as the appropriate goal of voting rights proponents. Her rationale is that "[i]nterests are those self-identified voluntary constituencies who choose to combine because of like minds."[65] Professor Guinier is dissatisfied with geographically-based constituencies because they do not provide an adequate vehicle for the combining of like-minded political voices.

Whether voting rights advocates seek their form of empowerment through consciously black-controlled districts or through nongeographic institutional structures that assure representation of group interests, the paradigm would appear to be the same. It is one of group autonomy and empowerment—principles ostensibly underlying federalism but without geographical constraint, and disconnected from the critical federalism principle of self-governance, because legislative representation contemplates participation in a pluralistic, deliberative body.[66]

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62. Id. at 1151-53.
63. Id. at 1153-63.
64. Id. at 1140.
65. Id.
66. A legislative district representative must function within and as part of a deliberative body. The transfer of "faction" from the voting population to representation in the political

And, of course, the same tensions exist between these group empowerment proposals for legislative representation and traditional civil rights virtues—is this the exaltation of faction at the expense of universalistic criteria of nondiscrimination? Should the principles of autonomy and kinship that characterize federalism be expanded to accommodate racial group interests, even at the expense of traditional principles of racial nondiscrimination? Is the revised voting rights agenda a proper case of doctrinal adaptation, or a case of an inappropriately matched intellectual transplant—a paradigm mistake?

In a fundamental way, those were the issues fought out in the pivotal Supreme Court decision in *Shaw v. Reno*,[67] the North Carolina racial gerrymander case. In redistricting, the state consciously drew two black-majority districts. That action reflected the view[68] that a majority-minority district was necessary for black empowerment. This is a manifestation of the group and kinship model, which holds that legislators should represent discrete interests without the need to be politically responsive to a pluralistic constituency. Because of the obvious racial basis for the weirdly drawn districts under challenge, the question was whether plaintiffs could state a traditional Equal Protection claim based on race discrimination.[69] The majority said yes, the dissenters said no.

The *Shaw* majority insisted that the case was like any other race-based districting case. Although it is true that no individual has any legally cognizable claim to reside in any particular legislative district,[70] it is also true that nobody can be assigned to a particular district on account of race in the absence of the government's satisfying the strictest standard of scrutiny reserved for race classifications.[71] No schoolchild involved in *Brown v. Board of*

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chamber can exacerbate the significance of faction rather than, as Madison urged, see note 23, diminishing its significance.

67. 113 S. Ct. 2816.

68. This apparently was the view of the Justice Department, which denied preclearance to an earlier plan that provided for a single black-majority district. Id. at 2820. For a somewhat different perspective on the issue of black representation of black interests, see Carol M. Swain, *Black Faces, Black Interests: The Representation of African Americans in Congress* (Harvard, 1993).

69. See, for example, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

70. See *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977).

71. Specifically, the Court stated:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. . . . Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us

Education[72] had a legally cognizable interest in being placed in any particular school, but the State could not classify schoolchildren into districts based on race. So it was in *Shaw* regarding legislative districts.

The *Shaw* dissenters would have dismissed the claim—thereby not requiring any state justification—because of a lack of showing of "discriminatory effects," even in the face of a showing of discriminatory intent.[73] For the dissenters, "[w]hen . . . the creation of a majority-minority district does not unfairly minimize the voting power of any other group," there is no Constitutional violation.[74] Whereas the majority recognized an individual's claim of race discrimination as "analytically distinct" from a group-based claim of vote dilution,[75] the dissent was unwilling to accept the relevance of the traditional individual rights paradigm in a legislative districting situation.

What *Shaw* reflects is the competing constitutional visions that govern the electoral process. The majority found the traditional civil rights paradigm controlling. The Court had previously, in *Richmond v. J. A. Croson Co.*,[76] established the principle of racial reciprocity—that all state-imposed racial classifications are suspect and subject to strict scrutiny, irrespective of which race is disadvantaged.[77] Consequently, all "state legislation that expressly distinguishes among citizens because of their race [must] be narrowly tailored to further a compelling governmental interest."[78] Race cannot be used, under traditional civil rights principles of strict scrutiny, as a proxy for a common group-based viewpoint[79] because such a proxy perpetuates "impermissible racial stereotypes" and "reinforces the perception that members of the same racial group—regardless of their

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> further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting hy our state legislatures demands close judicial scrutiny.

Shaw, 113 S. Ct. at 2832.

72. 347 U.S. 483 (1954).

73. *Shaw*, 113 S. Ct. at 2834 (White, J., dissenting).

74. Id. at 2842.

75. Id. at 2830.

76. 488 U.S. 469 (1989).

77. Id. at 493 (plurality opinion) (stating that express racial classifications are suspect because "[a]bsent searching judicial inquiry . . . there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated hy illegitimate notions of racial inferiority or simple racial politics"); id. at 520 (Scalia, J., concurring in the judgment).

78. *Shaw*, 113 S. Ct. at 2825.

79. But compare *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (applying intermediate scrutiny to federal race-based classification and allowing use of race as a proxy for viewpoint balance).

age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."[80]

It is apparent that the civil rights approach of *Shaw*[81] is fundamentally at odds with the racial group and kinship model advocated by some voting rights commentators. For the dissenters in *Shaw*, the civil rights paradigm had no independent application to the legislative districting context. If government chose to district by using race as just another ethnic group in a political gerrymander, then the civil rights approach of *Brown v. Board of Education*[82] had no application. The dissenters would have found that a cause of action exists only if the political influence of a racial group is "unduly diminish[ed]."[83]

Thus, the majority and the dissent in *Shaw* directly address the competing analytical paradigms. For the majority, a claim of race discrimination can be established in a legislative districting case. Racial gerrymanders are not just any garden variety of districting. Principles of racial nondiscrimination circumscribe governmental power to give effect to race-based group and kinship interests. For the dissent, state governments have more autonomy to accommodate race-based group interests. The *Shaw* majority, committed to the principle of racial reciprocity, saw the federalism deal as encompassing an obligation to police the use of race by state governments. This reflected the national commitment to enforce norms of racial nondiscrimination against state violation. The *Shaw* dissenters were prepared to defer to the state government the authority to use race-based

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80. *Shaw*, 113 S. Ct. at 2827.

81. The *Shaw* majority purported to leave open the question whether the principles announced in the case and the analysis of the issues in that case were limited in their application to weird districts, "express[ing] no view as to whether 'the intentional creation of majority-minority districts, without more' always gives rise to an equal protection claim." Id. at 2828 (quoting id. at 2839) (White, J., dissenting). Despite Justice White's belief that the "case cannot stand for the proposition that the intentional creation of majority-minority districts, without more, gives rise to an equal protection challenge under the Fourteenth Amendment," id., it is hard to give intellectual coherence to the majority opinion otherwise. The weird district was deemed evidence of purposeful racial classification. If purposeful racial classification is established in other ways, it seems apparent that the strict scrutiny requirement must stand. And, given the *Croson* principle of racial reciprocity, see note 77 and accompanying text, it would seem logically to follow that all a challenger need show to establish a racial classification and demand scrutiny is that race was a motivating factor. Defendants would then have the burden of establishing as an affirmative defense, that race was not the dispositive factor in the decision making process. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270-71 n.21 (1977). Of course, depending on the circumstances, the state may be able to bear its burden of establishing a compelling interest and a suitably tailored means/ends fit.

82. 347 U.S. 483 (1954).

83. 113 S. Ct. at 2834. See generally *Davis v. Bandemer*, 478 U.S. 109.

principles of group and kinship, which bear a common intellectual provenance with some undergirding principles of federalism.

Given the national commitment to establishing strict limits on the use of race by state governments and the doctrinal principle of racial reciprocity, the majority in *Shaw* seems to have had the better of the argument. But for our purposes, the correctness or incorrectness of *Shaw* is of less significance than the basis of the analytical divergence—the tension between the competing paradigms—reflected in the division on the Court in that case. Thus, while the principles underlying federalism have much in common with civil rights paradigms, *Shaw* demonstrates that there are also important tensions that must be confronted.

C. Federalism and Civil Rights: Similar and Dissimilar Principles

In summary, then, federalism bears certain similarities to principles underlying civil rights protections, but federalism can also endanger the civil rights of minorities within the localized community. Those in the local community seek local control as a means of overcoming the persistent submersion of their interests in the national context. Minorities in local communities, on the other hand, confront the same kinds of risks of submersion of their political interests, but at the hands of ascendant local factions. Modern civil rights groups in the United States historically have sought to overcome the submersion of minority interests within the state and local community, where race discrimination has been endemic, by resort to national political institutions.

This form of national protection of civil rights is a fundamental component of the successful federalism deal. We cannot have local autonomy without some form of national protection for minorities within those autonomous areas. For example, the Bosnian Serbs and the Croats within Bosnia were quite content to live as minorities within Bosnia when Bosnia was part of the nation-state of Yugoslavia. When Bosnia seceded and formed its own independent state—that is, when it exercised self-determination and established sovereign independence—those ethnic and religious groups were quite unwilling to remain as minorities within an independent Bosnia. The absence of recourse to protection from a nation-state, with the possibility of forming coalitions with those of similar interests in Yugoslavia beyond the Bosnian frontier, raised an unacceptable risk of subjugation. Bloodshed developed in the absence of assurances from national

Yugoslavian institutions of civil rights protection for the minorities within Bosnia.

Thus, the push for national civil rights protections for localized minorities is analogous to the thrust for federalism itself. Federalism allows geographically defined groups to have self-rule even when their political tastes diverge from those of the nation's majority. The civil rights paradigm limits state power to submerge political interests of minorities in a local area on a persistent and a pervasive basis. This provides a form of liberation from potential oppression by local majorities. In this sense the federalism paradigm and the civil rights paradigm are not only similar in objective but also complementary in that the civil rights model provides protection against the risk of oppression from local ascendant factions. However, the civil rights supervisory role of the national government, a part of the federalism deal, contains within it a threat to the legal foundation of federalism—the legal seeds of federalism's own self-destruction.

IV. THE THREAT TO FEDERALISM FROM EXPANDING FEDERAL POWER

The federalism deal, as I call it, empowers local communities, but it also constrains local power regarding civil rights by the superior authority of the federal government and national political institutions. Because of the implications for the expansion of federal power, this protection of civil rights by the national government can undermine the legal and political foundation of federalism. The scope of federal authority is broadened, formally (in a legal/constitutional sense) and informally (in a political/cultural sense), so that the federal government can serve as a civil rights ombudsman. That expanded national authority, while necessary to effectuate the federalism deal, is difficult to cabin and can threaten the constitutional and political underpinnings of federalism.

Local empowerment within the American tradition has been defined as the absence of federal power in certain areas. This is our constitutional model. Whereas states are assumed to have general police powers without specific authorization, the federal government has limited, constitutionally enumerated powers.[84] The process of

84. Local governments, like the federal government, have traditionally been viewed as possessing limited power. In the absence of specific authorization, local governments are typically viewed as without power to act. See Chester J. Antieau, 1 *Local Government Law: Municipal Corporation Law* § 2.00 (Matthew Bender, 1993). See generally Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057, 1062-67 (1980).

determining whether the federal government may enact legislation requires, at least as a formal matter, that the first analytical question be whether the federal government has a constitutional source of authority for the legislation. The federal government does not have inherent powers; its authority extends only to those powers constitutionally conferred. The states are the sources of inherent residual power not conferred on the national government. The Tenth Amendment[85] reminds us of that "truism."[86]

Because, from a constitutional perspective, local empowerment is defined by the absence of national authority, the expansion of the scope of federal authority results in the erosion of the legal protection for local spheres of power. If the national government gets into the habit of intervening aggressively to fulfill the civil rights part of the federalism deal, the scope of national authority expands and encroaches on the local sphere. This is particularly true if the source of authority for federal intervention is not limited to the civil rights arena but instead derives from broader, more generic sources of national power.

The primary constitutional source of authority for expanding federal power has been the Commerce Clause.[87] The Civil Rights Act of 1964,[88] for example, was justified and upheld by the Supreme Court on the basis of the federal government's power to regulate interstate commerce.[89] Although there was some dispute about the appropriate constitutional grounding for this major legislative protection of civil rights,[90] advocates viewed the Commerce Clause as the safer doctrinal foundation.[91] The cases that upheld the Civil Rights Act of 1964 vindicated that pragmatic judgment,[92] building doctrinally on earlier decisions that justified expanding federal power over social welfare

85. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X.

86. In *United States v. Darby*, 312 U.S. 100, 124 (1941), the Supreme Court stated that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." See also *New York v. United States*, 112 S. Ct. 2408, 2417-18 (1992).

87. See *Garcia*, 469 U.S. at 580, 581-85 (O'Connor, J., dissenting).

88. Pub. L. 88-352, 78 Stat. 241 (1964).

89. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964); *Katzenbach v. McClung*, 379 U.S. at 300-04.

90. For a discussion of this issue, see Gerald Gunther, *Constitutional Law* at 147-51 (Foundation, 12th ed. 1991).

91. Id. at 149 (quoting Attorney General Robert F. Kennedy's testimony before the Senate Committee on Commerce that use of the Commerce Clause would make the law "clearly constitutional").

92. See *Heart of Atlanta Motel*, 379 U.S. at 261; *Katzenbach v. McClung*, 379 U.S. at 300-04.

legislation such as labor relations.[93] The use of the broad commerce power as the engine of expansion of federal authority—in civil rights, social welfare, and elsewhere—meant that the scope of federal authority was broadened generically, not just in carefully delimited or circumscribed areas. The constitutional consequence has been a much expanded across-the-board federal role that is relatively unconstrained.[94]

The pivotal doctrinal shifts that allowed expansion of federal power under the Commerce Clause were the demise of two doctrines—dual federalism, and the requirement that federal power under the Commerce Clause be directly related to interstate commerce in a qualitative (and not just a quantitative) sense.

The dual federalism model assumes that there are non-overlapping spheres of state and federal power. Either a subject matter is within the state sphere because interstate commerce is not involved, or it is within the federal sphere because of its interstate commerce character. Under the dual federalism approach, every expansion of federal power came at the direct expense of state regulatory or taxing authority. This doctrine represented the classical zero sum situation, as far as federal/state power was concerned.[95]

Under the dual federalism regime, the Supreme Court was quite careful in determining whether federal power under the Commerce Clause existed. As the Court often pointed out, the potential loss of state authority provided an important institutional counterweight to the expansion of federal power.[96] Determining that the federal government had power to set labor standards, for example,

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93. See, for example, *Darby*, 312 U.S. 100 (upholding the Fair Labor Standards Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

94. See *Garcia*, 469 U.S. 528; but see *New York v. United States*, 112 S. Ct. 2408.

95. The analysis in the cases specifically acknowledged that the expansion of federal power under the Commerce Clause would be at the expense of the states and to the preclusion of the states' exercise of authority over the subject matter. See, for example, *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) (stating that "the production of articles, intended for interstate commerce, is a matter of local regulation. . . . If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control *to the practical exclusion of the authority of the States*") (emphasis added).

96. See, for example, *United States v. E.C. Knight Co.*, 156 U.S. 1, 14-15 (1895) (holding that a broad construction of federal authority under the Commerce Clause would give Congress vast power "to the exclusion of the States. . . . The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management" (quoting *Kidd v. Pearson*, 128 U.S. 1, 21 (1888) (upholding state prohibition on manufacture of intoxicating liquors because lack of state regulatory authority would mean exclusive federal regulatory power)).

meant that the states had no such power.[97] The power of the federal government to regulate or tax liquor would foreclose state authority in that area.[98] Politically and institutionally, the expanding role of the federal government could only be achieved at the direct expense of state authority. As a consequence, the Supreme Court involved itself deeply—it ultimately concluded too deeply[99]—in determining whether the Commerce Clause provided an appropriate source of constitutional authority for federal legislation under review.

As part of its attempt to develop tools for exploring and delineating boundaries along the borderland of federal and state power, the Court distinguished between "direct" and "indirect" regulation of interstate commerce. The "direct" regulation concept was logical and qualitative in character, unaffected by practical consequences or matters of degree. Perhaps the most explicit statement of this position came in *Carter v. Carter Coal Co.*,[100] in which the Court rejected federal authority to regulate wages and hours of employment in the area of mining and production. Employment relationships in the production market were local matters, subject to state and local regulation. Federal authority existed only if there were some "direct" relation to interstate commerce. And the test of directness was logical or qualitative in scope. If mining or producing one ton of coal was local in character, and therefore beyond the scope of federal power under the Commerce Clause, increasing the volume of the mining or production involved did not change its character.[101]

When the analysis in *Carter Coal*, decided in 1936, was repudiated the very next year,[102] the Supreme Court dramatically modified Commerce Clause analysis to allow for consideration of the practical economic effect of an activity on interstate commerce.[103] Quantitative

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97. See, for example, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

98. See *Kidd v. Pearson*, 128 U.S. 1, 21.

99. See, for example, *Darby*, 312 U.S. at 115-17; *Garcia*, 469 U.S. at 545-47.

100. 298 U.S. 238.

101. The Court stated:

> If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. . . . [T]he matter of degree has no bearing upon the question here, since that question is not—What is the *extent* of the local activity or condition, or the *extent* of the effect produced upon interstate commerce? but—What is the *relation* between the activity or condition and the effect?

Carter, 298 U.S. at 308.

102. See *Jones & Laughlin*, 301 U.S. at 36-37.

103. Three competing strands of Commerce Clause analysis co-existed over a period of years: See, for example, *E.C. Knight*, 156 U.S. at 13-18 and *Carter Coal*, 298 U.S. at 299-304

considerations were no longer analytically irrelevant, and the courts would show great (and eventually total)[104] deference to political judgments regarding such effects. The direct/indirect distinction for determining the scope of federal Commerce Clause authority disappeared.[105]

By 1941, the Supreme Court in *United States v. Darby*[106] also had definitively and decisively renounced the principles of dual federalism.[107] With his famous remark that the Tenth Amendment is "but a truism that all is retained which has not been surrendered,"[108] Justice Stone drained the Tenth Amendment of independent force as an affirmative limitation on federal power.[109] In place of dual federalism, modern Commerce Clause doctrine has substituted a concurrent jurisdiction paradigm. At least with regard to private activity,[110] the federal government has seemingly limitless Commerce Clause authority to regulate irrespective of objective. Provided that no other constitutional limitations are breached, federal power is plenary, and social welfare objectives unrelated to interstate commerce can be achieved through use of the federal government's Commerce Clause power.[111]

(using qualitative approach focusing on direct vs. indirect effects on interstate commerce); *Houston E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342, 350-52 (1914) (The Shreveport Rate Case) (using practical economic effect on commerce approach); *Stafford v. Wallace*, 258 U.S. 495, 518-20 (1922) (using stream of commerce approach).

104. See *Garcia*, 469 U.S. at 556.

105. The direct/indirect distinction retains some vitality in the negative commerce clause area, when the issue is the validity of state law in the absence of federal legislation. See note 116.

106. 312 U.S. 100.

107. See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1 (1950).

108. *Darby*, 312 U.S. at 124.

109. After a brief revival, see *National League of Cities v. Usery*, 426 U.S. 883 (1976), the Tenth Amendment was re-interred in *Garcia*. The status of the Tenth Amendment as an independent, affirmative limitation on the scope of federal power is a bit unclear after the Supreme Court's decision in *New York v. United States*, 112 S. Ct. 2408. Because that case involved a federal statute that operated directly on a state as a state, the Court was able to make its decision on absence-of-authority grounds, without having to determine whether to revive the Tenth Amendment as an independent restraint on the scope of federal power when federal power would otherwise be authorized under the Commerce Clause. See notes 179-97 and accompanying text. Despite the intimation in *New York* that there may yet be life in the Tenth Amendment, it is clear that the dual federalism regime remains deeply buried—at least beyond the question of federal power to operate coercively on states as states.

110. This is the import of *Garcia*. The Supreme Court's decision in *New York* holds that there are limits on the scope of federal power when the federal government acts coercively on the states as states. *New York v. United States*, 112 S. Ct. at 2434-35. Intimations in *New York* suggest that some limitations on federal power outside of the area of coercive legislation on states as states might be reestablished. That would require some modification of *Garcia*, a result advocated and foretold in the *Garcia* dissents.

111. See *Darby*, 312 U.S. at 115 (stating that "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the

Under the concurrent jurisdiction paradigm, states may act under their police power even on matters that affect interstate commerce. In this sense, state regulatory power sometimes may be enhanced as compared with the dual federalism approach; areas that previously might have been reserved to the federal government under dual federalism can, under concurrent jurisdiction, be subjects of state regulation.

Two types of limitations on state power exist under the modern concurrent jurisdiction model of Commerce Clause analysis. First, state law that conflicts with or is preempted by federal law must yield[112] under the supremacy clause.[113] Second, in the absence of federal legislation, state legislation that discriminates against[114] or unduly burdens[115] interstate commerce[116] violates the "negative" or "dormant" Commerce Clause.

Institutionally, the demise of dual federalism and its replacement with a concurrent jurisdiction model of federal/state relations has meant that federal power could expand without automatically and necessarily restricting the scope of state power. Expansion of federal power no longer means reduction of state regulatory authority because federal/state relationships do not constitute a zero-sum situation. Predictably, the easing of that built-in institutional restraint has allowed the Supreme Court to legitimize expanded federal power under the Commerce Clause without fear for the direct and automatic erosion of state regulatory and taxing power.

Constitution places no restriction and over which the courts are given no control. . . . Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."). Accord *Heart of Atlanta Motel*, 379 U.S. 241 (upholding constitutionality under commerce clause of Civil Rights Act of 1964); *Katzenbach v. McClung*, 379 U.S. 294 (same). *Darby* adopted the plenary power approach that had led the Court to uphold the federal ban on importing, mailing, or interstate transporting of lottery tickets. See *Champion v. Ames*, 188 U.S. 321 (1903). For cases that condemned the exercise of federal power to achieve non-commerce-clause-related police power objectives, see *Hammer v. Dagenhart*, 247 U.S. 251, *Carter Coal*, 298 U.S. 238.

112. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977).

113. U.S. Const., Art. VI, cl. 2.

114. See *Hughes v. Oklahema*, 441 U.S. 322 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

115. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

116. The distinction between direct and indirect effects on interstate commerce, no longer significant in determining the scope of federal power under the Commerce Clause, still retains vitality in analyzing the restraints imposed by the Commerce Clause on state power. See *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (holding that a state's direct regulation of interstate commerce violates the Commerce Clause without balancing local interests against national interests as required by *Pike*, 397 U.S. 137). Accord *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 n.12 (1992).

Further, the demise of the Tenth Amendment as an independent, affirmative limitation on federal power—at least outside the realm of direct, coercive regulation on states as states—has left the task of limiting federal power to a determination that no source of national authority exists. With the elimination of the direct/indirect distinction and the shift from a qualitative to a quantitative standard for deciding whether federal Commerce Clause authority can be invoked, it has been difficult to contain expanding national authority. Since the only basis for restricting federal power is a finding that no appropriate source—for example, the Commerce Clause—of national power exists, and since the Supreme Court has declined to (or has been unable to) develop standards in this area, there are no constitutionally enforceable restrictions on the scope of federal power under the Commerce Clause.[117] Yet, constraints based upon the assumption that the federal government is one of limited and enumerated (and not inherent) powers, and which focus on whether a source of authority exists to support federal involvement in an area, are the type of constraints our system was designed to provide. But, as demonstrated above, such lack-of-authority reasoning has been an ineffective constitutional limit on the expansion of national power since 1937.[118]

The concern over the erosion of local spheres of authority mirrors the debate at the time of the ratification of the Constitution over the desirability of having a Bill of Rights. At the Constitutional Convention, the original framers did not include a Bill of Rights in the draft of the Constitution. Advocates of non-inclusion argued that a Bill of Rights was not needed because the federal government, which

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117. See *Garcia*, 469 U.S. 555-56. The exception to that statement, of course, is the Supreme Court's holding in *New York v. United States*, 112 S. Ct. at 2434-35, that there are limits to the ability of the federal government to act directly and coercively on the states as states.

118. There are a few recently decided lower court cases in the criminal area that suggest a return to a source-of-authority analysis in finding certain federal criminal statutes beyond the scope of federal Commerce Clause authority because the federal criminal activity had no rational connection to interstate commerce. See, for example, *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (1994) (holding 1990 Gun-Free School Zones Act unconstitutional absent nexus between interstate commerce and ban on firearms in school zones; interstate commerce not an element of the crime and no Congressional finding of an effect on commerce); *United States v. Cortner*, 834 F. Supp. 242, (M.D. Tenn. Oct. 19, 1993), reversed and remanded, No. 93-6398, 1994 U.S. App. LEXIS 19221, 1994 WL 389210 (6th Cir. July 26, 1994) (finding federal anti-hijacking statute unconstitutional, particularly as applied to purely intrastate car theft, because it does not assert a nexus between the criminalized conduct and interstate commerce). It will be interesting to see whether the Supreme Court uses those cases as a vehicle for reestablishing a judicial role in analyzing the scope of federal power under the Commerce Clause on matters beyond the narrow band of circumstances contemplated by *New York*.

was to have only limited and delimited powers, could not violate individual rights. No authority existed for the federal government to undermine basic freedoms. A Bill of Rights, they argued, would be superfluous.

The absence-of-authority argument meant not only that a Bill of Rights would be superfluous but also that it could be harmful as well. The failure on the part of the drafters of a Bill of Rights to enumerate certain protections could imply that broader national powers had been conferred than had been granted, in intent and in fact, in the Constitution.

History, however, has shown us who was right about the desirability of including a Bill of Rights in the Constitution: proponents of the Bill of Rights were clearly correct. The scope of federal power has been elastic and, since the pivotal year of 1937, largely unrestrained. In the absence of the kind of affirmative limitations on governmental power embodied in the Bill of Rights, governmental power would be much broader still than it is now. The Bill of Rights has been important not only as a restraint on federal power but also as an influence in shaping the amorphous principles of "liberty" and "due process" contained in the Fourteenth Amendment,[119] which, unlike the Bill of Rights itself,[120] applies to the states.[121] In sum, the Bill of Rights has been a critical component of the expanded individual freedoms Americans enjoy, a tool for protecting individuals against the exercise of governmental authority.

Indeed, the success of the Bill of Rights and the persistent resort by citizens to its provisions, which explicitly limit the scope of governmental power, suggest the use of the Bill of Rights as a paradigm, a tool for restoring a meaningful regime of legal/constitutional protection for federalism.

If one were writing on a clean slate—for example, drafting a constitution for an emerging eastern European nation—one might adopt a clearly delineated and explicitly defined set of rights or powers for states. This would be analogous to the Bill of Rights protections for individuals contained in the United States, and many other,

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119. U.S. Const., Amend. XIV.

120. See *Barron v. Baltimore*, 32 U.S. (7 Peters) 243, 250-51 (1833).

121. By a process of selective incorporation, the Supreme Court has applied nearly all provisions of the Bill of Rights to the states through the "liberty" term of the Fourteenth Amendment. See generally *Duncan v. Louisiana*, 391 U.S. 145 (1968).

constitutions. Such a provision could serve as an affirmative limitation on national power in designated areas other than civil rights.[122]

This type of approach could reverse, in certain specified areas (particularly those involving important local interests), the traditional supremacy accorded to national law.[123] It would establish a charter of authority and hegemony for sub-national units of government enforceable in court as higher law against national encroachment.[124] Such an enumerated reserved-powers model would facilitate adoption of the traditional counter-majoritarian rights-based techniques used for the protection of individual interests within political communities, and adapt those techniques as tools for the structural safeguarding and legal vindication of local political and institutional interests under a regime of federalism. This would honor the federalism deal—a delimited measure of local autonomy would be restored and legally safeguarded, but the national interest and supremacy in assuring civil rights would be retained.

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122. The Tenth Amendment reserves powers to the states that are not conferred on the federal government. In effect, the Tenth Amendment establishes the states as the holders of residual, unassigned powers. To the extent that the conferred powers are interpreted so broadly as to encompass nearly every conceivable subject of governmental interest, the residual powers concept becomes drained of significance. The idea suggested in the text would enumerate areas of specific state preeminence and reserve those te the states in a form of reverse supremacy clause arrangement.

123. The Canadian Constitution provides an example. It contains a conventional national supremacy clause: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Canada Act 1982 (U.K.), c. 11, s. 52-(1). But each province has "exclusive[]" authority to legislate "in relation to (a) exploration for non-renewable natural resources in the province; (b) development, conservation and management of non-renewable natural resources and forestry resources in the province . . . ; and (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy." Id. at s. 50, adding s. 92A.-(1) te the Constitution Act, 1867 (U.K.) 30 & 31 Vict. c. 3. In contrast te the provisions regarding provincial control over export of non-renewable natural resources, which may be overridden by Parliamentary action, id. at s. 92A.-(2), (3), the provisions of s. 92A.-(1) grant power "exclusively" te Provincial legislatures. Section 51 provides detailed definitions that relate to s. 50.

124. The German Constitution provides an example of an intermediate form of reserved-powers safeguard. In areas of concurrent jurisdiction between the national and state governments, the national government has authority te legislato "to the extent that a need for regulation by federal legislation exists." The Constitution then enumerates three situations in which federal legislation is authorized: (1) where legislation by an individual state cannot be effective; (2) where action by an individual state could "prejudice the interests" of other states or the nation; and (3) where the "maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions" beyond the borders of a particular state "necessitates such regulation." *Grundgesetz* [Constitution] Art. 72(2).

V. How Well Do Affirmative Protections for State Autonomy Fit the American Context?

The question to be addressed in this final section is how well this notion of affirmative political autonomy for states—a reverse supremacy clause in certain designated and defined areas—fits the American political landscape and constitutional context.

A. The Municipal Home Rule Example

Interestingly, there is an intellectual analogue to this concept in the municipal home rule movement. Cities traditionally have been considered creatures of the state, dependent on explicit delegations of power from the state legislature in order to exercise any political authority. Like the federal government, municipalities typically do not possess inherent powers. Cities can exercise only authority delegated to them by the state,[125] and there has been a traditional rule of strict construction of those delegations of power—that is, a canon of construction (Dillon's Rule)[126] against broad interpretations of statutes that delegate authority to municipalities.[127]

In response to the narrowly circumscribed powers allotted to municipalities, reformers have sought to broaden the scope of local authority. The home rule movement has pushed for greater municipal authority, most effectively through state constitutional home rule amendments. These provisions authorize municipalities to act on matters of local concern without the necessity of seeking specific statutory delegation of authority from the state legislature. In some jurisdictions, these home rule provisions go so far as to assign supremacy to local governments in areas of municipal concern.[128] Not only do cities have greater authority to act on local matters, but also their action may not be overturned by state legislative action.[129]

The home rule structure, in which municipalities are empowered to act within a certain sphere and prevail over encroachments by the state legislature, provides an analogue at the state/local level to

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125. See Antieau, 1 *Local Government Law* § 2.00 (1993) (cited in note 84).

126. See McQuillin, 2 *The Law of Municipal Corporations* § 10.09 (Callaghan, 3d ed. 1988).

127. Id. §§ 10.18a-10.21.

128. See Antieau, 1 *Local Government Law* § 3.01 (1993) (cited in note 84).

129. See, for example, *Four-County Metropolitan Capital Improvement Dist. v. Board of County Commissioners*, 149 Colo. 284, 369 P.2d 67 (1962) (invalidating a sales tax levied pursuant to state statute by a special district as violative of exclusive local powers conferred on home rule cities). Colorado's constitution subsequently was amended to allow for the establishment of multi-county service authorities. Colo. Const. Art. XIV, § 17.

the type of affirmative protection for federalism that I have discussed above. Lessons learned from the home rule experience concerning the allocation of authority between state and local governments would provide an interesting and useful starting point for developing any comparable concept of state-based reserved powers.

B. State-Protective Provisions of the United States Constitution

Further, the Constitution does contain a number of specific state-protective provisions aimed at limiting the scope of federal power.[130] The most important example is the provision that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate"—an explicit deviation from the general procedures established for amending the Constitution.[131] But there are other provisions of this nature as well.[132] This suggests that the Framers were sensitive to the need for certain types of specific limits on the nature and scope of federal power, even if a particular power were generally conferred on the federal government.[133] The concept of enumerated affirmative limits on national power, with a view of protecting state autonomy, would not be foreign to our constitutional framework.[134]

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130. The Constitution also provides states protection against acts of other states. See, for example, U.S. Const., Art. I., § 10, cl. 2 & 3. See also U.S. Const., Art. IV, § 1 (Full Faith and Credit provision); id. at § 2 (Privileges and Immunities Clause; mandatory extradition provision).

131. U.S. Const., Art. V. For a comparable provision, setting out a special state-protective rule regarding the admission of new states, see U.S. Const., Art. IV., § 3 (stating that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress").

132. See, for example, U.S. Const., Art I., § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken"); id. at cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State); id. at cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, he obliged te enter, clear or pay Duties in another"). The direct tax protection of Article I, § 9, cl. 4 was further insulated from change by a provision that no amendment of that clause under Article V would be authorized for twenty years. U.S. Const., Art. V. See note 13 (discussing the Twenty-first Amendment).

133. For a historical analysis of federalism principles embodied in the Constitution, see *EEOC v. Wyoming*, 460 U.S. 226, 265 (1983) (Powell, J., dissenting).

134. A poignant though noxious example of this form of affirmative delegation of authority te states coupled with a limitation on federal power regarded the "Migration or Importation" of slaves. See U.S. Const., Art. I, § 9, cl. 1. Formally, the provision empowered states to control immigration and barred the Congress from prohibiting the states' exercise of this power for a period of twenty years: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior te the Year one thousand eight hundred and eight. . . ." In practice, this provision allowed the slave states to continue to traffic in slaves without federal interference for a period of twenty years. This

C. *The Tenth Amendment:* National League of Cities *and* Garcia

Arguably, the Supreme Court's decision in *National League of Cities v. Usery*[135] was driven by the kind of considerations addressed above—that is, a perceived need to develop a constitutional shield against certain types of federal intervention. The decision re-enlisted the Tenth Amendment as a basis for re-establishing a judicially enforceable affirmative limitation on the scope of national power. In *National League of Cities* the Supreme Court viewed the Tenth Amendment as more than just a "truism." It served as a substantive vehicle for developing affirmative limits on federal power even, by assumption, in areas in which a source of federal constitutional power existed.[136] The limiting principle, as it evolved, was that the challenged federal law regulated "States as States" and concerned "attribute[s] of state sovereignty," and that state compliance with the federal law would interfere with "traditional" state functions.[137]

The analytical framework in *National League of Cities* was never used by the Supreme Court to invalidate other alleged federal encroachments on state power. This may be, as some have argued,[138] because the very concept itself was flawed. The "traditional governmental functions" formulation may not have been a sufficiently articulated or informative principle of limitation. That was the view expressed by Justice Blackmun in *Garcia v. San Antonio Metropolitan Transit Authority*,[139] which overruled *National League of Cities*. In *Garcia,* Justice Blackmun, who had concurred and had provided the necessary fifth vote in *National League of Cities*, rejected the

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Faustian allocation of power was also protected from constitutional amendment for the same poriod of time. See U.S. Const, Art. V.

135. 426 U.S. 833.

136. *National League of Cities* held unconstitutional under the Tenth Amendment the application of the Fair Labor Standards Act (FLSA) to certain state and local government employees such as police officers and fire fightors. The Court noted that the FLSA was "undoubtedly within the scope of the Commerce Clause" and therefore generally within the federal commerce power. 426 U.S. at 840-41. There was thus no question raised in the Court's opinion suggesting douht that tlie Act constitutionally could be applied under Congress' commerce power to private-sector workers. See *Darby*, 312 U.S 100 (upholding validity of Fair Labor Standards Act under commerce power as applied to private-sector employees).

137. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 286-87 (1981). The Court also asserted that "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission," even if the requirements described in text are satisfied. Id. at 288 n.29.

138. See Jesse H. Choper, *Judicial Review and the National Political Process* (U. of Chicago, 1980). See also Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 Vand. L. Rev. 1623 (1994).

139. 469 U.S. 528.

"function" standard of *National League of Cities* as "unworkable" and as "inconsistent with established principles of federalism."[140]

In his concurrence in *National League of Cities*, Justice Blackmun had viewed the decision as creating a balancing process in which national and state interests were weighed.[141] The majority opinion of Justice Rehnquist envisioned more of a categorical approach.[142] Because *National League of Cities* was a major doctrinal breakthrough, it merely announced the existence of a category and gave it a name ("traditional governmental functions"), but did not provide much analytical guidance in determining which state functions were beyond the scope of federal power.[143] The *National League of Cities* majority never persuaded the dissenters that there was a principled basis for identifying and isolating the inner circle of state powers that were worthy of protection against federal control.[144] The *Garcia* decision, over strenuous dissents,[145] abandoned the effort to

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140. Id. at 531.

141. *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring) (stating that the Court's opinion "adopts a balancing approach . . .").

142. See *Garcia*, 469 U.S. at 579-80 (Rehnquist, J., dissenting) (suggesting that *National League of Cities* did not apply a "balancing test" despite Justice Powell's contrary assertion in his separate dissent).

143. In *Garcia*, Justice Blackmun observed that the Court in *National League of Cities* "did not offer a general explanation of how a 'traditional' function is to be distinguished from a 'nontraditional' one." 469 U.S. at 530.

144. Ultimately, Justice Blackmun came around to this view. See *Garcia*, 469 U.S. at 539 (stating that "[w]e find it difficult, if not impossible, to identify an organizing principle" that distinguishes traditional from nontraditional governmental functions, a distinction that is "elusive at best").

145. Justice Powell, for example, noted that *Garcia* "effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause." 469 U.S. at 560. He was troubled that Congressional action under the expanded umbrella of the Commerce Clause would "not be subject to judicial review" so that "the role of the States in the federal system" will "depend upon the grace of elected federal officials, rather than on the Constitution as interpreted by this Court." Id. at 560-61. "More troubling than the logical infirmities in the Court's reasoning is the result of its holding, *i.e.*, that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power. This result is inconsistent with the fundamental principles of our constitutional system." Id. at 567.

In her dissent, Justice O'Connor found "scant comfort" for "those who believe our federal system requires something more than a unitary, centralized government." Id. at 589. She found the *Garcia* decision to reflect an abdication of the Court's responsibility to "reconcile the Constitution's dual concerns for federalism and an effective commerce power." Id. at 581.

The dissents of both Justice O'Connor and Justice Rehnquist can he characterized as of "The South will rise again" genre. See id. at 580 (Rehnquist, J., dissenting) (expressing confidence that the *National League of Cities* federalism principle "will . . . in time again command the support of a majority of this Court"); id. at 589 (O'Connor, J., dissenting) (stating that "I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility").

identify those state activities entitled to affirmative Tenth Amendment protection.[146]

It may be that the *National League of Cities* formulation was not successful in its mission of identifying an appropriate inner circle of state power worthy of protection from federal encroachment.[147] That is, the "traditional governmental function" approach may have been "unworkable," as the *Garcia* majority later held. But as with most doctrinally path-breaking decisions, it is not unusual for the pioneering decision itself to leave the details to subsequent development.[148] And in at least two subsequent (pre-*Garcia*) cases that reached the Supreme Court,[149] the decision not to apply *National League of Cities* principles to invalidate the measure under challenge was based on the votes of the four justices who dissented in *National League of Cities*, joined by Justice Blackmun.

This raises some questions about the "workability" issue. Had the Supreme Court affirmed the decisions in *EEOC v. Wyoming*[150] and *FERC v. Mississippi*,[151] a greater body of case law would have existed from which to see a traditional common law pattern of development.[152]

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146. The *Garcia* majority consisted of the *National League of Cities* dissenters (Justices Brennan, Marshall, Stevens, and White) plus Justice Blackmun, who alone changed his mind about the workability and legitimacy of the framework embraced in *National League of Cities*.

147. The Court in *Garcia* noted that it had "made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*." 469 U.S. at 539.

148. See, for example, *Baker v. Carr*, 369 U.S. 186 (1962), leaving formulation of equal protection standard to subsequent decision in *Reynolds v. Sims*, 377 U.S. 533 (1964). See also *Williams v. Rhodes*, 393 U.S. 23 (1968) (dealing with electoral ballot access issues but setting no definitive standards). For a very recent example of this approach by Chief Justice Rehnquist in the "takings" area, see *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

149. See *EEOC v. Wyoming*, 460 U.S. 226 (1983); *FERC v. Mississippi*, 456 U.S. 742 (1982). In both cases the federal agency had lost in the lower courts and sought Supreme Court review. An interesting irony here is that the Reagan Administration, which professed support for the principles of federalism embodied in *National League of Cities*, was in office when federal agencies sought Supreme Court review that ultimately helped undermine the vitality of the principles of the *National League of Cities* decision. In *Garcia* as well, the lower court had applied *National League of Cities* to rule in favor of the San Antonio Metropolitan Transit Authority.

150. 460 U.S. 226 (upholding application of Age Discrimination in Employment Act to bar involuntary retirement of a state employee pursuant to state law).

151. 456 U.S. 742 (1982) (upholding the Public Utility Regulatory Policies Act of 1978, which required state utility commissions to consider the adoption of certain policies and required those commissions to follow certain procedures during the course of such consideration).

152. The *Garcia* majority opinion seemed to recognize this point. 469 U.S. at 540 (stating that "[m]any constitutional standards involve '[undoubted] . . . gray areas,' . . . and, despite the difficulties that this Court and other courts have encountered so far, it normally might be fair to venture the assumption that case-by-case development would lead to a workable standard for determining whether a particular governmental function should be immune from federal regulation under the Commerce Clause"). In her *Garcia* dissent, Justice O'Connor acknowl-

So while much of the majority opinion in *Garcia* is devoted to the "workability" issue, what seems to have really changed is that Justice Blackmun altered his view about the propriety of the analytical assumptions that formed the basis of *National League of Cities*.[153]

Thus, in his opinion for the Court in *Garcia*, Justice Blackmun rejected as "unsound in principle"[154] a judicial role in defining the contours of state immunity from the reach of federal power because such a role "disserves principles of democratic self-governance."[155] *Garcia* therefore accepts the premise that, despite the remarkable broadening of federal authority under the Commerce Clause—an area of interpretation in which a judicial role is concededly appropriate—the establishment of affirmative limits on federal power should be left to the political process.[156] In that view, it is inappropriately counter-majoritarian[157] to develop affirmative limitations judicially

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edged the difficulty involved in "craft[ing] bright lines defining the scope of the state autonomy protected by *National League of Cities*." Id. at 588-89. For the majority, the difficulty suggested the impropriety of judicial intervention. For Justice O'Connor, "[r]egardless of the difficulty," it was the Court's "duty," id. at 589, not to "abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States." Id. at 581.

153. The Supreme Court noted probable jurisdiction in *Garcia*, 464 U.S. 812 (1983), in the same year that it decided *EEOC V. Wyoming*, 460 U.S. 226 (1983). The seed for *Garcia* was arguably sown in the sharp disagreement between Justice Stevens and Justice Powell in their separate opinions in *EEOC*. In his *EEOC* concurrence, Justice Stevens expressed his view that the Tenth Amendment does not "afford[] any support" for a "judicially constructed limitation on the scope of the federal power granted to Congress by the Commerce Clause." 460 U.S. at 248. Justice Stevens asserted that *National League of Cities* was "inconsistent with the central purpose of the Constitution itself," a "modern embodiment of the spirit of the Articles of Confederation," and was therefore "incorrectly decided." Id. at 249-50. He urged the "prompt rejection" of *National League of Cities*, which he characterized as "not entitled to the deference that the doctrine of *stare decisis* ordinarily commands." Id.

In response te Justice Stevens' concurrence, Justice Powell "record[ed] a personal dissent from Justice Stevens' novel view of our Nation's history." Id. at 265. Justice Powell emphasized that "even today federalism is not . . . utterly subservient" to the expanding scope of federal power under the Commerce Clause. Id. at 266. He viewed "the power to determine the terms and conditions of employment for the officers and employees who constitute a State's government" to be "as sovereign a power as any that a State possesses, and . . . far removed from the original concerns of the Commerce Clause." Id. at 269 n.5. Justice Powell was alarmed that Justice Stevens' position "recognize[d] no limitation on the ability of Congress to override state sovereignty in exercising its powers under the Commerce Clause." Id. at 275.

154. *Garcia*, 469 U.S. at 546.

155. Id. at 547.

156. Justice O'Connor's *Garcia* dissent emphasized the effect of a broadened interpretation of the federal commerce power on the scope of state authority. For Justice O'Connor, the expanded federal commerce power means that "Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers." Id. at 584. Justice O'Connor argued that the Court had an obligation to "reconcile" the "conflict" between the dual constitutional values of "federalism and the effectiveness of the commerce power." Id. at 589.

157. Justice Blackmun relied on the work of Professors Jesse Choper and Herbert Wechsler in reaching this conclusion. See generally Choper, *Judicial Review and the National Political Process* (cited in note 138); Herbert Wechsler, *The Political Safeguards of Federalism: The Role*

under the Tenth Amendment because "[a]ny rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[158]

The majority opinion in *Garcia* seemed to close the door on the development of judicially-created affirmative limitations on federal power under the Tenth Amendment. But the passion of the dissents, and their strong belief that affirmative restrictions on federal power were needed to provide a shield for states from expanding and encroaching federal power, were evident. While the language of *Garcia* seemed definitive, the closeness of the vote and the strength of the views expressed in the dissents suggested that the majority's judicial withdrawal from the field of Tenth Amendment federalism would not be the last word. *Garcia* did not seem like a stable precedent, and predictably it has not been as Justices Souter and Thomas have joined the Court.

*D. The Tenth Amendment Post-*Garcia

In the post-*Garcia* period, the members of the Supreme Court unhappy with *Garcia*'s doctrinal approach have developed two different strategies in response. These strategies are reflected first in *Gregory v. Ashcroft*,[159] and then in *New York v. United States*.[160]

Gregory involved the question whether the federal Age Discrimination in Employment Act ("ADEA")[161] barred Missouri's mandatory retirement provision for state judges. Resolution of the case called for determining whether state judges were "employees" covered by the ADEA. In 1974, Congress extended coverage under the ADEA to include states as employers.[162] At the same time, the definition of "employee" was changed to exclude appointed public officials "on the policymaking level."[163] The issue was whether, as a

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of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954).

158. *Garcia*, 469 U.S. at 546.

159. 501 U.S. 452.

160. 112 S. Ct. 2408.

161. Pub. L. No. 90-202, 81 Stat. 602, codified as amended, 29 U.S.C. §§ 621-634.

162. Pub. L. 93-259, § 28(a), 88 Stat. 74, codified at 29 U.S.C. § 630(b)(2) (1988).

163. 29 U.S.C. § 630(f) (1988).

matter of statutory interpretation, state judges were appointees "on the policymaking level."[164]

In introductory background to its analysis, the Court observed that, under the Tenth Amendment, "States . . . retain substantial sovereign authority under our constitutional system."[165] Preservation of federalism results in mutual checks on misuse of authority by both federal and state governments. "In the tension between federal and state power lies the promise of liberty."[166]

To play its role in the federalism balance, state power must be "credible."[167] Because of expansive interpretations of federal power and the supremacy of federal law, "Congress may legislate in areas traditionally regulated by the States."[168] Because defining the qualifications of state public officials is a "decision of the most fundamental sort for a sovereign entity, . . . Congressional interference with this decision . . . would upset the usual constitutional balance of federal and state powers."[169]

The Court's approach to preserving a certain measure of state authority in *Gregory* was to adopt a "plain statement" rule of statutory construction.[170] If *Garcia* leaves federalism issues to the political process, then the Court in *Gregory* found it appropriate that major intrusions on state authority should be given effect only when the Court is "absolutely certain that Congress intended" such an outcome.[171] The insistence on a "clear statement" assures that, with respect to "legislation affecting the federal balance," the Congress "has in fact faced, and intended to bring into issue, the critical matters" of federalism involved.[172] That is, if the federal government seeks to overturn local autonomy, it must express its intent to do so explicitly. Congress cannot escape political accountability by hiding its acts in

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164. A related but distinct issue under the 1974 ADEA amendments was adjudicated in *EEOC v. Wyoming*. *EEOC* did not involve a matter of statutory interpretation but rather the question of whether Congress had authority under the Tenth Amendment as construed in *National League of Cities* to apply the ADEA to state employees generally.

165. *Gregory*, 501 U.S. at 457.

166. Id. at 459.

167. Id.

168. Id. at 460

169. Id. This is a theme developed by the dissenters in *EEOC v. Wyoming*, 460 U.S. at 254 (Burger, C.J., dissenting) (stating that "defining the qualifications of employees is an essential of sovereignty"); id. at 269 n.5 (Powell, J., dissenting) (stating that "the power to determine the terms and conditions of employment for the officers and employees who constitute a State's government . . . is as sovereign a power as any that a State possesses. . . .").

170. *Gregory*, 501 U.S. at 460-61, 464.

171. Id. at 464.

172. *United States v. Bass*, 404 U.S. 336, 349 (1971), quoted in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989), quoted in *Gregory*, 501 U.S. at 461.

the political process, and dumping the burden on the courts to act interstitially, thereby indirectly eroding state authority.[173]

The decision in *Gregory* based its approach on a series of precedents from areas that reflect on sensitive federalism issues. For example, in the preemption context, the federal intent to preempt state authority in areas of traditional state power will be inferred only when there is a "clear and manifest" purpose expressed.[174] Similarly, in the area of Eleventh Amendment federalism jurisprudence, the Court has allowed federal abrogation of state powers but only if congressional intent is made "unmistakably clear in the language of the statute."[175] The Court has applied the same "clear statement" doctrine in other comparable federal-state areas as well.[176]

In *Gregory*, the Court found that "[i]t is at least ambiguous whether a state judge is an 'appointee on the policymaking level.'"[177] As a result, the Court held that the ADEA did not apply to Missouri's mandatory retirement policy for state judges.

The *Gregory* "clear statement" approach provides an important tool for protecting state authority by requiring Congress to address the political issue of federalism unambigously.[178] The *Gregory* analysis concentrates on whether the federal government has sought to exercise the broad powers it has. Its sensitivity to federalism concerns is expressed by requiring that the federal government act in a politically accountable manner in using its broad constitutional authority. It does not, however, attempt to establish an affirmative limitation on the scope of federal power.

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173. Compare with James F. Blumstein, *Court Action, Agency Reaction: The Hill-Burton Act as a Case Study*, 69 Iowa L. Rev. 1227, 1233-38, 1256-60 (1984) (discussing the courts' assumed "interstitial function" in enforcing "generally vague and precatory aspirational language" and the important restraining influence and maintenance of accountability from a "clear statement" principle of statutory construction).

174. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

175. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). See also *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

176. This principle has been applied to determining whether the state is a "person" for purposes of the federal civil rights statute, 42 U.S.C. § 1983 (*Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)), to situations in which the federal government is purported to have imposed substantial financial obligations on states (*Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981)), in construing the scope of coverage of federal criminal legislation (*United States v. Bass*, 404 U.S. 336, 349 (1971)), and in construing the application of the antitrust laws to anticompetitive conduct by the state as well as private anticompetitive conduct approved by a state (*Parker v. Brown*, 317 U.S. 341, 351 (1943)).

177. *Gregory*, 501 U.S. at 467.

178. Compare with Blumstein, 69 Iowa L. Rev. at 1237 (cited in note 173) (discussing the importance of setting an item on the political agenda).

In that sense, the Court's approach in *New York v. United States*[179] is a more direct, albeit delicate, challenge to the Tenth Amendment analysis of *Garcia*. *New York* dealt with the constitutionality of certain provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.[180] The statute's "take title" provision required a state in which low-level radioactive waste was generated to "take title" and possession of such waste if the state had not provided for the proper disposal of that waste by a specified date. New York challenged the validity of that provision[181] under the Tenth Amendment.

The Court in *New York* finessed the question of the role of the Tenth Amendment as a restraint on federal power. To do otherwise would have necessitated a direct reevaluation of the judicial noninvolvement principles of *Garcia*. Instead, in reinvigorating federalism principles, *New York* stressed the different factual contexts in which the cases arose.

The difference in context, which the dissent thought quite irrelevant to the federalism/constitutional principles at issue,[182] stressed the distinction "between a federal statute's regulation of States and private parties for general purposes, as opposed to a regulation solely on the activities of States."[183] This difference allowed the Court to downplay the role of the Tenth Amendment as an affirmative limitation on the federal commerce power.

In the context of a case like *Garcia*, where the Fair Labor Standards Act applies uniformly to employees in the private as well as the public sectors, the general federal commerce power is conceded. The analytical issue is whether some independent and affirmative limitation on federal power exists so that Congress' general commerce power is circumscribed as applied to public sector employees. *Garcia* expressly held that the Tenth Amendment embraces no such principle of affirmative limitation.

In *New York*, by contrast, there was no need to develop the Tenth Amendment as an affirmative limitation on the federal commerce power. Because the federal statute acted only on the state—requiring the state to take title to low-level radioactive waste if

179. 112 S. Ct. 2408.

180. Pub. L. 99-240, 99 Stat. 1842, codified at 42 U.S.C. § 2021b et. seq. (1988).

181. Two other provisions of the statute were at issue but their validity was upheld. For a description of those provisions, see *New York*, 112 S. Ct. at 2416.

182. See id. at 2441 (White, J., concurring in part and dissenting in part) (finding the contextual distinction between *New York* and *Garcia* "unpersuasive" and "insupportable and illogical").

183. Id.

the state did not provide for suitable disposal—there was no need to concede the general federal commerce power. As a result, the issue could be framed as an absence-of-federal-power question rather than as an affirmative-limitation-on-federal-power matter. In that sense, the analytical framework of *Garcia* could be left intact while the Court developed principles of Tenth Amendment federalism that were nonetheless at odds with the prevailing normative view in *Garcia.*

Writing for the *New York* majority, Justice O'Connor noted that federal/state power allocation questions can be "viewed in either of two ways."[184] They can be framed in terms of source of federal authority—that is, "whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution."[185] In the alternative, these issues can be framed in terms of federal encroachment on affirmative limitations placed on otherwise appropriate federal legislation—that is, "whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment."[186]

What was appealing about the factual context of *New York* was that the Court did not have to confront directly the *Garcia* issue concerning the role of the Tenth Amendment as an affirmative limitation on federal power. Rather, as Justice O'Connor aptly noted, "[i]n a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other."[187] The reason is straightforward: "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."[188] Thus, it made no difference in *New York* "whether one view[ed] the question at issue . . . as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sover-

184. Id. at 2417.
185. Id.
186. Id. at 2417.
187. Id.
188. Id. This power allocation paradigm essentially resurrects the doctrine of dual federalism in the narrow circumstance of direct federal regulation of states as states. That is, power allocation under this model is a zero-sum situation; either federal power exists or state power prevails. See notes 95-99 and accompanying text. The Court in *New York* made it clear that such a categorical approach was being adopted. In areas reserved to the states, federal power does not exist "[n]o matter how powerful the federal interest involved . . . ." Id. at 2429. There is no balancing; rather, "the Constitution simply does not give Congress the authority to require the States to regulate." Id.

eignty retained by the States under the Tenth Amendment."[189] As a result, the Court in *New York* could shuffle around the thorny question of what to do about *Garcia*.[190]

Nevertheless, the *New York* majority laid down some important doctrinal markers. It analogized the Tenth Amendment to the First Amendment, a classic Bill-of-Rights limitation on otherwise exercisable governmental power.[191] The limiting principles of the Tenth Amendment are "not derived from the text. . ., which . . . is essentially a tautology." Instead, the Tenth Amendment signals that the Constitution reserves certain powers to the states and that federal power "is subject to" these limits.[192]

The determinative limit in *New York* was that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[193] The federal government legitimately can induce state responsiveness to federal initiatives by use of the spending power.[194] Through a program of "cooperative federalism," Congress can provide states with a choice—"regulat[e] . . . according to federal standards or hav[e] state law pre-empted by federal regulation."[195] But the federal government may not coerce states to implement federal directives. Under the Constitution, Congress can "exercise its legislative authority directly over individuals rather than over States."[196] Thus, even in areas of authority delegated by the Constitution to the federal government, the federal government "lacks the power directly to compel the States to require or prohibit [certain] acts."[197] The federal "take

189. Id. at 2419.

190. The Court observed that cases such as *Garcia* "concerned the authority of Congress to subject state governments to generally applicable laws." *New York*, instead, "concern[ed] the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct . . . the States to regulate in a particular field or in a particular way." *New York* did not require the Court "to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable te private parties." Id. at 2420.

191. "[U]nder the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress. . . ." Id. at 2418.

192. Id.

193. Id. at 2420 (quoting *Hodel*, 452 U.S. at 288).

194. Id. at 2423. See, for example, *South Dakota v. Dole*, 483 U.S. 203 (1987).

195. 112 S. Ct. at 2424. See, for example, *Hodel*, 452 U.S. at 288-89.

196. 112 S. Ct. at 2422.

197. Id. at 2423. The Court stressed political accountability as a rationale to support its anti-commandeering principle of limitation. If the federal government can require state officials to implement federal policies or programs, then federal officials can avoid the political accountability that goes with proper identification of the parties responsible for a particular program:

> [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the

title" provision at issue in *New York* was deemed coercive because it offered the states no effective, constitutionally permissible choice.[198]

Of course, the issues avoided in *New York* go to the heart of the question of whether the Tenth Amendment can serve as a source of affirmative limitation on federal power. Formally, at least, *New York* can be interpreted as a lack-of-authority case.[199] But it is clear that the reason that no federal authority existed is that the Tenth Amendment "restrains the power of Congress."[200] Clearly, the federalism principles embraced by the Court in *New York* were, at a minimum, critical in leading to the conclusion that no source of federal authority existed to impose the "take title" provision on the states. Whether such a source-of-authority approach can be a stable basis for limiting federal power is unclear.

Past experience suggests that source-of-authority limits tend to fall as problems develop that are perceived as warranting national attention.[201] On the other hand, as the experience with the Bill of Rights has indicated, the establishment of affirmative limitations on federal power is more likely to result in actual, longstanding restraints on federal authority in areas of peculiar state concern. The fair question is whether the Tenth Amendment, by itself or linked with some other structural theory, is really up to the task of carving out, on a principled basis, a set of enforceable protections for state

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regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id. at 2424.

The Court relied on two scholarly works for this proposition. See Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 61-62 (1988); D. Bruce LaPierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U. L. Rev. 577, 639-65 (1985).

198. The states had a "'choice' of either accepting ownership of waste or regulating according to the instructions of Congress." Either "choice" was impermissibly coercive because it would "'commandeer' state governments inte the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." As the Court held, a "choice between two unconstitutionally coercive regulatory techniques is no choice at all." 112 S. Ct. at 2428.

199. In its statement of holding, the Court carefully maintained its agnosticism on the question of lack-of-a-source analysis or intrusion-on-an-affirmative-limitation mode of analysis. "Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." Id. at 2429.

200. Id. at 2418.

201. This point was made by the *New York* dissent, which cited the "crisis of national proportions in the disposal of low-level radioactive waste." Justice White referred to the majority's analysis as a "civics lecture" that he found to have a "decidedly hollow ring at a time when action, rather than rhetoric, is needed to solve a national problem." Id. at 2444.

interests. While *New York* may rightly be seen as a transitional case, the anti-commandeering principle that it establishes touches only a narrow category of cases. Ultimately, the Court will have to decide whether *New York* is a first step toward substantial revision or overruling of *Garcia*, or whether it is just a relatively narrow exception to *Garcia*'s broad principles.[202]

In a real sense, the debate about source-of-authority analysis versus affirmative-limitation analysis mirrors the debate surrounding adoption of the Bill of Rights. Advocates of stronger judicially-enforced protections of state autonomy interests are embracing a rights-oriented paradigm as a vehicle for protecting the political hegemony of states in certain circumscribed areas. Opponents of such a judicial role, such as Justice Stevens, view such a rights-oriented stance as unacceptably undemocratic, requiring the courts to make political judgments at the margin regarding the allocation of power. Ultimately, if the "workability" issue can be overcome, the issue may come down to a determination of whether federalism values are worthy of constitutionally enforceable status because of their important similarities to civil rights principles, or whether their particularistic, ascriptive, and non-universalistic characteristics suggest leaving state autonomy to the vagaries of the national political process.

E. McCarran-Ferguson and Parker v. Brown

In this final subsection, I will briefly address two nonconstitutional doctrines, alluded to in Part I,[203] that extend protection for state authority in a somewhat different manner from constitutional reinvigoration of the Tenth Amendment. They are concepts that have affirmatively empowered states vis-à-vis the federal government, embracing a form of the affirmative-limitation-of-federal-power model described earlier. One doctrine is explicitly statutory, and the other uses principles of common law to establish a gloss on the interpretation of a federal statute.

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202. Justice White's critique, in dissent, suggests that the state's interests in autonomy are not lessened just because the federal intrusion on state prerogatives is imposed on private parties as well. "An incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that 'commands' specific action also applies to private parties. The alleged diminution in state authority over its own affairs is not any less because the federal mandate restricts the activities of private parties." Id. at 2441. That, of course, was the position of the *Garcia* dissenters.

203. See notes 9-17 and accompanying text.

The straightforward statutory example is the McCarran-Ferguson Act,[204] a delegation to the states of federal regulatory authority over the business of insurance. In 1944, the Supreme Court held that the business of insurance was not purely an intrastate activity beyond the scope of the federal commerce power.[205] "The decision provoked widespread concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry."[206] The result was prompt Congressional action designed to authorize state taxation of, and allow state hegemony over regulation of, the business of insurance.[207]

McCarran-Ferguson was an act of federal self-abnegation, and it has been interpreted as such by the courts.[208] The Supreme Court, for example, has held that, under its commerce power, Congress through the McCarran-Ferguson Act "removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance."[209] Because the Commerce Clause empowers the federal government to regulate interstate commerce, the federal government can assign that power to the states and immunize them from the restraints of the negative Commerce Clause.[210] Thus, the negative Commerce Clause, which limits the power of states to burden excessively or discriminate against interstate commerce, has no

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204. 15 U.S.C. §§ 1011-1015 (1988).

205. See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

206. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978). To the extent that such concern was prompted by the desire of states to treat local insurance companies on a favored basis as compared to national or out-of-state companies, that fear was warrantod. The negative Commerce Clause prohibits that type of discrimination against interstato commerce. See *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Prudential Ins. Co.*, 328 U.S. at 429 (assuming state discriminatory tax against out-of-stato insurance company would violate negative Commerce Clause). However, *South-Eastern Underwriters* involved the application of the federal antitrust laws to the business of insurance. Ouly in a dual federalism world, where federal and state spheres are independent and non-overlapping, would such a decision jeopardize state regulation and taxation of insurance. See notes 95-99 and accompanying text. Under the concurrent jurisdiction approach that had recently been adopted to govern Commerce Clause doctrine, see, for example, *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), state regulation and taxation of the business of insurance would have been valid if non-discriminatory against, and not unduly burdensome of, intorstato commerce.

207. Congress delegated regulatory authority over the business of insurance to the states and adopted a "clear statement" principle of statutory construction: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

208. See *Prudential Ins. Co.*, 328 U.S. at 429-30.

209. *Western & Southern Life*, 451 U.S. at 653.

210. For a discussion of this form of Congressional power, see William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L. Rev. 387 (1983).

constraining effect on state regulatory or taxing authority regarding the business of insurance.[211]

For purposes of this discussion, the McCarran-Ferguson Act example is important because it demonstrates a paradigm of state autonomy through statutory delegation. Congress had power under the Commerce Clause to regulate the business of insurance but reallocated that power to the states in such a manner that states have virtually[212] plenary power over the taxation and regulation of the business of insurance. Further, Congress enacted a statutory "clear statement" rule of construction so that generally applicable federal legislation would not apply to the business of insurance unless Congress, in a particular statute, specifically mentioned and dealt with the business of insurance.[213]

The approach pursued under McCarran-Ferguson suggests a model for specifically identifying areas of state primacy and protecting state authority from federal intrusion by legislative enactment. The principle upon which McCarran-Ferguson was upheld—that Congress can allocate authority to the states in some subject area, and can even immunize state conduct from review under the negative Commerce Clause—could provide a vehicle for state empowerment through such state-protective federal charters. One strategy of protecting state institutional autonomy, then, would be the enactment of some form of federal statute that would, through the political process, develop an agreed-upon set of areas in which the primacy of the federal government would be reassigned to the states, subject, of course, to reclaiming by the federal government in whole or in part via a clearly stated legislative enactment.

A second potential paradigm for developing greater institutionalized state autonomy is the common law gloss on the federal antitrust law established under the doctrine of state action immunity. The pivotal cases are *Parker v. Brown*[214] and its progeny.[215]

The Supreme Court has construed the federal antitrust laws as extending to the maximum scope of Congressional power under the

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211. See *Western & Southern Life*, 451 U.S. at 653-55; *Prudential Ins. Co.*, 328 U.S. at 422-23, 429-30.

212. A split Supreme Court ruled that a state's regulation of insurance was subject to the strictures of equal protection, which, despite McCarran-Ferguson, acted as an instrument of intorstate federalism to limit discriminatory treatment of out-of-state insurance companies. See *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985). See also *Western & Southern Life*, 451 U.S. at 655-68.

213. 15 U.S.C. § 1012(b).

214. 317 U.S. 341 (1943).

215. See, for example, *Midcal*, 445 U.S. 97.

Commerce Clause.[216] Yet, out of considerations of federalism,[217] under the *Parker* state action immunity doctrine, certain state and state-approved private conduct has been held not to be prohibited by the antitrust laws.[218]

Parker v. Brown involved a challenge under the antitrust laws[219] to California's Raisin Proration Program, which authorized the state to appropriate a portion of each producer's output in order to stabilize raisin prices. A unanimous Supreme Court held that the state price stabilization program did not violate the federal antitrust laws.[220] While assuming that the program would violate the Sherman Act "if it were organized and made effective solely" by collective action of "private persons," the Court concluded that the Sherman Act did not "restrain a state or its officers or agents from activities directed by its legislature."[221]

Even though *Parker* involved a decision by California "to substitute sales quotas and price control—the purest form of economic regulation—for competition in the market for California raisins,"[222] the Court found no antitrust violation. "Relying on principles of federalism and state sovereignty,"[223] *Parker* announced the doctrine that "federal antitrust laws are subject to supersession by state regulatory programs."[224] The Sherman Act does not apply "to anticompetitive restraints imposed by the States 'as an act of government.'"[225]

By allowing federal antitrust law to be "subject to supersession by state regulatory programs," the *Parker* doctrine establishes a form

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216. See, for example, *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976).

217. The Supreme Court in *Parker* made clear the federalism concerns that underlay its decision not to apply the federal antitrust laws to state conduct in the absence of a clear statement of its contrary intent. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351.

218. For a discussion of the federalism aspects of the *Parker* doctrine, see James F. Blumstein and Terry Calvani, *State Action as a Shield and a Sword in a Medical Services Antitrust Context*: Parker v. Brown *in Constitutional Perspective*, 1978 Duke L. J. 389, 395-97, 400-03, 414-31.

219. There was also a Commerce Clause challenge, which was rejected by the Supreme Court. *Parker*, 317 U.S. at 359-68.

220. Id. at 350-52.

221. Id. at 350-51.

222. See *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 388 (1991) (Stevens, J., dissenting).

223. *Parker*, 317 U.S. at 370 (majority opinion). See also *Patrick v. Burget*, 486 U.S. 94, 99 (1988); *Hoover v. Ronwin*, 466 U.S. 558, 567 (1984).

224. *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2176 (1992).

225. See *Columbia*, 499 U.S. at 370.

of "inverse preemption."[226] Although at one time a plurality of four justices, led by Justice Stevens, argued that *Parker* immunity provided no defense at all for private defendants,[227] that position has not prevailed.[228] *Parker* immunity can apply to private[229] as well as governmental[230] defendants. As the doctrine has developed, there are two general requirements for *Parker* immunity: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[231] The *Parker* state-action doctrine, therefore, provides states with the authority to override the effect of the antitrust laws.

The federal antitrust law[232] embodies a fundamental national commitment to market-driven institutions, reflecting a "legislative judgment that . . . competition is the best method of allocating re-

226. See Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & Econ. 23, 25 (1983). For a critique of this view of the state-action doctrine, see Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 717-29 (1991).

227. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 585-92 (1976) (Part II, concurred in by White, Brennan, Marshall, JJ., not concurred in by Burger, C.J.). Justice Stevens observed that the Supreme Court had "never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law," id. at 600, and argued that *Parker* applied only to actions against state officials in their official capacities, id. at 591. This was a position asserted by the Solicitor General. Id. at 588-89.

228. See *Patrick v. Burget*, 486 U.S. 94, 99-100 (1988) (stating that "[a]lthough *Parker* involved a suit against a state official, the Court subsequently recognized that *Parker*'s federalism rationale demanded that the state-action exemption also apply in certain suits against private parties").

229. See, for example, *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985).

230. "[W]hen a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." *Hoover v. Ronwin*, 466 U.S. 558, 567 (1984). Further, a "state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature." Thus, "a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action." Id. at 568 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977)).

231. *Midcal Aluminum*, 445 U.S. at 105 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)). The "active supervision" prong of *Midcal* does not apply with respect to conduct by municipalities. *Hallie v. Eau Claire*, 471 U.S. 34, 46 (1985) (stating that "the active supervision requirement should not be imposed in cases in which the actor is a municipality").

The "active supervision" requirement "is designed to ensure that the state-action doctrine will shelter only the particular anti-competitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick*, 486 U.S. at 100-01. The "active supervision" provision serves "essentially an evidentiary function . . . ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie*, 471 U.S. at 46. To satisfy the "active supervision" requirement, the state must "exercise ultimate control over the challenged anticompetitive conduct. . . . The mere presence of some state involvement or monitoring does not suffice." *Patrick*, 486 U.S. at 101. With respect to anticompetitive conduct engaged in by a private party, "there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no [such] danger." *Hallie*, 471 U.S. at 47.

232. The Sherman Act, 15 U.S.C. § 1, et seq. (1988).

sources in a free market. . . ."[233] The courts have been unwilling to entertain arguments about the desirability or undesirability of procompetitive practices in a particular industry because the procompetitive policy embraced by the Sherman Act "precludes [judicial] inquiry into the question whether competition is good or bad."[234] Antitrust exemptions premised on the desirability of a regime of competition are "properly addressed to Congress."[235] But even if Congress does not act, the *Parker* doctrine allows states to substitute a policy of regulation for competition in opposition to the principles of the Sherman Act in specified contexts,[236] provided that, under *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*,[237] the states clearly articulate their policy and actively supervise it, thereby assuring that it is not a sham.[238]

Properly executed, state action under the *Parker* principle has the effect of an anti-supremacy clause, affording states primacy regarding regulation of their economies.[239] Despite what one believes about the need for or propriety of some state legislation under *Parker* principles,[240] *Parker* provides an example and establishes a paradigm

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233. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

234. Id.

235. Id. at 689. See also *Patrick*, 486 U.S. at 105 (stating that the "argument . . . challeng[ing] the wisdom of applying the antitrust laws to the sphere of medical care . . . is properly directed to [Congress]").

236. See *Patrick*, 486 U.S. at 105-06 (stating that "[t]o the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own").

237. 445 U.S. at 105.

238. See note 231.

239. A good example of the power that *Parker* provides to states derives from the movement spurred by the American Hospital Association, see Frederic J. Entin, Tracey L. Fletcher and Jeffrey M. Teske, *Hospital Collaboration: The Need for an Appropriate Antitrust Policy*, 29 Wake Forest L. Rev. 107 (1994), to insulate cooperative activities by hospitals from the reach of the antitrust laws. The debate about the wisdom of applying the antitrust laws to various cooperative hospital ventures, compare id. with David L. Meyer and Charles F. (Rick) Rule, *Health Care Collaboration Docs Not Require Substantive Antitrust Reform*, 29 Wake Forest L. Rev. 169 (1994), is taking place at the state level because of the potential applicability of *Parker* immunity. Although the antitrust laws reflect national policy, the *Parker* doctrine strikingly redirects focus away from the national political forum and to the state political arena. What is being proposed and enacted in a substantial number of states, see Rebert E. Bloch and Donald M. Falk, *Antitrust, Competition, and Health Care Reform*, 13 Health Aff. 206, 220 n.29 (1994), is legislation in which the states are able to authorize and immunize hospital mergers, insulate the division of markets territorially, and engage in other kinds of concerted activities that would be subject to the antitrust law. Yet, the states under *Parker* are authorized to immunize this conduct if they clearly articulate a regulatory philosophy and actively supervise that policy. For a discussion of this state-level activity, see Sarah S. Vance, *Immunity for State-Sanctioned Provider Collaboration after* Ticor, 62 Antitrust L. J. 409 (1994); Bloch and Falk, 13 Health Aff. at 219-21; James F. Blumstein, *Heath Care Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation*, 79 Cornell L. Rev. ___ (forthcoming 1994).

240. See generally Meyer and Rule, 29 Wake Forest L. Rev. 169 (cited in note 236).

of how our law vouchsafes local autonomy—even when the exercise of that authority is at odds with fundamental federal principles of economic policy. Undoubtedly, the *Parker* principle of federalism could be expanded beyond the area of antitrust to encompass a broader range of policies.

VI. CONCLUSION

In this Article, I have examined the objectives underlying federalism and argued that they present a viable alternative to self-determination and independence for geographically-based group interests. Federalism provides political autonomy for these groups. The secret to a successful regime of federalism—the "federalism deal"—is a linkage of geographically-based autonomy with a national assurance of civil rights protections for political, racial, gender-based, religious, or ethnic groups within those quasi-autonomous regions.

As a political principle and as an institutional structure, federalism decentralizes decisionmaking to promote autonomy, democracy, and freedom. In terms of goals, therefore, principles underlying federalism have much in common with traditional principles of civil rights. They both are tools for restraining majoritarianism, but their modes of operation are quite different. Federalism uses majoritarian principles at a subnational level as a means of delimiting national majoritarian authority; it protects geographically-based group interests.

In this regard, there is also a fundamental tension between the federalism paradigm and the civil rights paradigm. Civil rights principles restrain majoritarianism through the use of countermajoritarian precepts such as the rule against discrimination on the basis of race, religion, and gender. Consequently, while the objectives may be complementary in many circumstances, the techniques used often will be in considerable tension. The racial gerrymander situation is a good example of where the paradigms lead in very different analytical directions.

Because part of the federalism deal requires national intervention to assure civil rights protections, and provides recourse for regional minorities being treated unfairly in their quasi-autonomous areas, there is a need for strong national powers. But that need often becomes the basis for the legal/constitutional demise of institutionalized and enforceable limitations on the exercise of national power.

In the United States, limits on national power were supposed to derive from the nature of the federal government as a government of only enumerated powers. As the scope of national authority expanded, particularly with broad and flexible interpretations of the federal commerce power, it was clear that federal power would not be much, if at all, circumscribed by doctrines that relied on finding certain federal action beyond the scope of an enumerated power. In this Article, I have argued that serious attempts to allocate authority to states require a search for affirmative limits on federal power, analogous to Bill-of-Rights restraints that protect individuals against particular government conduct.

Finally, I conclude that developing an affirmative limitation on federal power may well be consistent with our constitutional and institutional traditions. The Tenth Amendment may or may not be up to the task of providing an affirmative restraint on national power; the issue seemed to be settled by the *Garcia* case, but the subsequent decision in *New York* suggests a renewed interest in doctrinally reinvigorating the Tenth Amendment as an affirmative limit on federal commerce power. Other techniques of limitation, such as the clear statement approach of *Gregory v. Ashcroft*, are found to offer some promise. Finally, there are the statutory and common-law examples of the federal government empowering the states to govern jurisdictionally in certain areas. Consistent with those principles, a charter of federalism could be developed, as an act of federal self-abnegation. As mentioned in the Introduction, such an executive order was promulgated during the Reagan-Bush years,[241] and is still in effect. Comparable statutory initiatives in carefully defined areas could restore greater balance between state and federal spheres.

241. See note 1.