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COMMENTS

THE SECOND DEATH OF FEDERALISM

*William W. Van Alstyne**

In 1976, in National League of Cities v. Usery, the Supreme Court distinguished acts of Congress regulating commercial relations from acts of Congress commanding the terms of state services. Last Term, in Garcia v. San Antonio Metropolitan Transit Authority, the Court abandoned the distinction and held that it was principally for Congress to determine federalism questions. In this Comment, Professor Van Alstyne criticizes the Court on both counts.

I

In 1938, under cover of the commerce clause, Congress enacted a national minimum wage law.¹ Somewhat affectedly styled the Fair Labor Standards Act (FLSA), the legislation applied to a large proportion of the nation's private employers. Its central feature was its prohibition of wage agreements at hourly rates less than those Congress fixed by law.

One effect of the Act may have been to push some wages up to a stipulated national standard of "decency."² Another effect may have been to eliminate jobs for those whose services were not valued at the federally mandated price.³ Its problematic economics aside, the FLSA was also controversial as a matter of constitutional law. In due course, the Act was challenged on two separate grounds.

The first ground was that Congress acted without sufficient constitutional authority to preempt the differing state statutes and state common law already applicable to employment contracts. In brief, this was the federalism argument. The argument relied substantially on the tenth amendment and on *Hammer v. Dagenhart*,⁴ an unadmired decision of the Supreme Court from 1918, conservatively interpreting

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1. Pub. L. No. 95-151, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1982)).

2. For the most recent judicial description and review of the FLSA, see Tony & Susan Alamo Found. v. Secretary of Labor, 105 S. Ct. 1953 (1985).

3. For an introductory review, see E. BROWNING & J. BROWNING, MICROECONOMIC THEORY AND APPLICATIONS 453-58 (1983); see also P. SAMUELSON, ECONOMICS 368-70 (11th ed. 1980). "What good does it do . . . to know that an employer must pay . . . \$4.00 per hour if that fact is what keeps [one] from getting [a] job?" *Id.* at 369 (footnote omitted).

4. 247 U.S. 251 (1918).

the power of Congress "[t]o regulate Commerce . . . among the several States."⁵ On the basis of *Hammer*, it was alleged that even if an employer produced goods shipped and sold in interstate commerce, the wages paid its employees were not themselves such commerce.⁶ Accordingly, they could not be regulated by Congress but, at most, by the state of manufacture.

The second ground of objection was more emphatic than the first. The objection was that the FLSA denied (substantive) due process to those whom it regulated and to those to whom it would deny jobs by artificially pricing their skills beyond the reach of employers otherwise willing to employ them. The argument was derived principally from *Lochner v. New York*,⁷ an unadmired decision of the Supreme Court from 1905, liberally interpreting the due process clause of the fourteenth amendment. If successful, it would have overridden state minimum wage laws as well as supererogatory acts of Congress.

In 1941, the FLSA was sustained by the Supreme Court against both objections in *United States v. Darby*.⁸ The due process objection was discredited on the strength of case law that had already effectively overruled *Lochner* so far as *Lochner* had limited the police power of the states to regulate conditions of labor.⁹ In *Darby*, the fifth amendment's due process clause was construed to be no more limiting of congressional acts than the fourteenth amendment's due process clause was limiting of state acts. As for the alleged "want-of-congressional-power" (federalism) objection, it, too, was rebuffed. The company's wage contracts were deemed to be sufficiently of a piece with its outbound commerce as readily to come within reach of national regulation. *Hammer v. Dagenhart*, moreover, was explicitly overruled.

The *Darby* case was decided by a unanimous Court, all of the (politically) conservative pre-New Deal Justices except Justice Roberts having left the bench since the last cases relying upon *Hammer v. Dagenhart*. On its facts, however, *Darby* was not an acutely radical decision. Doctrinally it hardly strayed from a Marshallian view of the commerce clause as vesting in Congress a generous authority to determine the rule by which the terms of competition in interstate (and

5. U.S. CONST. art. I, § 8, cl. 3.

6. See also *Carter v. Carter Coal Co.*, 298 U.S. 238, 303 (1936) ("Production is not commerce . . .").

7. 198 U.S. 45 (1905); see also *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

8. 312 U.S. 100 (1941).

9. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Bunting v. Oregon*, 243 U.S. 426 (1917); see also *Nebbia v. New York*, 291 U.S. 502 (1934).

foreign) commerce would be governed.¹⁰ The Darby Lumber Company was a conventional commercial enterprise. Its goods did compete in the national market,¹¹ and the wages at issue were paid to produce those goods.¹² If these considerations did not bring it within range of Congress' power "[t]o regulate Commerce . . . among the several States," it could only result from an ungenerous rule of construction, a rule that the Court was not prepared to defend. Indeed it was not necessarily *Darby* (or cases like *Darby*)¹³ that necessarily led to suggestions on the original death of federalism. It was, rather, the subsequent series of endless judicial passive acquiescences that appeared as Congress greatly expanded the FLSA and moved on to

10. It is arguable that *Darby* but re-established the rule of generous construction, from which *Hammer v. Dagenhart* itself had departed. See the dissent by Holmes in *Hammer*, 247 U.S. at 277; see also Powell, *The Child Labor Law, the Tenth Amendment, and the Commerce Clause*, 3 So. L.Q. (now TUL. L. REV.) 175 (1918). For Marshall's general statement of the rule of generous construction respecting enumerated congressional powers, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-25 (1819). For its general explication in respect to the commerce clause in particular, see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824).

11. States are precluded by the "negative voice" of the commerce clause from disallowing the importation of goods from other states or from differentially taxing those goods even if they were manufactured under more permissive wage laws than a state's own. Given the inability of each such state to enact either sort of equalizing measure against the inbound goods from other states, any minimum wage law a state might attempt to impose upon its own producers might merely generate an externality enabling companies like *Darby* to capture the entire economic return. The frustration of each other state's internal police power (by operative effect of the negative voice doctrine) might mean either that Congress must in these circumstances have the power to intervene, or that no state could gain anything whatever (except a loss of business) from adopting a minimum wage law applicable to any local producer effectively subject to interstate or foreign competition within the state. This consideration, incidentally, had been alluded to by Justice Holmes, in his dissent for himself and three others, in *Hammer v. Dagenhart*. See the discussion in Powell, *supra* note 10, at 179-81.

When no such consideration was present, on the other hand, Justice Holmes was appropriately skeptical of any claim of power in Congress to try to use the tail of the commerce clause to wag the whole dog of the tenth amendment. As he cautioned elsewhere, "Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce." *Northern Sec. Co. v. United States*, 193 U.S. 197, 402 (1904) (Holmes, J., dissenting). (See also his discussion of legislative pretext, 193 U.S. at 411.) Implicit in Holmes' dictum is his own recognition that the tenth amendment is in part a synecdoche of subject matter allocation to the states: differences among state laws are assumed, even supposing that they may generate significant economic effects. John Marshall, incidentally, would have agreed. See Marshall's own statements in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (dicta on legislative pretext) and see also JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland* 173, 187 (G. Gunther ed. 1969).

12. See discussion in note 11 *supra*.

13. Compare *Katzenbach v. McClung*, 379 U.S. 294 (1964), in which the chance ultimate source of some of the local vendor's particular supplies in no way contributed to his business practices and in no respect did those practices threaten the efficacy of any other state's police power. The regulation reaching local vendors in *McClung* may have been "necessary and proper" to maintain the integrity of the regulation placed on their competitors doing substantial interstate business, see note 34 *infra*, and the decision in *McClung* may also be defensible under section 2 of the 13th amendment, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), but the rationale the Court accepted in *McClung* is not of a piece with *Darby*. It is, rather, a clear example of permitting the tail (the commerce clause) to wag the whole dog (the tenth amendment).

claim a more generalized police power at large.¹⁴ Thirty-three years after *Darby*, Congress took what seemed to many to be the ultimate step — a step too far.¹⁵

II

In 1974, Congress decided that state governments should be required to operate under the same salutary wage constraints as private employers.¹⁶ That these were *governments* whose internal terms of employment Congress presumed to dictate, seemed no longer to make any difference. That none of the affected activity was commercial or in any other way comparable to that involved in *Darby* (it involved employing legislative staff, providing local fire protection, supervising parks and playgrounds, managing public housing for the poor, etc., as distinct from manufacturing goods for trade through national and international markets) seemed equally of no account. Congress was unmoved by such distinctions, evidently encouraged by three decades of judicial winking. Thus, Congress presumed to command the states by directing the terms of their own public service.

Objecting that the commerce power did not authorize such a travesty and that the tenth amendment disallowed Congress any power to dictate the terms of internal operations of state government in this fashion (to drive up the costs or to compel the abandonment of various public services),¹⁷ several states and a large number of state political subdivisions moved to enjoin the Act as amended. In *National League of Cities v. Usery*,¹⁸ the Supreme Court agreed. It held the FLSA ex-

14. In his recent Storrs lectures, for instance, Bruce Ackerman suggests that the Court ultimately treated the political will of persistent New Deal majorities as effectively adding an article V (un)written (non)amendment to the enumerated powers of Congress. In Ackerman's view, the new amendment vested in Congress a new power to define and to provide for the general welfare, thus effectuating a repeal of the tenth amendment. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1056-57, 1064-65 (1984). For a critical review of Professor Ackerman's notions on article V, see Van Alstyne, *Notes on a Bicentennial Constitution: Part I, Processes of Change*, 1984 U. ILL. L. REV. 933, 951 n.51.

15. In 1966, Congress extended the FLSA to cover certain public employees, including those at state hospitals, institutions, and schools. 80 Stat. 831, 29 U.S.C. § 203(d). The Court sustained those amendments in *Maryland v. Wirtz*, 392 U.S. 183 (1968). In 1974, Congress went further and extended the Act to all state employees. 88 Stat. 55, 29 U.S.C. § 203(d), (s)(5), (x). The 1974 amendments prompted the Court, in *Usery*, to reconsider and overrule *Wirtz*. See *National League of Cities v. Usery*, 426 U.S. 833, 837-38, 854 (1976).

16. See note 15 *supra*.

17. For suggestions that the principal impact of the Act would fall most heavily on the most vulnerable services provided by state and local governments to the least well-to-do persons, see Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1178-79 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1076 & n.42 (1977).

18. 426 U.S. 833 (1976).

tensions to be unconstitutional.

The Court's decision in *Usery* was only the second decision striking down an act of Congress on pure federalism grounds in four decades,¹⁹ a period embracing a greater volume of sweeping federal statutes than the whole of our previous 150-year history. Like the only other federalism decision adverse to Congress,²⁰ *Usery* was decided by a five-to-four vote. The critical vote, moreover, was self-consciously doubtful; Justice Blackmun only fretfully and barely concurred. And, as we know, his concurrence would not last. *Usery* was to be overruled in less than a decade, due solely to Justice Blackmun's change of mind.²¹

Before turning to the case that overruled *Usery*,²² however, some brief review of the Court's much-maligned reasoning in *Usery* itself may be useful. It is less clear to me than it may be to others that the decision was ill-reasoned or incorrect. In fact, the *Usery* case represented only the most modest sort of federalism restraint on Congress, a point often overlooked in the general academic rush to condemn it.²³

III

Certain clauses in the Constitution other than the commerce clause, the Court noted in *Usery*,²⁴ grant to Congress very great power to influence the scope and shape of state and local services, and nothing in the *Usery* decision affected *those* powers. The taxing powers of Congress are obviously superior powers, for instance, and, when exercised, they effectively remove an immense amount of revenue from each state's reach. In turn, Congress has virtually unlimited discretion to specify the conditions states must meet to be eligible for such aid or grant programs that Congress provides under its power to spend for "the general welfare." Congress may elect to share nationally collected revenues with state and local government almost entirely on

19. The other such decision was *Oregon v. Mitchell*, 400 U.S. 112 (1970), which was superseded by the twenty-sixth amendment. Prior to *Mitchell*, the last decision holding against an act of Congress on federalism grounds was *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

20. *Oregon v. Mitchell*, 400 U.S. 112 (1970). Five Justices, including the Chief Justice, joined in three separate opinions to strike down the federal voting age requirement as applied to the states. There was no opinion of the Court.

21. *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005 (1985).

22. And it is in fact but one feature of *that* case, rather than *Usery*, to which the more substantial portion of this Comment is directed. See sections IV-VII *infra*.

23. See note 17 *supra*; Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U. L. REV. 1 (1978). An exception to the general disapproval greeting *Usery*, albeit qualified, is Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979).

24. 426 U.S. at 843 n.17.

such terms as Congress alone thinks best.²⁵ It is not the case, therefore, that Congress is without appropriate influence in the uses of national largesse.²⁶

But no national funds were involved in *Usery*, and consideration of the spending power merely underscores the contrast. Congress did not, for instance, require merely that projects funded through federal grants would have to pay according to the federal minimum wage. The Act of Congress was *all* stick and no carrot. The services to be affected were wholly state services and in no sense federal services. The Act was entirely coercive federalism and neither "co-operative" nor even "incentive" federalism; i.e., there was not even a partial subsidy, much less a complete subsidy, to meet the costs of the federal demand imposed on purely state and local services.²⁷ So far as Congress was concerned, it was for Congress to command the states' decisions — to pay more and to provide less as Congress alone might prefer.

Certain other clauses in the Constitution may also vest in Congress a superior set of particular powers, the Court also noted, and these may sometimes be ample not merely to displace certain state laws but even, on occasion, to permit direct congressional command over the operations of state government. Thus, the majority in *Usery* expressly declined to overrule *Fry v. United States*,²⁸ (freezing state wage rates as an interim means of national inflation control); much less did it call into question any related war powers of Congress.²⁹ The amended

25. See, e.g., *Oklahoma v. Civil Serv. Commn.*, 330 U.S. 127 (1947); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 593-98 (1937); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 254, 258 (1934); *Massachusetts v. Mellon*, 262 U.S. 447, 479-80 (1923). I say "almost entirely" (rather than simply "entirely"), however, because the doctrine of unconstitutional conditions presumably will apply to forestall a complete end run around certain core constitutional features of federalism, despite the conventional wisdom of the spending power. It is doubtful, for instance, that Congress could condition receipt of federal funds for state revenue-sharing by restricting eligibility to those states whose legislatures would ratify a proposed constitutional amendment. (The assumptions of article V refute the idea.) It is similarly improbable that the Court, having held as it did in *Oregon v. Mitchell*, would thereafter sustain a limitation on revenue-sharing confined to states that altered their laws to permit eighteen-year-olds to vote, or (for instance) undertook to move the state capitol to a location that, in the view of Congress, was more consistent with "the general welfare." Cf. *Coyle v. Oklahoma*, 221 U.S. 559 (1911). Additionally, it remains arguable that the tenth amendment itself may interpose a requirement of "close fit" between conditions attached to federal funds and the demand made of recipient states, even in less obvious cases than these.

26. But see the suggestion of some limitations even on the spending power, note 25 *supra*.

27. In *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005, 1008, 1020 (1985), Justice Blackmun notes in passing that substantial federal funding contributed to the local transit service, but compliance with the FLSA was not a feature of that funding; the issue was therefore examined solely under the commerce power, as in *Usery*.

28. 421 U.S. 542 (1975).

29. *Usery*, 426 U.S. at 855 n.18; see *Case v. Bowles*, 327 U.S. 92 (1946) (examining congressional war powers).

FLSA could not, however, draw any strength from clauses or claims of exigent national circumstance: there were *no* such circumstances, either real or even alleged.³⁰

Finally, as the *Usery* Court also noted,³¹ the Constitution itself imposes a number of restrictions on the states as such, and nothing in the *Usery* decision affects the express powers vested in Congress appropriately to enforce those restrictions. But no such congressional enforcement powers were even vaguely relied upon to justify the minimum wage demands imposed on the states by the amended FLSA. It was never suggested, for instance, that state wages were so low, or that the conditions of public service so onerous, as to verge on a system of state peonage, which Congress could disallow under the enforcement clause of the thirteenth amendment.³² And, *unlike* the Equal Pay Act amendments of 1963, or the 1972 anti-discrimination amendments to Title VII of the Civil Rights Act of 1964, the FLSA state minimum wage requirements could not be sustained as an enforcement of the fourteenth amendment's equal protection clause.³³

Moreover, no claim was made that extending the FLSA to state and local government was necessary or proper simply as a means of insuring the integrity of the FLSA as applied to those whom Congress could reach (and had already reached) under the commerce power. This was clearly *not* a case in which Congress, having fixed the minimum wage for employees of firms in interstate commerce, found that those firms would be threatened with competitive ruin unless it also fixed the minimum wage of local firms.³⁴ In no respect was it sug-

30. Cf. *Wickard v. Filburn*, 317 U.S. 111 (1942).

31. 426 U.S. at 843 n.14.

32. "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1 (This prohibition clearly forbids conditions of forced labor by state governments, as well as private peonage maintained under state law.).

"Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2 (For a modern example of the latitude of this clause, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968)).

33. See and compare, for instance, *Arizona Governing Comm. for Tax Deferred Annuity v. Norris*, 463 U.S. 1073 (1983) (per curiam), and *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), with *EEOC v. Wyoming*, 460 U.S. 226 (1983). *Norris* and *Manhart* sustained direct congressional prohibition of state gender-based annuity tables under title VII, pursuant to Congress' enforcement powers under section 5 of the fourteenth amendment. In *EEOC v. Wyoming*, the Court avoided addressing whether Congress had the power under the enforcement clause of the fourteenth amendment to prohibit states from setting a mandatory retirement age (fifty-five) for state game wardens. 460 U.S. at 243. The government's attempt to anchor its prohibition in its fourteenth amendment enforcement powers was strained. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam) (state statute mandating retirement of state police officers at age fifty, held not to violate the equal protection clause).

34. Cf. *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914) (intrastate rates may be fixed to protect viability of interstate rates); see also *Katzenbach v. McClung*, 379 U.S. 294 (1964). In *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), the Court upheld

gested that private employers subject to the FLSA would be at risk unless state and local governments were compelled to pay police, firemen, school teachers, etc., at the same minimum rates.³⁵

The foundations of the FLSA extensions were therefore extremely shaky. Essentially, they amounted to an assertion by Congress: as the Court had previously sustained acts regulating some scarcely commercial activities by private parties far removed from interstate trade, presumably the Court would see nothing in the tenth amendment disallowing the imposition of identical restrictions directly on state and local government. In brief, *whatever Congress might preempt* from state regulation (namely, the determination of wages), *it might also command of the states themselves* (namely, the payment of wages). Congress acknowledged no distinction between a principle of constrained dual sovereignty and a virtually unlimited claim of command sovereignty: a plenary national power to dictate the terms of state and local government. The auspices of the federal claim for control, moreover, were themselves highly confrontational. Congress provided no reason for directing higher wages to be paid to state and local employees beyond its own naked preference.

Indeed, for all of these reasons it is quite arguable that the majority's opinion in *Usery* was unduly modest rather than too sweeping. The Rehnquist opinion held the FLSA extensions invalid only as applied to state and local agencies performing "*traditional* governmental functions." The distinction thus implied by the majority would invite endless controversy. "Traditional" might be synonymous with "customary" as of some particular date, e.g., 1791, when the Bill of Rights was adopted. Alternatively, "traditional" might be synonymous with "conservative,"³⁶ i.e., with minimalist theories of proper governmental

an act of Congress forbidding racial exclusion by a large (216 room) motel and restaurant catering to interstate travelers. In *McClung*, the act was similarly sustained as applied to a local restaurant. As local restaurants free to exclude persons forbidden by federal law to be excluded by their competitors might thereby divert a large portion of local customers away from their rivals, Congress could quite reasonably conclude that the inclusion of such enterprises was both "necessary and proper" to maintain the integrity of the rule it had imposed upon the other restaurants, i.e., those doing substantial (but of course not exclusively) interstate business. Omitting direct competitors of regulated enterprises from the same regulation might well expose the regulated class to economic ruin. The necessary and proper clause enables Congress to avoid that result. Compare this suggestion, *Houston, E. & W. Tex. Ry.*, and the discussion in note 13 *supra* (alternative analysis under section 2 of the thirteenth amendment), with the different (more doubtful) analysis accepted by the Court in *McClung*, and criticized in note 13 *supra*.

35. Nor was there any suggestion that the indiscriminate application of the FLSA to state and local services was sustainable under the commerce clause as some sort of valid limitation on state combinations in restraint of trade. See and compare the "state action" line of cases adjudicated under the Sherman Act, e.g., *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713 (1985); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

36. One might associate this view with *Usery* because the opinion for the Court was provided

functions: to provide laws mediating claims of private right, a police force to maintain order, and a court system for adjudications, and no more. Under either view, if a state undertook something new in the provision of public service, or otherwise moved beyond the grim role of the nightwatchman state, it would have to yield to Congress the power to determine the terms. Either way of drawing the line would pose problems for several Justices who would understandably resist a notion that the Constitution embeds some bright line conservative principle respecting the "proper" role of state government.

The test was a misfortune understood in these terms; its obvious invitation would be exploited with devastating effect in *Garcia v. San Antonio Metropolitan Transit Authority*.³⁷ The (new) majority would ridicule the idea and, by making a very strong case that the tenth amendment yielded no distinction of *this* sort, would dismiss the entirety of *Usery* as no better than a brick without straw. But it might all have been otherwise. Indeed, it is strongly arguable that *Usery* fell victim to a premature and unwarranted hostility. Several Justices, respectfully, did not try to make it work. Rather, those Justices originally in dissent from Justice Rehnquist's analysis failed to treat it in the manner the Court has otherwise wisely tended to do in equivalent circumstances associated with great cases: not as the final word on the subject, but as the first words.³⁸

A less hostile view of *Usery* might have sought to develop its basic distinction between preemption and command, in much more moderate fashion. The superior power of Congress as to the former would have remained unaffected. The exceptional hubris of the latter would require a suitable justification, quite parallel to what the first amendment requires in its field of concern.

Under this view of the matter, the existence of a public agency under state or local governmental auspices would itself suffice as clear evidence that the services it provides come within the felt responsibilities of government in the first instance, as determined solely by the constituents and representatives of that government.³⁹ Whether the

by one of its most (politically) conservative members, Justice Rehnquist. Nevertheless, the suggestion would be inappropriate since the public services at issue in *Usery* itself included several kinds of services not embraced by minimalist theories of government (e.g., part-time employment of teenagers to superintend municipal park playgrounds during summer time).

37. 105 S. Ct. 1005, 1010-16 (1985) (applying the FLSA's minimum wage and overtime pay provisions to a metropolitan transit authority); see also *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982).

38. Cf. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Schenck v. United States*, 249 U.S. 47 (1919); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

39. Cf. *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1720 (1985) ("We may pre-

need is for the ordinary protection of life and property (e.g., a police department, a judicial system), or for schools, parks, day care centers, or gravel pits (for patching local roads), the Constitution does not draw a line. Nothing we know about the tenth amendment suggests that it meant to limit the range of public services a state might provide to one or another of these things, even assuming (as we may) that nothing in the Constitution requires them, either.

If, then, a state wishes to provide opportunities for education (rather than to leave such opportunities to the vicissitudes of the private market), the tenth amendment need not be construed to treat that decision as less worthy than the decision to provide a state highway patrol. If a community resolves to establish a public day care center, it cannot be the case that the tenth amendment draws a shadow across its path. Accordingly, if Congress is nonetheless allowed to interfere with those purely state and local programs, under *Usery* it would be required to back its authority with a judicially acceptable reason in every such case, and not simply in those involving "traditional" public services as previously defined. The reason, moreover, could not be a mere naked preference by Congress to have state and local programs administered as Congress might like — the tenth amendment would disallow any such claim. Rather, the reason would need to relate to the imperatives of things otherwise within the power of Congress to command, just as *Usery* so reasonably suggested.⁴⁰

sume, absent a showing to the contrary, that the municipality acts in the public interest.") (footnote omitted). In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), Justice Blackmun joined the dissent in rejecting the Chief Justice's distinction (for antitrust state exemption purposes) between "governmental" and "proprietary" services; he regarded it as too narrow. The dissent argued that all governmental action, even that termed "proprietary," should be exempt from Sherman Act scrutiny. 435 U.S. at 432-34. Justice Blackmun noted, in particular, that imposing treble damage liability upon state and local governments could have a "grave" impact upon their ability to provide necessary governmental services. 435 U.S. at 442. (I am indebted to Professor Eleanor Fox for these helpful observations.)

40. If a distinction in the latitude of congressional override power is to be drawn based not on a claim of exceptional circumstance, but on the nature of the state or local government activity, moreover, it would need to be some sort of distinction between "commercial" and "noncommercial" activity rather than between "traditional" and "nontraditional" (or between "governmental" and "proprietary") public services. A "commercial/noncommercial" distinction responds to the distinction explicit in the commerce clause itself, as the other attempts at categorization do not. Under this view, the more the state's own commercial practices (e.g., making cars for sale at market prices to compete with G.M. or Ford) mingle in national commercial markets, the greater its subordination to such rules of trade as Congress may otherwise see fit to impose upon that trade.

Perversely, perhaps, the Court has recently tended to shelter state action when the state *has* intervened as a market participant (e.g., as a buyer or seller), although in fairness the Court may have been correct in not regarding the particular enterprises or practice at issue as other than public services. See, e.g., *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (commerce clause exemption, despite discriminatory in-state preference in state sales and state purchases). See also the manner in which the Court has attempted to prick out a line

In *Hodel v. Virginia Surface Mining and Reclamation Association*,⁴¹ the Court attempted diffidently to restate *Usery* in a four-part test.⁴² The first part of the restated test was that the federal statute in question must presume to regulate "the 'States as States,' " which, the Court later conceded, the statute in *Garcia*, like the statute in *Usery*, had presumed to do.⁴³ The second part of the test was that the statute must "address matters that are indisputably 'attribute[s] of state sovereignty,' " which, the Court conceded grudgingly, the statute in *Garcia* also presumed to do.⁴⁴ Third, forcing the state to comply with the federal statute must "directly impair [the state's] ability 'to structure integral operations in areas of *traditional* governmental functions,' " ⁴⁵ a test that need not have been at all difficult to satisfy, depending partly on what one thought it meant.⁴⁶ Fourth, the relative importance and "the nature of the federal interest advanced [must not] be such [as to] justiff[y] state submission,"⁴⁷ a fair enough requirement in itself, and one which the Court did not identify as having been met.⁴⁸

In *Garcia*, Justice Blackmun particularly picked on the allegedly vacuous nature of the third part of the test,⁴⁹ but we have already seen that it need not have been treated with such hostility. The question of "traditional governmental function," is acceptable if understood in a perfectly ordinary, straightforward way. It is simply the tradition of state and (more typically) of local governments to supply public services that they find consistent with the public welfare and unsuitable to leave to other providers, nothing more. Accordingly, the determi-

between the "commercial" and the "noncommercial," for first amendment (speech) distinctions, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Commn.*, 447 U.S. 557 (1980).

41. 452 U.S. 264 (1981).

42. 452 U.S. at 287-88 & n.29; see also *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005, 1010-11 (1985).

43. *Hodel*, 452 U.S. at 287. In both cases the state's own provision of local service was the direct object of the federal statute. In *Usery*, the minimum pay feature of the FLSA was at issue; in *Garcia*, it was the overtime pay feature. In contrast, in the *Hodel* case the state as such was not the direct object of regulation; the mining regulation at issue was challenged on behalf of private commercial companies (as in *Darby*) as invading state regulatory powers.

44. *Hodel*, 452 U.S. at 288. It is not clear why the matter at issue should have to be "indisputably" an attribute of state sovereignty, rather than simply "an attribute of state sovereignty," but one may pass over that question for the moment. In any event, the Court seems to concede in *Garcia* that providing for local public transportation is well within a state (or local) government's choice of services to provide as a state, unlike making treaties, regulating purely interstate carriers, taxing federal instrumentalities, or declaring war. The latter are also attributes of sovereignty, but they have been constitutionally reserved from the states.

45. 452 U.S. at 288 (emphasis added).

46. See text at note 40 *supra* and at note 49 *infra*.

47. 452 U.S. at 288 n.29.

48. Cf. *Fry v. United States*, 421 U.S. 542 (1975).

49. 105 S. Ct. at 1011-16.

nation of those services, by whom administered, and at what rates of pay, etc., are exclusively determinations for state and local governments in the first instance. If (but only if) their operation can fairly be described as somehow interfering with commerce (whether interstate or foreign) within Congress' power to control, may they properly be restricted, albeit, of course, only to the extent of their interference with that commerce. It is not the "traditional" or "nontraditional" nature of the public services that matters; it is, rather, the extent to which the manner of their execution interferes with what Congress has a right to control. This "test" (if one must call it that) may necessarily require a certain amount of judgment and wisdom on the part of the Court, but it is not worse on that account. Indeed, it is exactly such judgment and wisdom the Court is expected to provide. It is the very measure of the Court's own obligation.

In *Garcia*, however, Justice Blackmun does not provide it.⁵⁰ Rather, he suggests that there is no need to do so. "[W]e are convinced," he declared for the Court, "that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is [merely] one of process"⁵¹ It is for Congress, not the Court, to measure the scope of the commerce power and the countervailing weight of the tenth amendment. Such protection as the states may have from direct imposition of congressional commands is thus in fact not constitutional and substantive, but merely constitutive and political.⁵² The Constitution is deemed to fix the principal locus of tenth amendment adjudication in Congress. If so, then indeed we have witnessed the second death of federalism.

IV

The *Garcia* case, with its overruling of *Usery*, attracted a fair amount of journalistic comment. Much of that comment was interesting but predictably limited to *Garcia*'s immediate practical implica-

50. The *Garcia* majority opinion fails to identify any special circumstance or any overriding federal interest of any sort to justify the federal government's intrusion. To the contrary, the Court disclaims any obligation to identify such an interest or to require that Congress do so. Indeed, this is the feature of *Garcia* that spells its importance in overruling *Usery*. *Garcia* constitutes a complete repudiation of the foundations of *Usery*, rather than a mere disagreement with its result.

51. 105 S. Ct. at 1019. (Second brackets, [merely], added for emphasis.).

52. To be sure, there is some slight hedging on the point, but it appears to be more patronizing than promising. Justice Blackmun writes of political process safeguards as the "principal" (rather than as the sole) limitation upon Congress. 105 S. Ct. at 1018, 1020. He also cites *Coyle v. Oklahoma*, 221 U.S. 559 (1911), although it is difficult to say why, since the rationale of *Garcia* would otherwise be ample to sustain acts of Congress well drawn to "persuade" states to move their state capitols to their principal centers of commerce.

tions.⁵³ *The (London) Economist*, however, was more discerning.⁵⁴ It reported an appropriate sense of English puzzlement. It appeared to *The Economist* that the Supreme Court had partly repudiated *Marbury v. Madison*,⁵⁵ in favor of a rule of parliamentary supremacy in respect to the boundaries of federalism. "[I]t is curious," *The Economist* observed, "that in the San Antonio case the justices explicitly overruled a decision they had made only nine years before." It then went on to note something even "more startling":

Even more startling, though, was the view of federalism that the majority put forward to support its decision. The court could have made its ruling on a narrow technical ground. It did not. Justice Harry Blackmun, whose change of heart since 1976 was enough to shift the court, wrote in the majority opinion that the protection of the states from federal power "inhered principally in the workings of the national government itself," rather than in the constitution as interpreted by the Supreme Court. In other words, the states have some influence on congress and the president; if they do not succeed in using it to keep Washington from encroaching unduly on their powers, they should not expect the court to do the job for them by declaring federal laws unconstitutional. This view, said one of the dissenting justices, Mr. Lewis Powell, "rejects almost 200 years of the understanding of the constitutional status of federalism."

[The Blackmun opinion] also called into question a central principle of the Supreme Court's own constitutional position. Since 1803 the court has claimed the authority . . . to invalidate actions of the federal government if they conflict with the constitution. *The San Antonio decision seems to suggest that the principle of judicial review does not apply to questions of federalism when congress acts under the commerce clause.*

[T]he Supreme Court seems to have declared that judicial enforcement of the constitutional position on federalism is at an end.⁵⁶

Is the "judicial enforcement of the constitutional position on federalism at an end" and, if it is, why? Is it because the general approach of the Court in *Usery* was improper and, if it was, what made it so? Or does *Garcia* actually insinuate a different sort of answer altogether, even as *The Economist* suggests it does — that federalism questions in general (and not merely in *Garcia*-type cases) are not for the Court, but fundamentally for *Congress*, finally to determine?

All of these seem to me to be excellent questions, and some I have already obliquely addressed.⁵⁷ It is only the last of these, however,

53. E.g., the impact of the decision on state and local budgets, and the kinds of additional legislation the decision might encourage Congress to adopt (such as amending the national labor relations acts to compel collective bargaining in the public sector).

54. *Nine for the seesaw*, THE ECONOMIST, Mar. 2, 1985, at 21.

55. 5 U.S. (1 Cranch) 137 (1803).

56. *Nine for the seesaw*, *supra* note 54, at 21 (emphasis added).

57. E.g., that the general approach of the Court in *Usery* was sound, and that the repudiation

that I want now to address. The larger idea it may contain is fundamentally pernicious to the integrity and morale of American constitutional law. It is worth a wholly separate comment of its own.

V

The constitutional clauses examined in *Usery*⁵⁸ and reexamined in *Garcia* have borne more of the burden of federalism litigation than any other clauses, including the spending clause. From the beginning, moreover, there has been a blurriness in their scope and an admitted uncertainty in measuring their margins, even as reflected in the tumultuous reactions to the Court's earliest decisions.⁵⁹

Even so, with all the ups and downs of judicial vagary, the commerce clause and the tenth amendment have not until now been read as though they declared that it was not for the Court, but rather for Congress, to determine the extent to which enumerated powers permit the displacement of state laws or the command of state governments. Rather, each has been a staple of substantive judicial review. It has been for Congress to decide what to do. It has been for the Court to say whether it was within Congress' power to do it.

The results of that judicial review have not always been consistent, but perfect consistency is not to be expected insofar as judicial attitudes must themselves vary and none is particularly entitled to control all the rest.⁶⁰ Usually, however, even in close cases when the federalism claim has failed (as most often it has indeed failed), it has failed because the Court has yielded to an assertion of some overriding federal interest it deemed adequate to rationalize the exceptional intrusiveness of the challenged act.⁶¹ In *Garcia*, as I have noted, the majority identified no such overriding interest. Rather, it deemed itself

of its reasoning in *Garcia* is quite unconvincing. It is *Garcia*, more than *Usery*, that requires justification, and nothing in the opinion itself satisfactorily provides it.

58. I.e., the commerce clause, the necessary and proper clause, and the tenth amendment.

59. For instance, shortly after the Marshall Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Marshall's long-standing critic and rival, Judge Roane, accused the Court of so subversive and loose a construction of article I, section 8 powers as to have utterly destroyed the foundations of federalism — an accusation Marshall hotly denied. See the superb exchange in JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland*, *supra* note 11, and for related materials, see G. GUNTHER, CONSTITUTIONAL LAW CASES AND MATERIALS 82-92 (11th ed. 1985).

60. See Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

61. See, e.g., *Fry v. United States*, 421 U.S. 542, 548 (1975) (upholding application of federal wage restraints as a national emergency measure); *Case v. Bowles*, 327 U.S. 92 (1946) (upholding application of the Emergency Price Control Act); see also *Wickard v. Filburn*, 317 U.S. 111 (1942) (major disorders in national and world wheat markets held to warrant regulation of farm-consumed wheat which, in the aggregate, might substantially affect ultimate market quantities and price).

excused from this element of judicial review. It then weakly explained that it regarded the political safeguards of federalism to be the appropriate check against unconstitutional excesses by Congress.

By itself, this may do no more than to overrule *Usery*, i.e., to eliminate any requirement of justification even when Congress presumes to command the states themselves and even when it is not asserted that the states are engaging in commerce. Writ large, however, as the sources relied upon by Justice Blackmun would have us do,⁶² such alleged political safeguards of federalism may excuse the Court from answering any other question of a like kind as well. The practical choice between state action and national action generally, indeed always, in this view, is not to be judicially constrained but only politically constrained. To be sure, the Constitution may appear to have made an allocation (enumerating what may be national and homogeneous, reserving the rest to the states and protecting them in some measure from being commanded as well as preempted), but it is best not for the judiciary to say whether the constitutional plan is being adhered to. The determinations to be made are more appropriately resolved in Congress where the respective interests are able to work out the appropriate accommodations, rather than in the courts. The constitutional plan is thus not checked by an impacted litigant's standing to object as a sore loser in court; it is checked, rather, by the structural representation already amply afforded the states by the Constitution.

If, then, "the states" or "the people" do not appear to keep Congress to the plan, it may be because they do not see any real departure from that plan; alternatively, supposing they do, presumably they do not regard the departure as an undesirable rearrangement. Under these circumstances, it is scarcely for the courts to say that the Emperor, i.e., Congress, has no clothes. For the Constitution itself (under this view) relies upon the finality of federal politics, rather than judicial review, to determine the sufficiency of the national wardrobe. It is the role of the judiciary to uphold and enforce the majoritarian verdict on these questions and not to oppose it with a perception of its own.

Generally, the argument to this effect (which the *Garcia* case suggests the Court now flirts with), has been opposed principally in terms

62. See, e.g., J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980), cited in *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005, 1018 n.11 (1985). (The same footnote also cites to an article by Wechsler, urging extreme deference to Congress although not outright abdication of the judicial function. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).)

of the alleged naiveté of its political science.⁶³ Unquestionably that objection is well taken⁶⁴ but, ironically, to press one's objection in such terms is in one sense to miss the point of what is being said. It puts the real objection on quite the wrong ground. Even to participate in that debate is in one sense to lose it. It implies that if, as, or when (in the Court's view) such structural safeguards *might* reasonably be seen as adequate,⁶⁵ at least then and to that extent it would be inappropriate not to defer to them. Alternatively, it may concede even more, namely, that if it is true that the Constitution deems such safeguards adequate, the Court should not set up its opposing opinion, even if the Court finds those safeguards inadequate. In brief, if it is part of the constitutional plan that the constitutional boundaries of federalism are to be politically settled, rather than judicially maintained until altered by amendment, then the Court should, in decency, respect its assigned (non)role in such matters.

This is the strong form of what Justice Blackmun seems to have implied in the critical part of *Garcia*. And it is exactly *this* implication that raised an English eyebrow in surprise, as well it should. Stripped of its elegance, *Garcia* proposes the piecemeal repeal of judicial review. It also involves a double counting of what are in fact merely *pre-judicial* and *post-judicial* "safeguards" of the American constitutional plan, safeguards (such as they are) merely additional to, *and not in substitution of*, substantive judicial review.

The Constitution does of course notice the states other than through article III, i.e., other than in the duty of article III judges to hold an act of Congress invalid when, in an appropriate case, the government is unable to demonstrate the consistency of the act with the federalism provisions of the Constitution. It notices them in the representation formula of the Senate, with its assurance of two senators per state irrespective of size. It notices them in the Electoral College. It notices them in article V, with regard to the states' power to initiate and ratify proposed amendments, etc. How well (or ill) these constitu-

63. See, e.g., the discussion and references in footnote 9 of Justice Powell's dissent in *Garcia*, 105 S. Ct. at 1025-26.

64. I do not wish to argue the point here for reasons which will be fully developed in a moment, i.e., that nothing turns on its outcome. Still, it does seem so implausible to think that American politics will operate per se to constrain Congress within any serious person's view of merely regulating "Commerce . . . among the several States" (especially in the absence of the threat of judicial review), as virtually to compel one's skepticism that those who assert this argument can possibly believe it. Unless, then, one wishes to regard the entire set of provisions respecting enumerated powers as mere precatory expressions in the Constitution (and similarly to regard the tenth amendment as though it said, "Such power as Congress elects not to exert may to that extent leave something for state and local governments to do"), it is difficult to take the political science portion of the whole "safeguards" argument as other than a good-hearted joke.

65. Exactly as Justice Blackmun appears so to have regarded them in *Garcia*.

tive provisions contrive to keep Congress and the President in check, one may measure for oneself. Unless, however, they are designed not as merely additive to the safeguards of substantive judicial review but rather as partial or whole substitutes for that review, their speculative efficacy or inefficacy is utterly without relevance in constitutional litigation. They are, with all respect, not the proper concern of the Supreme Court in the adjudication of a particular case.

Concretely, if in the Court's view the bare bones of the commerce clause are insufficient as against the particular objections fielded in the *Garcia* case, then the Court must say so. As to that question, moreover, *nothing* can be derived from references to constitutive processes. The Court may not appropriately uphold an act of Congress based on reasoning that relies even partly on some theory of renvoi to what are, at best, altogether separate possible sources of constraint.⁶⁶ Those constraints either worked or did not work (to hold Congress within the boundaries laid down), and it is for the Court now to answer whether they did. The inputs of those features of the Constitution are now concluded. The product is at hand. The special "safeguard" of the Court's independent view of constitutional consistency is now requested. The litigant asks for the *Court's* answer. What, then, shall the Court say? Shall it say this:

It is not for us to say whether the Emperor (Congress) has no clothes. In a representative democracy such as ours, it is principally for

66. And significantly, John Marshall (who is too frequently cited as an author of "deference" review), emphatically agreed. In his defense of *McCulloch v. Maryland*, Marshall examined several objections Judge William Brockenbrough, writing under the pseudonym "Amphictyon," raised against his opinion in the case. Among these was what Marshall took to be a suggestion by Brockenbrough that if the Court were to uphold the congressional act at issue in the case, then it ought not have done so pursuant to its own interpretation of enumerated powers, an interpretation with which Brockenbrough disagreed. Rather, it should have done so strictly on the basis of "judicial modesty," i.e., on the basis that "it was for Congress to have judged of [the] necessity and propriety [of the act], and having exercised their undoubted functions in so deciding, that it was not consistent with judicial modesty to say there was no such necessity, and thus to arrogate to themselves a right of putting their *veto* upon a law." JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland*, *supra* note 11, at 104 (Marshall, quoting "Amphictyon") (emphasis in original).

Far from welcoming Brockenbrough's suggestion, much less welcoming it by suggesting that in essence this is what the Court had done in *McCulloch*, Marshall denounced the idea and heaped scorn on it. He insisted that "[i]t was incumbent on them [the judges] to state their real opinion and their reasons for it." *Id.* at 105. He derided Brockenbrough's advice, noting how such an approach would imply that the judges actually doubted the constitutionality of the act, while nonetheless upholding it. "Would this reasoning have satisfied, or ought it to have satisfied the publick?," Marshall asked rhetorically. *Id.* He left no doubt of his own answer:

The question is, and ought to be considered, as a question of fair construction. Does the constitution, according to its true sense and spirit, authorize Congress to enact the particular law which forms the subject of inquiry? If it does, the best interest of the people, as well as the duty of those who decide, require that the question should be determined in the affirmative. *If it does not, the same motives require a determination in the negative.* *Id.* at 160-61 (emphasis added).

the people who are affected by such things to determine, represented as they are, and as the states are as well, in the constitutive process of Congress and of the Presidency. They evidently think that Congress' clothes (i.e., its powers) are sufficient; otherwise we do not suppose they would have condoned the adoption of this act as impliedly consistent with the Constitution. Moreover, to the extent that the act may appear to breach the federalism boundary, recourse against the alleged breach remains fully available even now through those same constitutive processes which our Constitution provides as the principal check on all federalism questions.

To be sure, we have read the complaint in this case, the answer, and the briefs that have been submitted and we agree that it is not at all clear how the power to dictate the terms of a municipal service not constituting commerce or interfering with commerce among the states fits within the power of Congress to regulate commerce among the several states. Neither is it clear how the act can in these circumstances be squared with the tenth amendment. Neither have we been presented with a suggestion of special circumstances as might warrant such a regulation exceptionally, or demonstrate that it is a necessary and proper means of protecting that which all agree Congress has the undoubted power to control. Admittedly, too, Congress did not purport to adopt this act as an authorized enforcement measure of some restriction the Constitution itself provides, nor has anyone suggested the act has such a foundation. It is also true, we admit, that the regulation is not simply an incident of federal assistance; no one claims it is associated with the spending power.

This act of Congress may therefore seem to have a certain peculiar nakedness. Nonetheless, we think the constitutive processes provide such protection as is appropriate and, accordingly, we sustain the law. In brief, on matters of this sort (i.e., federalism issues), we are inclined to paraphrase Lord Chief Justice Holt: "[A]n Act of [Congress] can do no wrong, though it may do several things that look pretty odd"⁶⁷

What is wrong with this (and it *is* wrong) is that it is a misrepresentation of the Constitution that we have, whether or not it projects the likeness of a Constitution some might think would be better (i.e., more democratic?) than the one we have. What is wrong with it is its double counting of the pre-judicial and post-judicial constitutive political "safeguards."

The jurisprudence of *Garcia* interjects a wholly fictitious clause into article I. It is a clause that commits to Congress (or, if you like, to the "constitutive processes" operative in restraint of Congress) the power to decide how far the power to regulate commerce should extend. It is a clause that is not there and doubtless would never have been adopted.⁶⁸ Alternatively, the jurisprudence of *Garcia* interpolates a different sort of clause in article III. It is a clause that provides for

67. *City of London v. Wood*, 88 Eng. Rep. 1592, 1602 (K.B. 1701).

68. See Part VI *infra*; see also Part VII *infra*.

the withdrawal of substantive judicial review of "mere" federalism questions, in such measure as the Supreme Court concludes may be best left to constitutive politics. It, too, is a clause that is not there and had any such clause been included, it would almost certainly have led to the defeat of the entire Constitution.⁶⁹

It is a signal disservice for the Court to imagine either kind of clause and, assuredly, it does no credit to the specialness of the judicial power of the United States. One may hope that the trend will not be pursued. Surely, *Garcia* is not to be the last word. . . .

VI

In the course of the Philadelphia Constitutional Convention, on August 15, 1787, John Mercer, delegate from Maryland, rose to speak against the power of judicial review over acts of Congress. According to Madison:

He [Mercer] disapproved of the doctrine, that the judges, as expositors of the Constitution, should have the authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable.⁷⁰

Mercer was followed by John Dickinson, delegate from Delaware. As reported by Madison, Dickinson agreed with Mercer:

Mr. DICKINSON was strongly impressed with the remark of Mr. Mercer, as to the power of the judges to set aside the law. He thought no such power ought to exist.⁷¹

Immediately thereafter, an elaborate discussion ensued, designed principally to secure some clarification of the Mercer-Dickinson position. Thus, Madison asked whether they meant also to object to the power of judges to set aside such acts of Congress as might in their view be inconsistent even with the most explicit constitutional restrictions limiting the powers of Congress, such as those provided in the draft of article I, section 9, forbidding bills of attainder and ex post facto laws. Madison adverted also to the suggestion of several members that an additional bill of rights might eventually be forthcoming. He wished to know whether the objection to judicial review would apply to that as well? Mercer allowed as how he could see that that might be a different matter; his objection was not necessarily directed to that kind of judicial review.

Wilson wanted to know whether Mercer and Dickinson meant also to object to the construction of the judicial power as it might be called

69. *Id.*

70. 5 ELLIOT'S DEBATES 429 (1937).

71. *Id.*

upon in a particular case to determine the consistency of state laws with the Constitution. Mercer replied that as to these, there were in his view inadequate political safeguards against possible unconstitutional abuses by the states, and therefore he concurred that the judicial power of constitutional review should be preserved in such instances.⁷²

Wilson was followed by Randolph, who said: "What about separation of powers questions? If Congress were to encroach upon a power the proposed Constitution assigns solely to the President, but to do so in the guise of interpreting one of its own powers among those enumerated in article I, section 8, what then?" Mercer responded that he believed a very good argument could be made that in that instance, too, there was no real need to permit the courts any authority to pass on such questions,⁷³ although he did not desire to press the issue at this time.

The discussion continued in the same vein, as delegate after delegate queried Mercer and Dickinson with variations on the same question, i.e., the scope of the judicial power with respect to cases "arising under" the Constitution. They parried each in turn, although Madison did not catch all of the answers until he noted his own attempt to provide a summary:

MADISON: Let me see if I understand the right honorable members' position. That at least with respect to any question arising in a case where the objection is that Congress has not acted within any of the enumerated powers we are proposing in the federalism plan of article I, section 8, but has, instead, formulated a rule that invades the reserved powers of the several states, or has even acted on the states themselves to direct them or restrict them within their own operation in a manner alleged to be wholly unauthorized by this Constitution, the sole recourse shall be merely political, i.e., entirely exclusive of the judicial power?

After Mercer and Dickinson said that this indeed was precisely and only what they had in mind, Madison records himself as having then said:

MADISON: But since, when this Constitution is presented, its ratification will be sought partly on the basis that its integrity will be assured by the obligation of courts, does not our own minimum obligation to the people require us to disclose the important exception you have proposed?

Mercer and Dickinson purported not to understand Madison's point. In an evident effort to make it clear, Madison explained: "Well, I have seen a draft of remarks Mr. Wilson evidently intends to use hereafter on December 7, 1787, to endorse ratification in the Pennsylvania Conven-

72. For clarification of Mercer's concern on this point, see, e.g., Marshall's discussion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431-37 (1819), and O. HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920) ("I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.").

73. See, e.g., J. CHOPER, *supra* note 42, at 263.

tion. *At that time, Mr. Wilson proposes to provide express assurance to his fellow Pennsylvanians by telling them:*

If a law should be made inconsistent with those powers vested by this instrument in congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void.⁷⁴

"I have also seen a draft of quite an impassioned plea for ratification I understand a young lawyer, John Marshall, may make in the Virginia Constitutional Convention (of 1788). In it, Marshall will say:

If they [Congress], were to make a law not warranted by any of the powers enumerated, it would be considered by the [national] judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. *They would declare it void* To what quarter will you look for protection from an infringement of the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection.⁷⁵

"Indeed, prior to your novel proposal, to exempt every federalism issue from the judicial power, I had secured agreement with John Jay and with Alexander Hamilton to author a lengthy series of pseudonymous essays in elaboration and support of the Constitution. In those essays, which we hope might well serve beyond the immediate cause of ratification in New York, we intend to defend judicial review most especially as addressed to acts of Congress. For instance, this is what we say specifically about the point you have raised:

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute"⁷⁶

"Well," Madison summed up, "I think now you may see the difficulty. The Constitution does not now declare the power of constitutional

74. 2 ELLIOT'S DEBATES 489 (1836).

75. A. BEVERIDGE, I THE LIFE OF JOHN MARSHALL 452 (1916) (emphasis in original).

76. THE FEDERALIST No. 78, at 524-25 (A. Hamilton) (J. Cooke ed. 1961).

review as well as it should, other than what may be implied in the clause in article III (as it provides for the judicial power to extend to all cases arising under the Constitution). But it is clear from what I have said that the common understanding of that power will be emphasized. Indeed, if the material I have just quoted is even a fair sample, I suppose the expectation of that power may be relied upon equally as much as anything else, to assure the people of the safety of this proposed Constitution. If, however, we now mean to withhold the judicial power on the one question that currently most agitates the nation (by which I mean the federalism question), surely we have some duty to say so in an appropriate way.

"Perhaps the most forthright means to establish the exception you desire," Madison said to Mercer and Dickinson, "can be provided by an express clause. Such a clause can be drafted as an addition to the enumerated powers of Congress, to place the power exclusively where you insist it belongs. Thus, solely to test this convention's sentiment for your view," Madison continued, "and to make clear that neither state nor federal courts may regard any federalism question as justiciable, I propose we consider the following clause:

Article I, Section 8, Clause 19: Congress shall have the final authority to interpret the scope of the foregoing enumerated powers."

Mercer and Dickinson demurred to the proposal, exclaiming that it was not their purpose to put the proposition so bluntly. It would unduly excite the country, they thought, as well as draw attention away from the balance of the Constitution. They favored the new Constitution, they declared, and did not wish to see its chances for ratification so severely compromised as this form of carrying their proposal into effect was bound to do. Besides, they added, they were not at all sure it needed to be done in this fashion.

After further discussion which went largely unreported (although personal notes taken by Yates suggest that most of it was lost in uncivil suggestions that Mercer and Dickinson's ideas were crazy and could only be entertained by persons secretly opposed to the Constitution), Madison evidently made one more attempt to reconcile the convention delegates.

"It appears that some members think there may be merit in the position taken by Mr. Mercer and Mr. Dickinson," he suggested, "although most delegates seem overwhelmingly opposed. Even so, in fairness it also appears to me that few in this assembly are quite confident of the manner in which judicial review will operate, despite the fact that virtually all seem resolved to provide for it.

"Our shared uncertainties, however, are not difficult to understand.

After all, the English have provided us with virtually no examples of constitutional judicial review, and the experience we have accumulated from the states in respect to judicial review is admittedly quite modest.

"May we go forward to provide for it as already proposed, but to leave its use subject to discontinuance in this one respect only, whenever in the view of the Supreme Court it would become appropriate to give it up? If so, it would be sufficient so to provide in article III in a sufficiently straightforward manner as to make the proposition clear to the people, as well as to make clear to the Supreme Court the limited exception Mercer and Dickinson may have in mind. Simply to test the sentiment of this body, I therefore propose the following addition to article III:

Article III, Section 4: No Act of Congress shall be called in question in any court, whether of the United States or of any State, on grounds of exceeding the enumerated powers of Congress or usurping the reserved powers of the states or regulating them directly in ways alleged to be unauthorized by this Constitution, whenever in the opinion of the Supreme Court the political safeguards of federalism are sufficient per se."

Madison's effort to flush out the position first taken by Mercer and Dickinson lost by a vote of twelve states to none. Even Mercer and Dickinson voted against it, after saying they frankly did not wish to advertise such a proposition as they were certain it would doom the entire Constitution.

As the session adjourned, however, Mercer was overheard to say quietly to Dickinson: "Perhaps we have not seen the last of this, despite the impression that the matter has now been settled — that judicial review of acts of Congress is obviously an expected obligation under the proposed Constitution, most particularly to keep Congress within the boundaries of authority proposed under the plan of federalism. The fact remains that little more than the mere fidelity of the judges to that obligation may sustain it in actual practice. . . ."

VII

Unique among national constitutions of its day, the American Constitution remains quite special, even now. In yielding the check of judicial review to the claims of constitutive process, however, the Court renders this Constitution entirely ordinary. It is a mistake of historic proportions.

Written constitutions are now quite commonplace. The majority of the world's 160 written constitutions also provide for some facsimile of separated powers. Many reflect federalism provisions, and most have "guarantees" of personal rights. The majority of these constitu-

tions, however, are merely precatory; they are subject to such flexibilities of meaning and nonmeaning as constitutive politics determine. The study of constitutional law in such countries is relatively unimportant — the constitution is pretty much what each nation's national politics say it is.

Put bluntly, this is the proposition ultimately embedded in the critical portion of Justice Blackmun's *Garcia* opinion. To be sure, it is put on the basis of the best of motives, namely, to democratize the Constitution, to keep it closer to "the people," and correspondingly to leave it largely to them (or, rather, to their politics) to measure the boundaries it lays down. But paradoxically, to the extent that that is the case, it is not really "our" Constitution that is being expounded at all — not a Constitution as law, but a constitution of more ordinary politics, of organized influence — a constitution taken only as seriously as "constitutive processes" provide.

It is quite clear, however, that *our* Constitution was meant to do more, despite what the Court now so mildly suggests. And it is that Constitution that was internationally famous, largely *because* it was thought to do more. There is not the slightest suggestion that the Court was expected to take federalism questions more lightly than other questions or to punt them away when they came. Quite the opposite assurances were laid up in the making of this Constitution. There is not the slightest indication even now, in 1985, that an express amendment proposing to do what the tentative jurisprudence of the *Garcia* opinion presumes to have done, would stimulate any enthusiasm. There is no evidence of any popular desire at all, in short, for the sort of self-abnegating nonrole the Court has presumed to take on for itself with respect to federalism issues. To the contrary, it is most likely, if the matter were put to a fair referendum, that the mass of American citizens would vote emphatically for a Court at least equally assiduous on matters of federalism as on other matters that may happen to be of more intense personal interest to its members.⁷⁷

The *Usery* decision itself, moreover, was greeted with no rush of punitive legislation in Congress, either to strip the Court of some segment of its appellate jurisdiction or otherwise to overturn or outflank the outcome of the case. For all that one can tell, there was at most a slight ripple of mild surprise — that a Court so long thought to be a virtual nonentity in such matters and having already allowed so much else to pass over the boundaries of federalism had rallied a small veto. It is necessarily a matter for private conjecture, of course, but one may

77. Cf. *Roe v. Wade*, 410 U.S. 113 (1973) (opinion for the Court by Justice Blackmun).

even imagine some few members of Congress mustering a modicum of personal relief and institutional affection following *Usery*: relief, with the prospect of at least some abatement in the apparent insatiability of constituent pressures to interfere with state government; affection, for a Court that had at last adjudicated something other than race, religion, abortion, and crime. *Usery*, in short, far from necessarily discrediting the Court, may, to the contrary, have even restored some mild credibility to the Court's historic claims of institutional neutrality. The Court, in some small measure, had come home.

Insofar as this may have been so, while *Garcia* is an opinion written in deference to the political process and in praise of congressional good sense (to strike the right balance between national needs and local concerns), it is at best almost certainly premature. It is entirely doubtful whether a Court so conducting itself may correctly claim that it is simply yielding its role in deference to some national consensus. There is in fact *no* evidence that "the people" have any desire at all for the Supreme Court so to act — to yield to Congress the constitutional determination of the boundaries of federalism. In requiring no special justification by Congress for treating state governments as mere private commercial actors in pursuit of advantage within such markets as Congress may otherwise regulate ("among states" or "with foreign nations"), moreover, with no showing of connectedness or factual foundation at all, the *Garcia* opinion did more than defer — it resigned. A Court so given to write in substitutionary praise of constitutive processes in this area of its responsibilities may appropriately have to answer to the terms of its rhetoric elsewhere.⁷⁸ One hopes it may sensibly be able to do so, but it needs thoughtfully to consider its position in any case.

The tone of *Garcia* purports to be the tone of John Marshall, but it is not.⁷⁹ It is, rather, the tone of a judge who, professing not to know wherein the law lay, left it to others to say. It is not this tone that makes our Supreme Court significant and distinctive. It is surely not this tone, moreover, that most people wish to hear.⁸⁰

78. See, e.g., note 77 *supra*.

79. See note 66 *supra*.

80. The argument developed in this Comment is a continuation of arguments presented elsewhere on the role of the Court, standards of judicial review, and processes of constitutional change. Van Alstyne, *supra* note 14; Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 FLA. L. REV. 209 (1983).