Federalism for the New Millennium: Accounting for the Values of Federalism

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Abstract

This Article explores the long and intricate history of federalism, the arrangement between the federal and local governments to serve the people, in the United States. It begins with the beginnings of federalism in pre-colonial times and continues to discuss how recent Supreme Court decisions have failed to articulate a cohesive test for federalism issues. Ultimately, the Article proposes a method for resolving federalism disputes. This method focuses on the sociopolitical and economic benefits of federalism as the Framers intended. Further, it argues that courts should inquire as to the utility of either the federal or local government regulating a specific matter, and let each level of government do what it does best.

KEYWORDS: federalism, history, national government, local government, allocation of power
The central issue of federalism, of course, is whether any realm is left open to the States by the Constitution — whether any area remains in which a State may act free of federal interference.¹

Introduction

The American Republic consists of two governing bodies: the national and state governments.² Each government exists individually to serve the people³ and together, the state and national gov-

². See, e.g., The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) [hereinafter all citations are to this edition] (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among district and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”); Alexander Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), in VIII The Papers of Alexander Hamilton 63, 98 (Harold C. Syrett ed., 1965) (“The . . . powers of sovereignty are in this country divided between the National and State Governments . . . .”); James Wilson, Speech to the Pennsylvania Convention on the Adoption of the Federal Constitution, in 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 444 (Jonathan Elliot, ed., 2d ed., 1836) [hereinafter Elliot's Debates] (“[The people] can distribute one portion of power to the more contracted circle, called state governments; they can also furnish another proportion to the government of the United States.”).
³. See, e.g., The Federalist No. 46, supra note 2, at 294 (James Madison) (“The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes.”).
ernments serve as a check on each other, ensuring that the people are served.\(^4\) This arrangement, known as federalism, was the Framers' unique contribution to political science and theory.\(^5\)

At its core, federalism is a cooperative form of government where state and national governments are asked to provide citizens with services. Federalism seeks to allocate responsibility to whichever government that can best perform that service.\(^6\) This policy began with the Framers and serves as sound political theory relevant to twenty-first century America. Since America's inception, however, questions about federalism and the allocation of power between the national and state governments have plagued the nation.\(^7\)

\(^4\) See, e.g., The Federalist No. 28, supra note 2, at 181 (Alexander Hamilton) ("[T]he general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."); The Federalist No. 26, supra note 2, at 172 (Alexander Hamilton). [T]he State legislature, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the VOICE, but if necessary, the ARM of their discontent.

Id. Alexis de Tocqueville later noted:

It is an axiom of American public law that every power must be given full authority in its own sphere which must be defined in a way that prevents it [the power] stepping beyond it [its sphere]: that is a great principle, and worth thinking about.


\(^5\) See Henry J. Friendly, Federalism: A Forward, 86 Yale L.J. 1019 (1977) ("The genius of the Framers lay in devising a unique form of federalism in which a national government was authorized to act directly on the people within the powers confided to it rather than solely on the states, and was endowed with an amplitude of powers which might or might not be used as the future would dictate."). See generally, Gordon S. Wood, The Creation of the American Republic, 1776-1787 524-32, 564 (1969) (discussing federalism).

\(^6\) See, e.g. The Federalist No. 46, supra note 2, at 295 (James Madison) ("[I]t is only within a certain sphere that the federal power can in the nature of things, be advantageously administered.").

\(^7\) For a recent example, consider the recent debate over local "sanctuary" or "non-cooperation" ordinances and the effect they have on a state's ability to provide services for its citizens and the national government's ability to enforce immigration policy. See Ignatius Bau, Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS, 7 La Raza L.J. 50 (1994) (referring to ordinances that restrict cooperation between local police and federal
Immigration and Naturalization Service authorities as both “sanctuary ordinances” and “non-cooperation ordinances”). Briefly, non-cooperation ordinances prevent local officers and employees from giving the federal government information regarding the status of aliens. See id. Many cities passed these ordinances to alleviate fears of deportation for illegal and undocumented aliens who seek police protection, medical services or education for their children. See Rudolph W. Giuliani, Public Address, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 4 GEO. J. ON FIGHTING POVERTY 165 (1996) (“[New York City’s non-cooperation ordinance, Executive Order 124] create[s] a zone of protection for illegal and undocumented immigrants who are seeking the protection of the police, or seeking medical services because they are sick, or attempting to or actually putting their children in public schools so they can be educated.”). This policy, in turn, aids the general population. As New York Mayor Giuliani noted:

If you do not create an area of protection for those 400,000 [illegal and undocumented aliens in New York] people to report when they are victimized, then not only do you increase the risk that they will be victimized again, but that the next time the mugger seeks to victimize someone, that person might not be an illegal or undocumented immigrant.

Id. at 167. Mayor Giuliani also added:

If you tell people “you are going to pay a very heavy penalty by reporting crimes that are committed against you to the police,” you deprive the police of significant information they could use to catch criminals. And when you are talking about as many people as we are talking about, it is a significant part of the population in which the police enforce the law and protect all citizens.

Id. For these reasons, many states and cities enacted these ordinances. See Bau, supra note 6, at 52 & n.10 (listing jurisdictions with non-cooperation ordinances); Alison Fee, Note, Forbidding States from Providing Essential Social Services to Illegal Immigrants: The Constitutionality of Recent Federal Action, 7 B.U. PUB. INT. L.J. 93, 100-02 & nn.47-48 (1998) (same). Despite the compelling policy reasons underlying these ordinances, Congress twice attempted to revoke the ordinances. See H.R. 5255 102nd Cong., 2d Sess. (1992); S. 1607, 103rd Cong., 1st Sess. (1993); see also Giuliani, supra note 6, at 168 (“As I have said, this idea [revoking non-cooperation ordinances] has long been debated in Congress and there have been at least two other attempts to revoke the order [New York City’s Executive Order 124], both of which have been defeated.”). Both attempts failed. Eventually, however, Congress accomplished its goal by passing § 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1644 (1996) (“Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”), and Section 642 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996. 8 U.S.C. § 1373 (1996). Section 642 provides:

a. Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

b. Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful of any individual:
Part I of this Note explores the beginnings of federalism through an examination of the history of “layered” government in America. From Jamestown to the Articles of Confederation to the Constitutional Convention and beyond, America has always operated under two governments: one “national,” the other “local.” Therefore, paying attention to America’s history of layered government should clarify the Framers’ intent in making federalism a vital part of the Constitution.

Part II reviews the conflict in the Supreme Court over federalism. Specifically, this Part examines how the Court has dealt with federalism vis-à-vis congressional powers. The discussion will clarify the failure of the Supreme Court to articulate a cohesive test for federalism concerns covering a variety of congressional powers.

Part III then proposes a method for resolving federalism disputes. This method calls for an allocation of authority into the spheres intended by the Framers. The proposal specifically looks to the values of federalism to help distinguish between national and local interests and, thus, allocate authority. Such a test is easily applicable to all federalism concerns and is sound public policy for America in the twenty-first century. This Note concludes that revisions consistent with those prescribed in this Note are necessary to increase the effectiveness of the state and national governments alike.

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
Maintaining such information.

(2) Exchanging such information with any other Federal, State, or local government entity.


The Virginia and Kentucky Resolutions (1798-99), the Hartford Convention (1814-15), the Nullification Crisis (1831-33), the northern response to the Fugitive Slave Act (1850-52), the Civil War (1861-65) and Reconstruction (1868-70) are just a few of the conflicts between the national and state governments over the allocation of power and responsibility. See Calvin R. Massey, The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States, 1990 DUKE L.J. 1229, 1242-55, 1295-97 (1990) (discussing the Virginia and Kentucky Resolutions, the Hartford Convention, the Nullification Crisis, the northern response to the Fugitive Slave Act, the Civil War and Reconstruction).

8. This Note does not concern any of the problems of federalism as it coexists with the federal courts, the executive branch or the Fourteenth Amendment. Nor does this Note consider the effect later historical developments should or have had on Constitutional interpretation. See, e.g., Robert J. Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. REV. 863, 837 (1986) (“Because they believed that national citizenship was primary and state citizenship derivative, the congressional framers of the fourteenth amendment and the Civil Rights Act of 1866 also believed that Congress possessed primary authority to secure the civil rights of United States citizens.”).
I. Background

The history of inter-governmental relations between England and the colonies greatly influenced the Framers. As a result, they conferred upon the national government many of the same powers held by England in the colonial system. Likewise, the powers retained by the states are strikingly similar to those held by the colonies. Moreover, because the Framers were so influenced, the Constitution may be viewed as a return to the principles of layered government under the colonial system — principles disregarded while America was governed under the Articles of Confederation. Accordingly, understanding the relations between England and her colonies can better illustrate the Framers' intentions when they balanced power between national and state government.

A. America's Infancy, 1606-1700

1. Early Colonial Autonomy

The American colonies were a completely "new species of colonizing, of modern date, and differing essentially from every other species of colonizing that is known." While dependent on England, the early colonies enjoyed a great deal of autonomy. Two factors influenced this relationship. First, the nature of the colonies greatly shaped their relationship with England. The great distance from England to the American Colonies made control impracticable. More importantly, the colonies operated for specific purposes — to cultivate the land and promote trade for the good of themselves and England. Consequently, as England received the economic benefits from her colonies, strict control of colonial life was unnecessary.

Second, the character of the American colonialists also influenced the relationship with England. The monarchy encouraged private adventurers (either through chartered companies or indi-
individual lord proprietors) to settle colonies by granting them exclusive title to large areas of land, extensive self-governing powers and, often, special economic considerations. The resulting American colonists were an adventurous, individualistic people, motivated by profit or the pursuit of freedom. The colonists brought with them English traditions of law and governance, which put a high value on both individual liberty and local autonomy. As a result, the American colonists were predictably "jealous of [their] autonomy and resistant to local interference."

During the early years of the colonies, England, preoccupied with affairs at home and unsure of proper colonial policy, paid little attention to her colonies. The colonists, therefore, were left to

15. See generally Greene, Peripheries, supra note 9, at 10-11 (noting this English colonizing strategy). Moreover, as early as 1579, the younger Richard Hakluyt conceived of colonial self-government, for when recommending the occupation of the Magellan Strait he concluded:

But admit that we could not enjoye the same long, but that the English there would aspire to government of themselves, yet were it better that it sholde be soe then that the Spanyard shold with the tresure of that countrey torment all the contries of Europe. . . . But we myght kepe the countrie as well as the Spanyards doe, and use traffique with them.


16. See Greene, Peripheries, supra note 9, at 11; Mark A. Kishlansky, Community and Continuity: A Review of Selected Works on English Local History, 3 WILLIAM AND MARY QUARTERLY 31, 140, 146 (1980); Kenneth R. Andrews, Trade, Plunder and Settlement: Maritime Enterprise and the Genesis of the British Empire, 1480-1630 17 (1984). Tudor England, for example, was "a largely self-governing society-under the crown." Id. at 16-17. The Tudor monarchs freely extended franchise to English boroughs up until the reign of Charles II. See Leonard Woods Labaree, Royal Government in America 180 (2d ed., 1934). During and after the reign of Charles II, however, only twice was such local representation granted, to the borough of Newark (by the King) and the town and city of Durham (by Parliament). See id.

17. Andrews, supra note 16, at 16-17. From 1628, the time the House of Burgess reconvened in Virginia, until 1776 elective government was a permanent feature in the colonies. See Labaree, supra note 16, at 172. Edmund Burke summarized the situation: "The settlement of our colonies was never pursued upon any regular plan; but they were formed, grew, and flourished, as accidents, the nature of the climate, or the dispositions of private men happened to operate." Id. (quoting 2 Edmund Burke, An Account of the European Settlements in America 288 (1757)).

18. See Labaree, supra note 16, at 173. Indeed, Jack Greene remarked:

[T]he failure to develop any central agency in England for colonial administration, the distractions of the Civil War, the refusal of the colonists to abide by regulations they opposed, and the lack of adequate enforcement machinery prevented either crown or Parliament from establishing effective controls over the colonies, despite sporadic attempts by one or the other to do so.

Greene, Authorities, supra note 14, at 45.
define their own civil liberties and laws. In Massachusetts Bay, for example, the Body of Liberties of 1641 guaranteed all citizens due process and equal justice. It also ensured freedom of speech, assembly and movement. The Body of Liberties also extended fairly liberal criminal procedure protections and established criminal laws, such as prohibiting violence against married women by their husbands and protecting animals from cruelty, as well as listing capital offenses.

19. In 1625, after assuming control over Virginia after the courts vacated the charter of the Virginia Company, the crown asserted its jurisdiction over all colonial plantations and declared its intent to provide “one uniforme Course of Government” for all of them. A Proclamation for Settlinge the Plantations of Virginia, May 13, 1625, reprinted in 18 Foedera, Conventiones, Literal, Acta Publica, Regis Angliae 72-73 (Thomas Rymer ed., 1726), quoted in Greene, Authorities, supra note 14, at 45. This intention, however, was not fully carried to term, undermining its effectiveness.

21. See id. ¶ 1 at 74.
22. See id. ¶ 2 at 74 (“Every person . . . shall enjoy the same justice and law, that is generall for the plantation, which we constitute and execute one towards another, without partialitie of delay.”).
23. See id. ¶ 12 at 75.
24. See id.
25. See id.
26. Among them, Massachusetts Bay provided for grants of bail, granted the right to challenge jurors, prevented double jeopardy and cruel and unusual punishments and required a heightened burden of proof in capital cases. See id. ¶¶ 18 at 76 (bail), 30 at 78 (challenge jurors), 42 at 80 (double jeopardy), 46 at 80 (cruel and unusual punishments), 47 at 80 (requiring two witnesses in a capital case).
27. See id. ¶ 80 at 85.
28. See id. ¶ 92 at 87.
29. See id. ¶ 94 at 87 (including among them: “worship of any other god, but the lord god”; “[I]f any man or woeman be a witch”; blasphemy; murder, whether premeditated, in the heat of passion or by “poysoning or other such divelish practice[s]”; stealing; kidnapping; lying for the purpose of “tak[ing] away a man’s life”; and treason). Also in New England, Rhode Island established extensive regulations on internal matters. See Code of Laws adopted by the First General Assembly of “The Incorporation of Providence Plantations” in 1647, reprinted in The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719 12-55 (John D. Cushing ed., 1977) (providing for “relief for the poor,” requiring licenses for “Ale Houses,” outlawing “fraudulent dealing,” “trespass by man or
In Virginia, the House of Burgess produced the Virginia Code of 1662. This code covered most issues of colonial life. For example, it provided for marriage licenses, for replacement ministers and regulated the height of fences Virginian planters. It also regulated the cost doctors could charge for surgery, prohibited cruelty to servants, levied taxes on tobacco and other products and prevented any person from "having any commerce or trade with any Indian for beaver, otter, or any other furs except those commissioned by the governor."

William Penn, as proprietor of Pennsylvania, established a colonial government in 1682 — balancing power between the elected assembly and the proprietor's council. This government operated for seventeen years until 1699, when, faced with unhappiness in his colony, Penn, the Assembly and the Council completed the Charter of Privileges of 1701, the most famous of the colonial constitutions. The Charter provided for an enhanced freedom of religion, yearly elections to an annual assembly, the right to counsel in criminal trials, required licenses for tavern owners and other "houses of public entertainment," and intestacy laws.

Interestingly, New York's colonists did not have a large role in defining their laws and civil liberties. In 1665, Governor Nicolls drafted an extensive body of laws, covering topics ranging from capital offenses and juries to property laws and marriage regulations. These laws, based on the codes used in New Haven and Massachusetts, were presented to delegates from the Long Island towns at Hempstead in March of 1665. After incorporating minor


31. Hawke, supra note 30, at 143. The Maryland Assembly likewise, provided similar laws. See Charter of Maryland (1632), reprinted in Select Charters, supra note 20, at 53-58. Maryland also provided for extensive religious liberties. See Maryland Toleration Act (1649), reprinted in Select Charters, supra note 20, at 105 ("Be it Therefore . . . enacted . . . that no person or persons whatsoever within this Province . . . professing to believe in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in his respect of his or her religion nor in the free exercise thereof . . . .")

32. See Frame of Government of Pennsylvania (1682), reprinted in Select Charters, supra note 20, at 192.

33. See The Charter of Privileges (1701), reprinted in Select Charters, supra note 20, at 224.

revisions, the delegates reluctantly accepted the code,\textsuperscript{35} becoming the only colony to have its internal code provided for it.\textsuperscript{36}

2. Limitations on Colonial Autonomy

England’s lassie-faire attitude towards the American Colonies soon ceased. After the restoration of Charles II in 1660, Parliament issued various instructions to the royal governors to limit the authority of colonial assemblies.\textsuperscript{37} Parliament also established a series of acts designed to more precisely define the economic relationship between England and her colonies. The acts specifically sought to eliminate colonial trade with rival foreign powers and to subordinate the economies of the colonies to that of England.\textsuperscript{38}

The Navigation Acts of 1660\textsuperscript{39} and 1663,\textsuperscript{40} for example, afforded England increased control over commerce in the colonies. The 1660 Act provided that all imports and exports to and from British holdings must be transported in British or colonial vessels\textsuperscript{41} and that these exports were to be exported only to England or its holdings.\textsuperscript{42} The 1663 Act tightened this control by requiring all foreign exports destined for the colonies to be shipped by way of Eng-

\textsuperscript{35} See Hawke, \textit{supra} note 30, at 168.

\textsuperscript{36} Of interest is the case of Carolina, which, when presented with the Fundamental Constitutions of Carolina of 1669, rejected the program. Drafted by the Earl of Shaftesbury and John Locke, this government, as John Adams would attempt to do for both Massachusetts and all the United States, tied power to property. See 1 \textit{The Colonial Records of North Carolina} 187-205 (William L. Saunders et. al., eds. 1886-1914), \textit{cited in Hawke, \textit{supra} note 30, at 156.}

\textsuperscript{37} See Greene, \textit{Peripheries, \textit{supra} note 9, at 13-17.}

\textsuperscript{38} See, e.g., Lawrence Harper, \textit{The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineering} passim (1939) (discussing this point). Indeed, a report of royal commissioners sent to investigate the New England colonies suggested to reduce the colonies to “an absolute obedience to the King's authority.” 5 \textit{Calendar of State Papers, Colonial Series, America and the West Indies}, 1661-68 § 75 at 25 (W. Noel Sainsbury ed., 1964) (1880).

\textsuperscript{39} 12 Car. 2, ch. 18.

\textsuperscript{40} 15 Car. 2, ch. 7.

\textsuperscript{41} See 12 Car. 2, ch. 18.

\textsuperscript{42} See id. British control extended over “sugars, tobacco, cotton-wool, indigoes, ginger, fustick, or other dying wood, of the growth, production or manufacture of any English plantations in America, Asia, or Africa . . . .” Later Acts would extend such control over naval stores, hemp, rice, molasses, beaver skins, furs and copper ore. See Oliver M. Dickerson, \textit{The Navigation Acts and the American Revolution} 11 (1951). Later the Sugar Act of 1764 would include coffee, pimento, whale fins, coconuts, raw silk, hides and skins, pot and pearl ashes. See id.
land, thereby ending the burgeoning colonial foreign import-export trade and making England the colonies' sole marketplace.

During this period, England possessed great authority over inter-empire commercial matters. England not only controlled the flow of commerce, but also what products entered its stream by imposing tariffs and import bounties. For example, through various import bounties, England encouraged the colonists to grow their own hemp and make their own tar, thus building up the naval-stores industry. Due to its control over inter-empire trade, England enjoyed great power over foreign relations and maritime laws as well. Only the King, however, as the embodiment of the central government, held authority over inter-empire trade, foreign relations and maritime law, a view recognized by both colonist and King alike.

43. See 15 Car. 2., ch. 7.
44. As late as 1676, however, Edward Randolph would report that, when he instructed colonial leaders in Massachusetts Bay to enforce the Navigation Acts, he was told that the "laws made by your Majesty and your Parliament obligeth" Massachusetts residents "in nothing but what consists with the interests of that colony." GREENE, AUTHORITIES, supra note 14, at 46 (quoting A. BERRIEDALE KEITH, CONSTITUTIONAL HISTORY OF THE FIRST BRITISH EMPIRE 104-05 (1930).
45. Bounties of £6 per ton were placed on hemp. See 3 Anne ch. 10.
46. A 33% import bounty was placed on all foreign tar and pitch. See 5 W. & M. ch. 5.
47. Indeed, the colonists apprehended Parliament's trade laws, considering them a violation of their rights and liberties. This was because the colonists were not represented in Parliament and, thus, Parliament did not represent the whole empire in the way the King did. See 1 THOMAS HUTCHINSON, THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 272 (Lawrence Shaw Mayo ed., 1936). As Thomas Hutchinson, the former governor of colonial Massachusetts, and an authority on colonial history commented:

[The colonists] apprehended them [Parliamentary trade laws] to be an invasion of the rights, liberties and properties of the subjects of his Majesty in the colony, they not being represented in parliament, and according to the usual sayings of the learned law, the laws of England were bounded within the four seas and did not reach America. However, as his Majesty had signified his pleasure, that these acts should be observed in the Massachusetts, they had made provision by law of the colony, that they should be strictly attended to from time to time, although it greatly discouraged trade, and was a great damage to his Majesty's plantation.

Id.
48. King Charles II, after the passage of the Navigation Acts, sent a letter to Massachusetts saying, "[w]e are informed that you have lately made some good provision for observing the acts of trade and navigation, which is well pleasing to us." THOMAS HUTCHINSON, HUTCHINSON PAPERS 521 (Burt Franklin ed., 1967). Hutchinson explains, "[i]t is very extraordinary, for this provision [the "good provision" referred to] was an act of the colony declaring that the acts of trade should be in force there." Id. Here, King Charles II, the King responsible for one of the largest expansions of English power at the expense of colonial autonomy, recognized that colonial acquies-
In 1675, Charles II created the Lords of Trade ("Lords"), a permanent committee of the Royal Privy Council. For a decade, the Lords worked to secure colonial obedience to royal authority and the Navigation Acts and limit colonial autonomy. At the urging of Lords, the Privy Council voided numerous colonial acts. The Lords tightened control over the King's governors and also worked to reduce the influence of the colonial assemblies. In adherence to Parliament's authority was not obligatory. Indeed, John Adams cited this letter as evidence of royal recognition of the lack of authority Parliament had over the colonies. See John Adams, Novanglus, To the Inhabitants of the Colony of Massachusetts-Bay, Mar. 6, 1775, in 2 PAPERS OF JOHN ADAMS 319 (Robert J. Taylor et. al., 1977) ("Had he [the king], or his ministers an idea that parliament was the sovereign legislative over the Colony? If he had, would he not have censured this law [the Massachusetts law] as an insult to that legislature?").

49. See Greene, Peripheries, supra note 9, at 13-14; Labaree, supra note 16, at 222.

50. See, e.g., 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS (Leonard W. Labaree ed., 1935). For example, in Virginia, the Lords voided fifteen acts of the Virginia Assembly from 1676 to 1682. See id. at 159-60 (voiding eleven acts of the Virginia Assembly: An Act of Free Pardon, An Act of Attainder, An Act of Inflicting Pains, Penalties, and Fines upon Great Offenders, An Act for the Relief of Such Loyal Persons as Have Suffered Loss by the Late Rebels, An Act Limiting Times of Receipt and Payment of Public Tobaccos, An Act Regulating Ordinaries and the Prices of Liquors, An Act Disposing of Amercements upon Caste Actions, An Act Concerning Servants Who Were out in Rebellion, An Act for Laying of Parish Levies, An Act for Delivery of Stray Horses, etc., and An Act for Signing Executions on Judgments in the Assembly); id. at 161 (voiding two acts passed by the Virginia Assembly: An Act Prohibiting the Exportation of Any Iron, Wool, Woolfells, Skins, hides, or Leather and An Act for Encouragement of the Manufactures of Linen and Wollen Cloth in 1683); id. at 165 (voiding the proceedings of Virginia Assembly repealing the pardon of "Nathaniel Bacon the younger and his accomplices"). In addition, New Hampshire, see id. at 165 (requiring that the New Hampshire Assembly repeal all laws in that colony from 1682-86), and New York, see id. at 201 ("Repeal of New York 'Charter of Liberties and Privileges'” in 1686-88) also suffered significantly at the hands of the Lords.

51. The Lords did so by insisting upon more frequent and detailed reports on colonial activities and expanding the scope of the royal instructions given to the governors. See Greene, Peripheries, supra note 9, at 13-14; Labaree, supra note 16, at 222.

52. From 1678 to 1689, the Lords drafted directions to the Royal Governors for limiting the colonial assemblies. From 1678 to 1689, the Lords drafted directions to the Royal Governors for limiting the colonial assemblies. See 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, supra note 50, at 88-167. Some limitations on the colonial assemblies included: "Biennial Summons of Virginia Assembly" (obliging Virginia to call the assembly but "once in two years unless some emergent occasion shall make it necessary, the judging whereof we leave to your discretion") (Va., 1676); "Assemblies in Emergencies: Jamaica and Virginia" (excepting colonial laws passed during invasion, rebellion or urgent necessity, from transmitting them to England) (Va., 1679-82); "Disqualification of Beverley and Hill in Virginia" (disqualifying Col. Robert Beverley and Col. Edward Hill from public service, because they are "persons of evil fame and behavior") (Va., 1679-82); "Assemblymen to be Elected
dition, to increase the crown’s influence throughout the colonies, the Lords prevented the creation of any more private colonies and attempted to convert those existing private colonies into royal colonies.53 Perhaps the most ambitious attempt on colonial political

by Freeholders Only” (requiring all member of the assembly be freeholders) (Va. 1676-1761; Md. 1691-1715; NH, 1692-1776; NC, 1730-54; SC, 1720-76); “Council and Assembly Not to Meet in Taverns” (NH, 1682-86); “Not to Reë enact Laws” (prohibiting reenacting any law, presumably that was voided by the Privy Council) (Va., 1682-1728); “Laws Disallowed to be Void” (declaring all laws passed by colonial legislatures but not approved by the Privy Council to be void) (NY, 1686-88, New England, 1686-89). See id. The Lords also persuaded the Virginian and Jamaican assemblies to make the governors partially dependent on the crown for revenue, thus increasing both gubernatorial dependency on the crown, and, consequently, willingness to enforce royal prerogative over the colonists’ desires. See Greene, Peripheries, supra note 9, at 14. Virginia was the only mainland colony to do so. The other colonies refused as such a vote would deprive them of “the greatest Security of their Rights and Privileges: Viz. Their Power of Deprivation, which is the greatest Check against . . . absolute Government.” Id. (quoting Votes and the Proceedings of the General Assembly of the Colony of New-York, June 24, 1749-August 4, 1749 14-17 (New York, 1749)). In addition, theoretically, Royal Governors initiated all colonial legislation. See Labaree, supra note 16, at 218 (“The [governor’s] commission empowered the governor, by and with the advice and consent of council and assembly, ‘to make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare, and good government.’”). Practice, however, did not bear this out. Royal Governors commonly consented to legislation as it originated in the colonial assemblies. See Labaree, supra note 16, at 219. To remedy this, the Lords attempted to apply Poyning’s Law to Jamaica (in 1678) and Virginia (in 1679). See 1 Royal Instructions to British Colonial Governors, supra note 50, § 199 (Royal Instruction for incorporating “Poyning’s Method” to Virginia and Jamaica). The American version of Poyning’s Law (Poyning’s Law was originally applied to Irish Assembly, see Labaree, supra note 16, at 219, provided that all legislation, save for cases of invasion or other dire emergency, be framed by the governor, then sent to England for revision and approval by the Privy Council. Only then, now under the great seal, would the assembly be called to consent to the bill. See 1 Royal Instructions to British Colonial Governors, supra note 50, § 199; Labaree, supra note 16, at 219.

Virginia failed to see the significance of this innovation. See Labaree, supra note 16, at 221 (noting that the House of Burgess in Virginia passed the provisions with few amendments). The Jamaica Assembly, however, opposed the measure vehemently. See 10 Calendar of State Papers, Colonial, 1677-1680, supra note 38, §§ 596, 600, 601, 786, 794, 814, 815, 827, 961, 1001, 1117, 1188, 1265, 1361; 1 Acts of the Privy Council of England, Colonial Series 1613-1680 §§ 1201, 1202, 1257, 1274 (W. L. Grant & James Munro 1908). During the three years this measure remained in force, the Jamaica Assembly passed no bills that did not originate with them. In late 1680, the Lords of Trade acquiesced, restoring initiative to the assembly in Jamaica. See Labaree, supra note 16, at 222 & n.6 (citing Powers to the Earl of Carlisle for making laws, Nov. 3, 1680, and Instructions to Governor Carlisle, Jamaica, Nov. 3, 1680). These changes were made for Virginia in the next governor’s instruction as well. See Labaree, supra note 16, at 222.

53. Thus, upon its recommendation, the New Hampshire towns were separated from Massachusetts Bay in 1679 and made a royal colony. Although Charles II granted Pennsylvania to William Penn in 1681, the Lords secured a series of limitations and regulations into the Pennsylvania charter. The Lords also assaulted the
life occurred when the Lords briefly unified the colonies, creating
the Dominion of New England, which stretched from Maine to
Pennsylvania, in an effort to ease enforcement of royal
instructions.\footnote{54}

3. The Colonies Fight Back

In light of these attempts to reign in the colonies, the colonial
assemblies attempted to claim individual and collective rights from
the crown. Virginia, for example, attempted to obtain a new char-
ter in 1675-76.\footnote{55} The Charter of Liberties, enacted by the first New
York Assembly in 1683 and manifestos adopted in Massachusetts,
New York and Maryland in 1688-89 articulated rights the colonists
felt they possessed that England could not disturb. Predictably,
England and the Privy Council routinely denounced these acts, go-
ing so far as voiding the New York Charter of Liberties. Inspired
by the Glorious Revolution of 1688-89, the legislatures of Virginia,
New York, Massachusetts, South Carolina and Maryland passed
imitations of Parliament's 1689 Declaration of Rights.\footnote{56} Indeed,
despite England's attempts to the contrary, the colonists made it
clear that they intended to define their civil liberties.\footnote{57}

4. Summary of the Early Colonial Period

Early on, colonists sought to preserve their personal liberties and
to govern themselves. The colonists routinely established internal
laws and civil liberties, levied internal taxes and regulated internal,
or "intra-colony," commerce. The colonists repeatedly fought

\footnote{54. The Dominion lasted from 1684 to 1691 and proved disastrous. First, the Do-
mion destroyed the colonists' own attempt at unification, the New England Confed-
eration of 1643. The Confederation, borne of a limited desire for cooperation and the
need to address the problems made obvious by the Pequot War of 1637, was between
the colonies of Connecticut, New Haven, Massachusetts and Plymouth. \textit{See Articles}
of Confederation of May 19, 1643, \textit{in Documents of American History} 26-28
the dissolution of the Dominion required all legislation passed by the assembly and
approved of by the governor, be approved of by the king in council—who within
three years of the passage of the act, could disallow the legislation. Laws not disal-
lowed within three years remained in force. \textit{See Herbert Eugene Bolton and}
\textit{Thomas Maitland Marshall, The Colonization of North America} 344
(1942).
\footnote{55. \textit{See Greene, Peripheries, supra} note 9, at 16.}
\footnote{56. \textit{See id.}}
\footnote{57. \textit{See id.}}}
English encroachment on these local areas, especially intra-colonial political culture or territorial changes. England, on the other hand, controlled the external areas of inter-empire trade, foreign relations and Maritime laws. This rule was accomplished by royal, rather than parliamentary, fiat. These early examples of colonial authority established the American understanding of layered governments, an understanding the Framers would later rely on when creating the new government under the U.S. Constitution.

In the coming half-century, however, the colonial paradigm shifted. The King no longer conducted the day-to-day regulation of the colonists; instead, after the Glorious Revolution, Parliament emerged as England’s governing body. Consequently, colonial friction increased because Parliament, which the colonists did not recognize as a sovereign entity, began to legislate on subjects formally under the province of the King. The colonists were further angered by this new system because Parliament often legislated on matters traditionally of colonial concern. With the existing colonial model thus threatened, and Colonial America clinging to its past, the colonists had cause to charge toward revolution. As fate would have it, however, circumstance and a prolonged period of “salutary neglect” temporarily minimized confrontation between England and her colonies.

B. Eighteenth Century America, 1700-1763

1. Early Expansions of British Authority

Under King William, British influence over trade in the American colonies grew. Motivated by complaints from British merchants of piracy and smuggling, the crown created the Board of Trade (“Board”) to succeed the defunct Lords in 1696.58 The Board continued the policies taken up by the Lords a decade earlier. The Board drafted the instructions to the royal governors, examined colonial legislation, examined the accounts of the colonial treasuries and nominated new governors.59 The Board also conducted all aspects of colonial administration, except for the execution of its policies. Together with the Privy Council60 and Parliament, England thereby tightened its grip on the colonies.

58. See, e.g., Greene, Peripheries, supra note 9, at 16; Bolton & Marshall, supra note 54, at 347. Interestingly, among the Board’s first non-ministerial officials was John Locke. See id.
59. See Bolton & Marshall, supra note 55, at 347.
60. The Privy Council remained responsible executing of English law in the colonies. See id.
During the reigns of William and Anne, Parliament passed various trade laws designed to subrogate colonial commercial enterprises to that of the motherland. The Navigation Act of 1696 required that all ships carrying colonial imports and exports be English ships manned by English ship-masters and a crew at least three-fourths English. It also granted greater powers to Customs officials and called for trials under the authority of the Act to be done either by a jury of English or Irish natives, hence effectively precluding jury trials in America, or in the Admiralty Courts which did not provide for jury trials. The Woolen Act of 1698 restored the English monopoly over manufactured goods by forbidding the export of woolen products to the colonies. Seven years later, rice, molasses and various naval stores (tar and pitch) were included in the list of articles shipped solely to England. In 1710, Parliament reorganized the post-offices for the empire, a regulation that was previously left to the colonies. Finally, under the rule of Queen Anne, chartered colonies were disallowed and a few formerly chartered colonies shifted to royal control.

2. Fortune Smiles on the Colonists

Beginning in 1721, coinciding with the ascendancy of England's first minister, Sir Robert Walpole, colonial administration was relaxed. Three factors contributed to this situation. First, Sir Walpole, in practice, returned to the lassie-faire colonial administration that characterized the first half of English colonization in America. Second, day-to-day administration of colonial affairs
shifted from the Board of Trade to the secretary of state for the southern department. By 1724, the Duke of Newcastle was appointed to that position and, in his twenty-four year reign, proved to be a lax colonial administrator, as well as inefficient and corrupt. Lastly, a lack of support in England for strict enforcement of colonial policy, combined with a willingness to compromise with the colonies on economic measures where possible, contrib-

66. See Greene, Authorities, supra note 14, at 62.
67. See id.
68. For example, after repeated instructions and entreaties from the Board of Trade failed to force the Massachusetts House of Representative to establish a permanent revenue to provide salaries for crown officers, the Board threatened, in 1729, to turn to Parliament. The administration, led by the duke of Newcastle, was not eager to bring “things to that extremity” and thus, the Massachusetts house stood firm and the Board was forced to back down. See 36 Calendar of State Papers, 1728-29, supra note 38, ¶ 582, at 311-14; 643, at 338-40; 792, 793 at 412-414.
69. See Bolton & Marshall, supra note 54, at 349-53. Specifically, the Duke regarded the colonial policy as a means to reward supporters. As a result, while many of his gubernatorial appointments were excellent officials, others were corrupt or incapable. In addition, the Duke also attempted to regulate the entire of the colonies himself.
70. From 1734 to 1749, Parliament considered strengthening royal political authority in the colonies on three separate occasions and failed to do so. See Greene, Authorities, supra note 14, at 67 (noting that the House of Lords failed to transform a proposal to “prevent any colonial law from taking effect until they had been approved by the crown” into a bill to be voted on and that the House of Commons, in 1744 and then again in 1749, failed to enact clauses that would have given royal instructions the effect of law in the colonies, despite that both bills that included these measures originally were passed).
71. Noted historian Jack Greene explains:

Whenever colonial interests coincided with those of some influential group in Britain, the colonies could count on a favorable response to their requests. Thus, the rice growers of Carolina combined with rice traders in Britain in 1730 to persuade Parliament to permit the direct exportation of rice from Carolina to southern Europe, and South Carolina indigo planters joined with woolen manufacturers in 1748 to secure a bounty to encourage the production of Carolina indigo.

Greene, Authorities, supra note 14, at 65. James Oglethorpe summarized the prevailing ideal in the House of Common in 1732:

[I]n all cases that come before this House, where there seems to be a clashing of interests between one part of the country and another[,] we ought to have no regard to the particular interest of any country or set of people; the good of the whole is what we ought only to have under our consideration: our colonies are all a part of our own dominions; the people in every one of them are our own people, and we ought to shew an equal respect to all.

uted to this period of "salutary neglect." Fittingly, colonial resistance to British policies increased as well.

72. By 1701, royal governors complained of the situation in the colonies. Jamaica Governor William Beeston wrote that the members of the lower house of the Jamaica legislature believed "that what a House of Commons could do in England, they could do here, and that during the sitting all power and authority was only in their hands." Beeston to Board of Trade, Aug. 19, 1701, 19 CALENDAR OF STATE PAPERS 1701, supra note 38, at 424-25. Barbados Governor Robert Lowther wrote in 1712 that the colonists "have extorted so many powers from my predecessors, that there is now hardly enough left to keep the peace, much less maintain the decent respect and regard that is due to the Queen's servant." Lowther to Board of Trade, Aug. 16, 1712, 27 CALENDAR OF STATE PAPERS 1712-14, supra note 38, at 29. The situation deteriorated so much that, by 1752, South Carolina Governor James Glen would comment:

Governors are to do their utmost to enforce the observance of the laws, but I am afraid all they can do is very little. In England, indeed, if the laws of trade are not punctually observed, it must generally be owing to the negligence of officers. . . . But here we have few or no officers, and those I believe never attend either the loading or unloading and ship, and it is not possible they should attend all. . . . Some years ago I was assured that there was very little illegal trade carried on here, but I presume they have meant it comparatively with regard to some other provinces, for I am now convinced and know for certain that there is very considerable illegal trade in this province, injurious to the fair trader, highly hurtful to the king's revenue, and destructive to the manufactures of Britain; and I see it a growing evil.

Comment by South Carolina Governor James Glen to the Board of Trade (1752), reprinted in HAWKE, supra note 30, at 265-66. In 1752, the Board of Trade asked the colonial governors to comment on the Board's instructions to them. See id. at 265. The instructions in question were:

Article 1: You shall inform yourself on the principle laws relating to the plantation trade, [here follows a list of the ninety-four acts of navigation and trade relative to the colonies]. All which laws you will herewith receive: and you must take a solemn oath to do your utmost that all the clauses, matters, and things contained in the before- receited acts and all other acts of Parliament now in force or hereinafter shall be made relating to our colonies or plantations be punctually and bona fide observed, according to the true intent and meaning thereof.

Id. at 265.

73. For example, while individual colonists acquiesced to the navigation acts, they did so selectively. Merchants in the middle colonies and New England, for example, explicitly violated the Molasses Act of 1733 because they felt it discriminated against them in favor of West Indian sugar interests. As Caleb Heathcote, Surveyor-General of Customs, lamented:

[F]or while they [the colonists] have a power (as they imagine) of making laws separate from the crown, they'll never be wanting to lessen the authority of the King's officers, who, by hindering them from a full freedom of illegal trade, are accounted enemies to the growth and prosperity of their little commonwealths.

Caleb Heathcote to Board of Trade, Sept. 7, 1719, reprinted in DIXON RYAN FOX, CALEB HEATHCOTE, GENTLEMAN COLONIST 188 (1926). The colonial assemblies in particular resisted British attempts to limit their authority. Governors complained the assemblies "extorted so many powers from [their] predecessors that there" was "hardly enough left to keep the peace, much less to maintain the decent respect and
3. Focusing the Debate

Although governmental relations between England and her American colonies were generally amicable during this period, problems did arise. Particularly, disputes surfaced between the colonial assemblies and the colonial governors, problems that unearthed the fundamental question for this period, namely "On what foundation did the assemblies rest?" Did the assemblies rest on, as New York Justice William Smith said in 1734, the right "to choose the Laws by which we will be governed" and "to be governed only by such Laws," or by the King's prerogative alone?

The debate centered on the validity of royal limitations on the assemblies. Over the next seventy years, the colonial assemblies and governors wrangled over the authority to extend representation to new districts, to make qualifications necessary to vote and regard that is due to the Queen's servant. Sir William Beeston to Board of Trade, Aug. 19, 1701, 19 Calendar of State Papers, 1701, supra note 38, at 424-25; Robert Lowther to Board of Trade, Aug. 16, 1712, 27 id. at 29; Board of Trade to king, Aug. 10, 1721, 32 id. at 386-87; Samuel Shute to king, Aug. 16, 1723, 33 id. at 324-30. Caleb Heathcote, Surveyor-General of Customs reported the situation to the Board of Trade:

I need not acquaint your Lordships, that notwithstanding they have oft received commands for sending home their laws, it has hitherto, in this government, been wholly neglected; and they nevertheless presume to put them in execution, though many thereof are repugnant not only to the laws of Great Britain, but even to the express words of their charter.

Caleb Heathcote to Board of Trade, Sept. 7, 1719, reprinted in Dixon Ryan Fox, Caleb Heathcote, Gentleman Colonist 188 (1926). All royal officials, however, did not look at this with disdain. As the governor of Rhode Island noted, "the various circumstances of the time and place and people doe often make it necessary to enact and establish Laws different [from], though not repugnant, to the Laws of England." Governor and Company of Rhode Island, Reply to Charges, Feb. 1, 1706, 23 Calendar of State Papers, 1706-08, supra note 38, at 33-35. Robert Raymond told the Board of Trade that the colonists' "religion, liberties and properties should be inviolably preserved to them" through the assemblies. Robert Raymond to the Board of Trade, Aug. 17, 1713, 27 Calendar of State Papers, 1712-14, supra note 38, at 222.

74. See generally Labaree, supra note 16, at 179-217 (discussing this point).
75. Joseph Murray, Mr. Murray's Opinion Relating to the Courts of Justice in the Colony of New-York 7, 15 (1734), quoted in Greene, Peripheries, supra note 9, at 39.
76. See Labaree, supra note 16, 179-88. Who had authority to extend representation to new districts was an issue of paramount importance during the colonial period. Indeed, Jefferson gave voice to this grievance in the Declaration of Independence: "He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature, a right inestimable to them and formidable to tyrants only." The Declaration of Independence ¶ 5 (U.S. 1776). English precedent was inconclusive; early on, the Tudor Monarchs extended representation to towns and boroughs. Under the Stuarts, Parliament exercised this power. After the Restoration of Charles II, however, the
be elected,\textsuperscript{77} to fix the meeting places of the assemblies,\textsuperscript{78} to select

monarchy granted the borough of Newark representation. Three years earlier, Parliament granted representation to the county and city of Durham. These were the only precedents the Americans had to follow. See Labaree, supra note 16, at 180. If the extension of franchise was a power of the assembly, then, so the colonists contended, the assemblies existed as a natural right. If, however, the crown, as represented by the governors in America, was the only body who could properly extend representation to new towns, the colonial assemblies would exist by royal prerogative. See id. at 179. Two colonial examples, one from New Hampshire, and the other from Massachusetts, are noteworthy, yet inconclusive. In New Hampshire, pursuant to royal instruction, Governor Benning Wentworth ordered five new delegates from new towns and districts. See 1 Royal Instructions to British Colonial Governors, supra note 50, § 162. The New Hampshire Assembly refused to grant them seats. Throughout the next seven years, Governor Wentworth refused to nominate a speaker for the assembly, thus preventing the assembly from passing any new laws or collecting any taxes. By September 1752, a beaten New Hampshire Assembly admitted the new delegates and ended the struggle. See Labaree, supra note 16, at 179-83. Earlier, in 1742, Governor Shirley of Massachusetts suggested that the new frontier towns be organized into “precincts, parishes, or villages with all the officers and privileges of a township except that of sending representatives.” Id. at 185 (quoting Shirley to the Board of Trade, Oct. 18, 1742). Later, further instructions would commend Shirley for this policy. The policy, however, clearly infringed on the rights of assembly granted in Massachusetts’ charter of 1691. This, Professor Labaree has commented, may explain for the failure in enforcement of this instruction in Massachusetts. Indeed, Governor Shirely himself approved bills for the full incorporation of three towns in 1754, with representatives. See Labaree, supra note 16, at 184-85. Later, in 1767, due to the new settlements in the west, numerous acts from the assemblies of New Hampshire, Massachusetts, New York and South Carolina were sent to the Privy Council, increasing the number of communities eligible to send representatives, rapidly increasing the size of the colonial assemblies. See id. at 186. The Privy Council denied every such act. See 5 Acts of the Privy Council, 1766-1783, supra note 52, §§ 29-30, 32-35, 40. Further, in 1767, the Privy Council sent every governor a circular letter forbidding them from assenting to any act increasing the size of the assemblies. See Constitution of Assembly Not to be Altered by Act, reprinted in Labaree, supra note 16, at 107 (forbidding the governors from assenting to any increase in the size of the assembly).

\textsuperscript{77} See id. at 188-90. While the British and colonists agreed that franchise and the right to be elected ought to be limited to freeholders—those with tangible land stakes in the community—the property qualifications varied. By 1767, the Board of Trade attempted to regulate the property qualifications in all thirteen colonies. See, e.g., Circular instruction, approved Aug. 26, 1767, cited by Labaree, supra note 16, at 189 & n.38; 1 Royal Instructions to British Colonial Governors, supra note 50, §§ 154 (“Assemblymen to be Elected by Freeholders Only”) (requiring that freeholders only may vote), 159 (“Qualifications of Electors and Elected in Georgia”) (requiring Georgia assemblymen to be: non-Catholic (“no person shall be capable of being elected a representative . . . who is a Popish recusant”), twenty-one years old and have a freehold estate of five hundred acres) (also requiring the same of voters, except the freehold requirement was only fifty acres)), 163 (“Constitution of the New Jersey Assembly I“ (requiring that freeholders that are elected representatives have one thousand acre freeholds and that all voters have one hundred acre freeholds), 164 (“Constitution of the New Jersey Assembly II” (in addition to the first instruction, this provision extended franchise to men with a personal estate of £50 sterling and the right to be elected to those with a personal estate of £500 sterling).
speakers for the assemblies,\textsuperscript{79} to extend privileges to assembly-

\textsuperscript{78} See Labaree, supra note 16, at 190-99. Two examples are illustrative. The first involves instructions to the governors of New Jersey that required the meeting of the assembly alternatively at Perth Amboy in East Jersey and Burlington in West Jersey. \textit{See id.} at 190-91 & n.39 (discussing Instructions to Cornbury, and Instructions to Lovelace); \textit{1 Royal Instructions to the British Colonial Governors, supra note 50, § 148.} In 1709, an act of the West Jersey representatives and Lieutenant Governor Ingoldsby required all future sessions of the assembly to meet in Burlington. Governor Hunter, who arrived the next year, could not decide which to follow: the instruction or the act. The act, although signed by Queen Anne, had not arrived in signed form, so Governor Hunter followed the instructions. By 1715, the act was signed and received by Governor Hunter, which gave rise to a new question: should Hunter follow the act, now signed by Queen Anne, or the new instructions issued by King George I (King George I actually reissued the prior instructions)? In an important decision, the Board of Trade decided that Hunter should follow the act rather than the new instruction. As a result, royal authorities recognized that colonial legislation approved by the king was granted the same force as an act of Parliament. \textit{See Labaree, supra note 16, at 190-93.} The other notable controversy occurred in Massachusetts. A provincial elections act of 1698 repeatedly referred to the assembly as summoned to meet in the townhouse of Boston. \textit{See Labaree, supra note 16, at 193.} In 1721, the question of where the assembly was to meet arose. The representatives insisted that the act required the governor to convene all assemblies there. The governor asserted “Boston” was merely illustrative and that the meeting place might be freely altered. The question arose again in 1728, and on each occasion no final settlement was reached. In 1769, with the presence of regular troops in Boston, Governor Bernard chose to convene the assembly to Harvard College in Cambridge. The colonists objected strenuously. With the Boston Massacre in 1770, the formerly conservative majority in the assembly became distinctly hostile to the British desires. Lieutenant Governor Hutchinson later told the representatives that the assembly would convene in Cambridge because it was the king’s desire and his commission as Lieutenant Governor required his to act in accordance with royal instructions. The colonists responded by pointing to their charter which granted the governor “full power and authority” to adjourn, prorogue, and dissolve the assembly. Thus, the governor’s authority was not subject to royal instructions. After an address by Hutchinson in the Massachusetts House of Representatives, that body replied with an address, likely the work of Samuel Adams. In it, the paper asserted that the colonists have a right to dispute what was in the public good and “withstand the abusive exercise of a legal and constitutional acts of the crown.” House of Representatives to Hutchinson, July 31, 1770, \textit{3 History of the Colony and Province of Massachusetts Bay, supra note 47, at 388.} The paper held “that whenever instructions cannot be complied with, without injuring the people, they cease to be binding.” \textit{Id.} at 390. In 1772, Hutchinson compromised: he returned the assembly to Boston, but did so without implicating the king’s right to instruct governors. In 1774, however, Parliament passed the Boston Act and the Massachusetts Government Act and Secretary of State Dartmouth ordered the removal of the assembly to Salem. The colonists objected, but without result. As Professor Labaree notes, “[n]o more sweeping challenge than this was made to the system of royal government in the provinces before the actual expulsion of the governors upon the outbreak of the Revolution.” \textit{See Labaree, supra note 16, at 198.}

\textsuperscript{79} See id. at 199-203. As the colonists quickly pointed out, only in 1679 did royal approval of a speaker of the House of Commons become more than a formality. \textit{See id.} at 199. This method of controlling the legislature was, however, widely employed
men and to adjourn the assembly. These examples show that the colonists, as they did earlier when facing Poyning's Law, failed to recognize authority in Parliament to limit local political bodies with respect to their operation within the state.

English officials and Loyalists considered the colonists' right to an assembly to be a policy choice. Thus, the colonists legislated at England's whim. Most colonists, however, rejected this position. Some viewed the colonial charters as contracts with the King.

in America. See id. at 200. Such sentiments illustrate the growing self-consciousness of colonial assemblies and their feelings of equality with Parliament. See id. 207.

80. See id. at 203-10. Privileges often included access to the governor's person, freedom of debate and vote in the assembly, and freedom from arrest during the term. See id. at 203. Most assemblymen enjoyed these privileges, giving rise to colonial sentiment that "this house [the colonial assembly] has the same inherent rights in this province, as the House of Commons has in Great Britain." Massachusetts House of Representatives to Hutchinson, July 31, 1770, 3 History of the Colony and Province of Massachusetts Bay, supra note 47, at 392. Such comments are illustrative of the increasing self-awareness of the colonial assemblies and their feeling of equality with Parliament. See Labaree, supra note 16, at 207.

81. See id. at 207-17. The importance over this issue is evident; the Declaration of Independence complains:

He has dissolved representative houses repeatedly for opposing with manly firmness his invasions of the rights of his people. He has refused for a long time after such dissolutions to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the state remaining in the meantime exposed to all the dangers of invasion from without and convulsions within.

**Declaration of Independence ¶ 8.**

82. See supra note 52.

83. See Greene, Peripheries, supra note 9, at 34. One New York Loyalist even taunted by "prerogative...alone...you are ruled...the Royal Pleasure...is your Magna Charta." Id. "Without any Regard to the Magna Charta," another writer contended, the colonists might "be Ruled and Governed by such ways and methods, as the Person who wears [the]...Crown...shall think most proper and convenient." Id. at 35.

84. Edward Rawson, when justifying the overthrow of the Dominion of New England, called the charters the "Original Contract[s] between the King and the first Planters" by which the King promised them that "if they at their own cost and charge would subdue a Wilderness, and enlarge his Dominions, they and their posterity after them should enjoy such Privileges as are in their Charters expressed." Edward Rawson, The Revolution in New England Justified 42-43 (1691), quoted in Greene, Peripheries, supra note 9, at 36. Patrick Henry also used this argument in 1763. At the time, tobacco was the medium of exchange in Old Dominion, Virginia. The Virginia clergy were paid 17,000 pounds of tobacco annually. The Burgesses passed acts in 1755 and 1758 allowing debts to be redeemed at two pence per pound of tobacco—effectively reducing the ministers' yearly income. The King disallowed these laws in 1759 and the ministers brought suit to recover their losses. In one such suit, brought by Reverend James Maury in 1763, Patrick Henry argued that the acts of 1758 were acts of general utility consistent with the original compact upon which government was based. Thus, the King, by disallowing this act, became a tyrant and forfeited his
Other colonists viewed their rights in terms of natural law. The New York Assembly, for example, viewed the rights they desired as “Rights and Privileges inherent in Us, in common with ... his Majesty’s Free-born Natural Subjects.” Other Colonists argued that both British and American traditions supported the colonial assemblies and their claims to full legislative power.

Whether by contract, natural right or custom, the colonists believed in the authority of their assemblies. Consequently, the colonists right to obedience from his subjects. See Bolton & Marshall, supra note 54, at 429.

85. The Pennsylvania Assembly took this view when it initially refused to contribute to England’s wars with Spain and France because doing so violated the religious beliefs of the Quakers, a right protected in its charter:

That as very many of the Inhabitants of the Province are of the People called Quakers who, tho’ they do not condemn the use of Arms in others, yet are principled against it themselves; a law to compel them to arm would not only be a Breach of that fundamental One for Liberty of Conscience, comprised in the Charter of Privileges granted by the first Proprietor, and since [illegible] Times confirmed by Acts of Assembly, but would in Effect be to commence Persecution against them.

That as the greater Part of the Assembly are principled against Fighting, They cannot make any law exempting those of the same Principles, and compelling others of different Persuasions to bear Arms, without being chargeable with Partiality and [illegible] consistency.

1 The American Magazine 13 (Jan. 1740-41) (reporting the proceedings of the Assembly of Pennsylvania, Jan. 5, 1740) (emphasis added). Eventually, the Pennsylvania Assembly, only after much pressure from its Governor, did contribute to the war effort. See id. at 64 (reporting the proceedings of the Assembly of Pennsylvania, July 7, 1740) (noting that upon reading a threatening message from the Pennsylvania Governor, the Assembly voted “That a Sum of Money, such as the House should thereafter agree upon, be given to the Crown”).

86. Greene, Peripheries, supra note 9, at 34. Another colonist argued the inhabitants of “America have a just Claim to the hereditary Rights of British Subjects.” Id. at 36. These inherent, or hereditary rights, as one colonial writer defined them, included “to have a Property of his own, in his Estate, Person and Reputation; subject to Laws enacted by his own Concurrence, either in Person or by his Representatives.” Id.

87. Joseph Murray of New York relied on British tradition, declaring that the colonial assemblies derived “their Power or authority ... from the common Custom and Laws of England, claimed as an English-man[’]s Birth Right, and as having been such, by Immemorial Custom in England.” Joseph Murray, Mr. Murray’s Opinion Relating to the Courts of Justice in the Colony of New-York 7, 15 (1734), quoted in Greene, Peripheries, supra note 9, at 39. He continued “and tho’ the People” of the colonies could not “claim this by Immemorial Custom here, yet as being part of the Dominions of England, they are intitled to the like Powers and Authorities here, that their fellow Subjects have, or are intitled to, in their Mother Country, by Immemorial Custom.” Id. On the other hand, James Knight, a former attorney general of Jamaica, relied on American custom to give colonial assemblies their legitimacy. He announced that the assemblies had authority to exercise “Legislative power in its full[est] extent,” in part because over a long period of time the assemblies had “in Fact Exercised a Legislative Power in almost every Instance, wherein it is possible to be Exercised.” Id. at 39-40.
nial understanding was that England, the central authority, could not place limits on the colonial governments, insofar as they acted within their colony. To be sure, when an assembly acted outside its authority, the offending colonial act was voided. Yet, the colonists understood that layered government, under the colonial model, required each layer to have complete autonomy within their defined scopes of authority. Indeed, each layer was nearly sovereign within their respective scopes of authority.

C. A Seven Year Itch: Prelude to the Revolution, 1763-70

Throughout the middle of the eighteenth century, England waged wars against the Spanish and French in an effort to protect her colonies. In America, the colonists helped this effort from 1754-1763 during the French and Indian War. During this time, England exercised its war-making authority to request both troops and money contributions from the colonies, each a proper exercise of the power of the central government in the colonial scheme. The eventual defeat of the French, and the subsequent 1763 Peace of Paris, posed questions about what England should do with the western lands and how England would pay its staggering war debts. England's solutions, however, only opened the door to tougher questions.

1. Problematic Solutions

England sought to finance its war debts through taxing the colonies and tightening its control over colonial trade. Importantly, these acts came from Parliament, a representative body, rather than the crown. For the colonists, who generally believed they owed allegiance to the crown alone, this violated a basic concept of government.

Almost immediately after their passage, the colonists took strong stances against the acts. For example, a Massachusetts committee led by James Otis drafted and sent a memorial to the colony's agent in England, instructing the agent to repeal the Sugar Act and

88. Not all of the ensuing trade regulations passed during the next seven years were negative. For example, to stimulate the fur trade the old duties were abolished and new duties, an import duty of one pence a skin and an export duty of seven pence per skin were imposed. See Bolton & Marshall, supra note 54, at 430. Also, protectionist bounties were paid on hemp, flax and indigo. By allowing Georgia and the Carolinas to ship without restriction to the south, the rice trade was stimulated. Finally, duties on whale fins were repealed outright. These beneficial measures, however, were more than negated by long line of oppressive Acts. See, e.g., 4 Geo. 3, ch. 15 (Sugar Act); 5 Geo. 3, ch. 12 (Stamp Act); 5 Geo. 3, ch. 33 (Quartering Act).
then-proposed Stamp Act. In the Carolinas, New York, Connecticut, Pennsylvania, Maryland, Virginia and Rhode Island various committees were established to draft instructions for their respective colonial agents in England to complain of the laws of trade.

The colonists complained, not only of Parliament's lack of authority over the colonies, but continued to assert that the people of England possessed no authority over internal colonial matters. For example, the Virginia House of Burgesses passed the Virginia Resolves that declared the people of Virginia "have without interruption enjoyed the inestimable right of being governed by such laws respecting their internal polity and taxation . . . and that the same hath never been forfeited but hath been constantly recognized by the kings and people of Great Britain." Benjamin Franklin, when testifying before the House of Commons in 1766, distinguished between "internal taxes," which were "forced from the people without their consent, if not laid by their own representatives," and the "external tax" used to regulate imperial commerce. Hopkins also addressed this issue:

89. See Bolton & Marshall, supra note 54, at 432.
90. See 1 American Political Writing During the Founding Era 1760-1805 45-61 (Charles S. Hyneman and Donald S. Lutz, eds., 1983). Stephen Hopkins wrote this pamphlet with the approval of the Rhode Island legislature. He also served in the First and Second Continental Congresses and helped write the Articles of Confederation. See id. at 45. Rhode Island Governor Stephen Hopkins summed up the colonial position in The Rights of the Colonies Examined:

In an imperial state, which consists of many separate governments each of which hath peculiar privileges and of which kind it is evident the empire of Great Britain is, no single part, though greater than another part, is by superiority entitled to make laws for or to tax the lesser part; but all laws and all taxations which bind the whole must be made by the whole . . . . Indeed, it must be absurd to suppose that the common people of Great Britain have a sovereign and absolute authority over their fellow subjects in America, or even any sort of power whatsoever over them; but it will still be more absurd to suppose they can give a power to their representatives which they have not themselves.

91. Id. at 57-58.

See, e.g., id. at 50 ("[E]ach of the colonies has a legislature within itself to take care of its interests and provide for its peace and internal government . . . ."); Robert Bland, An Inquiry into the Rights of the British Colonies, reprinted in id. at 79 ("[The Colonies] were respected as [ ] distinct State[s], independent, as to their internal Government . . . .").


93. Benjamin Franklin, Examination before the Committee of the Whole of the House of Commons, February 13, 1766, in 13 The Papers of Benjamin Franklin
There are many things of a more general nature, quite out of the reach of these particular [colonial] legislatures, which it is necessary to be regulated, ordered, and governed. One of this kind is the commerce of the whole British empire, taken collectively, and that of each kingdom and colony in it as it makes a part of the whole. Indeed, everything that concerns the proper interest and fit government of the whole commonwealth, of keeping the peace, and subordination of all the parts towards the whole and one among another, must be considered in this light. Amongst these general concerns, perhaps money and paper credit, those grand instruments of all commerce, will be found also to have a place. These, with other matters of a general nature, it is absolutely necessary should have a general power to direct them, some supreme and overruling authority with power to make laws and form regulations for the good of all, and to compel their execution and observance.\footnote{127, 139 (Leonard Labaree ed., 1959). He continued: “a right to lay internal taxes was never supposed to be in Parliament.” \textit{Id.} at 127.}

These views reflected the general understanding of the Colonists, that “things of a general nature” were separate from “internal police” and that a central body could only rightfully control the former.

On October 7, 1765, nine colonies\footnote{94. Stephen Hopkins, \textit{The Rights of the Colonies Examined in American Political Writing}, supra note 90, at 45-61. While conceding Parliament possesses this role, Hopkins concludes “justice and [ ] the very evident good of the whole commonwealth” requires American representation in Parliament on all matters “by which their rights, liberties, or interests will be affected.” \textit{Id.} at 51. He also argues that as a prudential matter, it behooves the empire to grant American representation:} sent delegates to the New York Stamp Act Congress.\footnote{95. Virginia, North Carolina, Georgia and New Hampshire failed to send delegates. \textit{See Bolton \\& Marshall, supra} note 54, at 436.} On October 19, the Congress adopted a declaration of grievances, arguing, among other things, that the Stamp Act violated the colonists’ rights as Englishmen. Specifically, delegates argued that they could not be taxed by anyone but their representatives,\footnote{96. \textit{See id.}} and that the right to a jury trial, a
fundamental right of all Englishmen, could not be infringed upon.98 The delegates, however, were unable to persuade Parliament. Parliament repealed the Stamp Act in February 1766, only after the testimony of Benjamin Franklin, the support of William Pitt and protests from English merchants and manufacturers who were losing business through colonial boycotts.99

2. Different Solutions, Identical Problems

The colonial celebration over the defeat of the Stamp Act was short lived. In June 1767, Parliament passed the Townshend Revenue Act, the most serious threat yet to colonial autonomy.100 Duties were imposed on tea, glass, red and white lead, painter’s colors and paper.101 Writs of assistance were declared legal and the Quartering Acts were strengthened.102 Further, Parliament passed the infamous Tea Act.103 The colonists, however, would not passively acquiesce to such authority.

Through various means, the colonists displayed their displeasure. First, the colonists drafted several responses to the Townshend Acts. The most famous was John Dickinson’s “Farmer’s Letters,” which asserted that while Parliament had authority to regulate imperial trade, Parliamentary regulation of internal trade was a serious threat to American liberty.104 In response to the Quartering Act, the New York Assembly refused to comply with Governor Moore’s request for provisions for troops. After months of bickering between the Governor and Assembly, the Governor prorogued the Assembly in December 1766 and, in June 1767, Parliament sus-

98. The Stamp Act extended the jurisdiction of the admiralty courts to cover all actions under the Stamp Act. 5 Geo. 3, ch. 12. And, similar to its forerunner the Article III courts, the admiralty courts had jurisdiction over matters throughout the colonies. However, unlike the Article III courts, the admiralty courts were not constrained by personal jurisdiction/venue concerns. Thus, while actions brought under the Stamp Act in the admiralty courts afforded defendants jury trials, trials of Georgia defendants were often brought in courts in Maine—predictably resulting in defendants who did not show up for trial. See Bolton & Marshall, supra note 54, at 436.

99. See id. The repeal of the Stamp Act can be found in 6 Geo. 3, ch. 12.

100. See Bolton & Marshall, supra note 54, at 438.

101. See 7 Geo. 3, ch. 46.


103. See 7 Geo. 3, ch. 56.

104. “Once admit that she [England] may lay duties upon her exportations to us, for the purpose of levying money on us only, she then will have nothing to do but lay duties on the articles which she prohibits us to manufacture, and the tragedy of American liberty is finished.” Bolton & Marshall, supra note 54, at 440 (quoting Dickinson).
pended the New York Assembly. Predictably, however, the greatest response of all came from Massachusetts. From 1767-1770, James Otis, Samuel Adams and other Bostonians protested the Townshend Acts, held a series of town meetings and drafted numerous letters and petitions to the King and his ministers.

By March 1770, the presence of English troops in Boston symbolized all that was wrong with the current system for the colonists. Difficulties between the soldiers and townspeople became increasingly more frequent. On March 5, citizens pelted a sentinel with snowballs. When the sentinel called for assistance, a soldier was knocked down and a guard fired shots at the crowd, killing and wounding several citizens. The Boston Massacre, as it became known, symbolized English intrusions against colonial rights. It also became the rallying cry of the revolution.

D. Revolutionary Rhetoric, 1770-1781

1. Solidifying the Colonial Position

Late in 1774, Joseph Galloway of Pennsylvania presented a plan of union to the Continental Convention. This plan created a Grand Council, a body made of both American and English representatives. This plan provided for regulating “all the general police and affairs of the colonies, in which England and the colonies, or any of them, the colonies in general, or more than one colony,

105. See 7 Geo. 3, ch. 59.
106. See Circular Letter from the Select Men of Boston, to the Select Men of several towns in the Province, calling a Convention at Boston, on September 22, 1768, in 3 HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY, supra note 47, at 356; Resolves of the Assembly, that no laws imposing taxes, and made by any authority in which the people had not their representatives, could be obligatory, &c. &c. July 8, 1769, in id. at 361; Massachusetts Circular Letter, Feb. 11, 1768, in SELECT CHARTERS, supra note 20, at 330; see also BOLTON & MARSHALL, supra note 54, at 440-41.
107. Of course, the troops were there because Britain closed Boston Harbor. In the spring of 1768, the English warship Romney was anchored in Boston harbor. On the same day, John Hancock’s sloop, Liberty, arrived with an illegal shipment of Maderia wine. The Liberty’s crew locked up the customs collector while the cargo was being landed. Soon after, the Liberty was then seized and moored under the guns of the Romney. A riot then ensued; the houses of two customs officials damaged and the boat belonging to the controller burned. By September 1768, two English regiments arrived in Boston. See BOLTON & MARSHALL, supra note 54, at 441.
108. See id. at 443. Interestingly, John Adams and Josiah Quincy defended those soldiers involved in the matter, obtaining an acquittal for all but two soldiers—the two soldiers convicted receiving light sentences.
110. See id.
are in any manner concerned." Further, the plan compromised away the local right won by past generations by conferring to the Grand Council authority over "civil and criminal matters." 

The First Congress rejected this plan and, on October 22, had any mention of the plan expunged from the record. To be sure, the events during 1760-1770 solidified the colonists' distrust for English authority. By February 1774, for example, every colony except Pennsylvania created a standing committee of correspondence to watch over Parliamentary action, report on such actions to the colonial Assemblies and discuss any constitutional questions raised.

The First Congress stated the colonial position and beliefs in the Declaration of Resolves. In it, accompanying a laundry-list of grievances, Congress articulated the American conception of the proper relationship between governments:

Resolved, That . . . as the English colonists are not represented, and from their local and other circumstances, cannot be represented in British parliament, they [the colonists] are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such a manner as has been heretofore used and accustomed. But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British Parliament as are bona fide, restrained to the regulation of our external commerce, for the purposes of securing the commercial advantages of the whole empire to the mother country and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America without their consent.

John Adams, a few months later, embraced this philosophy:

111. Galloway's Plan of Union, September 28, 1774, in 1 JOURNALS OF THE CONTINENTAL CONGRESS 50 (Worthington C. Ford, ed. 1904).
112. Id. at 118.
113. See 1 JOURNALS OF THE CONTINENTAL CONGRESS supra note 111, at 49-51 ("They not only refused to resume the Consideration of it [Galloway's Plan], but directed both the Plan and Order to be erased from the Minutes, so that no vestige of it might Appear.").
114. See BOLTON & MARSHALL, supra note 54, at 446-47.
115. See 1 JOURNALS OF THE CONTINENTAL CONGRESS supra note 111, at 63-73.
116. Id. at 68-69. Congress, in the same resolves, declared:
That the power of making laws for ordering or regulating the internal polity of these Colonies, is, within the limits of each Colony, respectively and exclusively vested in the Provincial Legislature of such Colony; and that all
America has all along consented, and still consents, and ever will consent that parliament, being the most powerful legislature in the dominions, should regulate the trade of the dominions. This is founding the authority of parliament to regulate our trade upon compact and consent of the colonies ... not upon the principle that parliament is the supreme and sovereign legislature over them [the colonies] in all cases whatsoever.117

These works illustrates the general colonial understanding of layered government. That a "national body" should regulate general matters, such as inter-empire trade was widely accepted. Likewise, internal matters were to be left to the individual colonies.

2. An Early Brush with Statehood

On July 4, 1776, the Continental Congress signed the Declaration of Independence, thus establishing the American nation. During the ensuing Revolution, the new states showed the Continental Congress a great deal of deference. The national body controlled all matters dealing with the progress of the revolution. Additionally, no state drafted its own constitution without prior permission from Congress.118

Yet, the Revolutionary experience also appealed to a strong sense of statehood. The Declaration of Independence, for example, proclaimed the "Thirteen United States of America,"119 were "Free and Independent States [and] they have the full power to

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117. John Adams, Novangalus, To the Inhabitants of the Colony of Massachusetts-Bay (Mar. 6 1775), in 2 PAPERS OF JOHN ADAMS, supra note 48, at 307-08. Adams continued: "And therefore I contend, that our provincial legislatures are the only supreme authorities in our colonies. Parliament, notwithstanding this, may be allowed an authority supreme and sovereign over the ocean, which may be limited by the banks of the ocean, or the bounds of our charters." Id. at 313. Adams, then summed up his position:

There has been, from the first to last, on both sides of the Atlantic, an idea, an apprehension that it was necessary, there should be some superintending power, to draw together all the wills, and unite the strength of the subjects in all dominions, in case of war, and in the case of trade. Id. at 321. Although, Adams denied the power of war to the general government, noting that it was only necessary if the local governments were unprepared for war—something he supposed not to be the case in the future America. See id. at 322.

118. See RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 164 (1996). Indeed, until the general resolutions of May 10 and 15, 1776, no state drafted a constitution without receiving individual permission from Congress. See id.

119. The Declaration of Independence § 1 (U.S. 1776).
levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things independent States may of right do." Later, the Paris Treaty of 1783 listed each state separately and granted each state international recognition.

As a result of this entrenched sense of statehood, the new states faced many interstate difficulties. New Yorkers and New Hampshirites eagerly questioned each other’s loyalty. Pennsylvanians feared the mounting Connecticut forces would be used in the dispute over Wyoming. Carter Braxton of Virginia pointed to several troubles. Connecticut, for example, sent “eight-hundred Men in Arms: to enforce its claims in the Wyoming Valley of Pennsylvania,” thus causing “heartburning & Jealousy between these People.” In addition he reported that “New York is not without her Fears & Apprehensions from the Temper of her Neighbors,” and “even Virginia is not free from Claims on Pennsylvania nor Maryland from those on Virginia.”

120. Id. ¶ 32.
122. The case of Vermont is but one illustration of the territorial conflicts between states in the young republic. In 1764, New York and New Hampshire asked the British Privy Council to settle the contest for jurisdiction over the area between the Hudson and Connecticut rivers; the Privy Council decided in favor of New York. See PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC, JURISDICTIONAL CON- TROVERSIES IN THE UNITED STATES, 1775-1787 127 (1983). The Vermont independence movement was born from the subsequent challenges to the Privy Councils decision on behalf of settlers and speculators holding New Hampshire titles. See id. In 1777, Vermont was formally created when representatives of approximately twenty-eight towns in the New Hampshire Grants declared independence from New York and adopted their own constitution. See id. Vermont, thus, existed, yet as its own entity from 1777 to 1791, when it was formally admitted to the union. See id.
123. See ONUF, supra note 122, at 9 (“[The] Tories . . . to a man, through the whole State, are . . . in favour of the government of New-York.”) (quoting ETHAN ALLEN, ANIMADVERSARY ADDRESS TO THE INHABITANTS OF VERMONT 5 (1778)). Not to be out done, New Yorkers circulated rumors of negotiations between England and Vermont. See, e.g., ONUF, supra note 122, at 9 (citing THE PUBLISHED RESOLUTIONS OF THE TOWN OF GUILFORD, March 12, 1782 (Vermont Historical Society, Montpelier, James Phelps Scrapbook).
125. Letter from Carter Braxton to Landon Carter, April 14, 1776, reprinted in 3 LETTERS OF THE DELEGATES TO CONGRESS: 1774-1789, supra note 124, at 520-23. A report of the time concurred in this estimation: “The uncertainty of the Boundaries between Virginia and Penn[sylvan]ia is the Cause of Great uneasiness.” Letter from George Ross to Lancaster Committee of Correspondence, May 30, 1775, reprinted in 1 id. at 421-22. Because of these problems, Braxton advised, in his Address to the Convention of Virginia, Congress should “have power to adjust disputes between Colonies, regulate affairs of trade, war, peace, alliances, &c.” See ONUF, supra note 122,
As illustrated during this period and the following decade, the young America ignored its traditions and localized power to dangerous levels. Such circumstance would force the states into a competition without any national guidelines. It would, however, take a decade of disunity before the young nation would learn from its history.

E. The Articles of Confederation, 1781-1787: Ignoring the Lessons of the Past

The Articles of Confederation\textsuperscript{126} exemplified a weak central government and a strong sense of state sovereignty. Article II ex-
pressed this position best: "Every State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."\textsuperscript{127} A new era of dual-government was at hand, and the states were the senior authority. The individual states retained the right to regulate commerce\textsuperscript{128} and the right to tax.\textsuperscript{129} All final lawmaking decision rested with them while congressional resolutions remained mere recommendations that states could enforce if each so chose. Moreover, states usurped many "national" powers reserved to the Congress under the Articles. Many states provided for armies, imposed embargoes and, in some cases, carried on separate diplomatic relations in Europe.

Yet, when compared to similar republican confederations throughout history, the Articles of Confederation achieved a great deal of unity. The Articles provided for the equality of all citizens of all states in privileges and immunities,\textsuperscript{130} the reciprocity of extradition and judicial proceedings among the states,\textsuperscript{131} and the elimination of travel restrictions and discriminatory trade restrictions between the states.\textsuperscript{132} Importantly, the Articles recognized that the general government should control matters of war and foreign policy and they conferred substantial power upon Congress in Article 9 on those subjects.\textsuperscript{133}

1. \textit{A Thirteen-Headed Monster}

The Articles of Confederation had varying authority in the individual States. In some states, "the Confederation is recognized by, and forms a part of the [State] constitution. In others however it has received no other sanction than that of the Legislative authority."\textsuperscript{134} The arising problems were obvious: first, acts repugnant to

\textsuperscript{127} \textit{Articles of Confederation} art. 2 (U.S. Mar. 1, 1781).
\textsuperscript{128} See id. at art. 4.
\textsuperscript{129} See id.
\textsuperscript{130} See id.
\textsuperscript{131} See id.
\textsuperscript{132} See id.
\textsuperscript{133} See id. at art. 9.
\textsuperscript{134} James Madison's Notes, April 1787, \textit{reprinted in} 24 \textit{Letters of the Delegates to Congress: 1774-1789}, \textit{supra} note 124, at 265.
the Articles of Confederation remained in force; second, the states could act contrary to the Articles without recourse.\textsuperscript{135}

Because of this lack of national influence and authority, the states experienced many problems. Easily the most pervasive problem dealt with state creditor and debtor laws. Simply put, states whose citizens were primarily debtors passed laws favorable to debtors (e.g., permitting payment of debts in devalued currency such as paper money). Such pro-debtor provisions were looked upon as attacks against the sanctity of contracts.

Under the Articles, states could not guarantee their own territorial integrity.\textsuperscript{136} For example, Massachusetts, Virginia, and North Carolina (areas including the future Maine, Kentucky and Tennessee) all experienced separatist movements.\textsuperscript{137} Vermont successfully wrested independence from New York and attracted towns in New Hampshire to it.\textsuperscript{138} In addition, there was a movement to form a new state from Delaware and the eastern shores of Maryland and Virginia.\textsuperscript{139} Similarly, disputes over the western lands (between the Appalachian Mountains and the Mississippi River) caused strife between the states with claims to such lands, as well as between those states without such claims.\textsuperscript{140}

Without a cohesive national commercial policy, the states engaged in highly competitive trade practices that caused a myriad of problems. Delaware, for example, due to its competitive disadvantages to Pennsylvania, struggled to compete commercially.\textsuperscript{141} Similarly, New Jersey, in addition to being ravaged by the Revolutionary War,\textsuperscript{142} unsuccessfully attempted to compete with New York and Pennsylvania for trade.\textsuperscript{143} Even strong commercial states like Virginia faced commercial difficulties under the Articles. Maryland, due to its location on the Potomac River, levied heavy taxes on ships navigating the river that were destined for Northern

\textsuperscript{135} See id. at 268.
\textsuperscript{136} For an exhaustive discussion of this area, see ONUF, supra note 122, passim (discussing the turmoil created by the myriad of territorial disputes during the period before the Constitution).
\textsuperscript{137} See id. at 8-20 (discussing the multitude of interstate territorial conflicts during the period under the Articles of Confederation).
\textsuperscript{138} See id.
\textsuperscript{139} See RAKOVE, supra note 118 at 165 (discussing various territorial conflicts).
\textsuperscript{140} See, e.g., ONUF, supra note 122, at 8-20.
\textsuperscript{142} See id. at 58.
\textsuperscript{143} See id.
Virginia. In response, threatened Maryland-bound ships that entered the Chesapeake Bay with taxes as well.

2. Early Solutions

Initiatives existed to remedy these problems. In 1781, and again in 1783, Congress entertained measures to increase its authority over commerce. In response to the situation in Virginia, George Washington invited Maryland and Virginia delegates to his Mount Vernon home to discuss the problems. Moreover, the delegates recommended holding annual conferences on commercial disputes. As a result, Pennsylvania and Delaware sent delegates to the following year’s convention. On the heels of this success, Congress considered expanding its commercial powers for twenty-five years. Again, due to a lack of unanimous support, the motion failed.

Virginia suggested that all the states form a commission “to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony.” During the proceedings of this commission, the com-

144. See id. at 202.
145. See id. Perhaps James Madison best articulated the problems with the United States under the Articles. See James Madison Vices of the political system of the U. States, (April 1787), reprinted in 24 LETTERS OF THE DELEGATES TO CONGRESS: 1774-1789, supra note 124, at 265. Of the greatest concern for Madison was the young nation’s inability to effectively implement any national policy, the cutthroat competition ongoing among the states and the difficulties the states encountered while experimenting with democracy. See id. (listing the following “vices” of the states: “Failure of the States to comply with the Constitutional requisitions”; “Encroachments by the States on the federal authority”; “Violations of the law of nations and of treaties”; “Trespasses of the States on the rights of each other”; “Want of concert in matters where common interest requires it”; “Want of Guaranty to the States of their Constitutions and laws against internal violence”; “Want of sanction to the law, and of coercion in the Government of the Confederacy”; “Want of ratification by the people of the Articles of Confederation”; “Multiplicity of the laws in several States”; “Injustice of the laws of the States”; and “Impotence of the laws of the States”).
146. See CONLEY & KAMINSKI, supra note 141, at 26. Thus, these measures would allow Congress to lay import duties.
147. See id. at 203.
148. See id. The Maryland legislature suggested that Pennsylvania and Delaware send delegates to the conference as well.
149. See id. at 26.
150. See id.
missioners\textsuperscript{152} agreed that the problems of the Union did not concern trade alone.\textsuperscript{153} The New Jersey Commissioners thought that, because commercial interests were so intertwined with other powers, this commission should expand its scope and examine other areas.\textsuperscript{154} In the end, the commission suggested that the States appoint commissioners "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union."\textsuperscript{155}

Ironically, what the Americans learned under the Articles of Confederation was that the balance of power between the central and local governments was more efficient under the colonial system. Even from thousands of miles away, by having England exercise control over external matters, the colonies avoided the problems the states faced under the Articles. The lack of central control of interstate commerce, a defect complained of by most states at the time, caused a host of problems. Similarly, whereas the Privy Council adjudicated matters of territorial integrity, there was no such body under the Articles. Consequently, the states engaged in fierce competition among one another.

\begin{enumerate}
\item The commissions were: Alexander Hamilton and Egbert Benson of New York, Abraham Clarke, William C. Houston and James Schurman of New Jersey, Tench Coxe of Pennsylvania, George Reed, John Dickinson, who was unanimously elected Chairman, and Richard Bassett of Delaware and Edmund Randolph, James Madison and Saint George Tucker of Virginia. See Proceedings of Commissioners to Remedy Defects of the Federal Government, Sept. 11, 1786, in id at 39.
\item See Proceedings of Commissioners to Remedy Defects of the Federal Government, Sept. 14, 1786, in id. at 41. Early on it was noted:
\begin{quote}
That the State of New Jersey had enlarged the object of their appointment, empowering their Commissioners, "to consider how far an uniform system in their commercial regulations and other important matters, might be necessary to the common interest and permanent harmony of the several States and to report such an Act on the subject, as was ratified by them would enable the United States in Congress assembled, effectually to provide for the exigencies of the Union.
\end{quote}
\textit{Id.} Although the commissioners noted that such was beyond the scope of their authority, they agreed "[t]hat there are important defects in the system of the Federal Government" that should be addressed at a Convention. \textit{Id.} at 42.
\item See Proceedings of Commissioners to Remedy Defects of the Federal Government, Sept. 14, 1786, in id. at 42.
\begin{quote}
[T]hat the power of regulating trade is of such comprehensive extent, and will enter so far into the general System of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Federal System.
\end{quote}
\textit{Id.}
\end{enumerate}
F. The Constitutional Convention, 1787

Born of a desire to remedy the defects in the Articles of Confederation, Congress commissioned a Convention "for the sole and express purpose of revising the Articles of Confederation." Accordingly, the Convention identified both the goals for the new government, as well as the defects with the old one. These became the principles underlying the new government.

One of the fundamental goals for the new government was to retain the advantages of the states while procuring the "various blessings" of a general government. A number of instances show the predilection of the delegates towards preserving the states.

156. See Report of Proceedings in Congress, Feb. 21, 1787, in id. at 44-45. That it be recommended to the States composing the Union that a convention of representatives from the said States respectively be held at — on — for the purpose of revising the Articles of Confederation and perpetual Union between the United States of America and reporting to the United States in Congress assembled and to the States respectively such alterations and amendments of the said Articles of Confederation as the representatives met in such convention shall judge proper and necessary to render them adequate to the preservation and support of the Union.

157. See id. at 46.

158. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 18 (Max Farrand ed., 1937) [hereinafter FARRAND]. Randolph told the Convention that the new government should: secure 1., against foreign invasion: 2., against dissensions between members of the Union, or seditions in particular states: 3., to p[ro]cure to the several States, various blessings, of which an isolated situation was i[n]capable: 4., to be able to defend itself against incroachment: and 5. to be paramount to the state constitutions.

1 id. at 18.

159. 1 id. at 19. Randolph told the delegation:
[T]hat the confederation produced no security against foreign invasion; congress not being permitted to prevent a war nor to support it by th[eir] own authority . . . that the federal government could not check the quarrels between states, nor a rebellion in any not having constitutional power Nor means to interpose according to the exigency . . . that there were many advantages, which the U.S. might acquire, which were not attainable under the confederation - such as a productive impost - counteraction of the commercial regulations of other nations - pushing commerce ad libitum . . . that the federal government could not defend itself against incroachments from the states . . . that it was not even paramount to the state constitutions, ratified, as it was in many of the states.

1 id. at 19.

160. Even such an ardent nationalist as James Wilson observed: that by a Nat[iona]l Government he did not mean one that would swallow up the State Governments as seemed to be wished by some gentlemen. He was tenacious of the idea of preserving the latter. . . . [States] were absolutely necessary for certain purposes which the former could not reach. All large Governments must be subdivided into lesser jurisdictions.
Likewise, the Convention expanded national authority to address the problems faced by the states under the Articles — most often parroting the powers commonly wielded by England. For example, the Convention voted to grant powers to the national body necessary to preserve harmony between the States and thought it wise for the general government to protect the governments of the states, such that it may suppress rebellions in the states and protect against foreign invasions.

1. Setting the Boundaries

Although the delegates generally understood the principle of dual-government, defining the boundaries of the national and state powers became increasingly difficult. Roger Sherman attempted to define the jurisdiction, suggesting that Congress should:

make laws binding on the people of the United States in all cases which may concern the common interests of the Union;

but not to interfere with the Government of the individual States in any matters of internal police which respect the Gov-

1 id. at 322-23. John Dickinson of Delaware noted “one source of stability is the double branch of the Legislature. The division of the Country into the distinct States formed the other principal source of stability. This division ought therefore to be maintained, and considerable powers to be left with the States.” 1 id. at 86. Indeed, James Madison would “preserve the State rights, as carefully as the trials by jury.” 1 id. at 490. General Pinckney “wished to have a good national Government and at the same time leave a considerable share of power in the States.” 1 id. at 137. Rufus King suggested that Congress provide a bill of rights for the states, as between the layers of government. 1 id. at 493 (“As the fundamental rights of individuals are secured by express provisions in the State Constitutions; why may not a like security be provided for the Rights of the States in the National Constitution.”).

161. See 1 id. at 54.

162. See 2 id. at 47-48. Luther Martin thought that the states should suppress rebellions themselves, although this was quickly dismissed. See 1 id. at 48.

163. Such difficulties eventually doomed the proposed provision that the national government should legislate “in all cases to which the State Legislatures were individually incompetent.” 1 id. at 53. Mr. Pinckney and Mr. Rutledge objected to the vagueness of incompetent and required Mr. Randolph to elaborate. “Mr. Randolph disclaimed any intention to give indefinite powers to the national Legislature, declaring he was entirely opposed to such an inroad on the State jurisdictions, and that he did not think any considerations whatever could ever change his determination.” See 1 id. at 53. After this elaboration, the delegation unanimously voted for the clause, with Connecticut divided. On July 16, however, the vote was retaken, now with a frame for what the houses of Congress and the rest of the government would look like. Again, two delegates objected to the term “incompetent” and this time the motion failed, with the vote ending in a tie. See also 2 id. at 17 (“Mr. Butler calls for some explanation of the extent of this power: particularly of the word incompetent. The vagueness of the terms rendered it impossible for any precise judgment to be formed.”); see 2 id. at 17 (“Mr. Rutledge, urged the objection started by Mr. Butler . . . .”).
ernment of the such States only, and wherein the general welfare of the United States is not concerned.\textsuperscript{164}

Although this resolution failed,\textsuperscript{165} the national and state governments eventually possessed separate and distinct jurisdictions, similar to those Sherman proscribed.\textsuperscript{166}

Indeed, many of the Delegates agreed with Sherman's concept of layered government.\textsuperscript{167} John Dickinson "compared the proposed National System to the Solar System, in which the States were the planets, and ought to be left to move freely about their proper orbits."\textsuperscript{168} The Committee of Eleven recommended to the Convention that the general welfare provision not interfere with the State's "internal police."\textsuperscript{169} Oliver Elsworth thought that the "Nat[ional] Gov[ernmen]t could not descend to the local objects

\textsuperscript{164} 2 id. at 25. James Wilson seconded the amendment, as "better expressing the general principle." 2 id. at 26. Roger Sherman elaborated on this point: The objects of the Union he thought were few: 1. defence against foreign danger. 2. against internal disputes & a resort to force. 3. Treaties with foreign nations 4 regulating commerce & drawing revenue from it. These & perhaps a few lesser objects alone rendered a Confederation of States necessary. All other matters civil & criminal would be much better in the hands of the States.

1 id. at 133.

\textsuperscript{165} See 2 id. at 25 (the resolution failed by a vote of seven to two). Perhaps more interesting is the ensuing debate, in particular the early understanding of "internal police" to mean more than criminal enforcement. Moreover, Gouverneur Morris categorized issuing paper money as part of the "internal police" as understood by the States. See 2 id. at 26 (he noted that such a power "ought to be infringed"). Roger Sherman continued, noting that the levying of taxes on trade was also an internal police power. See 2 id. at 26.

\textsuperscript{166} See 1 id. at 133 (Roger Sherman "was for giving the General Gov[ernmen]t power to legislate and execute within a defined province.").

\textsuperscript{167} In particular, George Mason noted that the "General Government could not know how to make laws for every part—such as respect agriculture [etc]." 1 id. at 160. James Wilson observed that "War, Commerce and Revenue were the great objects of the General Government. All of them connected with money." 2 id. at 275. As Wilson later explained:

Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.

2 ELLIOT'S DEBATES, supra note 2, 424. Such was the common view of the delegates. George Mason, for example, said that the "General government could not know how to make laws for every part—such as respect agriculture &c." 1 FARRAND, supra note 158, at 160. Roger Sherman later related this point to why the national government was not given authority to establish a university: "it was thought sufficient that this power should be exercised by the States in their separate capacity." 3 id. at 362.

\textsuperscript{168} 1 FARRAND, supra note 158, at 152-53.

\textsuperscript{169} 2 id. at 367.
on which this [domestic happiness] depended. It could only embrace objects of a general nature,” such as “national security.”

Although the Convention failed to accept any provision explicitly protecting state police powers, later clarifications by the delegates show this to be their actual intention.

2. Negative on State Laws

Perhaps the most illuminating debate on national and state authority took place when James Madison proposed to grant the national government a “negative” over improper state laws. Not surprisingly, this national legislative veto was derived from the colonial experience under England. Madison himself referred to this power as “a negative in all cases whatsoever on the legislative act of States, as heretofore exercised by the Kingly prerogative.” Madison likened it to the British example where “harmony & subordination of the various parts of the empire” were maintained thanks to “the prerogative by which means the Crown, stifles in the birth every Act of every part tending to discord or encroachment.” This, however, was one instance when the Framers rejected the ways of the past.

Certainly Madison garnered some minimal support for the provision. Charles Pinckney, for example, supported the provision from the beginning. The veto, however, was vigorously attacked. Mr. Williamson argued that the negative should not extend to the

170. 1 id. at 492.
171. Even though the Convention held a vote on such a provision twice. See 2 id. at 25, 630.
172. See, e.g., infra notes 178-185 and accompanying text.
173. 1 FARRAND, supra note 158, at 164-65. Madison thought it necessary to give this power over all state laws because “[a] discrimination [between categories of laws] w[ould only be a fresh source of contention between the two authorities.” 1 id. at 165. The “negative” on state laws resembled the kingly prerogative over colonial laws, as it served as a federal veto power over state laws.
174. 1 id. at 164 (Mr. Pinckney noted “that under the British Gov[ernmen]t the negative of the Crown had been found beneficial . . .”); 1 id. at 168 (Mr. Madison observed “[t]his was the practice [the negative] in Royal Colonies before the Revolution and would not have been inconvenient; if the supreme power of negativit had been faithful to the American interest, and had possessed the necessary information.”).
176. 2 FARRAND, supra note 158, at 28.
177. On June 8, Mr. Pinckney moved that the national legislative veto extend to “all Laws which they [the members of the national legislature] sh[ould] judge to be improper.” 1 id. at 164.
state’s internal police. Elbridge Gerry thought that a “Nat[iona]l. Legislature with such a power may enslave the States. Such an idea as this will never be acceded to.” Even the staunch nationalist Governor Morris opposed the power “as likely to be terrible to the States, and not necessary, if sufficient Legislative authority should be given to the Gen[era]l Government.” Ultimately, despite two votes on the subject, the negative on state laws failed to become part of the Constitution.

This debate more than illustrates that the Framers rejected bestowing open-ended national authority as a means for controlling the states. It also shows that the Framers intended to restrain the states by granting the union sufficient powers, over which it was supreme. Indeed, Governor Morris stated just that proposition. Moreover, recall that the Committee of Detail replaced the original Virginia Plan, and its broad categories of national powers, with a detailed list of powers that the national legislature would exercise. Consideration of such evidence strongly exhibits that the Framers intended the allocation of authority to serve as the limit on the state governments.

178. 1 id. at 165.
179. 1 id. at 165 (“Mr. Gerry coul[d] not see the extent of such a power, and was against every power that was not necessary. He thought a remonstrance against unreasonable acts of the States would reclaim them. . . . He had no objection to authorize a negative to paper money and similar measures.”).
180. 2 id. at 27.
181. 1 id. at 168. This vote was taken twice and each time the Convention rejected the proposal. See 1 id. at 168; 2 id. at 28.
182. See U.S. CONST. art. VI, § 2.
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

183. See supra note 180 and accompanying text.
184. The Virginia Plan provided that the national government “legislate in all Cases for the general interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.” 2 FARRAND, supra note 158, at 25.
185. See Draft IV, in 2 id. at 142-44; see also Note, John C. Hueston, Altering the Course of the Constitutional Convention: the Role of the Committee of Detail in Establishing the Balance of State and Federal Powers, 100 YALE L.J. 765-83 (1990) (discussing the Committee of Detail’s role in defining the powers of the national legislature). Historian Clinton Rossiter writes: “The most important contribution of the committee of detail was to convert the general resolution on the law-making authority of the proposed government to a list of eighteen specific powers of Congress . . . .” CLINTON ROSSITER 1787: THE GRAND CONVENTION 208 (1966).
3. Forming the Senate

A number of resolutions on the formation of the Senate further illustrate the intended separateness between governments. The best example was the institution of per capita voting. Previously, as well as in the Constitutional convention, delegates voted in bloc fashion, meaning each State possessed one vote, regardless of the delegates a State sent to the convention. Governor Morris and Rufus King, however, moved for providing each Senator with a separate vote—per capita voting. The motion passed with only Maryland, Luther Martin’s State, disapproving. Thus, the States, as a political body, would have much less influence in the Senate, than they possessed in previous conventions.

One hotly debated topic during the Convention concerned the payment of Legislators, particularly of Senators. The debate, however, ultimately centered on the role of the Senate in relation to the States. If the several states were to compensate their respective Senators, then the Senate would serve to represent the states. Alternatively, if Senators were paid out of the national treasury, then the Senate would be regarded as a national body. The Convention resoundingly voted to pay all federal legislators out of the national treasury. In so doing, the Convention seems to have desired that the Senate not represent the States, despite state selection of Senators.

Finally, the Convention discussed the selection process for Senators, specifically, “that the members of the second branch ought to be chosen by the individual Legislatures.” During this discussion, Mr. Sherman noted that if the States selected one branch of

186. 2 Farrand, supra note 158, at 94. Luther Martin opposed the motion, on the grounds that it departed from “the idea of the States being represented in the second branch [the Senate].” 2 id. at 94.
187. See 2 id. at 95. This provision was brought up again on August 9, and was agreed upon without debate on the merits of the provision. See 2 id. at 233-34.
188. See 2 id. at 287-92.
189. See 2 id. at 292 (Mr. Luther Martin noted “[a]s the Senate is to represent the States, the members of it ought to be paid by the States.”).
190. See 2 id. at 292 (Mr. Carrol countered Mr. Martin’s comment noting, “[t]he Senate was to represent and manage the affairs of the whole, and not to be the advocates of State interests. They ought then not to be dependent on nor paid by the States.”).
191. See 2 id. at 292.
192. But see Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 24 Letters of Delegates to Congress 500, 504 (Paul Smith ed., 1996) (“The Senate will represent the States in their political capacity; the other House will represent the people of the States in their individual capacity.”).
193. 1 Farrand, supra note 158, at 150.
the government, they would have an interest in the national government, thus promoting harmony between the two governments. Colonel Mason articulated another reason for giving the States a voice in the composition of the national legislature:

The State Legislatures also ought to have some means of defending themselves against encroachments of the National Government. In every other department we have studiously endeavored to provide for its self-defence. Shall we leave the States alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a constituent part of the National Establishment.

James Wilson disagreed, observing that the government rested on the people at large. Thus, because the government was meant for individuals, the Senate should not become a body representing the States. Mr. Pierce had a different understanding. He looked to allow the state legislatures to select Senators because then “the Citizens . . . would be represented both individually [in the House of Representatives] and collectively [in the Senate].” This, in turn, would create dissension in Congress. Despite Wilson’s observations, the delegates twice voted in favor of allowing the states to appoint senators.

194. See 1 id. at 150 Sherman later added that the character of Senators would likely be better if chosen by the State legislatures than if chosen by the people. See 1 id. at 154. Pinkney “thought the second branch [the Senate] ought to be permanent and independent and that the members of it would be rendered more so by receiving their appointment from the State Legislatures.” 1 id. at 155. Sharman admitted that the States and National Governments “ought to have separate and distinct jurisdictions, but that they ought to have a mutual interest in supporting each other.” 1 id. at 150. Thus, allowing the states to select Senators would ensure that the governments would support each other.

195. 1 id. at 155-56.

196. See 1 id. at 405-06. By allowing the State legislatures to select Senators, argued Wilson, the government would then rest on different foundations. See 1 id. at 405-06.

197. See 1 id. at 137.

198. The first vote was unanimous, see 1 id. at 156, the second by a nine to two vote. See 1 id. at 408. Based on the debates, one cannot be sure if the Senate was the states’ voice in the national government or not. That the states were permitted to select their Senators shows intent of the Convention to grant considerable influence over national policy to the states. Measures like per capita voting work to strengthen the independence of individual Senators, decreasing Senator’s dependence on their home states. Additionally, paying Senator’s wages from the national government’s treasury increases senatorial allegiance to the national government at the states’ expense. The importance of this bears on whether the Framers intended for the national political process to work out federalism concerns, or whether the Supreme Court should mediate such disputes. See Herbert Weschler, The Political Safeguards of Federalism: The
4. The Final Document

The final draft of the Constitution granted to the national government various powers, most of which relate to the defects of the Articles of Confederation. For example, one of the nation's greatest deficiencies under the Articles was the lack of a national commerce authority. The new commerce power extended to Congress the powers to lay imposts, excises and duties.\(^{199}\) Similarly, the Constitution conferred to Congress the power to coin money and regulate its value, thereby answering the problem of the various paper money laws throughout the states.\(^{200}\)

The Articles permitted the states to maintain their own militias and ratify treaties, thus indicating a lack of a national foreign policy power. The Constitution rectified these defects by providing for a national military and foreign policy power. The Constitution also conferred the power to Congress to punish piracies, felonies on the high seas and offenses against the laws of nations—all crimes that effect the nation as a whole, rather than its constituent parts.

Moreover, all the objects of the general government were those that affected the nation as a whole. While the delegation rejected a proposal for the national government to create universities,\(^{201}\) it supported a proposition to "promote the Progress of Science and useful Arts."\(^{202}\) This illustrates a line of demarcation the delegates observed between management and funding. While creating a university was a local act, as it would necessitate management within a state, supporting science and the arts implies funding, an act that does not require management on the level of a university.\(^{203}\)

The Supremacy Clause, however, remedied the most obvious defect in the Articles. It protected the pursuits of the national government, thereby preventing the states from legislating on general matters. Any state attempts to legislate on matters proper for the national government would stand only at the whim of the national government.

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Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954).

199. See U.S. CONST. art. I, § 8, cl. 1.

200. See U.S. CONST. art. I, § 8, cl. 5.

201. See 2 FARRAND, supra note 158, at 616. Although the only debate on the subject suggested that Congress had the power to do so within its other powers—although this was only the view of Gouverneur Morris. See 2 id. at 616.


203. The only example of the Constitution granting Congress a power that would require "management" of a local institution was the power to establish post offices. See U.S. CONST. art. I, § 8.
In a letter to Thomas Jefferson, James Madison discussed the now completed debates:

[T]he great objects which presented themselves [in the convention] were 1. to unite a proper energy in the Executive and a proper stability in the Legislative departments, with the essential characteristics of Republican Government. 2. to draw a line of demarkation which would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them. 3. to provide for the different interests of different parts of the Union. 4. to adjust the clashing pretensions of the large and small States.\(^{204}\)

He described the second object, partitioning power between governments, as "the most nice and difficult."\(^{205}\) As this discussion shows, while the delegates differed as to the importance of states,\(^{206}\) the grand majority sought to balance governmental power between the states and national government.\(^{207}\) This debate over the role of the states, however, was far from over when the Convention closed; it was in fact, just getting under way.

G. The Ratifying Conventions, 1787-1789

Perhaps the most hotly contested issue in the ratification conventions was the role of the states and the national government in this new federal system. The Antifederalists feared what this new, strengthened national government would do to the states.\(^{208}\) Most

\(^{204}\) Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 24 LETTERS OF THE DELEGATES TO CONGRESS, supra note 124, at 500, 501.

\(^{205}\) 24 id. at 502.

\(^{206}\) "A few contended for the entire abolition of the States; Some for indefinite power of Legislation in the Congress, with a negative on the laws of the States: some for such a power without a negative: some for a limited power of legislation, with such a negative: the majority finally for a limited power without the negative." 24 id. at 502-03.

\(^{207}\) See, e.g., 24 id. at 507 ("In the extended Republic of the United States, The General Government would hold a pretty even balance between the parties of the particular States, and be at the same time sufficiently restrained by its dependence on the community, from betraying its general interests.").

\(^{208}\) Surprisingly, the role of the new courts, and how the courts would impact on the states, was a heavily debated topic. See 3 ELLIOT'S DEBATES, supra note 2, at 57, 319, 446, 539-46 (speeches of Henry in the Virginia Convention); 3 id. at 66-67, 517, 546-49, 570-72 (speeches Pendleton in the Virginia Convention); 3 id. at 247, 443 (speeches of Nicolas in the Virginia Convention); 3 id. at 468 (speech of Randolph in the Virginia Convention); 3 id. at 521-29 (speech of Mason in the Virginia Convention); 3 id. at 532-36 (speech of Madison in the Virginia Convention); 3 id. at 551-55 (speech of Marshall in the Virginia Convention); 2 id. at 109 (speech of Holmes in the Massachusetts Convention); 2 id. at 112 (speech of Gore in the Massachusetts Con-
of the Antifederalists scoffed at this balance between governments, relying largely on the doctrine of *imperium ad imperio*: the impossibility of having two sovereigns rule one country. The Federalists, however, conceived layered government differently.

...
James Wilson, in his speech on November 26, 1787, described the interplay between the state and the proposed national government. He told the Pennsylvania Convention:

> It was easy to discover a proper and satisfactory principle on the subject [the proper line between the national and state governments]. Whatever object of government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operation or effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States.

He later explained his position in his lecture on the History of Confederacies, while a professor of law at the college of Philadelphia in the winter of 1790-91.

In this kind of republic [the United States], the rights of internal legislation may be reserved to all the states, of which it is composed; while the adjustment of their several claims, the power of peace and war, the regulation of commerce, the right of entering into treaties, the authority of taxation, and the direction and government of the common force of the confederacy may be vested in the national government.

*The Federalist Papers* took this position as well:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Madison explained that "it is only within a certain sphere that the federal power can in the nature of things, be advantageously administered." Moreover,

> [t]he powers delegated in the proposed constitution to the federal government are few and defined. Those which are to re-

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209. Historians often say that but for this speech, the Constitution would not have been adopted. See Pennsylvania and the Federal Constitution 1787-1788 758 (John B. McMaster & Frederick D. Stone eds., 1970).


211. 1 id. at 535.

212. See 1 id. at xvii.

213. 1 id. at 312.

214. See The Federalist No. 51, supra note 2, at 323 (James Madison).

215. See The Federalist No. 46, supra note 2, at 295 (James Madison).
main in the State governments are numerous and indefinite. The Former will be exercised principally on external objects as war, peace, negotiations and foreign commerce . . . . The powers reserved to the States will extend to all objects which, in the course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State.\textsuperscript{216}

Hamilton agreed with this proposition. He explained that this allocation of powers provides state and national leaders with enough power to oppose the other's abuse of power.\textsuperscript{217}

Madison added an interesting twist to the notion of layered government. Where earlier periods saw fighting and disobedience between governments, due to perceived encroachments on each other's spheres of authority, Madison proposed that the jurisdiction of both governments might change.\textsuperscript{218} He anticipated that, although commerce, war, and foreign affairs were amongst the general concerns of 1787, local objects could one day become matters of a "general concern." Conversely, objects once general may devolve to make state control beneficial. This aspect of federalism may be the most original innovation of the Framers.

\section*{H. A Summary}

Federalism, a system of layered government that divides authority among levels of government, has existed throughout America's history. Generally speaking, the central body, be it the King or the national government, must control matters of general interest.\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{216} \textit{The Federalist} No. 45, supra note 2, at 303. In the Virginia Convention Madison repeated, "The powers of the general government relate to external objects, and are few but, the powers in the State relate to those great objects which immediately concern the prosperity of the people." 3 \textit{Elliot's Debates}, supra note 2, at 259.
\item \textsuperscript{217} \textit{See} \textit{The Federalist} No. 26, supra note 2, at 177 (Alexander Hamilton).
\item \textsuperscript{218} \textit{The Federalist} No. 46, supra note 2, at 295 ("If . . . the people should in the future become more partial to the federal than the State governments . . . the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.").
\item \textsuperscript{219} Interestingly, from 1789 to 1792 Congress exercised its authority over the following matters in the general interest: Oath of Affirmation, \textit{see} Act of June 1, 1789, ch. 1, 1 Stat. 23; establishment of the Department of War, \textit{see} Act of Aug. 7, 1789, ch. 7, 1 Stat. 50; Northwest Territory government, \textit{see} Act of Aug. 7, 1789, ch. 8 1 Stat. 50; Indian Negotiations, \textit{see} Act of Aug. 20, 1789, ch. 10, 1 Stat. 59; Judiciary, \textit{see} Act of Sept. 24, 1789, ch. 20, 1 Stat. 73; Naturalization of Citizens (limited naturalization to whites only) \textit{Act of Mar. 26, 1790, ch. 3, 1 Stat. 103; Patents, see Act of Apr. 10, 1790, ch. 7, 1 Stat. 109; Piracy, see Act of Apr. 30, 1790, ch. 9, 1 Stat. 112; Copyrights, see Act of May 31, 1790, ch. 15, 1 Stat. 124 (current version in various sections of 17 U.S.C.); Presidential Electoral College, \textit{see} Act of Mar. 1, 1792, ch. 8, 1 Stat. 239;
The individual colonies or states, on the other hand, must represent matters of local interest. This paradigm existed under the colonies, and clearly influenced the Framers' version of federalism. This is evident through comparing the colonial jurisdictions with the anticipated constitutional ones.

Perhaps the great innovation to federalism was the idea these jurisdictions are not permanent. Indeed, the Framers intended that the jurisdictions change with time as the needs of the people demand. Lastly, the Constitution should not be viewed as favoring central government or local government; the Constitution is merely a return to the wisdom of the ages before the Articles of Confederation, an age when governments acted upon objects best suited to their particular advantages.

II. Congressional Federalism in the Courts

Prior to 1937, the Supreme Court used federalism as the means for invalidating a myriad of national laws.\textsuperscript{220} The New Deal, however, changed federalism forever. Cases such as \textit{NLRB v. Jones & Laughlin Steel Co.},\textsuperscript{221} \textit{United States v. Darby}\textsuperscript{222} and \textit{Wickard v. Filburn},\textsuperscript{223} refused to limit the national legislative power due to federalism concerns. As Professor Laurence Tribe remarked, "[f]or almost four decades after 1937, the conventional wisdom was that federalism in general — and the rights of states in particular — provided no judicially enforceable limits on congressional power."\textsuperscript{224}

\begin{footnotesize}
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\item Federal Pension Claims, see Act of Mar. 23, 1792, ch. 11, 1 Stat. 243; Presidential federalization of the militia, see Act of May 2, 1792, c. 28, 1 Stat. 269.
\item 220. See, e.g., United States v. E.C. Knight Co., 156 U.S. 1, 11-13 (1888) (precluding application of federal antitrust laws to production); Hammer v. Duggenhart, 247 U.S. 251, 272 (1918) (invalidating federal laws regulating the use of child labor) (overruled by United States v. Darby, 312 U.S. 100, 117 (1941)); United States v. Butler, 297 U.S. 1, 68, 78 (1936) (invalidating federal subsidies for agriculture); Carter v. Carter Coal Co., 298 U.S. 238, 310 (1936) (invalidating the Bituminous Coal Conservation Act of 1935 because the act regulated production and not commerce); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (invalidating provisions of the National Industrial Recovery Act of 1933 because the regulated activities were indirectly connected to interstate commerce); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 374 (1935) (invalidating the Railroad Retirement Act because Congress did not have the power to establish a compulsory retirement and pension plan, because it had no reasonable relationship to commerce).
\item 221. 301 U.S. 1, 27 (1937).
\item 222. 312 U.S. 100, 113 (1941).
\item 223. 317 U.S. 111, 115 (1942).
\item 224. Laurence H. Tribe, \textit{American Constitutional Law} 378 (2d ed. 1988).
\end{footnotes}
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For the next thirty years, Congress was permitted to regulate nearly every human industry. This became strikingly clear in *Heart of Atlanta Motel, Inc. v. United States*,\(^{225}\) where the Court upheld Title II of the Civil Rights Act of 1964 through congressional authority under the Commerce Clause.\(^{226}\) There, despite the original objective for the Act,\(^{227}\) the Court found that "the applicability of Title II is carefully limited to enterprises having direct and substantial relation to the interstate flow of goods and people . . . ."\(^{228}\) To wit, the Court allowed Congress to regulate race relations under the Commerce Clause, even though Congress did not consider the regulation to be commercial.\(^{229}\)

A. **National League of Cities v. Usery**

After *Heart of Atlanta*, federalism hit an all-time low. Indeed, the Supreme Court read into a law a commercial intent regardless of Congress' original intention. Yet, federalism lay dormant rather than dead. In 1976, Justice Rehnquist revived federalism in *National League of Cities v. Usery*.\(^{230}\) And although *Usery* was later overturned, it is known as the Supreme Court case most responsible for the judicial rebirth of federalism.\(^{231}\)

At issue in *Usery* was a 1974 amendment to the Fair Labor Standards Act extending minimum wage and maximum hours provi-
sions to the majority of state and local employees.\textsuperscript{232} Justice Rehnquist, writing for the Court, explained that “Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in the federal system.”\textsuperscript{233} Having announced this principle, Rehnquist bounded it within, the “traditional-state functions” test.\textsuperscript{234} Thus, where federal legislation “directly displace[s] the States’ freedom to structure integral operations in areas of traditional governmental functions[,]” it is not within congressional authority.\textsuperscript{235}

In an important concurrence, Justice Blackmun, who would later author the opinion overruling \textit{Usery}, indicated that he understood that the majority “adopted a balancing approach.”\textsuperscript{236} This approach, he continued, should not disrupt national authority over areas where the national interest was paramount to the local

\textsuperscript{232} See \textit{Usery}, 426 U.S. at 837-38.

\textsuperscript{233} See \textit{id.} at 843 (quoting \textit{Fry} 421 U.S. at 547, n.7).

\textsuperscript{234} Traditionally, States held nearly exclusive jurisdiction over areas concerning the health, safety and welfare of its citizens, but defining the scope of these state powers was very difficult. \textit{Compare} Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956, 967-969 (W.D.Mo. 1982) (regulating ambulance services is a traditional governmental function); United States v. Best, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (licensing automobile drivers is a traditional state function); Amersbach v. City of Cleveland, 598 F.2d 1033, 1037-38 (6th Cir. 1979) (operating a municipal airport is a traditional governmental function); Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1196 (6th Cir. 1981) (performing solid waste disposal is a traditional governmental function); and Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841, 845-46 (1st Cir. 1982) (operating a highway authority is a traditional governmental function) \textit{with} Transportation Union v. Long Island R.R. Co., 455 U.S 678 (1982) (holding that the state-owned Long Island Railroad did not constitute a traditional governmental function); Woods v. Homes and Structures of Pittsburgh, Kan., Inc., 489 F. Supp. 1270, 1296-1297 (Kan. 1980) (issuing industrial development bonds is not a traditional governmental function); Oklahoma \textit{ex rel.} Derryberry v. FERC, 494 F. Supp. 636, 657 (W.D. Okla. 1980) (regulating intrastate natural gas sales is not a traditional governmental function); Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir. 1977) (regulating traffic on public roads is not a traditional governmental function); Hughes Air Corp. v. Pub. Util. Comm’n of California, 644 F.2d 1334, 1340-41 (9th Cir. 1981) (regulating air transportation is not a traditional governmental function); Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 700-01 (1st Cir. 1977) (operating a telephone system is not a traditional governmental function); Pub. Serv. Co. of North Carolina v. FERC, 587 F.2d 716, 721 (5th Cir. 1979) (leasing and selling natural gas is not a traditional governmental function); Williams v. Eastside Mental Health Ctr., Inc., 669 F.2d 671, 680-681 (11th Cir. 1982) (operating a mental health facility is not a traditional governmental function); and Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1472 (9th Cir. 1983) (providing in-house domestic services for the aged and handicapped).

\textsuperscript{235} See \textit{Nat’l League of Cities v. Usery}, 426 U.S. 833, 856 (1976). Rehnquist noted that traditional state functions included “fire prevention, police protection, sanitation, public health, and parks and recreation.” \textit{id.} at 851.

\textsuperscript{236} \textit{id.} at 856 (Blackmun, J., concurring).
The principle dissent, on the other hand, accused the majority of "usurp[ing] [ ] the role reserved for the political process" by discovering a limitation on Congress' commerce authority in the Tenth Amendment. Furthermore, this dissent rejected any and all restraints on the congressional commerce powers due to federalism.

B. Garcia v. San Antonio v. Metropolitan Transit Authority

Over the next nine years, the Supreme Court chiseled away at what Usery tried to accomplish. In 1985, however, Garcia v. San Antonio Metropolitan Transit Authority overruled Usery and seemed to destroy federalism. Justice Blackmun, a member of the Usery majority, now writing for the Court, declared it was not the province of the federal courts to enforce the Tenth Amendment. He labeled the "traditional state functions" test impossible to apply and pointed to the disparate holdings of the lower courts as proof. He further argued that judicial attempts to label one

237. See id. ("I may misinterpret the Court's opinion, but it seems to me that it ... does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where the state facility compliance with imposed federal standards would be essential.").

238. Id. at 858 (Brennan, J., dissenting); see also Vile, supra note 231, at 488 (discussing Brennan's opinion).

239. "[T]here is no restraint" declared Justice Brennan, "based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on commerce power." Usery, 426 U.S. at 858. Justice Stevens, agreed, saying he could not "identify a limitation on ... federal power that would not also invalidate federal regulation of state activities that I consider unquestionably permissible." Usery, 426 U.S. at 881 (Stevens, J., dissenting).

240. See, e.g., Hodel v. Virginia Surface & Mining Reclamation Association, Inc. 452 U.S. 264 (1981) (upholding a federal regulation requiring states to either comply with federal strip mining standards or to submit to a federal mining plan). Hodel attempted to institute a three-part test for invalidating the exercise of federal commerce powers. First, the challenged statute must regulate the "States as States." Second, the federal legislation must address matters that are indisputably "attribute[s] of state sovereignty." Lastly, state compliance with the federal legislation must directly impair their ability "to structure integral operations in areas of traditional governmental functions." Id. at 287-88. See United Transportation Union v. Long Island R.R. Co., 455 U.S. 678 (1982) (holding that Congress could regulate interstate railways, despite a state owning and operating the railroad), FERC v. Mississippi, 456 U.S. 742 (1982) and EEOC v. Wyoming 460 U.S. 226 (1983) (upholding the application of the 1974 amendments to the Age Discrimination Employment Act of 1957, which prevented the use of mandatory retirement ages for employees prior to their seventieth birthday, to the states) for other cases in this line.

242. See id. at 550-52.
243. See id. at 538-39.
function as "traditional" and others as "non-traditional" "invite[d] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."\textsuperscript{244}

Importantly, Justice Blackmun relied on the writings of Professor Herbert Wechsler\textsuperscript{245} in arguing that the constitutional scheme protects the states through the political process. Justice Blackmun noted many of the political safeguards inherent to the federal system\textsuperscript{246} including the states ability to direct large portions of federal revenues into state treasuries\textsuperscript{247} and federal assistance to state and local governments minimize the burdens that the States bear under the Commerce Clause.\textsuperscript{248} These safeguards, Justice Blackmun argued, show that federalism is being protected by the current system\textsuperscript{249} and judicial enforcement is unnecessary.\textsuperscript{250}

\textsuperscript{244} Id. at 546.
\textsuperscript{245} See Garcia 469 U.S. at 554 ("[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result.'"); Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954). See also, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS, 171-259 (1980) (discussing the "political safeguards of federalism"); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 300 (1978) ("[T]he conventional wisdom was that, since 1937, there have been no judicially enforceable limits on congressional power which derive from considerations of federalism.").
\textsuperscript{246} See Garcia, 469 U.S. at 550-51 (citing to Wechsler and the institutional safeguards).
\textsuperscript{247} See id.
\textsuperscript{249} Indeed, the federal government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." Garcia, 469 U.S. at 551 (quoting THE FEDERALIST No. 46, supra note 2, at 292 (James Madison)). The national representatives would infallibly bring a "local spirit" and favorable attitude towards the states with them to Congress. See THE FEDERALIST No. 46, supra note 2, at 296 (James Madison). As a result, Congress would be "inclined to invade the rights on the individual States, or the prerogatives of their governments." Id. at 219. See also Wechsler, supra note 245, 559-60 ("Federal intervention as against the states is thus primarily a matter for congressional determination in our system as it stands. . . . The Court makes the decisive judgment only when-and to the extent that-Congress has not laid down the resolving rule."); CHOPER, supra note 245, at 171-259. Professor Wechsler's theory, based largely on Madison's FEDERALIST Nos. 45 and 46, asserts that despite the rise of the national party system and the direct election of Senators, see Wechsler, supra note 245, at 546 ("Indeed, the problem of the Congress is and always has been to attune itself to national opinion and produce majorities for action called for by the voice of the entire nation.") the "crucial role" of the States in composing the national govern-
In his dissenting opinion, Justice Powell complained that the majority "effectively reduced the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause." Powell was equally disturbed with the Court's willingness to end adequate protection of the states from federal encroachment. See id. (noting that members of each branch are chosen, in one way or another, by the States); see also Choper, supra note 245, at 176. Weschler places emphasis on facts such as: the Senate consists of representatives of the States, see Wechsler, supra note 245, at 546 ("Representatives no less than Senators are allotted by the Constitution to the States."); the States create the voting districts and voter qualifications for elections of members of the House, see id. at 548 ("Even the House is slanted somewhat in the same direction [towards the States], though the evidence is less severe. . . . It is due rather to the states' control over voter qualifications, on the one hand, and of districting on the other."); see also Choper, supra note 245, at 177, and the electoral college casts votes for the presidency on the basis of state units. See Weschler, supra note 245, at 552-53 (noting the role of the electoral college, as an arm of the States, in selecting the President); see also Choper, supra note 245, at 177-78. He contends that, due to these factors, States "are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics." Weschler, supra note 245, at 542-43. Thus, states are adequately protected in the federal system without the help of the federal courts.

Although not relied on by Justice Blackmun, Professor Jesse Choper, who agrees with a Weschlerian process-based protection of federalism, also argues that the Court's difficulty in identifying state viewpoints weighs against judicial enforcement of federalism. See Choper, supra note 245, at 181-84. When opinions of federal representatives differ from the opinion of other federal representatives from the same state, the "state's view" is difficult to ascertain. See id. at 181. Even more confusing is when States split over support of legislation that supposedly violates the Tenth Amendment. See id. at 182.

250. See Garcia, 469 U.S. at 554. Notably, Garcia may be the best illustration of the political process at work protecting federalism. Nine months after Garcia was decided, Congress enacted amendments to the Fair Labor Standards Act ("FLSA"). See John E. DuMont, State immunity From Federal Regulation—Before and After Garcia; How Accurate was the Supreme Court's Prediction in Garcia v. SAMTA that the Political Process Inherent in Our System of Federalism was Capable of Protecting the States Against Unduly Burdensome Federal Regulation?, 31 Duq. L. Rev. 391, 396 (1993). The States and Congress worked to create an amendment, providing an exception for States and their political subdivisions to the controversial overtime requirement at issue in the case. See id. This exception is codified in 29 U.S.C. § 207.

251. Garcia, 469 U.S. at 560 (Powell, J., dissenting). Powell further argued that the majority "propound[ed] a view of federalism that pays only lip service to the role of the States" and that:

The Court recasts the language [of the Tenth Amendment] to say that the States retain their sovereign powers 'only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.' This rephrasing is not a distinction without a difference; rather, it reflects the Court's unprecedented view that Congress is free under the Commerce Clause to assume a State's traditional sovereign power, and to do so without judicial review of its action.

Id. at 574-75.
judicial protection of federalism. Also in dissent, Justice

252. See id. at 567 n.12 (Powell, J., dissenting) ("This Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process."). See generally Zoe Baird, State Empowerment After Garcia, 18 Urb. Law. No. 3, 491, 502 (1986) (Just as "[m]ediating inter-branch conflicts is at the core of the judiciary's work," "resolving federalism questions of all sort is a steady part of what federal judges do."). Wechsler's theory is often challenged on a number of grounds. Under the Wechsler model, absence of vocal opposition from state government permits Congress to pass legislation that wholly encroaches on State authority. See Carol F. Lee, The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability, 20 Urb. Law 301, 334 (1988) (noting that Congress never once discussed the substantial fiscal impact placed on the states as a result of the Superfund amendment to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)). The ambiguity over the role of the states as players in the national government, even at the time of the drafting of the Constitution, seriously undermines this theory. See supra notes 186-198 and accompanying text. In addition, various changes have occurred from the time of the adopting of the Constitution, changes that make reliance on Federalist Nos. 45 and 46 equally dubious. For example, the Framers originally provided that Senators would be elected by state legislatures. See U.S. Const. art. I, § 3. Yet, even this system was never able to insure the preservation of state interests. Senators had been paid out of the federal treasury and served six-year terms. See The United States Senate 1787-1801, S. Doc. No. 64 87th Cong., 1st Sess. 154 (1961); see also, Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1466 n.170; 4 Elliot's Debates, supra note 2, at 60; Diamond, The Federalist on Federalism: Neither a National nor a Federal Constitution, but a Composition of Both, 86 Yale L.J. 1273, 1281-82 (1977). Senators votes had been conducted per capita rather than through State "bloc voting" (where each State casts one vote for the State). See id. Virtually all limitations on reelection have been eliminated and, early on, States lost the right to recall their Senators. Consequently, after a number of state legislatures tried to instruct their Senators, Senators simply refused to comply. See The United States Senate, supra note 237, at 162-72. These Senators took the position that they were "constitutionally bound to act in accordance with the general interests of the Union" and could not follow the instructions of the state legislatures. Id. at 164 (quoting Letter from Senators Benjamin Hawkins and Samuel Johnson to the North Carolina legislature (Feb. 22, 1791)). Finally in 1913, the Seventeenth Amendment removed the remaining control the state governments held over its Senators, providing for the direct election of Senators by the people. See U.S. Const. amend. XVII. In addition, federal election requirements have eroded State control over elections, undermining the political safeguards of federalism. Direct selection of candidates in the primary system challenges the electoral college as a viable protector of federalism as well. See William Denny, Breakdown of the Political Safeguards of Federalism: A Response to Garcia v. San Antonio Metropolitan Transit Authority, 3 J. Law & Pol. 749, 759 (1986). Candidates now compete for party support, rather than state support. See id. These party-minded candidates, owing little to state alliances, are more inclined to follow the "party line", in an effort to win future party support. See id. Such practice is just one of the many indicia that the importance of the states as states, in national politics, has greatly diminished.

O'Connor shared this concern, declaring that federalism "requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power."  

C. New York v. United States

Federalism, however, would recover in the subsequent years. In New York v. United States, Justice O'Connor invalidated the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that required states without provisions for waste disposal to take title and assume all liability for such waste. Justice O'Connor held this provision unconstitutional because Congress was attempting to "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." This action would consequently interfere with the accountability of the state officials.

253. Garcia, 469 U.S. at 587 (O'Connor, J. dissenting). She also cautioned that the commerce power should not become a means for swallowing the states. See id. ("As a result [of increases in the national commerce power], there is a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic.").

256. See New York, 505 U.S. at 153-54.
258. See id. at 168.

Where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. But where the Federal Government directs the States to regulate, it may by state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decisions. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with
Due to the importance of holding our state officials politically accountable, not even unified state acquiescence to Congress could permit this provision.259

The dissenters, on the other hand, focused chiefly on the general agreement of the states to the bill.260 Moreover, the law "resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal preemption or intervention, but rather congressional sanction of interstate compromises they had reached."261

D. United States v. Lopez

In United States v. Lopez,262 the Supreme Court affirmatively limited congressional commerce power.263 Specifically, the Court found the Gun-Free School Zones Act did not have the required "nexus with interstate commerce",264 and did not "substantially affect[] interstate commerce".265 Moreover, "[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."266

Justice Rehnquist, discussed three legitimate categories within which Congress may legitimately legislate under the Commerce Clause:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ com-

259. See id. at 181-82. Justice O’Connor explained:
[t]he Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. . . . Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the “consent” of state officials.

260. See id. at 189-90.
261. Id.
263. See id. at 555-568.
264. Id. at 562 (quoting United States v. Bass, 404 U.S. 336, 347 (1971)).
265. Id. at 561.
266. Id. at 551.
merce authority includes the power to regulate those activities having a substantial relation to interstate commerce.\(^{267}\)

Under this formula, the legislation in question fell into the last category. The Court characterized the law as a criminal statute "[having] nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms."\(^{268}\) Consequently, the Court rejected the government's contention that, as the majority put it, Congress could regulate "all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce" and "any activity that it [Congress] found was related to the economic productivity of individual citizens . . . ."\(^{269}\)

In an important concurrence, Justice Kennedy, taking up the torch lit by Justice Powell in his \textit{Garcia} dissent, focused on and explicitly refuted the process-based protections of federalism.\(^{270}\) Although he noted that Professor Wechsler's interpretation of federalism is a reasoned one,\(^{271}\) Justice Kennedy concludes that federalism is vital to the American government, and the Court must be active in the face of violations of federalist principles.\(^{272}\) Indeed, the Court's duty to declare "what the law is," for Justices Kennedy and O'Connor, compelled the Court to resolve the difficult constitutional question of federalism role in American government.\(^{274}\)

The principle dissent, written by Justice Breyer, argued that the "substantial effects" test unduly restricted congressional power and that "the question of degree (how much effect) requires an esti-

\(^{267}\) Lopez, 514 U.S. at 558-59.

\(^{268}\) Id. at 561.

\(^{269}\) Id. at 564.

\(^{270}\) See id. at 575-79.

\(^{271}\) See id. at 577 ("To be sure, one conclusion that could be drawn from \textit{The Federalist Papers} is that the balance between national and state power is entrusted in its entirety to the political process.").

\(^{272}\) See id. at 578 ("[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far.").

\(^{273}\) See \textit{Lopez}, 514 U.S. at 579 (quoting \textit{Marbury v. Madison}, 1 Cranch 137, 177 (1803)).

\(^{274}\) See id. at 578:

Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far. \textit{Id.} (citations omitted) (Kennedy, J., concurring).
mate of the ‘size’ of the effect that no verbal formulation can capture with precision.”275 To wit, Justice Breyer opted for a rational basis test: “[w]e must ask whether Congress could have had a rational basis for finding a significant (or substantial) connection between gun-related school violence and interstate commerce.”276 Consequently, after noting the connection between education and commerce277 and citing numerous studies on the effects of gun violence in schools,278 Justice Breyer concluded Congress would have a rational basis for determining that this law was connected to commerce and, thus, valid.

E. United States Term Limits v. Thornton

Much of federalism jurisprudence deals with infringements on “state’s rights” by the national government. In United States Term Limits, Inc. v. Thornton,279 however, Arkansas amended its Constitution to impose term limits on its members of Congress,280 thus interfering with the “rights” of the national government.281 Through its interpretation of history,282 the majority rejected Arkansas’ claim that this amendment was an exercise of its reserved powers under the Tenth Amendment.283 The Court claimed that “the power to add qualifications is not part of the ‘original powers’ of sovereignty that the Tenth Amendment reserved to the States.”284 Additionally, the majority continued, even if the states originally possessed this power, the “Framers intended the Constitution to be the exclusive source of qualifications for members of

275. Id. at 615.
276. Id. at 618.
277. See id. at 620 (“Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation’s economy.”).
278. See Lopez, 514 U.S. at 619.
280. See id. at 783-84 (citing ARKANSAS CONST. amend. 73).
281. Recall the discussion of England’s attempts to control the colonial assemblies and the colonial elections. See supra notes 52, 76-82 and accompanying text. The right to control elections became synonymous with the body holding the election: states were to control state elections, the national government to control national elections. This situation was noted in 1970, when the national government tried, via statute, to lower the voting age to eighteen in all elections, national and state. See Oregon v. Mitchell, 400 U.S. 112, 117 (1970) (discussing the Voting Rights Act Amendments of 1970), overruled by U.S. CONST. amend. XXVI. Indeed, Mitchell relied on Colonial history in invalidating that section of the amendment. Id. at 124-25.
282. The Court undertook a lengthy discussion of the Framers’ intent, focusing on THE FEDERALIST PAPERS, the State Ratification Debates, and various letters of the Framers on the subject. See Thornton, 514 U.S. at 801-822.
283. See id. at 800.
284. Id.
Congress... thereby 'divest[ing]' States of any power to add qualifications.'\textsuperscript{285}

Justice Kennedy, in his concurrence, pointed out that "the National Government is and must be controlled by the people without collateral interference by the States."\textsuperscript{286} He then likened his position to that taken in \textit{McCulloch v. Maryland}:\textsuperscript{287} the actions of a single state should not interfere with properly exercised national powers, because in doing so, one state would affect all the states.\textsuperscript{288} Reconciling this stance with his prior opinions on the importance of the states in the federal system, Justice Kennedy noted that both governments, national and state, are equally sovereign and must operate within their respective spheres of sovereignty, free from interference by the other.\textsuperscript{289}

The dissenters first argued that "where the Constitution is silent, it raises no bar to action by the States or the people."\textsuperscript{290} Further, as they viewed the situation, the states inherently possessed the power at issue as, "the notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them."\textsuperscript{291} Lastly, the dissenters argued that the qualifications for members of Congress, as listed in the Constitution, were minimum requirements and that the Framers intended that Congress not add to these qualifications.\textsuperscript{292} Accordingly, the dissenters saw no reason for barring states from imposing restrictions on who may run for national office.

F. \textit{Printz v. United States}

\textit{Printz v. United States}\textsuperscript{293} explored whether the national government could impress upon the states a duty to enforce a national law.\textsuperscript{294} In this case, the Brady Handgun Violence Prevention Act\textsuperscript{295} required local Chief Law Enforcement Officers ("CLEOs")
to receive and evaluate permit applications\textsuperscript{296} and to report, upon request, their reasoning for rejecting any application.\textsuperscript{297} Predictably, the Court affirmed its holding that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."\textsuperscript{298}

Justice Scalia, writing for the majority, first discussed the history of congressional legislation that required state actors to perform national duties.\textsuperscript{299} Justice Scalia further noted that each duty so performed by the states at the behest of the national government was of a judicial nature.\textsuperscript{300} Thus, there was no prior example on which Congress could rely for requiring the CLEOs to implement national policy.\textsuperscript{301}

Justice Souter, in dissent, relied heavily on \textit{The Federalist No. 27}.\textsuperscript{302} There, Hamilton explained that the national government will have "authority . . . when exercising an otherwise legitimate power . . . to require state 'auxiliaries' to take appropriate action."\textsuperscript{303} Such language, according to Justice Souter, is strong evidence that the national government could require state officials to enforce national law and that the provision at issue was valid.\textsuperscript{304}

**G. Cedar Rapids Community School District v. Garret F.**

Recently, the pendulum has swung away from the states and toward favoring congressional authority. A series of cases coming under the Spending Clause has afforded Congress greater authority. This increase in national authority, however, has come at the expense of that most local of concerns, namely education.

In \textit{Cedar Rapids Community School v. Garret F.},\textsuperscript{305} the Court held that the Individuals with Disabilities Education Act\textsuperscript{306} ("IDEA") required a public school to provide a disabled student

\textsuperscript{298} \textit{Printz}, 117 S. Ct. at 2380 (quoting New York v. United States, 505 U.S. 144, 188 (1992)).
\textsuperscript{299} See id. at 2370-79.
\textsuperscript{300} See id. at 2371.
\textsuperscript{301} See id.
\textsuperscript{302} See \textit{The Federalist No. 27}, supra note 2, at 177 (Alexander Hamilton).
\textsuperscript{303} \textit{Printz}, 117 S.Ct. at 2403-04 (Souter, J., dissenting).
\textsuperscript{304} Although, Justice Souter continued to agree with the Court's holding in \textit{New York v. United States}, as there, the regulation attacked the legislative function of the states. \textit{See id.} at 2404.
\textsuperscript{305} 119 S.Ct. 992 (1999) (holding that the Individuals with Disabilities Education Act required continuous nursing services for a ventilator-dependent quadriplegic who needed such services).
\textsuperscript{306} § 602(a)(17), as amended, 20 U.S.C.A. § 1401(a)(17); C.F.R. § 300.16(b)(4).
with continuous nursing service.\textsuperscript{307} Generally, as a condition of receiving federal funding, the IDEA requires schools to provide "related services" to disabled students, in order to provide disabled students with "free appropriate public education."\textsuperscript{308} Schools, however, are not required to provide "medical services;" thus, the case turned on what whether the services in issue were "related" or "medical."

The majority considered whether the nursing service was a "related service" under the statute.\textsuperscript{309} The Court looked to various regulations defining "related services"\textsuperscript{310} and noted that the term "related services" broadly encompasses those supportive services that 'may be required to assist a child with a disability to benefit from special education.'\textsuperscript{311} Further, the Court noted the similarities between the services at issue in \textit{Irving Independent School Dist. v. Tatro}\textsuperscript{312} and those at issue here.\textsuperscript{313} Consequently, the Court found the services were "related" and, thus, the school was required to provide them.

Importantly, for federalism purposes at least, the Court dismissed the school district's "multi-factor test" that focused on the burden the proposed service would place on the school district.\textsuperscript{314} Noting that the proposed test "is not supported by any recognized source of legal authority,"\textsuperscript{315} the Court made short work of the policy concerns brought up by the school district: "The District may have legitimate financial concerns, but our role in this dispute is to interpret existing law."\textsuperscript{316}

The crux of the dissent rested largely on federalism.\textsuperscript{317} Because the law at issue, wrote Justice Thomas, "condition[ed] an offer of federal funding on a promise by the recipient," pursuant to the Spending Clause it "amounts essentially to a contract between the

\textsuperscript{307} Garret F., 119 S. Ct. at 997.
\textsuperscript{308} Id. at 996 (discussing the lower court's decision).
\textsuperscript{309} See id.
\textsuperscript{310} See id. at 997-98.
\textsuperscript{311} Id. at 997.
\textsuperscript{312} 468 U.S. 883 (1984).
\textsuperscript{313} Garret F., 119 S. Ct. at 998 ("While more extensive, the in-school services Garret needs are no more "medical" than was the care sought in Tatro.").
\textsuperscript{314} Id. The school proposed a test "which the outcome in any particular case would depend upon a series of factors, such as [1] whether the care is continuous or intermittent, [2] whether existing school health personnel can provide the service, [3] the cost of the service, and [4] the potential consequences if the service is not properly performed."
\textsuperscript{315} Id.
\textsuperscript{316} Id. at 999.
\textsuperscript{317} See id. at 1000-03 (Thomas, J., dissenting).
Government—and the recipient of funds.” Thus, the state receiving funding must have “voluntarily and knowingly accept[ed] the terms of the ‘contract’”. As a result, Spending Clause legislation should be interpreted narrowly, “in order to avoid saddling the States with obligations they did not anticipate.” Here, the dissent argued that the proper result, considering the federalism concerns underlying Spending Clause jurisprudence, was to require schools provide handicapped children health-related services consistent with what school nurses can perform as part of their “normal duties.” This would lighten the burden placed on schools and was consistent with the Spending Clause jurisprudence.

H. Davis v. Monroe County Board of Education

Building on the increase in Spending Clause authority gained in Garret F., the Supreme Court recently implied a private right of action under Title IX of the Education Amendments of 1972 ("Title IX"), for inaction by a school when one student sexually harasses another student. In so holding, the Court recalled the wisdom of Pennhurst: that Spending Clause legislation must exhibit a clear intent by Congress to require state to comply with any particular condition. Justice O’Connor, writing for the majority, also noted that “a recipient of federal funds may be liable . . . for its

318. Id. at 1002 (quoting Gesber v. Lago Vista Independent School Dist., 524 U.S. 274, 276 (1998)).
319. Garret F., 119 S. Ct. at 1002 (quoting Pennhurst State Sch. and Hosp. v. Had-derman, 451 U.S. 1, 17 (1981) (“There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.”)).
320. Id.
321. Id. at 1003.
322. The dissent noted that the cost of the services required by the respondent would cost a “minimum of $18,000 per year.” Id. at 1003.
323. See id. (“This [majority’s] approach disregards the constitutionally mandated principles of construction applicable to Spending Clause legislation and blindsides unwary States with fiscal obligations that they cold not have anticipated.”).
325. Davis v. Monroe County Bd. of Ed., 119 S.Ct. 1661, 1669 (1999) (“We must determine whether a district’s failure to respond to student-on-student harassment in its schools can support a private suit for money damages.”).
327. Davis, 119 S.Ct. at 1670.

In interpreting language in spending legislation, we thus “inst[s]t that Congress speak with a clear voice,” recognizing that “[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.”

Id. (quoting Pennhurst, 451 U.S. at 17, 24-25).
own misconduct.” The Court, however, found that a school board’s decision not to act, in the face of known student-on-student sexual harassment, rose to this level of misconduct and was actionable in federal court.

Mindful of the burden this could place on the nation’s school system, the Court announced that the “deliberate indifference” standard should apply to this case. This test, already employed in Gesber v. Lago Vista Independent School Dist., would eliminate the risk of being liable “not for its own official decision but instead for its employees’ independent actions.” Cognizant of likely criticisms, Justice O’Connor noted that “[s]chool administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed ‘deliberately indifferent’... only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of known circumstances.”

The dissent, authored by Justice Kennedy, vigorously attacked the majority opinion for “eviserat[ing] the clear-notice safeguard of our [the Supreme Court’s] Spending Clause jurisprudence,” and the issuing a heavy blow to federalism. Justice Kennedy first noted that although Congress could pursue objectives outside its enumerated powers through the Spending Clause, the safeguard against federal intrusion into state affairs is that “when Congress imposes a condition on the States’ receipt of federal funds, it [Con-

328. Id. at 1670.
329. See id. (“Here, petitioner attempts to hold the [School] Board liable for its own decision to remain idle in the face of known student-on-student harassment in its schools.”).
330. See id. at 1671-73 (discussion of “deliberate indifference” standard and its implications).
333. Id. at 1674.
334. Id. at 1677 (Kennedy, J., dissenting).
335. See id. at 1692 (“As its holding makes painfully clear, the majority’s watered-down version of the Spending Clause clear-statement rule is no substitute for the real protections of state and local autonomy that our constitutional system requires. ... Federalism and our struggling school systems deserve better support from this Court.”).
336. See id. at 1677 (“Congress can use its Spending Clause power to pursue objectives outside of ‘Article I’s ‘enumerated legislative fields’ by attaching conditions to the grant of federal funds.”) (quoting South Dakota v. Dole, 483 U.S. 207 (1987); United States v. Butler, 297 U.S. 1, 65 (1936)).
gress] ‘must do so unambiguously.’” 337 Otherwise, states will be unable to “guard against excessive federal intrusion into state affairs.” 338

The dissent attacked the majority on both legal 339 and policy grounds. 340 Moreover, the failings of the majority’s standard for liability, namely, its broad scope, 341 lack of clarity, 342 and low threshold for requiring a trial, 343 all worked to subject school districts to “limitless liability.” 344 Most problematic of all for Justice

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337. Id. (quoting Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981)). Indeed, Justice O’Connor, in her South Dakota v. Dole dissent, noted the rational for this rule:

If the spending power is to be limited only by Congress’ notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives ‘power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.’”


339. See, e.g., id. at 1678.

Schools cannot be held liable for peer sexual harassment because Title IX does not give them clear and unambiguous notice that they are liable in damages for failure to remedy discrimination by their students. As the majority acknowledges, Title IX prohibits only misconduct by grant recipients, not misconduct by third parties.

Id. See also id. at 1679 (“It is not enough, then, that the alleged discrimination occur in a ‘context subject to the school district’s control.’ The discrimination must actually be ‘controlled by’—that is, be authorized by, pursuant to, or in accordance with, school policy or actions.”) (citations omitted) (quoting id. at 1672); id. at 1686 (“[R]espondents have made a cogent and persuasive argument that the type of student conduct alleged by petitioner should not be considered ‘sexual harassment,’ much less gender discrimination actionable under Title IX.”); id. (“In reality, there is no established body of federal or state law on which courts may draw in defining the student conduct that qualifies as Title IX gender discrimination.”).

340. See, e.g., id. at 1682 (“The practical obstacles schools encounter in ensuring that thousands of immature students conform their conduct to acceptable norms may be even more significant than the legal obstacles.”).

341. See id. at 1688 (“The majority’s test for actionable harassment will . . . sweep in almost all of the more innocuous conduct it acknowledges as a ubiquitous part of school life.”).

342. See id. (noting that while the majority attempts to limit liability to “known” acts of student harassment, this begs an obvious question: “known to whom?”).

343. See id. at 1688 (“[T]he majority’s test, in fact, invites courts and juries to second-guess school administrators in every case, to judge in each instance whether the school’s response was ‘clearly reasonable.’ A reasonableness standard, regardless of the modifier, transforms every disciplinary decision into a jury question.”).

344. Id. at 1689 (“The limitless liability confronting our schools under the implied Title IX cause of action puts schools in a far worse position than businesses.”).
Kennedy was that, while “this case is about federalism,” the majority ignored this consideration entirely.

Part II Conclusion

The last sixty years of the federalism in the Supreme Court has been confusing. Congressional authority vis-à-vis the states has contracted, expanded, and contracted again, all the while Garcia, the case that explicitly stated that federalism did not bar congressional authority, remains relevant law. Comparing “congressional federalism” to other federalism concerns, such as Article III federalism, only magnifies its inconsistencies.
Perhaps the one constant in the midst of this confusion is the Supreme Court’s formalistic approach. In all recent cases, the Court systematically outlines major premises from which it deduces minor ones, eventually arriving at a conclusion.\textsuperscript{348} The problem with this approach is that, because the Constitution is ambiguous as to the allocation of power between government, the major premises the Supreme Court conjures up are little more than arbitrary guidelines. Thus, it is impossible to achieving any clear premises for reasoning.\textsuperscript{349} As Part III of this Note discusses, employing a functional approach, one that maximizes the benefits of the federal union, can solve this problem.

III. A New Method for a New Millennium

Federalism is based on certain values. Throughout America’s history, both as a colony and a country, objects of a grand scope have always been allocated to the central government, while issues of local concern have been left to the subordinate units. James Madison discussed this point, noting “it is only within a certain sphere that the federal power can in the nature of things, be advantageously administered.”\textsuperscript{350} Moreover, Madison gave federalism definition; by explaining that some governmental units can “advantageously administer[ ]” object in one sphere, he prescribes allocating responsibility over a sphere to the government that can “advantageously administer[ ]” it. This is both wise public policy and true to the Framers’ intent.

Armed with this insight constitutional analysts are left at square one. Indeed, how is it determined which governments can “advantageously administer[ ]” which objects? To answer this question, the benefits of federalism must be analyzed.

A. What Are the Values of Federalism?

As Justice O’Connor points out, federalism has both sociopolitical and economic benefits:

This federalist structure . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experi-


\textsuperscript{349} See infra notes 409-411 and accompanying text for an illustration of this problem.

\textsuperscript{350} See The Federalist No. 46, supra note 2, at 295 (James Madison).
mentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.\textsuperscript{351}

Federalism is theory of decentralization in government.\textsuperscript{352} As such, it shares a number of the economic benefits of decentralization.\textsuperscript{353} Indeed, one of federalism's greatest benefits is that it is a means to efficient management.\textsuperscript{354}

The essence of federalism, as a political concept, differs from mere decentralization. In a federal system, the subordinate units of government operate within a prescribed area that the central authority may not invade.\textsuperscript{355} Equally important, the leaders of the subordinate units draw their power from sources independent of the central authority.\textsuperscript{356} The point of granting such independence

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\item Federalism, as a political concept, is a structuring principle for a government that divides and allocates power over particular issues to political sub-units. \textit{See id.} Thus, federalism is merely a method of decentralization.
\item Aside from the various social science studies conducted on the effects of decentralization, the Supreme Court has recently discussed the "values of federalism." \textit{See Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 788-791 (1982) (O'Connor, J., concurring in part and dissenting in part) ("Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. . . . [F]ederalism enhances the opportunity of all citizens to participate in representative government. . . . [O]ur federal system provides a salutary check on governmental power."); Garcia, 469 U.S. at 528 (O'Connor, J., dissenting) ("The States were to retain authority over those local concerns of greatest relevance and importance to the people. . . . [P]roduce[ing] efficient government and protect[ing] the rights of the people."); New York, 505 U.S. at 157 (cataloging the benefits of the federal structure); Lopez, 514 U.S. at 581 (Kennedy, J., concurring) ("[T]he theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").}
\item \textit{See, e.g.}, Rubin & Feeley, \textit{supra} note 352, at 911.
\end{enumerate}
\end{footnotesize}
is to allow disagreement amongst the subordinate units. Each unit thus may subscribe to different value systems, consequently leading to experimentation.\textsuperscript{357} Additionally, this independence serves to check the power of the national government by limiting its jurisdiction, just as the Framers intended.\textsuperscript{358}

1. \textit{The Sociopolitical Benefits of Federalism}

Generally, because social tastes and preferences differ, most often along geographic lines,\textsuperscript{359} a basic shortcoming of unitary forms of government is an “insensitivity to varying preferences among the residents of the different communities.”\textsuperscript{360} Where governmental units are small, however, legislators can more adequately respond to local preferences.\textsuperscript{361} Many modern scholars recognize this increase in responsiveness as one of the greatest values of decentralized government.\textsuperscript{362} This increased

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357. See id. at 912; Kim Lane Scheppel, \textit{The Ethics of Federalism in Power Divided} 51, 52 (Harry N. Scheiber & Malcolm Feely eds., 1989).

358. See, e.g., \textit{The Federalist No. 51}, supra note 2, at 323 (James Madison) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among district and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”).


361. See Gregory, 501 U.S. at 458 (noting that federalism assures “that a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society . . . .”); see also McConnell, supra note 359, at 1491-1511 (noting the three objectives of dual sovereignty: “(1) to secure the public good, (2) to protect private rights, and (3) to preserve the spirit and form of popular government”) (quoting \textit{The Federalist No. 10}, supra note 2, at 80 (James Madison)); Deborah Jones Merritt, \textit{The Guarantee Clause and State Autonomy: Federalism for a Third Century}, 88 Colum. L. Rev. 1, 9-10 (1988) (noting the three main advantages of federalism are its check on the national government, its ability to draw citizens into the political process and the political and cultural diversity it fosters).

Responsiveness, in turn, better satisfies the desires of the populace.\textsuperscript{363}

Consequently, the desire to satisfy the populace compels jurisdictions to compete with one and another in an effort to win citizens, valuable tax dollars and jobs.\textsuperscript{364} This economic reality yields increased social experimentation. Charles Tiebout’s economic theory of jurisdictional competition addresses this situation.\textsuperscript{365} According to the “Samuelson condition,” public goods\textsuperscript{366} are allocated efficiently when the sum of a citizen’s marginal rate of substitution of income for the good equals the marginal cost of an additional unit of the good.\textsuperscript{367} Nevertheless, this condition is not easily met. With private goods, market competition exerts downward pressure on producers’ marginal costs, and market prices provide concrete information about consumers’ rates of substitution.\textsuperscript{368} With public goods, however, no obvious market forces exert such pressure on governmental producers’ marginal
costs. Nor does an obvious mechanism force taxpayers to truthfully reveal their rates of substitution.

The Tiebout model claims to satisfy the "Samuelson condition" by identifying the machinery that disciplines governmental producers and matching citizen preferences with levels of public goods provision and taxation. Simply, Tiebout explains that citizens, unhappy with the policies of their state, may move to another state capable of better providing for their desires and needs. This competition amongst jurisdictions allows citizens to decide what public goods and rights are desirable and at what cost.

This "responsiveness-competitiveness" model illustrates the role of voice and exit in government. Individuals seek governments that respond to their needs, or voice. If their government does not respond, citizens may exercise their exit option and relocate to another jurisdiction that will. Conversely, governments may select membership by resisting some voices and being more responsive to citizens who have remained or recently entered.

369. See id.

370. Taxpayers will not state their rates of substitution accurately because of the "free-rider" problem that arises in cases of collective political action. An actor, for example, will overstate her demand if she believes that her level of payment will remain unchanged, with the additional cost of providing the good falling on others. See Bratton & McCahery, supra note 367, at 207, n.16, (citing Theodore Groves, Incentive in Teams, 41 ECONOMETRICA 617, 624 (1973)).

371. Note here the assumptions Tiebout makes before applying his model. Tiebout assumes: (1) a large number of communities exist and the public goods of each reflect the range of public goods available; (2) mobility is free for all relocating actors who choose a jurisdiction based on a taxes-public goods balancing; (3) perfect information is available, as to each jurisdiction's public goods offerings; (4) every jurisdiction is of optimal size, that is, having the number of residents for which the public goods can be produced at the lowest average cost; (5) communities below optimal size will try to attract new citizens to reduce the average cost of producing goods and services; and (6) there are no externalities, monopolies or spillover effects across jurisdictions. See Tiebout, supra note 363, at 419. Understandably, such questionable assumptions have brought criticism, see Susan Rose-Ackerman, Tiebout Models and the Competitive Ideal: An Essay on the Political Economy of Local Government, 1 PERSPECTIVES ON LOCAL PUBLIC FINANCE AND PUBLIC POLICY 23, 28 (1983) (characterizing the theory as "simply not very robust"), although a great deal of empirical research appears to support the thesis. See Cebula, supra note 359; WALLIS & OATES, supra note 359.

372. See LeBoeuf, supra note 352, at 561.

373. But see Rubin & Feeley, supra note 352, at 918 ("There is something a bit fanciful in the image of people choosing a place to live the way shoppers choose their favorite breakfast cereal . . . ").

374. See ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970); Rubin & Feeley, supra note 352, at 917.

375. See id.

376. See id.
Inevitably, the consequence of this economic benefit is an increase in social experimentation.\footnote{As Justice Brandeis observed, each of the states "serve as a laboratory" that may "try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). \textit{See also} Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (observing the unique phenomenon of "the making of social experiments that an important part of the community desires [ ] in the insulated chambers afforded by the several States . . . ."); LeBoeuf, \textit{supra} note 352, at 561 ("Just as the competitive firms engage in experimentation and innovation in providing private goods, so too will competitive jurisdictions experiment with various methods of providing public goods.").} In particular, states, due to their small size, are better equipped to experiment because experimentation is best conducted on a small scale.\footnote{See \textit{Legal Stud.} 593 (1980) (suggesting that local politicians will be loath to experiment with social policies).} State governments have blazed trails with new social and economic reforms, such as women's suffrage,\footnote{See Act of Jan. 21, 1891, ch. 100 § 4, 1890-1891 Wyo.Sess.Laws 394 (Wyoming grants women the right to vote).} unemployment insurance,\footnote{See \textit{Unemployment Ins.} Act of Jan. 28, 1932, ch. 20, 1931-1932 Wis.Laws 57; Act of June 1, 1933, ch. 186, 1933 Wis.Laws 448; Act of June 2, 1933, ch. 194 Wis.Laws 491 (Wisconsin codifies unemployment insurance).} minimum wage laws,\footnote{See \textit{Mass}., Acts 780 (Massachusetts enacts minimum wage laws for women and minors).} child labor laws,\footnote{See Commission on Intergovernmental Relations, \textit{The Question of State Government Capability}, 23-24 (1985) (noting that state governments have experimented with "sunset legislation, zero based budgeting, equal housing, no-fault insurance . . . gun control, pregnancy benefits for working women, limited access highways, education for handicapped children, auto pollution standards and energy assistance for the poor.").} accident-insurance plans that benefit victims of on-the-job accidents\footnote{See \textit{id}.} and prohibitions against employment and housing discrimination.\footnote{See \textit{id}.} As these theories are tested, more desirable techniques are discovered, allowing jurisdictions to adopt the successful policies, thus increasing efficiency throughout society.\footnote{See \textit{id}.}
Decentralization through federalism provides greater citizen participation in government and increases accountability among elected officials. As the physical distance between legislators and their constituents decreases, the familiarity between them increases. This results in citizens becoming more aware of their elected officials.386 Citizen participation in government also increases.387 This situation, in turn, yields further benefits: enhanced voter confidence in the political process,388 minimized influence of interest groups and political action committees389 and increased diversity among elected officials.390

2. The Economic Benefits of Federalism

In addition to the economic gains realized by the Tiebout Model, by creating separate spheres of authority for the central and subordinate governmental units, federal governments have the ability to realize economies of scale. Central governments, for example, are better suited to perform governmental functions where

386. See The Federalist No. 45, supra note 2, at 291 (Madison):
   The members of the legislative, executive, and judiciary departments of thirteen and more States, . . . with all county, corporation, and town officers, . . . having particular acquaintance with every class and circle of people, must exceed, beyond all proportion, both in number an influence, those of every description who will be employed in the administration of the federal system.
Id.; LeBoeuf, supra note 352, at 564 (“[P]hysical proximity nonetheless continues to promote some sort of closeness between citizens and legislators. Additionally, as the ration of citizens to representatives falls, the citizens become more aware of the activities of their elected officials.”).
387. See Garcia, 469 U.S. at 575-77 & n.18 (Powell, J., dissenting) (“Participation is likely to be more frequent, and exercised at more different stages of a governmental activity at the local level, or in regional organizations.”) (quoting Advisory Commission on Intergovernmental Relations, Citizen Participation in the American Federal System 95 (1980)).
388. See Merritt, supra note 361, at 7-8.
389. See F.H. Buckley & Margaret F. Brinig, Welfare Magnets: The Race for the Top, 5 Sup. Ct. Econ. Rev. 141, 153 (1997) (“The relative clout of entrenched interest groups is weaker at the local level, where it is easier to organize dispersed voters. In contrast, voters are more dispersed at the federal level, and interest group clout is more likely to be overpowering.”). This explains why public sector wages are higher in larger jurisdictions. See Paul E. Peterson, The Price of Federalism 21 (1995).
390. The relatively high proportion of women holding positions in state and local government illustrates this increased diversity. In 1992, women held approximately 22% of the seats in the state legislature almost double the proportion in Congress. See World Almanac Book of Facts, 337 (Robert Famighetti ed., 1997); id. at 111-18. That newcomers can participate in government at the state level at double the rate of the national offices tends to suggest that state governments are more receptive to citizen participation, which adds new ideas and solutions to the political landscape. See Merritt, supra note 361, at 7.
the average cost lessens with the greater number of citizens for which the function is performed.\footnote{391} Similarly, the average cost of performing a service remains constant or goes up in proportion to the increase in citizens receiving the service.\footnote{392} Factoring such considerations of scale into determining government responsibilities increases efficiency throughout government.

Federal governments also reduce cross-boundary externalities. For example, if country A generated pollution that imposed costs on country B, the two might bargain in the Coasean sense, attempting to internalize the externalities.\footnote{393} Thus, Country B could pay Country A’s polluters not to pollute. Problems arise in the first instance due to the costs of negotiating the agreement, identifying the cross-boundary cost and enforcing the agreement. In federal governments, however, a central government acts to coordinate such efforts and work to limit interstate difficulties.\footnote{394}

Because federalism separates power between multiple jurisdictions, there is a limit as to how much power each jurisdiction can amass between both subordinate jurisdictions and between the central and subordinate governments. The benefit of these mutual constraints is the limitation of the monopolistic tendencies of government.\footnote{395} Suppose, for example, it is just as efficient for the subordinate governments to perform the function as it is for the central government. In such instances, subordinate units should be given the authority to provide the service, on the ground that competition between the subordinate governments will benefit the country in ways that centralizing the service will not. Now, if a subordinate unit abuses its monopolistic position, for example, by imposing a confiscatory tax, citizens can migrate to another subordinate jurisdiction with a more reasonable tax. This corrective migration is not nearly as possible when responding to bad

\footnote{391} See Thomas S. Ulen Economic and Public-Choice Forces in Federalism, 6 GEO. MASON U. L. REV. 921, 924-30 (1998). For example, collecting national taxes or providing for a national defense are functions properly placed in the hands of the central government. See id. at 929.

\footnote{392} See id.

\footnote{393} See id.

\footnote{394} Indeed, the Framers actively thought of such consideration at the time. James Madison observed such problems in the United States under the Articles of Confederation, problems he sought to remedy in the Constitution. See James Madison, Vices of the political system of the U. States (April 1787), in 24 LETTERS OF THE DELEGATES TO CONGRESS: 1774-1789, supra note 124, at 265 (discussing the “Trespasses of the States on the rights of each other” and “Want of concert in matters where common interest requires it”). Years earlier, Benjamin Franklin commented on the free-rider problem in America. See supra note 126.

\footnote{395} See Ulen supra note 391, at 939-34.
policies taken by the central government. Indeed, it is far more likely for a citizen to migrate from Illinois to Ohio to avoid a burdensome Illinois policy than it is to leave the United States over a similarly burdensome national policy.

All of these factors are designed to increase efficiency and maximize social utility. Social utility most often is maximized when smaller governmental units implement policy.\textsuperscript{396} For example, Oregon, in response to local desires, enacted legislation granting its citizens the right to physician-assisted suicide.\textsuperscript{397} Considering the heated debate around the topic, a federal law permitting this action would anger millions of citizens. However, because the law only affects Oregonians, at most 49% of Oregon could be upset with the law. Thus, social utility and the public good are maximized through jurisdictional differences by limiting the citizenry upon which policy affects.

Most importantly, federalism makes government more efficient. Nobel Laureate James Buchanan demonstrated mathematically that centralized decision-making over local projects results in local government spending more than it would freely choose to spend.\textsuperscript{398} Moreover, policy makers in local government are simply more aware of the costs of their policies, as the flow of information improves.\textsuperscript{399} Thus, policymakers and citizens alike are more likely to weigh the benefits of any program against its actual cost.\textsuperscript{400} Once in place, monitoring the effects of policies is easier and enforcement costs are lower as government downsizes.\textsuperscript{401}

\textbf{B. Functional Analysis v. Formal Analysis}

Federalism's two greatest benefits are that each government may serve as a check on the other one and that the union of central and subordinate governments yields the benefits of both unitary and

\textsuperscript{396} As Richard Henry Lee, writing under the pseudonym "Federal Farmer" noted, "one government and general legislation alone, can never extend equal benefits to all parts of the United States: Different laws, customs, and opinions exist in the different states, by which a uniform system of laws would be unreasonably invaded." Richard Henry Lee, Letter I (Oct. 8, 1787) THE FEDERALIST AND OTHER CONTEMPORARY PAPERS ON THE CONSTITUTION OF THE UNITED STATES 839, 847 (E.H. Scott ed., 1894).

\textsuperscript{397} 13 OR. Rev. Stat. § 127.800 (Supp. 1998). This legislation is commonly known as the "Death with Dignity Act."


\textsuperscript{399} See McConnell, supra note 359, at 1509-10.

\textsuperscript{400} OATES, supra note 360, at 13.

\textsuperscript{401} See McConnell, supra note 359, at 1504.
decentralized governments. Consequently, in a functional analysis of federalism, the focus must be on allocating tasks to state or national governments based promoting these values. Simply, because some tasks are better accomplished on a national scale while others are better handled at the state of local level, courts should inquire as to the “utility” of one government regulating a matter over another, while, at the same time, maintaining the socio-political benefits of federalism. In this manner, federalism would seek to let the each level of government do what it does best.

In so doing, a court should evaluate the economic and socio-political gains, via the entire nation, of promoting either local or national authority in the questioned area. Moreover, the base-line inquiry must be whether the problem complained, which provoked the questioned law’s passage, is a “national” problem. In so doing, responsibility will be allocated to the government where the most gains, nationally, can be realized, thereby, realizing the advantages of both national and state governments. By approaching questions with the formal analysis, however, the crucial policy goals of federalism become secondary matters. As a result, a constitutional policy is disregarded and the nation suffers as a whole.

As proof, consider the Violence Against Women Act of 1994 (“VAWA”). This Act, recently invalidated by the Fourth Circuit on federalism grounds, was a “response to the problems of domestic violence, sexual assault, and other forms of violence against women.” The controversial provision extends a federal substantive right to “[a]ll persons within the United States ... to be free from crimes of violence motivated by gender.” To enforce this right, the law creates a private cause of action against any “person ... who commits a crime of violence motivated by gender” and allows any victim of such a crime to obtain compensatory damages.


405. Id. at 827.


407. Id.
punitive damages, and injunctive, declaratory or other appropriate relief.⁴⁰⁸

Now under traditional, formal, Supreme Court review, the Fourth Circuit invalidated the VAWA. The formal Supreme Court approach would first announce that the Constitution dictates that Congress may only legislate in areas that substantially affect commerce. One should question the validity of this premise. Why is it that the constitutional grant of power to regulate commerce⁴⁰⁹ is limited to objects that “substantially affects” commerce? The Constitution says nothing on the matter, and historical evidence is rather ambiguous on what included “commerce.”⁴¹⁰ Thus, one encounters the first flaw in the Court’s reasoning.

Next, the formal approach would look at VAWA and, perhaps comparing it to the Gun Free School Zone Act, declare that it has nothing to do with commerce. Again, one should question the application of the substantially affects commerce “principle” to this situation. It is plausible for Congress to find that the effects of gender violence could deter commerce. The necessary nexus may be the psychological effects of gender violence on one’s ability to travel or purchase goods. Likewise, the power imbalances inherent to relationships marred by gender violence could restrict the abused partner’s access to income, again potentially affecting interstate commerce.

Lastly, just as the Fourth Circuit did, the formal approach would declare the law void on federalism grounds. Moreover, the Fourth Circuit’s reasoning follows the formal model perfectly:

[T]o sustain section 13981 as a constitutional exercise of the Commerce power, not only would we have to hold that congressional power under the substantially affects test extends to the regulation of noneconomic activities in the absence of jurisdictional elements, but we would also have to conclude that violence motivated by gender animus substantially affects interstate commerce by relying on arguments that lack any principled limi-

⁴⁰⁸. See id.
⁴⁰⁹. U.S. CONST. art. I, § 8, cl. 3.
tations and would, if accepted, convert the power to regulate
interstate commerce into a general police power.\footnote{411}

It is interesting to note the lack of discussion on how this law actu-
ally affects federalism. The policy rationale underlying VAWA, as
it relates to federalism is never discussed. Further, the court never
even considered if gender abuse has risen to levels beyond which a
state can effectively rectify the situation. Thus, to remedy this de-
fect, the proposed test has as its underlying purpose to find what
types of problems should be handled nationally and at the state
level, and allocating responsibility accordingly.

\section{C. Putting the Test to the Test}

Continuing with the VAWA example, a functional analysis would
first consider the national gains for allowing this law. VAWA
grants citizens a remedy for a heinous wrong, a wrong that the
states might not compensate victims for specifically. In addition,
granting a federal remedy will uniformly address this wrong, thus
making recoveries across the nation relatively equal. Note, how-
ever, that few of the typical benefits for large government action
are realized. Cross-boundary externalities, for example, will most
likely not be decreased, as it is unlikely that defendants under this
law would move to one jurisdiction on the basis that it did not have
the law. Economies of scale are certainly not realized, as the costs
for trials based on this new cause of action, both in terms of court
costs and other litigation expenses, will not go down proportion-
ately to the increase in people taking advantage of the law.

Next, a court should consider the gains for localizing this matter.
Because safety and other social concerns change based on the
needs of particular jurisdictions, it usually makes sense to leave
both the creation of a new tort and a new crime to the states. Resi-
dents and local officials, for whom monitoring this law will be more
efficient, for example, will be able to better value the gains and
weaknesses of the policy, as compared to national lawmakers.
Such monitoring could permit changes in the permitted value of
the award, or perhaps to explicitly include attorney's fees. In addi-
tion, a jurisdiction might think its rape and assault laws sufficient,
while still another locale might wish to make this remedy available,
but lower the burden of proof, thus making recovery easier. All in
all, local officials will be able witness the effects of the law and
address problems with it much faster, thus increasing accountabil-

\footnote{411. \textit{Brzonkala}, 169 F.3d at 838.}
ity and efficiency in government throughout the nation. Additionally, because the costs for enforcing this law grow in proportion to the size of its citizenry, it makes more economic sense to allocate such responsibility to local government, both to enact such cost-inducing legislation, and to enforce it.

This test is an easily applied mechanism to achieve the Framers’ goal: to let the national government legislate over national concerns and permit the states to control matters of local concern. Thus, the test attempts to answer whether gender abuse has evolved, from what was once a local problem, to an issue of national concern. Based on the brief exposition of economic and socio-political benefits derived from VAWA, the answer seems to be no. Yet, one must consider the effect this problem has on the nation as a whole. If there is evidence that the combined effects of gender violence affects the nation, much like, even in the absence of the Fourteenth Amendment, the effects of racial discrimination affect the entire nation, then Congress may have the proper basis for the law.

In the end, laws must succeed or fail not due to a lack of a nexus with interstate commerce, but due to their connection to the national interest. As a result, state governments will be more proactive, forced to perform their constitutionally prescribed task of providing for local concerns. Likewise, the national government will be responsible for performing its intended objectives, without interfering in matters best left to the states. The benefits of federalism will be realized as a result, the Framers’ vision better effectuated and the nation will be better off as a whole.

Conclusion

As America enters the new millennium, it should reevaluate the structure of its government. To best maximize the utility of the current structure, the Supreme Court should employ a functional test emphasizing the values of federalism. To its credit, this test retains the Framers’ vision by dividing powers among local and national entities. Importantly, this division can change over time. Additionally, this test can be applied to all federalism concerns, thus yielding its greatest benefit — uniformity in the Court’s federalism jurisprudence. Consequently, the Court should adopt such a test and support the purposes of federalism, thereby safeguarding its values.