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## NOTES

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# ONE FEDERALISM AND THE JUDICIAL ROLE: ENFORCING THE LIMITS OF ARTICLE I

Alexa R. Baltes\*

### INTRODUCTION

Federalism has been at the heart of our political system since the time of the Founding. Reinvigorated by Herbert Wechsler's 1954 article on the political safeguards of federalism,<sup>1</sup> and by the rise of "New Federalism" in the late twentieth century, the federalism debate has ceaselessly perplexed the legal community. Scholars disagree about the safeguards of federalism, the purpose of federalism, and the continuing legitimacy of the federal structure. Focusing on the history, text, and structure of the Constitution, this Note seeks to advance that debate by engaging two points made by a prominent scholar in the field regarding the safeguards of federalism.

First, Heather Gerken's recent suggestion that scholars on both sides of the political safeguards of federalism versus judicial review debate should give up the fight<sup>2</sup> threatens clarity going forward and lacks historical, constitutional foundation. Professor Gerken's sensitivity to the realities of our complex federal structure sharpens debate regarding the proper approach to federalism today.<sup>3</sup> It is certainly true that the relationship between the federal government and the states has changed since 1789, and modern theories of federalism must be able to engage the world we inhabit. But the complexity of our system does not negate the need "to adopt one theory to rule them all."<sup>4</sup> While she is right to point out the "both/and" nature of federalism protection<sup>5</sup>—that is, both procedural safeguards and judicial review have a

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1 See 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).

2 See Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012).

3 See generally *id.*

4 *Id.* at 1552.

5 *Id.* at 1551 (emphasizing the role of cooperative federalism throughout the article).

role in maintaining our constitutionally conceived dual system of government—it does not follow that there are “many federalisms”<sup>6</sup> or that a unifying theory for maintaining and protecting the proper balance of our federal structure is somehow unnecessary. The constitutionally designed federalism structure still provides the roles and mechanisms for maintaining that delicate balance of power—even if the balance, rightfully, looks different today than it did in the past. Debates about the proper safeguards of federalism may be “tired,”<sup>7</sup> but their persistence is a testament to their importance. A unified theory of federalism, offered by the framers and entrenched in the text of the Constitution, must prevail over an “analy[sis] [of] which flavor of federalism best fits a given context.”<sup>8</sup>

Second, because she does not ground her theory of federalism primarily in the text of the Constitution, Professor Gerken’s later work distorts the analysis required from the Court on federalism questions. Evaluating the two main approaches the Court has taken, Professor Gerken notes: “Some of the Court’s decisions define federal power in relation to the states, and others define it in isolation.”<sup>9</sup> She finds the former, relational approach better (though not ideal) because it is more manageable and durable, and because it comes closer to recognizing the reality that “states and the federal government regulate shoulder-to-shoulder in the same, tight policymaking space.”<sup>10</sup> Professor Gerken’s insightful analysis illuminates a need for a cogent, principled approach to federalism questions that forces judges to conform to “a mediating theory for translating abstract principles into concrete doctrine”<sup>11</sup> instead of getting caught up in the “tangled underbrush of lawyers’ tricks and logicians’ games.”<sup>12</sup> Her concerns force more precise thinking about the Court’s role in this area. Nevertheless, she ultimately inverts the analysis by suggesting it is better for the Court to frame the limits imposed on the federal government in terms of state sovereignty rather than constitutional limits on federal power.<sup>13</sup>

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6 *Id.*

7 *Id.*

8 *Id.* at 1552; *see also id.* at 1550–51 (“When scholars write about these debates, they often write as if we must choose between these different accounts of federalism—that we need one theory to rule them all . . . We need not hew exclusively to one vision of federalism. We can choose all of them at once. . . . It would be useful if federalism debates were more attentive to the fact that there are many federalisms, not one.”).

9 Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 95 (2014).

10 *Id.* at 87, 95.

11 *Id.* at 100.

12 *Id.* at 86; *see also id.* at 99, 104.

13 *Id.* at 86 (asserting that the Court is right to “mark where Congress’s power ends by identifying where state power begins, using sovereignty as a touchstone”). Though she ultimately dismisses the Court’s analysis in these cases as “wrongheaded and out of date,” Gerken believes it is nonetheless appropriate to “retain the central insight of the sovereignty cases—that federal power must be defined in relation to the states.” *Id.* at 113–14. Such a framework, she claims, “generate[s] doctrine that is more manageable, more comprehensible, and therefore more likely to endure.” *Id.* at 86.

This stands in tension with the Constitution's text: the Court's role in safeguarding federalism is to enforce the constitutional limits of federal power. The Constitution gives the Court no power to leverage state sovereignty as such, but it offers a clear directive for the judiciary to check congressional overreach.<sup>14</sup> This means, properly construed, limited federal government is a means to a split sovereignty (and thus, state sovereignty) end. Thus, Professor Gerken is misguided in her criticism that "limiting the federal government's power" is a "limit[ ] for limits' sake."<sup>15</sup> State sovereignty, in and of itself, is an end worth pursuing and one protected by the Constitution. This Note maintains that a judicial role focused on enforcing the limits of federal power provides the cogent, durable framework for analyzing federalism questions that Professor Gerken rightly demands.

Part I of this Note offers a brief account of the two main theories of federalism protection: the political safeguards (or process federalism) and judicial review. Part II then suggests a dual-safeguards approach as the single constitutionally grounded theory, and proceeds to situate the procedural safeguards and, importantly, judicial review, in the history, text, and structure of the Constitution. Next, delving into the Court's New Federalism line of decisions, Part III analyzes the implications for these two constitutionally grounded safeguards to deduce the proper framework for their respective applications. It suggests that while political safeguards may be conceived in terms of state sovereignty, the Court should frame its analysis in terms of constitutional limits on federal power. Furthermore, Part III demonstrates that judicially imposed limits on constitutionally enumerated powers offer a workable, and desirable, framework in practice. Part IV then explains why such a framework matters and defends state sovereignty as an end worthy of it all.

## I. REHASHING THE TIRED DEBATE

### A. *The Political Safeguards of Federalism*

In his 1954 article on the "Political Safeguards of Federalism," Herbert Wechsler argues that there is no need for judicial protection of state sovereignty because the Constitution equips the states to protect their own institutional prerogatives via the political process.<sup>16</sup> Wechsler emphasizes the "crucial role [played by the states] in the selection and the composition of

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14 See *infra* Parts II, III.

15 Gerken, *supra* note 9, at 111 (criticizing "*NFIB* and its doctrinal traveling companions" for "allow[ing] means to bleed into ends"); see also *id.* (claiming that there is no difference "between the means (limiting the federal government's power) and ends (a limited federal government)").

16 See Wechsler, *supra* note 1; see also *id.* at 544 (noting that specific procedural provisions that serve to protect state interest add to the protections inherent in "the sheer existence of the states and their political power to influence the action of the national authority").

the national authority”<sup>17</sup> in each of the three policy-making bodies of the federal government. First, he points to the Senate and finds it “cannot fail to function as the guardian of state interests as such.”<sup>18</sup> Equal representation of states in the Senate, combined with the filibuster rule and the individual authority of senators, serves to protect state interests against the potential oppression of a national majority.<sup>19</sup> Turning to the House, Wechsler finds state interests are protected in that body as well—“though the incidence is less severe.”<sup>20</sup> Here, he suggests that the states are protected by “[their] control of voters’ qualifications, on the one hand, and of districting, on the other.”<sup>21</sup> Lastly, Wechsler claims that state interests are also protected via the President:

[B]oth the mode of his selection and the future of his party require that he also be responsive to local values that have large support within the states. And since his programs must, in any case, achieve support in Congress—in so far as they involve new action—he must surmount the greater local sensitivity of Congress before anything is done.<sup>22</sup>

While the Supreme Court’s jurisprudence after 1937 seemed to have already embraced Wechsler’s vision of a minor (even nonexistent) judicial role in protecting state sovereignty,<sup>23</sup> his theory was “significant because it provided a theoretical justification” for the Court’s new minimalist approach.<sup>24</sup> Indeed, the Court later cited Wechsler’s theory to validate its decision to defer to a congressionally defined balance of power between the federal government and the states.<sup>25</sup> Moreover, even as the Court began to

17 *Id.* at 546.

18 *Id.* at 548 (“[T]he composition of the Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control.”).

19 *Id.*; see also Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1681 (2008) (“Not coincidentally, the Constitution prescribes precise procedures to govern the adoption of each [federal] law, and all of these procedures specifically require the participation of the Senate or the states.”).

20 Wechsler, *supra* note 1, at 548–52.

21 *Id.* at 548, 550 (meaning that a state-defined electorate chooses the state’s representatives and that “the delineation of the districts rests entirely with the states”).

22 *Id.* at 558.

23 Wechsler did not altogether reject judicial review of potential congressional overreach; instead, he argued that the Court was on its “weakest ground” when interfering on the behalf of states. *Id.* at 559. Importantly, he perceived “[t]he prime function envisaged for judicial review—in relation to federalism—[as] the maintenance of national supremacy against nullification or usurpation by the individual states.” *Id.*

24 John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1315 (1997).

25 See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985) (“[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.”).

rediscover its voice in federalism issues, the political safeguards justification became a staple component of a perpetual multi-Justice dissent.<sup>26</sup>

Wechsler's theory is active in contemporary legal scholarship as well. Expanding and modifying the theory in their own ways, Jesse Choper and Larry Kramer established themselves as two of the most prominent defenders of the political safeguards camp. For Choper, Wechsler's theory is part of a bigger philosophy, which conceives no role for the Court in federalism questions: "[T]he constitutional issue of whether federal action is beyond the authority of the central government and thus violates 'states' rights' should be treated as nonjusticiable, final resolution being relegated to the political branches—i.e., Congress and the President."<sup>27</sup> Instead of inserting itself in an area adequately protected in the political process, Choper thinks the Court should save its judicial capital for the protection of individual rights.<sup>28</sup> Finally, without conceding the point, Choper suggests that even if the Framers intended judicial review of federalism questions, it is simply unnecessary in our present political system.<sup>29</sup>

Taking a yet more evolved approach to political safeguards, Larry Kramer focuses on the protections offered by substantive politics, rather than those inherent in political procedure.<sup>30</sup> In fact, Kramer is highly critical of Wechsler's theory. As he sees it, the procedural safeguards so important to Wechsler either (1) miss the mark by protecting state interests rather than autonomy,<sup>31</sup> or (2) are completely ineffective.<sup>32</sup> Focused on "protecting the integrity and authority of state political institutions," Kramer turns to the "*real* 'political safeguards' of federalism"—party politics.<sup>33</sup> Because political parties transcend every level of government, our political culture "promotes relationships and establishes obligations among officials that cut across gov-

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26 See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 183 & n.66 (1996) (Souter, J., dissenting) (citing Wechsler, *supra* note 1); see also *United States v. Morrison*, 529 U.S. 598, 647 (2000) (Souter, J., dissenting) (raising a "political safeguards" objection to the majority's analysis); *id.* at 660–61 (Breyer, J., dissenting) (same); *Printz v. United States*, 521 U.S. 898, 957 (1997) (Stevens, J., dissenting) (same).

27 JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 175 (1980).

28 *Id.* at 59, 123, 169–70.

29 *Id.* at 242.

30 See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

31 *Id.* at 222 (explaining that federalism is not about "ensuring that national lawmakers are responsive to [state] interests" and finding instead that "federalism is meant to preserve the regulatory authority of state and local institutions to legislate policy choices").

32 For example, with respect to the states' ability to limit the electorate, Kramer explains that "[i]t is, in fact, impossible to think of anything a state could do to protect itself with this power today that would not be either unlawful or ineffective." *Id.* at 226.

33 *Id.* at 226, 278.

ernmental planes.”<sup>34</sup> In turn, this “mutual dependency” protects the influence of state voices in federal laws more than merely their interests.<sup>35</sup>

Though fractured over the details, advocates in the political safeguards camp share two unifying principles. First, the political process sufficiently protects states from congressional overreach and preserves the federal structure. Second, the Court has no (or very little) role to play in protecting states from congressional overreach.

### B. *Judicial Review*

On the other side, proponents of judicially protected federalism are not willing to wager the permanence of our constitutionally crafted federal structure on the ability of Congress to check itself.<sup>36</sup> Furthermore, this side suggests that the framers were likewise unwilling to risk it all on unreliable political safeguards. While the political safeguards are an undeniable first line of defense, it is illogical—indeed, “ahistorical”<sup>37</sup>—to suggest that they are the only line of defense against the erosion of the central feature of the American system.

Thus, by necessity and by constitutional design, “federal courts have a role to play in safeguarding state sovereignty that is . . . legitimate and essential.”<sup>38</sup> Even when sovereignty is inefficient for a state, it is no less essential to the preservation of our federal structure. Viewed in this light, judicial review “provides an important check on the temptation to surrender state sovereignty voluntarily.”<sup>39</sup> Furthermore, and most intuitively, there is no textual exception to judicial review for federalism cases—if the Court does not have the power of judicial review, it does not have the power to do its job.<sup>40</sup>

34 *Id.* at 279.

35 *Id.*

36 Justice Kennedy has expressed this same sentiment:

[I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure. . . . 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 [the Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far.

United States v. Lopez, 514 U.S. 549, 577–78 (1995) (Kennedy, J., concurring) (citations omitted).

37 Yoo, *supra* note 24, at 1357.

38 Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 952 (2001); see also Saikrishna B. Prakash & John C. Yoo, *Questions for the Critics of Judicial Review*, 72 GEO. WASH. L. REV. 354 (2003) (offering textual and structural justifications for judicial review).

39 Yoo, *supra* note 24, at 1402.

40 See Prakash & Yoo, *supra* note 38, at 361; Yoo, *supra* note 24, at 1330–31.

Defending the Court's role in catching congressional overreach—and thus alerting Congress to the importance of federalism—Lynn Baker explains another angle of federalism the Court is uniquely equipped to protect. She distinguishes between vertical federalism—the ability of the states, collectively, to influence and protect their institutional prerogative in national policymaking—and horizontal federalism—each state's separate, sovereign interests and authority.<sup>41</sup> Ironically, then, Wechsler's, Choper's, and Kramer's political safeguards exacerbate the potential for horizontal aggrandizement: “The state-based allocation of representation in the federal lawmaking process facilitates congressional responsiveness to state-based interests and preferences, and the majoritarian nature of that process permits a simple majority of states to impose its will on the minority.”<sup>42</sup> Equal representation in the Senate, for example, results in disproportionate distribution of “the federal fiscal and regulatory ‘pie.’”<sup>43</sup> Thus, “[t]his systematic wealth redistribution obviously infringes on the autonomy of the states that are burdened by, rather than beneficiaries of, this redistribution.”<sup>44</sup> The Court should therefore limit the federal government's ability to intrude on state sovereignty despite the *imprimatur* of a state majority.

Though there have been some attempts to find a middle ground between these two positions,<sup>45</sup> clear battle lines between political safeguards and judicial review persist. Both sides agree on the presence of political safeguards. The debate comes down to judicial review—does the Court have a role to play in maintaining the balance of power between the states and the federal government, or not? The stakes are high, and the answer requires great care and precision. It is thus a bit disheartening to consider the ease with which Professor Gerken wipes away this noble fight in favor of context-driven “flavors” of federalism. If there is to be any principled force preserved in our nation's carefully crafted compact, the only flavor of federalism worth its salt is the one mandated by the Constitution itself.

## II. ONE THEORY, TWO SAFEGUARDS

Though many scholars who favor judicial review criticize the efficacy of political safeguards in our current political environment, these criticisms do little to advance their position.<sup>46</sup> Federalism—the allocation of power

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41 See generally Baker, *supra* note 38.

42 *Id.* at 966.

43 *Id.* (citation omitted).

44 *Id.*

45 See, e.g., Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001) (suggesting that judicial review of process rather than substance might be a logical compromise); see also *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (explaining the need for the Court to ensure an unambiguous statement before it will read a federal statute to intrude on traditional state functions, in order to protect the function of the political safeguards).

46 See Clark, *supra* note 19, at 1700 (rejecting the view that “the rise of the modern administrative state not only makes it impossible to enforce the procedural safeguards in



between the federal government and the states—was perhaps the single most important issue at the time of the Founding. The centrality of this concern was not lost on the framers or ratifiers. Returning to that time, and the product of thoughtful debate and drafting, one multi-layered model for protecting the federalism balance is evident. Federalism was, and is, doubly guarded: political safeguards and judicial review. This model must guide and frame the analysis still today.<sup>47</sup>

While no one seriously questions the inclusion of procedural protections in the Constitution, a brief review of these provisions is a helpful starting point for a grounded analysis. For example, the Constitution mandates equal representation in the Senate,<sup>48</sup> gives states control over voter qualifications<sup>49</sup> and congressional districting,<sup>50</sup> and requires the participation of the Senate in the making of every federal law.<sup>51</sup> There is no doubt these provisions were meant to protect the states. In just one instance of explicit support for this premise, James Madison explained that “the equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty.”<sup>52</sup> Nevertheless, Madison never suggested this was the only instrument for that purpose. Quite the contrary, a close analysis reveals the framers doubly guarded this most essential division of sovereignty.

#### A. History

At the time of the Founding, the magnitude of adequately allocating and protecting the division of power and sovereignty between the federal government and the states could not be overstated. As John Yoo explains, “[o]pponents and supporters of the new Constitution were [so] obsessed with the relationship between the federal and state governments” that even those critical of an originalist approach should be reluctant to minimize the historical context.<sup>53</sup> The American Revolution was sparked by dissatisfaction over the allocation of power between Great Britain and the Colonies. In our

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that context, but also counsels disregarding such safeguards more broadly as a kind of compensating adjustment,” and instead explaining that “[b]ecause these safeguards are so carefully spelled out in the Constitution and were so central to its adoption, courts could not read them out of the document and still remain faithful to their oath to uphold ‘this Constitution’” (citation omitted)).

47 *Cf.* *South Carolina v. United States*, 199 U.S. 437, 448 (1905), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (“The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.”).

48 U.S. CONST. art. I, § 3, cl. 1.

49 *Id.* art. I, § 2, cl. 1.

50 *Id.* art. I, § 4, cl. 1.

51 *Id.* art. I, § 7, cl. 2 (bicameralism); *id.* art. II, § 2, cl. 2 (advice and consent); *id.* art. V (constitutional amendment).

52 THE FEDERALIST NO. 62, at 332 (James Madison) (J.R. Pole ed., 2005).

53 Yoo, *supra* note 24, at 1359 (responding to criticisms about selective use of history based on incomplete information, Yoo explains that “[f]ederalism . . . did not suffer from

first attempt to do it better, the Articles of Confederation ultimately crumbled because a misallocation of power rendered a unified government inept.<sup>54</sup> The Constitution represented the third, and presumably final, chance at a workable, sustainable “compound republic.”<sup>55</sup> Precision was paramount.

In light of the Articles’ failure, many of the framers sought to diminish the role of states, granting them only subordinate participation in the national government.<sup>56</sup> But that view ultimately lost out at the Philadelphia Convention. Advocating for ratification, James Madison explained that, under the Constitution, the federal government’s “jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and *inviolable* sovereignty over all other objects.”<sup>57</sup> The Great Compromise granting equal representation in the Senate,<sup>58</sup> and the Senate’s pervasive contact in all lawmaking processes, provided state sovereignty with significant protection.<sup>59</sup> But even then—before the Seventeenth Amendment mandated popular election of senators, before the Civil War Amendments radically reordered the balance of power, and before the New Deal Era established the administrative state—procedural safeguards were not, alone, enough to render sovereignty “inviolable.”

John Yoo highlights a couple of these potential shortcomings. He explains that, because each senator had one vote, there may be a temptation and an opportunity for senators to represent powerful interest groups rather than the institutional interests of the state.<sup>60</sup> Furthermore, Yoo points out that, though state-centric in composition, the Senate is a national actor, and protection of state sovereignty risks being overpowered when it acts in that national capacity.<sup>61</sup>

During the ratification debates, such fears consumed Anti-Federalists, who were unsatisfied with assurances of limited, enumerated powers<sup>62</sup> and

such neglect. Federalists and Anti-Federalists conducted an extensive, sophisticated debate . . . over the spheres to be occupied by the federal and state governments”).

54 Notably, the Articles of Confederation lacked a federal judiciary, which was “especially noticeable when it came to questions of federalism, for no independent tribunal existed that could draw the lines between the proper spheres of the national and state governments.” *Id.* at 1365.

55 THE FEDERALIST NO. 51, at 282 (James Madison) (J.R. Pole ed., 2005).

56 See Yoo, *supra* note 24, at 1367–68.

57 THE FEDERALIST NO. 39, at 210 (James Madison) (J.R. Pole ed., 2005) (emphasis added).

58 The importance of this safeguard is underscored by that fact that it is today the only provision in the Constitution incapable of being amended. See U.S. CONST. art. V (declaring that “no State . . . shall be deprived of its equal Suffrage in the Senate”).

59 See *supra* notes 48–52 and accompanying text (laying out the political safeguards).

60 Yoo, *supra* note 24, at 1370.

61 *Id.*

62 See, e.g., THE FEDERALIST NO. 14, at 71 (James Madison) (J.R. Pole ed., 2005) (“[The federal government’s] jurisdiction is limited to certain enumerated objects, which concern all the members of the republic . . . . The [states] which can extend their care to all those other objects . . . will retain their due authority and activity.”).

protections of political safeguards<sup>63</sup> touted by the Federalists. In addition to inherent shortcomings in the procedural system, Anti-Federalists feared the “allegedly universal[ ] principle of eighteenth century political science: that any group of rulers would seek to expand their power at the expense of the people.”<sup>64</sup> If these procedural and structural safeguards were to be the only restraint on congressional power, Congress alone would have the power to impose limits on itself.

It was at this point in the historical “dialogue,” with Anti-Federalists firm in their resolve to denounce self-imposed congressional limits, that Federalists turned their attention to the protection offered by a federal judiciary.<sup>65</sup> Finally acknowledging the real threat to state sovereignty, James Wilson explained:

[I]t is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before *the judges*,—when they consider its principles, and find it to be incompatible with the superior power of the Constitution,—it is their duty to pronounce it *void*.<sup>66</sup>

He was not alone in his understanding, as the power of the Court to check Congress became something of a ratification rallying cry for Federalists eager to gain the cooperation of Anti-Federalists.<sup>67</sup>

However, it was federal power the Anti-Federalists feared, not just congressional power. Yoo outlines three of their primary apprehensions about the federal judiciary. First, there was a concern the Court would not be bound by rules of interpretation. Second, the Anti-Federalists viewed judges as equally susceptible to corruption. And third, there was no check on the Court’s decisions.<sup>68</sup> Nevertheless, while engaging in these concerns it became evident the debate was about the kind of authority the courts would

63 See, e.g., THE FEDERALIST NO. 45, at 252 (James Madison) (J.R. Pole ed., 2005) (“[E]ach of the principal branches of the federal government will owe its existence more or less to the favor of the state governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them.”).

64 Yoo, *supra* note 24, at 1381–82 (explaining the Anti-Federalists’ view that “[p]archment barriers . . . could not stand before the natural instinct of the rulers to expand their powers”).

65 *Id.* at 1359, 1383.

66 James Wilson, Pennsylvania Ratifying Convention (Dec. 1, 7, 1787), in 4 THE FOUNDERS’ CONSTITUTION (2000), [http://press-pubs.uchicago.edu/founders/documents/a3\\_2\\_1s11.html](http://press-pubs.uchicago.edu/founders/documents/a3_2_1s11.html).

67 See, e.g., THE FEDERALIST NO. 78, at 415 (Alexander Hamilton) (J.R. Pole ed., 2005) (“[W]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.”). Moreover, if we concede, and most do, the power of judicial review generally, it must also be true that it includes the review of questions about the allocation of power. No Bill of Rights existed when the Constitution was ratified. See 400, *supra* note 24, at 1371.

68 Yoo, *supra* note 24, at 1389–90.

have to resolve disputes, not whether they would have authority to do so.<sup>69</sup> It is this context—the “sophisticated, long-running dialogue between Federalists and Anti-Federalists throughout the states”<sup>70</sup>—in which it becomes evident that “[u]nder the Framers’ conception of judicial review, the federal courts were created [in large part] to protect state rights.”<sup>71</sup>

### B. Text

This Note assumes the logical next step in a principled evaluation of the safeguards of federalism is the text of the Constitution: “For the question is not, what did the framers of the Constitution *hope* or *desire* with reference to judicial review, but what they did *do* with reference to it.”<sup>72</sup> For some time proponents of judicial review in this area seemed content to rely on the structure of the Constitution,<sup>73</sup> or, very generally, the judiciary’s “arising under” jurisdiction—a phrase that has “long confounded judges and scholars.”<sup>74</sup> However, recent scholarship has offered a clearer understanding about the scope of the Article III “arising under” provision and its significant relation to the Supremacy Clause. Therein lies a compelling and textually explicit constitutional foundation for judicial review of federal laws alleged to exceed the scope of congressional power. Even here, a brief gloss of the specific historical context is helpful as a way of understanding the trajectory of the constitutional text.

As they did in so many areas of our political system, the Framers anticipated inevitable conflicts between state and federal law, and carefully considered the best methods to resolve those conflicts. Between Edmund Randolph’s Virginia Plan and William Paterson’s New Jersey Plan, three principal options emerged as to how to best resolve conflict between the federal

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69 *Id.* at 1391. Judge Wilkinson offers a helpful analogy on this point. He explains that

this concern about abuse can be understood by envisioning a hard-fought basketball game. The officials may be too quick on the whistle and call too many fouls, and they may have, in some cases, an effect upon the actual outcome of the game itself. But the fact that referees might unfortunately abuse their authority does not lead to the conclusion that they should have no authority. Someone must enforce the rules of the game. In our system, the Constitution sets the rules, and . . . the judiciary is the ultimate interpreter of them. In law, as in basketball, we have long ago rejected the notion that it is best for a contest to have no referees at all.

J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1692 (2004).

70 Yoo, *supra* note 24, at 1384.

71 *Id.* at 1391.

72 EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS* 2 (1914).

73 See, e.g., Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1505 (2001) (emphasizing “the concept of a limited, written Constitution and the existence of a judiciary”).

74 Anthony J. Bellia Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263, 266 (2007).

government and the states. Initially, both Plans provided for a national judiciary and the use of force to enforce the laws of the federal government against the states.<sup>75</sup> The Virginia Plan also included a congressional negative (or veto) on state laws, whereby Congress could “negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union” in order to ensure federal supremacy.<sup>76</sup> The New Jersey Plan, on the other hand, included a supremacy provision, which made supreme those laws of the United States “made by virtue & in pursuance of the powers hereby . . . vested in them.”<sup>77</sup>

Ultimately, the Virginia Plan prevailed over the New Jersey Plan, but debate continued regarding the proper means by which to ensure federal supremacy. Some, like Madison, were weary of coercive force. Instead, he strongly advocated an unlimited congressional negative.<sup>78</sup> However, “the negative would have allowed Congress to determine for itself the scope of its powers vis-à-vis the states”<sup>79</sup>—a notion that terrified Anti-Federalists already fearful of a tyrannical federal government. In the end, the Convention rejected the negative.<sup>80</sup>

Immediately following rejection of the negative, Luther Martin proposed, as a “substitution,” a supremacy provision not unlike the one from the abandoned New Jersey Plan.<sup>81</sup> The Convention unanimously adopted this supremacy provision “thereby delegating to judges (state and federal) what previously had been the veto’s function of voiding state law contrary to fed-

75 *Id.* at 294–98.

76 *Id.* at 294 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1966)).

77 *Id.* at 296 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 76, at 245).

78 See Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1044–45 (1997) (“Madison was convinced that the fundamental defect of the Confederation was that Congress lacked the sanctioning power necessary to make the states carry out its decisions. . . . [His] obsession with the internal vices of state politics convinced him that both the stability of the federal system and the pursuit of justice required giving the new Congress an unlimited negative on all state laws.”).

79 Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 108 (2003).

80 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 76, at 28.

81 Bellia, *supra* note 74, at 299–300. The provision asserted:

[T]he legislative acts of the United States made by virtue and in pursuance of the articles of the union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, so far as those acts or treaties shall relate to the said states or their citizens and that the judiciaries of the several states shall be bound thereby in their decisions, any thing in the respective laws of the individual states to the contrary notwithstanding.

*Id.* (alterations in original) (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 76, at 286–87).

eral law,”<sup>82</sup> and “requir[ing] courts to police the bounds of federal power by conditioning the supremacy of federal statutes on compliance with ‘this Constitution.’”<sup>83</sup> Thus, even in isolation, the Supremacy Clause intimates judicial review by federal courts as a proper mechanism for maintaining the balance between federal and state power.

Not coincidentally, the very next matter addressed and decided by the delegates at the Convention was a jurisdictional provision of federal court power. The jurisdiction of the federal judiciary would extend to “cases *arising under* laws passed by the general Legislature, and to such other questions as involve the National peace and harmony.”<sup>84</sup> Thus, by giving a national body (now the judiciary instead of the legislature) the power to enforce the supremacy of federal law, the “arising under” jurisdiction was meant to “compensate somewhat for the loss of the [congressional negative].”<sup>85</sup> The Arising Under Clause, then, reinforces the role for the *federal* courts in reviewing and enforcing federal laws.

While the supremacy provision and the “arising under” provision, as originally drafted, already provided for federal judicial review of federalism cases, the Convention went on to “conform the language of the Supremacy Clause to the language of the Arising Under Clause, strengthening the efficacy of both.”<sup>86</sup> After a series of proposals and revisions on both provisions, the parallel between the final products is striking:

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 . . . .<sup>87</sup>

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.<sup>88</sup>

This symmetry was “intentional and structurally crucial.”<sup>89</sup> The Supremacy Clause, in conjunction with the Arising Under Clause, “provided a limited

82 James S. Liebman & William F. Ryan, “*Some Effectual Power*”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 730 (1998) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 76, at 28–29).

83 Clark, *supra* note 79, at 109.

84 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 76, at 221 (emphasis added).

85 Liebman & Ryan, *supra* note 82, at 732; *see also* Bellia, *supra* note 74, at 301 (“Presumably, Madison particularized the ‘arising under’ category of jurisdiction to make certain, after the defeat of the negative, that Congress would have power to enable inferior federal courts to administer federal law in the first instance as a means of maintaining its supremacy.”).

86 Bellia, *supra* note 74, at 301.

87 U.S. CONST. art. VI, cl. 2.

88 U.S. CONST. art. III, § 2, cl. 1.

89 Liebman & Ryan, *supra* note 82, at 708.

means for Congress, through the judiciary, to ensure the supremacy of federal law.”<sup>90</sup>

Furthermore, though the language is “virtually identical,”<sup>91</sup> the central difference between the Clauses is equally as instructive. The Supremacy Clause, and only the Supremacy Clause, qualifies its force to only those laws “*made in Pursuance*” of the Constitution.<sup>92</sup> Thus, the “conditional nature of the Supremacy Clause”<sup>93</sup> indicates “courts must necessarily consider and resolve challenges to the constitutionality of federal statutes.”<sup>94</sup> In other words, “[b]y its terms . . . the Supremacy Clause suggests that courts should prefer federal statutes to contrary state law *only if* the statutes themselves fall *within the scope* of Congress’ *enumerated* powers.”<sup>95</sup> The same condition does not extend to the federal judiciary’s ability to hear the case under the Arising Under Clause; thus, the Court hears all cases arising under the “Constitution, the Laws of the United States, and all Treaties made . . . under their Authority,”<sup>96</sup> but only makes supreme those laws “made in Pursuance [of the Constitution]”<sup>97</sup>—necessitating review of the extent to which the laws conform to constitutionally defined congressional power.

The conditional nature of the Supremacy Clause, emphasized by its relation to the Arising Under Clause, was a central feature of the compromise between Federalist and Anti-Federalists. Alexander Hamilton was explicit about this balance in *Federalist No. 33*. After emphasizing the need for a supreme and unifying federal law, he went on to qualify:

[I]t will not follow from [the Supremacy Clause] that acts of the larger society which are *not pursuant* to its constitutional powers but which are invasions of the residuary authorities of the smaller societies will become the supreme law of the land. These will be merely acts of usurpation and will deserve to be treated as such. . . . [The Clause] *expressly* confines this supremacy to laws made *pursuant to the constitution*.<sup>98</sup>

Thus, the Supremacy Clause is a two-way street. As Bradford Clark explains, “the Clause pursues two distinct goals simultaneously: to secure the supremacy of federal law and to prevent Congress from exceeding the scope of its enumerated powers.”<sup>99</sup> It is a compromise that simultaneously facilitates an able union<sup>100</sup> and entrenches a layer of judicial protection for states from unconstitutional encroachment by the federal government. The con-

90 Bellia, *supra* note 74, at 304.

91 Clark, *supra* note 19, at 1688.

92 U.S. CONST. art. VI, cl. 2 (emphasis added).

93 Clark, *supra* note 79, at 99.

94 *Id.* at 92.

95 *Id.* at 100 (emphasis added).

96 U.S. CONST. art. III, § 2, cl. 1.

97 *Id.* art. VI, cl. 2.

98 THE FEDERALIST NO. 33, at 174–75 (Alexander Hamilton) (J.R. Pole ed., 2005).

99 Clark, *supra* note 79, at 99.

100 See THE FEDERALIST NO. 33, at 174–75 (Alexander Hamilton) (J.R. Pole ed., 2005) (noting that supremacy “flows immediately and necessarily from the institution of a federal government” because otherwise the Constitution would be “a mere treaty, dependent on

text, notion of compromise, and parallel language between the Supremacy Clause and the Arising Under Clause compel recognition of judicial review over constitutionally mandated limits on federal lawmaking power.

### C. Structure

The constitutional text itself provides a critical foundation for understanding the judicial role in federalism cases; however, that understanding is incomplete absent consideration of the structural principles embedded within. Structure informs and adds dimension to text. Here, however, complexity exists because the structure of the Constitution works both in and around the conceptualization of the judicial role in federalism cases. In other words, the structure of the Constitution both offers another constitutional hook for judicial participation in federalism cases and informs the exercise of that participation as developed in the history, text, and structure. While all signs point in the same direction, it is the whole of the Constitution—in context, substance, and form—that offers the clearest directive for the exercise of judicial review.<sup>101</sup> It is helpful, then, to turn to this last component to frame and fuse that which came before.

As adopted, judicial review stems from two structural principles: a written Constitution that grants only limited and enumerated federal power, and the very existence of the judiciary within a separation of powers scheme.<sup>102</sup> First, our written Constitution inherently implies that the federal government may exercise only that authority explicitly surrendered by the people. Ironically, perhaps, this concept is fundamental to Wechsler's contention that the background, default authority is retained by the states and federal law is only "interstitial" in nature.<sup>103</sup> Moreover, in most contexts, state law applies unless displaced by a federal law "*made in Pursuance*" of the Constitution.<sup>104</sup> Thus, the very nature of a written Constitution ultimately points back to the Supremacy Clause, which necessitates judicial review.<sup>105</sup>

Intratextual consistency and the canon against surplusage offer another illuminating structural axiom stemming from a written Constitution. To say there is no judicial review of congressional power—that Congress may exercise federal power up to, and limited only by, its own discretion—would make superfluous the specific and enumerated grants of power defined in Article I, especially the Necessary and Proper Clause. Thus, "[a]n absence of judicial review would transform our constitutional system into one of legislative supremacy, which contradicts the Constitution's core principle of a

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the good faith of the parties, and not a government; which is only another word for POLITICAL POWER AND SUPREMACY").

101 Some go a step further, suggesting "the structure of the federal government itself dictates the existence of judicial review." Prakash & Yoo, *supra* note 38, at 358.

102 *Id.* at 359–60.

103 *See supra* Section II.A.

104 *See supra* Section III.B.

105 *See supra* Section III.B.



national government of limited powers.”<sup>106</sup> In other words, without judicial review, our Constitution could be altered and amended through the ordinary lawmaking process—which cannot be the case if Article V (the rigorous and constitutionally mandated process for amending the Constitution) is to mean anything.<sup>107</sup>

Second, the separation of powers between the branches of the federal government and the mere existence of an independent federal judiciary indicate a judicial role for checking congressional overreach. In *Federalist No. 78*, Hamilton wrote:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two . . . the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.<sup>108</sup>

The Judiciary interprets the Constitution in order to rule on the constitutionality of a challenged law. It would undermine its function, and indeed veneration for the Constitution itself, if the Court were required to hear “all cases arising under” and enforce them without regard to their constitutionality. Eliminating both the judicial check on congressional authority and its power of judicial review would be a “perverse [and] asymmetrical allocation of power.”<sup>109</sup> Such a disadvantage “would damage the separation of powers by undermining the independence of the judiciary and its ability to resist the encroachments of the other branches.”<sup>110</sup>

As important as the now well-established role of the judiciary in federalism cases is the way in which the structure of the Constitution informs that role. There is no one “federalism clause” in the Constitution; yet “references to federalism pervade the constitutional scheme.”<sup>111</sup> It is within the underlying and overarching scheme, then, that “[t]he Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two

106 See Prakash & Yoo, *supra* note 73, at 1469.

107 See *id.* Article V requires agreement from two-thirds of both the Senate and the House (or state legislatures), and three-fourths of the state legislatures or state conventions in order to amend the Constitution. U.S. CONST. art. V.

108 THE FEDERALIST NO. 78, at 415 (Alexander Hamilton) (J.R. Pole ed., 2005). Here, the “intention of the people” is something much broader than the intent expressed through the immediate political process. Cf. Richard W. Garnett, *Symposium: Legislative Prayer and Judicial Review*, SCOTUSBLOG (Sept. 27, 2013, 1:13 PM), <http://www.scotusblog.com/2013/09/symposium-legislative-prayer-and-judicial-review/> (explaining that “[j]udicial review is one important mechanism . . . for holding later majorities to the earlier deal, and for delivering on the promises that earlier majorities made to later minorities”).

109 Prakash & Yoo, *supra* note 38, at 361.

110 *Id.*

111 Patrick M. Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights*, 36 SETON HALL L. REV. 851, 855 (2006).

political capacities, one state and one federal, each protected from incursion by the other.”<sup>112</sup> Split sovereignty was quickly reinforced by the Tenth Amendment, which made explicit the residual powers of state sovereigns, underscored the limited nature of federal power, and, in so doing, made permanent the inviolable sovereignty retained by the states.

Two conclusions flow from the subtle, yet central, conception of “our federalism.” First, the value of state sovereignty permeates and informs every word of constitutional text. Thus, its importance informs the Court’s role in judicial review of congressional overreach. This is not to say the judiciary should frame its analysis in terms of state sovereignty—no part of the text gives it that function—rather, understanding the reason for limited federal power offers purpose and direction for imposing constitutionally mandated limits on federal power. Because the split atom of sovereignty supports the American system of government, it is paramount for the judiciary to hold firmly the lines drawn by the Constitution against federal incursion of state sovereignty.

Second, the permanence of states as sovereign entities within our system of government has critical, albeit narrow, force of its own. In addition to the many provisions accentuating the importance of state sovereignty, the Tenth Amendment is the clearest place to identify the source of this force.<sup>113</sup> Though the limits of Tenth Amendment are largely “structural, not substantive,”<sup>114</sup> there is a substantive component inherent in that very structure. If sovereignty is the ability to maintain one’s own government, and to make and enforce one’s own laws, then, based on the permanence of state sovereignty embedded in the Constitution, the Constitution guards at least that much for the states without regard to limits on federal power. This is a narrow,<sup>115</sup> but powerful, exception to the otherwise consistent constitutional directive for courts to protect state sovereignty only by enforcing the constitutional limits of federal power.<sup>116</sup>

The Constitution’s history, text, and structure—individually but more importantly, together—require judicial review of federal laws that challenge

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112 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

113 See generally *New York v. United States*, 505 U.S. 144 (1992) (suggesting the Tenth Amendment has some independent force of its own).

114 *South Carolina v. Baker*, 485 U.S. 505, 512 (1988) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537–54 (1985)).

115 Note, this is a different proposition than the one put forth in *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976), which sought to protect a zone of “integral” and “traditional” state functions. See *infra* notes 137–39 and accompanying text (elaborating on the very narrow, independent force of the Tenth Amendment).

116 This is a distinction Professor Gerken does not identify. Thus, she erroneously relies on anti-commandeering cases to support her view that courts should conduct a federalism analysis in terms of state sovereignty. Anti-commandeering cases, however, more accurately flow from the narrow positive protection of state sovereignty found in the Tenth Amendment, and are in this way fundamentally different than other federalism cases. See *infra* notes 137–39 and accompanying text.

the scope of Congress's enumerated, and therefore limited, powers. The political safeguards of federalism offer the states a voice in the lawmaking process, but they do nothing to negate the Court's role of ensuring that the product of that process conforms to the dictates of the Constitution.

### III. FRAMING THE JUDICIAL ANALYSIS

#### A. *The Theoretical Framework*

There is one federalism. The safeguards of federalism are complex in their artistically woven security, twofold in process, but ultimately one, unified design that defends our structure of government. There is no choice in the matter. Context cannot drive either the safeguard selected, or its application—the Constitution drives the analysis. Together, and respectively, political safeguards and judicial review protect a state sovereignty that is malleable at the margins (political safeguards), enduring as to its very existence (anti-commandeering principle), and inviolable to federal incursion (judicial review enforcing the limits of enumerated federal powers).

As most do, this Note takes for granted the political safeguards as one element of federalism protection. Thus, focusing on the judiciary, Part II demonstrated the constitutionally established role for the Court in protecting *the* federalism prescribed by the history, text, and structure of our Constitution. Because there is one constitutional theory dictating the roles of the political process and the Court, it follows that the same theory must necessarily inform the functioning of those roles. The Court has a constitutional duty to ensure that only those laws made in pursuance of the Constitution become supreme over conflicting state law. As the last line of defense protecting the delicate federal balance, the Court is charged with ensuring that the supreme law of the land conforms to the limited power vested in its makers. Thus, the Court must approach these questions in terms of constitutional limits (negative implications of enumerated powers) on federal power—not in terms of state sovereignty. To be sure, state sovereignty is a real and present consideration for the Court—structure informs text—but the judicial role in that structural balance is defined in terms of limits on federal power.<sup>117</sup> From the Court's perspective, limited federal government is a means to a state sovereignty end.

Conversely, procedural protections can be conceived in state sovereignty terms. The text of the Constitution makes it so.<sup>118</sup> In other words, it is because of the sovereign interests of the states that they may influence, and thus limit, federal power—state sovereignty is a means to an end of limited federal power. Indeed, the political safeguards represent a practical reason why the Court's role should not be conceived in state sovereignty terms.

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117 To reiterate, the Court limits federal power by enforcing the boundaries of the enumerated powers laid out in the Constitution, based on its charge to hear cases "arising under" the laws of the United States and to make supreme only those laws made in pursuance of the Constitution.

118 See *supra* notes 48–52 and accompanying text.

There is no way for the Court to “mark [ ] the outer limits of federal authority by identifying the bounds of state power”<sup>119</sup> because there are no fixed boundaries to state power. State power is (a) residual, and (b) malleable based on the vigor of political safeguards. This is the reason the Court’s analysis in *National League of Cities v. Usery* could not stand the test of time.<sup>120</sup>

Thus, the dual safeguards of federalism—the political process and judicial review—are not in any sense incompatible. While, contextually, there is overlap and sometimes tension, conceptually, they use different means, serve different ends, and maintain a different framework of analysis.<sup>121</sup> When the Court protects state sovereignty by imposing the limits of enumerated powers on congressional legislation, a political safeguards objection is a non sequitur. This is a single, cohesive, constitutionally mandated theory in action.<sup>122</sup>

Professor Gerken disfavors a single theory of federalism protection because she overlooks the Constitution’s text, informed by history and structure.<sup>123</sup> Without such a theory, she misconceives the framework through which the Court’s analysis should take place. Despite her criticisms of cases that “rely on state sovereignty to limit federal power,”<sup>124</sup> she finds this line of doctrine “more manageable, more comprehensible, and therefore more likely to endure” than those that focus on limits to federal power.<sup>125</sup> But such affection is misplaced on a framework divorced from—indeed, antithetical to—the Constitution. The judicial role is to ensure all federal laws, subject to the jurisdictional limits of Article III, conform to the Constitution before they become supreme.

119 Gerken, *supra* note 9, at 96.

120 See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548 (1985) (overruling *Usery* and expressing “doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress’s Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty . . . because of the elusiveness of objective criteria for ‘fundamental’ elements of state sovereignty”); *id.* at 550 (highlighting “the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies”).

121 Importantly, both safeguards protect the same—the only—federalism.

122 Here, the “balance” seems double-stacked in favor of the states. However, the Supremacy Clause is a two-way street, and this analysis is merely confined to the more controversial of the two directives.

123 See Gerken, *supra* note 2, at 1550–51 (“We need not hew exclusively to one vision of federalism. We can choose all of them at once. . . . Every flavor of federalism can be found somewhere in our system. . . . [T]here are many federalisms, not one.”).

124 See Gerken, *supra* note 9, at 86, 114 (concluding even though decisions defining federal power in relation to the states rightly take a relational approach, they are “misguided” because they fall short of “captur[ing] the deeply integrated, highly interactive relationship that exists between the states and federal government”).

125 *Id.* at 86–87.

### B. *Framing for the Future*

To recap, there is one federalism, not many. Furthermore, the Constitution establishes a role for the courts in federalism cases and defines that role in terms of limits on federal power.<sup>126</sup> Professor Gerken has no counterclaim on this point because she disregards the Constitution's text. This Section challenges Professor Gerken's support for state-centric analysis and her criticism of judicially imposed limits on enumerated federal power, by her own standards of endurance and manageability.<sup>127</sup>

#### 1. Defining Federal Power in Relation to the States

Though Professor Gerken offers a litany of justifications for defining federal power in relation to the states,<sup>128</sup> such justifications are largely undermined by (1) a judiciary with the power to enforce limits on federal power,<sup>129</sup> and (2) an understanding of the value served by state sovereignty.<sup>130</sup> More specific engagement of these claims is outside the scope of this Note. Nevertheless, it is worth highlighting the line of cases that "define federal power in relation to the states," which Professor Gerken champions as "more cogent, more intuitive, and more likely to last past the next round of federalism fights."<sup>131</sup>

She places in this category of cogency and endurance *Gregory v. Ashcroft*,<sup>132</sup> *New York v. United States*,<sup>133</sup> *Printz v. United States*,<sup>134</sup> the Eleventh Amendment cases, cases involving the Enforcement Clause of the Fourteenth Amendment, and *National Leagues of Cities v. Usery*.<sup>135</sup> While she is right, in a cursory sense, that each of the aforementioned cases uses state sovereignty as a launching pad to limit federal power, she is wrong to group them together as members of the same class. Untangling this contrived coalition reveals the impotence of a general rule that defines the limits of federal power in relation to the states.

*Gregory* was decided in relation to the states, and rightly so. It was not a case imposing constitutional limits on congressional power; it was, rather, a case of statutory interpretation. There, the Court expressed the clear statement rule to ensure that when Congress regulates *within* its power (checked only by the political process), the political process actually has an opportunity to safeguard state autonomy.<sup>136</sup> Thus, that case was fundamentally dif-

126 See *supra* Part II.

127 See Gerken, *supra* note 9, at 87, 95.

128 *Id.* at 96–97.

129 See *supra* Part II.

130 See *infra* Part IV.

131 Gerken, *supra* note 9, at 95.

132 501 U.S. 452 (1991).

133 505 U.S. 144 (1992).

134 521 U.S. 898 (1997).

135 426 U.S. 833 (1976).

136 See *Gregory*, 501 U.S. at 464.

ferent than cases asking whether a given regulation is within congressional power in the first place.

*New York* and *Printz* are likewise misplaced in this group. The anti-commandeering principle flows from the narrow substantive structure of the Tenth Amendment.<sup>137</sup> In other words, the Tenth Amendment does not define the scope of state sovereignty against which federal power pushes, but it does recognize the permanence of state sovereignty. In doing so, it protects sovereignty as such—not “integral” or “traditional” state functions,<sup>138</sup> but rather those powers inseparable from sovereignty itself (i.e., making one’s own laws). However,

to say that the Constitution assumes the continued role of the States is to say little about the nature of that role. . . . and the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies.<sup>139</sup>

Therefore, the anti-commandeering cases are categorically different, and not instructive for the Court’s more general role in policing constitutional limits on federal power.

The Eleventh Amendment cases, and cases about the Enforcement Clause of the Fourteenth Amendment, suffer from similar categorical misplacement. Professor Gerken recognizes that the focus on states in Eleventh Amendment cases is “overdetermined given the nature of the constitutional inquiry. The same is probably true of the state-centered Fourteenth Amendment cases, where state action is a necessary condition for regulation.”<sup>140</sup> Thus, it is misleading to point to such outliers as representative of a general class.

That leaves only *Usery*<sup>141</sup>—“unsound in principle and unworkable in practice”<sup>142</sup>—as the sole representative of a general approach that defines federal power in relation to the states. Its nine-year life is not the poster child for manageability and endurance on which one would want to rest her case.<sup>143</sup>

## 2. Limits of Enumerated Federal Powers

Much of Professor Gerken’s advocacy for framing state sovereignty as the means for limiting federal power stems from what she perceives as the short-

137 See *supra* notes 114–16 and accompanying text.

138 See *Usery*, 426 U.S. at 851.

139 *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985).

140 Gerken, *supra* note 9, at 97 (citing *United States v. Morrison*, 529 U.S. 598, 620–22, 626 (2000)).

141 426 U.S. 833 (protecting a zone of traditional state functions from federal incursion).

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

143 In fairness, Gerken describes *Usery* as a “swing[ ] and [a] miss[ ]” even though it purported to use her favored framework. Gerken, *supra* note 9, at 100 n.86. The point, however, is that, in context, *Usery* is the only model available to her.

comings of “defining federal power in isolation.”<sup>144</sup> She contends that when, “[r]ather than trac[ing] the (state) boundaries that federal power cannot cross, the Court demarcates federal power without looking to the states,”<sup>145</sup> it results in “a failure on almost any measure.”<sup>146</sup> Put differently, she finds that a commitment to constitutionally defined limits on federal power turns out to be nothing more than “identify[ing] limits through sheer force of logic”<sup>147</sup>—distinctions without a difference. Her misgivings reduce to two main points.<sup>148</sup>

First, Professor Gerken is skeptical of categorical limits, wherein the Court declares that, “*by definition*, something isn’t within the ambit of Article I.”<sup>149</sup> Most notably, she refers to two categorical distinctions featured in the Court’s more recent Commerce Clause jurisprudence: the economic-noneconomic distinction,<sup>150</sup> and the activity-inactivity distinction.<sup>151</sup> She is unsettled by the notion that “distinctions that played no role in prior cases suddenly [took] on doctrinal salience.”<sup>152</sup> However, far from unsettling, the

144 *Id.* at 97.

145 *Id.* (citing Alison L. LaCroix, *The Shadow Powers of Article I*, 123 *YALE L.J.* 2044, 2047, 2050–51 (2014)).

146 *Id.* at 87.

147 *Id.*

148 In a third point, Gerken raises distinct concerns about the Necessary and Proper Clause; namely regarding the refusal by some members of the Court—those insistent on enforcing limits inherent in constitutionally enumerated powers—to apply the Necessary and Proper Clause as a blank check. *Id.* at 105–07. She worries, first, about the malleability of the integral part principle derived from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819), and featured in the Court’s modern jurisprudence. *See id.* at 105–06 (first citing *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012); and then citing *Gonzales v. Raich*, 545 U.S. 1 (2005)). Second, she worries about the independent meaning said to flow from the words “necessary” and “proper.” *See id.* at 105–07; *see also* *Bond v. United States*, 134 S. Ct. 2077, 2101 (2014) (Scalia, J., concurring in the judgment) (explaining that a law can be necessary but not proper); *NFIB*, 132 S. Ct. at 2592 (same); *Raich*, 545 U.S. at 39 (Scalia, J., concurring) (citing *McCulloch*, 17 U.S. (4 Wheat.) at 421–22) (same). Professor Gerken’s criticisms of the Necessary and Proper Clause jurisprudence that imposes limits on congressional power are, generally speaking, subject to the same shortcomings as her two more central arguments regarding categorical distinctions and level of generality. Therefore, instead of rehashing the same arguments, the Necessary and Proper Clause is not taken up directly by this Note, but is indirectly addressed in this Section. For a thoughtful account of the original meaning of “necessary and proper,” see GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 2* (2010) (acknowledging the Constitutional Convention’s “silen[ce] on the meaning of the necessary and proper power” and turning to other meaningful influences on the framing generation like agency law, administrative law, and corporate charters (quoting BERNARD H. SIEGAN, *THE SUPREME COURT’S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY 1* (1987))). They ultimately suggest that “necessary” was understood as a “means” term implying a moderately close fit to the end, and “proper” implied an obligation to take account of the relevant effects of an action. *Id.* at 1–12.

149 Gerken, *supra* note 9, at 104.

150 *See* *United States v. Lopez*, 514 U.S. 549, 566 (1995).

151 *See NFIB*, 132 S. Ct. at 2587.

152 Gerken, *supra* note 9, at 104.

Court's resolve to conform to that which came before is comforting and commendable. While it is true that cases like *Lopez* and *NFIB* were the first to explicitly identify these distinctions, the very point of limiting principles is that they reflect what is true of all prior precedent.<sup>153</sup>

In *Lopez*, a majority of the Court expressed the sentiment that post–New Deal era jurisprudence pushed the Commerce Clause to, and perhaps over, its constitutional breaking point. Writing for the Court, Chief Justice Rehnquist acknowledged: “Admittedly, some of our prior cases have taken long steps down [the] road” of “pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”<sup>154</sup> However, he went on to resolutely assert, “[W]e decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated . . . . This we are unwilling to do.”<sup>155</sup> The Court was not willing to expand prior caselaw, but, importantly, neither did it overrule. Instead, it committed itself to a limiting principle—here, commercial activity.

Therefore, the Court did not create these categories out of thin air. Our Constitution and our federal structure imply limits on federal power. During a significant period in our nation’s history, there were, effectively, no limits on congressional power. To recall the massive body of law developed in the wake of that unadulterated deference would have catastrophic consequences for the stability of our country:

[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature.<sup>156</sup>

Thus, the Court prudently discerned a limiting principle with the effect of maintaining stability and enforcing limits inherent in the Constitution’s enumerated powers and structure of split sovereignty. In sum, limiting principles, like the ones featured in *Lopez* and *NFIB*, have their origin in precedent, and, more importantly, in the Constitution itself—hardly indefensible.

Second, and relatedly, Professor Gerken voices skepticism about doctrinal distinctions—like economic-noneconomic and activity-inactivity<sup>157</sup>—given the reality that many cases “boil down to the level of generality at which

153 See *Lopez*, 514 U.S. at 560 (synthesizing prior caselaw and determining that “the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”).

154 *Id.* at 567.

155 *Id.* at 567–68.

156 *Id.* at 574 (Kennedy, J., concurring).

157 See, e.g., Gerken, *supra* note 9, at 105–06, 106 n.123 (“Even the active/inactive distinction the Court has drawn depends largely on the level of generality at which the activity is cast.”).



the regulated activity and the regulation is cast.”<sup>158</sup> In essence, she adopts a criticism familiar to due process and equal protection jurisprudence that, by adjusting the level of generality at which they approach the issue, judges are able to employ their own value judgments in the outcome.<sup>159</sup> At first glance, this analysis appears to hold some water, as evidenced in *NFIB v. Sebelius*. In the Commerce Clause portion of that case, labeling the choice not to purchase health insurance as an activity (within reach of Congress’s commerce power), or inactivity (beyond the scope of congressional power), turned exclusively on the level of generality with which the Court defined the relevant market.<sup>160</sup> Plausibly, one could define the market as that for health insurance—in which case those who do not purchase insurance are not in the market. But equally as plausible, on at least some level, one could define the relevant market as that for healthcare—in which all will inevitably participate. Thus, according to Professor Gerken and others, the choice ultimately turns on the will of the judge.<sup>161</sup>

Admittedly, there is no clear “economic” or “activity” requirement—or any bright-line limitation for that matter—written into the Commerce Clause.<sup>162</sup> There is, as Chief Justice Rehnquist conceded, some “legal uncertainty” in the application of categorical limits, as there is with all “enumerated powers . . . interpreted as having judicially enforceable outer limits”;<sup>163</sup> however, “[a]ny possible benefit from eliminating this ‘legal uncertainty’ would be at the expense of the Constitution’s system of enumerated powers.”<sup>164</sup> As Judge Easterbrook once put it, “Written instruments are meant to have bite; and our Constitution not only is written but also establishes a system of limited government. If there are limits then there are boundaries to be patrolled. Otherwise our government is not limited after all.”<sup>165</sup> In other words, if for the sake of certainty (achieved, here, by eliminating limiting principles from the analysis) we sacrifice the commitment to constitutionally

158 *Id.* at 106.

159 *See, e.g.*, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1087 (1990) (explaining that even when Justices claim to look objectively to tradition, the evaluation necessarily “involves value judgments”).

160 *See NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

161 Judge Easterbrook fosters a similar argument, acknowledging the notion that “[b]oosting the level of generality . . . can be a method of liberating judges *from* rules. . . . Movements in the level of constitutional generality may be used to justify almost any outcome. It is correspondingly important that we have a consistent theory of choice.” Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 355, 358 (1992).

162 This complicates the otherwise reasonable method of approaching the level of generality as a part of the Constitution’s text. *See* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 149 (1990). *But see* Easterbrook, *supra* note 161, at 362 (identifying a limit to Bork’s theory because it has the tendency to reject change even on matters the Constitution was designed to accommodate).

163 *United States v. Lopez*, 514 U.S. 549, 566 (1995).

164 *Id.*

165 Easterbrook, *supra* note 161, at 374 (citation omitted).

enumerated and limited federal power, what have we achieved but the destruction of that which we sought to protect?

Still, “[u]nless there is an answer” such that constitutional law is not left to the absolute discretion of a judge, “we should abandon hope of government by law.”<sup>166</sup> Justice Scalia submitted a similar plea for constraining analytical principles in the area of substantive due process in his opinion in *Michael H. v. Gerald D.*,<sup>167</sup> and proceeded to offer one:

Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general.<sup>168</sup>

Defending Justice Scalia’s approach is beyond the scope of this Note, but the purpose in raising it is twofold. First, level of generality is not an easy problem, but it is one the Court must engage as an inherent element of serving the judicial function. Second, because of the difficulty and potential for abuse present in defining the level of generality, a principled approach—that is, one that dictates outcomes by a measurable source outside of the judge himself—is necessary. It is also possible. Whether or not the Court has actually applied a principled basis when it sets the level of generality is a question for another day—but it is a question separate from understanding the Court’s role in enforcing constitutional limitations on congressional power.

It is not a persuasive argument to suggest the Court should not enforce the boundaries of Article I’s enumerated powers because any such boundary is marked by nothing more than the absolute discretion of five members. In commerce cases, as elsewhere, “[i]t is emphatically the province and *duty* of the judicial department to say what the law is.”<sup>169</sup> When it says what the law is, it is bound by text, precedent, and principle—and ultimately called upon to exercise “merely judgment” not “will.”<sup>170</sup>

Categorical doctrinal distinctions and principled selections of the applicable level of generality are rooted in the Constitution’s enumerated powers<sup>171</sup> and refined by settled tradition and precedent. Decisions that utilize such tools to define federal power in terms of the powers granted in the

166 *Id.* at 350.

167 See 491 U.S. 110, 127 n.6 (1989) (Scalia, J., dictum) (explaining that “a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all,” but rather it “permit[s] judges to dictate rather than discern the society’s views”).

168 *Id.* (emphasis added). Justice Scalia went on to explain that even though a lack of societal tradition might force the Court into a higher level of generality, in the case at hand, “there [was] such a more specific tradition.” *Id.*

169 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

170 *THE FEDERALIST* No. 78, at 412 (Alexander Hamilton) (J.R. Pole ed., 2005).

171 These categorical distinctions emanate from the text of the Constitution in two ways: first, from an Article I perspective, as the units of negative implication inherent in enumerated powers, and second, from an Article III perspective, as workable units by

Constitution are enduring, then, because of their entrenchment with the text of the Constitution; and they are manageable precisely because of the laboriously located limiting principles.<sup>172</sup> The Constitution not only mandates a single federalism, but, by its terms and vesting of power, it also provides for its lasting security.

#### IV. STATE SOVEREIGNTY: THE OTHER PART OF THE SPLIT ATOM

Perhaps the most unconvincing component of Professor Gerken's argument is her premise that limiting federal power by enforcing the boundaries of Article I results in "limits for limits' sake."<sup>173</sup> That the written Constitution charges the judiciary with an obligation to enforce the limits of enumerated powers sufficiently undermines her theory—there is a separate good that flows from upholding the edicts of the Constitution. But, equally as important, the great value in *what* the Constitution achieves by ensuring a limit to federal power cannot be overstated. In other words, it would be wrong to emphasize the value of state sovereignty only (and inaccurately) as a vehicle by which the courts measure federal power. Instead, state sovereignty, as half the "genius" of the split atom of sovereignty,<sup>174</sup> is its own end.

In some ways, it seems unnecessary to march through the list of values served by the state sovereignty aspect of federalism, given that the Court has taken the charge upon itself to educate and remind readers time and time again.<sup>175</sup> Nevertheless, a brief review offers important insight into the ultimate purpose for which judges enforce the limits of Article I and thus help to preserve the constitutional design.

Indeed, limited federal power and protection against tyranny is one goal of split sovereignty; however, it is not the only goal. Our federal structure offers the people a closeness and control over both levels of government that could not be achieved if the sovereignty of either was sacrificed. The American system is such that "federalism [gives] each level of government certain advantages and responsibilities . . . [and leaves] exploitation of the resulting opportunities to govern open to the process of political competition."<sup>176</sup> Thus, federalism ensures to the people a meaningful choice in their own governance. Moreover, that choice is protected in the cycle of the system whereby limited quantities of power "foster [ ] a competition for power,"<sup>177</sup> which increases accountability to the people across the board. This active, people-driven balance of power could not exist without state sovereignty.

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which the Court fulfills its duty to hear, and resolve, "arising under" cases in accordance with the Supremacy Clause.

172 See Gerken, *supra* note 9, at 92.

173 *Id.* at 111.

174 *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy J., concurring).

175 See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566, 2578 (2012); *United States v. Lopez*, 514 U.S. 549, 552 (1995); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

176 Rakove, *supra* note 78, at 1042.

177 Garry, *supra* note 111, at 857.

Even beyond its role in the effective power dynamic of our federalism, however, state sovereignty offers a multitude of distinctive virtues. First, smaller state sovereigns offer more opportunities for political participation by the citizenry.<sup>178</sup> Second, and related to increased political participation, states have an ability to be more responsive to the unique needs of their people, which allows people to organize and govern themselves by shared common values.<sup>179</sup> This enhanced self-determination results in more desirable laws for more people than could a unified federal law. Finally, state sovereignty also allows states to function as laboratories of democracy, which ultimately produces “more innovation and experimentation in government.”<sup>180</sup>

Raising the values of federalism here is not meant to be a misplaced and woefully abbreviated civics lesson. Instead, recounting the values of federalism highlights the important state-sovereignty consequences achieved by an intentional focus on federal power. The Court has a constitutionally assigned responsibility to enforce the written bounds of the Constitution, and thus preserve the federal structure—of which state sovereignty, in its own right, is an important end. Indeed, “[t]here is *nothing* in the U.S. Constitution that is more important or that has done more to promote peace, prosperity, and freedom than the federal structure of that great document.”<sup>181</sup>

#### CONCLUSION

The Constitution designed one federalism with two safeguards. The political process offers the people of each state a voice in the congressional allocation of power between the states and the federal government. However, to ensure the balance struck comports with the parameters of constitutional design, Article III makes it the duty of the judiciary to guarantee that a challenged product of the political process has its origin in an enumerated power. No provision of the Constitution makes it the Court’s prerogative, let alone its duty, to define for the political process the boundary of state sovereignty. Instead, itself a creation of that which it upholds, the Court is required to hold firmly the lines drawn by the text of the Constitution in order to preserve and protect a fundamental baseline in the federal balance. The two safeguards work in tandem to protect our federalism.

Admittedly, the allocation of power in the twenty-first century is different from anything the framers could have envisioned when crafting the dual safe-

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178 Timothy Zick, *Active Sovereignty*, 21 ST. JOHN’S J. LEGAL COMMENT. 541, 566 (2007) (explaining that “sovereignty requires that states, as political communities, provide the sorts of direct governance opportunities that the federal Constitution omits”).

179 Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)) (explaining that “[state] laws can be adapted to local conditions and local tastes, while a national government must take a uniform . . . approach”).

180 See *Gregory*, 501 U.S. at 458.

181 Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 770 (1995).

guards of federalism. However, it does not follow that their design “can’t survive in a world where sovereignty is not to be had, where regulatory overlap is the rule.”<sup>182</sup> The constitutional limit on federal power may, as a matter of practical reality, fall in a different place than it once did, but that says nothing about *who* is charged with holding that line or *how* they go about enforcing it. That judicial function is entrenched in the Constitution. The Court, by design, is a key player—the last line of defense—in maintaining our federalism. Logically, the Constitution dictates the rules of the game it created, and, in doing so, charges the judiciary with the authority to enforce the limits of constitutionally enumerated powers.

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182 Gerken, *supra* note 9, at 113.