BUT WHEN EXACTLY WAS JUDICIALLY-ENFORCED FEDERALISM "BORN" IN THE FIRST PLACE?

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In only three words, "Constitutional Federalism Reborn," the title of this panel manages to commit two misnomers. First, there is "constitutional federalism," which appears to refer to constitutional limits on the scope of federal power. Aside from the fact that federalism means preserving Congress's power to act in areas properly subject to national regulation as much as it means protecting the sovereignty of the states, no one has ever really doubted that there are constitutional limits on the scope of federal power. Even the Court in *Garcia v. San Antonio Metropolitan Transit Authority*[1] recognized that there are limits on what Congress can do under the Commerce Clause.[2] So there is nothing interesting in asking whether such limits exist or not.

What the people who named this panel had in mind when they used the phrase "constitutional federalism," and what I am sure occurred to most of you when you read the title, were *judicially-enforced* limits on the power of the national government vis-à-vis the states. That is what *Garcia* purported to get rid of, and what supposedly signaled the death of constitutional federalism.[3] What we are really talking about, then, is the role of the courts–specifically of the Supreme Court–at the boundary between state and national sovereignty. So we should use the term "judicially-enforced federalism" rather than "constitutional federalism."

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1. 469 U.S. 528, 555-56 (1985) (upholding the application of federal wage and hour laws to state and local employees).

2. 469 U.S. at 556; *see also* Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 354-65.

3. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 23-24 (1995); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

The second misnomer is "reborn," which suggests that "judicially-enforced federalism" actually lived, flourished, and then died. One of the great hoaxes of legal history is the grand tradition of judicially-enforced limits on Congress's powers under Article I–a tradition that was supposedly killed sometime in the late 1930s, or maybe it was the '60s or even the '70s, by an irresponsible, centralizing, nationalizing Court. And now, the Supreme Court is acting as if it wants to resurrect the tradition, to take us back to our roots and put the Constitution back where it used to be, where it is supposed to be.

Well, let us examine that. When exactly was this grand tradition of judicially-enforced federalism born? 1789 seems like the logical place to begin our search. But the Founding turns out to be a lot more complicated in this respect than most judges and lawyers would like to believe. At least some of the Framers certainly anticipated that the Court would exercise judicial review,[4] but the issue was rarely discussed in any depth.[5] When it did come up, everyone simply assumed that

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4. *See, e.g.*, ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW 56-71 (1989); J. M. SOSIN, THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA 227-69 (1989).

5. Only Brutus and Publius offered extensive discussions of judicial review, and neither of these essayists was very widely read at the time. *See* THE FEDERALIST NOS. 78, 81 (Alexander Hamilton); Brutus XI, N.Y.J., Jan. 1, 1788, *reprinted in* 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 512 (John P. Kaminski and Gaspare J. Saladino eds., 1984) [hereinafter "DOCUMENTARY HISTORY"]; Brutus XII, N.Y.J., Feb. 7, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* at 72; Brutus XII, N.Y.J., Feb. 14, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* at 120; Brutus XV, N.Y.J., Mar. 20, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* at 431. In addition, judicial review was mentioned by James Wilson at the Pennsylvania Ratifying Convention and Oliver Ellsworth in Connecticut. *See* James Wilson, *in* 2 DOCUMENTARY HISTORY, *supra* at 450; Oliver Ellsworth, *in* 3 DOCUMENTARY HISTORY 553 (Merrill Jensen ed., 1978). Article III was extensively debated in Virginia, where a number of the delegates made reference to judicial review, though none offered detailed analysis. *See* Patrick Henry, *in* 9 DOCUMENTARY HISTORY 1070 (John P. Kaminski and Gaspare J. Saladino eds., 1984); Edmund Randolph, *in* 9 DOCUMENTARY HISTORY, *supra* at 1085; Patrick Henry, *in* 9 DOCUMENTARY HISTORY, *supra* at 1219; George Nicholas, *in* 10 DOCUMENTARY HISTORY, *supra* at 1327; George Mason, *in* 10 DOCUMENTARY HISTORY, *supra* at 1361; John Marshall, *in* 10 DOCUMENTARY HISTORY, *supra* at 1431. Finally, a handful of pamphleteers and newspaper commentators referred to judicial review. *See, e.g.*, ARISTEDES, REMARKS ON THE PROPOSED PLAN OF A FEDERAL GOVERNMENT (1789) *reprinted in* 15 DOCUMENTARY HISTORY, *supra* at 531; Fabius IV, PA. MERCURY, Apr. 19, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* at 182; *Report of Proceedings and Debates*, PA HERALD, Dec. 7, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* at 524; *A Well-Wisher to Good Government*, VA. INDEP. CHRON., June 18, 1788, *reprinted in* 10 DOCUMENTARY HISTORY, *supra* at 1644. That this list exhausts the discussion of judicial review is remarkable given the many volumes of essays, articles, and pamphlets that were published and the hundreds of pages of recorded debates. The contest over whether to adopt the Constitution dominated public discussion as few issues have in

the Supreme Court would exercise review power, disagreeing only about whether this was a good or a bad thing.[6]

There was, as a result, extraordinarily little discussion about how judicial review would work or what exactly it would mean in practice. Realistically, though, how could there be? Judicial review was a novel doctrine, outside the Framers' actual experience. It made sense in the abstract, given the emerging view of the Constitution as positive law superior to statutory or common law. But the idea that courts could provide a strong check on popularly-elected legislatures would have seemed laughable at the time. Consider the experience in the states prior to 1787. Only a couple of courts had suggested that they might have the power to review legislation under their state constitutions, and most of them had gone to extreme lengths to avoid having to use it.[7] In the few instances in which a court purported to have the power to strike down a legislative act–all concerning judicial procedure, mostly the right to trial by jury, and none involving anything especially controversial–the judges were subjected to a humiliating dressing-down from an angry legislative assembly.[8] The scope

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American history, and it kept printers and publishers in all thirteen states busy for more than nine months. In reading through this vast amount of material, the most striking thing by far is how rarely and quietly judicial review appears in the discussion.

6. Compare, for example, the debate in the New York newspapers between Brutus and Publius. *Compare* Brutus XI, N.Y.J., Jan. 31, 1788, *in* 15 DOCUMENTARY HISTORY 512 (John P. Kaminski and Gaspare J. Saladino eds., 1984); Brutus XII, N.Y.J., Feb. 7, 1788, *in* 16 DOCUMENTARY HISTORY, *supra* at 72; *and* Brutus XV, N.Y.J., Mar. 20, 1788, *in* 16 DOCUMENTARY HISTORY, *supra* at 431, *with* THE FEDERALIST NOS. 78, 81 (Alexander Hamilton).

7. *See* CLINTON, *supra* note 4, at 48-55; SOSIN, *supra* note 4, at 203-23. In *Commonwealth v. Caton*, 4 Call 5 (Va. 1782), for example, the judges disagreed about whether they could or should assert a power to declare an act of the assembly void. They eventually dismissed the case without making clear their grounds for doing so. *See* SOSIN, *supra* note 4, at 208-09. In *Rutgers v. Waddington* (N.Y. Sup. Ct. 1785), *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 317-419 (Julius Goebel, Jr., ed., 1964), the court avoided the question of whether it could or should exercise judicial review by upholding a statute under a rather strained interpretation.

8. Consider, for example, the case of *Trevett v. Weeden*, which is unreported but was described in a pamphlet. *See* JAMES VARNUM, THE CASE, TREVETT AGAINST WEEDEN: ON INFORMATION AND COMPLAINT, FOR REFUSING PAPER BILLS IN PAYMENT FOR BUTCHER'S MEAT, IN MARKET, AT PAR WITH SPECIE (Rhode Island 1787). In the case, Varnum argued that the Rhode Island law requiring merchants to accept paper money at face value was unconstitutional (as inconsistent with the peace treaty with England), but the court avoided the issue and dismissed instead for lack of jurisdiction. Although the judges had neither declared the law unconstitutional nor even stated clearly that they had the power to do so, the governor convened a special meeting of the legislature, which summoned the court to explain its action. At first, the judges refused to answer, boldly declaring that they were "accountable only to God and their own consciences." Quoted in Sosin, *supra* note 4, at 217. With further prodding, the judges explained to

and efficacy of the power of judicial review were thus very much open to question, and there was little to indicate that judicial review would be anything more than a peripheral practice, useful mostly in enabling courts to protect their own institutional integrity.[9]

Those few who thought about the issue at all thus probably thought that courts might exercise judicial review, and that, in cases that were not terribly contentious, the legislature might even yield to the court's decision. More often, however–especially in controversial cases–they presumably expected declarations from the Court to take their place in the political debate for whatever they were worth, which probably would not be much. Nor did even the advocates of judicial review think that judges would have much to say about the limits of Congress's powers under Article I. James Madison, for example, insisted both before and after ratification that the boundaries between federal and state power were too ambiguous and uncertain to be fixed through adjudication, and instead would have to be settled by experience and political practice.[10]

This may not seem like a wholly coherent position. Having lived with judicial review for so long, its basic operation seems obvious to us. Courts either do it or they do not. And if they declare a law unconstitutional, then the legislature exceeded its power and that is that. But the Founders had not worked this

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the assembly that they had not declared the law unconstitutional because the finding of no jurisdiction had made the question irrelevant. The assembly nevertheless recorded its dissatisfaction and entertained a motion to dismiss the entire bench. At that point, the judges submitted a written memorial "totally disavow[ing] the least power or authority, or the appearance thereof, to contravene or control" the laws adopted in the legislature. *Id.* This appeased the assembly just long enough for the judges to keep their seats until the following election, at which point all but one were turned out of office. *See id.* at 217-18.

In New Hampshire, where newspapers reported that some judges were refusing to enforce a law depriving small creditors of trial by jury, the legislature similarly entertained motions to impeach and voted 44-14 that the law was constitutional before deciding nevertheless to repeal it. *See* 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 969-71 (1953); SOSIN, *supra* note 4, at 211-12.

9. *See* CLINTON, *supra* note 4, at 54-55; SOSIN, *supra* note 4, at 222-23; Gordon Wood, *Judicial Review in the Era of the Founding*, *in* IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION? (Robert A. Licht ed., 1993).

10. *See* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 THE PAPERS OF JAMES MADISON 211 (Robert A. Rutland et al. eds., 1977); THE FEDERALIST NO. 44 (James Madison); *Madison's Report on the Virginia Resolutions*, *in* 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 549 (1836) [hereinafter "ELLIOT"].

out when they wrote the Constitution. Few of them, if any, really understood the implications of judicial review, and there was not enough debate about it during ratification to force anyone to do so.

How, then, *did* the Founders expect Congress to be restrained? How *did* they think limits on federal power would be preserved? It helps if we examine what they actually said about the problem. For Publius mavens, that means looking at *The Federalist Nos.* 45 and 46[11]–not 10, not 51, and most certainly not 78.[12] And while it can be misleading to look only at *The Federalist*, what Publius had to say on this particular issue was not different from what everyone else was saying, which was that Congress would be restrained by politics[13]–not politics in

11. THE FEDERALIST NOS. 45, 46 (James Madison).

12. THE FEDERALIST NOS. 10, 51 (James Madison), 78 (Alexander Hamilton).

13. Statements to this effect are routine and pervasive throughout the ratification materials. *See, e.g.*, James Wilson *in* 2 DOCUMENTARY HISTORY 383, 515, 560 (John P. Kaminski and Gaspare J. Saladino eds., 1984); Anthony Wayne *in* 2 DOCUMENTARY HISTORY, *supra* at 411; Thomas McKean *in* 2 DOCUMENTARY HISTORY, *supra* at 414, 538; *A Jerseyman: To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1788, *reprinted in* 3 DOCUMENTARY HISTORY 148, 151 (Merrill Jensen ed., 1978); *Philanthrop: To the People*, AM. MERCURY, Nov. 19, 1788, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* at 468; *A Citizen of New Haven*, CONN. COURANT Jan. 7, 1788, *reprinted in* 3 DOCUMENTARY HISTORY, at 524; *The Republican: To the People*, CONN. COURANT, Jan. 7, 1788, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* at 528; Oliver Ellsworth *in* 3 DOCUMENTARY HISTORY, *supra* at 553; Letter from George Washington to Bushrod Washington (Nov. 10 1787) *reprinted in* 8 DOCUMENTARY HISTORY, *supra* at 154; Editorial, VA. INDEP. CHRON., Nov. 28, 1787, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* at 179; *An Impartial Citizen VI*, PETERSBURG VA. GAZETTE, Mar. 13, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* at 497; George Nicholas *in* 8 DOCUMENTARY HISTORY, *supra* at 927-28, *and* 10 DOCUMENTARY HISTORY, *supra* at 1327; Edmund Randolph *in* 9 DOCUMENTARY HISTORY, *supra* at 1024-25; James Madison *in* 10 DOCUMENTARY HISTORY, *supra* at 1149; Editorial, POUGHKEEPSIE COUNTY J., Oct. 3, 1787, *in* 13 DOCUMENTARY HISTORY, *supra* at 309; Edmund Pendleton *in* 10 DOCUMENTARY HISTORY, *supra* at 355; A CITIZEN OF PHILADELPHIA, THE WEAKNESSES OF BRUTUS EXPOSED, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* at 68-70, 74; Uncus, MD. J., Nov. 9, 1788, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* at 79; *A Countryman II*, NEW HAVEN GAZETTE, Nov. 22, 1788, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* at 173-74; Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1788), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* at 196, 201, 203; A Landholder VI, CONN. COURANT, Nov. 26, 1788, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* at 234; Letter from Roger Sherman (Dec. 8, 1788), *reprinted in* 14 DOCUMENTARY HISTORY, *supra* at 386-87; Letter from Isaac Stearns to Samuel Adams (Dec. 31, 1788), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* at 193; America, N.Y. DAILY ADVERTISER, Dec. 31, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* at 195-97; *Hugh Williamson: Speech at Edenton, N.C.*, N.Y. DAILY ADVERTISER, Feb. 25, 1789, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* at 203; Publicola, *An Address to the Freemen of North Carolina*, STATE GAZETTE OF N.C., Mar. 20, 1789, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* at 437, 440; Fabius IV, PA. MERCURY, Apr. 19, 1789, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* at 181, 183; Fabius IX, PA. MERCURY, May 1, 1789, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* at 263-64; *A Patriotic Citizen*, PA. MERCURY, May 10, 1789, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* at 10; Jones *in* 2 ELLIOT,

the sense of the sterile structural devices described by Herbert Wechsler[14] and cited by the Court in *Garcia*,[15] but *real* politics: state officials organizing opposition among the people, establishing committees of correspondence with officials in other states, and forcing Congress to back down through protest and remonstrance, or by actively campaigning to unseat unsatisfactory representatives.[16]

What the Founders expected, in other words, was just the sort of thing that actually occurred when the federal government overreached by enacting the Alien and Sedition Acts in 1798. At the time, these Acts were seen as posing problems of states' rights and federalism as much as individual liberty.[17] Yet no one bothered with an appeal to the Supreme Court, though opportunities to do so were plentiful.[18] Instead,

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supra note 10, at 29; Brooks *in* 2 ELLIOT, *supra* note 10, at 45; Sumner *in* 2 ELLIOT, *supra* note 10, at 63; Gore *in* 2 ELLIOT, *supra* note 10, at 64-65; Bowdoin *in* 2 ELLIOT, *supra* note 10, at 85-88; Sedgwick *in* 2 ELLIOT, *supra* note 10, at 96-97; Smith *in* 2 ELLIOT, *supra* note 10, at 103-04; Stillman *in* 2 ELLIOT, *supra* note 10, at 167; Alexander Hamilton *in* 2 ELLIOT, *supra* note 10, at 252; James Iredell *in* 4 ELLIOT, *supra* note 10, at 98; Archibald Maclaine *in* 4 ELLIOT, *supra* note 10, at 161-62, 172.

14. *See generally* HERBERT WECHSLER, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, *in* PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 49-88 (1961).

15. *See* 469 U.S. at 554-56.

16. The argument that state officials and state institutions would be particularly effective at keeping federal legislators in line was a favorite with the authors of *The Federalist*. *See* THE FEDERALIST NOS. 17, 25, 26, 28, 31, 32 (Alexander Hamilton); 44, 45, 46 (James Madison); and 84 (Alexander Hamilton). The role of the states as agencies for organizing effective political opposition to the national government was emphasized by many other commentators as well. *See, e.g.*, *A Citizen of New Haven*, CONN. COURANT, Jan. 7, 1788, *reprinted in* 3 DOCUMENTARY HISTORY 525 (Merrill Jensen ed., 1984); Poplicola, MASS. CENTINEL, Oct. 31, 1787, *reprinted in* 4 DOCUMENTARY HISTORY 181 (John P. Kaminski and Gaspare J. Saladino eds., 1984); *An Independent Freeholder*, WINCHESTER VA. GAZETTE, Jan. 25, 1788 *in* 8 DOCUMENTARY HISTORY, *supra* at 326-28; Alexander White, WINCHESTER VA. GAZETTE, Feb. 22, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* at 405-06, 439; An Impartial Citizen VI, PETERSBURG VA. GAZETTE, Nov. 22, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* at 497-500; George Nicholas *in* 9 DOCUMENTARY HISTORY, *supra* at 926-27; James Madison *in* 9 DOCUMENTARY HISTORY, *supra* at 997-98, 1151-52; Edmund Randolph *in* 9 DOCUMENTARY HISTORY, *supra* at 1102; AN AMERICAN CITIZEN IV, ON THE FEDERAL GOVERNMENT (1788), *reprinted in* 13 DOCUMENTARY HISTORY, *supra* at 436-37; Roger Sherman *in* 14 DOCUMENTARY HISTORY, *supra* at 387; *A Friend of Society and Liberty*, PA. GAZETTE, July 23, 1788, *reprinted in* 18 DOCUMENTARY HISTORY, *supra* at 281; Thacher *in* 2 ELLIOT, *supra* note 10, at 145-46; Alexander Hamilton *in* 2 ELLIOT, *supra* note 10, at 253, 266-67, 304-05, 353-55; Charles Pinckney *in* 4 ELLIOT, *supra* note 10, at 259.

17. *See* Kentucky Resolutions of 1798 and 1799, *in* 4 ELLIOT, *supra* note 10, at 540; Madison's Report on the Virginia Resolutions, *in* 4 ELLIOT, *supra* note 10, at 546; JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 193-97 (1993).

18. In part, no one appealed to the Supreme Court because the Court was packed with Federalist judges whom everybody knew would uphold the laws.

opponents acted through the agency of the states, turning the Alien and Sedition Acts into a political issue. Virginia and Kentucky issued their famous resolves, and Republicans used these as propaganda in a successful national election campaign to wrest control of the federal government from the Federalists.[19]

That the Founders thought problems of federalism should be tackled in this way is hardly surprising. Their history, their political theory, and their actual experience taught that popular pressure was the only sure way to bring an unruly authority to heel. We seem to forget that the Founding took place against the background of the Glorious Revolution and the American Revolution rather than the New Deal or the civil rights movement. The colonial experience in opposing Parliament provided a model from which the Founders drew inferences. By 1787, they had more than a century of experience in a federal system, and the American Revolution itself, beginning with the Stamp Act protests, provided their blueprint for opposing a central government that exceeded its constitutional authority.[20] This is why courts and judicial review were so rarely mentioned during ratification; they had a different model in mind, and the idea of depending on courts to restrain an abusive legislature simply never occurred to the vast majority of participants in the debates. They would not necessarily have been opposed to the idea: they simply would not have found the argument that courts were there to protect

19. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 719-43 (1993); JOHN C. MILLER, THE FEDERALIST ERA 228-77 (1st ed. 1960).

20. Bear in mind that armed hostilities and the Declaration of Independence came at the end of a very long process. The colonial assemblies struggled for power with authorities in Britain from the earliest days of settlement, with remarkable success for the most part. The process of blocking intrusive measures from England through petition and remonstrance was thus familiar, as were a variety of more blunt and more subtle means of waging politics. *See* JACK P. GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 1689-1776 (1963); JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788 (1986). Although they would not have used the term, the structure of the British Empire was effectively "federal" in nature, and the argument about what limits, if any, the King and Parliament had to observe in their dealings with the colonies were explicitly understood to be over the terms and meaning of the customary constitution of England. *See generally* JOHN REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (1986); Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

them from legislative abuses very convincing or persuasive. If it is original intent that one cares about, in other words, *Garcia* is a lot closer to the mark than *United States v. Lopez*[21] or *National League of Cities v. Usery*.[22]

Then again, just because the Founders did not specifically anticipate something does not mean that it cannot become part of the Constitution. So if judicially-enforced federalism was not born in 1789, maybe it was born in the early years of the republic, after *Marbury v. Madison*.[23] But the early practice offers no more support than the Founding for an aggressive judicial role in defining limits on Congress's power under Article I. Although active and effective in policing the states,[24] the Court made little effort to control Congress. Most instances in which Congress sought to extend its power were not even challenged in the courts, despite the fact that federalism was *the* critical constitutional issue throughout the period. In the few cases that did make their way to the Court, such as *Gibbons v. Ogden*[25] and *McCulloch v. Maryland*,[26] the Justices yielded to Congress, recognizing concurrent or exclusive federal legislative jurisdiction and leaving the question of whether to exercise it to politics. Some of these federal acts were pretty dramatic in context, too, much more dramatic than, say, *Printz v. United States*[27] or *Lopez*. The creation of a national bank had fearful consequences for the states. Protective tariffs and internal improvements were much bigger and more controversial grabs

21. 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded Congress's authority under the Commerce Clause).

22. 426 U.S. 833 (1976) (holding that the Commerce Clause does not empower Congress to enforce portions of the Fair Labor Standards Act against the states "in areas of traditional government functions"), *overruled by Garcia*, 469 U.S. 528.

23. 5 U.S. (1 Cranch) 137 (1803).

24. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351 (1816) (affirming the Supreme Court's appellate jurisdiction over decisions of state courts); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (holding state legislature's rescission of land grants unconstitutional); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 654 (1819) (invalidating attempts by the New Hampshire legislature to change and amend the charter of Dartmouth College); Worcester v. Georgia, 31 U.S. (6 Peters) 515, 561-62 (1832) (striking down Georgia legislative act that asserted control over Cherokee lands and governance).

25. 22 U.S. (9 Wheat.) 1, 189-97, 221 (1824) (broadly enumerating Congress's powers under the Commerce Clause and striking down New York's grant of an exclusive right to operate steamboats).

26. 17 U.S. (4 Wheat.) 316, 436-37 (1819) (denying states the power to tax the Bank of the United States).

27. 117 S. Ct. 2365, 2383-84 (1997) (holding that statute requiring background checks for gun purchasers unconstitutionally required state officers to execute federal laws).

for power than regulating guns near schools. In *Prigg v. Pennsylvania*,[28] the Court even upheld a federal statute regulating fugitive slaves–one of the most controversial issues in American history–where there was no grant of authority to Congress whatsoever. These were not easy cases at the time–however obvious the results may seem today. They presented close, controversial legal issues that the Justices could easily have decided either way. Yet in each case the Court deferred to Congress, leaving the states to protect themselves in the political process–just as the Framers had expected.

Actually, that last sentence is not entirely accurate. There was one, though only one, instance in which the Supreme Court stepped in to impose its own view of the proper limits on Congress's power–*Dred Scott v. Sanford*.[29] This was hardly the Court's finest hour, however, and *Dred Scott* was disastrous from the perspective of both the institution and the nation.

In any event, the birth of judicially-enforced federalism must have occurred later, sometime after the Civil War, possibly the late Nineteenth and early Twentieth Centuries. Congress became increasingly active during this period, a result of advances in communication and transportation, together with increasing industrialization and the expansion of interstate markets.[30] In fact, the Court did begin to exercise some muscle. I think of this as a sort of gestation period: Judicially-enforced federalism was not fully born in any real sense, but the Court did begin to experiment with the notion that it might have a role to play in setting limits on Congress's powers under Article I.

It was not yet much of a role, though. The story that, prior to the New Deal, the Supreme Court was out there as some stern and implacable foe of intrusive regulatory efforts, successfully holding the line against federal expansion, is nothing but a myth. In reality, while the Court did express misgivings about

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28. 41 U.S. 539 (1842).

29. 60 U.S. 393, 420, 436 (1856) (holding that Congress lacked power under the Constitution to naturalize slaves or regulate territory acquired after the adoption of Constitution).

30. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991); MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933 (1990); EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 148-76 (1992).

some things Congress tried to do, usually in the context of statutory interpretation but occasionally under the Constitution, the Court's activity in this period can more accurately be characterized as indecisive, grudging acceptance. Consider the following facts. The New Deal created eight to ten new agencies, doubling the existing number.[31] This means that there were already quite a few agencies out there. The Interstate Commerce Commission, the Federal Trade Commission, the Commodities Exchange Authority, the Food and Drug Administration, and the Federal Power Commission,[32] for example, were all created before the New Deal, which offered little that was novel from the perspective of federalism.[33] The national government had already been regulating interstate markets for quite some time. Indeed, the Court upheld most of the elements of the New Deal prior to 1935.[34] As early as the 1920s, the Court in *Massachusetts v. Mellon*[35] approved a federal grant-in-aid program designed to promote maternal health, using what amounts to the same theory a later Court would use in *South Dakota v. Dole*,[36] that the state had a choice about whether to accept the federal money or not.

There are, to be sure, cases in this period that take a restrictive line, cases like *United States v. E.C. Knight Company*[37] and *Hammer v. Dagenhart*.[38] But every *E.C. Knight* has a

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31. *See* CONGRESSIONAL QUARTERLY FEDERAL REGULATORY DIRECTORY 5 (8th ed. 1997); CENTER FOR THE STUDY OF AMERICAN BUSINESS, DIRECTORY OF FEDERAL REGULATORY AGENCIES (3d ed. 1982).

32. *See id.*

33. *See* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 289 (1982); Larry Kramer, *What's A Constitution For Anyway? Of History and Theory, Bruce Ackerman and the New Deal*, 46 CASE W. RES. L. REV. 885, 921-27 (1996).

34. *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 62-63 (1932) (upholding Longshoreman's Compensation Act setting federal standard for recovery of workman's compensation with limited judicial review of agency determinations); Humphrey's Executor v. United States, 295 U.S. 602, 632 (1935) (upholding congressional statute limiting president's power of removal over administrative agency officers).

35. 262 U.S. 447, 483 (1923) (holding a state's challenge to an exercise of the federal spending power non-justiciable because the state had the option of simply refusing to accept the money).

36. South Dakota v. Dole, 483 U.S. 203, 212 (1987) (upholding regulation of state drinking age through conditioned disbursement of federal highway funds).

37. 156 U.S. 1, 12 (1895) (holding that Congress does not have the power to regulate manufacturing under the Commerce Clause).

38. 247 U.S. 251, 272, 274-76 (1918) (invalidating the Child Labor Act because it regulated production and not transportation, and because it violated the Tenth

matching *Shreveport Rate Case*[39] holding the opposite, and for every *Hammer v Dagenhart* there is a *Lottery Case*[40] which holds the opposite. And the fact remains that, with the sole exception of child labor,[41] the Court did not prevent Congress from adopting a single program that Congress really cared about during this entire period.

True, the Court did strike down some federal statutes, but none that had substantial political support and so none that triggered a confrontation. On the contrary, whenever the Court tried to interfere in something that really mattered–like the railroads–Congress responded aggressively, as it did with the Hepburn Act in 1906,[42] and forced the Justices to back down. And, in the meantime, the federal government kept growing, maturing into a modern bureaucratic giant with 650,000 employees by 1920–a three hundred percent in approximately thirty years[43]–whereas by 1940, after the New Deal, there were only 950,000 federal employees–a smaller growth in both percentage and real terms.[44]

I think the myth of judicially-enforced federalism comes in large part from the tendency of legal scholars to take an excessively "court-centric" view of things, focusing on the Court's rhetoric rather than what the Court has done and how that affects the world outside the courtroom.[45] Viewing things

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39. Houston, East & West Tex. R.R. Co. v. United States (The Shreveport Rate Cases), 234 U.S. 342, 351-55 (1914) (upholding ICC regulation of intrastate shipping rates because of its substantial relation to interstate commerce).

40. 188 U.S. 321, 357 (1903) (affirming Congress's power to regulate and prohibit activities under the Commerce Clause on grounds of morality); *see also* Hoke v. United States, 227 U.S. 308, 323 (1913) (upholding Mann Act under Congress's complete "power over transportation").

41. After the Court struck down a federal statute prohibiting interstate transportation of goods manufactured by child labor in *Hammer*, 247 U.S. at 276, Congress made a second effort, using its taxing powers instead. But the Court struck this second Act down too. *See* Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 44 (1922). Federal legislation to protect children in the marketplace remained problematic until the Supreme Court overruled *Hammer* in *United States v. Darby*, 312 U.S. 100, 117 (1942) (upholding Fair Labor Standards Act because Congress's commerce power extends to intrastate activities substantially affecting interstate commerce).

42. Hepburn Act, ch. 3591, 34 Stat. 584 (1906).

43. *See* 2 BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 1102-03 (1989). In 1891, the federal government employed 157,442 people. This number grew to 239,476 by 1901, 388,708 in 1910, and 655,265 by 1920. *See id.*

44. *See id.*

45. In part, the myth results from conflating the history of substantive due process

from this parochial perspective, legal commentators have failed to appreciate how little the Court did to shape the allocation of power between the state and federal governments. Looked at more broadly, the historical record discloses relatively unimpeded federal expansion, a modest and uncertain judicial role.

This brings us to 1932, the year Franklin Roosevelt was elected President. Under his leadership, Congress adopted a sizeable body of legislation reflecting radically different political and economic ideas. Challenges to this legislation reached the Court in a bunch in 1935 and 1936. And the Court panicked. The President and Congress asked the apprehensive Justices, who had slowly been coming to accept the changes that had been taking place gradually for nearly fifty years, to put aside whatever misgiving they might still have and to swallow a huge mouthful of innovative social legislation all at once. The Court reacted, as one might have predicted, by pulling back–which, in this case, meant selecting from the inconsistent strands in its existing jurisprudence all those cases that limited federal power and affirming them in a strong, dramatic fashion.[46]

At the risk of sounding flippant, I think the best way to characterize what happened is to say that the Court experienced what lovers call "commitment problems." As in any new relationship where one party is uncertain, the Court

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with the history of federalism jurisprudence. Even in the substantive due process area, the Court's actual record is considerably more mixed than the legal mythology generally has it. *See* ROBERT G. MCCLOSKY, THE AMERICAN SUPREME COURT 104-05, 151-52 (1st ed. 1960); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 Y.B. OF THE SUP. CT. HIST. SOC'Y 53. In any event, questions of protecting individual rights have always been treated differently, and the Court has, from the start, been more aggressive in the immediate protection of individual rights than in defining the boundaries of constitutional grants of power to Congress under Article I.

46. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 297-312 (1936) (striking down the Bituminous Coal Conservation Act of 1935 as an impermissible delegation of power to set up a regulatory code for coal industry and as an overly expansive reading of the Commerce Clause power); United States v. Butler, 297 U.S. 1, 63-65 (1936) (holding the Agricultural Adjustment Act of 1933 unconstitutional because it exceeded scope of Congress's spending power); Schechter Poultry Corp. v. United States, 295 U.S. 495, 542, 550 (1935) (invalidating the National Industrial Recovery Act as an unconstitutional delegation of power to the executive branch and as exceeding the Commerce Clause); Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330, 362, 374 (1935) (holding that the federal railroad retirement system enacted by Congress was a violation of due process and that it did not constitute a regulation of interstate commerce).

had been letting things develop slowly, not committing itself wholeheartedly, yet also not saying so. But when the President and Congress suddenly presented the Justices with the complete package and said "choose," the Justices found that they were not yet ready to say they loved the welfare state, much less to marry it. Two years later, with more time to reflect, more pressure, and a new wave of statutes that were better drafted and better defended, the Court relented.[47]

In any event, after a period of gestation during the late Nineteenth and early Twentieth Centuries, judicially-enforced federalism was "born" only in 1935. A sickly infant from the start, it died a quick death in 1937.

So think what you like about whether it is a good idea for the Court to play an active role in regulating the allocation of power between Congress and the states, but do not delude yourself into believing that you are recovering some lost tradition of American constitutionalism or original intent. What the Court is threatening to do now–only threatening because these first steps still seem modest–is radical and new and has very little to do with our Constitution or its actual history.

Before concluding, I should reveal my own views on how active the Court should be in setting limits on Congress's power vis-à-vis the states. If you ask me, the less the Court does in this area the better. I say this not because I am a rabid liberal who loves centralized authority and hates the states–I think I like state and local government as much as the next person. But I agree with Alexander Hamilton that "the *division of powers* between the general and state governments, is a question of convenience" and "a prudential inquiry,"[48] and I happen also to believe that, when it comes to federalism, the political process is likely to be a whole lot more prudent than the Court. Neither is perfect; both will make mistakes. But on the whole, I think history and experience demonstrate that the national political system functions fairly well, whereas the Court's rare interventions–like *Dred Scott* and the New Deal cases–have been consistently disastrous. With all due respect to the Justices, I think the Supreme Court has no idea what it is

47. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act against a Commerce Clause challenge).

48. 2 ELLIOT, *supra* note 10, at 350.

doing when it intrudes here–no idea how its decisions affect governmental operations beyond the particular statutes it invalidates and no idea whether its judgments are making things better or worse. The federal system has survived and thrived for more than 200 years without an active judicial presence to police the limits of Article I, and the states have remained important and powerful institutions. "If it ain't broke, don't fix it"–and we need a lot more evidence than we have to conclude that it *is* broke and that the Court needs to start fixing.

I have explained elsewhere how and why I think the federal system protects state sovereignty without the courts, so I will only summarize the conclusions of this earlier study.[49] The political process did not develop exactly as the Framers had envisioned, and state political institutions as such did not long remain effective engines of opposition or political organization. By George Washington's second term in office, a more complex process had begun to emerge to protect state interests in the national political arena. The critical feature of this process was a unique system of political parties that linked the fortunes of state and federal officeholders, and in this way, assured respect for state officers and state sovereignty. The parties dominated intergovernmental relations at least until the New Deal, and they continue to serve this function to an unexpectedly large extent today. But while political parties remain important, they have been supplemented by a variety of other mediating institutions–the most important of which is an interlocking state-federal administrative bureaucracy. Over time, the balance of power has plainly shifted away from the states and toward the federal government, reflecting the needs and demands of a modern superpower. Yet the states have remained powerful and important institutions of government. State governments today do a lot more than they did at the beginning of the century, and a *lot* more than they did at the beginning of the century before that. Indeed, state governments are still principally responsible for most of the things that affect most of the people most of the time–a role they have managed to preserve without significant help from the Supreme Court.

We cannot begin to talk sensibly about the actual political

49. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

mechanisms that protect the states and fulfill the Framers' vision of a vibrant federal republic until we abandon the false belief that courts are supposed to be doing something that they have seldom done and done badly when they tried. We have to get past the *hypothetical* Constitution that the one the legal mythology says the inexperienced Framers imagined when they drafted the Constitution, and begin to deal seriously with the *real* Constitution, that they, and we, have been creating for the past two centuries.