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Citation: 88 Colum. L. Rev. 1 1988



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COLUMBIA LAW REVIEW

VOL. 88

JANUARY 1988

NO. 1

THE GUARANTEE CLAUSE AND STATE AUTONOMY: FEDERALISM FOR A THIRD CENTURY

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For two hundred years, the Supreme Court has struggled to reconcile the conflicting demands of state autonomy and national supremacy. During the last eleven years alone, the Court has issued two pathbreaking yet contrary decisions on state sovereignty. In *National League of Cities v. Usery*,¹ the Court stunned legal scholars by declaring that the tenth amendment immunized some aspects of state government from federal regulation.² Nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,³ the Court flatly discarded *National League of Cities* and adopted a novel view that the political process gives the states their primary protection against destructive federal intrusions.⁴

Neither of these decisions adequately addressed the problem of federal-state relations. The tenth amendment invoked in *National League of Cities* provides poor textual support for an affirmative limit on

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1. 426 U.S. 833 (1976).

2. For a sampling of the articles greeting *National League of Cities* with surprise, see Cox, Federalism and Individual Rights Under the Burger Court, 73 Nw. U.L. Rev. 1, 19-25 (1978); Michelman, States' Rights and States' Roles: Permutations of "Sovereignty" in *National League of Cities v. Usery*, 86 Yale L.J. 1165 (1977); Tribe, Unraveling *National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065 (1977).

3. 469 U.S. 528 (1985).

4. The Court derived its theory of political protection from the work of three scholars. See *id.* at 551 n.11 (citing J. Choper, Judicial Review and the National Political Process 175-84 (1980); 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); La Pierre, The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation, 60 Wash. U.L.Q. 779 (1982) [hereinafter La Pierre, Political Safeguards]). One of these scholars has proposed that the Court leave the protection of state sovereignty entirely to the political process. J. Choper, *supra*, at 175-76, 193-95. The other two contemplate a less absolute approach, permitting judicial enforcement of some constitutional limits on federal interference with the states. La Pierre, Political Safeguards, *supra*, at 977-1056; La Pierre, Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues, 80 Nw. U.L. Rev. 577, 634 (1985) [hereinafter La Pierre, Political Accountability]; Wechsler, *supra*, at 559.

federal power to meddle with state sovereignty.⁵ The political process rationale embraced in *Garcia*, on the other hand, lacks empirical foundation and misconstrues the judicial role in protecting the federal system.⁶ Rather than pursuing either of these doctrines, the Supreme Court should attempt to reconcile state autonomy and national power by recognizing the federalism principle rooted in the guarantee clause of article four, section four, of the Constitution. In that clause the United States pledges to "guarantee to every State in this Union a Republican Form of Government."⁷ As this Article demonstrates, the states cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government. The guarantee clause, therefore, implies a modest restraint on federal power to interfere with state autonomy.⁸

Part I reviews the principal values of a strong federal system and the Supreme Court's abortive attempts to protect that system. Part II draws upon the language and history of the guarantee clause to demonstrate how the clause supplies an effective shield for state autonomy. Part III then applies this understanding of the guarantee clause to a variety of federal actions, showing how the guarantee clause limits some types of federal regulation. Part IV concludes by demonstrating that, although the Supreme Court traditionally has held claims based on the guarantee clause nonjusticiable, the interpretation of the clause outlined in this Article should be fully enforceable in the courts.

I. BACKGROUND

Opponents of state sovereignty view the federal system as an outdated relic of the colonial period. At best, these critics charge, the piecemeal legislation of fifty separate sovereigns hampers the resolution of national economic and social problems.⁹ At worst, state govern-

5. See *infra* notes 64-74 and accompanying text.

6. See *infra* notes 88-119 and accompanying text.

7. U.S. Const. art. IV, § 4.

8. This focus on the guarantee clause, of course, need not render the tenth amendment obsolete. The language of that amendment reinforces the Framers' commitment to autonomous state governments. As such, the tenth amendment underscores the need to enforce the federalism principle found in the guarantee clause. The structure of the Constitution, which clearly contemplates a federal system, likewise affirms the importance of interpreting the guarantee clause as a restraint on federal power. Indeed, the latter clause may simply be the "textual embodiment" of structural concerns reflected in the Constitution as a whole. Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 13 n.72 (1975). The arguments made in this Article, therefore, are not intended to suppress all federalism arguments based on the tenth amendment or the structure of the Constitution. Instead, the Article maintains that courts evaluating federal intrusions into state autonomy should begin their analysis with the guarantee clause. Arguments based on the tenth amendment or constitutional structure may properly supplement that primary focus.

9. See, e.g., Laski, The Obsolescence of Federalism, 98 New Republic 367 (1939); Mason, Judicial Activism: Old and New, 55 Va. L. Rev. 385, 391 (1969) (judicial doc-

ments perpetuate racism and other oppressive political agendas.¹⁰ As the following discussion shows, however, independent state governments still serve several important functions in the United States. The Supreme Court's recent attempts to preserve the independence of those governments, moreover, have been largely unsuccessful.

A. *The Values of Federalism*

The federal system resulted from a compromise between those who saw the need for a strong central government and those who were wedded to the independent sovereignty of the states.¹¹ It was unthinkable to most eighteenth century citizens that the Constitution should abolish state governments. At the same time, the difficulties experienced under the Articles of Confederation demonstrated the need for a strong central power. Given these constraints, the Framers of the Constitution pursued the only practical course: a federal system that would maintain independent state governments while giving the new central government supreme authority in certain designated areas. Federalism in the United States thus was born as a political compromise rather than as a theoretical ideal.

At the same time, eighteenth century thinkers perceived several advantages in their federalist compromise. Proponents of the Constitution were quick to point out these virtues to their more dubious brethren. James Madison, for example, argued in *The Federalist* that the division of power between national and state governments would check abuses of governmental power. "In the compound republic of America," Madison contended, "a double security arises to the rights of the people. The different governments will controul each other, at the

trine of dual federalism was a "lethal weapon . . . stalling government action amid economic crisis 'more serious than war.'" (quoting C. Hughes, *The Supreme Court of the United States* 96 (1928)).

10. See, e.g., A. Pekelis, *Law and Social Action* 127 (M. Konvitz ed. 1950); J. Roche, *The Quest for the Dream* 234-57 (1968); Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 *Yale L.J.* 1552, 1618-19 (1977); La Pierre, *Political Safeguards*, *supra* note 4, at 782-83 & n.9. Other critics maintain that state sovereignty is largely an opportunistic doctrine; proponents of states' rights emerge "[o]nly when a national program seem[s] to them harmful to their interests." R. Leach, *American Federalism* 38 (1970); see also La Pierre, *Political Safeguards*, *supra* note 4, at 783 & n.10.

11. See, e.g., Letter from James Madison to George Washington (Apr. 16, 1787) ("Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty, and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful."), reprinted in J. Madison, *The Complete Madison: His Basic Writings* 184, 184 (S. Padover ed. 1953); R. Leach, *supra* note 10, at 3-10 (1970); Wechsler, *supra* note 4, at 543 ("Federalism was the means and price of the formation of the Union.").

same time that each will be controuled by itself."¹² Alexander Hamilton, coauthor of *The Federalist*, agreed that federalism would help restrain governmental tyranny. "Power being almost always the rival of power," Hamilton predicted, "the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."¹³

Madison also believed that the federal system steered a safe passage between the perils of a large republic and the dangers of a small one. In large republics, Madison observed, "the representative[s] [are] too little acquainted with . . . local circumstances and lesser interests."¹⁴ In small republics, on the other hand, representatives may become "unduly attached to these [local interests], and too little fit to comprehend and pursue great and national objects."¹⁵ A federal system "form[ed] a happy combination in this respect" and promoted wise legislation at both the national and local level; "the great and aggregate interests being referred to the national, the local and particular[,] to the state legislatures."¹⁶

These values of federalism have survived the two hundred years since the Constitution's adoption. Indeed, contemporary thinkers identify at least four positive features of our federal system. First, like Madison and Hamilton, twentieth century commentators stress the ability of independent state governments to check the oppressive power of a strong central government.¹⁷ The federal government, with

12. *The Federalist* No. 51, at 351 (J. Madison) (J. Cooke ed. 1961). Thomas Jefferson expressed a similar sentiment in a letter written to Joseph Cabell in 1816. "[T]he way to have good and safe government," Jefferson wrote,

is not to trust it all to one, but to divide it among the many, distributing to every one exactly the functions he is competent to It is by dividing and subdividing these republics from the great national one down through all its subordinations, until it ends in the administration of every man's farm by himself; by placing under every one what his own eye may superintend, that all will be done for the best. . . . The elementary republics of the wards, the county republics, the State republics, and the republic of the Union, would form a gradation of authorities, standing each on the basis of law, holding every one its delegated share of powers, and constituting truly a system of fundamental balances and checks for the government.

Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816) [hereinafter *Jefferson Letter*], reprinted in 1 *The Founders' Constitution* 142, 142 (P. Kurland & R. Lerner eds. 1987) [hereinafter *The Founders' Constitution*].

13. *The Federalist* No. 28, at 179 (A. Hamilton) (J. Cooke ed. 1961); see also *id.* at 179-80 ("It may safely be received as an axiom in our political system that the state governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.").

14. *The Federalist* No. 10, at 63 (J. Madison) (J. Cooke ed. 1961).

15. *Id.*

16. *Id.*

17. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 570-72 (1985) (Powell, J., dissenting); *FERC v. Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J.,

its broad constitutional authority, its army of administrative agencies, and its vast financial resources, possesses almost unlimited power to regulate the lives of its citizens. The individual voter has little hope of influencing the course of this federal leviathan.¹⁸ Given these realities, state governments provide an institutional check on potential abuses of federal power.

State governments, of course, do not restrain national power in the same way that the President checks congressional action or the Supreme Court checks the executive and legislative branches. State governments can neither veto federal legislation nor declare it unconstitutional. Indeed, if the federal government chooses to preempt a field within its delegated powers, the states must yield gracefully to that decision.¹⁹ Nevertheless, the states retain significant ability to check the exercise of national power in other ways.

Some state and local governments have proven themselves formidable lobbyists and indefatigable litigants.²⁰ When the Reagan administration attacked quotas and other types of affirmative action for minorities, several states and cities defended those practices in complex lawsuits.²¹ Other states cooperated with social security beneficiaries to sue the federal government for benefits denied the physically and men-

dissenting in part); Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1500-03 (1987); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977); Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943, 943 (1963); Macmahon, *The Problems of Federalism: A Survey*, in *Federalism: Mature and Emergent* 3, 10-11 (A. Macmahon ed. 1962); Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 380-95; Stewart, *Federalism and Rights*, 19 Ga. L. Rev. 917, 918 (1985).

18. Indeed, even a majority of voters may not control the content of federal programs. The national electorate has become so large, and its majority so diffuse, that federal legislators and administrators may be more responsive to special interest groups and lobbyists than to the majority's will. See Rapaczynski, *supra* note 17, at 386.

19. U.S. Const. art. VI, cl. 2; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (acts of Congress within delegated authority supersede state law except to the extent that they make express exceptions in favor of state law or fail to cover a field); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (same). See generally 1 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* §§ 12.1-4 (1986).

20. Although the guarantee clause does not protect local governments directly, see U.S. Const. art. IV, § 4 (guaranteeing "every State . . . a Republican Form of Government") (emphasis added), those governments are a product of state action. The benefits produced by local governments, therefore, may be counted among the benefits of maintaining independent state governments.

21. See, e.g., *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987) (county agency defended affirmative action plan in suit that lasted six years and reached the Supreme Court); *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986) (city defended affirmative action plan adopted in consent decree while United States, participating as an amicus curiae, attacked the plan); *States Are Found More Responsive on Social Issues*, N.Y. Times, May 19, 1985, at 1, col. 1, 32, cols. 2-3 [hereinafter *States More Responsive*].

tally impaired.²² On the legislative front, state officials recently pressed federal regulators for more stringent restrictions on toxic waste sites, hazardous air pollutants, and pesticides.²³ In both courts and Congress, therefore, states can provide a particularly organized and effective opposition to federal policies.²⁴

In addition, state and local governments check federal authority by regulating areas that the federal government chooses to ignore. When President Reagan vetoed a bill designed to alleviate the high rate of unemployment among American youth, cities and states around the country created more than thirty programs to employ teenagers in productive tasks.²⁵ Similarly, when the federal Food and Drug Administration refused to require fast-food chains to label their ingredients, New York and several other states compelled the chains to disclose that information.²⁶ And, although both the Department of Justice and the United States Commission on Civil Rights have rejected the concept of comparable worth, at least five states have adopted comparable-worth legislation and twenty-four others have shown interest in the idea.²⁷ Thus, state governments check federal power by balancing the content

22. See *States More Responsive*, supra note 21, at 32, col. 5 (noting cooperation of New York, North Carolina, Massachusetts, and Illinois in such lawsuits).

23. *Id.* at cols. 5-6.

24. In *The Federalist*, Alexander Hamilton recounted the characteristics of state governments that would make them better able than individual citizens to check national authority. "The legislatures," Hamilton wrote, "will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community." *The Federalist* No. 28, at 180 (A. Hamilton) (J. Cooke ed. 1961). For this reason, Hamilton concluded, "[p]rojects of usurpation cannot be masked under pretences so likely to escape the penetration of select bodies of men as of the people at large." *Id.* More recently, Professor Rapaczynski has expressed the same sentiment:

[t]he independence of the very process of state government . . . assures the existence of an organizational framework, more efficient than any private institution could provide, that may always be used as an effective tool for bringing together otherwise defenseless individuals with some stakes in resisting the overreaching of the national government.

Rapaczynski, supra note 17, at 390; see also Amar, supra note 17, at 1500-01.

25. Thomas, *National Service for Jobless Youth?*, N.Y. Times, June 6, 1985, at A27, col. 1.

26. See *In the Jungle of Food Regulations, Congress and States Clear a Path*, N.Y. Times, June 17, 1987, at C1, col. 5.

27. *States More Responsive*, supra note 21, at 32, col. 5 (citing a recent study by the National Governors Association). A larger number of states have older statutes that ban discrimination in pay between "comparable" jobs. Comment, *Comparable Worth: The Struggle for Pay Equity*, 65 Or. L. Rev. 145, 145 n.3 (1986). Some state agencies and courts may interpret these statutes to embrace modern comparable-worth principles. See Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv. L. Rev. 1728, 1755 & n.108 (1986); Comment, supra, at 145 n.3. See generally Stewart, *State Initiatives in the Federal System: The Politics and Policy of Comparable Worth in 1984*, 15 Publius 81 (1985) (discussing the role of state and local governments in implementing policy of comparable worth).

of regulatory programs. With two levels of government, the political pendulum is less likely to swing too far towards either conservative or liberal ideas.²⁸

Most importantly, states check national power by serving as a well-spring of political force. Political parties that are out of power on the federal level can maintain their constituencies in the states. When the time comes to challenge the dominant national party, these challengers gather strength from their state organizations.²⁹ At the same time, individuals representing new interests can organize more easily on the state level, building lobbies that may someday be powerful enough to sway national politics.³⁰ In these ways, state governments help maintain the multiparty system and prevent the growth of a monolithic political power on the federal level.³¹

The second major advantage of federalism lies in the ability of state and local governments to draw citizens into the political process. The greater accessibility and smaller scale of local government allows individuals to participate actively in governmental decisionmaking.³² This participation, in turn, provides myriad benefits: it trains citizens in the techniques of democracy,³³ fosters accountability among elected representatives,³⁴ and enhances voter confidence in the democratic

28. See *States More Responsive*, supra note 21, at 32, col. 4 ("it [is] a mark of the strength and resilience of the Federal system that when one level of government [is] dominated by conservative ideas, the other levels [are] still open to liberal ideas and innovations") (quoting Professor Richard P. Nathan, director of the Urban and Regional Research Center at Princeton University, and John Shannon, executive director of the Advisory Commission on Intergovernmental Relations).

29. See, e.g., Macmahon, supra note 17, at 11.

30. Rapaczynski, supra note 17, at 387-88; see also infra notes 37-39 and accompanying text (noting increased involvement of women and minorities in state and local politics).

31. See, e.g., Rapaczynski, supra note 17, at 388. Originally, the Framers intended the states to exert a military check on the national government as well as the institutional check described here. See *The Federalist* No. 46, at 320-22 (J. Madison) (J. Cooke ed. 1961); *The Federalist* No. 28, at 178-80 (A. Hamilton); Amar, supra note 17, at 1495-1500. The decline of this military check renders the states' role as an institutional check on federal power even more important.

32. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 575-77 & n.18 (1985) (Powell, J., dissenting); Advisory Commission on Intergovernmental Relations, *Citizen Participation in the American Federal System* 8 (1980) [hereinafter *Citizen Participation*] ("It is at the local level—the government 'closest to the people'—that citizen participation is most prevalent and significant."); id. at 95; Engdahl, *Sense and Nonsense About State Immunity*, 2 Const. Commentary 93, 122 (1985); Macmahon, supra note 17, at 10-11.

33. See, e.g., 1 A. de Tocqueville, *Democracy in America* ch. 5 (G. Lawrence trans. 1966); J.S. Mill, *Utilitarianism, Liberty, and Representative Government* 469 (Everyman's ed. 1951); Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 Ga. L. Rev. 789, 795 (1985).

34. See, e.g., J.S. Mill, supra note 33, at 225-29; Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 853-54 (1979). But see Tushnet, *Federalism and the Traditions of American Political Theory*, 19 Ga. L. Rev.

process.³⁵ For these reasons, the opportunity to participate personally in governmental decisionmaking is an important part of the democratic process.³⁶

One measure of the success of state and local governments in drawing citizens into the governmental process lies in the relatively high proportion of women and minority members holding positions in those governments. In 1985, women held 14.4% of the seats in state legislatures—three times the proportion of seats they held in Congress.³⁷ Similarly, blacks held 5% of the state legislative seats, as opposed to only 3.6% of congressional seats.³⁸ Another 2,685 black Americans served as mayors or members of municipal governing boards as of January 1986.³⁹ The ability of these political newcomers to gain a stronger toehold in state than in national government suggests that state governments may indeed be more receptive to citizen participation.

The third advantage of independent state governments stems from the political and cultural diversity they provide.⁴⁰ Acting through their state and local governments, citizens in each region create the type of social and political climate they prefer. Alaska spends \$8,627 per pupil for elementary and secondary education, while Utah spends only

981, 991–92 (1985) (contending that contemporary politics belie the republican theory of accountability to active local participants).

35. See, e.g., Jefferson Letter, *supra* note 12:

Where every man is a sharer in the direction of his ward-republic, or of some of the higher ones, and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day; . . . he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte.

Id. at 142. A study conducted by the Rand Corporation during the early 1970s disputed this contention, concluding that citizen participation in governmental processes does not reduce the citizens' alienation from government. See *Citizen Participation*, *supra* note 32, at 175. Another study conducted at the same time, however, concluded that citizen participation in governmental programs does foster positive attitudes towards government. *Id.* at 169, 175.

36. See *FERC v. Mississippi*, 456 U.S. 742, 789–90 (1982) (O'Connor, J., dissenting in part); B. Bailyn, *The Ideological Origins of the American Revolution 172–75* (1967); Beer, *Federalism, Nationalism and Democracy in America*, 72 *Am. Pol. Sci. Rev.* 9, 10 (1978); Kaden, *supra* note 34, at 855–57. Most citizens, of course, may remain apathetic towards their governments and refuse any form of political participation beyond voting. The opportunities for participation, however, remain greatest at the state and local levels. Indeed, these opportunities may be all the more important as a means of combating citizen apathy.

37. See *States More Responsive*, *supra* note 21, at 13.

38. *Id.*

39. *The World Almanac and Book of Facts 1987*, at 379 (M. Hoffman ed. 1986) [hereinafter *World Almanac*].

40. See, e.g., Howard, *supra* note 33, at 795; Kaden, *supra* note 34, at 854; Macmahon, *supra* note 17, at 10; Stewart, *supra* note 17, at 918.

\$2,053.⁴¹ Some states have enacted stringent pollution control laws and high industrial taxes, while Louisiana advertises itself as the "Right-to-Profit State."⁴² The city of Santa Monica in California has established social welfare programs that critics dub "a form of socialism."⁴³ For a nation composed of diverse interest groups, this opportunity to express different social and cultural values is essential.⁴⁴

Finally, as Justice Brandeis observed more than fifty years ago, each of the states "serve[s] as a laboratory" that may "try novel social and economic experiments without risk to the rest of the country."⁴⁵ State governments repeatedly have proved the truth of this statement by pioneering new social and economic programs. Unemployment compensation, minimum-wage laws, public financing of political campaigns, no-fault insurance, hospital cost containment, and prohibitions against discrimination in housing and employment all originated in state legislatures.⁴⁶ When these programs proved their worth on the state level, they expanded into nationwide programs. Many scholars point to the continued existence of strong state governments as a principal source of governmental innovations.⁴⁷

41. World Almanac, *supra* note 39, at 214. For this money, Alaska purchases a pupil-to-teacher ratio of 17.1 to 1, while Utah tolerates a 24.1 to 1 ratio. *Id.*

42. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. Tol. L. Rev. 619, 621 (1978).

43. Olson, *Federalism from the Standpoint of the Department of Justice*, 6 Harv. J.L. & Pub. Pol'y 7, 12 (1982); see also Graglia, *In Defense of "Federalism,"* 6 Harv. J.L. & Pub. Pol'y 23, 25-26 (1982).

44. See, e.g., Howard, *supra* note 33, at 795. Some commentators maintain that federalism is not necessary to produce this diversity, because a centralized government could achieve the same effect by delegating discretion to branch offices. See, e.g., Macmahon, *supra* note 17, at 11. It is unlikely, however, that a unitary government acting through branch offices would ever create as much diversity as a federal system of independent state and local governments. In any unitary organization, the incentives for uniformity are powerful and may overwhelm the desire for diversity. Branch officers chosen by a central government, moreover, are less likely to reflect local preferences than elected officials chosen locally. Perhaps for these reasons, even Professor Arthur Macmahon concedes that under "certain unitary constitutions . . . seemingly strong mandates for devolution in provinces and communes [have been] largely disregarded." *Id.*

45. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also *FERC v. Mississippi*, 456 U.S. 742, 788-89 (1982) (O'Connor, J., dissenting in part); *Chandler v. Florida*, 449 U.S. 560, 578-80 (1981); *Roth v. United States*, 354 U.S. 476, 505-06 (1957) (Harlan, J., dissenting).

46. See *FERC v. Mississippi*, 456 U.S. 742, 788-89 (1982) (O'Connor, J., dissenting in part) (discussing unemployment compensation and minimum wage laws); Kaden, *supra* note 34, at 854-55 (discussing unemployment compensation, public financing of political campaigns, no-fault insurance, and hospital cost containment). The list of state-generated innovations could be expanded considerably. For further examples, see *FERC v. Mississippi*, 456 U.S. at 788-89 (O'Connor, J., dissenting in part); Kaden, *supra* note 34, at 854-55. The Constitution itself was drawn from the provisions of several state constitutions. See 1 *The Founders' Constitution*, *supra* note 12, at 7-9, 11-23 (reprinting Virginia and Massachusetts constitutions).

47. See, e.g., Fried, *Federalism—Why Should We Care?*, 6 Harv. J.L. & Pub. Pol'y

Four principal values, therefore, support preservation of the federal system. A dual system of government checks abuses of power in any branch of the system. State and local governments increase the opportunities for citizens to participate actively in the democratic process and create diverse cultural and political environments. Finally, the distribution of power among fifty-one different governments enhances opportunities for innovation and experimentation.

B. *The Supreme Court and Federalism*

The Supreme Court has always recognized the importance of maintaining independent state governments. In 1869, the Court declared that "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."⁴⁸ Each of the states, the Court pointed out, is "endowed with all the functions essential to separate and independent existence."⁴⁹ In short, "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."⁵⁰

Despite the Court's announced allegiance to state sovereignty, many of its twentieth century rulings have diminished the autonomy of state governments. Since 1937, the Supreme Court has interpreted the commerce clause broadly, authorizing the federal government to regulate many economic and social matters previously left to the states.⁵¹ At the same time, the Court has approved expansive congressional delegations of power to administrative agencies, enabling the federal government to establish large regulatory bureaucracies.⁵² Finally, the

1, 2-3 (1982); Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019, 1034 (1977); Macmahon, *supra* note 17, at 10-11.

A few scholars have questioned Brandeis' dogma, maintaining that state governments are not effective innovators. Professor Susan Rose-Ackerman, for example, concludes on the basis of a theoretical model that federal systems do not encourage innovation. Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. Legal Stud. 593, 603-05 (1980); see also Rapaczynski, *supra* note 17, at 408-12. Professor Rose-Ackerman, however, admits that her model has several significant limits. In particular, she assumes that states are administered by a single elected official, rather than by a multimember legislature, and she assumes that elected officials are motivated solely by a desire to maximize their chances of reelection. Rose-Ackerman, *supra*, at 595. These limits minimize several important incentives for innovation in the federal system. State politicians, for example, may acquire more prestigious federal offices by conducting successful experiments in their states. *Id.* at 614-15.

48. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

49. *Id.* (quoting *County of Lane v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)).

50. *Id.* at 725.

51. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (prohibiting racial discrimination in public accommodations); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (restricting production of wheat for home consumption); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937) (regulating labor relations). See generally 1 R. Rotunda, J. Nowak & J. Young, *supra* note 19, §§ 4.8-10.

52. See, e.g., *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981); Sun-

Court has interpreted the spending clause as an independent grant of federal power, allowing Congress to regulate a vast array of state and local activities by attaching conditions to monetary grants.⁵³ Since 1960, the number and scope of these conditions has grown dramatically.⁵⁴ As a result of these trends, the independence of state governments has been greatly reduced.

In 1976, the Supreme Court attempted to halt this tide of federal encroachments on state power. Justice Rehnquist's opinion for the Court in *National League of Cities v. Usery*⁵⁵ proclaimed that the tenth amendment limited congressional power to legislate under the commerce clause. The tenth amendment, the Court concluded, sheltered "the States' freedom to structure integral operations in areas of traditional governmental functions."⁵⁶ Accordingly, Congress could not "directly displace" that freedom by regulating "the States as States" and limiting "attributes of state sovereignty."⁵⁷ Applying this standard to the facts in *National League of Cities*, the Court forbade Congress to regulate the wages and hours of public employees engaged in traditional governmental functions.⁵⁸

National League of Cities was a revolutionary opinion. Since at least 1941, the Court had refused to read the tenth amendment as a cap on congressional power.⁵⁹ On the contrary, the Court had interpreted that provision as a mere "truism."⁶⁰ By rereading the tenth amendment as an affirmative limit on congressional power, *National League of Cities* promised a dramatic reshaping of federal-state relations.

In fact, however, *National League of Cities* had a limited impact on the law. Although litigants raised tenth amendment claims in more than three hundred cases reported after *National League of Cities*, courts re-

shine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); 1 R. Rotunda, J. Nowak & J. Young, *supra* note 19, § 4.8, at 294-95 & n.4.

53. See, e.g., South Dakota v. Dole, 107 S. Ct. 2793 (1987); United States v. Butler, 297 U.S. 1, 65-66 (1936); 1 R. Rotunda, J. Nowak & J. Young, *supra* note 19, § 5.7; Rosenthal, Conditional Federal Spending and the Constitution, 39 Stan. L. Rev. 1103 (1987); see also *infra* notes 263-86 and accompanying text.

54. See C. Lovell, R. Kneisel, M. Neiman, A. Rose & C. Tobin, Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts 70-73 (1979); Koch, The Mandate Millstone, in *American Intergovernmental Relations* 217 (L. O'Toole ed. 1985).

55. 426 U.S. 833 (1976).

56. *Id.* at 852.

57. *Id.* at 852, 854.

58. On remand, the district court refused to enter a decree excluding all public employees from federal wage and hour legislation. Instead, the court observed that the Supreme Court's opinion was "limited to . . . those state and local government employees engaged in activities integral to and traditionally provided by government." *National League of Cities v. Marshall*, 429 F. Supp. 703, 705 (D.D.C. 1977).

59. See *United States v. Darby*, 312 U.S. 100, 123-24 (1941).

60. *Id.* at 124.

jected most of those claims.⁶¹ The Supreme Court itself never relied upon *National League of Cities* to invalidate any other federal law. Instead, the Court progressively narrowed the effectiveness of its tenth amendment principle in a series of cases decided between 1976 and 1985.⁶² Finally, less than ten years after *National League of Cities* debuted, the Court overruled the decision.⁶³

The sterility of *National League of Cities* was not surprising, because the decision itself contained three mortal flaws. First, the language of the tenth amendment fails to support the affirmative limit on congressional power described by the Court in *National League of Cities*. The tenth amendment declares simply that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁶⁴ As the Court itself had recognized during an earlier period, this language "states but a truism that all is retained which has not been surrendered."⁶⁵ The Court's attempt to build a firm federalism principle on these pusillanimous words smacked of judicial invention; critics accused the Court of pulling a federalist rabbit from an empty tenth amendment top hat.⁶⁶

Second, even if the passive language of the tenth amendment could have been read to impose an affirmative restraint on Congress, that language failed to generate a workable principle separating permissible congressional enactments from unconstitutional ones. The words of the tenth amendment, which simply "reserve" power to the states, shed no light on the type of congressional actions that interfere unduly with state autonomy. The Court's own attempts to graft addi-

61. See La Pierre, Political Accountability, *supra* note 4, at 580 n.9; La Pierre, Political Safeguards, *supra* note 4, at 785 n.21. Ultimately, the only claims that succeeded were claims seeking to exempt particular categories of employees from the specific wage and hour legislation at issue in *National League of Cities*. La Pierre, Political Accountability, *supra* note 4, at 580 n.9.

62. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 n.54 (1978); *City of Rome v. United States*, 446 U.S. 156, 178-80 (1980); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 283-93 (1981); *FERC v. Mississippi*, 456 U.S. 742 (1982); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 684-86 (1982); *Bell v. New Jersey*, 461 U.S. 773, 790-91 (1983); *EEOC v. Wyoming*, 460 U.S. 226 (1983).

63. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). See *infra* notes 78-119 and accompanying text.

64. U.S. Const. amend. X.

65. *United States v. Darby*, 312 U.S. 100, 124 (1941); see also *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 403 (1963); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 96 (1947) ("If granted power [to the federal government] is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.").

66. See, e.g., *EEOC v. Wyoming*, 460 U.S. at 248 (Stevens, J., concurring); *National League of Cities*, 426 U.S. at 860 (Brennan, J., dissenting). Even friends of the Court's decision in *National League of Cities* criticized the Court's reliance on the tenth amendment. See, e.g., Engdahl, *supra* note 32, at 93, 99-100.

tional language onto the tenth amendment failed to produce any more definite guidelines. Although *National League of Cities* and its progeny repeatedly condemned congressional regulation of "the States as States,"⁶⁷ federal interference with essential "attributes of state sovereignty,"⁶⁸ and congressional obstruction of "the States' freedom to structure integral operations in areas of traditional governmental functions,"⁶⁹ the Court never explained the meaning of these complex terms.⁷⁰

The Court exacerbated the ambiguity of its tenth amendment principle, moreover, by suggesting that a strong federal need could, on occasion, outweigh the states' interest in sovereignty. In *National League of Cities* itself, the Court acknowledged that the federal government could impose a temporary across-the-board freeze on the wages of state and local employees in order to "'counter severe inflation that threatened the national economy.'" ⁷¹ Justice Blackmun, concurring in the judgment, suggested more explicitly that the Court had adopted a "balancing approach" that would permit "federal power in areas . . . where the federal interest is demonstrably greater and where state . . . compliance with imposed federal standards would be essential."⁷² Subsequent opinions incorporated Justice Blackmun's "balancing approach" into the *National League of Cities* formula.⁷³ The Court never spelled out, however, what types of federal needs might outweigh the interest in state sovereignty or how this balance should be struck.⁷⁴

67. See, e.g., *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 684 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287 (1981); *National League of Cities*, 426 U.S. at 845.

68. See, e.g., *United Transp. Union*, 455 U.S. at 684; *Virginia Surface Mining*, 452 U.S. at 288; *National League of Cities*, 426 U.S. at 845.

69. See, e.g., *United Transp. Union*, 455 U.S. at 684; *Virginia Surface Mining*, 452 U.S. at 288; *National League of Cities*, 426 U.S. at 852.

70. As one commentator has observed, the doctrine adopted in *National League of Cities* was "extraordinarily unclear and indefinite." Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84, 91 (1985); see also *EEOC v. Wyoming*, 460 U.S. at 238 n.11; La Pierre, *Political Safeguards*, supra note 4, at 804-16. But see Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709, 1717-20 (1985) (suggesting that the Court could have drawn a workable standard from *National League of Cities* by "develop[ing] its basic distinction between preemption and command").

71. 426 U.S. at 853 (quoting and reaffirming *Fry v. United States*, 421 U.S. 542, 548 (1975)).

72. Id. at 856 (Blackmun, J., concurring).

73. See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 237, 239-42 (1983); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 684 n.9 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 n.29 (1981).

74. Indeed, several of the Justices who supported *National League of Cities* disagreed over the precise role of any balancing test. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579-80 (1985) (Rehnquist, J., dissenting); Field, supra note 70, at 92-93. For a thorough discussion of the perils of balancing in constitutional cases, see Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987).

Finally, the Court stumbled in *National League of Cities* by purporting to protect only state sovereignty in "areas of traditional governmental functions."⁷⁵ This limit distracted litigants from the Court's primary objective of protecting the independence of state governments and generated endless disputes over which government services were "traditional."⁷⁶ In addition, the focus on "traditional governmental functions" defeated the Court's own commitment to state autonomy by denying constitutional protection to states that exercised their independence by adopting innovative governmental services. As the Court itself ultimately concluded, "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'" is both "unsound in principle and unworkable in practice."⁷⁷

In *Garcia v. San Antonio Metropolitan Transit Authority*,⁷⁸ decided less than a decade after *National League of Cities*, the Supreme Court overruled both the reasoning and result of its earlier decision. In *Garcia*, a city transit authority challenged the federal government's power to regulate the hours and wages of its employees. The lower court agreed that the transit authority was immune from this federal regulation because the transit system was "a 'traditional' governmental function."⁷⁹ On appeal, the Supreme Court refused to decide whether operation of a transit system was a traditional governmental function. Instead, the Court rejected *National League of Cities* in its entirety and concluded that the principal protection for state sovereignty lies in "the structure of the Federal Government" rather than in the tenth amendment or any other judicially enforceable constitutional provision.⁸⁰

According to the reasoning of *Garcia*, the Constitution's Framers relied primarily on the structure of the federal government to shield the interests of state governments. In particular, the Framers gave the

75. 426 U.S. at 852.

76. Compare *Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841, 845-46 (1st Cir. 1982) (operating a highway authority is a traditional governmental function); *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037-38 (6th Cir. 1979) (operating a municipal airport is a traditional governmental function); and *United States v. Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (licensing of automobile drivers is a traditional governmental function) with *Hughes Air Corp. v. Public Utils. Comm'n*, 644 F.2d 1334, 1340-41 (9th Cir. 1981) (regulating air transportation is not a traditional governmental activity); *Friends of the Earth v. Carey*, 552 F.2d 25, 38 (2d Cir.) (regulating traffic on public roads is not a traditional governmental activity), cert. denied, 434 U.S. 902 (1977). See generally *Garcia*, 469 U.S. at 538-39 (citing additional cases).

77. *Garcia*, 469 U.S. at 546-47.

78. 469 U.S. 528 (1985).

79. *San Antonio Metro. Transit Auth. v. Donovan*, 557 F. Supp. 445, 446 (W.D. Tex. 1983), rev'd sub nom. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

80. 469 U.S. at 550; see also *National League of Cities*, 426 U.S. at 876-78 (Brennan, J., dissenting) (proposing a similar approach).

states equal representation in the Senate,⁸¹ declared that Senators should be chosen by their state legislatures,⁸² allowed the states control over electoral qualifications for the House of Representatives,⁸³ and provided for the election of a President and Vice President through electors appointed in a manner prescribed by the state legislatures.⁸⁴ These structural provisions, the Court concluded, "systematically protect[] States from the risk of having their functions . . . handicapped by Commerce Clause regulation."⁸⁵ The courts, therefore, may interfere with congressional regulation of the states only if the states can point to specific "failings in the national political process."⁸⁶ Finding no such defects in the congressional enactment of overtime and minimum wage laws, the Court upheld application of those laws to state and local transit employees.⁸⁷

Garcia, like *National League of Cities*, was a radical decision. The Court overturned a precedent of recent vintage and adopted an unusual structural approach to state autonomy. Unfortunately, however, the Court's decision in *Garcia* is as deficient as its theory in *National League of Cities*.

The Court's treatment of federal-state relations in *Garcia* is wholly unsatisfactory, first, because *Garcia*'s central assertion that the structure of federal politics protects the autonomy of state governments is simply wishful thinking.⁸⁸ Senators and Representatives undeniably represent the interests of the citizens in their states. Congressional delegates

81. U.S. Const. art. I, § 3, cl. 1.

82. Id. The seventeenth amendment, of course, negated this protection by giving the people of each state the power to elect Senators directly. U.S. Const. amend. XVII. See *Garcia*, 469 U.S. at 554 & n.18.

83. U.S. Const. art. I, § 2, cl. 1.

84. U.S. Const. art. II, § 1, cls. 2-3; id. amend. XII. Today, of course, the citizens of each state vote for the electors. This procedure, however, is a matter of state law; the Constitution would permit state legislatures to appoint electors directly. See 1 R. Rotunda, J. Nowak & J. Young, *supra* note 19, § 9.12, at 523-24.

85. 469 U.S. at 555.

86. Id. at 554. Although the Court recognized the possibility of judicial intervention under these circumstances, it did not clarify the constitutional basis for that interference. Presumably, the Court would rely on the tenth amendment if it ever struck down federal legislation stemming from "failings in the national political process." This approach, however, would merely revive the difficulties inherent in any reliance on the amorphous language of the tenth amendment. See *supra* notes 64-74 and accompanying text.

87. 469 U.S. at 555-56. For a discussion of the scholarly work on which the Court relied in reaching this result, see *supra* note 4.

88. See, e.g., Van Alstyne, *supra* note 70, at 1724 n.64. This hypothesis is "so implausible," Professor William Van Alstyne argues, "as virtually to compel one's skepticism that those who assert [it] can possibly believe it. . . . [I]t is difficult to take the political science portion of the whole 'safeguards' argument as other than a good-hearted joke." Id. Even Professor Martha Field, who approves the holding in *Garcia*, admits that in its "extreme" form, exclusive reliance upon the national political process to protect state interests is "difficult to support." Field, *supra* note 70, at 109 n.127.

from the farmbelt promote agriculture, while representatives from urban districts favor mass transportation and inner city revitalization. Nothing in the structure of federal politics, however, guarantees that these representatives will promote the institutional interests of state and local governments.⁸⁹ The only constitutional provision that might have ensured some congressional representation for these institutional interests—the selection of Senators by state legislatures—was repealed in 1913.⁹⁰

Several scholars, moreover, suggest that any link between Congress and the political machinery in each state has declined markedly in recent decades. Congressional representatives increasingly draw their support from nationally organized interest groups, rather than from state political organizations.⁹¹ In addition, although former governors once filled twenty-two percent of all Senate seats, only twelve members of the current Senate have that background.⁹² Fully fifteen percent of today's Senators lack any prior experience in state or local office, a nearly twofold increase from the first half of the twentieth century.⁹³ Another twelve percent have experience only at the local, rather than the statewide, level.⁹⁴ These circumstances cast doubt on any assertion that the political background and allegiances of our national legislators predispose them to protect state sovereignty.

89. See, e.g., Field, *supra* note 70, at 110; La Pierre, *Political Accountability*, *supra* note 4, at 626–29; see also *Garcia*, 469 U.S. at 565 & n.9 (Powell, J., dissenting).

90. U.S. Const. amend. XVII. Even before adoption of the seventeenth amendment, the structure of the Senate may have discouraged representation of state interests. One scholar maintains that Senators have always been “representatives in the Burkean sense, free to serve long-run national interests,” rather than parochial state ambitions. Diamond, *The Federalist on Federalism*: “Neither a National nor a Federal Constitution, but a Composition of Both”, 86 Yale L.J. 1273, 1282 (1977). The factors contributing to this “nationalization” of the Senate include voting by Senator rather than by state, six-year terms, unlimited eligibility for reelection, and the inability of state legislatures to recall recalcitrant Senators. *Id.* at 1281–82.

91. See Howard, *supra* note 33, at 793; Kaden, *supra* note 34, at 862–64; High Court Ruling Source of Dismay to Local Officials, N.Y. Times, Feb. 21, 1985, at A1, col. 1, B8, col. 5 (preliminary findings of a study conducted by the Advisory Commission on Intergovernmental Relations suggest that “Congress ha[s] become an assembly of independent operators little influenced by party officials or elected officials in [their] respective states”).

92. See Codispoti, *The Governorship-Senate Connection: A Step in the Structure of Opportunities Grows Weaker*, *Publius*, Spring 1987, 41, 41, 43 n.12; see also Kaden, *supra* note 34, at 865.

93. Codispoti, *supra* note 92, at 52.

94. *Id.* Between 1914 and 1956, only 4.67% of the Senators had experience limited to local office. *Id.*

Even more telling, perhaps, is the fact that national representatives rarely leave Congress for state legislatures or governorships. *Id.* at 41. If Senators and Representatives frequently followed that path, one might argue that they had a personal stake in preserving the autonomy of state officials. The lines between state and federal office, however, appear to run in only one direction; Senators and Representatives rarely yearn for the challenges of state administration.

The realities of political life, in fact, suggest that congressional interests frequently clash with those of state and local governments. Pressed to accomplish national goals without raising taxes, Congress has recently forced state and local governments to administer national programs at state expense.⁹⁵ This technique permits Congress to escape fiscal accountability for its actions.⁹⁶ Similarly, if proposed legislation promises to prove unpopular with some segments of the public, Congress can attempt to avoid political censure by compelling state officials to enact and enforce the controversial measures.⁹⁷ For these reasons, national representatives often have a strong incentive to harness the energy of state and local governments for national purposes. In general, "the hydraulic pressure inherent within each of the separate Branches [of government] to exceed the outer limits of its power"⁹⁸ will reduce any congressional solicitude for state autonomy.⁹⁹

Second, even if *Garcia's* assumptions about the national political process rest on a sound empirical basis, the decision errs because it assumes that mere political consensus may override constitutional provisions designed to check the concentration of governmental power. The national political process represents state interests, *Garcia* reasons; therefore, the states consent to any national legislation that infringes state sovereignty.¹⁰⁰ Rather than rescue the states from a position they voluntarily chose, the judicial branch conserves its scarce resources for other jobs.¹⁰¹

95. See Moore, *Mandates Without Money*, 18 Nat'l J. 2366 (1986).

96. See *Brown v. EPA*, 521 F.2d 827, 840 (9th Cir. 1975), vacated and remanded for consideration of mootness, 431 U.S. 99 (1977); La Pierre, *Political Accountability*, *supra* note 4, at 660-62.

97. See *Texas v. United States*, 730 F.2d 339, 354 (5th Cir.), cert. denied, 469 U.S. 892 (1984); La Pierre, *Political Safeguards*, *supra* note 4, at 1035-36.

98. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

99. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 565 & n.9 (1985) (Powell, J., dissenting); Rapaczynski, *supra* note 17, at 388 (national representatives have incentive to restrict operation of state and local governments because those governments generate new interests that may challenge their own grip on national power).

In addition to these facts, several observers have suggested that Congress is inherently incapable of giving careful consideration to most constitutional issues. Judge Abner Mikva, a former Congressman, has argued strenuously that "institutionally and politically, Congress is designed to pass over the constitutional questions." Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L. Rev. 587, 609 (1983). "While constitutional rhetoric occasionally finds its way into the legislative history of a statute," Mikva contends, "and may even convince some members of Congress to act in a certain manner, for the most part the legislators are motivated by a desire to enact any particular piece of legislation that fills the perceived needs of the moment." *Id.* at 606; see also *Oregon v. Mitchell*, 400 U.S. 112, 204-05 (1970) (Harlan, J., dissenting in part); M. Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* 30 (1966). These observations on the character of Congress raise serious doubts about the ability of that body to enforce the delicate constitutional balance between federal and state power.

100. 469 U.S. at 549-55.

101. Professor Jesse Choper has argued vigorously that the Court should save its

The difficulty with this argument is that it overlooks the purpose of preserving state autonomy: the principal role of independent state governments is to check the power of the federal government.¹⁰² If the purpose of one governmental body is to check another, however, it is foolish to allow the two bodies to conspire together to abandon that check. An independent tribunal, such as the Supreme Court, must ensure that the reciprocal checks against national and state tyranny remain in place.¹⁰³

In other cases involving the separation of powers, the Supreme Court has steadfastly refused to uphold the infringement of constitutionally required political checks — even when the affected governmental bodies have consented to the intrusion. In *INS v. Chadha*,¹⁰⁴ for example, the Court struck down a statutory provision authorizing one House of Congress to veto an executive decision. Any such action by Congress, the Court concluded, is “legislative” and requires approval by both Houses of Congress and presentment to the President.¹⁰⁵ Stressing the important roles of bicameralism and presentment in checking abuses of political power,¹⁰⁶ the Court invalidated the provi-

institutional capital for individual rights cases by eschewing adjudication of federalism and separation-of-powers claims. J. Choper, *supra* note 4. The notion that the Court can hoard its political capital in this manner, however, is dubious. As Professor Lawrence Sager has observed, recent federalism and separation-of-power cases have either escaped public attention completely or “engender[ed] respect for the Court.” Sager, *Constitutional Triage* (Book Review), 81 *Colum. L. Rev.* 707, 710 (1981). It is hard to believe that elimination of these decisions would increase the public’s appetite for the Court’s more controversial pronouncements on school prayer, abortion, and criminal procedure. See Levinson, *Judicial Review and the Problem of the Comprehensible Constitution* (Book Review), 59 *Tex. L. Rev.* 395, 403 (1981) (characterizing as a “bit politically naive” the belief that the “public will sit still for an activist Court in regard to individual rights.”); Monaghan, *Book Review*, 94 *Harv. L. Rev.* 296, 300–01 (1980) (the proposition that adjudicating federalism decisions weakens the Court’s ability to protect civil liberties is “speculative”). Frequent flexing of the Court’s judicial muscles, moreover, does not necessarily provoke hostility to that power; demonstrations of strength may breed acceptance and respect. Hovekamp, *The Proud Pre-eminence* (Book Review), 8 *Hastings Const. L.Q.* 429, 441 (1981); Sager, *supra*, at 708–09. Certainly that is the United States’ intention when it sends its naval fleet into foreign waters.

102. See *supra* notes 17–31 and accompanying text.

103. Even James Madison, an ardent advocate of a strong central government, recognized that “some such tribunal is clearly essential” to adjudicate “controversies relating to the boundary between the two jurisdictions.” *The Federalist* No. 39, at 256 (J. Madison) (J. Cooke ed. 1961). A century later, John Stuart Mill reiterated the necessity of an impartial umpire to police disputes between the central and state governments in a federation. J.S. Mill, *supra* note 33, at 499; see also *New York v. United States*, 326 U.S. 572, 594 (1946) (Douglas, J., dissenting); Howard, *supra* note 33, at 791. The Supreme Court’s decision in *Garcia*, Professor William Van Alstyne observes, gives “the Emperor, i.e., Congress” the sole power “to determine the sufficiency of the national wardrobe.” Van Alstyne, *supra* note 70, at 1723.

104. 462 U.S. 919 (1983).

105. *Id.* at 951–59; see U.S. Const. art. 1, § 1; *id.*, § 7, cl. 2; *id.*, § 7, cl. 3.

106. 462 U.S. at 946–51, 959.

sion even though Congress and the President had both "consented" to the infringement of their powers by approving the challenged legislation.¹⁰⁷ In matters of state sovereignty, as in *Chadha*, political waiver of a constitutional limit on governmental power should not bar vigorous judicial review.¹⁰⁸

Permitting a majority of Congress to override constitutional limits on state autonomy, moreover, disregards the express language of Article V. Under that provision, changes in the constitutional balance of powers may be achieved only by a constitutional amendment garnering support from two-thirds of the members of Congress, as well as three-fourths of the states.¹⁰⁹ A bare majority of Congress is never sufficient to amend the Constitution; yet *Garcia's* logic appears to give Congress just that power.¹¹⁰

This oversight in *Garcia's* reasoning reveals a third, even more troubling flaw in the decision. As Professor William Van Alstyne has recognized, when *Garcia* is "[s]tripped of its elegance," the decision does nothing less than "propos[e] the piecemeal repeal of judicial review."¹¹¹ The Court in *Garcia* seemed to regret the

107. *Id.* at 942 n.13.

108. For other cases in which the Supreme Court invalidated legislation affecting the separation of powers, despite political "approval" of the legislation, see *Buckley v. Valeo*, 424 U.S. 1, 118-37 (1976) (holding unconstitutional provisions of the Federal Election Campaign Act that gave congressional officers the power to appoint members of the Federal Election Commission, despite presidential approval for the legislation); *Myers v. United States*, 272 U.S. 52 (1926) (striking down a federal law that purported to restrict the President's power to remove executive officers, even though a President had signed the law into effect); cf. *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-37 (1964) (invalidating apportionment scheme that had been approved by a majority of voters) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."). See generally *Garcia*, 469 U.S. at 567 n.12 (Powell, J., dissenting) (criticizing majority opinion as inconsistent with *Buckley* and *Myers*); *National League of Cities*, 426 U.S. at 841 n.12 (criticizing dissent in *National League of Cities* on same ground); *Texas v. United States*, 730 F.2d 339, 355 (5th Cir.) (noting inconsistency of process argument with *Chadha*), cert. denied, 469 U.S. 892 (1984).

109. U.S. Const. art. V.

110. Cf. *Oregon v. Mitchell*, 400 U.S. 112, 201 (1970) (Harlan, J., concurring in part and dissenting in part) ("States may be deprived of their retained powers only with the concurrence of two-thirds of each House of Congress and three-fourths of the States.").

111. Van Alstyne, *supra* note 70, at 1724. Professor Van Alstyne quotes an astute essay in *The (London) Economist*, which observes with some surprise that *Garcia* appears to repudiate *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The *Garcia* decision, according to *The Economist*:

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

Van Alstyne, *supra* note 70, at 1721 (quoting *Nine For the Seesaw*, *The Economist*, Mar. 2, 1985, at 21) (emphasis added by Van Alstyne); see also Howard, *supra* note 33, at 791.

countermajoritarian role of the third branch and to yearn for a more "democratic" system in which voters and legislators would settle all important issues.¹¹² This yearning, however, neglects the fact that the Constitution requires the courts to set aside legislation violating express constitutional commands.¹¹³ If the Constitution forbids federal interference with state autonomy, then the courts cannot abandon their duty to enforce that limit simply because the political process appears to provide a tolerable substitute for judicial review. Indeed, *Garcia* raises the spectre of the Court curtailing judicial review in other areas as well. The funding of parochial schools and availability of abortions, for example, might be trusted to the political process as easily as the autonomy of state governments.¹¹⁴

Finally, *Garcia* fails even by its own terms. In *Garcia*, the Court set out to avoid the ambiguities of *National League of Cities* and to remove the judiciary from the difficult task of drawing boundaries between federal and state power. Even the *Garcia* majority, however, conceded that the courts could not abstain entirely from policing federal-state relations. "[T]he States," *Garcia* recognized, "occupy a special and specific position in our constitutional system and . . . the scope of Congress' authority under the Commerce Clause must reflect that position."¹¹⁵ At some point, the Court intimated, it might enforce "affirmative limits . . . on federal action affecting the States under the Commerce Clause."¹¹⁶ The majority in *Garcia*, however, refused to specify the nature of those "affirmative limits" or their constitutional source. At most, the Court suggested that any judicially enforceable "substantive restraint on the exercise of Commerce Clause powers" should "find its justification in the procedural nature of [the structural] limitation" on congressional power, and should "be tailored to compensate for possi-

112. See 469 U.S. at 546 ("Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."); *id.*, at 556-57 ("[T]he model of democratic decisionmaking the Court . . . identified [in *National League of Cities*] underestimated . . . the solicitude of the national political process for the continued vitality of the States."); Van Alstyne, *supra* note 70, at 1732.

113. U.S. Const. art. VI, cl. 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *The Federalist* No. 78, at 524-25 (A. Hamilton) (J. Cooke ed. 1961).

114. See Van Alstyne, *supra* note 70, at 1733 & n.78. One tradition of judicial review suggests that judicial scrutiny is defensible when a legislature has attempted to restrict the rights of "discrete and insular minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Pregnant women and parents of public school children, however, hardly seem to qualify as this type of political minority. See also *Garcia*, 469 U.S. at 565 n.8 (Powell, J., dissenting) ("One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle.").

115. 469 U.S. at 556.

116. *Id.*

ble failings in the national political process."¹¹⁷ Presumably the Court believed these unidentified restraints would flow from the tenth amendment or the structure of the Constitution itself.

Garcia, therefore, does not avoid the need for courts to define the limits of congressional power or to identify the constitutional underpinnings of those limits. Instead, the opinion replaces the amorphous restrictions of *National League of Cities* with an even more vague reference to "possible failings in the national political process."¹¹⁸ That standard, moreover, derives no support from any part of the constitutional text; it is pure judicial embroidery. In the end, *Garcia*'s structural analysis is simply a sleight of hand. The structural theory does not bypass the need for courts to define the boundaries of federal-state relations; it merely transforms that issue into an inquiry into the workings of the political process. The five Justices who joined the majority in *Garcia*, therefore, did not avoid the hard work of reconciling state sovereignty and federal supremacy; they merely put that job off to another day.¹¹⁹

Both *National League of Cities* and *Garcia* failed to devise a lasting solution to the problem of reconciling a strong national government with equally vigorous state governments. The flaws in *National League of Cities* suggest that any future attempt to build a durable theory of federalism on the flimsy words of the tenth amendment is doomed to failure. The defects in *Garcia*, on the other hand, intimate that the Court's polit-

117. *Id.* at 554.

118. *Id.*; see also *id.* at 564 n.7 (Powell, J., dissenting) (noting vagueness of the majority's standard).

Professor D. Bruce La Pierre has offered the most detailed outline of what types of "failings in the national political process" might support judicial intervention to protect state sovereignty. La Pierre, *Political Accountability*, *supra* note 4, at 635-64; see also Rapaczynski, *supra* note 17, at 391-95. Professor La Pierre's approach, however, would require the courts to act as amateur political scientists and invalidate statutes intruding upon state authority only when "Congress is not politically accountable." La Pierre, *Political Accountability*, *supra* note 4, at 665. It is preferable to rest determination of federalism issues on a specific constitutional command, such as the guarantee clause, than on notions of political accountability that find no support in the constitutional text. Nevertheless, a focus on failings in the political process leads to invalidation of many of the same federal intrusions as those criticized in this Article. See *infra* notes 443-46 and accompanying text.

119. The *Garcia* majority, of course, expressed the fervent hope that their day of reckoning would never come. Quoting Justice Frankfurter, the majority observed that: The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court.

469 U.S. at 556 (quoting *New York v. United States*, 326 U.S. 572, 583 (1946)). On the other hand, the *Garcia* majority intimated that Congress had already overstepped the bounds of its constitutional authority at least once. *Id.* (citing *Coyle v. Smith*, 221 U.S. 559 (1911)). It is hard to understand, therefore, why the Court was so certain that the issue was unlikely to arise again.

ical-process theory will not endure long.¹²⁰ The Supreme Court needs to seek another path.

II. AN ALTERNATIVE FEDERALISM PRINCIPLE: THE GUARANTEE CLAUSE

The guarantee clause declares that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."¹²¹ Scholars have proposed a wide variety of uses for this clause.¹²² Most modern commentators, however, have overlooked the most obvious meaning of this language: in the guarantee clause the United States promises to secure each of the states the autonomy necessary to maintain a republican form of government.¹²³ The guarantee

120. Three of the *Garcia* dissenters, in fact, predicted that more vigorous judicial protection for state autonomy would "in time again command the support of a majority of this Court." *Id.* at 580 (Rehnquist, J., dissenting); see also *id.* at 589 (O'Connor, J., joined by Powell, J., and Rehnquist, J., dissenting).

121. U.S. Const. art. IV, § 4.

122. See, e.g., Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513, 565-69 (1962) (guarantee clause should supplement fourteenth amendment in protecting individuals' political and civil rights); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 19 (1971) (guarantee clause supports some reapportionment of state legislatures); Seeley, *The Public Referendum and Minority Group Legislation: Postscript to *Reitman v. Mulkey**, 55 Cornell L. Rev. 881, 905-10 (1970) (guarantee clause should be used to challenge "discrimination-prone" public referenda); Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. Chi. L. Rev. 208 (1987) [hereinafter Comment, Proposals] (guarantee clause should be used to limit state delegation of legislative power, place some constraints on initiatives and referenda, and subject state regulation to meaningful rationality review); Note, *A Niche for the Guarantee Clause*, 94 Harv. L. Rev. 681, 682, 696-99 (1981) [hereinafter Note, Niche] (guarantee clause "authoriz[es] judicial action where individual rights defined in other provisions of the Constitution are threatened by structural defects in state or local government"); Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 Yale L.J. 561 (1984) [hereinafter Note, New Interpretation] (guarantee clause requires states to comply with their own state constitutions). See generally W. Wiecek, *The Guarantee Clause of the U.S. Constitution* (1972) (discussing a variety of interpretations of the clause propounded during its history).

123. Professor William Wiecek, who has written a thoughtful book about the history of the guarantee clause, recognizes that the language of the clause lends itself to this interpretation. See W. Wiecek, *supra* note 122, at 294 (one view of the guarantee clause "emphasizes the independence of the states and the right of their people to untrammelled self-government"). Indeed, nineteenth century politicians sometimes propounded this construction of the guarantee clause. *Id.* at 204-05, 294-95. Wiecek, however, characterizes the extreme expression of this view as "reactionary" and prefers an interpretation of the guarantee clause that would empower the federal government to "remove conditions in the structure of the state governments, in their functioning, or in the social institutions of the people that threaten republican government." *Id.* at 294, 302. Other scholars have mentioned the restrictive view of the guarantee clause in passing, without espousing much interest in it. See, e.g., Note, Niche, *supra* note 122, at 689, 693-94 n.85. Judges in a few recent cases have also intimated that the guarantee clause might restrain federal interference with state governments. See *infra* notes 140-55 and accompanying text. So far, however, the implications of this view have remained relatively unexplored.

clause, therefore, provides an essential constitutional limit on federal interference with state autonomy. Both the language and the history of the guarantee clause are consistent with this interpretation.

A. *Text of the Guarantee Clause*

The expansive language of the guarantee clause has always intrigued legal scholars. Twenty years after the Constitution was ratified, John Adams confessed that he "never understood" what the guarantee clause meant and "believe[d] no man ever did or ever will."¹²⁴ The reference to republican government, Adams brooded, "is so loose and indefinite that successive predominant factions will put glosses and constructions upon it as different as light and darkness."¹²⁵ Even today, the outer boundaries of the guarantee clause remain murky; no single scholarly work can capture the full meaning of "republican government."

Nevertheless, widespread agreement exists among scholars and jurists about the core meaning of republican government. Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their rulers.¹²⁶ That control, moreover, is exerted principally—although not exclusively—through majoritarian processes. A republic, James Madison wrote, is "a government which derives all its powers directly or indirectly from the great body of the people."¹²⁷ Alexander Hamilton agreed that the "fundamental maxim of republican government . . . requires that the sense of the majority should prevail."¹²⁸ Charles Pinckney told the members of South Carolina's ratifying convention that a republic was a form of government in which "the people at large, either collectively or by representation, form the legislature."¹²⁹ And

124. W. Wiecek, *supra* note 122, at 72 (quoting Letter from John Adams to Mercy Warren (July 20, 1807)).

125. *Id.*

126. See, e.g., J. Locke, *Second Treatise of Government* § 149 (C.B. Macpherson ed. 1980) (6th ed. London 1764) (people retain supreme power to alter legislative acts when government acts contrary to ends for which government established); *id.* at § 222 (people reserve to themselves the choice of representatives). See generally W. Everdell, *The End of Kings* (1983) (tracing the history of the republican tradition from its Homeric and Biblical beginnings to the present day).

127. *The Federalist* No. 39, at 251 (J. Madison) (J. Cooke ed. 1961); see also *The Federalist* No. 10, at 62 (J. Madison) (J. Cooke ed. 1961) (A republic is characterized by "the delegation of the Government . . . to a small number of citizens elected by the rest . . ."); *The Federalist* No. 37, at 234 (J. Madison) (J. Cooke ed. 1961) ("The genius of Republican liberty, seems to demand on one side, not only that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people . . .").

128. *The Federalist* No. 22, at 139 (A. Hamilton) (J. Cooke ed. 1961); see also *The Federalist* No. 57, at 384 (J. Madison or A. Hamilton) (J. Cooke ed. 1961) ("The elective mode of obtaining rulers is the characteristic policy of republican government.").

129. 4 Debates in the Several State Conventions on the Adoption of the Federal

Thomas Jefferson assured Congress during his first inaugural address that "absolute acquiescence in the decisions of the majority" is "the vital principle of republics."¹³⁰

Early Supreme Court decisions offered a similar view of republican government. In 1793, Associate Justice Wilson declared that a "short definition" of a republican government is "one constructed on this principle, that the Supreme Power resides in the body of the people."¹³¹ Almost a century later, a unanimous Court proclaimed that "the distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws."¹³²

Nor has the twentieth century altered our conception of a republic.

Constitution 328 (J. Elliot ed. 1881) [hereinafter *Elliot's Debates*]; see also 3 *Elliot's Debates*, supra, at 396 (statement by Patrick Henry to Virginia's ratifying convention) ("The delegation of power to an adequate number of representatives, and an unimpeded reversion of it back to the people, at short periods, form the principal traits of a republican government.").

130. First Inaugural Address by President Thomas Jefferson (Mar. 4, 1801), reprinted in 1 *The Founders' Constitution*, supra note 12, at 140, 141; see also Van Sickle v. Shanahan, 212 Kan. 426, 443, 511 P.2d 223, 237 (1973) (the Framers spent relatively little time discussing "the elements of a republican form of government" because "there existed no substantial disagreement between the Founding Fathers as to the republican concepts upon which the government was to be patterned"); Bonfield, supra note 122, at 527 (noting that in 1786 Samuel Johnson's Dictionary defined "Republican" as "Placing the government in the people"); Letter from Benjamin Rush to John Adams (July 21, 1789) ("[W]hen I speak of a republic I mean a government consisting of three branches, and each derived at different times and for different periods from the PEOPLE"), reprinted in 1 *The Founders' Constitution*, supra note 12, at 138, 138; Brutus I, New York Journal, Oct. 18, 1787 ("In a free republic, . . . all laws are derived from the consent of the people . . ."), reprinted in 13 *The Documentary History of the Ratification of the Constitution and the Bill of Rights* 411, 418 (M. Jensen, J. Kaminski, G. Saladino & R. Lefler eds. 1976-86) [hereinafter *Documentary History*]; Centinel I, Philadelphia Independent Gazetteer, Oct. 5, 1787 (in a republican government "the people are the sovereign and their sense or opinion is the criterion of every public measure"), reprinted in 13 *Documentary History*, supra, at 326, 331.

Political theorists frequently identify republican government with representative government. That is, the citizens of a republic elect representatives who enact laws; they do not govern through popular referenda. See, e.g., *The Federalist* No. 10, at 62-64 (J. Madison) (J. Cooke ed. 1961); J. Adams, *Defence of the Constitutions of Government of the United States* (1787), reprinted in 1 *The Founders' Constitution*, supra note 12, at 119. The use of representatives, however, does not undermine the fundamental point that all governmental power in a republic derives from the people.

131. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793) (opinion of Wilson, J.).

132. *In re Duncan*, 139 U.S. 449, 461 (1891); see also *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1875) (arguing that the pattern of popular participation in all state governments at the time the Constitution was adopted provides "unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution"); *Hopkins v. City of Duluth*, 81 Minn. 189, 191-92, 83 N.W. 536, 536 (1900) ("The test of republican or democratic government is the will of the people, expressed in majorities, under the proper forms of law . . . [S]o long as the ultimatum of decision is left to the will of the people, at the ballot box, it is essentially republican . . .").

"The first principle inherent in our republican form of government," one federal judge concluded in 1966, "is that individual citizens submit to rule by legislative fiat enacted by a majority of a popularly elected legislative body working within a constitutional framework."¹³³ "A distinguishing feature of this form of government," the Kansas Supreme Court concurred, "is that the people . . . have the right to choose their own officials for governmental affairs and enact their own laws pursuant to the legislative power reposed in representative bodies."¹³⁴

The guarantee clause, therefore, promises each state a government based on popular control. This promise plainly restricts the freedom of the states. No state may establish a monarchy, a dictatorship, or any other form of government inconsistent with popular representation.¹³⁵ At the same time, however, the words of the guarantee clause suggest a limit on the power of the federal government to infringe state autonomy: the citizens of a state cannot operate a republican government, "choos[ing] their own officials" and "enact[ing] their own laws," if their government is beholden to Washington. Article IV's pledge by the "United States" to "guarantee . . . every State . . . a Republican Form of Government," therefore, may be read as a promise to preserve the state autonomy necessary to foster republican government. Only by leaving the citizens of each state free to establish and run their own governmental bodies can those citizens achieve Madison's republican ideal of "a government which derives all its powers directly or indirectly from the great body of the people."¹³⁶

The language of the guarantee clause, in other words, has two aspects. On the one hand, the clause prohibits the states from adopting nonrepublican forms of government. On the other hand, as long as the states adhere to republican principles, the clause forbids the federal government from interfering with state governments in a way that would destroy their republican character.

These two aspects of the guarantee clause point in different direc-

133. *Buchanan v. Rhodes*, 249 F. Supp. 860, 865 (N.D. Ohio), appeal dismissed, 385 U.S. 3 (1966), vacated and remanded to convene three-judge court, 400 F.2d 882 (6th Cir.), cert. denied, 393 U.S. 839 (1968).

134. *Harris v. Shanahan*, 192 Kan. 183, 204, 387 P.2d 771, 789 (1963); accord *Baker v. Carr*, 369 U.S. 186, 242 (1962) (Douglas, J., concurring); *Downes v. Bidwell*, 182 U.S. 244, 279 (1901); *W.E. Tucker Oil Co. v. Portland Bank*, 285 Ark. 453, 455, 688 S.W.2d 293, 294 (1985); *Eckerson v. City of Des Moines*, 137 Iowa 452, 461, 115 N.W. 177, 181 (1908); *Van Sickle v. Shanahan*, 212 Kan. 426, 450, 511 P.2d 223, 235 (1973); *Kadderly v. City of Portland*, 44 Or. 118, 144-45, 74 P. 710, 719 (1903).

135. See, e.g., *The Federalist* No. 43, at 291 (J. Madison) (J. Cooke ed. 1961) (The guarantee clause gives "the superintending government . . . authority to defend the system against aristocratic or monarchical innovations."); *Plain Truth: Reply to An Officer of the Late Continental Army*, *Independent Gazetteer*, Nov. 10, 1787 [hereinafter *Plain Truth*] ("The United States shall guarantee to every state, a republican form of government." That is, they shall guarantee it against monarchical or aristocratical encroachments.), reprinted in 2 *Documentary History*, supra note 130, at 216, 218.

136. *The Federalist* No. 39, at 251 (J. Madison) (J. Cooke ed. 1961).

tions, but they are not inconsistent. The Framers of the Constitution recognized that the federal government's power to use the guarantee clause as a sword was quite limited; that authority arose only when the states "exchange[d] republican for anti-republican Constitutions."¹³⁷ On the other hand, as long as the states maintained their "existing republican forms" or "substitute[d] other republican forms" of government, those governments were "guaranteed by the Federal Constitution" and were immune from federal interference.¹³⁸ The two faces of the guarantee clause thus complement one another: the clause shields state governments from federal intrusion as long as they remain republican, but invites that intervention when the states repudiate republican precepts.¹³⁹

Several jurists have divined this second side of the guarantee clause, recognizing that the clause restricts the federal government's power to infringe state autonomy. In 1966, Justice Black dissented from the Supreme Court's denial of certiorari in *Lance v. Plummer*.¹⁴⁰ The district court in that case had held a state sheriff in contempt for violating an injunction by threatening a black guest who attempted to register at a local motel. Although the sheriff was not a party to the injunction, the court summarily found that he had notice of its terms and ordered him to "surrender his badge, resign his position as a Florida deputy sheriff, and 'no longer act under any color, guise, or pretense as a law enforcement or peace officer.'"¹⁴¹ Justice Black

137. The Federalist No. 43, at 292 (J. Madison) (J. Cooke ed. 1961).

138. *Id.*; The Federalist No. 21, at 131 (A. Hamilton) (J. Cooke ed. 1961) (The guarantee clause "could be no impediment to reforms of the State Constitutions by a majority of the people in a legal and peaceable mode. . . . The guarantee could only operate against changes to be effected by violence."); see also Plain Truth, *supra* note 135, at 218-19 (Congress has the power under the guarantee clause to protect the states "against monarchical or aristocratical encroachments," but "can go no further, for the states would justly think themselves insulted, if [Congress] should presume to interfere in other alterations which may be individually thought more consistent with the good of the people.").

139. The precise balance between the occasions when the guarantee clause operates as a sword for federal intrusion into state affairs and those when it operates as a shield depends on the meaning courts attach to the phrase "republican form of government." If the courts give that phrase an expansive meaning, requiring specific election procedures and legislative forms, then the clause will operate frequently as a federal sword. On the other hand, if the courts define a republican government simply as one in which the people control their representatives in some manner, then the clause will have greater scope to operate as a shield. The history of the guarantee clause suggests that the concept of republican government should be construed narrowly, because the Framers appeared to contemplate relatively infrequent intervention in state affairs, see *supra* note 138 and accompanying text, and believed that the clause would protect state autonomy in a significant manner. See *infra* notes 168-95 and accompanying text. No matter how expansively the idea of republican government is interpreted, however, at some point the states will satisfy that mandate and benefit from the operation of the guarantee clause as a shield.

140. 384 U.S. 929 (1966) (Black, J., joined by Harlan, J., dissenting).

141. *Id.* at 929-30. The court of appeals had modified the contempt order to per-

suggested that this peremptory dismissal of a state officer came "perilously close to violating" the guarantee clause.¹⁴² "Subjecting a state official's tenure of office to the discretion of the federal judiciary," Black observed, "makes state officers responsible not to the people of the State but instead to federal judges."¹⁴³ The lower court's action, moreover, could not be confined to the activities of this one sheriff: by questioning "the authority of a state to conduct its governmental operations by agents responsible to the people of the [s]tate," the opinion intimated that federal judges could remove state legislators, judges, and even governors from their offices.¹⁴⁴

Later the same year, the Court of Appeals for the Third Circuit held that state judicial officers are immune from liability under the Civil Rights Act.¹⁴⁵ In construing the federal statute to preserve the traditional doctrine of judicial immunity, the court stressed that a contrary decision would violate the guarantee clause. "The framers of the Constitution," the court explained, "clearly evinced their belief that a separate and independent judiciary is an indispensable element of a republican form of government."¹⁴⁶ Subjecting state judges to liability under a federal statute, the court concluded, would interfere with the independence of state governments by destroying the competence of

mit the sheriff to resume his duties when he persuaded the district court that he was "no longer engaging in any of the acts prohibited" by the injunction. 353 F.2d 585, 592 (5th Cir. 1965). Justice Black, however, focused his remarks on the district court's action.

142. 384 U.S. at 931.

143. *Id.*

144. *Id.* at 932; see also *id.* at 932-33 (Harlan, J., dissenting from denial of certiorari) (agreeing with Black, J., that "the issues in this case are important"). Although Justice Black's perception of the guarantee clause as a limit on federal power was sound, his application of the principle to the facts in *Lance* may have been flawed. The lower court's action in that case probably was justified as an attempt to enjoin unconstitutional behavior by a state official. See *infra* notes 306-08 and accompanying text.

A majority of the Supreme Court perceived some link between the guarantee clause and state autonomy in *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870), overruled, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). In that case, the Court observed that "[t]he Constitution guarantees to the States a republican form of government," and concluded: "[s]uch being the separate and independent condition of the States in our complex system, . . . it would seem to follow . . . that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence . . . should be left free and unimpaired." *Id.* at 125. Thus, although the Court did not base its decision on the guarantee clause, it recognized that state autonomy "follow[s]" somehow from that clause. See also *South Carolina v. Katzenbach*, 383 U.S. 301, 359 (1966) (Black, J., concurring in part and dissenting in part) ("[I]t seems to me that § 5 [of the Voting Rights Act] which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that 'The United States shall guarantee to every State in this Union a Republican Form of Government.'").

145. *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966) (en banc), cert. denied, 386 U.S. 1021 (1967).

146. *Id.* at 588.

their judicial branches.¹⁴⁷

Other courts have invoked the guarantee clause to restrain federal action in other contexts. In *United States v. Downey*,¹⁴⁸ for example, a district court declared that the guarantee clause prohibits the federal government from prescribing rules of criminal procedure for state courts. If the federal government could police state courts in this manner, the court observed, it would "prevent [the] state from discharging its ordinary functions of government."¹⁴⁹ Likewise, in *Cintron-Garcia v. Romero-Barcelo*,¹⁵⁰ the Court of Appeals for the First Circuit suggested that the guarantee clause "embodie[d]" the "wisdom of allowing the states themselves to decide whether, and when, to fill interim vacancies" in their legislatures.¹⁵¹

Finally, in *Brown v. EPA*,¹⁵² the Court of Appeals for the Ninth Circuit drew upon the guarantee clause while reviewing a series of regulations promulgated by the Environmental Protection Agency. The regulations directed state governments to enforce federal pollution standards by enacting appropriate laws and delegating state officers to administer the federal program. A guarantee clause challenge to these regulations, the court observed, was neither "frivolous" nor "irresponsible."¹⁵³ If the federal government could command state governments to implement federal programs, the court pointed out, state citizens would lose control over disbursement of their state-generated tax funds. This disassociation of the power to spend and the power to tax would destroy popular accountability and "encourage few even casually acquainted with the writings of Montesquieu and the *Federalist* papers to assert that the states enjoyed a Republican Form of Government."¹⁵⁴ In order to avoid any conflict with the guarantee clause, the court construed the Clean Air Act narrowly and invalidated the offending regulations.

Thus, a number of courts have recognized the guarantee clause's potential as a limit on federal interference with state governmental

147. *Id.* at 588-89. The court noted that the Supreme Court had pursued a similar line of reasoning when construing the Civil Rights Act to preserve legislative immunity. See *Tenney v. Brandhove*, 341 U.S. 367 (1951). Although the Court in *Tenney* did not name a specific constitutional provision, it suggested that Congress might lack the power "to limit the freedom of State legislators acting within their traditional sphere." *Id.* at 376.

148. 195 F. Supp. 581 (S.D. Ill. 1961).

149. *Id.* at 585 (quoting 11 Am. Jur. Constitutional Law § 174, at 870 (1960)).

150. 671 F.2d 1 (1st Cir. 1982).

151. *Id.* at 5.

152. 521 F.2d 827 (9th Cir. 1975), vacated and remanded for consideration of mootness, 431 U.S. 99 (1977).

153. *Id.* at 838, 840.

154. *Id.* at 840. *Brown* was one of a series of cases in which litigants challenged EPA regulations under the Clean Air Act, 42 U.S.C. §§ 1857-57I (1982). For further discussion of these cases, see *infra* notes 345-49 and accompanying text.

processes.¹⁵⁵ By guaranteeing the states a republican form of government, the language of the clause implicitly promises the states sufficient independence to maintain the responsiveness of their governments to popular will. History confirms that role for the guarantee clause.

B. *History of the Guarantee Clause*

The Virginia Plan for a Constitution, presented to the Constitutional Convention on May 29, 1787, included a resolution "that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State."¹⁵⁶ On June 11, after a brief debate, the Convention deleted the reference to territorial integrity and modified the resolution to provide "that a republican constitution, and it's [sic] existing laws, ought to be guaranteed to each State by the United States."¹⁵⁷ In both its original and amended form, the resolution responded to two fears then sweeping the nation: that rebellious mobs would overthrow existing governments in the states and that opponents of democratic rule would establish a monarchy in the new republic.¹⁵⁸

According to Madison's notes, the brief Convention debates on the embryonic guarantee clause focused on these objectives. Edmund Randolph, for example, told the delegates that the provision had two "Objects": "to secure Republican Government" and "to suppress domestic commotions."¹⁵⁹ The first object was necessary "because a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy."¹⁶⁰ James Wilson agreed with Randolph that the purpose of the clause was "to secure the States agst. dangerous commotions,

155. See also *Green v. McKeon*, 468 F.2d 883, 885-86 (6th Cir. 1972) (O'Sullivan, J., dissenting) (arguing that both the guarantee clause and the tenth amendment should restrain federal courts from interfering with the machinery of state government), overruled, *City of Akron v. Bell*, 660 F.2d 166 (6th Cir. 1981); *Heimbach v. Chu*, No. 83 Civ. 5318 (S.D.N.Y. Dec. 23, 1983) (LEXIS, Genfed library, Dist file) ("if a basic principle of republicanism is that decisions most directly affecting a body of people be made by the people themselves, the guarantee clause itself argues against the imposition by a federal court of its own governmental values") (quoting Note, Niche, *supra* note 122, at 689) (dictum), *aff'd*, 744 F.2d 11 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *Dawson v. Vance*, 329 F. Supp. 1320, 1326 (S.D. Tex. 1971) (refusing to enjoin enforcement of a state criminal statute in part because "precipitate and peremptory federal court . . . review" of such statutes diminishes the constitutional guarantee of "a republican form of government").

156. 1 Records of the Federal Convention of 1787, at 22 (M. Farrand ed. 1911) [hereinafter *Farrand Records*].

157. *Id.* at 227.

158. See W. Wiecek, *supra* note 122, at 27-50; 13 Documentary History, *supra* note 130, at 91-96, 168-78.

159. 2 *Farrand Records*, *supra* note 156, at 47.

160. 1 *id.* at 206.

insurrections and rebellions.”¹⁶¹ Nathaniel Gorham argued at greater length that the proposed clause was necessary because otherwise:

an enterprising Citizen might erect the standard of Monarchy in a particular State, might gather together partizans from all quarters, might extend his views from State to State, and threaten to establish a tyranny over the whole & the Genl. Govt. [would] be compelled to remain an inactive witness of its own destruction.¹⁶²

Opposition to the guarantee of “a Republican Constitution & its existing laws” also focused on these objectives. Several delegates worried that, rather than preventing the growth of monarchy, the guarantee clause would perpetuate objectionable features in the existing state governments.¹⁶³ Others argued that the United States should not be able to quash rebellions in a state without the consent of that state.¹⁶⁴ In order to accommodate these concerns, the Convention redrafted the provision in its final form.¹⁶⁵

Notes of the debates in the Constitutional Convention, therefore, suggest that the delegates concentrated on two applications of the guarantee clause: to prevent the establishment of antirepublican forms of government in the states and to suppress domestic rebellions. Both of these purposes, moreover, contemplated federal intervention in state affairs. Through the guarantee clause, the Framers assigned the federal government the task of rooting out monarchical tendencies and putting down armed rebellions in the states.

Throughout the ratification debate, essayists continued to point to these objectives of the guarantee clause. Madison, for example, observed that the guarantee clause gave the federal government “authority to defend the system against aristocratic or monarchical

161. 2 *id.* at 47. During the ratification debates, however, Wilson perceived a broader purpose behind the guarantee clause. See *infra* notes 173–74 and accompanying text.

162. 2 *Farrand Records*, *supra* note 156, at 48.

163. *Id.* at 47 (Gouverneur Morris “thought the Resol[ution] very objectionable. He should be very unwilling that such laws as exist in R. Island should be guaranteed [sic].”); *id.* at 48 (“Mr. Houston was afraid of perpetuating the existing Constitutions of the States. That of Georgia was a very bad one, and he hoped would be revised & amended.”).

164. *Id.* at 317 (“Mr L. Martin opposed it as giving a dangerous & unnecessary power. The consent of the State ought to precede the introduction of any extraneous force whatever. Mr. Mercer supported the opposition of Mr. Martin.”); *id.* (statement by Mr. Ellsworth that “[i]n many cases The Genl. Govt. ought not to be able to interpose unless called upon.”); *id.* (“Mr. Gerry was agst. letting loose the myrmidons of the U. States on a State without its own consent.”); *id.* at 48 (“Mr. L. Martin was for leaving the States to suppress Rebellions themselves.”).

165. “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” U.S. Const. art. IV, § 4; see 2 *Farrand Records*, *supra* note 156, at 47–49, 316–18, 466–67, 662.

innovations" and the power to suppress "domestic violence."¹⁶⁶ Likewise, Hamilton noted that the guarantee clause promised "assistance . . . from the Union in repelling those domestic dangers which may sometimes threaten the existence of the State constitutions."¹⁶⁷

At the same time, however, political leaders and commentators began to perceive a broader meaning in the guarantee clause. These citizens argued that the guarantee clause protected the states not only from domestic rebellion or monarchy, but from unwanted federal intrusions into state sovereignty.¹⁶⁸ Indeed, on several occasions proponents of the Constitution used the guarantee clause as a major weapon to rebut charges that the new Constitution would destroy state autonomy.

On November 30, 1787, for example, Jasper Yeates delivered a lengthy speech supporting the proposed Constitution to the Pennsylvania convention.¹⁶⁹ During the course of his remarks, Yeates attempted to answer claims that the Constitution represented "a consolidation and not a confederation of the States."¹⁷⁰ Yeates responded to these allegations by observing that the states would control both the election of Senators and Representatives and the appointment of presidential electors. He then clinched his argument by referring to the language of the guarantee clause. "Lest anything, indeed, should be wanting," Yeates announced,

to assure us of the intention of the framers of this constitution to preserve the individual sovereignty and independence of the States inviolate, we find it expressly declared by the 4th section of the 4th article, that "the United States shall guarantee to every State in this Union, a republican form of government". . . .¹⁷¹

The "constitutional security" provided state governments by this clause, Yeates urged, was "far superior to the fancied advantages of a bill of rights."¹⁷²

166. The Federalist No. 43, at 291, 293 (J. Madison) (J. Cooke ed. 1961).

167. The Federalist No. 21, at 130-31 (A. Hamilton) (J. Cooke ed. 1961).

168. Hamilton himself may have seen these broader implications of the clause. Although Hamilton stressed that the guarantee clause would help suppress domestic rebellions, he also observed that this "guarantee . . . would be as much levelled against the usurpations of rulers, as against the ferments and outrages of faction and sedition in the community." *Id.* at 132. Read broadly, this statement could include federal officials among the "rulers" who might usurp state power.

169. Yeates, a strong federalist and a member of Pennsylvania's ratifying convention, was praised by one correspondent for his "good sense." See *Pennsylvania and the Federal Constitution 1787-1788*, at 450, 761 (J. McMaster & F. Stone eds. 1888) [hereinafter *Pennsylvania and the Constitution*].

170. *Id.* at 295; 2 *Documentary History*, *supra* note 130, at 436.

171. *Pennsylvania and the Constitution*, *supra* note 169, at 296-97; 2 *Documentary History*, *supra* note 130, at 437.

172. *Pennsylvania and the Constitution*, *supra* note 169, at 297; 2 *Documentary History*, *supra* note 130, at 437. Yeates' comparison of the guarantee clause with a bill

Yeates' speech struck a responsive chord in several members of the Pennsylvania convention. James Wilson and Anthony Wayne both recorded Yeates' explanation of the guarantee clause in their notes of the convention's debates.¹⁷³ Wilson himself apparently intended to mention the guarantee clause in a December 4 speech to the convention, listing it in his notes among "Reasons for Adopting the Constitution."¹⁷⁴ It is quite possible, therefore, that Yeates' interpretation of the guarantee clause influenced the votes of his fellow delegates.

General Brooks, a delegate to the Massachusetts convention, made a similar point in his state. Like Yeates, Brooks raised a series of arguments to rebut contentions that the "Constitution would produce a dissolution of the state governments."¹⁷⁵ And, again like Yeates, he ended his speech "by observing that, as the United States guaranty to *each state* a republican form of government, the state governments were as effectually secured as though this Constitution should never be in force."¹⁷⁶

Several days later, the Reverend Samuel Stillman delivered a major address in favor of the Constitution to the Massachusetts convention. Stillman stressed that several "circumstances" of the proposed Constitution "secure[d] the liberties of the people."¹⁷⁷ The fifth of these circumstances was the guarantee clause. According to this clause,

of rights was especially revealing because delegates had proposed a bill of rights as a means of limiting the central government's power. By likening the guarantee clause to a bill of rights, therefore, Yeates underscored his perception that the clause would operate as a restraint on the national government.

173. See 2 Documentary History, *supra* note 130, at 439. James Wilson was a prominent lawyer who had been a member of both the Continental Congress and the Constitutional Convention. 2 Pennsylvania and the Constitution, *supra* note 169, at 757-58. As a delegate to the Pennsylvania convention, he was the Constitution's "foremost defender" and is credited with persuading that convention to ratify. *Id.* at 758. Anthony Wayne, like Wilson, was a federalist and delegate to the Pennsylvania convention.

174. 2 Documentary History, *supra* note 130, at 492-93. An account of the speech given by Wilson, however, suggests that he may not have reached the intended discussion of the guarantee clause before yielding the floor. *Id.* at 493-500.

175. 2 Elliot's Debates, *supra* note 129, at 99-100.

176. *Id.* at 100. Brooks' declaration provoked some discussion about the guarantee clause among his colleagues, suggesting that they noted his interpretation of the clause. Mr. Singletary objected that the guarantee of a republican form of government was too vague and wondered why the Constitution couldn't instead "say that Congress will guaranty our state constitution." *Id.* at 100-01. Two other delegates explained that the Framers intended only to guarantee a "form of government" and that any more specific guarantee would "have precluded the state from making any alteration" in its own constitution. *Id.* at 101 (statements of General Thompson and Rufus King). The records of the Massachusetts convention do not reflect how this discussion was resolved. Instead, the notes indicate simply that "[s]everal other gentlemen spoke, in a desultory conversation, on various parts of the Constitution," that "many questions [were] asked the honorable gentlemen who framed the Constitution, to which answers apparently satisfactory were given." *Id.*

177. *Id.* at 166.

Stillman explained, "each state shall choose such republican form of government as they please, and Congress solemnly engage themselves to protect it from every kind of violence, whether of faction at home or enemies abroad."¹⁷⁸ This guarantee, Stillman then noted, provided "security of the people at large, as well as of the several governments of the states; consequently the general government cannot swallow up the local governments, as some gentlemen have suggested."¹⁷⁹ Once again, these arguments may have influenced the delegates' votes; that very afternoon the Massachusetts convention ratified the Constitution.¹⁸⁰

Outside the convention halls, political pamphleteers repeated many of the same arguments in support of the Constitution. On November 9, 1787, a federalist writing under the name "Uncus" published a defense of the new Constitution in the *Maryland Journal*.¹⁸¹ This author relied upon the guarantee clause to refute claims that congressional power would "necessarily, absorb the state legislatures and judicatories."¹⁸² On the contrary, Uncus argued, "[s]o decided have the Convention been in not infringing upon the internal police of the states, that they ordain in art. 4, sect. 4, that Congress shall not only allow, but 'shall guarantee to every state in the Union, a republican form of government.'"¹⁸³ This essay, clearly acknowledging the guarantee clause as a restraint on national power, was reprinted in both Boston and Providence newspapers.¹⁸⁴

Another federalist, identifying himself simply as "A Jerseyman," identified the guarantee clause as a bulwark against "the danger of our state governments being annihilated."¹⁸⁵ This observer's statement, characterizing the guarantee clause as a "guard . . . against improper [national] encroachments," appeared in New Jersey's *Trenton Mercury* on November 6, 1787, and in Philadelphia's *Pennsylvania Packet* on November 15, 1787.¹⁸⁶ The article received nationwide distribution when it was reprinted in the November 1787 issue of the *American Museum*.¹⁸⁷

Other writers assured citizens that the guarantee clause prohibited

178. *Id.* at 168.

179. *Id.*; see also *id.* at 86 (statement of Mr. Bowdoin, listing the guarantee clause as one of seven "great checks" on the power of the federal government).

180. *Id.* at 176-81.

181. Uncus, *Maryland Journal*, Nov. 9, 1787, reprinted in 14 *Documentary History*, supra note 130, at 76.

182. *Id.*, reprinted in 14 *Documentary History*, supra note 130, at 79.

183. *Id.*

184. Boston's *American Herald* reprinted the essay on December 10, 1787; Providence's *United States Chronicle* reprinted it on January 10, 1788. *Id.* at 76.

185. A Jerseyman, To the Citizens of New Jersey, *Trenton Mercury*, Nov. 6, 1787, reprinted in 3 *Documentary History*, supra note 130, at 146, 149.

186. *Id.*, reprinted in 3 *Documentary History*, supra note 130, at 146, 149, 151 n.1.

187. 3 *Documentary History*, supra note 130, at 151 n.1. The *American Museum*, published monthly in Philadelphia, circulated throughout the United States. Subscribers included such prominent statesmen as George Washington, Benjamin Franklin,

the federal government from interfering with provisions of their state constitutions. The *Independent Gazetteer* printed a letter by "A Federalist," which assured its Pennsylvania readers that "'certain privileges secured to you by the constitution of this Commonwealth,' . . . are not infringed in the smallest degree by the proposed federal constitution, which obliges Congress to guarantee to each State its respective republican form of government."¹⁸⁸ The same newspaper printed another letter explaining why the proposed Constitution did not explicitly secure freedom of the press. This omission, the writer declared, "arose from a respect to the state constitutions, in each of which this palladium of liberty is secured, and which is guaranteed to them as an essential part of their republican forms of government."¹⁸⁹ These advocates too perceived the guarantee clause as a provision designed to protect the integrity of state governments.

Even opponents to the Constitution beheld the guarantee clause as an attempt to shield state sovereignty. These critics objected to the clause only because they believed it was not strong enough to achieve that goal. An anti-federalist writing under the pseudonym "Sydney" asked the citizens of New York whether "a 'guarantee of a republican form of government to every state in the union' [will] be of any avail, or [will] secure the establishment and retention of state rights?"¹⁹⁰ The clause, Sydney concluded, would not "solve any [of these] difficulties" because it allowed the states "the form and not the substance" of a republican government.¹⁹¹ Similarly, an essay distributed in at least four states complained that the new Constitution "entirely annihilated . . . the particular governments of the several states."¹⁹² The guarantee clause, this essayist continued, could not remedy that defect:

Alexander Hamilton, John Jay, James Madison, and Thomas Jefferson. See *id.*, *supra* note 130, at xxxiii.

188. A Federalist, To the Freemen of Pennsylvania, *Independent Gazetteer*, Oct. 25, 1787, reprinted in *Pennsylvania and the Constitution*, *supra* note 169, at 164, 166.

189. One of the Four Thousand Citizens of Philadelphia . . . Who Subscribed the Petition . . . to Adopt the Proposed Federal Constitution, To the Freemen of Pennsylvania, *Independent Gazetteer*, Oct. 15, 1787, reprinted in *Pennsylvania and the Constitution*, *supra* note 169, at 114, 116.

190. Address by Sydney, *New York Journal*, June 13-14, 1788, reprinted in 6 *The Complete Anti-Federalist* 107, 113 (H. Storing ed. 1981).

191. *Id.* at 116. George Clinton made a similar point on the floor of New York's ratifying convention. Clinton noted that he was "sensible . . . that the Constitution has guaranteed to [the states] a republican form" of government, but objected that the guarantee was "too feeble a security to be relied on," because "[t]he form may exist without the substance." Speech by George Clinton, *New York State Convention* (July 11, 1788), reprinted in 6 *The Complete Anti-Federalist*, *supra* note 190, at 181, 184-85.

192. Centinel III, *Philadelphia Independent Gazetteer*, Nov. 8, 1787, reprinted in 14 *Documentary History*, *supra* note 130, at 55, 57. The essay was reprinted, in slightly altered form, on November 14, 1787, in *Philadelphia's Freeman's Journal*; on November 20, 1787, in the *New York Journal*; on January 3, 1788, in *Providence's United States Chronicle*; and on January 7, 1788, in *Boston's American Herald*. 14 *Documentary History*, *supra* note 130, at 55.

The convention, after vesting all the great and efficient powers of sovereignty in general government, insidiously declare by section 4th of article 4th, "that the United States shall guarantee to every state in this union, a republican *form* of government;" but of what avail will be the *form*, without the *reality* of freedom.¹⁹³

Thus, both advocates and foes of the new Constitution recognized the guarantee clause as an attempt to mark the boundary between federal power and state sovereignty. Although the original impulse behind the clause might have been a desire to protect the states from the dangers of aristocratic government or internal rebellion, the broad language of the clause secured the states against any threat to "republican government."¹⁹⁴ That promise, political leaders quickly realized, applied to intrusions by the federal government, as well as to the pretensions of marauding mobs and would-be monarchs. The guarantee clause barred "any man, or body of men, however rich or powerful," from making "an alteration in the form of government of any state, whereby the powers thereof shall be attempted to be taken out of the hands of the people at large."¹⁹⁵ That prohibition was general enough

193. Centinel III, *supra* note 192, reprinted in 14 Documentary History, *supra* note 130, at 58; see also A Federal Republican, A Review of the Constitution (Nov. 28, 1787) ("The several states are by this constitution, to have a republican government guaranteed to them; but . . . [t]hat the republican form here decreed to each state will indeed be only *form*, human nature as well as experience will evince."), reprinted in 14 Documentary History, *supra* note 130, at 255, 267; An Officer of the Late Continental Army, To the Citizens of Philadelphia, Independent Gazetteer, Nov. 6, 1787 (The proposed Constitution is objectionable because "[t]he sovereignty of the States is not expressly reserved; the form only, and not the substance of the government, is guaranteed to them by express words."), reprinted in Pennsylvania and the Constitution, *supra* note 169, at 179, 180; A Manifesto of a Number of Gentlemen from Albany County, The New York Journal and Weekly Register, Apr. 26, 1788 (The proposed Constitution is defective because of "[t]he guaranteeing to the several states, not the substance, but a republican form of government"), reprinted in The Antifederalists 359, 363 (C. Kenyon ed. 1966); A Columbian Patriot: Observations on the Constitution (Feb. 1788) (referring to "the delusory promise to guarantee a Republican form of government to every State in the Union"), reprinted in 16 Documentary History, *supra* note 130, at 272, 280.

194. Indeed, other provisions of the Constitution address the problems of aristocratic invention or armed rebellion more directly than the guarantee clause. The second half of article IV, section 4, for example, specifically provides that the "United States . . . shall protect each [State] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." Sections 9 and 10 of article I prohibit both the federal government and the states from granting titles of nobility. U.S. Const. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"); *id.* § 10, cl. 1 ("No State shall . . . grant any Title of Nobility."). With these specific provisions in the Constitution, the guarantee clause would be largely superfluous if it referred only to the problems of armed rebellion and incipient aristocracy.

195. An American Citizen IV, On the Federal Government (Oct. 1787) (original emphasis deleted), reprinted in 13 Documentary History, *supra* note 130, at 431, 431-32. This essay was widely reprinted and distributed throughout the United States. See 13 Documentary History, *supra* note 130, at 431.

to prevent the federal government from destroying the autonomy of the states.

III. APPLICATIONS OF THE GUARANTEE CLAUSE

Both the language and history of the guarantee clause support the conclusion that the clause prohibits the federal government from interfering with state sovereignty in a manner that would destroy republican government in the states. The guarantee clause thus provides a more definite limit on national power than the ambiguous language of the tenth amendment. In addition, the concept of republican government produces more concrete judicial guidelines than the notion of "traditional governmental functions" employed in *National League of Cities*. As the following discussion demonstrates, the guarantee clause produces a workable concept of federalism — one that preserves the values of independent state governments without denying the federal government the power to address compelling national concerns.

A. *The Franchise*

Control over the franchise is a hallmark of republican government. Montesquieu observed that "it is as important to regulate in a republic, in what manner, by whom, to whom, and concerning what suffrages are to be given, as it is in a monarchy to know who is the prince, and after what manner he ought to govern."¹⁹⁶ James Madison echoed this thought, declaring in *The Federalist* that "[t]he definition of the right of suffrage is very justly regarded as a fundamental article of republican government."¹⁹⁷ In order to establish a government responsive to its electorate, a state must first define that electorate. The power to define the franchise for state and local elections, therefore, is one of the powers that the guarantee clause originally reserved to the states.

The modern Supreme Court has recognized that control over the franchise is an essential component of state sovereignty. In *Lassiter v. Northampton County Board of Elections*,¹⁹⁸ the Court firmly rejected the claim that a state-imposed literacy test for voters violated the fourteenth amendment. Justice Douglas, writing for a unanimous court, observed that "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised."¹⁹⁹ In particular, he suggested, states have authority to deny the franchise based on residence, age, or previous criminal

196. Montesquieu, *The Spirit of Laws* book 2, ch. 2, at 9 (T. Nugent trans. 1949).

197. *The Federalist* No. 52, at 354 (J. Madison) (J. Cooke ed. 1961); see also 2 Farrand Records, *supra* note 156, at 203, 249–50 (recording statements by Madison during the Constitutional Convention that suffrage was "one of the fundamental articles of republican Government").

198. 360 U.S. 45 (1959).

199. *Id.* at 50.

records.²⁰⁰

A decade later, in *Oregon v. Mitchell*,²⁰¹ a majority of the Court struck down a federal statute setting a minimum voting age of eighteen for all state and local elections. In reaching this result, Justice Black acknowledged that “[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.”²⁰² Three of his colleagues agreed that “‘the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the states.’”²⁰³

Although these decisions recognize that the Constitution gives the states broad power to set voting qualifications, few of the Court's decisions tie that authority to a specific constitutional provision. Several of the Justices in *Oregon v. Mitchell* thought that the “whole Constitution” reserved this power to the states.²⁰⁴ Others cited the tenth amendment²⁰⁵ or the second section of article I.²⁰⁶ The “whole Constitution” and tenth amendment, however, provide only amorphous support for

200. Id. at 51.

201. 400 U.S. 112 (1970).

202. Id. at 125 (Black, J., announcing judgments of the Court in an opinion expressing his own views).

203. Id. at 294 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part) (quoting opinion of Black, J., id. at 125); see also id. at 201 (Harlan, J., concurring in part and dissenting in part) (“The power to set state voting qualifications was neither surrendered nor delegated” to the national government under the original Constitution, “except to the extent that the guarantee of a republican form of government may be thought to require a certain minimum distribution of political power.”). Even the Justices who voted to uphold federal regulation of the minimum voting age in state and local elections expressed some discomfort with widespread federal control over state voting qualifications. “It is important at the outset,” Justice Brennan wrote:

to recognize what is not involved in these cases. We are not faced with an assertion of congressional power to regulate any and all aspects of state and federal elections, or even to make general rules for the determination of voter qualifications.

Id. at 240 (Brennan, J., joined by White, J., and Marshall, J., concurring in part and dissenting in part).

204. Id. at 125 (Black, J., announcing the judgments of the Court in an opinion expressing his own views); id. at 294 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part).

205. Id. at 124-25 (Black, J., announcing the judgments of the Court in an opinion expressing his own views); id. at 201 (Harlan, J., concurring in part and dissenting in part); accord *Vargas v. Calabrese*, 634 F. Supp. 910, 922 (D.N.J. 1986); *Antonio v. Kirkpatrick*, 453 F. Supp. 1161, 1165 (W.D. Mo.), aff'd, 579 F.2d 1147 (8th Cir. 1978).

206. U.S. Const. art. I, § 2 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous

state control of the franchise.²⁰⁷ In particular, nothing in the tenth amendment seems to prevent Congress from defining state voter qualifications if it rests that action on one of its delegated powers.

The guarantee clause supplies a much firmer base for any restriction on congressional interference with state or local franchises. As explained above, the definition of the electorate is central to republican government. The plain language of the guarantee clause, therefore, secures this power to state governments in a way that other provisions of the Constitution cannot. The courts can affirm state control over the franchise for state and local elections by recognizing that this power is one of the aspects of republican government promised the states by the guarantee clause.

Even under this interpretation of the guarantee clause, of course, the states do not have unfettered discretion to set voting qualifications. The guarantee clause itself imposes some limits on state power, requiring the states to define their franchises in a manner consistent with republican principles.²⁰⁸ In addition, a series of constitutional amendments has narrowed the states' discretionary authority over the franchise. The fifteenth amendment bars a state from denying the right to vote "on account of race, color, or previous condition of servitude."²⁰⁹ The nineteenth amendment extends the franchise to women,²¹⁰ and the twenty-fourth amendment abolishes the poll tax.²¹¹ The twenty-sixth amendment overturns the result in *Oregon v. Mitchell* by establishing a nationwide minimum voting age of eighteen.²¹² The fourteenth amendment's promise of "equal protection" has been inter-

Branch of the State Legislature."); *Oregon v. Mitchell*, 400 U.S. at 125 (Black, J., announcing the judgments of the Court in an opinion expressing his own views).

207. The second section of article I provides only marginally stronger support for state power to define the franchise. That section declares that members of the House of Representatives shall be chosen by the voters eligible to vote for "the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2. The section appears to assume that the states will define the electorate for their own legislatures. Nothing in this section, however, promises the states exclusive power to set those qualifications. Even if such a promise could be distilled from this section, moreover, it would apply only to elections for one branch of the state legislature.

208. But see *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1874) (rejecting claim that guarantee clause grants suffrage to women). As explained above, the guarantee clause both limits the freedom of state governments and protects them from undue federal interference. See *supra* notes 135-39 and accompanying text.

209. U.S. Const. amend. XV.

210. U.S. Const. amend. XIX.

211. U.S. Const. amend. XXIV.

212. U.S. Const. amend. XXVI. The existence of these amendments, of course, provides further evidence that Congress lacks the power to alter state voting qualifications on its own authority. See *Oregon v. Mitchell*, 400 U.S. at 125, 126 (Black, J., announcing the judgments of the Court in an opinion expressing his own views); *id.* at 202 (Harlan, J., concurring in part and dissenting in part); *id.* at 293 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part).

preted to outlaw both lengthy residency requirements²¹³ and some property qualifications.²¹⁴ Taken together, these amendments significantly limit the states' residual power to define the state and local franchise.²¹⁵

The fourteenth, fifteenth, nineteenth, twenty-fourth, and twenty-sixth amendments, moreover, specifically authorize Congress to enforce their provisions "by appropriate legislation."²¹⁶ These enforcement clauses give Congress the power to overturn state election practices even when those practices might not violate the direct language of the Constitution itself. Thus, in *South Carolina v. Katzenbach*²¹⁷ the Supreme Court upheld a section of the Voting Rights Act banning the use of literacy tests in covered states. Although the Court had held in *Lassiter* that the nondiscriminatory use of literacy tests does not violate the Constitution, the Court in *Katzenbach* concluded that suspension of these tests for five years in covered states was a "legitimate response to the problem" of widespread use of the tests in a discriminatory manner.²¹⁸

As a result of these constitutional provisions, and the broad congressional power to enforce them, the states' practical ability to define the franchise today is relatively small. The guarantee clause, however, still assures the states some control over the franchise. The states, for example, may choose to disenfranchise convicted felons,²¹⁹ to restrict voting to property owners in some special elections,²²⁰ and to set rea-

213. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 352, 360 (1972).

214. See, e.g., *Phoenix v. Kolodziejski*, 399 U.S. 204, 212-13 (1970); *Cipriano v. City of Houma*, 395 U.S. 701, 702 (1969) (per curiam); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 632-33 (1969); see also *Hunter v. Underwood*, 471 U.S. 222, 227-29 (1985) (fourteenth amendment prohibits intentional racial discrimination in defining franchise).

215. These limits, of course, are still consistent with the notion of republican government. Indeed, the fourteenth, fifteenth, nineteenth, twenty-fourth, and twenty-sixth amendments may be viewed as attempts to specify particular characteristics of a republican government. As the Constitution's definition of a republican franchise has grown more specific, the states' power to exercise their autonomy to define that franchise has waned.

216. U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2; U.S. Const. amend. XIX, cl. 2; U.S. Const. amend. XXIV, § 2; U.S. Const. amend. XXVI, § 2.

217. 383 U.S. 301 (1966).

218. *Id.* at 334; see also *Katzenbach v. Morgan*, 384 U.S. 641, 646-47 (1966) (upholding section of Voting Rights Act that prohibited use of literacy test to disqualify any person from voting who had successfully completed sixth grade in an American school in which the predominant language was other than English).

219. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974); *Davis v. Beason*, 133 U.S. 333, 346-47 (1890). But see *Hunter v. Underwood*, 471 U.S. 222, 231-32 (1985) (striking down provision of Alabama constitution that disenfranchised any person convicted of a crime involving moral turpitude because provision was motivated by desire to disenfranchise black voters).

220. See, e.g., *Ball v. James*, 451 U.S. 355, 371-72 (1981) (upholding Arizona scheme for electing directors of water reclamation district under which property owners received one vote for each acre of land they owned); *Salyer Land Co. v. Tulare Lake*

sonable residency requirements for all state and local elections.²²¹ This reservoir of state power is worth noting to remind Congress that some adjustments in the state franchise must be accomplished by constitutional amendment rather than federal legislation.²²²

B. *The Structure and Mechanics of State Government*

The Supreme Court frequently has observed that Congress cannot abolish the state governments. Instead, "in many articles of the Constitution the necessary existence of the States . . . is distinctly recognized."²²³ The guarantee clause provides a convenient anchor for this principle. Obviously the United States cannot "guarantee to every state in this union a Republican form of government" if it has destroyed those governments. At the very least, therefore, the guarantee

Basin Water Storage Dist., 410 U.S. 719, 730-35 (1973) (upholding California statute that allowed only landowners to vote in water storage district elections). But see *supra* note 214 and accompanying text.

221. See, e.g., *Burns v. Fortson*, 410 U.S. 686 (1973) (per curiam) (upholding 50-day durational residency requirement for all elections except presidential and vice presidential elections); *Marston v. Lewis*, 410 U.S. 679 (1973) (per curiam) (same); *Pope v. Williams*, 193 U.S. 621, 632-34 (1904) (upholding Maryland statute requiring new residents to declare their intention of becoming state citizens before registering to vote). But see *supra* note 213 and accompanying text. Title II of the Voting Rights Act abolishes state residency requirements in presidential and vice presidential elections. 42 U.S.C. § 1973aa-1 (1982). The Supreme Court upheld this provision in *Oregon v. Mitchell*, 400 U.S. 112, 118-19 (1970).

Congress might attempt to overcome some of these limits by adopting an expansive notion of its power to enforce the fourteenth amendment. For example, Congress might conclude that disenfranchising convicted felons is a cruel and unusual punishment violating the due process clause of the fourteenth amendment. Congress could then "enforce" that prohibition by forbidding the states to disenfranchise former felons. The Supreme Court, however, has been reluctant to allow expansive congressional enforcement of the fourteenth amendment outside the area of racial discrimination. See *infra* note 262 and accompanying text. It is unlikely, therefore, that Congress could evade the strictures of the guarantee clause in this manner. Indeed, the protection afforded state autonomy by the guarantee clause confirms the need for careful judicial scrutiny of Congress' enforcement power.

222. See *Oregon v. Mitchell*, 400 U.S. at 152 (Harlan, J., concurring in part and dissenting in part).

223. *County of Lane v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869); see also *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968) ("The Court has ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity.'" (quoting the appellants); *The Collector v. Day*, 78 U.S. (11 Wall.) 113, 125 (1871) ("[T]he existence [of the states] is so indispensable, that . . . it would seem to follow . . . that the means and instrumentalities employed for carrying on the operations of their governments [and] for preserving their existence . . . should be left free and unimpaired"), overruled, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939); *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."). Even in *Garcia*, the majority "recognize[d] that the States occupy a special and specific position in our constitutional system." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985).

clause promises the states federal support for the continued existence of some form of government.

The guarantee clause, moreover, restricts the federal government's power to interfere with the organizational structure and governmental processes chosen by a state's residents. A republican government, as explained above, is responsible to its voters rather than to any outside agency.²²⁴ In order to ensure that state and local governments remain responsive to their constituents, those citizens must have the power to choose the governmental forms that work best for them. The guarantee clause, therefore, grants states control over their internal governmental machinery. States, for example, should be free to allocate power among the branches of state government; to create political subdivisions and administrative agencies; to set terms of office for state officials; and to regulate the internal affairs of governmental bodies.²²⁵ In addition, states should have the power to control the procedures by which their government officials are selected: to draw election districts, set the dates and times of local elections, and govern other aspects of election procedure.²²⁶

The Supreme Court has firmly acknowledged the power of states to control these aspects of internal government, although the Court has rarely tied that power to a specific constitutional provision. In *Highland Farms Dairy v. Agnew*,²²⁷ the Court declared that "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."²²⁸ Similarly, in *Missouri v. Lewis*,²²⁹ the Court announced that "[e]ach State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government."²³⁰ In *Coyle v. Smith*²³¹ the Court invali-

224. See *supra* notes 126–36 and accompanying text.

225. See Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1231–32 (1977) [hereinafter Stewart, *Pyramids*]; Note, *On Reading and Using the Tenth Amendment*, 93 Yale L.J. 723, 737 (1984) [hereinafter Note, *Reading and Using*]; Note, *The Clean Air Act Amendments of 1970: A Threat to Federalism?*, 76 Colum. L. Rev. 990, 1022 (1976). Even Professor Martha Field, who has criticized *National League of Cities*, has suggested that the Supreme Court could have used *National League of Cities* to create a "core governmental functions" test protecting "internal state activities" such as "the organization of state and local governments, the treatment of the states' own employees, and other activities that fall under the rubric of housekeeping functions." Field, *supra* note 70, at 105.

226. See Rapaczynski, *supra* note 17, at 416.

227. 300 U.S. 608 (1937).

228. *Id.* at 612; see *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) ("We recognize a State's interest in establishing its own form of government."); *Wilson v. North Carolina*, 169 U.S. 586, 594 (1898) ("In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office.").

229. 101 U.S. 22 (1880).

230. *Id.* at 30; see also *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) ("Municipal

dated a federal statute limiting the location of Oklahoma's capital city, noting that "[t]he power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers."²³² Even *Garcia* suggested that the power to locate a state capital is so essential to state sovereignty that the Court might intervene if Congress once again attempted to dictate that matter to a state.²³³

The courts have also granted the states broad control over the process of filling their governmental offices. In *Wilson v. Oklahoma City Council*,²³⁴ a district court upheld a state law directing the members of a city council to fill interim vacancies on that council. In dismissing the plaintiffs' constitutional challenge to this procedure, the court cited the tenth amendment and observed that "it is clear that this type of legislative decision was reserved to the states."²³⁵ Similarly, in *Cintron-Garcia v. Romero-Barcelo*²³⁶ the Court of Appeals for the First Circuit observed that "considerations of federalism (state autonomy in determining, within fairly broad limits, the nature of its own political system)" support the power of states to fill interim legislative vacancies by appointment.²³⁷

Congress itself has recognized that the Constitution limits its authority to regulate state election procedures. In 1965, while debating the Voting Rights Act, the Senate considered a provision that would

corporations are political subdivisions of the State The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.").

231. 221 U.S. 559 (1911).

232. *Id.* at 565.

233. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985); see also *Morgan v. South Bend Community School Corp.*, 797 F.2d 471, 477 (7th Cir. 1986) (suggesting that Congress may not "decide who within a state's government has the authority to act on behalf of that government"); *Bradley v. School Bd.*, 462 F.2d 1058, 1068 (4th Cir. 1972) ("One of the powers . . . reserved to the states [by the tenth amendment] is the power to structure their internal government."), *aff'd* by an equally divided Court, 412 U.S. 92, 93 (1973); *United States v. Mandel*, 415 F. Supp. 1025, 1031 (D. Md. 1976) ("Nor can it be doubted that the states under our federal scheme have, within broad constitutional limits, the exclusive power to allocate the functions of the executive, judicial, and legislative powers as they wish.").

234. 347 F. Supp. 306 (W.D. Okla. 1972).

235. *Id.* at 308.

236. 671 F.2d 1 (1st Cir. 1982).

237. *Id.* at 5. The court further suggested that both the guarantee clause and the tenth amendment "embod[y] this wisdom." *Id.*; see also *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 12-14 (1982) (upholding procedure for filling vacancies in Puerto Rico House of Representatives); *Kaelin v. Warden*, 334 F. Supp. 602, 607-08 (E.D. Pa. 1971) (upholding Pennsylvania's procedure for filling vacancies in office of county commissioner); *Valenti v. Rockefeller*, 292 F. Supp. 851, 866-67 (S.D.N.Y. 1968) (upholding New York's procedure for filling vacancies in United States Senate), *aff'd* mem., 393 U.S. 405 (1969).

have prohibited vote buying in all federal, state, and local elections.²³⁸ Senator Hart, however, cautioned that the "question, whether Congress has the power to insure fair election procedures in State and local elections . . . is a very open one and a very serious one."²³⁹ Likewise, Senator Ervin objected that the provision under consideration was "unconstitutional because it [was] not restricted to Federal elections."²⁴⁰ Ervin offered an amendment limiting the provision to federal elections and Congress adopted the statute in that form.²⁴¹

Finally, several courts have suggested that the Constitution forbids the federal government from intervening in the internal affairs of state governmental bodies. In *Dauids v. Akers*,²⁴² the Court of Appeals for the Ninth Circuit refused to interfere with the assignment of committee members in the Arizona House of Representatives. "We have a strong feeling," the court announced, "that if [we] were to undertake to grant to plaintiffs the relief that they seek, our action would set the sometimes canonized and frequently capitalized Founding Fathers, as well as the Framers and Supporters of the Fourteenth Amendment, spinning in their graves."²⁴³ Federal oversight of committee assignments in a state legislature, the court concluded, would be both "startlingly unattractive" and inconsistent with the principles articulated in *National League of Cities v. Usery*.²⁴⁴

Likewise, in *Heimbach v. Chu*²⁴⁵ the district court refused to adjudicate a constitutional challenge to the use of a "fast roll call" procedure in the New York State Senate. In holding this claim nonjusticiable, the

238. 111 Cong. Rec. 7890 (1965). Senator Williams proposed the provision on the floor of the Senate. *Id.* at 7889-90.

239. *Id.* at 8431 (1965) (statement of Sen. Hart). Later, Hart observed that "we do not attempt to reach State or local elections with a criminal sanction on payment for fraudulent registration in voting. Why? Because we had very grave doubt that on that basis we could." *Id.* at 8433. The guarantee clause, of course, may give Congress some power to intervene in state elections to insure basic fairness. For a further discussion of congressional power to wield the guarantee clause as a sword, see *supra* notes 135-39 and accompanying text.

240. 111 Cong. Rec. at 8975 (1965) (statement of Sen. Ervin).

241. *Id.* at 8975, 8988 (1965) (action in the Senate); *id.* at 16245-51 (1965) (action in the House). For the provision's final form, see 42 U.S.C. § 1973i(c) (1982). See generally *United States v. Cianciulli*, 482 F. Supp. 585, 613-16 (E.D. Pa. 1979) (reviewing legislative history of statute).

242. 549 F.2d 120 (9th Cir. 1977).

243. *Id.* at 123.

244. *Id.* at 123, 127. The plaintiffs in *Dauids* had challenged the composition of Arizona's legislative committees under the first and fourteenth amendments. In addition to expressing its federalism concerns, the court of appeals rejected these claims on the merits. *Id.* at 123-25. Cf. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1175-77 (D.C. Cir.) (withholding judicial relief on prudential grounds from a challenge to committee composition in the United States House of Representatives), cert. denied, 464 U.S. 823 (1983).

245. No. 83 Civ. 5318 (S.D.N.Y. Dec. 23, 1983) (LEXIS, Genfed library, Dist file), aff'd on other grounds, 744 F.2d 11 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

court pointed out that "if a basic principle of republicanism is that decisions most directly affecting a body of people be made by the people themselves, the guarantee clause itself argues against the imposition by a federal court of its own governmental values."²⁴⁶ The court suggested that the guarantee clause forbids federal intrusion into the governmental procedures adopted by the citizens of a state.

The guarantee clause provides a firmer foundation for all of these rulings than the vague references to the tenth amendment or "considerations of federalism" employed by some courts. As the court in *Heimbach* recognized, a republican government is one in which the people make important decisions affecting their community. In order to accommodate that goal, the guarantee clause must grant the states a measure of autonomy in directing their governmental machinery.

At the same time, however, the guarantee clause does not give the states carte blanche to order their government systems. Other constitutional provisions impose a variety of restrictions on a state's freedom to structure its governmental processes. The first amendment prohibits a state from delegating legislative authority to a religious organization²⁴⁷ or limiting some types of campaign expenditures.²⁴⁸ The due process clause of the fourteenth amendment requires each state to conform its criminal justice system to many of the specific commands found in the fourth, fifth, sixth, and eighth amendments.²⁴⁹ Indeed, the guarantee clause itself limits the autonomy of each state by requiring the states to maintain republican forms of government. If a state abandons republican principles, the United States may intervene and restore that form of government.²⁵⁰

246. *Id.* (quoting Note, Niche, *supra* note 122, at 689).

247. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-27 (1982); see also *Chambers v. Marsh*, 675 F.2d 228, 231 (8th Cir. 1982) (tenth amendment does not forbid federal court from scrutinizing state's practice of opening legislative sessions with a prayer in order to determine whether that practice violates establishment clause), *rev'd* on other grounds, 463 U.S. 783 (1983).

248. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 58-59 (1976) (*per curiam*) (first amendment prohibits limits on independent campaign expenditures by individuals); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (corporations have first amendment right to make unlimited expenditures supporting or opposing referendum issues); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. 616, 630-31 (1986) (nonprofit, issue-oriented corporation without shareholders has first amendment right to make unlimited expenditures on behalf of candidate where there is no compelling justification for the curtailment of expenditures).

249. See generally 2 R. Rotunda, J. Nowak & J. Young, *supra* note 19, § 14.2.

250. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 40-42 (1849) (suggesting that Congress, but not the federal courts, may take action to quell uprisings in the states and to decide which government is the legitimate government of that state); cf. *Plessy v. Ferguson*, 163 U.S. 537, 564 (1896) (Harlan, J., dissenting) (state-sanctioned segregation is "inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts"), overruled, *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954); *Heimbach v. Chu*, No. 83 Civ. 5318 (S.D.N.Y. Dec. 23, 1983) (LEXIS Genfed library, Dist file)

The fourteenth and fifteenth amendments impose particularly broad limits on a state's discretion to determine its own governmental processes.²⁵¹ Courts have invoked these amendments to command states to redraw their municipal boundaries and election districts in order to cure purposeful discrimination against racial minorities.²⁵² The fourteenth amendment also requires the states to apportion both state and local legislative bodies on the basis of population²⁵³ and forbids political gerrymandering in those bodies.²⁵⁴ In all of these ways, the fourteenth and fifteenth amendments modify the autonomy promised states by the guarantee clause. As the Supreme Court declared in *Milliken v. Bradley*,²⁵⁵ the Constitution's "reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment."²⁵⁶

As noted above, moreover, Congress may enforce the fourteenth and fifteenth amendments through "appropriate legislation."²⁵⁷ Invoking this power, Congress has required some states to obtain federal approval before changing the composition of their elected bodies, the

(guarantee clause may authorize courts "to restructure state government when necessary to vindicate individual rights") (dictum), aff'd on other grounds, 744 F.2d 11 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *City of Rome v. United States*, 472 F. Supp. 221, 241 (D.D.C. 1979) (suggesting in dictum that Voting Rights Act might be proper exercise of congressional power under the guarantee clause because it guarantees "one essential feature of a truly republican form of government—i.e., the equal right of any citizen, irrespective of race or color, to exercise the franchise."), aff'd, 446 U.S. 156 (1980); Bork, *supra* note 122, at 18–19 (guarantee clause provides better basis for reapportionment cases than equal protection clause).

251. The fourteenth amendment forbids a state to "deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, while the fifteenth amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

252. See, e.g., *White v. Regester*, 412 U.S. 755, 766–70 (1973); *Gomillion v. Lightfoot*, 364 U.S. 339, 346–47 (1960).

253. See, e.g., *Hadley v. Junior College Dist.*, 397 U.S. 50, 57–59 (1970) (junior college district); *Avery v. Midland County*, 390 U.S. 474, 478–81 (1968) (county commissioners court); *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) (state legislature). It has been suggested that the reapportionment cases can be more easily rationalized under the Guarantee Clause. See J. Ely, *Democracy and Distrust* 118–23 (1981); Bork, *supra* note 122, at 19.

254. See *Davis v. Bandemer*, 106 S. Ct. 2797 (1986). Although a majority of the Court agreed in *Davis* that political gerrymanders violate the equal protection clause, a majority of Justices could not agree on a standard to enforce that constitutional right. Compare *id.* at 2806–16 (plurality opinion) with *id.* at 2822–25 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment) and *id.* at 2825–38 (Powell, J., joined by Stevens, J., dissenting).

255. 433 U.S. 267 (1977).

256. *Id.* at 291.

257. U.S. Const. amend. XIV, § 5; *id.* amend. XV, § 2. See *supra* notes 216–18 and accompanying text.

terms of office for their elected officials, or the boundaries of their electoral districts.²⁵⁸ Without the extensive power vested in Congress under the fourteenth and fifteenth amendments, this federal supervision of changes in the structure of state government almost certainly would violate the guarantee clause.²⁵⁹ As the Supreme Court has recognized, however, the Civil War amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty."²⁶⁰ Congressional power to enforce those amendments, therefore, "necessarily overrid[es]" any "principles of federalism that might otherwise be an obstacle to congressional authority."²⁶¹

This does not mean, of course, that Congress has an unchecked power to tinker with state governmental structures under the fourteenth and fifteenth amendments. When Congress attempts to "enforce" those amendments by addressing problems other than racial discrimination, the courts will scrutinize its actions with care. Indeed, in *Oregon v. Mitchell*, the Supreme Court held that Congress had exceeded its enforcement powers by attempting to mandate a minimum voting age for all state and local elections. Because higher voting ages were not linked to racial discrimination, Congress could not justify its enactment under the fourteenth and fifteenth amendments.²⁶²

In addition to the power gleaned from the Civil War amendments, Congress may attempt to alter a state's government structure by condi-

258. 42 U.S.C. § 1973c (1982); *City of Rome v. United States*, 446 U.S. 156, 177 (1980).

259. See *South Carolina v. Katzenbach*, 383 U.S. 301, 359 (1966) (Black, J., concurring in part and dissenting in part) (footnote omitted):

Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. Moreover, it seems to me that [a law] which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that "The United States shall guarantee to every State in this Union a Republican Form of Government."

260. *City of Rome*, 446 U.S. at 179; see also *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880) (The Civil War amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. [Congressional] enforcement [of these amendments] is no invasion of [s]tate sovereignty.").

261. *City of Rome*, 446 U.S. at 179.

262. 400 U.S. 112, 124-31 (1970) (Black, J., announcing judgments of the Court in an opinion expressing his own views) (invoking federalism principles); *id.* at 200-09 (Harlan, J., concurring in part and dissenting in part) (same); *id.* at 293-96 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part) (same); see also Stewart, *Pyramids*, *supra* note 225, at 1246 ("However broad Congress's discretion in enforcing the Fourteenth Amendment, it does not extend to the creation of wholly novel constitutional rights. Such a prerogative would permit easy circumvention of federalism limits on national power."). But see Ross, *Legislative Enforcement of Equal Protection*, 72 Minn. L. Rev. (forthcoming 1988) (urging a greater congressional role in interpreting and enforcing the fourteenth amendment).

tioning the receipt of federal funds on changes in that structure. The Supreme Court has been quite tolerant of conditions attached to federal grants in this manner. In *Oklahoma v. United States Civil Service Commission*,²⁶³ for example, the Court upheld a federal statute that forbade all state and local employees who worked for agencies supported by federal funds from "tak[ing] any active part in political management or in political campaigns."²⁶⁴ The Court acknowledged that "the United States is not concerned with, and has no power to regulate, local political activities as such of state officials."²⁶⁵ Nevertheless, it held that Congress had the "power to fix the terms upon which its money allotments to states shall be disbursed."²⁶⁶

More recent decisions have endorsed other congressional attempts to modify state governmental structures through federal grant programs. In *Florida v. Mathews*,²⁶⁷ the Court of Appeals for the Fifth Circuit approved a federal regulation restricting the membership of state boards that license nursing home administrators.²⁶⁸ Compliance with the regulation was a condition of receiving federal Medicaid funds for nursing home care. Although the regulation altered the composition of a state agency, the court of appeals found that the regulation did "not infringe upon any power reserved to the state."²⁶⁹ The regulation "merely establish[ed] terms and conditions under which federal assistance [would] be provided to states" electing to participate in this portion of the Medicaid program.²⁷⁰ "Once a state chooses to participate in a federally funded program," the court concluded, "it must comply with federal standards."²⁷¹

Similarly, in *Florida Department of Health & Rehabilitative Services v. Califano*,²⁷² the district court upheld federal regulations governing the administrative structure of state agencies that receive federal funds to provide vocational rehabilitation services for the handicapped.²⁷³ Although the regulation forces "adoption by a state of a particular gov-

263. 330 U.S. 127 (1947).

264. Hatch Act, ch. 640, § 12, 54 Stat. 767, 767 (1940) (codified as amended at 5 U.S.C. § 1502(a) (1982)).

265. 330 U.S. at 143.

266. *Id.*

267. 526 F.2d 319 (5th Cir. 1976).

268. Specifically, the regulation required that "less than a majority of the board membership shall be representative of a single profession or institutional category." *Id.* at 322 (emphasis omitted) (quoting 45 C.F.R. § 252.10(b)(3) (1976) (redesignated 42 C.F.R. § 452.10(b)(3) in 1977) (repealed 1978)).

269. 526 F.2d at 326.

270. *Id.*

271. *Id.*

272. 449 F. Supp. 274 (N.D. Fla.), *aff'd*, 585 F.2d 150 (5th Cir. 1978), cert. denied, 441 U.S. 931 (1979).

273. The regulations, for example, require the states to designate a full-time director of the governmental unit responsible for vocational rehabilitation. 34 C.F.R. § 361.8 (1986).

ernmental structure," the court approved the measure as "wholly indirect and limited to measures meant to insure the proper functioning of federally funded programs."²⁷⁴ Like the courts in *Oklahoma v. Civil Service Commission* and *Florida v. Mathews*, the district court stressed that the regulations did "not impose a set of coercive, mandatory requirements" on the states.²⁷⁵ Instead, "any state which object[ed] to the 'strings' attached to receipt of the federal funds ha[d] the option to refuse both the grants-in-aid and the objectionable conditions."²⁷⁶

The spending power thus gives Congress considerable opportunity to induce changes in state governmental structures. Recently, however, both courts and commentators have cautioned that this power is not unlimited.²⁷⁷ In *South Dakota v. Dole*,²⁷⁸ the Supreme Court's most recent discussion of the spending power, the Court noted that congressional authority under the spending clause is bounded by five conditions. First, "the exercise of the spending power must be in pursuit of 'the general welfare.'"²⁷⁹ Second, any condition of the receipt of federal funds must be stated " 'unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.' "²⁸⁰ Third, the conditions must be related " 'to the federal interest in particular national projects or programs.' "²⁸¹ Fourth, the condition must not require "the States to

274. 449 F. Supp. at 283, 284. Notably, the plaintiffs in this case challenged the federal regulations under both the tenth amendment and the guarantee clause. *Id.* at 283.

275. *Id.* at 284.

276. *Id.*; see also *Middlesex County Utils. Auth. v. Borough of Sayreville*, 690 F.2d 358, 364 (3d Cir. 1982) (requirement that Middlesex County Utilities Authority adopt a system of user charges did not violate tenth amendment because the requirement was simply a condition of receiving federal funds that the Authority was " 'free not to apply for' "), cert. denied, 460 U.S. 1023 (1983); *Arizona State Dep't of Pub. Welfare v. Department of Health, Educ. & Welfare*, 449 F.2d 456, 473-74 (9th Cir. 1971) (summarily dismissing tenth amendment challenge to requirement that Arizona establish an advisory committee on public assistance programs because that requirement was a condition to receiving federal funds), cert. denied, 405 U.S. 919 (1972); *Montgomery County v. Califano*, 449 F. Supp. 1230, 1242-50 (D. Md. 1978) (the National Health Planning and Resources Development Act did not violate the 10th Amendment because assistance offered thereunder could be refused), *aff'd mem.*, 599 F.2d 1048 (4th Cir. 1979). *Cf.* *Bell v. New Jersey*, 461 U.S. 773, 790 (1983) ("Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty.").

277. See, e.g., Kaden, *supra* note 34, at 874-83; Rapaczynski, *supra* note 17, at 417-18; Rosenthal, *supra* note 53, at 1131-64; Stewart, *supra* note 17, at 958-59; Note, Taking Federalism Seriously: Limiting State Acceptance of National Grants, 90 Yale L.J. 1694 (1981).

278. 107 S. Ct. 2793 (1987).

279. *Id.* at 2796.

280. *Id.* (quoting *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

281. *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (Brennan, J., joined by White, J., Marshall, J., and Stevens, J.)).

engage in activities that would themselves be unconstitutional," such as invidious discrimination or the imposition of cruel and unusual punishments.²⁸² And, finally, "the financial inducement offered by Congress" must not "be so coercive as to pass the point at which 'pressure turns into compulsion.'" ²⁸³ Although the Court ultimately upheld the condition on highway funds challenged in *Dole*, its extensive treatment of the issue suggests a growing willingness to limit Congress's expansive power under the spending clause.²⁸⁴

To protect the concept of state autonomy implicit in the guarantee clause, courts should rigorously enforce the limits on the spending power identified in *South Dakota v. Dole*. When Congress attempts to condition the receipt of federal funds on a modification of state governmental structure, courts should insure that the modification is directly related to the achievement of that particular program's goals. Congress should not be allowed to meddle with local governmental processes unless there is a clear nexus between that interference and enhancement of the federal program for which money has been provided.²⁸⁵ In addition, courts should carefully scrutinize conditions that

282. *Id.* at 2798. The Supreme Court has made clear that this injunction against unconstitutional conditions does not apply to provisions of the Constitution, such as the tenth or twenty-first amendments, designed to allocate powers between the state and national governments. *Id.* at 2794-95. The guarantee clause, therefore, would not automatically invalidate any conditions imposed on the structure of state governments.

283. *Id.* at 2798 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)); see also *Montgomery County v. Califano*, 449 F. Supp. 1230, 1247 (D. Md. 1978) ("the withholding of federal funds in some instances may resemble the imposition of civil or criminal penalties and . . . economic pressure may threaten such havoc to a state's well-being as to cause the federal legislation to cross the line which divides inducement from coercion"), *aff'd mem.*, 599 F.2d 1048 (4th Cir. 1979). In *Dole* itself, however, the Court concluded that a federal statute withholding five percent of a state's highway funds if the state did not raise its drinking age to 21 was only a "relatively mild encouragement to the States." 107 S. Ct. at 2798.

284. The contested statute in *Dole* withheld a percentage of federal highway funds from states that refused to enforce a minimum drinking age of twenty-one. Justice O'Connor, who dissented from the Court's opinion, concluded that this statute exceeded Congress' power under the spending clause because the condition was not "reasonably related" to the distribution of highway funds. 107 S. Ct. at 2799-2802 (O'Connor, J., dissenting).

285. In measuring the connection between grant conditions and program goals, courts might adopt the standard proposed by Professor Lewis Kaden; he has argued that when a grant condition "interfere[s] with state autonomy," the condition should be "related to the achievement of an important governmental objective." Kaden, *supra* note 34, at 896; see also Van Alstyne, *supra* note 70, at 1714 n.25 ("a requirement of 'close fit' between conditions attached to federal funds and the demand made of recipient states" arguably may be required under the tenth amendment). The majority in *South Dakota v. Dole*, on the other hand, inquired only whether the condition was "reasonably calculated to advance the general welfare." 107 S. Ct. at 2797. Under any of these standards, some grant conditions clearly would be unconstitutional; Congress, for example, could not condition the receipt of highway funds on a state's adoption of a unicameral legislature. *Id.* at 2801 (O'Connor, J., dissenting) (quoting concession to that effect by counsel for the United States). Cf. Rosenthal, *supra* note 53, at 1162 (suggesting that

tie an unusually large portion of a state's grant money to a change in the state's governmental structure. Under such circumstances, Congress may have attempted to tie the condition to unrelated grants or may have crossed the line from seduction to coercion. By enforcing these limits on the spending power, courts can ensure that Congress does not intrude too deeply on the state autonomy promised by the guarantee clause.²⁸⁶

The Constitution gives the federal government considerable power to dictate the structure of state and local governments. The Civil War amendments, spending clause, and other constitutional provisions all limit the freedom of states to arrange their internal governmental affairs. Outside of these express constitutional commands, however, the guarantee clause prevents the federal government from interfering with the governmental process established by a state's voters. By enforcing the promise of autonomy embedded in the guarantee clause, courts can assure state governments the degree of independence necessary to foster republican government.

C. Qualifications for State Office

The authority to set qualifications for state and local offices is closely related to the power to determine the basic structure of those governments. If government officials are to be responsive to their constituents, as a republican government demands, then the voters must be free to reject candidates they deem unqualified. The Supreme Court has long acknowledged this principle. In 1900, the Court declared that "[i]t is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."²⁸⁷

During the last two decades, several lower courts have reaffirmed

Congress could not condition receipt of federal funds on a state's agreement to shorten the governor's term of office or change the boundaries of its counties). On the other hand, some conditions would survive even the most rigorous test of germaneness. A prohibition against partisan political activity in federally funded programs, for example, is substantially related to the success of those programs. See *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947); *supra* notes 263-66 and accompanying text.

286. Conditions that are invalid under this view of the spending clause, of course, may still be valid under other grants of congressional power. A requirement that state and local governments set aside at least 10% of federal public works funds for purchases from minority businesses, for example, is a valid exercise of congressional authority to enforce the fourteenth amendment—even if the requirement is not directly related to the completion of public works projects. See *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980). Other crossover restrictions, applicable to a wide variety of grant programs, may fall in this category.

287. *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900); see also *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892).

this ideal and refused to modify state qualifications for elective office. In *Chimento v. Stark*,²⁸⁸ a three-judge district court upheld a New Hampshire constitutional provision requiring all candidates for governor to reside within the state for seven years prior to their election. In reaching this decision, the court observed that "[a] state's right to impose restrictions on one seeking public office is a power reserved to the states under the Tenth Amendment of the United States Constitution."²⁸⁹ Similarly, the Court of Appeals for the Eighth Circuit upheld a Minnesota statute requiring candidates for the state supreme court to be "admitted or entitled to be admitted to the practice of law in Minnesota."²⁹⁰ Like the district court in *Chimento*, the Eighth Circuit observed that "[t]he right to . . . prescribe qualifications for statewide political offices is reserved to the states under the tenth amendment of the United States Constitution."²⁹¹

Once again, the guarantee clause provides a more secure basis for these rulings than the tenth amendment. The tenth amendment's bare reservation of power to the states does not demonstrate why the states require the ability to set qualifications for their government offices. The guarantee clause, however, directly commands that result by promising the states a republican form of government. A republican government implies a special relationship between the state and its citizens; the citizens of a republican government retain ultimate authority to make, enforce, and interpret their own laws.²⁹² In order to control those functions, the citizens of each state must regulate the qualifications of all government employees who perform legislative, executive,

288. 353 F. Supp. 1211 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973).

289. *Id.* at 1215. Two years later, the same court upheld a seven-year residency requirement for state senatorial candidates. *Sununu v. Stark*, 383 F. Supp. 1287, 1290 (D.N.H. 1974) ("The State has the power, reserved to it by the Tenth Amendment to the United States Constitution and the compelling interest, to impose eligibility requirements upon those who seek state-elective office."), *aff'd mem.*, 420 U.S. 958 (1975).

290. *Bullock v. Minnesota*, 611 F.2d 258, 259 (8th Cir. 1979).

291. *Id.*; see also *Woodward v. City of Deerfield Beach*, 538 F.2d 1081, 1083-84 (5th Cir. 1976) (upholding six-month residency requirement for office of city commissioner). Cf. *Antonio v. Kirkpatrick*, 579 F.2d 1147, 1150 (8th Cir. 1978) ("The right to prescribe qualifications for statewide political offices is a power reserved to the States under the tenth amendment of the Constitution, and the federal courts must exercise caution to avoid usurping this power.") (applying strict scrutiny to defeat residency requirement on equal protection grounds); *Henderson v. Fort Worth Indep. School Dist.*, 526 F.2d 286, 292 (5th Cir. 1976) ("The state is clearly vested with the power, derived from the Tenth Amendment, . . . to prescribe reasonable qualifications [for] . . . candidates for office."); *Matthews v. City of Atlantic City*, 84 N.J. 153, 170-71, 417 A.2d 1011, 1021 (1980) ("The power to prescribe qualifications for state political office [is] retained by the states under the Tenth Amendment. . . .").

292. See, e.g., *The Federalist* No. 39, at 251 (J. Madison) (J. Cooke ed. 1961) (A republican government is "a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."). See generally *supra* notes 127-34 and accompanying text.

or judicial tasks. That power encompasses functionaries such as state legislators, city council members, county board members, governors, members of administrative agencies, sheriffs, police officers, judges, and magistrates.²⁹³

The guarantee clause, however, does not assure states the authority to prescribe qualifications for all of their other employees. The concept of republican government does not require the establishment of public schools, waste treatment plants, or mass transit systems. Employees of these institutions perform important services, but they do not exercise the powers of republican government. The guarantee clause, therefore, does not give the states any special authority to set qualifications for school teachers, sanitation engineers, or bus drivers. Congress may regulate the qualifications for these positions if it has the power to do so under the commerce clause or one of its other delegated powers.

This distinction between employees who perform the functions of a republican government and employees who provide other services does not revive the dichotomy between "traditional" and "nontraditional" governmental functions discarded by the Court in *Garcia*.²⁹⁴ The number of employees who exercise the powers of republican government is far smaller than the number of workers engaged in traditional governmental operations. In *National League of Cities*, the Supreme Court listed fire prevention, sanitation, public health, and parks and recreation among the traditional functions of state and local governments.²⁹⁵ Most of the workers employed at those jobs, however, do not promote the ends of republican government and would not fall within the curtilage of the guarantee clause.²⁹⁶

293. Decisions about which employees perform sufficient executive, legislative, or judicial tasks to qualify for protection under the guarantee clause necessarily must be made on a case-by-case basis. An employee need not hold a political appointment, however, to perform the type of governmental function protected by the guarantee clause. If a state chooses to endow civil servants with executive, judicial, or legislative power, then the guarantee clause should insure state autonomy to prescribe qualifications for those employees. On the other hand, employees who perform purely ministerial tasks do not possess the type of governmental power protected by the guarantee clause. Cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (recognizing qualified immunity only for government officials who perform "discretionary functions"). An employee who nominally holds a position within the state's executive, legislative, or judicial branches, moreover, may not perform true executive, legislative, or judicial functions. Cf. *Walker v. Jones*, 733 F.2d 923, 931 (D.C. Cir.) (speech or debate clause did not shield congressional representative from liability for dismissing general manager of the House of Representatives Restaurant System, because "[s]electing, supervising, and discharging a food facilities manager . . . is not reasonably described as work that significantly informs or influences the shaping of our nation's laws"), cert. denied, 469 U.S. 1036 (1984). Courts enforcing the guarantee clause thus must examine carefully the functions performed by particular employees invoking that clause.

294. See supra notes 75-77 and accompanying text.

295. *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976).

296. Some of these workers, of course, may exercise legislative or executive func-

A government official's role in republican government, moreover, does not depend upon the historical pedigree of that office. States are free to devise new ways of making, enforcing, and interpreting their laws; the guarantee clause shields all employees who perform these functions.²⁹⁷ *National League of Cities* failed because its reliance on the historical functions of state government "result[ed] . . . in linedrawing of the most arbitrary sort" and prevented citizens from experimenting with new forms of government.²⁹⁸ The distinction proposed in this Article avoids these pitfalls by adopting a functional principle that identifies protected employees by determining whether those employees perform the executive, judicial, or legislative tasks essential to a republican government.

This principle, finally, differs from the obscure distinction between "governmental" and "proprietary" functions occasionally drawn by the Supreme Court. When the Supreme Court has differentiated between governmental and proprietary functions, it has included undertakings such as a municipal water works under the governmental label.²⁹⁹ The functions essential to republican government are much narrower than these "governmental" operations. A municipal water works, like a waste treatment center or subway system, is not engaged in legislative, executive, or judicial functions; the employees of such a plant, therefore, are not protected by the guarantee clause. The guarantee clause, moreover, supplies a concrete concept of republican government to help the courts separate protected employees from unprotected ones. Enforcement of the guarantee clause thus avoids the Court's often incoherent attempts to distinguish governmental and proprietary functions.³⁰⁰

tions. Members of a local board of health, for example, may promulgate health regulations or enforce quarantine laws. The guarantee clause would protect these officers. Employees who promote the public health by providing medical or counseling services, on the other hand, are not agents of a republican government and would not merit the shelter of the guarantee clause.

297. Cf. The Federalist No. 43, at 292 (J. Madison) (J. Cooke ed. 1961) ("Whenever the states may chuse to substitute other republican forms [of government], they have a right to do so, and to claim the federal guaranty for the latter.").

298. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543-44 (1985).

299. See *Brush v. Commissioner*, 300 U.S. 352, 370-73 (1937) (provision of water is an essential governmental function exempt from federal taxation).

300. Because of the difficulty in discerning the difference between governmental and proprietary functions, a majority of the Court rejected the distinction as unworkable in *New York v. United States*, 326 U.S. 572, 579-81 (1946) (Frankfurter, J., joined by Rutledge, J., announcing the judgment of the Court); *id.* at 586 (Stone, C.J., concurring); *id.* at 591 (Douglas, J., joined by Black, J., dissenting). See generally *Garcia*, 469 U.S. at 540-47 (noting that the distinction between governmental and proprietary has never been adequately enunciated and leads to line drawing by the Court for the sake of line drawing). The distinction between governmental and proprietary functions, however, persists in the dormant commerce clause cases. See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (distinguishing "between States as market participants and States as market regulators"). But see *South-Central Timber Dev., Inc. v. Wunnicke*,

The guarantee clause, in sum, grants the states authority to set qualifications for a limited number of government positions. Even with respect to these employees, however, the state does not enjoy completely unfettered discretion. Once again, other constitutional provisions restrict the states' ability to determine qualifications. The first amendment prevents the states from conditioning public employment on a belief in God³⁰¹ or from firing some employees because of their political affiliation.³⁰² The guarantee clause itself presumably forbids the states from establishing a monarchy by making their gubernatorial offices hereditary. The fourteenth amendment prohibits the states from discriminating on the basis of race or national origin when setting qualifications for public office.³⁰³ The same amendment significantly limits a state's ability to use gender as a criterion for filling those offices.³⁰⁴ Even durational residency requirements for state officials may violate the fourteenth amendment when those requirements serve no sufficiently important state interest.³⁰⁵

467 U.S. 82, 101 (1984) (Brennan, J., concurring) ("point[ing] up the inherent weakness of [that] doctrine"); *id.* at 102 (Rehnquist, J., joined by O'Connor, J., dissenting) (distinction between market participation and market regulation is "both artificial and unconvincing").

301. *Torcaso v. Watkins*, 367 U.S. 488 (1961); see also U.S. Const. art. VI, § 3 ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States"); *McDaniel v. Paty*, 435 U.S. 618 (1978) (Tennessee could not bar religious leaders from serving in state offices).

302. *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). The first amendment also prohibits the states from dismissing employees who speak out on issues of public concern. *Rankin v. McPherson*, 107 S. Ct. 2891 (1987); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

303. *Turner v. Fouche*, 396 U.S. 346 (1970).

304. See, e.g., *Personnel Adm'r v. Feeney*, 442 U.S. 256, 273 (1979) ("[A]ny state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.") (upholding preferences for veterans because of absence of discriminatory intent).

305. See, e.g., *Antonio v. Kirkpatrick*, 579 F.2d 1147 (8th Cir. 1978) (ten-year residency requirement for state auditor violated equal protection clause); *Henderson v. Fort Worth Indep. School Dist.*, 526 F.2d 286 (5th Cir. 1976) (three-year residency requirement for school board members violated equal protection clause); *McKinney v. Kaminsky*, 340 F. Supp. 289 (M.D. Ala. 1972) (five-year residency requirement for county commissioner violated equal protection clause). Courts have disagreed over the strength of an interest that states must demonstrate to overcome such equal protection challenges. Compare *Antonio*, 579 F.2d at 1150 (durational residency requirement must "have some rational relationship to a legitimate State interest") with *Henderson*, 526 F.2d at 292 (qualification for elected office "must be shown necessary to promote a compelling state interest").

Congress may also affect qualifications for state office by conditioning the receipt of federal funds on compliance with federal requirements. For example, in the Hatch Act Congress required state and local employees administering programs funded wholly or in part by federal money to abstain from political activity. See *supra* notes 263-66 and accompanying text. In limiting state autonomy under the spending clause, however, Congress must enact restrictions that are related to the goals of its federal program and

These constitutional limits on state power permit the federal courts, not only to invalidate state attempts to prescribe discriminatory qualifications for governmental offices, but to remove state officials who have violated the constitutional rights of others. In *United States v. Brockway*,³⁰⁶ for example, the Fifth Circuit upheld a probation order forbidding an elected state sheriff from serving as a law enforcement officer during the period of his probation. The sheriff had been convicted for brutalizing a pretrial detainee in an attempt to obtain a confession.³⁰⁷ Under these circumstances, the Fifth Circuit held that the probation order did not violate the tenth amendment.³⁰⁸

The guarantee clause thus demarcates only a modest area of state control over the qualifications of government employees. The clause shields only workers who exercise legislative, executive, or judicial power. Even with respect to these employees, the states may not adopt criteria for selection that violate other constitutional provisions; nor may they retain employees who have violated the constitutional rights of others. Apart from these limits, however, the guarantee clause secures the states unrestricted authority to further the ends of republican government by prescribing qualifications for their elected and appointed officials.

D. *Wages of State Employees*

In 1974, Congress extended the Fair Labor Standards Act to embrace most state and local government employees.³⁰⁹ The tenth amendment challenges in *National League of Cities*, *Garcia*, and a host of lower court cases centered on this legislation.³¹⁰ The Supreme Court

must avoid making its conditions overly coercive. See *supra* notes 277–86 and accompanying text.

306. 769 F.2d 263 (5th Cir. 1985).

307. The conviction rested on 18 U.S.C. § 242 (1982), which prohibits the “deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States” by one who acts “under color of any law, statute, ordinance, regulation, or custom.”

308. The same principle suggests that, despite Justice Black’s reservations in dissenting from the denial of certiorari in *Lance v. Plummer*, 384 U.S. 929 (1966), see *supra* notes 140–44 and accompanying text, the lower court in that case was justified in suspending from duty a state deputy sheriff who had threatened a black citizen attempting to register at a local motel. See also *United States v. Tonry*, 605 F.2d 144 (5th Cir. 1979) (upholding probation order that prohibited defendant who had pleaded guilty to promising benefits in return for political contributions from running for political office or engaging in any political activity during the course of his probation); *United States v. Mandel*, 415 F. Supp. 997 (D. Md.) (refusing to dismiss federal indictment of state governor who was accused of taking bribes and conspiring to defraud the citizens of his state), supplemented, 415 F. Supp. 1025 (D. Md. 1976).

309. Act to Amend the Fair Labor Standards Act, Pub. L. No. 93-259, § 6, 88 Stat. 55, 58–62 (1974) (codified as amended at 29 U.S.C. §§ 203, 204, 207, 213, 216, 255, 260 (1982 & Supp. III 1987)).

310. See *La Pierre*, Political Safeguards, *supra* note 4, at 808–10 n.115, 896–97 n.454 (citing cases).

ultimately rejected these challenges, subjecting the states to all wage and hour legislation enacted by Congress.³¹¹ Enforcement of the guarantee clause would alter that result only slightly; even under the proposed interpretation of the guarantee clause Congress retains the authority to regulate the wages and hours of most government employees.

Most state and local employees do not perform functions related to a republican form of government. School teachers, hospital orderlies, garbage collectors, bus drivers, and air traffic controllers do not exercise the lawmaking, adjudicatory, or enforcement functions that characterize a republican government. Congress, therefore, may adjust the wages and hours of these and similar employees without diminishing the states' ability to conduct a republican form of government.³¹²

The guarantee clause, on the other hand, does bar Congress from regulating the wages of state governors, legislators, judges, and other employees who exercise the powers of republican government. If Congress could set the wages and hours of these officials, it would intrude upon the power of the states to appoint their own governmental representatives.³¹³ In addition, federal wage and hour legislation might limit the quantity of governmental work performed in a state. Almost any minimum wage would severely curtail activities of the New Hampshire legislature, which has more than four hundred members and currently pays those legislators only \$100 a year for their efforts.³¹⁴ Federal interference of this nature would violate the principle that, in a republican government, the citizens determine who wields legislative, executive, and judicial power and how often that power is exercised.

Cogizant perhaps of these limits on its authority, Congress has not attempted to regulate the wages and hours of most government employees who possess legislative, executive, and judicial power. The wage and hour provisions of the Fair Labor Standards Act do not apply to "any employee employed in a bona fide executive, administrative, or professional capacity."³¹⁵ In addition, the Act specifically exempts

311. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); see *supra* notes 78-87 and accompanying text.

312. Cf. *Kaden*, *supra* note 34, at 890 ("Neither the fiscal nor the governmental impact of fair labor standards . . . significantly alters a state's political process.").

313. States often further important policy objectives through the salaries paid their officials. Some states, for example, bar the reduction or increase of salaries paid legislators, governors, or other officials during their terms of office. See, e.g., *Del. Const. art. III, § 7*. These restrictions "are designed not merely to safeguard the officials concerned, but . . . to protect the public from having to deal with officials who might treat them unfairly out of the dread of . . . a salary cut." *Stiftel v. Malarkey*, 384 A.2d 9, 15 (Del. 1977). The provisions also prevent candidates from auctioning their services to the voters and ensure that penurious citizens, as well as wealthy ones, will be able to hold public office. See *Brown v. Hartlage*, 456 U.S. 45, 59-60, 60 n.9 (1982).

314. See 26 *The Book of the States* 79, 87 (1986).

315. 29 U.S.C. § 213(a)(1) (1982).

from its coverage state and local employees who hold public elective office, have been appointed by an elected official to serve in a policymaking capacity, serve on the personal staff of an elected official, advise an officeholder directly with respect to the constitutional or legal powers of that office, or work in the legislative branch of a state, political subdivision, or agency.³¹⁶ These exemptions probably include most employees who exercise executive, legislative, or judicial power. Thus, most government positions shielded by the guarantee clause already are exempt from the Fair Labor Standards Act.

The Act, however, does regulate the minimum wages paid police officers.³¹⁷ This aspect of the Act appears to violate the guarantee clause. Police officers enforce the laws of their state, exercising substantial discretion over what conduct constitutes a crime and when to effect an arrest. As the Supreme Court has recognized in another context, police officers "fulfill[] a most fundamental obligation of government to its constituency" and "are clothed with authority to exercise an almost infinite variety of discretionary powers."³¹⁸ Just as the citizens of a republican government decide whether to enact a law, those citizens should decide how vigorously to enforce the law. Federal regulation of the wages paid police officers undermines this republican power by affecting both the number of police officers employed by a state and their qualifications. For these reasons, the guarantee clause requires Congress to exempt state and local police officers from the minimum wage provisions of the Fair Labor Standards Act.³¹⁹

The guarantee clause, on the other hand, does not affect the scope of the Equal Pay Act, which prohibits salary discrimination "between employees on the basis of sex."³²⁰ Congress could extend this Act to all state and local employees, even those performing the functions of

316. *Id.* § 203(e)(2)(C) (1982 & Supp. III 1985). In order to enjoy this exemption, the individual also must not be "subject to the civil service laws of the State, political subdivision, or agency which employs [sic] him." *Id.*

317. Elected law enforcement officials and their staff who are not subject to the civil service laws are exempt from this requirement. 29 U.S.C. § 203(e)(2)(C) (1982 & Supp. III 1985). The only other exemption applicable to police officers, however, is a limited exemption from the maximum hour regulations. 29 U.S.C. § 213(b)(20) (1982). The latter exemption is quite limited; it applies only if the public agency for whom the employee works employs "less than 5 employees in . . . law enforcement activities." *Id.*

318. *Foley v. Connelie*, 435 U.S. 291, 297 (1978) (footnote omitted).

319. Fire fighters, on the other hand, do not exercise any legislative, executive or judicial functions. The guarantee clause, therefore, does not command their exemption from federal minimum wage and maximum hour laws. This contrast between the treatment afforded police officers and that given fire fighters highlights the distinction between the principle proposed in this Article and the focus in *National League of Cities* on "traditional governmental functions." Under the latter rule, of course, both police officers and fire fighters would be exempt from federal regulation. See *National League of Cities*, 426 U.S. at 851 & n.16 (listing both fire prevention and police protection as activities "which are well within the area of traditional operations of state and local governments").

320. 29 U.S.C. § 206(d)(1) (1982).

republican government, because the right to pay female employees less than male employees for the same work "cannot be considered an attribute of sovereignty necessary to a separate and independent existence."³²¹ Congress, moreover, has ample authority under the fourteenth amendment to outlaw discrimination on the basis of both sex and race in the wages paid by state employers.³²² The guarantee clause, therefore, does not grant state and local employers a license to discriminate against women or minorities when setting pay scales.

With respect to the wages paid state and local employees, the guarantee clause thus adopts a middle position between the extremes of both *National League of Cities* and *Garcia*. Congress has the power under the commerce clause to regulate the wages paid all but a few categories of employees who exercise executive, legislative, or judicial functions. Even with respect to these employees, moreover, the fourteenth amendment authorizes Congress to ban invidious discrimination on the basis of race or sex. The guarantee clause, therefore, promises states the freedom to set salaries for only a small group of employees and only when those wages are paid in a nondiscriminatory manner.

E. Regulation of Private Activity

In the wake of *National League of Cities*, litigants in several cases challenged the power of Congress to preempt state laws governing private conduct in areas traditionally regulated by the states. The Supreme Court emphatically rejected these claims in *Hodel v. Virginia Surface Mining & Reclamation Association*³²³ and *Hodel v. Indiana*.³²⁴ The tenth amendment principle recognized in *National League of Cities*, the Court stressed, restrains Congress only from regulating the "'States as States'"³²⁵—nothing in that amendment "prohibits Congress from dis-

321. *Marshall v. City of Sheboygan*, 577 F.2d 1, 6 (7th Cir. 1978); see *Marshall v. A & M Consol. Indep. School Dist.*, 605 F.2d 186, 188 (5th Cir. 1979); *Pearce v. Wichita County Hosp. Bd.*, 590 F.2d 128, 132 (5th Cir. 1979).

322. See, e.g., *Usery v. Charleston County School Dist.*, 558 F.2d 1169, 1170-71 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).

Consistent with the limits described above, see *supra* notes 263-86 and accompanying text, Congress may also exercise its power under the spending clause to regulate the wages paid state and local employees who exercise legislative, executive, or judicial functions. See *County of Los Angeles v. Marshall*, 631 F.2d 767, 769 (D.C. Cir.) (per curiam) (upholding application of Federal Unemployment Tax Act to state and local government employees), cert. denied, 449 U.S. 837 (1980); *New Hampshire Dep't of Employment Sec. v. Marshall*, 616 F.2d 240, 245-47 (1st Cir.) (same), appeal dismissed and cert. denied, 449 U.S. 806 (1980).

323. 452 U.S. 264 (1981).

324. 452 U.S. 314 (1981).

325. *Virginia Surface Mining*, 452 U.S. at 287 (quoting *National League of Cities*, 426 U.S. at 854).

placing state . . . laws regulating *private* activity.”³²⁶ Thus, Congress could regulate surface coal mining, even though the states traditionally had policed all aspects of local land use.

Furthermore, the Court held that Congress could engage in the practice of conditional preemption. Some of the Surface Mining Act provisions reviewed in the companion *Hodel* cases permitted the states to regulate surface mining if they obtained federal approval for their regulatory programs.³²⁷ If a state did not wish to control surface mining in this manner, federal regulations would govern surface mining in that state.³²⁸ Nothing in this scheme, the Court concluded, invaded the sovereign power of the states: if Congress had the power to preempt all control of surface mining, it could adopt the more moderate position of giving the states an opportunity to participate in this regulation.

Similarly, the guarantee clause does not prevent Congress from preempting—either directly or through conditional preemption—state regulation of private activity. The guaranty of a republican form of government relates to the process of state government; a republican government is one in which the people control the actions of their leaders and lawmakers. A republican government, however, need not exercise its authority over any particular substantive area. A government may be republican, with all of its officers accountable to the public, even though it has no power to regulate coal mining, atomic energy, or railroad freight charges.³²⁹ The guarantee clause assures the states the right to maintain autonomous, republican governments.³³⁰ The supremacy clause, however, denies those governments the power to regulate any fields properly preempted by Congress.³³¹

326. *Id.* at 292 (emphasis added). Furthermore, “[n]othing in *National League of Cities* compels or even hints at” such a prohibition. *Id.* (footnote omitted).

327. See *id.* at 271–72; *Hodel v. Indiana*, 452 U.S. at 319–20.

328. See *Virginia Surface Mining*, 452 U.S. at 271–72, 288.

329. One might argue, of course, that a republican government must have the power to regulate some aspects of private conduct and that the guarantee clause requires Congress to allow the states to engage in some minimum level of regulatory activity. As a practical matter, however, this question is unlikely to arise. Although Congress’ constitutional powers are broad, it remains a government of delegated authority. Some purely local matters may remain outside of Congress’ regulatory competence. Moreover, even if Congress could theoretically render the states obsolete by preempting state regulation on every conceivable subject, practical limits on congressional time and federal funds would prevent Congress from exercising its powers that broadly. See, e.g., Dorsen, *The National No-Fault Motor Vehicle Insurance Act: A Problem in Federalism*, 49 N.Y.U. L. Rev. 45, 61 (1974). Both constitutional and institutional limits on congressional authority, therefore, ensure that the states will retain some scope for the exercise of their republican powers.

330. See *FERC v. Mississippi*, 456 U.S. 742, 777 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part) (“[T]he Constitution and federal statutes define the boundaries of [each state’s legislative] domain,” but “each State is sovereign within its own domain, governing its citizens and providing for their general welfare.”).

331. U.S. Const. art. VI, cl. 2; see also *Texas v. United States*, 730 F.2d 339, 357 n.32 (5th Cir.) (“The Constitution’s protection of state sovereignty is concerned with

F. Employing the States as Agents of the Nation

Although the federal government has the power to regulate a wide range of private conduct, it does not always exercise that power directly. On several occasions, Congress or federal administrators have attempted to employ the "States as Agents of the Nation"³³² by directing the states to regulate designated private activities. These federal attempts to appropriate state legislative or executive power³³³ raise serious questions under the guarantee clause.

During the 1970s, for example, the Environmental Protection Agency attempted to control air pollution in some states by directing those states to create automobile inspection programs.³³⁴ If the states lacked the legal apparatus to establish those programs, the federal agency commanded them to pass the necessary legislation and to appropriate adequate funds to initiate and maintain the programs.³³⁵ If a state failed to comply with these orders, the EPA claimed authority to impose civil and criminal sanctions on the state. "In a nutshell," one court observed, "the EPA has directed Maryland and her legislature to

the manner in which the federal government treats the states and with the effect that this treatment has upon the state governments; it is not concerned with the *substantive* effect of federal law."), cert. denied, 469 U.S. 892 (1984); *District of Columbia v. Train*, 521 F.2d 971, 994 n.27 (D.C. Cir. 1975) ("The principle at work here is not that the states have an interest in keeping the federal government from regulating vehicles owned by their citizens but rather that they are to be protected from federal compulsion to exercise state governmental functions in an area where they choose to remain inactive."), vacated and remanded for consideration of mootness sub nom. *EPA v. Brown*, 431 U.S. 99 (1977) (per curiam); Note, Reading and Using, *supra* note 225, at 738 ("When the Constitution refers to the states, it does not delineate substantive tasks; it establishes political institutions and participatory processes.").

332. Professor A.N. Holcombe coined this phrase in 1921. See Holcombe, *The States as Agents of the Nation*, 1 Sw. Pol. Sci. Q. 307 (1921).

333. The exercise of judicial power is subject to somewhat different limitations. See *infra* notes 366-70 and accompanying text.

334. See *Maryland v. EPA*, 530 F.2d 215, 219 (4th Cir. 1975), vacated and remanded for consideration of mootness sub nom. *EPA v. Brown*, 431 U.S. 99 (1977) (per curiam); *District of Columbia v. Train*, 521 F.2d 971, 979-80 (D.C. Cir. 1975), vacated and remanded for consideration of mootness sub nom. *EPA v. Brown*, 431 U.S. 99 (1977) (per curiam); *Brown v. EPA*, 521 F.2d 827, 830 (9th Cir. 1975), vacated and remanded for consideration of mootness, 431 U.S. 99 (1977) (per curiam).

335. The EPA supervised these state processes closely. The agency, for example, required the state of Maryland "to submit 'the text of needed statutory proposals and regulations that it will propose for adoption' as well as the 'text of needed legislation' for funding, if not otherwise available." *Maryland v. EPA*, 530 F.2d at 224. Similarly, the EPA ordered California:

to report the date by which the State would recommend any needed legislation and to submit '[a] signed statement from the Governor and State Treasurer identifying the sources and amounts of funds for the program' and the 'text of needed legislation' if existing legislation [did] not authorize the funds which the program [would] require.

Brown v. EPA, 521 F.2d at 830 (footnote omitted).

legislate under pain of civil and criminal penalties. . . ."³³⁶

Similarly, in the Public Utilities Regulatory Policies Act of 1978 (PURPA),³³⁷ Congress commanded state utility commissions to consider adopting a dozen different standards governing utility services and rates. Although the federal Act does not force state commissions to adopt any of the standards, it compels them to consider each of the prescribed standards and to follow detailed procedures in evaluating those standards.³³⁸ PURPA thus treats state utility commissions as "think tanks to which Congress may assign problems for extended study."³³⁹

Federal attempts to appropriate state governmental resources in this manner deny the states a republican form of government. In a republican government, all power derives from the voters. The citizens of a republican state decide when to exercise their legislative or executive power and how to wield that authority.³⁴⁰ If the federal government forces the states to adopt a statute, it destroys this relationship between state voters and their representatives; state legislators become accountable to Congress, rather than to their constituents. Similarly, if the national government compels the states to enforce federal regulatory programs, state budgets and executive resources reflect federal priorities rather than the wishes of local citizens. These results are antithetical to the popular control exerted in a republican form of government.

Even a federal command that the states consider proposed legislation, as in PURPA, strains the principles of republican government. State legislatures and regulatory agencies have limited time and resources. In a republican government, the citizens have the right to decide how those legislative bodies allocate their energies. If state legislators and administrators must devote their time to evaluating proposals formulated in Washington, then the citizens of the state have lost a significant measure of popular control over their representatives.³⁴¹

Directives that the states consider, adopt, or enforce federal programs, moreover, permit federal officials to escape responsibility for their own initiatives. Congress may conserve federal resources and avoid unpopular tax increases by compelling state governments to eval-

336. *Maryland v. EPA*, 530 F.2d at 224.

337. 16 U.S.C. §§ 2601-2645 (1982).

338. *Id.* The requirements are summarized in *FERC v. Mississippi*, 456 U.S. 742, 746-50 (1982).

339. *FERC v. Mississippi*, 456 U.S. at 777 (O'Connor, J., concurring in part and dissenting in part).

340. See *supra* notes 126-34 and accompanying text.

341. See *FERC v. Mississippi*, 456 U.S. at 779 (O'Connor, J., concurring in part and dissenting in part); Kaden, *supra* note 34, at 870; La Pierre, *Political Safeguards*, *supra* note 4, at 1037; Rapaczynski, *supra* note 17, at 416-17.

uate or administer costly national programs.³⁴² If a necessary program threatens to generate controversy, Congress can avoid the voters' ire by forcing state legislatures to adopt the measure.³⁴³ The citizens of each state, assuming that their local officials are responsible for the unwanted enactment, will retaliate against those officials. Such confusion over the lines of political responsibility is unacceptable in a republican government; in order to fulfill the ideal of popular control, the citizens must know which officials are responsible for unpopular legislation.³⁴⁴

Because of these concerns, several courts have questioned the constitutionality of federal attempts to commandeer state executive and legislative resources. In *Maryland v. EPA*,³⁴⁵ for example, the Court of Appeals for the Fourth Circuit denounced the EPA's requirement that state legislatures enact statutes establishing automobile inspection programs. "[I]f there is any attribute of sovereignty left to the states," the court declared, "it is the right of their legislatures to pass, or not to pass, laws."³⁴⁶ The Court of Appeals for the Ninth Circuit invalidated the same EPA regulations, pointing out that they deprived state voters of their power to control state expenditures.³⁴⁷

The Court of Appeals for the District of Columbia Circuit even more emphatically rejected the EPA's attempt to coopt state legislative processes. Relegating the states to the status of mere "departments of the EPA," the court concluded, would "'impair[] the States' integrity' and 'their ability to function in a federal system.'"³⁴⁸ Thus, the EPA's attempt to "commandeer the regulatory powers of the states, along with their personnel and resources," violated the tenth amendment.³⁴⁹

342. See Moore, *supra* note 95, at 2368.

343. In 1979, for example, the President tried to compel state governors to establish and enforce an unpopular gas rationing program. See *FERC v. Mississippi*, 456 U.S. at 787-88 n.19 (O'Connor, J., concurring in part and dissenting in part) (citing statement of Professor Daniel Elazar to the Advisory Commission on Intergovernmental Relations in *Advisory Commission on Intergovernmental Relations, The Federal Role in the Federal System: The Dynamics of Growth*, Hearings on the Federal Role 32 (Oct. 1980)).

344. See Kaden, *supra* note 34, at 868; Stewart, *Pyramids*, *supra* note 225, at 1241.

345. 530 F.2d 215 (4th Cir. 1975), vacated and remanded for consideration of mootness sub nom. *EPA v. Brown*, 431 U.S. 99 (1977) (per curiam).

346. *Id.* at 225.

347. *Brown v. EPA*, 521 F.2d 827, 840 (9th Cir. 1975), vacated and remanded for consideration of mootness, 431 U.S. 99 (1977) (per curiam). Cf. *Maryland v. Wirtz*, 392 U.S. 183, 204-05 (1968) (Douglas, J., dissenting) (arguing that Congress could not "compel the States to build superhighways . . . , to provide inns and eating places for interstate travelers, to quadruple their police forces [or otherwise] draw up each State's budget to avoid disruptive effect[s] . . . on commercial intercourse.") (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964)).

348. *District of Columbia v. Train*, 521 F.2d 971, 992, 994 (D.C. Cir. 1975) (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)) (footnote omitted), vacated and remanded for consideration of mootness sub nom. *EPA v. Brown*, 431 U.S. 99 (1977) (per curiam).

349. *Train*, 521 F.2d at 992. The Supreme Court granted certiorari in all three of

Several years later, the Court of Appeals for the Fifth Circuit agreed that, although the federal government may preempt state legislation, it may not "force the states to administer congressional policy judgments" or "convert state agencies into tools of federal policy."³⁵⁰ Federal compulsion of this kind, the court pointed out, "'blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.'"³⁵¹ Accordingly, federal statutes that compel the states to carry out national policies contradict the notions of federalism implicit in the structure of the Constitution.³⁵²

Even the Supreme Court once suggested that federal compulsion of state governmental processes would violate the Constitution. In *Hodel v. Virginia Surface Mining & Reclamation Association*,³⁵³ the Court carefully distinguished the conditional preemption scheme before it from a federal act that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."³⁵⁴ Federal programs of the latter type, the Court implied, would raise more serious constitutional issues.³⁵⁵

these cases and consolidated them with others in order to review the validity of the EPA's regulations. 426 U.S. 904 (1976). While the cases were pending before the Court, however, the EPA rescinded some of the regulations and conceded that the rest were "invalid unless modified in certain respects." *EPA v. Brown*, 431 U.S. 99, 103 & n.3 (1977) (per curiam). In light of these developments, the Court vacated the circuit court decisions and remanded the cases for consideration of mootness. *Id.* at 104. Thus, the Supreme Court never decided the constitutionality of the EPA's wide ranging regulations.

For other decisions questioning the constitutionality of the EPA's actions, see *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 533 F. Supp. 869, 879 (E.D. Pa.) (agreeing with the "majority" of circuit courts that suggest that "Congress lacks the power [to compel states to establish and fund automobile inspection programs] because of the Tenth Amendment and principles of federalism"), *aff'd* on other grounds, 678 F.2d 470 (3d Cir.), cert. denied, 459 U.S. 969 (1982); *Friends of the Earth v. Carey*, 422 F. Supp. 638, 643-44 (S.D.N.Y. 1976) (interpreting Clean Air Act narrowly to avoid "serious 10th amendment problems"), vacated on other grounds, 552 F.2d 25 (2d Cir. 1977). But see *Dressman v. Costle*, 759 F.2d 548, 557 (6th Cir. 1985) (summarily dismissing tenth amendment challenges to EPA's authority in light of *Garcia*); *Pennsylvania v. EPA*, 500 F.2d 246, 260-63 (3d Cir. 1974) (upholding EPA's power under the commerce clause to force states to implement federal pollution control plans).

350. *Texas v. United States*, 730 F.2d 339, 356 (5th Cir.), cert. denied, 469 U.S. 892 (1984).

351. *Id.* at 354 (quoting *FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in part and dissenting in part)).

352. *Id.* at 355-56.

353. 452 U.S. 264 (1981).

354. *Id.* at 288.

355. See also Currie, *Federal Air-Quality Standards and Their Implementation*, 1976 Am. B. Found. Res. J. 365, 394 ("I would hold, and I would expect the Supreme Court to hold, that . . . the commerce power does not extend to forcing states to adopt or enforce regulatory laws as if the states were administrative organs of the federal government.").

All of these judicial pronouncements are consistent with the theory that federal coercion of state legislative and executive processes deprives the states of republican government. Indeed, two of the decisions discussed above specifically noted the conflict between federal compulsion and republican government.³⁵⁶ Certainly a federal statute that requires a state agency to respond to the federal government, rather than to its state constituents, undermines the basic principles of republican government.

In *FERC v. Mississippi*,³⁵⁷ however, the Supreme Court approved Congress' attempt in PURPA to harness state utility commissions for evaluation of proposed regulatory standards. The Court's surprising support for this statutory scheme rested on two grounds. First, the Court stressed that in PURPA Congress directed the states only to *consider* certain regulatory standards; it did not force the states to adopt any of those standards.³⁵⁸ Second, the Court suggested that Congress' directive to the states in this case was analogous to the conditional preemption upheld in *Hodel v. Virginia Surface Mining & Reclamation Association*. If the states wished to regulate electric and gas utilities, the Court reasoned, they would have to consider the proposed federal standards. If they did not want to consider those standards, they could abandon the field of utility regulation.³⁵⁹

The analysis proposed in this Article demonstrates the flaws in this reasoning. First, as explained above, the power to set a legislative agenda is as much a part of republican government as the power to adopt a particular law.³⁶⁰ PURPA's command that state utility commissions consider specified regulatory standards is less intrusive than a direct order that the states adopt those standards. Nevertheless, PURPA saps the states' legislative resources by diverting the utility commissions' attention from programs proposed by the states' citizens to programs proposed by Congress.

Second, as Justice O'Connor recognized in her dissent, the "condition" imposed by PURPA was far different from the conditions set by the statute reviewed in *Hodel v. Virginia Surface Mining & Reclamation Association*. The statute challenged in *Virginia Surface Mining* allowed the states either to develop their own surface mining regulations or to cede that power to the federal government. If a state chose not to regulate

356. See *Maryland v. EPA*, 530 F.2d 215, 225 (4th Cir. 1975) (quoting *In re Duncan*, 139 U.S. 449, 461 (1891)), vacated and remanded for consideration of mootness sub nom. *EPA v. Brown*, 431 U.S. 99 (1977) (per curiam); *Brown v. EPA*, 521 F.2d 827, 840 (9th Cir. 1975), vacated and remanded for consideration of mootness, 431 U.S. 99 (1977) (per curiam); see also *supra* notes 345-49 and accompanying text.

357. 456 U.S. 742 (1982).

358. *Id.* at 764.

359. *Id.* at 764-70. For an eloquent defense of this position, see Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. Pa. L. Rev. 289 (1984).

360. See *supra* note 341 and accompanying text.

surface mining, the federal government would bear the full regulatory burden.³⁶¹ PURPA, on the other hand, required the states either to consider the proposed federal standards or to abandon all regulation of their electric utilities.³⁶² If a state attempted to avoid evaluation of the federal standards by abolishing its utility commission, the federal government would not step into the breach; instead, the utilities would simply remain unregulated.³⁶³ The "choice" embodied in PURPA, therefore, was illusory.³⁶⁴

For these reasons, the Supreme Court's decision in *FERC v. Mississippi* should not stand as a lasting barrier to the proposed interpretation of the guarantee clause. The majority's reasoning in *FERC v. Mississippi* was clouded, and the statute challenged in that case was deceptively unobtrusive. PURPA appropriated the legislative power of state utility commissions, rather than that of state legislatures, and required those commissions to consider proposed federal standards, not to adopt them. If Congress had directed state legislatures to enact those federal standards—or even to consider them—the Court might have perceived the threat to republican government more easily.³⁶⁵

Despite the result in *FERC v. Mississippi*, therefore, the principles outlined in this Article demonstrate that federal compulsion of state executive or legislative power violates the guarantee clause by under-

361. 30 U.S.C. §§ 1252–1255 (1982 & Supp. III 1985).

362. 16 U.S.C. §§ 2621(a), 2623(a), 2624(b) (1982).

363. See *FERC v. Mississippi*, 456 U.S. 742, 766 (1982).

364. Congress, moreover, certainly did not intend to give the states a choice under PURPA. As Justice O'Connor pointed out in her dissent, Congress specifically rejected the possibility of federal utility regulation as unwise. *FERC v. Mississippi*, 456 U.S. at 785 n.15 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part). And, as Professor La Pierre has argued, nothing in the structure or legislative history of PURPA suggests that Congress believed states could evade their duty to evaluate federal standards by abolishing their utility commissions. On the contrary, several sections of PURPA specifically contemplate ongoing state regulation, and Congress provided for judicial enforcement of the states' obligation to consider the federal standards. La Pierre, *Political Safeguards*, supra note 4, at 946–47. The majority's pretense that the states had a choice under PURPA, therefore, was "surprising and unwarranted." *Id.* at 940.

The type of "conditional preemption" approved by the majority in *FERC v. Mississippi*, moreover, would leave the states vulnerable to the most intrusive federal mandates. Under the Court's analysis, for example, "Congress could dictate the agendas and meeting places of state legislatures, because unwilling States would remain free to abolish their legislative bodies." *FERC v. Mississippi*, 456 U.S. at 782 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) (footnote omitted); see also *id.* at 773 (Powell, J., concurring in part and dissenting in part) ("Under [the majority's] 'threat of pre-emption' reasoning, Congress . . . could reduce the States to federal provinces.").

365. Several scholars have criticized the Court's decision in *FERC v. Mississippi*, suggesting that the Court missed the subtle infringement of state autonomy worked by PURPA. See, e.g., L. Tribe, *Constitutional Choices* 125–32 (1985); Engdahl, supra note 32, at 110–13; Field, supra note 70, at 88 n.26; The Supreme Court, 1981 Term, 96 Harv. L. Rev. 62, 190–96 (1982); Note, Reading and Using, supra note 225, at 741–42.

mining republican government in the states. This does not mean, however, that the federal government can never employ state government officials for federal ends. The Constitution endows the federal government with several techniques for inducing or commanding the cooperation of those officials.

First, the supremacy clause requires state judges to enforce federal law. When a litigant invokes the jurisdiction of a state court, the court has an obligation to decide all claims before it. If adjudication of those claims involves a federal right, then the state court must sustain that right. As early as 1816, the Supreme Court recognized that "[f]rom the very nature of their judicial duties, [state court judges] would be called upon to pronounce the law applicable to the case in judgment."³⁶⁶ In performing this task, the Court stressed, state judges "were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—the supreme law of the land."³⁶⁷

Congress, moreover, may direct state courts to entertain suits bottomed exclusively upon federal law if "th[e] same type of claim arising under [state] law would be enforced by that State's courts."³⁶⁸ This power derives from the supremacy clause, as well as from the Framers' express recognition that state courts would enforce federal claims.³⁶⁹ Compelling state courts to adjudicate these claims, moreover, does not diminish the state's judicial power in the same way that federal appropriation of a state's executive or legislative resources would dilute those powers. Trial judges, unlike legislators or executive officers, do not have the authority to set their own agendas.³⁷⁰ A requirement that state courts adjudicate federal claims, therefore, does not intrude upon the states' republican powers as seriously as a requirement that the executive or legislative branches enforce federal priorities.

Second, the federal government may require state executive employees to enforce federal laws when that enforcement is ancillary to state-created tasks. In *District of Columbia v. Train*,³⁷¹ for example, the Court of Appeals for the District of Columbia Circuit held that the EPA

366. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816).

367. *Id.* at 340–41; accord *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982).

368. *Testa v. Katt*, 330 U.S. 386, 394 (1947).

369. See, e.g., *Brown v. EPA*, 521 F.2d 827, 841 (9th Cir. 1975) (state court enforcement of federal rights is "imbedded in the Constitution"), vacated and remanded for consideration of mootness, 431 U.S. 99 (1977) (per curiam). No such historical tradition supports federal compulsion of a state's legislative or executive branches. See generally *Currie*, supra note 355, at 393; *Dorsen*, supra note 329, at 53–55; *Hart*, *The Relations Between State and Federal Law*, 54 *Colum. L. Rev.* 489, 515–17 (1954); *Stewart*, *Pyramids*, supra note 225, at 1246–47.

370. See *FERC v. Mississippi*, 456 U.S. 742, 784–85 (O'Connor, J., concurring in part and dissenting in part); *Mikva*, supra note 99, at 606.

371. 521 F.2d 971 (D.C. Cir. 1975), vacated and remanded for consideration of mootness sub nom. *EPA v. Brown*, 431 U.S. 99 (1977) (per curiam).

could constitutionally order states to refuse to register vehicles that did not comply with federal antipollution standards. This mandate, the court stressed, was "directly related to existing activities [i.e., automobile registration] . . . carried on by the states, and it [did] not specify the manner in which the state [was] to comply."³⁷² The state did not have to establish any inspection facilities to conform with the federal mandate; instead, it could "requir[e] applicants for vehicle registration to submit a certificate of compliance obtained from federal officials or from private sources not manned by state personnel."³⁷³

The Court of Appeals for the Sixth Circuit reached the same result in *United States v. Ohio Department of Highway Safety*.³⁷⁴ The contested EPA regulation, the court observed, did "not require the State to adopt legislation, establish new regulatory agencies or change its procedures for registering vehicles. It merely require[d] the State to deny use of [highways] to those whose use adds to the national problem of pollution."³⁷⁵ Under these circumstances, requiring the state to enforce federal standards through its existing registration system would not "impair the integrity of the State or its ability to function in the federal system."³⁷⁶

Third, Congress and the federal courts may direct state officials to undertake actions to honor their constitutional obligations. As the Supreme Court recently observed in *Puerto Rico v. Branstad*,³⁷⁷ "[i]t would be superfluous to restate all the occasions on which th[e] Court has imposed upon state officials a duty to obey the requirements of the Constitution, or compelled the performance of such duties."³⁷⁸ The federal courts have ordered local government officials to desegregate their schools,³⁷⁹ to redraw discriminatory voting districts,³⁸⁰ and, as in *Branstad* itself, to deliver up fugitives "to be removed to the State having Jurisdiction of the Crime."³⁸¹ These decisions directing state

372. *Id.* at 991; see also *Brown v. EPA*, 566 F.2d 665, 673 (9th Cir. 1977) (EPA may direct states to deny registration to noncomplying vehicles; this "merely requires the state to proceed in a certain manner if it is to regulate this aspect of commerce at all.").

373. *Train*, 521 F.2d at 991-92.

374. 635 F.2d 1195 (6th Cir. 1980), cert. denied, 451 U.S. 949 (1981).

375. *Id.* at 1205. In addition, the court found that the state would not have to make any substantial expenditures to comply with the federal mandate. *Id.*

376. *Id.*; see also *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287 (2d Cir.) (federal government may order metropolitan transit authority to allow Amtrak trains to run over its lines, especially if Amtrak compensates the local authority for that use), cert. denied, 107 S. Ct. 669 (1986).

377. 107 S. Ct. 2802 (1987).

378. *Id.* at 2808.

379. *E.g.*, *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

380. *E.g.*, *White v. Regester*, 412 U.S. 755 (1973).

381. U.S. Const. art. IV, § 2, cl. 2. *Branstad* overruled *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), a nineteenth century decision divesting the federal courts of authority to order compliance with the extradition clause.

The Supreme Court has cautioned, however, that "[a] federal court . . . must iden-

officers to comply with their express constitutional duties do not violate the guarantee clause, because these affirmative constitutional commands transcend any autonomy granted the states in Article IV.³⁸²

Congress, moreover, may use its enforcement powers under the fourteenth, fifteenth, and other amendments to issue similar commands to state officers. In the Voting Rights Act, for example, Congress enjoined some states to obtain federal approval before changing any "voting qualification or prerequisite . . . , or standard, practice, or procedure."³⁸³ Congressional power to end the vestiges of discrimination in voting supports the constitutionality of this requirement.³⁸⁴

Fourth, Congress may beguile state and local officials to carry out federal commands by conditioning the receipt of federal funds on that compliance. Last Term the Supreme Court upheld a federal statute directing the Secretary of Transportation to withhold federal highway funds from states that failed to raise their minimum drinking ages to twenty-one.³⁸⁵ This "relatively mild encouragement to the States to enact higher minimum drinking ages" was defensible, the Court concluded, because "the enactment of such laws remain[ed] the prerogative of the States."³⁸⁶ Although congressional power to tie conditions to its grants is not unlimited,³⁸⁷ the spending power gives Congress broad authority to entice states to enact particular laws or enforce specified programs.

Finally, Congress may insure state cooperation with a federal program by employing the technique of conditional preemption. As in the statutory scheme reviewed in *Virginia Surface Mining*, Congress may threaten to preempt a field unless the states create their own regulatory laws and enforcement mechanisms. In the Natural Gas Policy Act of 1978, for example, Congress authorized the Federal Energy Regulatory Commission to delegate some of its administrative functions "to any State agency (with the consent of such agency)."³⁸⁸ The Court of Ap-

tify a constitutional predicate for the imposition of any affirmative duty on a State." *Youngberg v. Romeo*, 457 U.S. 307, 319 n.25 (1982). In addition, judicial remedies cannot exceed the scope of the constitutional violation. See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 378 (1976).

382. Some of these constitutional commands, moreover, may represent specific attempts to define the notion of republican government. See *supra* note 215. Compliance with these commands, therefore, does not in any way deprive the states of a republican government.

383. 42 U.S.C. § 1973c (1982).

384. See *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); *Dorsen*, *supra* note 329, at 55-56.

385. *South Dakota v. Dole*, 107 S. Ct. 2793 (1987); see also *Neikirk v. State*, 260 Ark. 526, 542 S.W.2d 282 (1976) (upholding, against guarantee clause challenge, federal statute that conditioned receipt of federal highway funds on adoption of 55 mile per hour speed limit), cert. denied, 430 U.S. 909 (1977).

386. *South Dakota v. Dole*, 107 S. Ct. at 2798-99.

387. See *supra* notes 277-86 and accompanying text.

388. 15 U.S.C. § 3411(c) (1982).

peals for the Tenth Circuit upheld this provision, stressing that delegation depends on the state agency's consent and that, if a state does not wish to undertake the designated functions, " 'the full regulatory burden will be borne by the Federal Government.' " ³⁸⁹ Unlike the mandatory directive in PURPA, the Natural Gas Policy Act offers states a choice between cooperation and preemption. This "distinction between 'coercion' and 'permission' " spells the difference between a statute that violates the Constitution and one that rests within congressional power. ³⁹⁰

The guarantee clause thus places a modest restraint on congressional power to interfere with state governmental operations. In order to assure the states a republican form of government, Congress must leave the states free to define their own franchises; to design their own governmental machinery; and to set qualifications and wages for employees who exercise legislative, executive, or judicial power. In addition, Congress cannot compel the states to adopt particular laws, to modify their legislative agendas, or to enforce federal regulatory programs.

Each of these prohibitions, however, is tempered by the Civil War amendments, the spending clause, and other provisions of the Constitution. ³⁹¹ Congress can command the states to eradicate racial discrimination in local elections and to observe the first amendment's separation of church and state. Congress, moreover, may coax the

389. *Oklahoma v. FERC*, 661 F.2d 832, 840 (10th Cir. 1981) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 288), cert. denied, 457 U.S. 1105 (1982). In the district court, the parties attacking the federal statute invoked the guarantee clause, as well as the tenth amendment. The court rejected the guarantee clause claim, noting that the challenged provisions did "not modify any state government, or in any way deny a republican form of government to any state." *Oklahoma v. FERC*, 494 F. Supp. 636, 662 (W.D. Okla. 1980), aff'd, 661 F.2d 832 (10th Cir. 1981), cert. denied, 457 U.S. 1105 (1982).

390. *Oklahoma v. FERC*, 661 F.2d at 839 (quoting the district court's opinion, 494 F. Supp. at 660); see also *Illinois Commerce Comm'n v. ICC*, 749 F.2d 875 (D.C. Cir. 1984) (upholding provisions of Staggers Rail Act that give states option to participate in regulation of intrastate rate adjustments), cert. denied, 474 U.S. 820-21 (1985); *Texas v. United States*, 730 F.2d 339 (5th Cir.) (same), cert. denied, 469 U.S. 892 (1984).

In addition to providing the states a choice, conditional preemption differs from direct coercion because it preserves the political accountability of Congress. "If the federal government is willing to assume the full burdens of direct regulation it will not impose regulations without carefully considering the costs involved." Thus, "[c]onditional preemption provides a structural check on congressional decisionmaking which lessens the need for judicial activism." Rotunda, *supra* note 359, at 312-13 (footnote omitted).

391. In addition to the constitutional provisions discussed above, Congress' defense powers, U.S. Const. art. 1, § 8, cls. 11-16, may override the autonomy granted states under the guarantee clause. Cf. *Case v. Bowles*, 327 U.S. 92, 102 (1946) (upholding against a tenth amendment challenge congressional authority to set maximum prices under its war powers); *National League of Cities v. Usery*, 426 U.S. 833, 854 n.18 (1976) (declining to overrule *Case v. Bowles*).

states to adopt and enforce a wide range of federal programs by using its spending clause power or wielding the threat of conditional preemption. The scope of state autonomy today depends upon the interaction of the guarantee clause with all of these other constitutional provisions.

Most importantly, the protection afforded states by the guarantee clause does not prevent Congress from preempting areas of substantive state law. The guarantee clause grants states a measure of autonomy over their governmental processes; it does not promise them sovereignty over any aspect of private behavior. This ability of Congress to override state substantive authority through the supremacy clause—while preserving the autonomy of state governmental processes under the guarantee clause—assures a proper balance between national power and state independence.

IV. JUSTICIABILITY

In *Luther v. Borden*³⁹² the Supreme Court declared that vindication of a claim based on the guarantee clause “rest[ed] with Congress.”³⁹³ Since that 1849 decision, the Court has held guarantee clause claims nonjusticiable as political questions in a wide variety of cases.³⁹⁴ Indeed, in 1946 the Court announced flatly that “[v]iolation of the great guaranty of a republican form of government in [the] States cannot be challenged in the courts.”³⁹⁵ For more than a hundred years, therefore, the Supreme Court has maintained that the guarantee clause raises only nonjusticiable political questions.³⁹⁶

Despite these sweeping statements, the proposed interpretation of the guarantee clause should be fully enforceable in the courts. Even if the courts continue to dismiss some claims bottomed on the guarantee clause as political questions, neither Supreme Court precedent nor considerations of policy foreclose adjudication of claims that the federal government has violated the guarantee clause by intruding upon

392. 48 U.S. (7 How.) 1 (1849).

393. *Id.* at 42.

394. See *Baker v. Carr*, 369 U.S. 186 (1962) (challenge to legislative apportionment); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937) (attack on delegation of legislative authority to state agency); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930) (challenge to taxation scheme); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (attack on workers' compensation act); *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916) (challenge to state referendum procedure).

395. *Colegrove v. Green*, 328 U.S. 549, 556 (1946); see also 1 R. Rotunda, J. Nowak & J. Young, *supra* note 19, § 2.16(c)(3).

396. In a few early decisions, however, the Court rejected guarantee clause claims on the merits without suggesting that the claims were nonjusticiable. E.g., *Michigan ex rel. Kies v. Lowrey*, 199 U.S. 233 (1905) (claim that guarantee clause forbade alteration of school districts); *Forsyth v. Hammond*, 166 U.S. 506 (1897) (claim that guarantee clause prohibited states from giving courts power to set municipal boundaries); *In re Duncan*, 139 U.S. 449 (1891) (claim that criminal conviction rested on invalidly enacted statute); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875) (claim that guarantee clause guaranteed suffrage to women).

state autonomy. On the contrary, four considerations support judicial review of such claims.

First, the Supreme Court itself has backed away from earlier declarations that guarantee clause claims are always nonjusticiable. In *Baker v. Carr*³⁹⁷ the Court stressed that determinations of justiciability demand a "case-by-case inquiry" into the facts of each controversy.³⁹⁸ After reviewing a series of cases in which claims had been held nonjusticiable, the Court proposed six factors to guide this "discriminating inquiry into the precise facts and posture of [each] particular case."³⁹⁹ Moreover, although the Court found the guarantee clause argument in *Baker* nonjusticiable, it indicated that "the implication of the Guaranty Clause in a case concerning congressional action does not always preclude judicial action."⁴⁰⁰

Two years later, in *Reynolds v. Sims*,⁴⁰¹ the Court suggested more explicitly that some guarantee clause claims are judicially reviewable. "As we stated in *Baker v. Carr*," the Court observed, "some questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards."⁴⁰² By referring to "some" guarantee clause claims and tying those claims to the factors articulated in its case-by-case analysis, the Court hinted that other arguments based on the guarantee clause might win judicial review.

Several lower courts have relied upon these suggestions to hold guarantee clause claims justiciable. In *Van Sickle v. Shanahan*,⁴⁰³ for example, the Kansas Supreme Court entertained a challenge to a Kansas constitutional amendment reorganizing the state's executive branch. After reviewing the Supreme Court's precedents, including *Luther*, *Baker*, and *Reynolds*, the court determined that "the contention [that] all cases arising under the guaranty clause are nonjusticiable has no historical precedent."⁴⁰⁴ Instead, the court concluded that it should look to the particular "facts and circumstances surrounding the litigation . . . to ascertain whether the issue may be resolved by the judicial process."⁴⁰⁵

397. 369 U.S. 186 (1962).

398. *Id.* at 211.

399. *Id.* at 217.

400. *Id.* at 226 n.53 (citing *Coyle v. Smith*, 221 U.S. 559 (1911), and *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869)); see also *id.* at 222 n.48 (suggesting that "the political question barrier [in guarantee clause cases] was no absolute" and that guarantee clause complaints might be justiciable in "extreme" situations). *Baker*, however, is not completely consistent on this point. In other portions of the opinion, the court seemed to indicate that all claims based on the guarantee clause were nonjusticiable. See, e.g., *id.* at 224, 227.

401. 377 U.S. 533 (1964).

402. *Id.* at 582 (emphasis added).

403. 212 Kan. 426, 511 P.2d 223 (1973).

404. *Id.* at 437, 511 P.2d at 234.

405. *Id.* at 438, 511 P.2d at 234. On the merits, the court rejected the guarantee clause claim.

Similarly, in *Kohler v. Tugwell*,⁴⁰⁶ two judges held justiciable a guarantee clause challenge to the manner in which a state constitutional amendment had been adopted. Citing both *Baker* and *Reynolds*, the judges concluded that "[t]he nature of the question, . . . and not the mere invocation of the clause, determines whether a contention is justiciable."⁴⁰⁷ Finally, in *Bauers v. Heisel*,⁴⁰⁸ the Court of Appeals for the Third Circuit suggested in an en banc opinion that a congressional decision to abolish judicial immunity would be reviewable under the guarantee clause. Supreme Court precedents holding the clause nonjusticiable, this court believed, "involve[d] extraordinary circumstances which would not be present if . . . [Congress] abolish[ed] judicial immunity."⁴⁰⁹ In addition, the Court intimated that "[t]he absence of any overbearing political factor and the presence of substantial precedent to serve as criteria" might very well support the justiciability of such a claim.⁴¹⁰

These cases suggest that a per se rule no longer bars the courts from resolving challenges based on the guarantee clause. The Supreme Court's decisions in *Baker* and *Reynolds* require a case-by-case inquiry into the reviewability of guarantee clause claims, and lower courts have held an increasing number of those claims justiciable.⁴¹¹

406. 292 F. Supp. 978 (E.D. La. 1968), aff'd mem., 393 U.S. 531 (1969).

407. Id. at 985 (Wisdom, J., and Boyle, J.). Judge Rubin believed that the clause was not justiciable. Id. at 981-82. All three judges rejected the guarantee clause claim on the merits.

408. 361 F.2d 581 (3d Cir. 1966) (en banc), cert. denied, 386 U.S. 1021 (1967).

409. Id. at 589. The court, however, did not adjudicate this guarantee clause claim; it construed the Civil Rights Act narrowly to avoid any conflict with the guarantee clause.

410. Id.; see also *Heimbach v. Chu*, No. 83 Civ. 5318 (S.D.N.Y. Dec. 23, 1983) (LEXIS, Genfed library, Dist file) (noting that *Baker* and *Reynolds* reject the "notion that all claims under the Guaranty Clause are nonjusticiable," but finding the instant claim nonjusticiable), aff'd, 744 F.2d 11 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *Hitson v. Baggett*, 446 F. Supp. 674 (M.D. Ala.) (rejecting guarantee clause claim on merits without discussing justiciability), aff'd mem., 580 F.2d 1051 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979); *Burger v. Judge*, 364 F. Supp. 504 (D. Mont.) (following *Kohler* and holding justiciable guarantee clause challenge to adoption of state constitutional amendment), aff'd mem., 414 U.S. 1058 (1973); *Hoxie School Dist. No. 46 v. Brewer*, 137 F. Supp. 364, 366-67 (E.D. Ark.) (plaintiffs were "entitled to invoke the provisions of Section 4, Article IV, of the national Constitution" and to "appeal[] to the national courts for protection" when defendants resisted their efforts to desegregate schools), aff'd on other grounds, 238 F.2d 91 (8th Cir. 1956). Several commentators have also suggested that some guarantee clause claims should be justiciable. See Bonfield, *supra* note 122, at 560-65; Comment, *Proposals*, *supra* note 122; Note, *New Interpretation*, *supra* note 122; Note, *Niche*, *supra* note 122.

411. Despite the Supreme Court's flexible approach in *Reynolds* and *Baker*, a few lower courts have adhered to the orthodoxy that all guarantee clause claims present political questions. See, e.g., *O'Hair v. White*, 675 F.2d 680, 684 n.5 (5th Cir. 1982); *Brenner v. School Dist. of Kansas City*, 315 F. Supp. 627, 628 n.1 (W.D. Mo. 1970), aff'd mem., 403 U.S. 913 (1971). Although the results reached in these cases may be defensi-

These decisions open the door for judicial enforcement of the guarantee clause claims discussed in this Article.

Second, the Supreme Court has been most hospitable to challenges founded on the guarantee clause when those challenges reinforced state autonomy. On the contrary, some of the most significant cases in which the Court refused to enforce guarantee clause claims were cases in which the Court feared that judicial review would interfere unduly with the processes of state government. In *Luther v. Borden*, for example, the litigants disagreed over which of two governments was the lawful government of Rhode Island. The Supreme Court observed that if it "decided that the [established] government had no legal existence during the period of time" when it controlled the state, then:

the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.⁴¹²

Understandably, the Court was loathe to unsettle the workings of a state government to this extent.⁴¹³

Similarly, in *Pacific States Telephone & Telegraph Co. v. Oregon*,⁴¹⁴ the Court refused to adjudicate a challenge to an Oregon law adopted by voter initiative. Once again, the Court stressed that if it accepted the challengers' guarantee clause argument, its decision "would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative."⁴¹⁵ In order to avoid "these strange, far-reaching and injuri-

ble, their automatic rejection of justiciability is inconsistent with the Supreme Court's modern political question doctrine.

412. 48 U.S. (7 How.) 1, 38-39 (1849); see also *id.* at 47 ("[T]he sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure. But whether they have changed it or not . . . is a question to be settled by the political power."); *Baker v. Carr*, 369 U.S. 186, 219 (1961) ("A decision for the plaintiff [in *Luther*] would inevitably have produced some significant measure of chaos, a consequence to be avoided if it could be done without abnegation of the judicial duty to uphold the Constitution.").

413. See *Baker v. Carr*, 369 U.S. at 223 (suggesting that *Luther v. Borden* was nonjusticiable because the guarantee clause could not produce "standards which a court could utilize independently in order to identify a State's lawful government"); Note, Niche, *supra* note 122, at 683 (arguing that "[t]he holding of *Luther* should therefore be read narrowly: it applies only when a state is in armed upheaval, with more than one faction contending to be the legitimate government").

414. 223 U.S. 118 (1912).

415. *Id.* at 141; see also *Van Sickle v. Shanahan*, 212 Kan. 426, 437, 511 P.2d 223, 233 (1973) ("[T]he holding in *Pacific* was that courts will not consider the merits of a lawsuit where the aggrieved party is challenging the state government as a political entity. This court cannot conclude the rule adopted in that case adjudicated all questions arising under the guaranty clause to be nonjusticiable."); *Bonfield*, *supra* note 122, at

ous results," the Court dismissed the case as nonjusticiable.⁴¹⁶

On the other hand, when resolution of an argument based on the guarantee clause would protect state sovereignty, the Supreme Court has not hesitated to address the claim. In *Coyle v. Smith*,⁴¹⁷ the Court reviewed a congressional act restricting the location of Oklahoma's capital. Counsel argued that the guarantee clause gave Congress the power to impose conditions on state governments in order to insure that those governments were republican in form. In addition, counsel argued that this power was "political . . . , and as such, uncontrollable by the courts."⁴¹⁸ The Supreme Court rejected both counsel's interpretation of the guarantee clause and, implicitly, the assertion that congressional exercises of power under the guarantee clause are unreviewable. The guarantee clause "may imply the duty of [each] new State to provide itself with . . . [a republican form of] government," the Court observed, "and [may] impose upon Congress the duty of seeing that such form is not changed to one anti-republican."⁴¹⁹ All of the existing states, however, possessed the power to locate their own capitals and this authority was "essentially and peculiarly [a] state power[]." ⁴²⁰ Under these circumstances, the guarantee clause "obviously [did] not confer power" on Congress to limit the location of Oklahoma's capital and thereby "admit a new State which [was] any less a State than those which [already] compose[d] the Union."⁴²¹

These decisions suggest that a significant factor in the Supreme

560-61 (noting that *Pacific Telephone* "presented an exceptional situation" and that "[t]he Court's refusal of jurisdiction was tied to the severe consequences that might flow from an adjudication on the merits—the invalidation of all or a large part of a state's legislation").

416. 223 U.S. at 142. The Court also listed among the "injurious results" of a decision on the merits the fact that the judiciary would have to construct a new, republican government to replace the one it struck down and that it would have to compel Congress and the President to recognize that government. *Id.*; see also *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) (rejecting guarantee clause challenge to state delegation of power and noting that "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself"); *Amoco Prod. Co. v. Douglas Energy Co.*, 613 F. Supp. 730, 738 (D. Kan. 1985) (holding guarantee clause claim nonjusticiable when application of clause "would require a federal court to make a subtle analysis of the allocation of power within . . . [a] state").

417. 221 U.S. 559 (1911).

418. *Id.* at 566.

419. *Id.* at 567-68.

420. *Id.* at 565.

421. *Id.* at 568. In a few other cases, the Supreme Court has dismissed state challenges to federal action as political questions, despite the fact that acceptance of these challenges might have furthered state sovereignty. See *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867) (dismissing suit by Georgia seeking to enjoin reorganization of its government by Reconstruction Acts); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867) (dismissing suit by Mississippi seeking same relief). The opinions in these cases, however, do not discuss the guarantee clause explicitly. Professor Arthur Bonfield, moreover, has argued that these cases "can and should be limited to their facts" because "[t]hey arose in the milieu of Reconstruction and therefore involved unique circum-

Court's refusal to adjudicate claims based on the guarantee clause has been its reluctance to interfere with the independence of state governments.⁴²² The proposed construction of the guarantee clause, however, would not require the courts to overturn established bodies of state law or eject existing state governments from power. On the contrary, the courts would use the guarantee clause to protect state governments from undue federal interference. As in *Coyle*, claims that Congress has enacted an invalid "limitation upon the power of [a] State" should be justiciable.⁴²³

Third, challenges to federal interference with state autonomy under the guarantee clause satisfy the six criteria for justiciability identified by the Supreme Court in *Baker v. Carr*. The guarantee clause does not include any "textually demonstrable constitutional commitment" of issues arising under that clause "to a coordinate political department."⁴²⁴ On the contrary, the clause declares that "[t]he United States shall guarantee to every State . . . a Republican Form of Government."⁴²⁵ This reference to the "United States" plainly encompasses the judicial branch, as well as the executive and legislative branches of the federal government.⁴²⁶ The location of the guarantee clause in article IV of the Constitution, moreover, strengthens the conclusion that the Framers did not intend enforcement of the clause to be the exclusive province of Congress or the President. If the Framers had intended that result, they would have incorporated the clause into the

stances not likely to reoccur in American history." *Bonfield*, supra note 122, at 564 & n.211.

422. See Note, Niche, supra note 122, at 688.

The mere fact that a judicial resolution of a claim may interfere with the workings of a state's government, of course, does not render the claim unreviewable. The Constitution places judicially enforceable limits on state governments as well as on the federal government. Indeed, in *Baker v. Carr*, the Court stressed that it had never rejected the justiciability of a guarantee clause claim simply because the claim "touch[ed] matters of state governmental organization." 369 U.S. at 229. Certainly many claims that undercut state autonomy are justiciable. The fact remains, however, that in cases like *Luther* and *Pacific Telephone* the Court was particularly reluctant to assume jurisdiction because of the possible effect of its decision on the integrity of state government. The thrust of this argument is that, even if the courts decline to review guarantee clause claims when those claims would intrude upon state sovereignty, they should enforce those claims when the opposite result would prevail.

423. 221 U.S. at 565. But cf. *Montgomery County v. Califano*, 449 F. Supp. 1230, 1243 (D. Md. 1978) (summarily dismissing guarantee clause claim as nonjusticiable because the claim went "to the heart of the power of the federal Congress to intermesh the working relationships of federal, state and local governments and private persons and agencies"), aff'd mem., 599 F.2d 1048 (4th Cir. 1979).

424. *Baker v. Carr*, 369 U.S. at 217.

425. U.S. Const. art. IV, § 4 (emphasis added).

426. See *Baker v. Carr*, 369 U.S. at 297 (Frankfurter, J., dissenting) (guarantee clause not committed by express terms to Congress); *Montgomery County v. Califano*, 449 F. Supp. at 1243; *Kohler v. Tugwell*, 292 F. Supp. 978, 984 (E.D. La. 1968) (Wisdom, J., concurring), aff'd mem., 393 U.S. 531 (1969); *Bonfield*, supra note 122, at 563; Comment, Proposals, supra note 122, at 217-19.

articles detailing the powers of those bodies.⁴²⁷

Nor does the guarantee clause claim discussed here "lack . . . judicially discoverable and manageable standards."⁴²⁸ The Supreme Court itself has declared that "we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution."⁴²⁹ Widespread concurrence exists over the core notion of republican government; scholars and jurists agree that a republican government is one in which all power stems from the people.⁴³⁰ Enforcing the fundamentals of republican government provides a judicial standard at least as manageable as the malleable standards supplied by the equal protection or due process clauses.⁴³¹

Judicial enforcement of the guarantee clause's solicitude for the independence of state governments, moreover, does not require "an initial policy determination of a kind clearly for nonjudicial discretion."⁴³² The only "policy determination" demanded by this interpretation of the guarantee clause is that the states should maintain a "separate and independent existence."⁴³³ That policy decision, however, has already been made by the Constitution and is embedded in our constitutional history. Enforcement of a state's claim to autonomy under the guarantee clause hardly involves the Court in an "initial" policy decision of any kind.

Protection of state autonomy, of course, may require the courts to invalidate some federal legislation. That task, however, does not rise to the level of "expressing lack of the respect due coordinate branches of government."⁴³⁴ Courts have a constitutional obligation to review the validity of both state and federal statutes. As the Supreme Court has recognized, "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch."⁴³⁵ That difference of opinion alone, however, "cannot justify the courts' avoiding their constitutional responsibility."⁴³⁶

Nor will federal legislation challenged under the guarantee clause

427. See Comment, *Proposals*, *supra* note 122, at 217.

428. *Baker v. Carr*, 369 U.S. at 217.

429. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 176 (1875) (referring to the form of state governments at the time the Constitution was ratified); see also *Van Sickle v. Shanahan*, 212 Kan. 426, 440-47, 511 P.2d 223, 235-41 (1973).

430. See *supra* notes 126-34 and accompanying text; see also *Bonfield*, *supra* note 122, at 563 (contending that "section 4 provides a workable criteri[on] in the substance of the term 'republican'").

431. See Note, *Niche*, *supra* note 122, at 686. Even in *Baker v. Carr*, the Supreme Court conceded that the guarantee clause includes judicially manageable criteria at its "extreme limits." 369 U.S. at 222 n.48.

432. *Baker v. Carr*, 369 U.S. at 217.

433. *County of Lane v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869).

434. *Baker v. Carr*, 369 U.S. at 217.

435. *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

436. *Id.*; see also *Bonfield*, *supra* note 122, at 565 (if the Supreme Court reviewed

present "an unusual need for unquestioning adherence to a political decision already made."⁴³⁷ Unless the legislation relates to the mobilization of troops during wartime or some other emergency demanding "[a] prompt and unhesitating obedience,"⁴³⁸ courts may exercise their usual power to declare congressional acts invalid.

The sixth *Baker* criterion, the "potentiality of embarrassment from multifarious pronouncements by various departments on one question,"⁴³⁹ likewise poses no obstacle to judicial review of federal action under the guarantee clause. As the Supreme Court explained in *Powell v. McCormack*,⁴⁴⁰ it "is the responsibility of this Court to act as the ultimate interpreter of the Constitution."⁴⁴¹ If the Supreme Court strikes down a federal law because it denies the states a republican form of government, the Court has merely fulfilled its role of enforcing the Constitution. The Supreme Court's decision is final and no "multifarious pronouncements" can survive.⁴⁴² Thus, judicial enforcement of the protection for state autonomy contained in the guarantee clause satisfies all six of the conditions identified in *Baker v. Carr*.

Finally, judicial enforcement of the guarantee clause as a shield for state autonomy is particularly appropriate because the political process cannot guard against most of the federal actions that would infringe republican government in the states. The failure of the political process to prevent federal interference with the state franchise is apparent from Congress' recent attempt to lower the voting age in all state and local elections.⁴⁴³ Similarly, the political process is unlikely to erect lasting barriers against federal interference with state government structures; qualifications for state legislative, executive, and judicial officials; or the wages paid those officials, because state governments have no institutional representation in Congress.⁴⁴⁴ National politics, finally, will not keep Congress from employing the states as "agents of the nation" because that technique permits Congress to further its own goals with the least federal cost and political embarrassment.⁴⁴⁵ Even if one accepts the premise of *Garcia*, therefore, judicial enforcement of the guarantee clause furthers the ends of that decision by permitting

congressional action under the guarantee clause "it would be only performing its usual function of keeping the legislature within those powers actually conferred").

437. *Baker v. Carr*, 369 U.S. at 217.

438. *Id.* at 213 (quoting *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827)).

439. *Baker v. Carr*, 369 U.S. at 217.

440. 395 U.S. 486 (1969).

441. *Id.* at 549.

442. *Cf. McPherson v. Blacker*, 146 U.S. 1, 24 (1892) ("The question of the validity of this act . . . is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of [our] judgment. . . .").

443. See *supra* notes 201-07 and accompanying text.

444. See *supra* notes 88-94 and accompanying text.

445. See *supra* notes 342-44 and accompanying text.

the courts to protect state autonomy from "possible failings in the national political process."⁴⁴⁶

In sum, neither Supreme Court precedents holding the guarantee clause nonjusticiable nor deference to the political process bars judicial review of claims that Congress has offended the guarantee clause by invading state autonomy. A proper understanding of the Supreme Court's guarantee clause decisions, together with a careful application of the criteria in *Baker v. Carr*, demonstrates that such claims are fully enforceable in the courts. The failure to enforce such claims, in fact, would leave the federal system without an impartial umpire to reconcile the competing claims of state and national power.

V. CONCLUSION

In article IV of the Constitution, the United States "guarantee[s] to every State in this Union a Republican Form of Government." The citizens who ratified the Constitution understood this language to assure each state an independent and vigorous government. Recognition of the same promise today would resolve the difficulties that have plagued the Supreme Court's recent attempts to shield state autonomy through the tenth amendment and the national political process. The guarantee clause grants the states a limited, yet indispensable, role in the federal system. As republican governments, the states have discretion to define their own franchises; to choose their own governmental structures; to set qualifications and salaries for officials performing legislative, executive, or judicial tasks; and to operate their governments as autonomous units rather than as branch offices of the federal government. Enforcing the guarantee of republican government in this manner maintains the power of the national government while preserving the benefits of federalism for a third constitutional century.

446. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).