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The Return of Constitutional Federalism

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THE RETURN OF CONSTITUTIONAL FEDERALISM

LOGAN EVERETT SAWYER III†

ABSTRACT

The return of federalism to a prominent and hotly contested place in constitutional jurisprudence is one of the most important legal developments of the last half-century. But this Article argues that current explanations for the return of constitutional federalism are flawed in ways that distort our understanding of constitutional development and impoverish current debates over the judicial protection of state authority. Conventional jurisprudential approaches cannot explain why the Court in the 1970s began to turn away from long-established doctrinal principles and a decades-old theoretical justification for deference on federalism questions. Political approaches cannot explain why that shift originated with Justices associated with the political left.

This Article offers an explanation for the return of federalism to prominence in our constitutional law that ignores neither the Court’s unique institutional norms nor the importance of political change outside the Court. Through a close examination of the first decision since the New Deal to invalidate an exercise of Congress’s commerce power on federalism grounds—the 1976 decision in National League of Cities v. Usery—it shows how durable changes in American government and politics undermined the dominant jurisprudential justification for deference on federalism questions. As the consensus surrounding the political safeguards of federalism collapsed, the debate over constitutional federalism returned. By portraying constitutional development as a result of the interaction of jurisprudential norms and political change, this approach casts light on contemporary efforts to generate constitutional change and current debates over the value of constitutional federalism.

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**INTRODUCTION**

In the four decades following *Carter v. Carter Coal Co.*\(^1\) in 1936, the Supreme Court did not strike down a single exercise of Congress's commerce power on federalism grounds.\(^2\) The Court repeatedly and by wide margins upheld national regulation of what had been considered local economic and social issues: wage payments to local factory workers, wheat production on a family farm, and choice of customers in a

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1. 298 U.S. 238 (1936).
mom-and-pop restaurant. This nearly uniform support for judicial deference to Congress on federalism questions clearly ended in 1976 with the decision in National League of Cities v. Usery. There, a narrow five-Justice majority invalidated an extension of the Fair Labor Standards Act to state and local governments on the grounds that principles of federalism prohibited Congress from using its commerce power to impair the ability of states "to structure integral operations in areas of traditional governmental functions." That particular doctrine was abandoned less than a decade later in Garcia v. San Antonio Metropolitan Transit Authority, but, as Justices Rehnquist and O'Connor predicted in their Garcia dissents, National League of Cities marked the return of constitutional federalism. In the nearly four decades since National League of Cities, there has been continuous and often fierce debate on the Court and in the law reviews over the Court's proper role in protecting federalism. Last year's decision in National Federation of Independent Business v. Sebelius (NFIB) is only the most recent example. The return of constitutional federalism is recognized as one of the most significant developments in constitutional law in the last forty years, yet—as I argue below—a close examination of the decision that sparked that development indicates that conventional explanations for it are not just inadequate, but inadequate in ways that distort our understanding of constitutional development and impoverish current debates over the future of constitutional federalism. Those explanations either emerge from normative legal analysis or focus tightly on the role of con-

5. Id. at 852.
7. Id. at 579 (1985) (Rehnquist, J., dissenting); id. at 580 (O'Connor, J., dissenting).
servative politics.\(^\text{11}\) The vast normative literature that debates whether the "judicial safeguards of federalism" are properly inferred from the Constitution includes claims that constitutional federalism returned because of insights into the proper interpretation of the relevant legal materials.\(^\text{12}\) Opposed to these jurisprudential perspectives are political approaches, which emphasize either the politics of the Justices or the role the Court plays as a part of a larger political movement. On this view, constitutional federalism returned because it was effective camouflage for the efforts of some Justices to promote business interests and other conservative ends,\(^\text{13}\) or because the political success of the "New Right" gave a series of Republican presidents the opportunity to appoint Justices who shared their party's opposition to federal power.\(^\text{14}\)

Placing *National League of Cities* in its political and doctrinal context indicates, however, that neither of these approaches can convincingly explain the return of constitutional federalism. Jurisprudential explanations cannot explain why the majority in *National League of Cities* rejected a long-established theoretical justification for judicial deference to Congress and overturned a forty-year-old precedent that had been recently reaffirmed. Political explanations are unconvincing because the debate over constitutional federalism emerged before the New Right seized political power with the election of Ronald Reagan in 1980 and

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11. Minority explanations for the revival of constitutional federalism include Vicki Jackson's claim that the Court's primary concern was Congress's laxity in considering constitutional constraints in Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?*, 574 ANNALS AM. ACADEMY POL. & SOC. SCI. 145 (2001), and that the decisions are aimed at protecting the docket of the federal courts in Ann Althouse, *Inside the Federalism Cases: Concern About the Federal Courts*, 574 ANNALS AM. ACADEMY POL. & SOC. SCI. 132 (2001).


originated with Justices who cannot be characterized as conservatives, including Hugo Black and William O. Douglas, two paragons of New Deal liberalism and stalwarts of the Warren Court.

Reconnecting *National League of Cities* to its jurisprudential and political context also provides an opportunity to present a new explanation for the return of constitutional federalism, one that tries to reveal the interaction of jurisprudential norms and political developments rather than reduce one to the other. In what follows, I argue that the return of constitutional federalism was caused by structural changes in American government and durable shifts in political debate that undermined a near uniform consensus that what was best known as the political safeguards of federalism thesis accurately described American government. As that broad consensus crumbled, some close observers of the federal system rejected the political safeguards thesis's conclusion that broad judicial deference to Congress on federalism issues should be the norm. One such observer was Justice Lewis Powell, who then played a central role in pushing the Court to conclude that doctrinal tensions, which had existed in the Court's federalism jurisprudence for four decades, were a sufficient justification for striking down Congress's exercise of its commerce power in *National League of Cities*.16

I make this argument in four parts. The first part argues that traditional legal materials do little to explain the majority's opinion in *National League of Cities* (*NLC*), which rejected a doctrinal principle that had been established for forty years, an admittedly controlling precedent less than a decade old, and a theoretical justification for judicial deference on federalism questions—the political safeguards thesis—that had driven commerce clause jurisprudence for decades. I conclude that any solely jurisprudential explanation for *NLC* will be insufficient.

Part II argues that the political explanations for the return of constitutional federalism are not convincing either. Admittedly, every vote in the five to four majority came from a Republican appointee, four of those votes came from recent appointees of Richard Nixon, and the opinion was written by Nixon's third appointment, then-Justice Rehnquist.17 However, that evidence is insufficient because concerns with limiting federal power emerged on the Supreme Court before Nixon's four appointments arrived and were expressed by Justices who cannot be characterized as supporters of Nixon, the New Right, or conservative politics more broadly. Most important are Hugo Black's opinions in *Younger v. Harris*18 in 1971 and *Oregon v. Mitchell*19 in 1970, which protected the

16. See infra Part IV.B.
17. The majority in *NLC* was composed of Powell (Nixon, 1972), Rehnquist (Nixon, 1972), Blackmun (Nixon, 1970), Burger (Nixon, 1969), and Stewart (Eisenhower, 1958).
autonomy of state courts and state legislatures on the basis of "Our Federalism,"20 and William O. Douglas's 1968 dissent in *Maryland v. Wirtz*,21 which argued that the Court should strike down an exercise of Congress's commerce power on federalism grounds and blazed the doctrinal path the majority followed in *National League of Cities v. Usery*.22

Part III begins to provide an alternative explanation of *NLC* by showing how structural changes in American government and durable shifts in the political debate undermined the near-universal faith in the political safeguards thesis. From the mid-1950s to the mid-1960s, close observers of American government agreed that the political safeguards of federalism were producing effective, democratic governance. They saw a federal system characterized by shared authority that was both responding to majority will and helping the nation respond effectively to the challenges of the time, most importantly in the field of civil rights. By the late 1960s and early 1970s, however, that consensus had collapsed. The causes of that collapse included significant reforms in state government, systemic changes in federal elections, and the administrative dysfunction produced by some of Lyndon Johnson's Great Society programs. Of at least equal importance were durable changes in the political debate caused by the reorientation of the fight for civil rights from *de jure* to *de facto* segregation and Southern state governments' belated decision to oppose the lawless violence of racist segregationists. The convulsions caused by Vietnam and Watergate also contributed. As a result of these changes, a variety of observers concluded that the political safeguards did not, in fact, produce a democratic and effective distribution of authority between state and federal governments. Some of those observers then concluded that a judicial role in protecting the states was appropriate.

By examining the internal dynamics that produced the Court's decision in *National League of Cities*, Part IV argues that the same developments that convinced some close observers of the federal system that the political safeguards of federalism were insufficient also convinced the Court. Central to that argument is revealing the central role Justice Louis Powell played in the Court's decision-making process and his rejection of the political safeguards thesis. "One can argue" Powell wrote justifying his vote in *National League of Cities*, "that the states can 'trust' Congress not to go so far," but the statute at issue in the case disproved the claim: "the political muscle of organized labor outweighed" the opposition of "virtually every state and city in the nation" and "what appeared

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to be overwhelming local political views to the contrary."  

Part IV further undermines political approaches by establishing that the replacement of Democratic appointee William O. Douglas with Republican appointee John Paul Stevens in 1975 at least changed a 6–3 vote to re-establish constitutional federalism into a 5–4 vote, and very nearly led to the opposite outcome: a 5–4 vote to reject constitutional federalism.

Part V summarizes my causal claim and contrasts it with other explanations for NLC and the return of constitutional federalism. A conclusion briefly considers the implications of this history for our understanding of constitutional change and contemporary debates over constitutional federalism. It argues this integrative explanation for the return of constitutional federalism is important because it provides a case study of constitutional change that neither ignores the Court's unique institutional norms nor the importance of political change outside the Court. It also undermines the suggestion that constitutional federalism is inherently conservative and that the contemporary partisan divide on those issues is thus inevitable and permanent. This Article thus provides indirect but important support for the efforts of scholars investigating how federalism can advance interests typically associated with the political left, which can only enrich the ongoing debate over the value of federalism in government and constitutional law.

I. NATIONAL LEAGUE OF CITIES IN JURISPRUDENTIAL CONTEXT

By placing the opinions in NLC in doctrinal and jurisprudential context, this part has two goals. The first is to establish that the political safeguards thesis had for decades generated a consensus on the Court that judicial deference to Congress on federalism questions was appropriate. The second is to challenge the implicit claims made in the vast normative literature on constitutional federalism that the Court's renewed concern with protecting state autonomy resulted from an improved understanding—or a new misunderstanding—of traditional legal sources. As important as that literature is for some purposes, it does not provide a convincing way to explain why the debate over constitutional federalism returned in NLC. In addition to doubt that such approaches can answer


what is an inherently historical question, there is evidence that makes such a claim difficult. Although there was some doctrinal support for the decision in \textit{NLC} in the tension between the Court's treatment of Congress's taxing power and its commerce power, that tension had existed for forty years without the Court feeling it needed to be resolved. In addition, the opinion had to overturn a forty-year-old precedent that had been relied upon only eight years earlier and reject a theoretical justification for deference—the political safeguards thesis—that had driven commerce clause doctrine for decades.

\textbf{A. National League in Doctrinal Context}

\textit{National League of Cities} arose from amendments to the Fair Labor Standards Act of 1938 (FLSA). The original FLSA established a national minimum wage, mandated “time and a half” for overtime in many industries, and outlawed child labor. But until 1966, the FLSA applied only to employees of private businesses. It did not regulate employees of the federal government, of state governments, or of state-controlled entities like state hospitals. In 1966, Congress began to chip away at this distinction by extending the FLSA to cover employees of state-run hospitals, some state educational institutions, and state and local transit authorities. Following the 7–2 decision to uphold the 1966 Amendments in \textit{Maryland v. Wirtz}, Congress passed another set of amendments in 1974 that extended the FLSA to all state and local employees. President Nixon vetoed those amendments. His veto message primarily argued that the amendments would create inflation by raising the minimum wage too quickly, but also briefly mentioned that the law had been opposed by the Advisory Commission on Intergovernmental Relations and was “an unwarranted interference with State prerogatives.” He later signed the extensions after Congress passed a second bill with veto-proof majorities.

The National League of Cities, the National Governor’s Conference, twenty states, and four cities sought to enjoin the application of the

\begin{itemize}
  \item 25. See Keith E. Whittington, \textit{Taking What They Give Us: Explaining the Court’s Federalism Offensive}, 51 DUKE L.J. 477, 480 (2001) (discussing shortcomings of jurisprudential explanations); \textit{see also PURCELL, supra} note 14, at 158–59 (arguing that the text and history of the Constitution are insufficient to generate such insights on their own).
  \item 28. \textit{Id.}
\end{itemize}
1974 Amendments to states and local governments because the amendments violated federalism principles. Plaintiffs did not deny that the amendments regulated commerce. Throughout the litigation they and everyone else accepted that the amendments regulated an activity that affected interstate commerce and that identical regulations of private parties were clearly constitutional. The issues plaintiffs asked the Court to resolve were whether principles of federalism recognized by the Tenth Amendment and other provisions of the Constitution limited Congress’s authority to use its commerce power to regulate the behavior of states and, if so, whether the 1974 Amendments violated those limits. In other words, did the 1974 Amendments violate any immunity the states had against Congress’s commerce power implied by the Constitution’s federal system?

The doctrine controlling the answer to those questions was decades old. The most relevant decision was United States v. California, decided in 1936. In California, the Court considered whether the Federal Safety Appliance Act could be constitutionally applied to a railroad run by the State of California not for profit. Arguing by analogy from intergovernmental tax immunity doctrine developed in the late nineteenth century, the State of California argued that the same principles of federalism that prevented the federal government from taxing instrumentalities of state governments also prevented the federal government from using its commerce power to regulate states when the state was performing a public function in its sovereign capacity. Whenever states were acting in a governmental capacity, California argued, principles of federalism meant they were immune from regulation by Congress’s commerce power just as they would be immune from its taxing power.

Justice Stone’s opinion for a unanimous Court was not helpful to the plaintiffs’ cause. In fact, it rejected their primary argument outright. “The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies,” he concluded, “is not illuminating.” Intergovernmental tax immunity “is implied from the nature of our federal system” while, for reasons he did not explain,
"there is no such limitation upon the plenary power to regulate commerce." 42

But an opening remained for plaintiffs because the difference between the Court’s treatment of Congress’s commerce and taxing powers remained unexplained, even after the Court altered its intergovernmental tax immunity doctrine in the second decision that framed the dispute in NLC, the 1946 decision in New York v. United States. 43 At issue in New York was a two-cents-per-gallon federal tax on the production of soft drinks. 44 The State of New York, which had taken control of Saratoga Springs to address private overuse of the springs and was selling mineral water in order to fund the resort and spa, joined forty-five other states to argue that states should be immune from the tax. 45 Although a badly fractured Court could not agree on the governing doctrinal rule, every Justice agreed that the sovereignty of the states required the Court to limit Congress’s taxing power. 46

Justice Frankfurter’s opinion for the Court rejected the traditional nineteenth century rule in part because “social complexities” made the rule unworkable 47 and in part because, anticipating Herbert Wechsler’s political safeguards argument, “the States share in the legislative process by which a tax of general applicability is laid.” 48 He instead supported a non-discrimination rule, which required only that the tax treat the states like it treated private parties. 49 This rule, Frankfurter argued, retained sufficient protection for state sovereignty because “[t]here are . . . State activities and State-owned property that . . . inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing.” 50

Justice Stone wrote separately to argue for a rule more protective of the states. 51 “[A] federal tax which is not discriminatory as to the subject matter,” he argued, “may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State’s

42.  Id. at 185.
44.  Id. at 573–74.
45.  Id. at 575.
46.  Id. at 574–75 (plurality opinion); id. at 586 (Stone, J., concurring); id. at 591 (Douglas, J., dissenting). The rule was applied in South Carolina v. United States, 199 U.S. 437, 463 (1905), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), Ohio v. Helvering, 292 U.S. 360, 371 (1934), overruled by Garcia, 469 U.S. 528, and Helvering v. Powers, 293 U.S. 214, 227 (1934), overruled by Garcia, 469 U.S. 528. In a badly fractured decision, the entire Court rejected the existing doctrinal rule, which allowed federal taxation of “proprietary” State activity—activity in which a private business might participate—but not federal taxation of “traditional” state government activities. New York, 326 U.S. at 574, 583.
47.  New York, 326 U.S. at 576.
48.  Id. at 577.
49.  Id. at 582–84.
50.  Id. at 587 (Stone, J., concurring).
performance of its sovereign functions of government." A better approach, Stone suggested, was case-by-case balancing aimed at protecting both federal and state governments' taxing powers while allowing each government to function with a minimum of interference.53 "The problem," he wrote, "is not one to be solved by a formula."

Justice Douglas's dissent went even farther by suggesting that the Tenth Amendment prohibited the federal government from taxing any state activity at all. Frankfurter's non-discrimination rule, he wrote, "disregards the Tenth Amendment, places the sovereign States on the same plane as private citizens, and makes the sovereign States pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution." Every Justice in New York thus recognized a role for the judiciary in protecting the autonomy and sovereignty of the States from the federal taxing power.

The decision, as a result, gave plaintiffs in \textit{NLC} something to work with. The different treatment of Congress's taxing and commerce power was clear, but a principled explanation for it was not.56 Nothing in the constitutional text that granted Congress its commerce or taxing power suggested they should be treated differently by the Court, and both were enumerated in Article I, Section Eight of the Constitution. The truth of McCulloch \textit{v. Maryland}'s famous aphorism that the power to tax is the power to destroy was dubious in the twentieth century59 and, even if the power to tax remained the power to destroy, the expansion of the commerce power from the 1940s to the 1960s made the commerce power look just as threatening to state sovereignty.60

This tension between the Court's tax and commerce powers jurisprudence provided the doctrinal justification for Justice Rehnquist's ruling in \textit{NLC} that the 1974 Amendments to the FLSA violated the Constitution. Rehnquist did not deny that the 1974 Amendments were regulations of interstate commerce. It was established, he wrote, "beyond peradventure," that Congress could regulate wages and hours using its

\begin{itemize}
  \item 52. Id.
  \item 53. Id. at 589–90.
  \item 54. Id. at 589.
  \item 55. Id. at 596 (Douglas, J., dissenting).
  \item 56. In \textit{Case v. Bowles}, 327 U.S. 92, 101–02 (1946), the Court held that the War Power ought to be treated like the commerce power. \textit{Maryland v. Wirtz}, 392 U.S. 183, 198 (1968), \textit{overruled by Nat'l League of Cities v. Usery}, 426 U.S. 833 (1976), and \textit{Fry v. United States}, 421 U.S. 542, 543–44 (1975), supported the distinction between the tax and commerce power, but none of those decisions provided clear reasons. They are discussed below. \textit{See infra} notes 124–31, 295–331, and accompanying text.
  \item 57. U.S. CONST. art. I, § 8, cl. 1, 3.
  \item 58. 17 U.S. 316, 327 (1819).
  \item 59. See, e.g., \textit{Panhandle Oil Co. v. Mississippi ex rel. Knox}, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits."); \textit{overruled in part by Alabama v. King \\& Boozer}, 314 U.S. 1 (1941).
\end{itemize}
commerce power. But he nevertheless ruled that principles of federalism implicit in the structure of the Constitution prevented the federal government from interfering with the integrity and function of state government.

Not surprisingly, the primary authority he offered for this decision was New York v. United States. Justice Stone's opinion in New York, Rehnquist argued, indicated that Congress could not use its taxing power to interfere with the integrity and function of state governments. Rehnquist then argued there was no justification for treating the taxing and commerce powers differently. Finally, he held that the 1974 Amendments interfered with the autonomy of the states because setting the terms of employment was an attribute of state sovereignty that was "essential to [the] separate and independent existence" of the states. Both the minimum wage and overtime requirements limited important policy decisions of the states and thus needed to be struck down.

B. National League of Cities and the Political Safeguards Thesis

As the foregoing discussion indicates, there was some doctrinal support for the Court's decision in NLC, but case law certainly did not require the result. In fact, as both the tone and substance of Justice Brennan's opinion indicated, NLC was a clear departure from the Court's Commerce Clause doctrine. Despite the support it found in the tension between the Court's treatment of Congress's taxing and commerce powers, Rehnquist's opinion had to overrule California and Maryland v. Wirtz—a 1968 decision that had explicitly continued California's approach to the commerce power—and distinguish Fry v. United States—a decision from the previous term that also seemed to support California.

Justice Brennan's dissent pointed out these problems and added a pragmatic critique as well. However, he reserved special vitriol for the majority's rejection of a theoretical justification for deference to Congress that had driven Commerce Clause doctrine for decades: the polit-
cal safeguards thesis. The majority decision, he wrote, was a “patent usurpation of the role reserved for the political process.”

Since at least 1942, when it helped convince Justice Robert Jackson to adopt the “aggregation principle” in *Wickard v. Filburn*, the idea that the Court should defer to Congress on federalism issues because Congress had political incentives to provide the appropriate respect for the states had been central to the Court’s treatment of the commerce power. But the argument was systematized and given its name by Herbert Wechsler in one of the most cited law review articles of all time: his 1954 *Political Safeguards of Federalism*.

There, Wechsler famously argued that judicial protection of the autonomy of states was unnecessary, unwise, and inconsistent with the founders’ design and a proper understanding of the judicial role. The Constitution, he argued, did not depend on the Supreme Court’s enforcement of the enumeration of powers and the Tenth Amendment to protect federalism. It wisely provided other protections to state autonomy. The states, he pointed out, kept their own independent basis of authority and their own administrative machinery. But even more importantly, they helped select the leadership of the national government. Those “political safeguards of federalism” sufficed to ensure the proper protection of state autonomy.

In advancing that argument, Wechsler emphasized that, even after the Seventeenth Amendment, states had enormous influence over senators and thus over national policy. In 1950, he pointed out, filibuster rules would permit seventeen states with a total combined population less than the state of New York to stifle any bill. And, of course, the power to stop legislation was a powerful tool in negotiations that the states could use to ensure fair, or even more than fair, treatment by the national government.

The House also gave the states significant influence over the national government. The Constitution allows states to control the shape of congressional districts—which, in 1954, did not need to be of equal population—as well as determine who could vote for Congress by tying qualifications for congressional elections to the criteria for the lowest

70. Id. at 858.
71. 317 U.S. 111 (1942).
73. Wechsler, supra note 15, at 545–47.
76. Id. at 543–44.
77. Id. at 552–53.
78. Id. at 547.
house of the state legislature.\textsuperscript{79} Thus, state legislatures, controlled by state parties, could use literacy tests, poll taxes, gerrymandering, or other methods to ensure that their interests and autonomy were respected.\textsuperscript{80}

Even the President, the most national of federal positions, was responsive to the power of the states. The Constitution itself specified that state legislatures would determine the manner of selecting presidential electors. More practically, the Electoral College focused presidential candidates on a limited number of close states, which provided the people and the political parties of those states influence over the President. Thus, at least some states and some state parties would have the authority to influence the President on questions of state autonomy.

Wechsler’s arguments for political safeguards as the appropriate way to draw the line between state and federal power convinced so many because it fit neatly with every major justification for judicial review.\textsuperscript{81} For pragmatists, Wechsler’s argument freed the national government from foolish legalisms. When it was necessary to prevent problems like destructive, “race to the bottom” interstate competition, the national government with the input of the States could institute a single national rule. When local control was better, national involvement could be avoided. It was this insight that convinced pragmatist Robert Jackson to support the “aggregation principle” of \textit{Wickard v. Filburn} despite his concern that it would remove Court oversight of the reach of Congress’s commerce power.\textsuperscript{82}

For patrons of judicial restraint, the political safeguards approach was welcome because it minimized the invalidation of democratically passed laws. Felix Frankfurter—a leading supporter of deference—adopted a version of what became Wechsler’s argument in \textit{New York v. United States}, where he justified his new rule for intergovernmental tax immunity by noting that “the States share in the legislative process by which a tax of general applicability is laid.”\textsuperscript{83}

For political process theorists who drew on Chief Justice Stone’s famous footnote four in \textit{Carolene Products},\textsuperscript{84} aggressive judicial protec-

\textsuperscript{79} Id. at 548–49.
\textsuperscript{80} Id. at 549–52.
\textsuperscript{81} Charles W. McCurdy, Remarks at the Robert Cross Memorial Lecture (2011) (transcript on file with author).
\textsuperscript{82} \textit{Cushman}, supra note 72, at 224 (recounting Justice Jackson’s struggle with \textit{Wickard} and his ultimate adoption on political safeguards grounds); see also Noah Feldman, \textit{Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices} 123–25 (2010) (identifying Robert Jackson as a pragmatist). Justice Stone recognized similar pragmatic reasons in \textit{Helvering v. Gerhard}, 304 U.S. 405 (1938), an intergovernmental tax immunity decision. The political process, he argued, “provides a readier and more adaptable means than any . . . courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other.” \textit{Id.} at 416.
\textsuperscript{83} 326 U.S. 572, 577 (1946).
\textsuperscript{84} United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
tion of rights was necessary only when the political process or the rights of discrete and insular minorities were being threatened. States, Wechsler argued, in effect, were not a discrete and insular minority and had ample opportunities to exercise political power. Stone advanced what later became Wechsler’s argument in Helvering v. Gerhardt in 1938. He rejected claims that states should have the same immunity to federal taxation that the federal government had to state taxation on the grounds that “the people of all the states have created the national government and are represented in Congress.” Through that representation,” he continued, “they exercise the national taxing power. The very fact that when they are exercising it they are taxing themselves serves to guard against its abuse through the possibility of resort to the usual processes of political action.”

For those concerned with the intentions of the founders, Wechsler pointed out his idea wasn’t really his, it was James Madison’s. He quoted a letter Madison wrote that listed three ways the states would be protected from the national government: (1) the role of the state and the people of the states in the election of the Senate and the House; (2) the role of the states and the people of the states in the election of the President; and (3) the ability of the House and Senate to impeach and remove executive officers. Madison, Wechsler noted, did not mention the Court at all.

Wechsler’s argument provided clear support for Congress’s aggressive uses of the commerce power in the 1964 Civil Rights Act, which the Court upheld in Heart of Atlanta Motel and Katzenbach v. McClung. And its abandonment incensed Brennan in NLC. In addition to calling the decision a usurpation of authority that should reside with the political process, Brennan specifically cited Wechsler. “Judicial restraint in this area,” he wrote,

merely recognizes that the political branches of our Government are structured to protect the interests of the States . . . and that the States are fully able to protect their own interests in the premises. Congress is constituted of representatives in both the Senate and House Elected from the States . . . . Judicial redistribution of powers granted the National Government by the terms of the Constitution violates the fundamental tenet of our federalism that the extent of federal interven-

85. 304 U.S. 405 (1938).
86. Id. at 416.
87. Id.
tion into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress.  

Brennan continued by arguing that contemporary practice supported Wechsler's predictions. The "enormous . . . political power" of the states, he wrote, was not accurately reflected in the potential $1 billion cost of the FLSA amendments. More important was the $60.5 billion the states received from the federal government. States, he wrote, were complaining of the costs of the FLSA amendments on police and fire departments, but the federal government was providing $716 million of assistance to such entities. The states were complaining about the problems the amendments created for summer jobs for students, but the federal government was already providing $400 million for such jobs—enough for 670,000 students to work for state or local government.

It seems clear, given these arguments, that while the majority's position was not without support in traditional legal materials, that support was far from decisive. In fact, given the broad support for the political safeguards thesis and the decisions in California and Wirtz, it seems more reasonable to view NLC as a substantial change in approach made in spite of existing legal materials. But regardless of whether NLC is understood as a correct or incorrect interpretation of existing legal materials, the important point for the purposes of this Article is that an analysis of traditional legal materials cannot explain the decision because those materials cannot explain why the tension between the Court's commerce and taxing power doctrines that had existed for forty years became unbearable only in 1976. No change to the constitutional text can explain it. Nor can changes to related doctrinal structures. Rather, some other factor must explain why Rehnquist and four other Justices in the NLC majority decided to ignore the implications of the political safeguards thesis and resolve the doctrinal tension in favor of state sovereignty in 1976.

II. NATIONAL LEAGUE OF CITIES IN POLITICAL CONTEXT

Some scholars who share my doubts that traditional legal materials can explain the return of constitutional federalism have looked for alternative explanations. Almost all found a single cause: conservative politics. They certainly do not agree on every issue. Some have argued

93. Id. at 876–77 (emphasis added) (citing Wechsler, supra note 15).
94. Id.
95. Id. at 878.
96. Id.
97. Id.
98. Id.
100. See generally id.
that constitutional federalism returned because it has been a useful way for conservative Justices to camouflage their efforts to advance a conservative policy agenda.\textsuperscript{101} Others have argued that view is at least incomplete because they believe the Court’s federalism decisions have generally, but not always, advanced conservative political goals.\textsuperscript{102} But they too see politics as the crucial cause, arguing that constitutional federalism returned because the rise of the New Right allowed Republican presidents to appoint Justices who shared their party’s long established ideological opposition to federal power.\textsuperscript{103} Keith Whittington’s identification of larger social, political, and intellectual structures that influenced federalism doctrine points towards a different kind of explanation, but even he indicates those structural changes mattered because they provided opportunities conservative Justices needed to advance their own political preferences.\textsuperscript{104} This part continues examining \textit{NLC} in its historical context to argue conservative politics cannot effectively explain the return of the debate over constitutional federalism that became clear in \textit{NLC}.

None of this is to suggest that a political explanation for \textit{NLC} cannot find significant support from the historical record. There is, in fact, substantial evidence. The case was decided after Richard Nixon made four Supreme Court appointments, every vote in the majority came from a Republican appointee, and the majority opinion was written by President Nixon’s third appointment, then-Justice Rehnquist, who undoubtedly had conservative political preferences.\textsuperscript{105} Furthermore, the majority’s concern with protecting state autonomy had some similarities to Nixon’s “New Federalism” policy. Nixon even vetoed the 1974 Amendments in part on federalism grounds. More broadly, because the opinion limits congressional authority, it can be seen to reflect the New Right’s opposition to federal authority specifically and government authority in general.

Nevertheless, other evidence indicates that viewing conservative politics as the cause of the return of constitutional federalism is incomplete, if not misleading. Two Republican appointees dissented in \textit{NLC}—Justices Brennan and Stevens—and Justice Brennan wrote the impassioned dissent. Other factors are also hard to explain using a purely political model of doctrinal development. First, although Nixon initially vetoed the 1974 Amendments, he later signed them, and his brief mention

\begin{thebibliography}{10}
\bibitem{101} See, e.g., Schwartz, \textit{supra} note 13, at 155, 166–67; Fallon, \textit{supra} note 13, at 449–94.
\bibitem{102} Purcell, \textit{supra} note 14, at 158–59; Pickerill & Clayton, \textit{supra} note 14, at 236–43; Purcell, \textit{supra} note 14, at 127–74.
\bibitem{103} Purcell, \textit{supra} note 14, at 158–59; Pickerill & Clayton, \textit{supra} note 14, at 236–43; Purcell, \textit{supra} note 14, at 127–74.
\end{thebibliography}
of federalism in his veto message suggests it was an afterthought.\textsuperscript{106} It is clear in any case that Nixon did not share the New Right’s antipathy to government power in general and federal power in particular.\textsuperscript{107} It is hard to understand how the New Right’s political preferences could influence the Court when the movement had not yet seized political power. Second, and perhaps most damning to explanations focused solely on conservative politics, the return of constitutional federalism began before either Nixon or Reagan appointed any Justices and originated with Justices who cannot be described as conservatives. The remainder of this part considers those two points in more detail.

\textit{A. President Nixon, the New Right, and Federalism}

Although federalism rhetoric and policy played an important role in Nixon’s administration, his federalism policies were not, like those of the New Right and President Reagan, aimed at undermining federal and governmental power. Nixon’s New Federalism agenda aimed to rationalize intergovernmental relations to make regulation more effective. Thus, in areas where state and local governments had special competence—community development, education, and job training—the Nixon administration sought to decentralize real control of federal programs.\textsuperscript{108} His General Revenue Sharing Program, the centerpiece of his New Federalism agenda, for example, aimed to replace many narrow federal “categorical” grants to states and localities with fewer large, virtually unrestricted grants.\textsuperscript{109}

But Nixon was also clearly willing to exercise federal power when he believed it was the most effective tool. He campaigned to create a federal minimum-income program to replace the existing welfare program.\textsuperscript{110} He aggressively expanded federal environmental regulation by helping to pass the National Environmental Policy Act, the Clean Air Act, and the Clean Water Act, all of which placed significant new regulatory requirements on the private sector and the states.\textsuperscript{111} He instituted the first national speed limit in response to the OPEC oil embargo by threatening to cut off all federal highway aid to any state that failed to comply with the national standard,\textsuperscript{112} and his 1970 Economic Stabilization Act allowed the President to stabilize wages and salaries by, among other

\begin{itemize}
  \item \textsuperscript{107} Whittington, \textit{supra} note 25, at 504 ("Nixon always had an uneasy relationship with the ‘[N]ew [R]ight’ and its ideological concerns.")
  \item \textsuperscript{108} TIMOTHY CONLAN, \textit{FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM} 20–21 (1998).
  \item \textsuperscript{109} \textit{Id.}
  \item \textsuperscript{110} \textit{Id.} at 30–31.
  \item \textsuperscript{111} \textit{Id.} at 89–90.
  \item \textsuperscript{112} \textit{Id.} at 91.
\end{itemize}
things, denying pay raises to both public and private sector employees.\textsuperscript{113} Nixon clearly did not share the New Right’s opposition to federal power. \textit{NLC} thus seems unlikely to be a reflection of the policy preferences of the New Right because the New Right was not yet in power. And Nixon’s pragmatism is the antithesis of \textit{NLC’s} focus on “traditional governmental functions.”\textsuperscript{114}

\textbf{B. Hugo Black, William Douglas, and the Return of Constitutional Federalism}

Also damaging to the political approach is that the return of constitutional federalism began before Nixon made his Supreme Court appointments and emerged, in part, from Democratic appointees. \textit{NLC} was the first time the Court struck down a regulation of interstate commerce on federalism grounds since 1936, but it was not alone in supporting judicial protection of state sovereignty in the late 1960s and early 1970s. \textit{Oregon v. Mitchell} in 1970, \textit{Younger v. Harris} in 1971, and \textit{Maryland v. Wirtz} in 1968 all evinced that concern in varying degrees. These cases were decided before Nixon made all his appointments and included opinions written by Justices Douglas and Black—stalwarts of the Warren Court and appointees of Franklin Roosevelt who are difficult, if not impossible, to consider conservatives or representatives of the New Right.\textsuperscript{115}

In \textit{Oregon v. Mitchell} the State of Oregon challenged two amendments to the Voting Rights Act: one that enfranchised eighteen-year-olds in federal elections, the other that enfranchised eighteen-year-olds in state elections.\textsuperscript{116} Given the Warren Court’s willingness to reshape state political structures entirely on its own in \textit{Reynolds v. Sims}\textsuperscript{117} just six years earlier, one might expect \textit{Oregon v. Mitchell} to have been an easy case. Certainly four Justices believed that the case was straightforward, but the case produced a fractured decision. Douglas, Marshall, Brennan, and White voted to uphold both provisions. Justice Harlan’s historical investigations led him to join Justice Stewart, Burger, and Blackmun in voting to strike both down. Black’s vote was thus decisive, and he returned a split decision: voting to uphold the federal provision, but to strike down the provision regulating state elections.\textsuperscript{118}

\begin{itemize}
\item \textsuperscript{115} There are other examples as well. See, e.g., Note, Municipal Bankruptcy, the Tenth Amendment and the New Federalism, 89 HARV. L. REV. 1871, 1873–78 (1976).
\item \textsuperscript{116} 400 U.S. 112, 117 (1970).
\item \textsuperscript{117} 377 U.S. 533 (1964).
\item \textsuperscript{118} Mitchell, 400 U.S. at 118.
\end{itemize}
Black argued that the Tenth Amendment and the values of federalism protected state elections from federal regulation. "[T]he Constitution," he wrote,

was . . . intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother Harlan has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.\textsuperscript{119}

The Civil War Amendments on which Congress relied, Black argued, provided broad but not unlimited authority. The Fourteenth Amendment was not "intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation."\textsuperscript{120}

Black showed a similar concern with federalism in \textit{Younger v. Harris} in 1971. His opinion for the Court established a new abstention doctrine on the basis of a history of deference to state court criminal proceedings, the need to protect the role of the jury, and a concern with duplicative legal proceedings.\textsuperscript{121} But the decision was also supported by an even more vital consideration:

\begin{quote}
[T]he notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federal-
\end{quote}

\textsuperscript{119} Id. at 124-25 (footnote omitted).
\textsuperscript{120} Id. at 128.
\textsuperscript{121} Younger v. Harris, 401 U.S. 37, 43-45 (1971).
ism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.  

Neither Younger v. Harris nor Oregon v. Mitchell concerned a conflict between Congress's commerce power and state sovereignty. The Court did address that issue in Maryland v. Wirtz and Justice Douglas's dissent anticipated the arguments Rehnquist would make in NLC.

Wirtz addressed the 1966 Amendments to the Fair Labor Standards Act that extended the Act's coverage to employees of hospitals and other entities run by the States. As the plaintiffs did in NLC, Maryland and twenty-seven other states argued that the law was unconstitutional as applied to the states because it interfered with sovereign state functions. Justice Harlan's majority opinion rejected the argument, as Justice Brennan would in NLC, because he believed it was based on the discredited ideas of dual federalism and had previously been rejected in United States v. California.

Douglas played Rehnquist to Harlan's Brennan. His dissent, joined by Justice Stewart, countered that the different treatment Congress's commerce and taxing powers received under California and New York v. United States was unjustified. The federal government, he argued, could destroy the autonomy of the states with the commerce power as well as the taxing power. Like the taxing power, "[t]he exercise of the commerce power may also destroy state sovereignty," especially after Wickard and Katzenbach clarified its breadth. Cases like California should be differentiated from New York and the tax immunity cases not because California was a commerce clause case and New York a taxing power case, but because the interference with State autonomy was meaningful in New York (and Wirtz) and limited in California: "It is one thing to force a State to purchase safety equipment for its railroad [as the law at issue in California did] and another to force it either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas." Ultimately, Douglas recommended a balancing rule: "Whether, in a given case, a particular commerce power regulation by Congress of state activity is permissible depends on the facts."

122. Id. at 44-45.
124. Id. at 186-87.
125. Id. at 187.
126. Id. at 197 (referencing United States v. California, 297 U.S. 175 (1936), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).
127. Id. at 204-05 (Douglas, J., dissenting).
128. Id. at 204.
129. Id. at 203.
130. Id. at 205.
In *Wirtz*, he found those facts constituted a sufficient threat to state sovereignty to justify striking down the 1966 FLSA amendments.\textsuperscript{131}

Justice Douglas cannot be accurately characterized as either a conservative or a supporter of the New Right. He was a principle architect of both the New Deal\textsuperscript{132} and the Warren Court's rights revolution.\textsuperscript{133} He was so unpopular among Republicans that some had called for his impeachment.\textsuperscript{134} Given Justice Douglas's support, it is clear conservative politics cannot be a complete explanation for the return of constitutional federalism.

### III. The Political Safeguards Thesis and the Changing Debate over Constitutional Federalism

If the conventional explanations are unconvincing, how can the return of constitutional federalism in *NLC* be explained? This part argues that the decision resulted from a series of developments that undermined broadly shared faith in the primary justification for judicial deference on federalism questions: Wechsler's *Political Safeguards of Federalism*.\textsuperscript{135} Wechsler was far from alone in arguing the political process itself was the best way to properly divide authority between federal and state governments. Almost every close observer of American government believed that real governing authority was shared between different levels of government and that that authority was distributed through a fair, democratic process. The leading voices were further convinced that the sharing of authority helped the system respond effectively to the challenges of the time. These views were so widely accepted because they were supported by a particular set of historical circumstances, the most important of which was the federal government's campaign against *de jure* segregation sparked by *Brown v. Board of Education*.\textsuperscript{136} Those circumstances simultaneously emphasized both the political power of the states and the benefits of expanding federal authority. They made Wechsler's arguments against judicial review of federalism issues appear clearly correct.

By the late 1960s and early 1970s, however, those circumstances had changed and the debate over the appropriate role for judicial review of federalism issues changed with them. Among those changes were the growing administrative dysfunction produced by some of Lyndon Johnson's Great Society programs, the increasing competence of state governments, the shift of the fight for civil rights from *de jure* segregation into more broadly, though less intensely, contested issues of *de facto*

\textsuperscript{131} Id. at 204–05.  
\textsuperscript{133} Id. at 121–24.  
\textsuperscript{134} Id. at 146.  
\textsuperscript{135} Wechsler, *supra* note 15.  
\textsuperscript{136} 347 U.S. 483 (1954).
segregation, the growing power of national interest groups, and the belated turn of Southern state governments against racist violence. Observers began to doubt that the sharing of functions between state and federal governments was evidence of the sharing of real governing authority. They began to question whether the political process was fairly and effectively distributing governing functions. Those doubts, in turn, undermined faith in the political safeguards thesis and ultimately led to the return of constitutional federalism in NLC.

A. The Political Safeguards Thesis at Its Zenith

The political safeguards thesis at its zenith was more than an article. By the early 1960s it was a set of arguments elaborated by a variety of close observers of the federal system that had grown substantially beyond Wechsler’s pithy critique of judicial review of federalism questions. The research those observers produced led to some disagreement, but its primary effect was to produce new arguments that gave Wechsler’s ultimate conclusions nearly universal acceptance. It was hard to find disagreement that American government was a system of shared authority distributed through fair, democratic means. And most leading voices saw it as an effective tool for solving the problems of the time.

Observers of American federalism had long understood that the constitutional revolution generated by FDR’s appointments to the Supreme Court transformed the American federal system. But until the mid-1950s, the study of federalism continued to focus on formal constitutional analysis. After the mid-1950s, scholars increasingly turned their attention to the actual operation of the federal system. These scholars, wrote Morton Grodzins, a leader in the movement, were concerned not with formal, or constitutional, power relationships . . . but with social reality; not with the sporadic umpiring of the courts but with the day-to-day pattern of who does what under whose influence; not with the theoretical locus of supreme powers but with the actual extent of the


139. Martin Diamond, On the Relationship of Federalism and Decentralization, in Cooperation and Conflict: Readings in American Federalism 72, 73 (Daniel J. Elazar et al. eds., 1969) ("[There is a] general contemporary unwillingness to accept what are deemed to be formal, legalistic, mechanistic notions of the American [federal] system and an insistence upon the importance of what are held to be the underlying political realities . . . .").

sharing of decision-making in legislation and administration between
the central, state, and local governments.141

Wechsler’s political safeguard thesis was part of that movement.142
His article examined constitutional text and history, but its real bite came
from how smoothly he integrated those considerations with an analysis
of the political power that states exercised due to their role in the national
government.143 Other scholars soon strengthened Wechsler’s claims by
exploring how constitutional guarantees interacted with the structure of
American political parties.144 With that refinement, Wechsler’s conclu-
sion that the political process was the most democratic, effective, and
thus legitimate way to distribute authority between federal and state gov-
ernments became a near universally accepted principle.

The leading voices in the study of American government agreed
that the American federal system shared important governmental func-
tions. As Grodzins famously put it, American intergovernmental rela-
tions did not resemble a “three-layer cake” in which power was divided
between state, local, and federal governments, but a “marble cake.”145
“Functions are not neatly parceled out among the many governments,”
he wrote.146 “They are shared functions. It is difficult to find any gov-
ernmental activity which does not involve all three of the so-called ‘lev-
els’ of the federal system.”147 Even government functions traditionally
associated with local control—functions like education and law enforce-
ment—were, these observers explained, really shared functions.148 Federal
aid in the 1950s, for example, provided school lunches, trained
teachers, built school buildings, and supported testing programs.149 Local
law enforcement provided local knowledge and manpower to support
federal investigations, while the federal government provided training,
expertise, and access to information like the FBI’s fingerprint data-
base.150

141. MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE
142. Scheiber, supra note 138, at 663.
143. Wechsler, supra note 15.
144. Larry Kramer resurrected this argument in his widely noted article. Kramer, supra note 12.
146. Id. at 266.
147. Id.; see also Daniel J. Elazar, Federalism and Intergovernmental Relations, in POLITICAL
148. GRODZINS, supra note 141, at 4–5, 89.
149. Id. at 5.
150. Id. at 105.
Observers identified federal grants-in-aid as both the best example of and most important pathway for this kind of sharing of functions. Though they were created earlier, grants-in-aid had grown consistently since the New Deal. In total dollars, they expanded from around $1.6 billion in 1948 to almost $7 billion by 1960. Most were "categorical grants" that provided federal dollars for specific state activities. These grants had a profound effect on the relationship of the federal government and the states, but even though the money came from Washington, these observers believed grants-in-aid encouraged cooperative problem solving. Grants-in-aid, Grodzins wrote, "have supplied a cooperative method for achieving results that might never have been achieved."

As Grodzins's statement suggests, there was broad agreement that the sharing of government functions demonstrated that real governing authority was shared between state, local, and federal governments. "The sharing of functions is, in fact, the sharing of power," wrote Grodzins. William Riker agreed. States cannot control national decisions, the nation cannot control state decisions, and a standoff was the result. Daniel Elazar—a student of Grodzins—even denied that the American federalist system was "decentralized." That term, he argued, implied there was a central authority that chose to distribute authority to the periphery. But in America, governing functions were distributed through the complex interaction of the center and the periphery, each of which had their own bases of authority. America, he argued, thus ought to be described as a "noncentralized" system.

In explaining the reasons for this shared authority, no one pointed to the doctrinal limits developed by the Supreme Court. Such limits were universally agreed to be moribund. Most observers—they though not

151. Id. at 60 ("[G]rant-in-aid programs . . . have been the foremost forces to bring about planned national-state collaboration."). See generally Deil S. Wright, Federal Grants-in-Aid: Perspectives and Alternatives (1968); Grodzins, supra note 145, at 266.
152. See generally V.O. Key, Jr., The Administration of Federal Grants to the States (1937).
154. Id. at 60.
155. Id. at 62.
156. Even in the 1950s, there were some who saw the states as lacking authority. C. Wright Mill's Power Elite (1956) saw power concentrated in the hands of an American elite, a theme supported by G. William Dornhoff in Who Rules America?, (1967), and The Higher Circle: The Governing Class in America, (1970). Arthur S. Miller saw economic power delegated to private industry like corporations, which in reality were more powerful than states, The Constitutional Law of the "Security State," 10 STAN. L. REV. 620, 637 (1958), which he saw as administrative units, id. at 629. Leonard D. White saw evidence of declining state authority in The States and the Nation, (1953). But by the early 1960s, these views were not shared by students of the federal system.
160. Id. at v–vii, 3.
161. Id. at 3.
162. See, e.g., Samuel Krislov, The Supreme Court in the Political Process 81 (1965) (describing the Court’s approach to limiting federal power as a “‘leave it to Congress’ attitude”).
all—and accepted Wechsler's arguments that the Constitution protected the authority of the states to influence the federal government. They agreed that state legislatures shaped the preferences of their state's congressional delegation through their power to apportion Congressional districts. And state control over federal elections provided a way for the states to influence their national representatives, thus providing a "de facto bulwark against overextension of federal authority."

But these observers emphasized the importance of informal institutional structures. Congress's institutional tradition of distributing committee chairmanships by seniority rather than merit or loyalty to party leadership left current and aspiring chairmen able to focus on local rather than national issues. State and local lobbying alliances provided another way for states to influence national policy, and state administrative officers could influence federal authority through their contacts with Washington officials. And all agreed that the primary reason governing authority was shared between state and federal governments was the American system of political parties.

American political parties, these observers noted, were not unified, programmatic parties like their European counterparts. They were largely undisciplined coalitions of state parties with limited ability to influence their membership. "[T]he real centers of party organization, finance, and power," Daniel Elazar wrote, "are at the state and local levels." This "lack of party solidarity," argued Grodzins, "fundamentally establishes the marble cake of shared functions that characterizes the American federal system." William Riker and David Truman agreed. And they saw no reason to expect that to change.

163. RIKER, supra note 158, at 89–91.
164. GRODZINS, supra note 141, at 277–78.
165. Id. at 220–24.
166. ELAZAR, supra note 159, at 142–43.
167. GRODZINS, supra note 141, at 283.
169. ELAZAR, supra note 159, at 150–51 ("[S]tate agencies can be of help to their state's representatives in Washington . . . In return, the congressmen will often help a state agency by securing additional funds . . . .").
170. GRODZINS, supra note 141, at 254 ("[T]he nature of American political parties accounts in largest part for the nature of the American governmental system."); RIKER, supra note 158, at 87, 101 ("[T]his decentralized party system is the main protector of the integrity of states in our federalism.").
171. RIKER, supra note 158, at 93 (noting that one of the most well known facts about American government is that the President cannot "count on substantially complete support from his partisans in Congress").
172. ELAZAR, supra note 159, at 49–50.
173. GRODZINS, supra note 141, at 260. "[P]arties are responsible for both the existence and form of the considerable measure of decentralization that exists in the United States." Id. at 254.
175. GRODZINS, supra note 141, at 285.
States, they also believed, could then use Congress’s oversight function to influence the federal bureaucracy. Congressmen worked consistently to help local interests influence administrative action. Congressional staff did this work “with great care, knowing that their congressman’s performance in that area is often likely to influence more voters than his actions on remote national issues.” Grodzins believed this oversight was “constant, effective, and institutionalized,” and “almost uniformly exercised in behalf of local interests.”

The vision of shared functions and governing authority advanced by these observers did not, however, blind them to the increasing role the federal government was playing in governing American society. They noted the steady increases in federal grants-in-aid, as well as Warren Court’s decisions. The Court limited state autonomy with its criminal justice, incorporation, and desegregation decisions, as well as its expansion of First Amendment protection in the areas of libel, obscenity, and church-state issues. Its decisions upholding civil rights legislation, expanding federal administrative preemption, and extending the reach of the Commerce Clause simultaneously increased federal authority. The Court was, William Riker wrote, “a major force for centralization.”

Increased federal authority did not suggest to these scholars that the political safeguards thesis was wrong. Some minimized these changes, but most were unconcerned because they believed increases in federal authority were democratic and functional responses to the challenges of the time. They took this perspective whether they found American federalism itself a useful or harmful institution as a whole. Growing federal power, Grodzins claimed, was a result of technological developments that were knitting the nation closer and closer together and “the demands

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177. ELAZAR, supra note 159, at 145.
178. GRODZINS, supra note 141, at 260.
179. RIKER, supra note 158, at 81.
181. Id. at 260, 279.
182. RIKER, supra note 158, at 102.
183. ELAZAR, supra note 159, at 54 (making similar claims); RIKER, supra note 158, at 81 (arguing that federal power had grown, but state power had as well, if not as much). See generally DANIEL J. ELAZAR, THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL CO-OPERATION IN THE NINETEENTH-CENTURY UNITED STATES (1962); GRODZINS, supra note 141, at 17–57 (making historical claims that these changes were not important because American federalism had always been characterized by functional, negotiated sharing of power); Elazar, supra note 147; Grodzins, supra note 145.
184. William Riker made clear his opposition to American Federalism: “The main beneficiary throughout American history has been the Southern whites, who have been given the freedom to oppress Negros . . . . The judgment to be passed on federalism in the United States is therefore a judgment on the values of segregation and racial oppression.” RIKER, supra note 158, at 152–53. Grodzins, Elazar, and others were much more supportive. See, e.g., COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM, supra note 139, at 6, 65.
of the citizenry." William Riker attributed it to a decline in "state nationalism" caused by increased mobility, a growing common culture, and patriotism generated by war. Elazar and others argued it was an inevitable response to increasing calls for government activity in a situation where the federal government's taxing authorities were more robust and responsive.

Many also believed federalism made American government more democratic. The system, with its divided and overlapping authorities, admitted Grodzins, is one of "chaos" which "flaunts virtually all tenets of legislative responsibility and administrative effectiveness. It appears always to be wasteful of manpower and money. At times it threatens the very democracy it is established to maintain. But," he concluded, "it works, it works—and sometimes with beauty." A large part of this success was federalism's tendency to promote democratic values by making it easier for different groups to influence the government.

B. The Zenith of the Political Safeguards Thesis in Context

Faith that the American federal system was characterized by shared authority and was responding productively and democratically to the challenges of the time was supported by the politics of the 1950s and early 1960s. The most important support was the progress of the fight against de jure segregation in the South. The failure of the states to

185. GRODZINS, supra note 141, at 319. The "expansion of the central government," Grodzins argued, has been produced by the dangers of the twentieth century . . . [and even] [w]ar items aside, the free votes of a free people have sustained federal programs in such areas as public welfare, highways, airports, hospitals and public health, agriculture, schools, and housing and urban redevelopment . . . . The plain fact is that large population groups are better represented in the constituencies of the President and Congress than they are in the constituencies of governors and state legislatures.

186. RIKER, supra note 158, at 105–08.


188. GRODZINS, supra note 141, at 14–15; Grodzins, supra note 145, at 265–66.

189. GRODZINS, supra note 141, at 7; see also id. at 14–16; RIKER, supra note 158, at 147; Grodzins, supra note 145, at 282.

190. Anderson, supra note 168, at 117–20. Evidence that these feelings of confidence in the federal system were shared outside academia is in the U.S. COMM’N ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS, H.R. Doc. No. 198, at 2–6 (1955). Tasked by President Eisenhower with identifying programs that could be more effectively returned to state governance, the Commission spent years of study to "identify only two programs—vocational education and municipal waste treatment." Purcell, supra note 14, at 147.

191. RIKER, supra note 158, at 142, 155 (identifying the question of "whether or not the national decision" regarding citizen rights for African-Americans as "the chief question of public morals," and arguing that "if in the United States one disapproves of racism, one should disapprove of federalism"); Introduction to Robert S. Rankin, The Impact of Civil Rights upon Twentieth-Century Federalism, in COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM, supra note 139, at 580, 580 ("C[ivil rights has accounted for much of the recent general tension in our nation. . . . [and] is one of the few issues in the United States that is intrinsically a problem of federalism."); Robert S. Rankin, The Impact of Civil Rights upon Twentieth-Century Federalism, in
protect peaceful protestors, civil rights workers, and even African-Americans not directly involved in the movement from violence, or to effectively prosecute the offenders, confirmed for many that state governments were undemocratic and either unable or unwilling to perform even the most basic task of protecting their citizens from lawless violence. Simultaneously, the effectiveness with which Southern states resisted even direct orders from the federal government demonstrated that they retained significant authority in the federal system. Those two observations made the ongoing shift in authority from state governments to the federal government seem a functional response to the most pressing challenges of the time. The claims of the political safeguard thesis appeared borne out in every particular.

1. Undemocratic and Incompetent States

It is clear that the failure of Southern state governments to protect African-Americans and supporters of the civil rights movement from violence confirmed doubts that close observers of American federalism already shared about the competence of state governments. General concerns with the competence of state governments were evident in the 1950s in a variety of sources. The Kestnbaum Commission argued that pressures for centralization came in part from weaknesses in state government. V.O. Key agreed, further pointing out that state governments across the nation gerrymandered their electoral districts in ways that undermined democratic principles. State governments were widely recognized to be heavily gerrymandered to favor not just white but also rural interests. Observers also noted the significant weaknesses in state administrative capacity. Most state legislatures met only every other year, and both state legislatures and executives often lacked access to meaningful administrative expertise. Robert Rankin, a political science professor and Chairman of the Civil Rights Commission, wrote, "[S]tates . . . are to a great degree responsible for citizens turning to the federal government for action and relief. . . . [P]eople have demanded services and protection, and the states have refused to give them."
The abject failure of the Southern state governments to challenge racist violence powerfully reinforced doubts about the competence and fairness of state governments. The Supreme Court’s decision in *Brown v. Board of Education* in 1954 sparked an epidemic of violence in the South against African-Americans and proponents of civil rights that went largely unopposed, unpunished, and unprosecuted. In many cases, it was even supported by Southern state governments.\(^{199}\) Between 1955 and 1959 there were “210 recorded incidents of [racial] intimidation” related to tensions sparked by *Brown v. Board*, ranging from Klan rallies to death threats, and 225 incidents of anti–civil rights violence, including six murders, twenty-nine assaults with firearms, and forty-four beatings.\(^{200}\) Between 1955 and 1958, “ninety southern homes suffered damage from anti–civil rights violence, [including] sixty from explosives, fifteen from gunfire, [and] eight from arson.”\(^{201}\) Over the same period, mob violence threatened seventeen towns and cities.\(^{202}\)

Riots and other violent responses to civil rights protests were a common occurrence. Martin Luther King’s home was dynamited in 1956 during Montgomery civil rights protests.\(^{203}\) An attempt to integrate the University of Mississippi in 1962 resulted in bloody rioting.\(^{204}\) Two years later, the Mississippi Freedom Summer led to what historian Michal Belknap called “a summer of rampant terrorism”\(^{205}\) that included the deaths of three civil rights workers, the shooting of at least four other persons, fifty-two beatings, and the burning of thirteen black churches.\(^{206}\) The Southern Christian Leadership Council’s campaign against racism in Birmingham, Alabama sparked remarkable violence, including reports of twenty bombings, shootings, and beatings in seven months.\(^{207}\)

What is more, these acts of violence regularly went unpunished, and often even unprosecuted. An all-white jury famously acquitted the murderers of Emmett Till, and such jury nullification was not uncommon.\(^{208}\) Between 1955 and 1957 “southern juries freed the white defendants” in thirteen of “fourteen widely publicized” civil rights cases.\(^{209}\) Often perpetrators were not even indicted and sometimes Southern law enforcement even supported the violence. The riots resulting from attempts to integrate the University of Mississippi were themselves sparked by the Mis-
Mississippi governor urging state officials and the public to defy the court-ordered integration.\textsuperscript{210} Michael Belknap has claimed that during the violence sparked by the Mississippi Freedom Summer, most of the rural sheriffs believed that their primary job "was to control Negroes, not to protect them from white attackers."\textsuperscript{211} Mississippi prosecutors collaborated with their sheriffs by failing to prosecute offenders, and all-white juries acted as a backstop for the few prosecutions that were brought.\textsuperscript{212}

Mississippi was a leading site of violence, but its support of racist violence was hardly rare. In Birmingham in 1963, violence against civil rights protestors was not just permitted but even inflicted by Bull Connor's all-white police force.\textsuperscript{213} A Miami assistant police chief made clear his officers would not help protect African-American children as they began the court-ordered integration of public schools: "If they ask for trouble, they needn't come to us for guards."\textsuperscript{214}

This violence and the failure of Southern state governments to respond effectively convinced many that states were failing at their most basic tasks of protecting the rights of their citizens and enforcing public order. One result was calls for federal legislation designed to force the states to carry out their responsibilities or to transfer those responsibilities to the federal government.\textsuperscript{215} Michael Klorman has shown how violence like the police dogs, fire hoses, and nightsticks Bull Connor's officers used on peaceful protestors in Birmingham contributed to the passage of the 1964 Civil Rights Act and other civil rights legislation that extended federal power into traditional state functions.\textsuperscript{216} Similarly, the failure of Mississippi to effectively punish—or in many circumstances even prosecute—the violence sparked by the Mississippi Freedom Summer led to passage of the Civil Rights Act of 1968, which gave federal prosecutors the legal authority they needed to prosecute that kind of racist violence.\textsuperscript{217}

2. Powerful and Influential States

While perceptions of the states as anti-democratic and incompetent supported the political safeguards thesis by suggesting that the growth of federal power was both functional and democratic, the South's success in using popular protest, state governmental institutions, and their federal

\textsuperscript{210} Id. at 89–91.
\textsuperscript{211} Id. at 138–39.
\textsuperscript{212} Id. at 140.
\textsuperscript{213} KLARMAN, supra note 208, at 434.
\textsuperscript{214} BELKNAP, supra note 199, at 33 (quoting Benjamin Muse, Confidential Memorandum on Law Enforcement in Miami—Conversation with Assistant Chief of Police J. J. Youell, Folder 75-01-58-38, SRCC) (internal quotation marks omitted).
\textsuperscript{215} BELKNAP, supra note 199, at 97–100; see also KLARMAN, supra note 208, at 436.
\textsuperscript{216} Michael J. Klorman, How Brown Changed Race Relations: The Backlash Thesis, 81 J. AM. HIST. 81, 82–83 (1994); see also BELKNAP, supra note 199, at 99–100; KLARMAN, supra note 208, at 435–36.
\textsuperscript{217} BELKNAP, supra note 199, at 99–101, 139–42, 237–38.
representatives to resist even direct federal orders provided proof that American government was not dominated by national institutions. 218 "Despite constant reaffirmations by the federal courts in the past two decades," wrote Daniel Elazar, "and despite presidential willingness to intervene with force where the states allow [the civil rights of African-Americans] to be publicly suppressed by force, the entire question of Negro rights remains greatly dependent on the willingness of the states to aid in carrying out, or in complying with, national policy." 219

3. Functional Federalism

A third support for the political safeguards thesis was the progress, however slow and halting, of the Civil Rights Movement, which was seen as evidence that the federal system worked. 220 Morton Grodzins summarized this argument. He saw the "Negro problem" as the problem of de jure segregation in the South, 221 and recognized that federalism had helped create it by giving southern states the power to slow national action. 222 But he still saw progress, which led him to keep faith with federalism. 223 He admitted one reason for progress was the "sheer force of public opinion," pushed by the decision in Brown v. Board and the Cold War. 224 But federalism, he argued, was another. It made African-Americans in Northern and Midwestern cities a crucial voting bloc that could push presidents and non-Southern elected officials towards reform. 225 "Integration of Negros," he concluded, "everywhere in law and many places in social life, will be achieved, I believe, in a relatively short time, [by] utilizing the possibilities of federalism to overcome the barriers a federal system had previously supported." 226

C. Changing Contexts

The circumstances that supported the near universal faith in the political safeguards thesis, however, had changed by the early 1970s. Rising faith in state governance as a result of their belated concern with rac-

218. Grodzins, supra note 141, at 297–98.
220. Grodzins, supra note 141; Elazar, supra note 147, at 167–70. Grodzins, for example, described school desegregation as an example of a conflict so fundamental that only a "demonstration of strength on one side or another" could solve it, but also saw it as reaching the correct solution because "the view of the whole nation must prevail" on such basic conflicts. Grodzins, supra note 145, at 278.
221. Grodzins, supra note 141, at 292–93 (describing the "Negro problem" as a problem of African-Americans being denied "the vote and the equal use of publicly supported facilities, especially schools, but also ... public transportation, libraries, parks, and swimming pools," rights they had already won in the North).
222. Id. at 292–94.
223. Id. at 301.
224. Id. at 301–03.
225. Id. at 294–95, 295 n.† (providing an Editor's Note discussing the "civil rights breakthrough of 1964 which brought a total collapse of the Southerner's veto power over civil rights legislation in Congress" for excellent evidence of this change).
226. Id. at 306.
ist violence combined with rising concerns about federal dysfunction to convince many that the rapidly accelerating growth in federal authority was unlikely to be the result of a fair, democratic process. Simultaneously, a decline in the political influence of state political parties and a rise in the power of national interest groups offered a way to explain what many saw as unproductive increases in federal power. Together these developments undermined faith that the political safeguards thesis was an accurate description of American government. That conclusion, in turn, led to new support for judicial intervention.

1. Expanding Federal Authority

Though growth in federal authority was a consistent theme of the twentieth century, observers perceived a clear acceleration in the mid- to late-1960s. Through the 1950s domestic spending remained equally balanced between the states and the federal government, a place it had reached after a slow and steady increase from the federal government’s 20% share in 1929.227 The 1960s, on the other hand, saw explosive growth in federal domestic spending. The number of grants-in-aid rose from 132 in 1960 to 379 in 1968.228 Total federal aid to the states rose from “$7 billion in 1960 to $24 billion in 1970.”229 As a result, the percentage of state budgets provided by the federal government increased by almost 35%.230

The scope of federal power expanded as well. The New Deal increased federal authority, but focused on national economic regulation and social insurance.231 The Great Society, on the other hand, went much further by combining professional services, social sciences, and federal authority to address a variety of social problems.232 It promoted “racial integration in housing and education,” challenged sex discrimination, and instituted education, community development, and anti-poverty programs.233 Through funding decisions or traditional regulations, the federal government began regulating an enormous number of activities that had been traditionally considered local: “elementary and secondary education, local law enforcement, libraries,” fire control, environmental protection, and antipoverty programs.234

228. Id. at 6.
229. Id.
230. Id.
231. Id. at 9.
233. CONLAN, supra note 227, at 9.
234. Id. at 6.
James Sundquist's analysis for the Brookings Institution in 1969 was a typical reaction. "In the nineteen-sixties," he wrote, "the American federal system entered a new phase." Congress asserted national authority "in a wide range of governmental functions that until then had been the province, exclusively or predominantly, of state and local governments." This "massive federal intervention in community affairs came in some of the most sacrosanct of all the traditional preserves of state and local authority," including "education[,] . . . local law enforcement[,] . . . manpower training and area economic development,. . . mass transportation, water systems, and sewage treatment plants." This was far more than a simple change in who paid. Dramatic alterations in the size and character of "federal grant-in-aid programs" had caused a "transformation of the federal system," Sundquist wrote. Earlier grant-in-aid programs helped states address what were seen as local issues. As a result, federal review focused on ensuring efficiency, and "[p]olicy making [authority] . . . remained where it resided before the functions were assisted." But the grants of the 1960s addressed national issues and "[a]chievement of a national objective requires close federal control over the content of the program." The result was "new patterns of relationships" between levels of government. Other scholars saw similar developments.

2. Growing Concerns with Federal Dysfunction

Close observers of the federal system—including many who a decade earlier had been remarkably sanguine about American federalism—also became concerned that those increases in federal authority were producing fragmentation, disorganization, and inefficiency. The Advisory Committee on Intergovernmental Relations was a bipartisan commission of congressmen, state officials, private citizens, and federal bureaucrats created in 1959 to recommend improvements to the federal system.

236. Id.
237. Id.
238. Id.
239. Id. at 3.
240. Id. at 4–6.
241. Id. at 1.
242. Daniel Elazar argued in 1973 that the growth of project grants in the 1960s—grants which states and localities had to apply for rather than simply receive conditioned on following federal guidelines—"transferred the decision as to who would get what from the normal federal–state channels to Washington." Daniel J. Elazar, Cursed by Bigness or Toward a Post-Technocratic Federalism, 3 PUBLIUS 239, 281 (1973). Michael Reagan believed these changes were so significant that their emergence explained why Morton Grodzins, who died in 1964 "just before the explosive proliferation of grant programs, particularly those of a project nature," had misunderstood the nature of the federal system. Michael D. Reagan, The New Federalism 161 (1972); see also Bruce K. MacLaury, Foreword to George F. Break, Financing Government in a Federal System vii (1980).
system. The General Accounting Office and Lynden Johnson's Bureau of the Budget agreed. The Bureau of the Budget found that the "complexity and fragmentation of federal grant programs . . . creates major problems of administration for both the federal government and local governments and inhibits the development of a unified approach to the solution of community problems." Daniel Elazar saw a federal bureaucracy that had become so unwieldy it was beyond the control of the President. Even Democratic politicians like Senator Edmund Muskie of Maine and LBJ's budget director began to question the ability of federal bureaucrats to oversee local plans and support decentralization.

These concerns gained strength from other sources. Vietnam, stagflation, and Watergate decreased faith in all levels of government, but damaged the federal government most severely. The shift of federal regulation into more broadly controversial topics was also damaging. In the 1950s and early 1960s, the most obvious extensions of federal power were aimed at de jure segregation and massive resistance in the South. Though many Southerners clearly opposed federal authority, the violence of fire hoses and police dogs made clear for others the need for federal intervention. But after the mid-1960s federal intervention turned towards de facto segregation, most visibly the use of busing to address school segregation. That issue was a complicated one for many and created new doubts about the effectiveness of expanding federal power. "The controversy over busing," wrote one commentator, "shows perfectly the difficulties to be encountered, once the first step is taken down the road of adding flesh to the constitutional bones of federalism."

3. Democratic and Competent States

Doubts about federal competence rose in tandem with faith in the competence of state government. An important reason for the improvements in state government was, ironically, federal intervention. The Warren Court's apportionment decisions made woefully gerrymandered state legislatures more responsive to the popular will, while its criminal procedure decisions removed some of the state executives' worst excess-

245. CONLAN, supra note 108, at 7 (omission in original) (quoting ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, IMPROVING FEDERAL GRANTS MANAGEMENT: THE INTERGOVERNMENTAL GRANT SYSTEM—AN ASSESSMENT AND PROPOSED POLICIES 11–12 (1977)) (internal quotation mark omitted).
246. Elazar, supra note 242, at 281.
The requirements of administering federal grant programs also encouraged states to improve their administrative capacities. Other developments included states instituting annual rather than semiannual legislative sessions.

But more important to growing faith in state government was the belated decision of the Southern state governments to prosecute the racist violence. The Civil Rights Act of 1968 gave the federal government new tools to prosecute racist violence, but the law went largely unused because growing fears of a breakdown of law and order led Southern states to begin prosecuting and convicting perpetrators of that violence. In stark contrast to the 1950s and early 1960s, Southern authorities charged 132 members of the KKK with "378 felonies and serious misdemeanors" between March 1967 and March 1969. And Southern juries often returned convictions. "By September 1973 the New York Times was able to report the 'virtual disappearance' . . . of unpunished [racist violence in the South]."  

4. Weak States and Special Interests

As doubts rose that the accelerating shift of governing authority to Washington was a functional response to the challenges of the time, changes in national politics offered a way to explain why the shift was continuing: the collapse of the political power of the states and the rising influence of national interest groups. Many observers saw how television and the age of mass campaigns had increased the influence of national interest groups. They also regularly noted the growing evidence that state political parties were losing influence over the national government in response to developments in state politics and the structure of Congress itself. The structures most people had identified as the central political safeguards of federalism, in other words, were eroding.

Federal action in the 1960s may have made state governments more competent, but it also reduced the ability of state political parties to influence their federal representatives. The Warren Court apportionment decisions made it more difficult to use gerrymandering to shape the preferences of a state congressional delegation, as did the 1965 Voting

253. Reeves, supra note 250, at 88; Purcell, supra note 14, at 156–57.
254. BELKNAP, supra note 199, at 237–42.
255. Id. at 234.
256. Id. at 235.
257. Id. at 232.
Rights Act and the prohibition of poll taxes and literacy tests.\textsuperscript{259} Reforms in Congress had a similar impact. The Legislative Reorganization Act of 1970 ended the era when powerful committee chairmen appointed by seniority could bend the legislative agenda to the interests of their local constituents with impunity.\textsuperscript{260} Those changes became clear in 1974 when the senior chairs of the Agriculture, Armed Services, and Banking Committees were deposed.\textsuperscript{261} Committee chairmen learned to be much more responsive to the party caucus, which reduced the influence of the state party.\textsuperscript{262}

The decline of state parties made them less able to mobilize voters and further undermined their influence. "[O]ur parties," wrote Samuel Beer, "have entered a state of decline."\textsuperscript{263} Increases in ticket-splitting, rising numbers of independents, and related changes were "abundantly in evidence."\textsuperscript{264} As television advertising became critical to political campaigns, fundraising increased in importance relative to party action and legislators quickly found that national interest groups—the AARP, the NRA, the Sierra Club, the AFL–CIO, and the Chamber of Commerce—could more easily contribute money.\textsuperscript{265} As a result, those national constituencies and their national interests gained salience. As the state parties lost influence over their representatives, their ability to use congressional oversight to influence the federal bureaucracy declined as well.\textsuperscript{266} The impression of limited congressional control over the bureaucracy was strengthened by growing concerns with "iron triangles" in which congressmen had to share influence with interest groups and state and federal administrators.\textsuperscript{267}

\textbf{D. The Consensus Fractures}

These developments led many to re-evaluate their belief that the American federal system was one characterized by shared governing authority.\textsuperscript{268} Not everyone changed their mind,\textsuperscript{269} certainly. But many

\begin{itemize}
  \item \textsuperscript{260} CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS 35 (3d ed. 1997).
  \item \textsuperscript{261} \textit{id.} at 38.
  \item \textsuperscript{262} \textit{id.}
  \item \textsuperscript{263} Beer, \textit{supra} note 252, at 94.
  \item \textsuperscript{264} \textit{id.}
  \item \textsuperscript{266} \textit{id.}
  \item \textsuperscript{267} See generally HAROLD SEIDMAN, POLITICS, POSITION AND POWER 271–77 (1st ed. 1970).
  \item \textsuperscript{268} See Robert J. Pranger, \textit{The Decline of the American National Government}, 3 PUBLIUS 97, 115 (1973) ("Until recently a profound nationalistic enthusiasm was widespread in the United States. Today there is a much more reserved attitude toward the nation, especially among educated people. Why? Some have blamed the Vietnam War or a more general technocratic organization that has produced citizen alienation and powerlessness. Another explanation might be that the national center can no longer generate nationalistic enthusiasm because it no longer operates as a center for the nation as a whole.").
\end{itemize}
became convinced that states did not have the governing authority the political safeguards thesis predicted they should. By 1973, Michael Reagan, who was a proponent of greater nationalization, was persuaded Grodzins and others had badly misunderstood the way the American federal system functioned. They had, he argued, “confused sharing of functions with sharing of power.”

The system he saw was so clearly not a system of shared governing authority—even if it was a system of shared administration—that it needed a new name. “Cooperative” and “creative” federalism were not accurate descriptions. “[P]ermissive federalism,” Reagan suggested, was more accurate because states exercised real authority only with the permission of the federal government. What real power states had was vestigial, and effectively meaningless.

A strong indication of the effect changed circumstances had on faith in the political safeguards thesis was the changed perspective of Daniel Elazar, a strong proponent of Morton Grodzin’s sharing approach in the early 1960s. By the early 1970s, Elazar believed, with Reagan, that the sharing of functions did not indicate the sharing of real power. It was possible, said Elazar, in the 1960s and 70s to “confuse all kinds of federal-state-local interaction with ‘cooperation’ whether the interaction involved federal coercion or not.” He ultimately rejected Grodzins’ sharing hypothesis. “When Grodzins wrote” in the 1950s, he claimed, there were still substantial constitutional and other kinds of barriers (including party, which he emphasized) to centralization of power in Washington, whether for its direct exercise or for the sake of decentralization along presumably more rational lines. Today, those barriers have by and large disappeared. Powers can be transferred to Washington in one way or another and, once transferred, are leading to token decentralization that becomes, in reality, the greater exercise of those powers by a newly enhanced national government.

Theodore Lowi’s thought followed a similar line. His 1969 *The End of Liberalism* saw a lack of centralized control as the hallmark of American government but by 1978 emphasized the power and importance of a

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270. REAGAN, supra note 242, at 53.
271. Id. at 161.
272. Id. at 163 (internal quotation mark omitted).
273. Id. (internal quotation marks omitted).
274. Id. at 13.
275. Elazar, supra note 242, at 244.
276. Id. at 245.
277. Id. at 243.
central national state. Others—even those who supported that centralization—noted similar trends.

A 1973 symposium on the state of the American federal system is another indicator. An animating question of the conference was whether “rather clearly definable limitations on federal and state action” had been removed and whether “our present mechanisms for making policy constitutionally and/or prudentially satisfactory in order to maintain our federal system[.]” Martin Landau had a clear answer to the first issue: “It is plain to see, however, that the nationalization . . . of authority has all but stripped the states of their independence. . . . And there is little doubt today that any of the residues of the classical federal relationship can be set aside by the national government.”

To conclude that the political process no longer protected state autonomy did not require one to believe that state autonomy needed judicial protection. Many observers who saw a decline in the real governing authority of the states neither supported decentralization nor called for a return of constitutional federalism. Michael Reagan, most notably, remained opposed to constitutional federalism and even decentralization, as did other prominent voices, including William Riker and, later, Jesse Choper.

The decline of what had been seen as the most important of the political safeguards of federalism nevertheless explained to some why the American government was transferring authority away from increasingly competent states to the increasingly incompetent federal government. And as doubts about the political safeguards thesis grew, so did calls for the return of constitutional federalism.

281. Id. at 7.
283. Richard Leach argued in 1973 that the judiciary was too involved in questions of federalism because it limited the authority of the states and encouraged less judicial involvement. Leach, supra note 249, at 23. Though even he admitted that one “judicial review has a merit” in that it can correct the overreach by Congress and the executive. Id. “The police power was not delegated to Congress . . . [A]s a part of the reservoir of state power, it permits a great deal of flexibility at the state level in the development of government policy,” a flexibility Leach believes Congress and the President are eliminating, a shift antithetical to the goals of the founders and good government. Id. at 23–25.
In the legal academy, scholars like Alexander Bickel and Phillip Kurland, most notably, began to complain about excessive nationalization.\(^ {285}\) Bickel's *The Supreme Court and the Idea of Progress* criticized the Warren Court for failing to defer to the democratically elected branches of both nation and states.\(^ {286}\) Kurland made similar claims in 1970 in *Politics, the Constitution, and the Warren Court* and spoke sorrowfully of the elimination of federalism elsewhere.\(^ {287}\) In *Storm over the States*, Democratic presidential candidate Terry Sanford argued a "new federalism" was necessary to free all levels of government from the special interests.\(^ {288}\)

Other observers went a step beyond critique and urged the judiciary to rediscover constitutional federalism. One of the animating questions of the 1973 conference on the state of American federalism was, "Should we consider placing an increased emphasis upon constitutional barriers . . . ?"\(^ {289}\) Martin Diamond called for a return to the doctrine of enumerated powers.\(^ {290}\) Daniel Elazar, too, supported such a move. The founders, he wrote, had "wisely noted" that "the preservation of constitutional barriers is necessary . . . [g]iven the nature of men and the problems of maintaining restraint under political pressure."\(^ {291}\) He thus concluded that "the re-establishment of constitutional restraints in areas other than those linked with the Bill of Rights should be a high priority matter."\(^ {292}\)

### IV. National League of Cities and the Political Safeguards

**Thesis Inside the Supreme Court**

The internal papers of the Supreme Court indicate that the same changes that led observers of the federal system outside the Court to lose faith in the political safeguards thesis had the same effect on the Justices inside the Court. Those changes framed the arguments made by the National League of Cities and supporting amici. They also convinced Justice Lewis Powell, who saw his doubts about the theory epitomized in *NLC* and then played the central role in building the coalition that, for the first time in forty years, struck down an exercise of Congress's commerce power on federalism grounds.

\(^{285}\) Scheiber, *supra* note 138, at 666, 674 n.8.


\(^{288}\) TERRY SANFORD, *Storm over the States* 207–12 (1967).


\(^{292}\) Id. at 253.
A. Fry v. United States: Laying the Groundwork

Powell's interest in NLC and his central role in building a coalition willing to revive constitutional federalism are revealed by the debate inside the Court over Fry v. United States, a case from the previous term that was decided in the midst of arguments over NLC. Fry concerned a federalism challenge to the Economic Stabilization Act of 1970 (ESA). The ESA aimed to slow runaway inflation by empowering a presidentially appointed Pay Board to deny wage increases by both public and private employers. Ohio brought suit claiming the law could not be constitutionally applied to the states. The Tenth Amendment and the structure of the Constitution, it argued, did not allow Congress to interfere with "sovereign state functions," which included the authority to set wages for at least some of the employees covered by the statute.

From the outside, the Court seemed to have few problems rejecting Ohio's claim. Justice Marshall's brief opinion for seven Justices held that the case was controlled by Maryland v. Wirtz, which "reiterated the principle that States are not immune from all federal regulation under the Commerce Clause merely because of their sovereign status." Justice Douglas concurred on the grounds that the appeal was moot since the ESA had expired by the time the Court considered the case. Justice Rehnquist's long dissent, which anticipated much of his majority opinion in NLC, seemed both an outlier and, in retrospect, evidence of his leadership on federalism issues.

Internal documents, however, tell a different story about the leading voice on the Court and how difficult Fry was to decide. From the start there was interest in reconsidering judicial limits to the commerce power in Fry. Justices Rehnquist, Douglas, Stewart, and Powell provided the four votes for certiorari. Rehnquist's dissent made his interest clear. Justices Douglas and Stewart likely voted for certiorari so they could consider reversing Wirtz, in which they had both dissented seven years earlier. Distinguishing Wirtz certainly seemed difficult to the writer of the certiorari memo, who thought the government would win "hands down" if Wirtz were not overruled. Justice Powell's notes indicate he

294. Id. at 548.
295. Id. at 547.
296. Id.
297. Id. at 548.
298. Id. at 549 (Douglas, J., concurring).
299. Id. at 557–58 (Rehnquist, J., dissenting).
301. Fry, 421 U.S. at 557–58 (Rehnquist, J., dissenting).
was ready to consider placing limits on Congress. "If [the] Commerce Clause," he wrote, "allows [the] Federal [government] to fix state salaries, there's not much left to [f]ederalism. Will state taxes & charges for municipal services be next?" The Fry case, he insisted, needed to be discussed at conference.305

That interest ebbed following oral argument. At the initial conference, no one voted to invalidate the ESA and the opinion was assigned to Justice Marshall.306 But the breadth of Justice Marshall's first draft and Justice Powell's interest in the opportunity to re-establish constitutional federalism in NLC nearly cost Marshall his majority.

Marshall's first circulated draft was far more deferential to Congress than his final opinion. The draft asserted that Wirtz had confirmed United States v. California's holding that the sovereign governmental functions of states were just as amenable to regulation under the Commerce Clause as their proprietary functions.307 As a result, the ESA, which everyone admitted was a regulation of interstate commerce, was clearly constitutional as applied to the states.308 Justices White, Stewart, and Blackmun quickly offered to join the opinion.309 Burger asked only for minor changes.310

Powell, however, challenged Marshall's interpretation of Wirtz in order to keep the Court's options open for NLC. In a memo circulated to the Court, he asked Marshall to narrow his draft to focus on the temporary, emergency nature of the ESA.311 More importantly, he asked him to remove his discussion of the line between "proprietary" and "governmental" state functions.312 Wirtz's discussion of that issue, Powell argued, was merely dicta and removing it would "leave[] open the possibility of distinguishing Wirtz in National League of Cities," as had been discussed at the last conference.313 If Marshall was unwilling to change

PAPERS OF HARRY A. BLACKMUN (on file with the Library of Congress) [hereinafter BLACKMUN PAPERS].


305. Id.


308. Id. at 8.


312. Id.

313. Id.
the opinion, Powell concluded, he would have to write a separate concur-
rence.314

Powell’s note nearly cost Marshall his majority. Justices Rehnquist
and Blackmun quickly offered their support for the changes.315 Rehnquist
even wrote that he might have to dissent, something that he seems to
have considered only after reading Powell’s note.316 Marshall believed
Powell had coordinated the challenge to his opinion with Justice
Blackmun, and was furious.317 His curt reply to Powell, which Blackmun
believed offensive, did not help.318 Fry, Marshall’s memo insisted, had
been “cut to the bone” and was “as narrow a holding as I can imag-
ine.”319 It was not the breadth of his Fry draft that suggested NLC was
being prejudged, Marshall continued, it was Powell’s suggestion that the
draft be changed.320

Things only got worse for Marshall after his note. The next day,
Rehnquist committed to dissent.321 In February, Douglas circulated his
brief concurrence urging dismissal.322 In March, Powell circulated a brief
concurrence that made clear his belief that state sovereignty set some
limits on Congress's commerce power.323 When Blackmun saw Powell’s
concurrence, he formally withdrew his joinder to Marshall’s opinion and
joined Powell.324 Burger soon offered to join Powell as well.325 Given
Stewart’s decision to join Douglas in dissent in Wirtz, Marshall had eve-
ry reason to worry about losing him to Powell as well.

As his 9–0 majority opinion careened towards becoming a concur-
rence for just three Justices, Marshall agreed to Powell’s changes. He
removed the discussion of the proprietary-governmental distinction and
integrated much of Powell’s circulated concurrence.326 Though he was

314.   Id.
315.   Letter from Justice Harry A. Blackmun to Justice Thurgood Marshall (Jan. 15, 1975), in
MARSHALL PAPERS, supra note 309; Letter from Justice William H. Rehnquist to Justice Thurgood
MARSHALL PAPERS, supra note 309.
317.   Note for File from Justice Harry A. Blackmun (April 8, 1975), in BLACKMUN PAPERS,
supra note 303.
318.   Id.
319.   Letter from Justice Thurgood Marshall to Justice Lewis F. Powell (Jan. 16, 1975), in
BLACKMUN PAPERS, supra note 303.
320.   Id.
in BLACKMUN PAPERS, supra note 303.
322.   Letter from Justice William O. Douglas to Justice Thurgood Marshall (Feb. 11, 1975), in
BLACKMUN PAPERS, supra note 303.
20, 1975), in BLACKMUN PAPERS, supra note 303 (withdrawn on April 8, 1975).
324.   Letter from Justice Harry A. Blackmun to Justice Thurgood Marshall (Mar. 20, 1975), in
BLACKMUN PAPERS, supra note 303.
325.   Letter from Chief Justice Warren E. Burger to Justice Lewis F. Powell (Mar. 27, 1975), in
BLACKMUN PAPERS, supra note 303.
prepared to publish his original opinion if he picked up no new votes, it was unnecessary.\(^{327}\) His changes were sufficient to bring everyone but Rehnquist back on board.\(^{328}\) With the briefing in \textit{NLC} already underway, however, it was clear \textit{Fry} was only the beginning. There seemed a clear possibility that Powell could find as many as six votes to re-establish constitutional federalism under the right circumstances.\(^{329}\)

\textbf{B. Localism, Judicial Review, and Lewis Powell}

Powell’s interest in federalism questions is easy to understand. His biographer John Jefferies describes his long-standing belief in the importance of local government, local community, and especially neighborhood schools.\(^{330}\) “He venerated the traditional connectedness of home, church, and school[,] and . . . feared the rootlessness, the anonymity, the impersonality of life in modern cities.”\(^{331}\) In his opinions, these concerns revealed themselves most clearly in his evaluation of court-ordered busing as a tool to achieve racial integration.\(^{332}\) For Powell, Jefferies wrote, “the neighborhood school[s] epitomized the values of community, of belonging, of cooperation [and] . . . common endeavor for the public good.”\(^{333}\) And he generally opposed busing because it undermined those values.\(^{334}\) He supported deference to state and local control in other circumstances, too. His majority opinion in \textit{San Antonio v. Rodriguez}\(^{335}\) —a class action suit by poor schoolchildren challenging a property-tax-based school financing system on equal protection grounds—protected the flexibility of the local school boards Powell had once been a member of.\(^{336}\) “The ultimate wisdom,” he wrote,
of these and related problems of education is not likely to be di-
vined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from interposing on the States inflexible constitutional re-
straints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions... 337

"We are unwilling," Powell continued, "to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational au-
thorities in 50 [s]tates."338

There was a crucial difference between a case like San Antonio and NLC, however. Both certainly activated Powell's concern for local gov-
ernment and local community. But in cases like San Antonio, Powell's concern with local community was reinforced by his concern with judi-
cial deference to the political branches. Protecting local autonomy in NLC would require him to invalidate a law passed by Congress. It would require, in other words, the very kind of judicial activism that was also a central concern of Justice Powell.339 That concern would have been acute in NLC because invalidating the law would require overturning a forty-
year-old precedent affirmed only eight years earlier.

C. The Political Safeguards Thesis in National League of Cities

Despite those concerns, Powell believed NLC required the return of constitutional federalism. "This is the one we've been waiting for," wrote Penny Clark, Powell's clerk for the arguments in Fry and the briefing in NLC.340 And memoranda from inside the Court indicate that he believed it was the one he had been waiting for because it embodied his doubts about the political safeguards thesis.341

Certainly the changes that influenced the growing skepticism of ob-
servers of the federal system outside the Court were also apparent to Powell and his colleagues. Improvements in state government, the rising power of interest groups, and growing federal administrative dysfunction had been issues of public comment since the 1960s. Those issues were raised by academic and public discussions of LBJ's "Creative Federalism" agenda,342 the Intergovernmental Relations Committee chaired by

337. Id. at 43.
338. Id. at 55. Powell's majority opinion in Warth v. Seldin adopted a similar approach in denying standing to a challenge by citizens to the zoning decisions of the town of Penfield, which they claimed excluded low-income people in violation of federal constitutional and statutory rights. 422 U.S. 490, 493 (1975). Ruling otherwise, Powell wrote, would call upon courts to decide ques-
tions "other governmental institutions may be more competent to address." Id. at 500.
339. JEFFRIES, supra note 330, at 273.
Senator Edmund Muskie, the Advisory Committee on Intergovernmental Relations, and Richard Nixon's New Federalism agenda. To give just a few examples: in 1967 the New York Times covered former North Carolina Governor Terry Sanford's critique of the federal system, Storm over the States; in 1970, the Washington Post discussed James Sundquist's Making Federalism Work, a clear example of changing views on American federalism discussed in Section III; and in 1972, Washington Post editorialist David Broder discussed the Advisory Committee on Intergovernmental Relations and its recognition of the sharp increase in "political, popular and academic discussion[s] of American federalism."

The success of Southern state governments in prosecuting the violence of white supremacists would have been even clearer, and perhaps even more important to Powell who had served on the Richmond School Board following Brown and was, wrote his biographer, "genuinely and passionately opposed to massive resistance" and "plainly appalled by the threat to the rule of law" it created. Those changes, in other words, would have made Powell and his colleagues doubt that the political safeguards thesis accurately described the system of American federalism, just as they had for many observers outside the Court.

The doubts Justice Powell and his colleagues had about the political safeguards thesis would have been strengthened by the briefs in NLC. The National League of Cities and supporting amici made careful doctrinal arguments, but they also fanned doubts about the political safeguards thesis with empirical assertions that would have been unconvincing two decades earlier. Federal regulations were inflexible, undemocratic, and ineffective in contrast to flexible, democratic, and effective state govern-

344. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, supra note 195.
349. JEFFRIES, supra note 330, at 179.
350. Id. at 149.
ance. The 1974 FLSA Amendments, they implied, were passed only because of the power of national interest groups.  

Criticism of the FLSA amendments as inflexible and ineffective was woven throughout the briefs. The law created "rigid nation-wide uniform rules" and "centralize[d] power in [the Secretary of Labor] to impose high cost, rigid, nation-wide uniformity, wiping out small cost arrangements developed by experience to meet unique State and local needs." They caused "chaos," "conflict," "confusion," "duplication, uncertainty, litigation, and damage to fiscal integrity" of the states. To understand the law, states, counties, and cities had to wade through "691 pages of a volume of Title 29 of the Code of Federal Regulations," 85% of which did not apply to them at all because they were written to regulate private industry. The federal government, the briefs complained, "does not possess all the knowledge, wisdom, fairness and reasonableness" about the best terms of employment for state employees. In fact, the evidence was to the contrary. The Department of Labor’s Wages and Hours Division, which was slated to oversee wage rules for the states, had already been criticized for "acting to retard progress and diversity in flexible scheduling of both Federal and State and local employees." 

Even worse, the rules were unnecessary. "[T]his centralization," argued the briefs, "is not mandated to wipe out substandard labor conditions as such conditions do not exist among State[] and local Governments. They pay fair and reasonable salaries, fix reasonable hours and have civil service, public sector collective bargaining and other laws insuring that their employees [receive] . . . fair treatment." And Congress knew it. It had "ample and competent evidence that extension of the Act to State and local Government employees was . . . unnecessary." The act was so irrational that even the lawyers for the government could cite "no evil of substance that the Act will cure . . . [or] any wrong of substance that the Act will right." 

Perhaps worst of all, the law was undemocratic. Under the FLSA, wage decisions would be "a policy decision of the Labor Department mandated without the consideration of one elected official and without

351. See Brief for Appellants, supra note 31, at *18–24.
352. Id. at *32, *42, *44.
353. Id. at *32.
355. Brief for Appellants, supra note 31, at *49.
356. Id. at *56–57.
357. Id. at *88.
358. Id. at *44.
359. Id. at *83.
the approval of one constituent.”\textsuperscript{361} State and local control, in contrast, provided “‘ballot box control’ [of] . . . the extent and nature of State and City Government services.”\textsuperscript{362} In sum, the law was a “nullification of the People’s power.”\textsuperscript{363} It shifted power from the “People in each State” who had exercised “ballot box control upon the services they need” to federal bureaucrats and courts.\textsuperscript{364} Henceforth, wages would be set by “Congress, the Secretary of Labor, or the Federal Courts free from ballot box control by the People in the States and Cities.”\textsuperscript{365}

Why was such an unproductive act passed when “[t]he history of State and local Government in this Nation has been one of flexibility, adaptation to change, and experimentation”?\textsuperscript{366} The briefs offered a simple answer: the political power of labor unions. The only supporters of the act mentioned by the brief were five major unions—the AFL-CIO, SEIU, AFSCME, International Association of Fire Fighters, and International Conference of Police Associations—while it was opposed by “[g]overnments at all levels,” including the National League of Cities, the U.S. Conference of Mayors, twenty-nine individual cities, both of President Nixon’s Secretaries of Labor, and even the President himself, all of whom had argued that the extension of the Act was unnecessary.\textsuperscript{367}

These arguments convinced Powell that NLC embodied his doubts about the political safeguards. A memorandum he prepared before the final discussions and vote in the case discussed the doctrinal complexities raised by the case, but more importantly it made clear why he believed an appropriate doctrine would limit Congress’s commerce power: his rejection of the political safeguards thesis. The facts of the case before him, he believed, demonstrated the theory’s weakness. “One can argue,” he wrote, “that the states can ‘trust’ Congress not to go so far” as to eliminate the right of the States to make their own personnel decisions.\textsuperscript{368} “But,” he continued,

the duty of this Court is to apply constitutional principle rather than trust to legislative forbearance. The extension of FLSA to the states in 1974 is an example. Judging by the briefs in this case, virtually every state and city in the nation opposes this legislation. The National Governors Conference and the National League of Cities are parties. Two members of the Cabinet testified against the 1974

\textsuperscript{362} Brief for Appellants, supra note 31, at *113.
\textsuperscript{363} Reply Brief, supra note 354, at *26.
\textsuperscript{364} Id. at *25.
\textsuperscript{365} Id.
\textsuperscript{366} Brief for Appellants, supra note 31, at *82.
\textsuperscript{367} Id. at *18–21.
\textsuperscript{368} Notes for Use at Conference by Justice Lewis F. Powell, Jr. (Mar. 4, 1976), in Powell Papers, supra note 23.
Amendment and the President vetoed it. Yet, the political muscle of organized labor outweighed what appeared to be overwhelming local political views to the contrary. Powell, in short, believed *NLC* embodied the argument against the political safeguards thesis: the power of national interest groups overcame expert opinion and the overwhelming views of state and local governments to muscle a dysfunctional law through Congress. And that conclusion helped him convince his colleagues to invalidate an exercise of Congress’s commerce power on federalism grounds for the first time in four decades.

**D. National League of Cities Decided**

Powell’s plans for *NLC*, however, were scrambled and nearly derailed when William Douglas’s stroke led to the appointment of John Paul Stevens. Douglas suffered his stroke on January 1, 1975, after the initial briefing but before oral arguments in *NLC*. In recognition of his absence and diminished capacity, his colleagues postponed decision in any case that might turn on Douglas’s vote. The result was two oral arguments and two votes in *NLC*: the first with Justice Douglas formally on the Court, the second after Republican Gerald Ford had appointed Stevens to Douglas’s seat. These votes indicate that replacing a Democratic with a Republican appointee almost ended the return of constitutional federalism before it began.

Douglas’s stroke kept him from the first conference, but the vote was four to three with one abstention. Burger, Powell, Rehnquist, and Blackmun voted to reverse on the grounds that *Wirtz* could be distinguished. Brennan, White, and Marshall voted to affirm on the grounds that it could not. Justice Stewart was undecided. *Wirtz*, he believed, could not be distinguished, and though he had earlier dissented in *Wirtz*, he was unwilling to provide the fifth vote to overrule it. As a result of the agreement to postpone any decision in which Douglas’s vote would be determinative, Stewart’s position—perhaps intentionally—required reargument.

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370. *HOYT*, *supra* note 132, at 159.
375. *Id.*
We, of course, cannot be sure, but Douglas's dissent in *Wirtz* and his decision to concur in *Fry* strongly suggests he would have voted to invalidate the 1974 amendments in *NLC*. If he did stand by his *Wirtz* dissent, Stewart would have joined him as he did in *Wirtz* and constitutional federalism would have returned to the Supreme Court in a 6-3 decision joined—or perhaps written—by a Roosevelt appointee and leader of the Warren Court.

But Douglas never had the chance to vote, and at the second conference his Republican replacement Stevens voted to uphold the law. Had Justice Stewart kept his earlier pledge not to be the fifth vote to overturn *Wirtz*, the final vote in *NLC* would have been a 5-4 to uphold the law. Replacing a Democratic with a Republican appointee thus nearly stopped the return of constitutional federalism in its tracks. Stewart, however, for unclear reasons, changed his plans, voted with Powell, and for the first time since the New Deal the Court struck down an exercise of Congress's commerce power on federalism grounds, 5-4.

V. NATIONAL LEAGUE OF CITIES, THE RETURN OF CONSTITUTIONAL FEDERALISM, AND THE CAUSES OF CONSTITUTIONAL CHANGE

This Article has used an historical examination of *NLC* to challenge existing explanations for the return of constitutional federalism and offer an alternative. That alternative seeks to reveal the interaction between jurisprudential norms and political change rather than reduce legal argument to political preference or vice versa. I also hope it can provide a case study in the processes of constitutional development and cast new light on contemporary debates over constitutional federalism. But before turning to those implications, it may be useful to clarify my causal claim and differentiate it from competing explanations.

I have argued that the best way to explain the return of constitutional federalism begins by recognizing that the structural changes to American government and durable changes in political debate that occurred in the late 1960s and early 1970s undermined broadly shared faith in political safeguards thesis. Those structural changes in government made state governments look more competent and the federal government look less competent. They also emphasized the growing power of national interest groups in contrast to the declining influence of states and localities. The durable changes in American politics included, most importantly, the end of the Southern states' acceptance, and even support, of the lawless violence of white supremacists. When combined with the belief that there was an accelerating shift of real governing authority from the states to the federal government, these changes created widespread doubt that the political safeguards thesis was an accurate description of the American federal system. Because the political safeguards thesis was the principle

376. *Id.*
justification for judicial deference on federalism questions, doubts about its accuracy led some to conclude that the judiciary should protect the autonomy of state governments.

Most important among those who came to doubt the accuracy of the political safeguards thesis was Justice Lewis Powell, who saw his doubts about the political safeguards thesis embodied in the passage of the statute challenged in *NLC*. He thus concluded that the existing tension between the Court's commerce and tax power doctrines was a sufficient justification for invalidating an exercise of Congress's commerce power on federalism grounds for the first time in four decades. Four of his colleagues agreed, joined an opinion that rejected Justice Brennan's paean to the political safeguards thesis, and inaugurated the return of constitutional federalism.

This explanation does not deny that developments beyond the judicial process caused the return of constitutional federalism. In fact, I have argued that such changes were the proximate cause of the decision in *NLC* and the return of federalism to a central place in debates in the courts and the law reviews. Mine is not a formalist or strictly "internalists" explanation. But I also believe this examination indicates that the return of constitutional federalism cannot be explained without considering the specialized language of doctrinal analysis and conceptual structures of constitutional theory that Justices use to justify their decisions. Most importantly, such approaches cannot explain why the return of constitutional federalism originated with Justices Black and Douglas, or why the replacement of a Democratic appointee with a Republican appointee almost prevented the return of constitutional federalism. This is not a fully "externalist" explanation, either.

It is instead an attempt to answer calls for an approach to legal change that integrates internal aspects of the judicial process with external influences. It argues that the decision in *NLC*—and the return of constitutional federalism more broadly—are best explained by considering how developments outside the Court were filtered through the conceptual structures of legal analysis. Justice Powell and the other members of the Court, in other words, did respond to political change. But they did not respond the same way non-judicial political actors would have. They did not evaluate the social and political implications of the case before them, then measure those implications against their political preferences. And they were more than pawns controlled by larger political move-

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378. See id.

ments like the New Right. Rather, they responded to the changed political environment as judges—as individuals operating in an institutional context and with a personal identity that made the language of doctrinal analysis and constitutional theory important determinants of their decisions. They abandoned a posture of near-complete deference to Congress on federalism issues because they concluded that the established legal justification for that deference was unconvincing in light of the circumstances they saw around them.

This explanation for the return of constitutional federalism has most in common with those offered by Keith Whittington and Edward Purcell, but important differences remain, especially regarding the role of the political safeguards thesis. Purcell has explored the causes of the return of constitutional federalism in broad examinations that span nearly all of the twentieth century. That work recognizes that structural changes in American government played a role in the return of constitutional federalism and identified associations between it and jurisprudential developments, including originalism and economic approaches to legal analysis. He has also explicitly recognized that jurisprudential ideas or doctrinal structures could shape debates over constitutional federalism in some circumstances. His analysis is thus more textured than a simple political explanation. But a central thrust of Purcell’s work on the return of constitutional federalism has been to emphasize the challenges of explaining those developments in purely legal terms and the central importance of judges’ personal values. That focus, together with the broad scope of his work, have produced explanations for both NLC itself and the return of constitutional federalism generally that strongly emphasize the role of political preferences. Thus, despite the caveats he provided, I think it fair to characterize his approach as inconsistent with the explanation I offer.

My primary difference with Whittington lies in our methods, which, though they are in many ways complementary, nevertheless produce an important disagreement over the role of the political safeguards thesis. Whittington’s goal, like mine, is to bridge the gap between internalist

380. See PURCELL, supra note 14; Purcell, supra note 14.
381. See PURCELL, supra note 14, at 178–79, 179 n.95 (citing Whittington, supra note 104).
382. See id. at 179–81, 183–84; Purcell, supra note 14, at 161.
383. See PURCELL, supra note 14, at 190.
384. Id. at 8–9.
385. See Purcell, supra note 14, at 161–63. He characterized National League of Cities in largely political terms: as an attempt by the Burger Court “to strike directly at the New Deal legacy by reviving the Tenth Amendment.” Id. at 163. “Although it employed the rhetoric of federalism,” he continued, “the Burger Court seemed increasingly committed to a substantively conservative political agenda, especially after the appointment of Justice Sandra Day O’Connor in 1981.” Id. at 162.
386. See PURCELL, supra note 14, at 158–59.
and externalist perspectives.\textsuperscript{387} We also see similar causes driving the return of constitutional federalism. We both emphasize the importance of durable changes in American politics, society, and jurisprudence,\textsuperscript{388} and we identify many of the same changes: declining faith in federal expertise,\textsuperscript{389} rising faith in state governments,\textsuperscript{390} and changes in racial politics.\textsuperscript{391} But the broad scope of Whittington's analysis, which covers decades of changes in multiple doctrinal areas, limits his ability to show how those external changes interacted with the internalist norms of the legal process. Ultimately, his primary evidence that the political, social, and intellectual changes he identified actually caused the return of constitutional federalism is the reasonable "common sense" relationship between them. But without more direct evidence of the very interactions between internal and external whose importance he is trying to show, his work can be interpreted to indicate, as he recognizes, that the developments he identified were important because they changed the political preferences of judges who then simply instituted those preferences.\textsuperscript{392} His investigation of the interaction between external and internal factors in federalism doctrine is thus more suggestive than conclusive.

My focus on a single case, on the other hand, has allowed me to try to trace the linkages between external changes and internalist structures. Through a close examination of debates inside and outside of the Court, I have tried to accomplish two things: (1) show that a specific set of changes to American government and politics caused the return of constitutional federalism, and (2) explain why those changes in particular—rather than many other changes in American politics and society that occurred during the same time—were important. My conclusion is that those changes mattered because they undermined the widely shared faith in the political safeguards thesis, which had been the nearly universally accepted justification for judicial deference on federalism issues. The result, I argued, was the return of constitutional federalism. One thus cannot explain the return of constitutional federalism without understanding the role played by the political safeguard thesis. In many ways, that makes my approach and Whittington's complementary. While his work indicates that many of the factors I identify had salience in the 1990s and beyond, my analysis indicates that some of the associations Whittington identified were important causes of the return of constitutional federalism.

\begin{itemize}
\item \textsuperscript{387} See Whittington, supra note 25, at 484.
\item \textsuperscript{388} Id. at 485; see Whittington, supra note 104, at 483–84.
\item \textsuperscript{389} See Whittington, supra note 25, at 498; Whittington, supra note 104, at 515–16.
\item \textsuperscript{390} Whittington, supra note 25, at 499, 502; Whittington, supra note 104, at 520–22.
\item \textsuperscript{391} See Whittington, supra note 25, at 494.
\item \textsuperscript{392} "It is possible that the Justices have considered such features of modern American life and have developed a policy preference for devolution. They may act directly on that policy preference." Whittington, supra note 25, at 500.
\end{itemize}
But I do differ from Whittington—and others—in identifying the political safeguards thesis as the jurisprudential structure most important to the return of constitutional federalism. The concern of Whittington, as well as Purcell and others, with current federalism doctrines, rather than the return of the debate over constitutional federalism more broadly, led them to see originalism and law and economics as the intellectual developments most important to the return of constitutional federalism. I find, however, little evidence they played an important role in NLC. That indicates that while originalism and law and economics have shaped the contours of contemporary federalism doctrines in important ways, they did not play a primary role in bringing the debate over federalism back to the courts and the law reviews. Distinguishing of the causes most important to the return of constitutional federalism from the causes most important to the shape of contemporary federalism doctrines is, as I briefly discuss below, of significant importance to contemporary debates over federalism. It suggests that a form of constitutional federalism quite different from the one we have now—one neither based on law and economics and originalism nor led by Justices associated with conservatism—could have emerged, and still might.

CONCLUSION

This integrative approach I have described seems to me the best way to explain the return of constitutional federalism in NLC, but I also hope that this Article can help today's close observers of the federal system understand—and even improve—the contemporary debate over the value of constitutional federalism. There are several ways it might contribute. Certainly, this explanation suggests that there is little reason to expect the debate over constitutional federalism to end anytime soon. Most of the factors that undermined faith in the political safeguards of federalism in the 1960s and 1970s have only accelerated since then. As a result, even a brief perusal of the legal literature confirms what Justice Breyer himself suggested in the oral arguments over the Affordable Care Act: there is widespread but not universal doubt that the political safeguards of federalism provide a sufficient mechanism to limit federal power. This continued doubt may help explain the limits the Court placed on the spending power in NFIB v. Sebelius, as well as the in-


394. Transcript of Oral Argument at 75, Dep't of Health and Human Servs. v. Florida, 132 S. Ct. 1618 (2012) (No. 11-398) ("And, of course, the greatest limiting principle of all, which not too many accept, so I'm not going to emphasize that, is the limiting principle derived from the fact that members of Congress are elected from States and that 95 percent of the law of the United States is State law. That is a principle though enforced by the legislature."); see, e.g., Prakash & Yoo, supra note 393, at 1461; Kramer, supra note 12, at 234; Lee, supra note 74, at 333–40.

creasing interest in the ways federalism can advance interests traditionally associated with the political left.

I also hope this explanation for the return of constitutional federalism can help produce a more robust normative debate over the value of constitutional federalism by undermining the assumption that it will inevitably be a tool to advance conservative values. By arguing that the return of constitutional federalism has been and remains a simple product of conservative politics, the political explanations for the return of constitutional federalism subtly but powerfully suggest that constitutional federalism is inherently conservative. That assumption in turn threatens to impoverish contemporary debates over the proper role of constitutional federalism by discouraging ongoing efforts to identify ways that federalism could advance the interests typically associated with the political left by scholars like Heather Gerken, Robert Schapiro, and others. By focusing on the importance of structural changes and developing jurisprudential norms, I hope this Article can remove the weight of the past from that debate and encourage discussions about constitutional federalism that are further enriched by contributions from scholars concerned with issues typically associated with the left.

Finally, I hope that this integrative approach to understanding doctrinal change provides a case study that can provide some guidance to those seeking constitutional change of any kind. Taken to its extreme, the internalist perspective suggests that constitutional change is generated by improved legal arguments, while the externalist perspective suggests that improved legal argument is irrelevant. Politics, not legal argument, this perspective suggests, is the path to constitutional change. The perspective offered here indicates that both politics and legal argument play a role in generating constitutional change. It thus supports the insights of scholars who have argued that meaningful changes in today's political system are not likely to come from electoral mobilization alone. Instead, with policy increasingly made in institutions like courts and bureaucracies that are governed by particular sets of professional norms and that are relatively insulated from electoral politics, meaningful change in-

396. See, e.g., Heather K. Gerken, Foreword: Federalism All the Way Down, 124 HARV. L. REV. 4, 9 (2010); Heather K. Gerken, A New Progressive Federalism, 24 DEMOCRACY 37, 37 (2012); Robert A. Schapiro, Not Old or Borrowed: The Truly New Blue Federalism, 3 HARV. L. & POL'Y REV. 33, 33 (2009); Robert A. Schapiro, Toward a Theory of Interactive Federalism, 91 IOWA L. REV. 243, 272 (2005); Kirsten H. Engel, Harnessing the Benefits of Dynamic Federalism in Environmental Law, 56 EMORY L.J. 159, 182 (2006). Lawrence Tribe and Frank Michelman began exploring such possibilities in their critique and interpretation of National League of Cities itself. Tribe, for example, argued that the decision could be read to support judicial protection of states in order to ensure that those states provide constitutionally required minimum government services. See Tribe, supra note 24, at 1075–76; Michelman, supra note 24, at 1173.
creasingly requires electoral mobilization in conjunction with new ideas, new arguments, and new perspectives.397

This Article examines the past, but I hope its most important effects will be on the future. My primary goal is to provide a better explanation for one of the most important developments in modern constitutional law: the return of constitutional federalism. But I do so in hopes of freeing contemporary analysis from understandings of the past that are inaccurate and unhelpful. The past provides few clear answers. But understanding the past more accurately can clear the road to a better future.