

2001]

PUTTING THE SAFEGUARDS BACK INTO THE POLITICAL
SAFEGUARDS OF FEDERALISM

LYNN A. BAKER*

IN a recent, characteristically eloquent Article, Professor Larry Kramer discussed “putting the politics back into the political safeguards of federalism.”¹ In this Article, I briefly explore putting the *safeguards* back into the political safeguards of federalism.

While nearly everyone seems to agree that judicial review is necessary and appropriate for the protection of individual rights, there is significant disagreement about whether judicial review is necessary, or even beneficial, in the federalism context. The earliest major “political safeguards” proponent, Professor Herbert Wechsler,² and the most recent, Larry Kramer,³ have each argued that the states are adequately protected by various aspects of the federal political process,⁴ and have each concluded that the federal courts therefore have no meaningful, direct role to play in

* Thomas Watt Gregory Professor, University of Texas School of Law <baker@mail.law.utexas.edu>. This Article is based on a paper presented at the Symposium entitled “New Voices on the New Federalism,” held at the Villanova University School of Law on October 28, 2000.

I am grateful to John Gotanda and Ernie Young for organizing the Symposium, to the Villanova Law School and *Law Review* for their hospitality, and to the Symposium participants for an enjoyable and stimulating day of intellectual exchange. Special thanks to Greg Magarian, Tim Simeone, Adrian Vermeule, and Ernie Young, my fellow speakers on “Federalism and Judicial Review,” for especially useful comments and discussion. Victoria Matthews and Tobe Liebert provided valuable research assistance.

Some of the arguments made in this Article are discussed at greater length in Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001) (contribution to Symposium on “The Constitution in Exile”). I am grateful to Ernie Young for the many conversations in the course of that collaboration that helped me clarify my own thinking on both judicial review and federalism. Ernie is entitled to a share of the credit for anything the reader of this Article finds to be useful, interesting, sensible, or correct. I am solely to blame for the rest.

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

2. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

3. See generally Kramer, *supra* note 1.

4. See Wechsler, *supra* note 2, at 543-58 (identifying various “political safeguards” of federalism, including the existence of the states, the allocation of representation in the Senate, state control of voters’ qualifications and congressional districting, and the Electoral College); Kramer, *supra* note 1, at 219, 276-87 (contending that “federalism in the United States has been safeguarded by a complex system of informal political institutions (of which political parties have historically been the most important),” and identifying the interlocking state-federal administrative bureaucracy spawned by the New Deal as a more recent safeguard).

(951)

demarcating and enforcing the boundary between the powers of our federal and state governments.⁵

I disagree. I believe that the federal courts have a role to play in safeguarding state sovereignty that is as legitimate and essential as that generally acknowledged to be both necessary and constitutionally mandated for the protection of individual rights.

In this brief Article, I can offer neither a comprehensive defense of my own view⁶ nor a nuanced critique of the influential work of Wechsler and Kramer.⁷ Thus, I shall limit my discussion to a preliminary examina-

5. Both Wechsler and Kramer claim to envision *some* role for the courts in protecting state autonomy, but in neither case does this role appear to be a meaningful or particularly clear one. Wechsler acknowledged that the Court had a role to play in “managing our federalism,” but explicitly termed it “subordinate.” Wechsler, *supra* note 2, at 560. In addition, he gave no example of when the Court might be needed or expected to play even this limited role in protecting state autonomy. Although Wechsler affirmed that claims of federal infringement on state autonomy are *not* non-justiciable, he was quick to add that “the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interests of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.” *Id.* at 559.

Kramer’s view of the courts’ appropriate role in protecting state autonomy is similarly minimalist. He contends that the absence of “a clear constitutional mandate demanding judicial intercession” to protect state sovereignty and “more than two centuries of successful federalism without the aid of an aggressive judiciary suggest[] that no such intercession is needed.” Kramer, *supra* note 1, at 291. Kramer goes on to suggest that the court “should continue to follow what had been its practice—formally since the New Deal, as a practical matter before that—of applying rational basis scrutiny to questions regarding the limits of Congress’s power under Article I.” *Id.* Although Kramer is clear that he would substitute this “rational basis scrutiny” for current Commerce Clause doctrine, for example, he offers no example of when this level of scrutiny might cause the courts to invalidate a federal law for exceeding Congress’ power under that clause. *Id.* One is left to question whether Kramer envisions any such invalidation under his ideal regime. If he does not, one wonders why he is concerned with preserving a role for the courts in this area as an apparent formality.

6. For some partial statements of my own evolving views on federalism, see Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. (forthcoming Jan. 2002); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195 (2001) [hereinafter Baker, *Spending Power*]; Lynn A. Baker, *Conditional Federal Spending and States’ Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (2001); Lynn A. Baker, *The Revival of States’ Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL’Y 95 (1998); Lynn A. Baker, *Federalism: The Argument from Article V*, 13 GA. ST. U. L. REV. 923 (1997); Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995) [hereinafter Baker, *Conditional Federal Spending*].

7. Another major and influential “political safeguards” theorist is, of course, Professor Jesse Choper, who argues that “the constitutional issue of whether federal action is beyond the authority of the central government and thus violates ‘states’ rights’ should be treated as nonjusticiable, final resolution being relegated to the political branches—*i.e.*, Congress and the President.” JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERA-

tion of two questions: (1) What are the “political safeguards” of federalism guarding against? and (2) Can the “political safeguards” identified by Wechsler or Kramer adequately serve this function?

I. WHAT ARE THE “POLITICAL SAFEGUARDS” AND WHAT ARE THEY GUARDING AGAINST?

In justifying its 1985 retreat from the judicial enforcement of federalism, the Court in *Garcia v. San Antonio Metropolitan Transit Authority*⁸ relied most fundamentally on the view that “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”⁹ Pointing to the equal representation of the states in the Senate and the states’ role in the selection of the Executive and Legislative branches of the Federal Government, the *Garcia* majority concluded that “[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”¹⁰

In its reasoning, the *Garcia* majority echoed that of Professor Wechsler, whom it cited.¹¹ In his now-classic 1954 Article, Wechsler observed that the Senate, in which all states are equally represented, “cannot fail to function as the guardian of state interests as such,” and that “[f]ederalist considerations . . . play an important part even in the selection of the President.”¹² He therefore concluded “that the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interests of the states, whose representatives control the

TION OF THE ROLE OF THE SUPREME COURT 175 (1980). He contends that “[n]umerous structural aspects of the national political system serve to assure that states’ rights will not be trampled,” and the structural features he identifies largely track those invoked by Wechsler. *Id.* at 176-90. Although I regret that space does not permit me to specifically address Choper’s thesis in this Article, the similarity of his argument to Wechsler’s in many critical aspects suggests that much of my critique of Wechsler would similarly apply to Choper.

8. 469 U.S. 528 (1985).

9. *Garcia*, 469 U.S. at 550. The Court also justified its retreat in terms of judicial competence. *See id.* at 546-49, 557; *see also* Baker & Young, *supra* note 6, at 92-100.

10. *Garcia*, 469 U.S. at 552.

11. *See id.* at 551 n.11. The Court also cited CHOPER, *supra* note 7, at 175-84; and Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982).

12. Wechsler, *supra* note 2, at 548, 557. The Article ranked as the sixty-ninth most-cited article since 1956 in a citation count published in 1996, and the current Court’s federalist revival has surely only caused the Article’s ranking to improve during the intervening five years. *See* Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 770 (1996).

legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress."¹³

Although the *Garcia* majority was willing to admit that "changes in the structure of the Federal Government . . . since 1789 . . . may work to alter the influence of the States in the federal political process,"¹⁴ it concluded that the "political safeguards" remained largely effectual. The Court cited, for example, federal legislation providing increasingly large financial grants to states and localities, as well as Congress' frequent willingness to exempt states and their political subdivisions from generally applicable regulatory regimes ranging from the Employee Retirement Income Security Act (ERISA) to the Federal Power Act.¹⁵

It is important to be clear at the outset about what this classic "political safeguards" argument does and does not entail. Neither Wechsler nor the *Garcia* majority contended that federalism issues are non-justiciable under the political question doctrine.¹⁶ Their claims rest on prudential considerations rather than constitutional command: We do not need judicial review of federalism issues because the political structure itself will keep the states safe. But safe from what?

As Professor Kramer has importantly observed, Wechsler did not distinguish in his brief, sixteen-page essay between two quite different roles that the political safeguards of federalism might play: "ensuring that national lawmakers are responsive to geographically narrow *interests*, and protecting the governance prerogatives of state and local *institutions*."¹⁷ Kramer goes on to argue, entirely persuasively, that most of the structural devices Wechsler invokes in support of his thesis "are mechanisms that (possibly) give state and local *interests* a greater voice in national politics, but in ways that do not necessarily protect state and local *institutions*."¹⁸ Kramer's stated concern, in contrast, is federalism's role in "protecting the integrity and authority of state political institutions,"¹⁹ whether from preemptive federal legislation or other congressional efforts to "displace the political authority of state institutions."²⁰ As is discussed at greater length

13. Wechsler, *supra* note 2, at 559 (footnote omitted); *see also id.* at 558 ("Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse.").

14. *Garcia*, 469 U.S. at 554. The Court cited "the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913" as the most important example. *Id.*

15. *See id.* at 552-53.

16. The "political question" doctrine is not mentioned anywhere in Wechsler, *supra* note 2, or *Garcia*, 469 U.S. 528. This doctrine has long stood for the proposition that some constitutional issues are non-justiciable despite falling within the jurisdiction of the federal courts. *See, e.g.*, *Nixon v. United States*, 506 U.S. 224, 228 (1993); *Baker v. Carr*, 369 U.S. 186, 210-37 (1962); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

17. Kramer, *supra* note 1, at 222 (emphasis in original).

18. *Id.* at 223 (emphasis added).

19. *Id.* at 226.

20. *Id.* at 225.

below, Kramer further contends that political parties are today the component of “[t]he structure of American politics [that] does offer states considerable protection from federal overreaching.”²¹

There is yet another important distinction that might be drawn, however, between various threats to state sovereignty that are typically conflated in the federalism literature: a distinction between what might be termed “vertical” and “horizontal” aggrandizement. The distinction that Kramer identifies between federalism’s role in protecting state institutions and its role in protecting state interests is a distinction between types of *vertical* aggrandizement. Vertical aggrandizement involves efforts by the federal government itself to increase its own power at the expense of the states, and may occur, for example, when the federal government takes over regulatory functions traditionally exercised by the states,²² preempts sources of state revenue,²³ or imposes regulatory burdens on state governments.²⁴

The substantive preferences of the states in these situations are irrelevant to the issue of vertical encroachment. The states may be relatively united in opposing the federal initiative on the merits;²⁵ they may actually favor the federal initiative or have adopted similar policies on their own;²⁶ or different states may have different preferences altogether. The important thing is that the impetus for the expansion of federal power comes from the federal government itself or from interest groups operating at the federal level, and *not* from state governmental institutions or geographically based interests primarily concentrated at the state level.

The second kind of threat to state autonomy, *horizontal* aggrandizement, focuses on the differences among the states in their substantive policy preferences. Here, the federal political process threatens state autonomy insofar as that process is the means by which a majority of states may impose their own policy preferences on a minority of states with different preferences. The federal political process may therefore in certain

21. *Id.* at 219.

22. *See, e.g.,* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 381-85 (1999) (holding that Congress gave FCC authority to implement and interpret Telecommunications Act of 1966, thereby preempting state regulatory authority over local telephone services).

23. *See, e.g.,* Baker, *Conditional Federal Spending*, *supra* note 6, at 1935-39. *See also generally,* Baker, *Spending Power*, *supra* note 6.

24. *See, e.g.,* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that Congress could validly subject state employees to Fair Labor Standards Act (“FLSA”)); Nat’l League of Cities v. Usery, 426 U.S. 833 (1976) (rejecting application of FLSA to state employees involved in “traditional governmental functions”).

25. All fifty states, for example, would generally (although not always) have the same incentives to oppose burdensome regulation of their own governmental operations by federal laws such as the FLSA.

26. *See, e.g.,* United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (noting that more than forty states already had gun-free school zone laws on their books when *Lopez* Court ruled).

circumstances threaten the autonomy of only some states, while arguably enhancing the autonomy of other states. An example might be efforts by interests concentrated in more socially conservative parts of the country to formulate and enact a uniform definition of "marriage" at the federal level in order to undermine attempts in more liberal states to legalize gay unions.²⁷ This sort of horizontal problem is typically overlooked in contemporary debates about federalism,²⁸ but I believe raises a distinct and potentially *more* serious criticism of the efficacy of the political safeguards than traditional critiques focusing exclusively on vertical issues.²⁹

In the next two parts, I examine in turn these horizontal and vertical threats to state autonomy. In Part II, I argue that although the political safeguards identified by Wechsler and Kramer undoubtedly *do* protect the states from *some* vertical threats, they are insufficiently reliable to operate without a robust role for judicial review. In Part III, I demonstrate that neither Wechsler's nor Kramer's political safeguards effectively address the horizontal problem of federal "homogenization" of diverse state policy preferences, which imposes burdens on some states to the benefit of other states.

II. THE STATES VS. THE FEDERAL GOVERNMENT: THE PROBLEM OF VERTICAL AGGRANDIZEMENT

Neither the *Garcia* majority nor Wechsler or Kramer distinguished between "vertical" and "horizontal" aspects of state sovereignty. Further, each appears to have focused solely on the problem of vertical aggrandizement: that is, attempts by the federal government to expand its own power at the expense of the states as a whole. Each tends to treat the states as a group with a single shared set of interests and a common enemy,³⁰ with-

27. See, e.g., Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?*, 26 HASTINGS CONST. L.Q. 419, 440 (1999) (describing origin of Defense of Marriage Act, 28 U.S.C. § 1783C (1996) & 1 U.S.C. § 7 (1996), as "a Congressional response to the opinion of two members of the five judge Hawaii Supreme Court who suggested that Hawaii's State constitution requires the recognition of same-sex marriages").

28. But see Baker, *Conditional Federal Spending*, *supra* note 6, at 1935-54 (demonstrating that conditional federal spending unfettered by Constitution's constraints is problematic because it allows "*some states* to harness the federal lawmaking power to oppress *other states*") (emphasis in original).

29. I should note that although I find it useful and informative to distinguish between vertical and horizontal federalism issues, the two categories are obviously not discrete, nor do I intend them to have any particular doctrinal import. Thus, reasonable people may sometimes disagree about whether a particular issue is ultimately or primarily a "vertical" or "horizontal" one. To my mind, a major benefit of emphasizing this distinction is to underscore for liberals the "diversity" benefits that accrue from the judicial enforcement of state autonomy. See Baker & Young, *supra* note 6, at 133-62. See generally Baker, *Should Liberals Fear Federalism?*, *supra* note 6.

30. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985) (observing that "the composition of the Federal Government was designed in large part to protect *the States* from overreaching by Congress") (emphasis ad-

out examining the role that federal lawmaking institutions might play in contests *among* states with different preferences on particular issues.³¹

The situation in *Garcia* itself is a good example of vertical aggrandizement. Congress' extension of the Fair Labor Standards Act's wage and hour requirements to state governmental employers was an attempt by the federal government to impose regulatory burdens on state governmental institutions, thereby presumably expanding its own power at the expense of the states as a whole.³² Such aggrandizement might be the result either of federal officials seeking to increase their own power at the expense of

ded); *id.* at 552 (discussing "effectiveness of the federal political process in preserving *the States'* interests") (emphasis added); *id.* at 556 ("The political process ensures that laws that unduly burden *the States* will not be promulgated.") (emphasis added); *see also* Wechsler, *supra* note 2, at 548 ("[T]he Senate cannot fail to function as the guardian of *state interests as such.*") (emphasis added); *id.* at 558 ("[T]he role of the states in the composition and selection of the central government . . . is intrinsically well adapted to retarding or restraining new intrusions by the center on *the domain of the states.*") (emphasis added); *id.* at 559 ("[T]he Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in *the interests of the states*, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.") (emphasis added) (footnote omitted); Kramer, *supra* note 1, at 219 ("The structure of American politics does offer states considerable protection from federal overreaching, but it does so in ways quite different from those identified by Wechsler."); *id.* at 269 ("Rather than judicial review, it was the party system itself that supplied the desideratum necessary to protect *the states* and make federalism functional.") (emphasis added); *id.* at 286 (contending that our political system "protect[s] *the states* by ensuring their ability to influence national politics") (emphasis added); *id.* ("The states do not need an untouchable domain of judicially protected jurisdiction; they need only the capacity to compete effectively for political authority.") (emphasis added).

31. Kramer does acknowledge that preserving diversity among the states is the "whole point of federalism (or at least the best reason to care about it)." Kramer, *supra* note 1, at 222. He notes that:

[B]ecause preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking. Federalism is a way to capture this advantage, by assuring that federal policymakers leave suitable decisions to be made in the first instance by state politicians in state institutions.

Id.

Kramer's central stated concern, however, is "protecting the governance prerogatives of state and local *institutions*" from federal interference. *Id.* And, as I explain in Part I above, his primary concern is therefore with vertical, rather than horizontal, aggrandizement.

32. One can imagine something like the FLSA being enacted as a response to horizontal pressures, as discussed *infra* Part III.A. For instance, states with relatively high prevailing wages might worry about losing businesses to lower wage states and therefore seek to impose minimum wages at the national level. Whether or not something like this dynamic lay behind the original enactment of the FLSA to govern private employers, it seems more far-fetched as an explanation for Congress' subsequent decision to extend the FLSA to *public* employers. Finally, for present purposes, it does not matter whether the congressional action was the result of a raw "power grab" by federal legislators or successful lobbying by a powerful, private interest group.

the states,³³ or of successful lobbying by private interest groups whose influence is concentrated at the national level.³⁴

Even focusing solely on the problem of vertical aggrandizement, a persuasive case cannot today be made for the effectiveness of the “political safeguards” described by Wechsler and the *Garcia* majority.³⁵ Their primary structural safeguards, the state-by-state allocation of electoral votes and congressional representation, do little to protect the interests of state governments as a whole from federal usurpation and encroachment.³⁶ The only constitutional institution that arguably *did* promote the representation of state *institutional* interests, the selection of senators by state legislatures, is now gone.³⁷

Today, if federal representatives (including the president as well as members of Congress), are responsive to state and local interests, those federal representatives are likely to seek to reduce or minimize the role of state governmental officials who represent the same constituents.³⁸ According to the “economic theory of regulation,” politicians obtain political support from constituents in exchange for providing beneficial regulation

33. See, e.g., Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1473-74 (1995) (describing Congress' incentives to “cheat” on the federal arrangement by aggrandizing its own power at the expense of the states).

34. See, e.g., Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 388 (arguing that federal government is likely to be influenced by well-established interest groups which have incentives to suppress the more diverse interests likely to be prevalent in the states).

35. See, e.g., Bednar & Eskridge, *supra* note 33, at 1484-85 (“*Garcia* has, justifiably, taken an academic beating for arguing that the formal representation of the states in the Senate and the Electoral College and their ostensible control over House redistricting assure that states qua states will be adequately protected by the ordinary political process.”). Even Professor Kramer, who believes that the “political safeguards” argument can be saved through re-tooling, concedes that “however convincing Wechsler’s reasoning may have been in its original context, subsequent experience and later developments have robbed his analysis of much, if not all, of its force.” Kramer, *supra* note 1, at 218.

36. See Kramer, *supra* note 1, at 223 (noting that most of Wechsler’s structural safeguards “are mechanisms that (possibly) give state and local interests a greater voice in national politics, but in ways that do not necessarily protect state and local institutions”); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2226 n.206 (1998) (noting that “senators, like their colleagues in the House, are said to represent, not the interests of states as governments, but the interests of people in the states”).

37. See U.S. CONST. amend. XVII (providing for direct election of U.S. Senators). Kramer contends that “the power of state legislatures to select Senators had lost most of its significance for federalism long before adoption of the 17th Amendment in 1913.” Kramer, *supra* note 1, at 224 n.33. He argues that the Senate was designed by the Framers to incorporate “several features meant to weaken the control of state legislatures,” thereby diminishing from the start the potential ability of the Senate to promote the representation of state institutional interests. *Id.*

38. See, e.g., Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 15-16 (1988); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 26.

and government services;³⁹ political support tracks governmental authority.⁴⁰ Thus, as Kramer notes, “[f]ederal politicians will want to earn the support and gratitude of local constituents by providing desired services themselves—through the federal government—rather than giving or sharing credit with state officials,” who are “rivals, not allies.”⁴¹

The Gun-Free School Zones Act struck down in *United States v. Lopez*⁴² seems like a clear example of this sort of vertical aggrandizement. At the time Congress passed this law, more than forty states had already enacted prohibitions on the possession of guns in or near schools, and there was no evidence that these state laws were ineffective.⁴³ Nor was there any evidence that the few states that had not yet enacted such a prohibition opposed the broader social policy involved. Thus, an entirely plausible explanation for the federal legislation is that members of Congress were seeking a share of the *credit* for addressing the (uncontroversial) issue.⁴⁴ In the words of one commentator: “[T]he Gun-Free School Zones Act was little more than a press release from Congress that it cared.”⁴⁵

39. See, e.g., Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 269 (1990) (“[P]oliticians maximize the aggregate political support that they receive from interest groups by supplying the legal rules that result in the highest net receipt of support.”); see also Baker, *Conditional Federal Spending*, *supra* note 6, at 1940-47; Baker, *Spending Power*, *supra* note 6, at 200-02, 222-25.

40. See Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1357 (1997) (observing that “[w]here central representatives are popularly elected, they may have a stake in reelection that induces them to favor central intervention whenever they can thereby be perceived as addressing an issue of interest to constituents, regardless of whether centralized attention to the issue is required or authorized”). This would be especially true if one assumes that the pool of “support”—especially campaign contributions—is finite within any given group of constituents. A wealthy businessperson with important regulatory interests, for instance, might well decide whether to concentrate her campaign contributions during a given election cycle on candidates at the state or federal level depending on which level of government she perceives as having primary authority to influence her interests.

41. Kramer, *supra* note 1, at 223-24; Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1510-11 (1994).

42. 514 U.S. 549 (1995).

43. See *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring); see also Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, Apr. 30, 1995, at A1.

44. I have previously suggested that the passage of the federal Gun-Free School Zones Act might be considered an example of what I categorize herein as “horizontal” aggrandizement. See Baker, *Conditional Federal Spending*, *supra* note 6, at 1941-44. Given the strong likelihood that the content of this regulation was normatively uncontroversial even in the few states that had not yet enacted a similar law, however, the enactment of this federal law now seems to me more plausibly to be categorized as an example of the failures of existing “vertical” safeguards.

45. Jerome L. Wilson, *High Court Did Well in School-Guns Case*, N.Y. TIMES, May 5, 1995, at A30; cf. *United States v. Morrow*, 834 F. Supp. 364, 366 (N.D. Ala. 1993) (“A generalized salutary purpose is simply not enough to justify the creation of a new federal crime. Liking the way ‘Gun-Free School Zones’ rolls off the tongue does not make § 922(q) constitutional.”).

Acknowledging the inefficacy of the state-based allocation of representation in Congress and the electoral college as vertical safeguards, Wechsler's major intellectual heir, Larry Kramer, has sought to identify alternative structural safeguards. Kramer contends that "federalism in the United States has been safeguarded by a complex system of informal political institutions (of which political parties have historically been the most important)".⁴⁶ He argues that the political parties "protect[] the states by making national officials politically dependent upon state and local party organizations."⁴⁷ "[B]y linking the fortunes of officeholders at different levels" of government, these organizations "foster[] a mutual dependency that induce[s] federal lawmakers to defer to the desires of state officials and state parties."⁴⁸

This may be true, at least to some extent. But, as I explain throughout the remainder of this Article, Kramer's argument suffers from several substantial flaws. Perhaps the most significant is the fact that, unlike the vertical safeguards upon which Wechsler relied, political parties are not themselves part of the constitutional structure. Thus, the nature of the party system and its role in protecting federalism is especially fluid and contingent.⁴⁹ Stabilizing the political party system sufficiently to make it a reliable safeguard for constitutional values of federalism would require entrenching a particular conception of the party system through some form of judicial review. But this would seem to give the game away entirely. It would be to trade one form of judicial review that, although controversial,

46. Kramer, *supra* note 1, at 219.

47. *Id.* at 278.

48. *Id.*

49. In the past, changes in party organization, such as the adoption of presidential primaries in most states, have had significant and often unanticipated effects on the nature and role of our political parties. See, e.g., Bruce Buchanan, *The Presidency and the Nominating Process*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM*, 251, 253-58, 261 (Michael Nelson ed., 2000) (describing changes in the presidential nominating process and in the role of political parties in that process, over time); A.E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 793 (1985) (observing that "[p]olitical parties, especially at the state level, no longer are the force they once were. Increased use of primaries and the impact of 'reforms' have had the unintended consequence of encouraging the development of alternative institutions."). Even Kramer concedes that "the parties' effectiveness in safeguarding state government may have been compromised to some degree by twentieth-century developments." Kramer, *supra* note 1, at 283.

Alteration of the ways in which election campaigns are financed likewise can be expected to alter the nature and role of the parties, however unpredictably. See, e.g., Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1714 (1999) ("We are particularly worried that [campaign finance] reforms would exacerbate the already disturbing trend toward politics being divorced from the mediating influence of candidates and political parties."); Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1365 (1994) (describing past efforts at campaign finance reform as "the classic illustration of the law of unanticipated consequences").

at least has some doctrine and precedent available to it, for a different, entirely open-ended judicial inquiry.⁵⁰ Nothing would be gained in terms of textual legitimacy or judicial competence, and it is hard to imagine what other advantages would stem from a world in which courts protected the political parties but not the states.

III. STATE VS. STATE: THE PROBLEM OF HORIZONTAL AGGRANDIZEMENT

Even if the various vertical safeguards identified by Wechsler and Kramer did ensure that “the States as States” are protected against federal overreaching, this is only one facet of the problem. Although, as was noted above, the central literature on “political safeguards” has focused solely on this “vertical” aspect of federalism,⁵¹ the “horizontal” dimension is at least as important. The concern here is that in the absence of judicial review, *some states* will harness the federal lawmaking power to impose their policy preferences on *other states* to the former states’ advantage.

In this Part, I first describe “horizontal aggrandizement” in greater detail. I then explain why the vertical safeguards identified by Wechsler and Kramer, respectively, not only cannot protect minority states against this majoritarian use of the federal lawmaking power but, in fact, facilitate it.⁵²

A. What Is “Horizontal Aggrandizement”?

It is important to appreciate that arguments about horizontal threats to state autonomy presume that the “political safeguards” are *sometimes* effective vis-à-vis *some vertical* aspects of federalism. That is, horizontal arguments rest on the assumption that federal institutions are sometimes responsive to the preferences and interests of state governments or (more often) of interest groups geographically concentrated in particular states.⁵³ It is this very responsiveness that creates the problem: To the

50. Given Kramer’s view that the Rehnquist Court’s “judicially-defined limits” on national power are both “novel” and “a radical experiment in judicial activism,” Kramer, *supra* note 1, at 290, 292, one wonders how he would describe and distinguish the “novel judicially-defined limits” on the regulation of political parties that his argument seems implicitly to require.

51. See *supra* notes 30-31 and accompanying text.

52. See, e.g., Baker, *Conditional Federal Spending*, *supra* note 6, at 1939-47; see also Baker, *Spending Power*, *supra* note 6, at 199-225; Baker & Dinkin, *supra* note 6, at 24-42, 47-55.

53. It is important to distinguish here between congressional responsiveness to geographically concentrated private interests and responsiveness to state governments. I agree with most of Wechsler’s critics who have argued that federal institutions may be responsive to geographically concentrated private interests without being responsive to the institutional interests of state governments. See, e.g., Kramer, *supra* note 1, at 223 (arguing that allocating congressional representation by states “may enhance the power of geographically-defined interests at the federal level, [but] does so in a way that is likely, if anything, to diminish the institutional role of state government”). Thus, private interests might be able to use the federal lawmaking process to impose horizontal encroachments on the auton-

extent that Congress responds to the preferences of a majority of states, it may take action that encroaches on the autonomy of a minority of dissenting states. Such encroachment diminishes the benefits of federalism by creating a federally imposed homogenization of preferences.

Why would some states seek to use federal power as an instrument for imposing their preferences on other states?⁵⁴ There are at least three different, if not entirely discrete, scenarios in which such encroachment might occur. The first and simplest involves a situation in which people in some states simply disapprove of certain activities that are legally permitted in other states, even though the activity in those other states does not affect them directly. When Arizona, New Mexico, Oklahoma and Utah entered the Union, for example, Congress required each, as a condition of admission, to include in its state constitution a provision stating that polygamy is “forever prohibited.”⁵⁵ As Justice Scalia has pointed out, this requirement amounted to an “effort by the majority of citizens to preserve its view of sexual morality . . . against the efforts of a geographically concentrated and politically powerful minority to undermine it.”⁵⁶ The preferences of polygamists in the new western states, however, did not “undermine” the marriage laws of the majority of states in any direct sense. Rather, the majority states seem to have acted out of a straightforward desire to impose their own moral code on others in the absence of a constitutional amendment reflecting a nationwide consensus on the issue.

A second scenario involves an attempt by some states to capture a disproportionate share of federal monetary or regulatory largesse.⁵⁷ Any conditional offer of federal funds, for example, is highly likely to make some states better off at the expense of other states.⁵⁸ Such an offer implicitly divides the states into two groups: (1) states that already comply, or without financial inducement would happily comply with the funding condition, and for which the offer of federal money therefore poses no real

omy of other states even if the federal political process is not generally responsive to state *governmental* or *institutional* interests. This means that vertical “safeguards” may function as instruments of horizontal aggrandizement while *still* not offering much protection for state governmental institutions against vertical encroachments.

54. See, e.g., Baker, *Conditional Federal Spending*, *supra* note 6, at 1942-47.

55. See Arizona Enabling Act, Pub. L. No. 61-219, 36 Stat. 569; New Mexico Enabling Act, Pub. L. No. 61-219, 36 Stat. 558; Oklahoma Enabling Act, Pub. L. No. 59-234, 34 Stat. 269; Utah Enabling Act, ch. 138, 28 Stat. 108. The complying state constitutional provisions—which are still in force—may be found at ARIZ. CONST. art. XX, para. 2; N.M. CONST. art. XXI, § 1; OKLA. CONST. art. I, § 2; Utah CONST. art. III, § 1. Indeed, the Arizona, New Mexico, and Utah enabling acts required that these provisions be “irrevocable without the consent of the United States and the people of said State.”

56. *Romer v. Evans*, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting).

57. See, e.g., Baker, *Conditional Federal Spending*, *supra* note 6, at 1939-51; Baker, *Spending Power*, *supra* note 6, at 199-217.

58. For a more extensive discussion of this argument, see Baker, *Conditional Federal Spending*, *supra* note 6, at 1939-51; Baker, *Spending Power*, *supra* note 6, at 212-17.

choice; and (2) states that find the funding condition unattractive and therefore face the choice of either foregoing the federal funds in order to avoid complying with the condition, or submitting to undesirable federal regulation in order to receive the offered funds. One would therefore expect such conditional funding legislation to be enacted only if a (substantial) majority of states fall within the first group: that is, they already willingly comply with or favor the stated condition, and the conditional offer of funds is therefore no less attractive to them than a similar unconditional offer. For the states in the majority (and their congressional representatives), a vote in favor of the conditional grant is nearly always a vote to impose a burden solely on other states. Whether a state that finds the funding condition unattractive and is therefore in the minority chooses to decline the offer of federal funds or to acquiesce in the stated condition, those states in the majority may well improve, and will only rarely worsen, their competitive position relative to that state.⁵⁹

Consider the following example: If most states have already set their minimum drinking age at twenty-one, then those states' congressional representatives should find it attractive to impose a condition on federal highway funds that permits their disbursement only to states with a minimum drinking age of twenty-one.⁶⁰ Such a condition would bring about one of two possible results. An outlier state with a minimum drinking age lower than twenty-one might comply with the condition, accepting the preferences held by the dominant majority and giving up whatever competitive advantage its lower minimum drinking age afforded. Alternatively, the outlier state may choose to forego the federal highway funds tied to the condition it finds unattractive, accepting an obvious financial disadvantage relative to each state that accepts the federal money (obviously including those states that already had a minimum drinking age of twenty-one). The ability to impose conditions on offers of federal funds to the states thus presents states in the majority (and their congressional representatives) with a "no lose" proposition—"no lose," that is, except to the extent that such measures undermine the autonomy of all states in the long run.

A final scenario arises when states seek federal regulation in order to avoid externalities or other collective action problems associated with regulating a particular subject at the state level. Consider, for example, a not-so-hypothetical state of affairs under which a majority of the states wish to discourage homosexual relationships. A solid majority of the citizens in each of these states may share this preference and support state laws making clear that gay partners are not entitled to family benefits, that gay couples cannot adopt children, and the like. Nonetheless, the leaders of

59. By "competitive position" here I mean a state's position, relative to other states, in the competition for individual and corporate residents and their tax dollars.

60. See Baker, *Conditional Federal Spending*, *supra* note 6, at 1943-45, 1978-87; see also *South Dakota v. Dole*, 483 U.S. 203 (1987) (examining one example of such legislation and holding it constitutional).

these states may know that many private companies are more progressive on these issues and that the minority states that refuse to enact such laws will have an advantage in attracting corporate facilities to their state. The states in the majority thus may seek to have their anti-homosexual social preferences enacted at the *federal* level.

The primary goal here, unlike in the first scenario discussed above, need not be the imposition of the majority states' moral code on the remaining states, nor the preservation by the majority states' citizens of their view of sexual morality against the efforts of a politically powerful minority to undermine it. Although the federal legislation that the majority states seek may have these effects, the states' primary motivation under this third scenario is to "level the playing field." Such anti-homosexual federal legislation will restrict the competition for residents and tax dollars that would otherwise exist among the states, and will divest the minority states of any competitive gains afforded by their preference not to enact similar anti-homosexual legislation at the state level.⁶¹

The net result of the federal legislation in each of the three scenarios discussed above is a reduction in the diversity among the fifty states in the package of taxes and services, including constitutional rights and other laws, that each offers its residents and potential residents. Some individuals and corporations may no longer find any state that provides a package (including the permissibility of polygamy, a minimum drinking age of eighteen, or the availability of various family benefits for homosexual partners) that suits their preferences, while other individuals and corporations may confront a surfeit of states offering a package (including prohibitions on polygamy, a minimum drinking age of twenty-one, and laws restricting various family benefits to married couples of different genders) that they find attractive. In many instances, this reduced diversity is *likely* to mean a decrease in aggregate social welfare because the loss in welfare to those with the minority preference is unlikely to yield a comparable gain in welfare for those who favor it.⁶²

61. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For commentary on Tiebout's classic model, see, e.g., CLAYTON P. GILLETTE & LYNN A. BAKER, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 384-85 (2d ed. 1999) (collecting sources); Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 514-18 (1991) (offering critique and collecting sources); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 25-33 (1998) (offering critique of "theory of public goods" including Tiebout's Article).

62. That is, the mere existence of the last remaining state in which polygamy is legal, the minimum drinking age is eighteen, or homosexual couples are eligible for family benefits seems *likely* to yield aggregate benefits for individuals with those (minority) preferences that are far greater than the aggregate benefits that individuals with the opposing (majority) preferences would realize if there were fifty rather than forty-nine states with laws consistent with those majority preferences. Indeed, for a homosexual couple, the only state in which they are eligible for family benefits may have a value beyond measure. Of course, the precise measure and calculation of the actual welfare gains and losses in any of these situations is not currently possible, so the above claim seems unlikely to progress any time soon

Of course, increased diversity among the states is not always a good thing. States sometimes may have a legitimate interest in having certain conditions imposed on federal funds offered the states.⁶³ And federal homogenizing legislation may increase aggregate welfare by impeding welfare-reducing inter-state races to the bottom⁶⁴ or by reducing the costs that disuniformities may impose on corporations and individuals seeking to act in more than one state.⁶⁵ Distinguishing between *good* horizontal encroachments and *bad* ones is, of course, no easy task. The important point for present purposes, however, is that one cannot necessarily expect

beyond the status of an open empirical question and a theoretical likelihood. See Baker, *Conditional Federal Spending*, *supra* note 6, at 1970-71 & n.279.

63. If an outlier state is pursuing policies that tend to undermine the efficacy of moneys provided for a federal program, other states might legitimately object that the common federal funds are not being efficiently spent and impose a funding condition to redress the problem. A majority of states could conceivably insist, for example, that federal highway funding be reserved for those states that adhere to certain minimum safety standards in roadway design. See, e.g., *Dole*, 483 U.S. at 215 (O'Connor, J., dissenting) ("When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one."); see also Baker, *Conditional Federal Spending*, *supra* note 6, at 1961-62 (discussing O'Connor's attempt to distinguish between constitutional and unconstitutional conditions attached to offers of federal funds to the states).

I have previously drawn a distinction between "reimbursement spending" and "regulatory spending" legislation. In the case of "reimbursement spending" legislation, the attached conditions simply specify the purpose for which the states are to spend the offered federal funds, and the legislation reimburses the states, in whole or in part, for their expenditures for that purpose. All other legislation that offers the states federal funds pursuant to other types of conditions is "regulatory spending" legislation. See Baker, *Conditional Federal Spending*, *supra* note 6, at 1916 n.16. For an extended discussion of why reimbursement spending legislation is likely always to be constitutionally unproblematic, while regulatory spending legislation will less often be, see *id.* at 1962-78.

64. The most obvious examples are laws concerning environmental regulation and poverty relief. See, e.g., WILLIAM J. BAUMOL & WALLACE E. OATES, *ECONOMICS, ENVIRONMENTAL POLICY, AND THE QUALITY OF LIFE* 75-79 (1979) (giving classic depiction of environmental pollution as uninternalized externality); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the 'Race-to-the-Bottom' Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210-11 (1992) (observing that "the race to the bottom has been invoked as an overarching reason to vest regulation that imposes cost on mobile capital at the federal rather than the state level, and has been cited as one of the bases for [federal environmental statutes and for] the New Deal") (footnotes omitted); PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 121-24 (1995) (arguing that devolution of welfare responsibility to the states induces a "race to the bottom" because of inter-state competition to avoid becoming a "welfare magnet"); Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 552 (1999) (arguing for "a more aggressive framework of national [welfare] standards or incentives that would insulate the disadvantaged poor from the tyranny of the advantaged majority"); see also Baker, *Conditional Federal Spending*, *supra* note 6, at 1951-52 n.186 (discussing "race-to-the-bottom").

65. The costs imposed by such disuniformities are among the arguments frequently made in favor of federal tort reform. See, e.g., Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 924-32 (1996).

the national political process to distinguish accurately between the two types.⁶⁶

B. *Why Wechsler's and Kramer's Vertical Safeguards Are Ineffective
Horizontal Safeguards*

Even if Wechsler's and Kramer's proposed safeguards were shown to provide adequate and effective protection against vertical aggrandizement, there is no reason to think that those safeguards will provide similar protection against horizontal aggrandizement. As I explained at length elsewhere, the aspects of the federal structure that Wechsler contends guard against *vertical* aggrandizement—particularly the state-based allocation of representation in both Congress and the Electoral College—are in fact instruments of *horizontal* impositions.⁶⁷ It is precisely because Congress and the President are responsive, at least some of the time, to interests concentrated at the state level that a majority of states is able to harness the federal lawmaking power to impose its policy preferences on the remaining states. The state-based allocation of representation in the federal lawmaking process facilitates congressional responsiveness to state-based interests and preferences, and the majoritarian nature of that process permits a simple majority of states to impose its will on the minority.

Ironically, it is the Senate, so celebrated by Wechsler as a vertical safeguard,⁶⁸ that presents the greatest horizontal threat to state autonomy. Because the Senate affords small population states disproportionately great representation relative to their shares of the nation's population, it ensures small population states a disproportionately large slice, and large population states a disproportionately small slice, of the federal fiscal and regulatory "pie."⁶⁹ This systematic wealth redistribution obviously infringes on the autonomy of the states that are burdened by, rather than beneficiaries of, this redistribution. In the absence of such redistribution, the burdened states would effectively have greater resources and, therefore, greater freedom of choice.⁷⁰ Interestingly, Wechsler himself seems to concede that the Senate *cannot* protect the states against horizontal im-

66. Current constitutional law is most cognizant of horizontal tensions among the states in the area of dormant Commerce Clause doctrine. *See, e.g.*, *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) ("In its negative aspect, the Commerce Clause 'prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'") (quoting *Associated Indus. v. Lohman*, 511 U.S. 641, 647 (1994)). That doctrinal area, of course, is characterized by particularly aggressive judicial review.

67. *See Baker, Conditional Federal Spending, supra* note 6, at 1939-47; *Baker & Dinkin, supra* note 6, at 21-24; *Baker, Spending Power, supra* note 6, at 199-221.

68. *See Wechsler, supra* note 2, at 548 (observing that "the Senate cannot fail to function as the guardian of state interests as such," and that "the composition of the Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control").

69. *See Baker, Spending Power, supra* note 6, at 199-211; *Baker & Dinkin, supra* note 6, at 24-42.

70. *See Baker, Spending Power, supra* note 6, at 199.

positions when he observes that “the composition of the Senate is intrinsically calculated to prevent intrusion from the center on subjects that *dominant state interests* wish preserved for state control.”⁷¹

An examination of the primary vertical safeguards Kramer identifies⁷²—the political parties—reveals that they fare no better than Wechsler’s candidates as bulwarks against horizontal aggrandizement. Under Kramer’s view, the modern political party “link[s] the fortunes of officeholders at different levels” of government, fostering “a mutual dependency that induce[s] federal lawmakers to defer to the desires of state officials and state parties.”⁷³ Although parties may therefore (sometimes) serve as effective vertical safeguards by “guarantee[ing] state officials an influential voice in the [federal] lawmaking and budgetary processes,”⁷⁴ this seems likely to facilitate, rather than deter, the use of the federal lawmaking process by some states as a means of imposing their majoritarian policy preferences on the minority.

Kramer’s own description of the modern political party gives potential outlier states little reason to view political parties as safeguards against federal homogenizing legislation. According to Kramer, the parties’ two “critical features” that have shaped their role in American federalism are: (1) the fact that they “are not especially programmatic,” being “more concerned with getting people elected than with getting them elected for any specific purpose;”⁷⁵ and (2) the fact that they are “basically non-centralized” with their “most conspicuous features [being] flabby organization and slack discipline.”⁷⁶ Taken together, these features suggest that political parties have neither the interest nor the ability to protect a minority state in Congress against majoritarian encroachments on its sovereignty.

Kramer contends that what the parties “stand for is broad enough and flexible enough to leave room for enormous disagreement,”⁷⁷ which might seem to suggest that minority preferences would find some measure of tolerance within any particular party. Kramer goes on to note, however, that “when ideology conflicts with electoral success, it is usually ideology that yields.”⁷⁸ It is precisely this need to win elections that transforms the

71. Wechsler, *supra* note 2, at 548 (emphasis added).

72. Although Kramer acknowledges that “the parties’ effectiveness in safeguarding state government may have been compromised to some degree by twentieth-century developments,” he contends that “these same developments have yielded new ‘political’ safeguards that assure and in some respects may even strengthen the states’ voice in national politics.” Kramer, *supra* note 1, at 283. The primary such safeguard that Kramer identifies is the existence of interlocking state and federal administrative bureaucracies. *Id.* at 283-85. For a brief critique of the effectiveness of this additional, “new” safeguard, see Baker & Young, *supra* note 6, at 117 n.197.

73. Kramer, *supra* note 1, at 278; Kramer, *supra* note 41, at 1523.

74. Kramer, *supra* note 1, at 284.

75. Kramer, *supra* note 1, at 278-79; Kramer, *supra* note 41, at 1524.

76. Kramer, *supra* note 1, at 279; Kramer, *supra* note 41, at 1527.

77. Kramer, *supra* note 1, at 279; Kramer, *supra* note 41, at 1526.

78. Kramer, *supra* note 1, at 279; Kramer, *supra* note 41, at 1526.

major political parties from “big tents,” in which the proverbial “thousand flowers” may peacefully co-exist (if not necessarily bloom),⁷⁹ into homogenizing institutions whose goal is “[u]niting diverse and sometimes latently antagonistic population subgroups into a single and successful voting coalition.”⁸⁰

It is possible, of course, that a particular minority viewpoint may receive *some* consideration and deference within a political party as the party undertakes the process of “subgroup integration and coalition management” prior to a national election.⁸¹ Indeed, as a faction within a party, persons espousing a minority viewpoint may even *sometimes* receive more nationwide acknowledgement of, and support for, that position than they would in the absence of the political party. But acknowledgement and peaceful coexistence within a party are not the same as the willingness of party members in Congress to oppose legislation that the minority faction alone opposes; nor are they the same as the willingness of a majority of Congress to forego enacting such legislation in the face of support for its passage by an overwhelming majority of their constituents.

Perhaps the best, if still unpersuasive, argument in favor of political parties as safeguards against horizontal aggrandizement is one that Kramer failed to make: the argument from party competition. The fact that interest groups with minority preferences and viewpoints have *two* major political parties to choose from arguably gives them more leverage—and therefore potentially more protection against federal homogenizing legislation—than if there were only one major party. Alas, *more* leverage is not the same as *meaningful* leverage. Even the competition that exists between the two major parties is unlikely often to mitigate significantly the homogenizing force exerted by each of the parties.

In his classic 1929 article on “stability in competition,” Harold Hotelling taught us that if a town has two competing grocery stores, they typically will not be located at opposite ends of the town.⁸² Rather, one will find both stores located, whether side by side or across the street from one another, in the middle of Main Street.⁸³ Hotelling observed that one

79. Kramer, *supra* note 41, at 1524-25 (quoting Clinton Rossiter’s description of Democratic and Republican parties as “vast, gaudy, friendly umbrellas under which all Americans, whoever and wherever and however-minded they may be, are invited to stand for the sake of being counted in the next election”) (citing CLINTON ROSSITER, *PARTIES AND POLITICS IN AMERICA* 11 (1960)).

80. Kramer, *supra* note 41, at 1524.

81. *Id.*

82. Harold Hotelling, *Stability in Competition*, 39 *ECON. J.* 41, 51-52 (1929).

83. *Id.* Hotelling adds that:

If a third seller C appears, his desire for as large a market as possible will prompt him likewise to take up a position close to A or B. . . . As more and more sellers of the same commodity arise, the tendency is not to become distributed in the socially optimum manner but to cluster unduly.

Id. at 53.

could substitute many other qualities for “location” or “distance” as used in his example and arrive at the broader conclusion that “competing sellers tend to become too much alike.”⁸⁴ He contended that this tendency was apparent in “the most diverse fields of competitive activity” and was “strikingly exemplified” in politics:⁸⁵

The competition for votes between the Republican and Democratic parties does not lead to a clear drawing of issues, an adoption of two strongly contrasted positions between which the voter may choose. Instead, each party strives to make its platform as much like the other’s as possible. Any radical departure would lose many votes, even though it might lead to stronger commendation of the party by some who would vote for it anyhow. Each candidate “pussyfoots,” replies ambiguously to questions, refuses to take a definite stand in any controversy for fear of losing votes. Real differences, if they ever exist, fade gradually with time though the issues may be as important as ever. The Democratic party, once opposed to protective tariffs, moves gradually to a position almost, but not quite, identical with that of the Republicans. It need have no fear of fanatical free-traders, since they will still prefer it to the Republican party, and its advocacy of a continued high tariff will bring it the money and votes of some intermediate groups.⁸⁶

Hotelling’s intellectual heirs built upon these insights in crafting the “median voter” thesis, which contends that the major political parties in a two-party system will both compete for voters in the middle of the distribution of voter preferences.⁸⁷ In the course of this competition, the parties

84. *Id.* at 53-54. Hotelling explains that:

When a new merchant or manufacturer sets up shop he must not produce something exactly like what is already on the market or he will risk a price war. . . . But there is an incentive to make the new product very much like the old, applying some slight change which will seem an improvement to as many buyers as possible without every going far in this direction. . . . [T]he tendency [is] to make only slight deviations in order to have for the new commodity as many buyers of the old as possible, to get, so to speak, *between* one’s competitors and a mass of customers.

Id. at 54.

85. *Id.*

86. *Id.* at 54-55.

87. In 1957, Anthony Downs presented the pioneering application and elaboration of Hotelling’s insights for political parties. See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 114-41 (1957). Building upon Hotelling’s model, Downs “confirm[ed] Hotelling’s conclusion that the parties in a two-party system converge ideologically upon the center, and Smithies’ addendum that fear of losing extremist voters keeps them from becoming identical.” *Id.* at 140.

Perhaps the most significant addition Downs made to the Hotelling-Smithies model was to examine the effects on party behavior of various distributions of voters’ preferences. See *id.* at 117-22. In particular, Downs demonstrated that a normal distribution of voter preferences (along a scale from 0-100 with a mean of 50)

will each move toward the middle of the preference distribution, converging on the same location until the vast majority of voters, on the vast majority of issues, are largely indifferent between the two parties.

Of course, there still will be differences between the parties, with one being more generally attractive to individuals to the “right” of center and the other being more generally attractive to individuals on the “left.”⁸⁸ But the core prediction of Hotelling and his intellectual heirs stands uncontroverted by observed reality or subsequent theoretical critique.⁸⁹

was a significant pre-condition for the convergence of the parties in a two-party system. *See id.* at 117-18. Given a normal distribution of voters’ preferences, the parties “will converge rapidly upon the center. The possible loss of extremists will not deter their movement toward each other because there are so few voters to be lost at the margins compared with the number to be gained in the middle.” *Id.* at 118. If, instead, “voters’ preferences are distributed so that voters are massed bimodally near the extremes, the parties will remain poles apart in ideology.” *Id.* Were the parties to move toward the center given this bimodal distribution of voters’ preferences, “they would lose far more voters at the extremes than they could possibly gain in the center.” *Id.*

Morris Fiorina has argued, however, that the “precise statement of the median voter theorem is that if everyone votes and votes sincerely, and voters have single-peaked preferences, then the ideal point of the median voter defeats any other position in a pairwise vote.” Morris P. Fiorina, *Whatever Happened to the Median Voter?* 12 (Oct. 2, 1999) (unpublished paper prepared for the MIT Conference on Parties and Congress, Cambridge, MA) (on file with author) (citing DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS*, ch. 4 (1963)). Fiorina adds, contrary to Downs, that the median voter theorem “holds irrespective of the shape of the distribution of voter preferences,” and therefore “the shape of the voter distribution in itself will not support divergent candidate positions.” *Id.* (footnote omitted). For an interesting discussion of the evolution of both the median voter thesis and Downs’ early model explaining “the apparent centripetal tendency of two-party competition,” *see id.*

88. For an early, formal explanation for this phenomenon, see Arthur Smithies, *Optimum Location in Spatial Competition*, 49 J. POL. ECON. 423 (1941).

89. Since 1957, there has been much empirical and theoretical work “extending and complicating the Downsian spatial model in ways that permit opposing candidates to take distinct positions away from the center of gravity of the voter distribution.” Fiorina, *supra* note 87, at 2; *see also* JOHN ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 182-86 (1995) (criticizing Downsian model); DENNIS C. MUELLER, *PUBLIC CHOICE II: A REVISED EDITION OF PUBLIC CHOICE* 180-93 (1989) (summarizing work relaxing various assumptions of Downsian model); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 303-04 (2001) (contending that “there is a curious competitiveness to the electoral process, even with only two major parties, so long as incumbents remain accountable to the pressures away from the center coming from within their party and to pressures toward the center coming from without”).

It is noteworthy, however, that even critics of the Downsian model concede that in the middle decades of the twentieth century “[o]n most issues, most of the time, the two major party candidates would take middle-of-the-road positions,” and that even today “[c]learly, centripetal forces continue to operate in American politics, especially at the presidential level.” Fiorina, *supra* note 87, at 2, 4.

Moreover, empirical studies of congressional voting finding that party affiliation does sometimes matter do not necessarily suggest that one must be skeptical of models predicting convergence of parties’ platforms. For example, one major, recent study found “significant party effects for only about 4 in 10 roll call votes in

there will be more similarities than differences between the two parties, and the differences often will not be great. This point was trenchantly made during the last presidential race by one commentator who described the first televised debate as follows:

At a cultural moment when many voters are forced constantly to make that hard choice between the Gap and Banana Republic, what is more apt than the spectacle of two princely boomers in identical outfits hypothesizing about how to spend a surplus of infinitely elastic trillions that both assume will last indefinitely? Now that . . . focus groups have a clout unmatched by labor unions or the religious right[,] what could be more fitting than a debate in which not a single word is uttered that hasn't been pre-tested more rigorously than a McDonald's breakfast sandwich rollout?⁹⁰

It is noteworthy in this context that Wechsler himself explicitly acknowledged that even in a competitive two-party system there is good reason to expect *both* parties generally to ignore minority interests in favor of the interests and majoritarian preferences of the median voter. He observed with regard to the selection of the President that “[f]ederalist considerations” play “a lesser part than many of the Framers must have contemplated” precisely because of the homogenizing role of the political parties:

The most important element of party competition in this framework is the similarity of the appeal that each [party] must make. This is a constant affront to those who seek purity of ideology in politics; it is the clue, however, to the success of our politics in the elimination of extremists.⁹¹

Thus, if one's concern is the protection, rather than the elimination, of “outlier” or “extremist” states, even Wechsler appears to concede that a competitive two-party system will not provide the states adequate and effective protection against horizontal aggrandizement.

the 103rd, 104th, and 105th Congresses.” Stephen Ansolabehere et al., *The Effects of Party and Preferences on Congressional Roll Call Voting 3* (May 16, 2000) (unpublished manuscript, on file with author). This study further revealed that “[p]arty asserts itself most strongly on questions of budgeting and taxation; it seems to have little influence on matters of conscience, such as abortion, or . . . affirmative action and gun control.” *Id.* It is precisely on those latter non-fiscal issues, of course, where protecting diversity among the states is most important to maximizing aggregate social welfare and, therefore, where horizontal aggrandizement is potentially most costly. To the extent that party membership does not meaningfully predict legislators' votes on such non-fiscal issues, political parties are apparently not reliable bulwarks against horizontal aggrandizement, notwithstanding Kramer's claims that the parties “offer states considerable protection from federal overreaching.” See Kramer, *supra* note 1, at 219.

90. Frank Rich, *The Bland Leading the Bland*, N.Y. TIMES, Oct. 7, 2000, at A15.

91. Wechsler, *supra* note 2, at 557.

The above critique of Wechsler's and Kramer's proposed safeguards is not meant to suggest that the national political process raises no impediment at all to horizontal encroachments on the autonomy of individual states. As Professor Brad Clark recently discussed, the Constitution imposes demanding *procedural* requirements on the creation of federal law.⁹² By requiring "the participation and assent of multiple actors to adopt federal law," the Constitution "creates the equivalent of a supermajority requirement and thus reinforces the burden of inertia against federal action, leaving states greater freedom to govern."⁹³ By making the creation of all federal law difficult, these requirements undoubtedly *somewhat* deter horizontal, as well as vertical, forms of aggrandizement. Under our Constitution, however, the states are entitled to more than this.

IV. CONCLUSION

In the end, the issue is not whether the federal political process taken alone is likely to afford *some* protections for state autonomy. It almost certainly does. The issue rather is whether judicial review is necessary to maintain and reinforce these political safeguards. Although the Constitution provides the various actors in the federal lawmaking process with the power and opportunity to check one another politically, those checks cannot operate most effectively or indefinitely if the basic rules of the system are not respected. And those rules include important substantive principles such as the limited nature of federal legislative power.

Substantive judicial review of federalism issues is necessary both to remind Congress of its own obligation to restrain itself,⁹⁴ and to catch any particularly egregious examples of federal overreaching—vertical or horizontal—that slip through the system's political and procedural checks. In the words of Justice O'Connor, it is imperative that the courts serve as "a

92. See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

93. *Id.* at 1339; see also Ernest A. Young, *Federal Courts: Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1609 (2000) ("[T]he ultimate political safeguard may be the procedural gauntlet that any legislative proposal must run and the concomitant difficulty of overcoming legislative inertia."). These procedures, as Professor Clark points out, also have the effect of channeling decisionmaking to Congress (where the states are represented) and away from federal administrative agencies (where they are not). See Clark, *supra* note 92, at 1339 (noting that "each procedure limits participation to actors—such as the Senate—originally structured to be responsive to state prerogatives").

94. See, e.g., Bednar & Eskridge, *supra* note 33, at 1484 (arguing that *Lopez* "is best read as a remand for Congress to attend to federalism values more explicitly"); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (arguing that Congress is unlikely to respect state autonomy politically if the judiciary tells Congress that its power is unlimited).

prudent umpire, who allows the contestants to play hard between the lines but takes swift and sure action when those lines are crossed."⁹⁵

95. Justice Sandra Day O'Connor, *Altered States: Federalism and Devolution at the "Real" Turn of the Millennium 7* (May 15, 2001) (unpublished manuscript, prepared for University of Cambridge Centre for Public Law, Sir David Williams Lecture Series) (on file with author).

