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NO PRAISE FOR PROCESS FEDERALISM: THE POLITICAL  
SAFEGUARDS MIRAGE AND THE NECESSITY OF SUBSTANTIAL,  
SUBSTANTIVE JUDICIAL REVIEW

TUAN N. SAMAHON\*

I. INTRODUCTION

IN October 2000, the *Villanova Law Review* hosted *New Voices on the New Federalism*, a symposium on the Rehnquist Court's federalism jurisprudence. The "Federalism and Judicial Review" panel, which featured several now-prominent constitutional law scholars, included former Villanova faculty alumnus Professor Ernie Young. His contribution, *Two Cheers for Process Federalism*, offered a qualified defense of "process-based federalism"—the notion that the national legislative political process may adequately safeguard and protect states' interests in our federal system.<sup>1</sup>

On Professor Young's account, *The Federalist Papers* contemplated the national political process as the principal safeguard of "Our Federalism" and did not (explicitly, at least) anticipate judicial policing of the substantive metes and bounds of enumerated congressional powers.<sup>2</sup> For process federalists, a claim that the political process serves as the principal safeguard against federal overreach implies a corollary for judicial enforcement of federalism: our counter-majoritarian Article III judiciary should very substantially defer to legislative judgments about the scope of national

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\* Professor of Law, Villanova University Charles Widger School of Law. I thank Andrew Barris, Robert Hegadorn, Alexander Torres, and Cody Wade for their research assistance, as well as the participants of a Villanova Law faculty workshop for their comments as I wrote this Essay. A version of this Essay was presented during the *Villanova Law Review's* September 18, 2015, Norman J. Shachoy Symposium.

1. See Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1358 (2001).

2. See *id.* at 1353. On this latter point, I doubt the characterization that the *Federalist Papers* offer no "explicit endorsement of judicial enforcement for structural values . . ." See *id.* In *Federalist No. 78*, Hamilton had offered ex post facto legislation and bills of attainder as explicitly endorsed examples of judicially enforceable limitations on enumerated legislative power. Both prohibitions appear in Section Nine of Article I and qualify the scope of powers granted in Section Eight of Article I. Hamilton reminded his readers that "[i]mitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the [C]onstitution void." THE FEDERALIST NO. 78, at 403 (Alexander Hamilton) (George W. Carey & James McClellan eds., Gideon ed. 2001). Thus, a claim that no judicial enforcement of the scope of national powers was explicitly contemplated would slice the historical evidentiary record too finely in light of Hamilton's plain intention to allow judicial policing of powers prohibited to Congress. Hamilton hardly cabined the scope of that judicial enforcement when, discussing judicial review, he categorically declared that "[n]o legislative act therefore contrary to the [C]onstitution can be valid." See *id.*

power. The procedural requirements of the national lawmaking process, like nondelegation, bicameralism, and presentment are appropriately judicially enforced. Judges may even properly require Congress to comply with judicially fashioned rules about *how* it achieves ends otherwise unquestionably within its power. “Legislate with clear statements.” Or “don’t commandeer state executives or legislatures; regulate individuals directly and do your own dirty work.” In short, assign blame and credit transparently. These procedural rules, calculated to maintain an efficient national political marketplace, cabin Congress less intrusively than a system that substantively places certain areas categorically off limits.

Professor Young’s defense of process federalism is nuanced and qualified because it recognizes the necessity of *some* substantive backstop to state power and avoids the extreme approach of abandoning judicial review altogether; “process federalism cannot be wholly indifferent to substance.”<sup>3</sup> The “vitality of political and institutional checks ultimately depends on the enforcement of certain substantive constraints on federal power.”<sup>4</sup> If the states substantially lose their capacity to deliver public goods, services, and regulations to the people located within their borders, then they will no longer be capable of competing with the federal government for the people’s “sentiments and sanction,” or popular loyalty.<sup>5</sup> In that case, the process-based approach to enforcing federalism would collapse. Thus, Young offers only “two cheers, not three” for process-based federalism that does not provide *some* judicially enforceable substantive backstop to legislative action.<sup>6</sup>

Unlike Young, I am far less sanguine about process federalism’s utility. Indeed, I offer no praise for process federalism, at least if it is understood as a substitute for robust, substantive, and substantial judicial review. Political safeguards surely were intended as the primary braking method for checking national governmental overreach. But judicial review of federalism—originally relied upon as only an emergency brake—necessarily assumes far greater significance as a braking mechanism since the Seventeenth Amendment and formal elimination of the key political safeguard of federalism—senatorial election by state legislatures. Without the key safeguard of state *institutional* representation, talk about “representation of the States” in the national political process amounts to nothing more than a mirage, an illusion that is not so.<sup>7</sup> Neither does the anecdotal basis for

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3. Young, *supra* note 1, at 1373 (internal quotation marks omitted).

4. *Id.* at 1368.

5. *See id.* at 1356 (quoting THE FEDERALIST NO. 46, at 316 (James Madison) (J.E. Cooke ed., 1977)).

6. *See id.* at 1373.

7. My critique of process federalism differs from that of Professors Prakash and Yoo and their (somewhat) sanguine assessment that “[t]he Senate clearly can represent state interests,” a view that while once true, is no longer tenable with direct election of U.S. Senators. *See* Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1471 (2001). Not only is it likely that U.S. Senators view state officials as competitors rather than

virtual, state institutional representation survive close inspection. Instead, failure in the political marketplace for popular loyalty—due to non-transparency, political ignorance, and the inefficiency of the modern senatorial ballot box—assures that the political process can now almost never safeguard federalism adequately.

## II. YOUNG’S PROCESS-FEDERALISM THEORY

The proper academic starting point for discussing Young’s contribution to process federalism is Herbert Wechsler’s seminal 1954 paper, *The Political Safeguards of Federalism*, which emphasized the congressional role in maintaining federalism. Wechsler claimed that “[t]he actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority.”<sup>8</sup> In particular, he emphasized the states’ “crucial rôle in the selection and the composition of the national authority.”<sup>9</sup> The selection and composition of national authority extend to equality of state representation in the Senate as well as allocation of House Representatives to the states by population. After all, these legislators are elected to represent “*the people of the states*.”<sup>10</sup> Similarly, the Electoral College represents the states’ interests in electing the President. All of this, he postulates, turns the states into “the strategic yardsticks for the measurement of interest and opinion” and makes them “the separate geographical determinants of national as well as local politics.”<sup>11</sup> Thus, Wechsler insists that Madison’s analysis—that the state governments remain constituent parts of the federal government—“has never lost its thrust,” notwithstanding the formal disenfranchisement of state governments from the national political process that came with the move to direct Senate election.<sup>12</sup>

Lay aside for now Wechsler’s facile analytical elision that the aggregated individual interests of “the people of the states” suffice as a safeguarding substitute for the institutional interests of State legislatures.<sup>13</sup> Whatever the soundness of Wechsler’s view, process federalism became academically and (eventually) judicially influential among the nationalist justices. In *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>14</sup> Justice

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comrades, U.S. Senators are incentivized to represent the interests of constituents living within their state’s boundaries, not the states’ legislatures or the states as states. See Young, *supra* note 1, at 1358.

8. Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954).

9. *Id.* at 546.

10. *See id.*

11. *Id.*

12. *See id.*

13. For a further discussion, see *infra* notes 16–56 and accompanying text.

14. 469 U.S. 528 (1985).

Blackmun, writing for a majority, offered this famous statement of process-based federalism:

[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the “States as States” is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a “sacred province of state autonomy.”<sup>15</sup>

Blackmun, who, like Wechsler, treated federalism as little more than an inconvenient political upstream constraint, applied process federalism nonstringently.

#### A. Professor Young’s Process Federalism

Young, while accepting Blackmun’s *Garcia* formulation, rejects the invocation of process federalism as “just a fig leaf for deference to Congress for the nationalist justices . . . .”<sup>16</sup> Instead, the doctrine should apply with teeth when there are procedural failings in the national political process. Accordingly, Young rejects a dichotomous approach to process federalism, viz., whether or not effectively to reject judicial review and remit all federalism review to the political process.<sup>17</sup> That exclusivist position neglects a broad range of available answers to the judicial review question, i.e., the “how much” and “what type” judicial review questions. For his part, Young accepts “some” judicial review. Like Wechsler and Blackmun, however, Young would rely principally on state political representation in Congress to stay any federal overreach.

Judicial review appropriately plays a significant role when it polices and maintains the system of political and institutional checks relied on to prevent or resolve disagreements about the federal balance of power. “We can go a long way towards assuring state autonomy by policing the federal lawmaking process, even if we are unwilling or unable to enforce substantive limits on federal power.”<sup>18</sup> Taking *Garcia* more seriously than Blackmun, Young would tailor judicial review to “compensate for possible

15. *Id.* at 554 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983)).

16. See Young, *supra* note 1, at 1366.

17. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 175 (Quid Pro Books unabr. reprinted ed. 2013) (1980) (“[W]hether federal action is beyond the authority of the central government . . . should be treated as nonjusticiable, final resolution being relegated to the political branches . . . .”); see also LARRY D. KRAMER, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 290 (2000) (“Active judicial intervention to protect the states from Congress is consistent with neither the original understanding nor with more than two centuries of practice.”).

18. Young, *supra* note 1, at 1364.

failings in the national political process” to “maintain[ ] a vital system of political and institutional checks on federal power, not on policing some absolute sphere of state autonomy.”<sup>19</sup> Thus, on one hand, a process-based federalism ideally directs judicial scrutiny to the Article I, Section Seven procedural requirements of how federal law is made and enforces the accountability of federal actors by ensuring transparent lines of political responsibility and forcing internalization of the costs of regulation. On the other hand, this approach contemplates minimal substantive judicial policing of enumerated powers. Judges properly referee the national political process by enforcing its procedural rules, but appropriately defer as to the substantive distribution of national–state power embodied in congressional enactments.

B. *Popular Loyalty: The “Sentiments and Sanction” of the People*

Central to the idea of process federalism is the notion that “We the People” make the substantive policy choices that favor the reallocation of power to either the states or the national government in the national legislative process. Reallocations may occur when Congress asserts authority to regulate new areas traditionally left to the states. Alternatively, authority and thereby power may devolve to the states by virtue of national legislative inaction that leaves particular subject matter areas to the states. Or Congress may repeal statutes that had granted regulatory authority to the national government. Madison referred to the preference for either a state or the national government tackling particular policy problems as “the sentiments and sanction” of the People, or what Young calls “popular loyalty.”<sup>20</sup> Madison assumed as a default that popular loyalty would naturally lie with state government where popular loyalty would also follow from greater popular participation in state government.<sup>21</sup> Ultimately, competition for the people’s popular loyalty determines how much power is allocated between the two levels of government. If this political tug-of-war “to attract and retain the loyalty of the People” is to act as a political safeguard of federalism, “state governments have to maintain the ability to provide beneficial regulation and services in areas that really matter.”<sup>22</sup>

What, however, if states are unable to compete effectively for the people’s affection because Congress (and the courts) have so broadly read federal power as to preempt state authority, leaving little to the states? The state governments must have at least *some* amount of regulatory authority to offer the people. Since the post-1937 Court at least, preserving a sphere for the states has become a growing concern. The states enjoy less and less authority even to compete for popular loyalty. The Court has

19. See *id.* at 1365 (quoting *Garcia*, 469 U.S. at 554); *id.* at 1351.

20. See THE FEDERALIST NO. 46, *supra* note 5, at 243 (James Madison); see also Young, *supra* note 1, at 1356.

21. See Young, *supra* note 1, at 1356.

22. See *id.* at 1369.

broadly interpreted federal constitutional power in the interstate commerce domain. Think *NLRB v. Jones & Laughlin Steel*,<sup>23</sup> *United States v. Darby*,<sup>24</sup> and *Wickard v. Filburn*<sup>25</sup> as well as cases interpreting statutes under that power as broadly preemptive.<sup>26</sup> Eventually, a tipping point comes where the states retain nothing to offer the people. Then, popular loyalty cannot police sufficiently the allocation of state–national power, and the political safeguards approach to federalism falls apart.

For this reason, Young offered only “two cheers, not three,” for “a purely process-based federalism doctrine . . .”<sup>27</sup> The states must retain at least some residuum of authority for the people to have a real choice in the political process. Young recognizes that “any process-based theory of federalism is incomplete without *some* ultimate substantive limit on federal power.”<sup>28</sup> This limit is “necessary to maintain the vitality of political and institutional safeguards.”<sup>29</sup> And there is the rub. Political safeguards of federalism require some backstopping judicial review so that states are not deprived of the power to win popular loyalty. Young acknowledges that the “vitality of political and institutional checks ultimately depends on the enforcement of certain substantive constraints on federal power.”<sup>30</sup> On rare occasion, this enforcement will assume the form of power federalism, as when the Court policed the outer bounds of commerce clause power in *United States v. Lopez*.<sup>31</sup> This substantive limit, however, is mostly only “a symbolic reminder,” an occasional “safeguard of last resort” motivated by the need for states to be able to compete for the sentiments and sanction of the people.<sup>32</sup> By and large, though, judicial review “should be directed toward maintaining a vital system of political and institutional checks on federal power, not on policing some absolute sphere of state autonomy.”<sup>33</sup>

Alternatively, Young proposes that the judiciary may most effectively—and perhaps more minimally—cabin expansive federal power by trimming overly broad interpretations of preemptive federal legislation. For defenders of state regulatory prerogative, Young says that the “central issue ought to be the preemption of state law and its displacement by fed-

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23. 301 U.S. 1 (1937).

24. 312 U.S. 100 (1941).

25. 317 U.S. 111 (1942).

26. See generally *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (interpreting Telecommunications Act of 1996 to supplant state and local ratemaking).

27. Young, *supra* note 1, at 1373.

28. *Id.* at 1390 (emphasis added).

29. See *id.* at 1354.

30. See *id.* at 1368.

31. 514 U.S. 549 (1995).

32. See Young, *supra* note 1, at 1374, 1395. For this reason, Young endorses as justifiable limited “power federalism,” by which he means merely policing the outer edges of enumerated congressional substantive powers, such as was done for the interstate Commerce Clause in *United States v. Lopez*. See *id.* at 1374.

33. *Id.* at 1351.

eral regulatory initiatives.”<sup>34</sup> Ironically, the Rehnquist and now Roberts Courts have freely permitted ambiguous federal statutes to preempt state law, neglecting a traditional presumption against preemption. Furthering the irony, the *nationalist* justices often promote state regulatory authority (and thereby their ability to win popular loyalty) by construing federal statutes to preempt less, rather than more, state regulatory authority. Justice Breyer explained this position when he wrote that:

[T]he true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress’ commerce power at its edges, or [in state sovereign immunity], but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.<sup>35</sup>

Many federal statutory cases call on the courts to endorse broad readings of national power. In each, the court may read a statute either for all that it could conceivably mean, i.e., reading a statute as broadly preemptive, or for what, at a minimum, it must mean, i.e., narrowly.

Young views this approach to federal statutes as a form of constitutional review merely in disguise as ordinary statutory interpretation.<sup>36</sup> To be sure, these cases concern not whether Congress has power to legislate and preempt the States but whether it has actually done so.<sup>37</sup> This approach avoids disabling Congress from exercising particular powers, but does establish legislative best practices, for example, that require Congress to speak by “clear statements” when exercising power intended to be broadly preemptive. A clear statement requirement operates as a “resistance norm” against overweening exercises of federal authority by making (theoretically at least) the broad exercise of legislative power more politically costly and transparent as state governments are placed on notice of federal intent.<sup>38</sup> Similarly, the presumption-against-preemption canon assumes a constitutional dimension as it reinforces federalism by presuming a non-preemptive congressional intention.

### C. “Representation Re-enforcement” for Federalism Doctrine

Young envisions a second mode of judicial review, one recognized in *Garcia*, which goes beyond judicial review that operates as a substantive backstop to federal power. This mode of review corrects for market failures in the political process. This approach follows John Hart Ely’s theory of representation re-enforcement. In *Democracy and Distrust*, Ely offered a limited scope for judicial review of *individual rights claims* by leaving “value

34. *Id.* at 1377.

35. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting) (citations omitted).

36. *See* Young, *supra* note 1, at 1387.

37. *See id.* at 1383.

38. *See id.* at 1389.



determinations” to elected representatives.<sup>39</sup> Congressional enactments must be subordinated to the clear commands of constitutional text, but the “open-textured” provisions of the Due Process and Equal Protection Clauses, among others, are fairly subject to competing judicial and congressional interpretation.<sup>40</sup> The Constitution itself dictates few substantive policy choices and concerns itself principally with the procedure by which laws are made, i.e., the law governing the making of laws.<sup>41</sup> Further, the democratic process entitles congressional majorities to secure their policy preferences through legislation. Accordingly, only defects in the legislative process appropriately justify counter-majoritarian judicial review of legislative outputs.<sup>42</sup>

Ely had identified two basic majoritarian “malfunctions” in the legislative process that justify judicial review. First, incumbent representatives and their constituent interests, or “the ins” may “chok[e] off the channels of political change to ensure that they will stay in and the outs will stay out . . . .”<sup>43</sup> Attempts by transient majorities at political self-entrenchment block future democratic majorities. Therefore, judicial review to protect unentrenched operation of the political process favors democracy rather than undermines it. Second, absent de jure denial of political participation to “the outs,” majority representatives “systematically disadvantage[s] some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest . . . .”<sup>44</sup> This systematic disadvantage “thereby den[ies] that minority the protection afforded other groups by a representative system.”<sup>45</sup> This democracy malfunction echoes the classic *Carolene Products* Footnote 4 formulation of “prejudice against discrete and insular minorities,” a minority made “discrete” and “insular” by the majority’s hostility, or at least by a lack of virtual representation inspired by alienating, irrational preconception.<sup>46</sup> A procedurally untrustworthy political process cannot be treated as self-policing and justifies judicial review.

Young conceptualizes his approach to process-based federalism as an adaptation of Ely’s theory, “a *Democracy and Distrust* for federalism doctrine—that is, a doctrine of judicial review constructed to protect the self-enforcing nature of the federalist system.”<sup>47</sup> As with Ely, the implication of this form of review calls for “courts to defer to the political process in the vast majority of cases.”<sup>48</sup> The existence of these checks justifies judi-

39. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980).

40. See *id.* at 11, 13, 14–21, 30–32.

41. See *id.* at 92.

42. See *id.* at 103.

43. *Id.*

44. See *id.*

45. See *id.*

46. See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

47. See Young, *supra* note 1, at 1395; see also *id.* at 1354, 1358, 1364, 1390, 1395 (referencing Ely’s theory).

48. See *id.* at 1354.

cial deference to Congress on the scope of national power and the appropriate balance of national–state power.

Similar to Ely, however, Young identifies a class of majoritarian malfunctions in the political marketplace that justify muscular judicial review. For example, federal commandeering of state government allows Congress to pass the buck on to the states for the political and financial costs of federal policy choices.<sup>49</sup> Also, Congress escapes scrutiny and minimizes blame for state governmental liabilities by abrogating state sovereign immunity with ambiguous legislative statements.<sup>50</sup> Similarly, Congress claims credit and avoids blame for tough and potentially unpopular policy choices when it delegates lawmaking authority to federal agencies, or, alternatively, when it enables federal common lawmaking activity through open-ended enactment.<sup>51</sup> These malfunctions exhibit a common failing as a class: Congress did not politically “own” its policy choices or otherwise make these decisions itself. To be entitled to judicial deference, “important governmental decisions actually have to be made through channels in which the states are represented. In other words, *Congress . . .*”<sup>52</sup>

Thus, provided Congress makes and owns its legislative decisions, a proper political process pedigree justifies deferential judicial review. Judicial deference is owed because, as Young tells us, “the states are represented” in the national political process that determines the people’s popular loyalty.<sup>53</sup> But Madison’s *Federalist No. 46* did not contemplate untempered, direct, and popular participation in both chambers of the national legislature. Instead, Madison wrote in defense of a process where the people’s popular loyalty was canalized through the Senate, a chamber uniquely responsive to the states, where state legislatures were formally and functionally represented.

### III. CHALLENGING YOUNG’S THEORY

As discussed in Part I, the political safeguards of federalism depend vitally on two propositions: (1) that the states are represented in the national political process and (2) that the political process provides a fair opportunity for the states and the national government to compete for the sentiments and sanction of the people. The states, however, are neither actually nor virtually represented in Congress. Young’s theory would benefit from some clarity on how the states are represented, as he acknowledges in several instances the absence of representation. Moreover, the national political process suffers from significant distortions due to non-transparency, political ignorance, and the inefficiencies of the ballot box.

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49. *See id.* at 1361, 1375.

50. *See id.* at 1359, 1374–75.

51. *See id.* at 1359, 1363–64.

52. *See id.* at 1358–59.

53. *See id.* at 1359.

Together these two realities undermine the workability of process federalism and justify vigorous judicial review.

A. *No Representation of the States Post-Seventeenth Amendment*

1. *No Actual Representation*

Professor Young's equivalence of Congress with "channels in which the states are represented" assumes that state institutional interests are meaningfully represented there.<sup>54</sup> In 1788, the newly ratified Constitution safeguarded the co-equal sovereignty of each state by providing that "[t]he Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof*, for six Years; and each Senator shall have one Vote."<sup>55</sup> This superseded provision gave states a distinctive presence at the congressional legislative table. U.S. Senators enjoyed deliberative independence from their states' respective legislatures during their tenures. Their reelections, however, depended upon winning the favor of approximately 120 well-informed state legislators who reliably showed up to vote. Therefore, senators took note when state legislatures through formal "instruction"—a directive not unlike a sovereign's diplomatic *démarche*—assertively directed how "their" U.S. Senators ought to vote on particular federal legislative matters.<sup>56</sup>

Today, however, the proposition that the states are meaningfully represented in the national legislative process is undeniably false. The early twentieth century's progressives campaigned for direct election of U.S. Senators, leading to the Seventeenth Amendment's 1913 ratification.<sup>57</sup> Significantly, that Amendment ousted state legislatures from the election of senators. "The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof*, for six years; and each Senator shall have one vote."<sup>58</sup> The Amendment changed senators' constituents. No longer "chosen by the Legislature thereof," but "elected by the people thereof," U.S. Senators were now accountable to individual state citizens.

This shift in constituencies—from state legislatures to state citizens—had important consequences for senatorial responsiveness to States and concerns about the national-state balance of power. First, without the electoral check, state legislative "instruction" would become merely precatory. Second, the U.S. Senators' new masters—the People themselves—

54. *See id.* at 1358–59.

55. *See* U.S. CONST. art. I, § 3, cl. 1 (emphasis added).

56. *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 Nw. U. L. REV. 500, 524–28 (1997) (discussing historical instruction of U.S. Senators by state legislatures).

57. For a discussion of the campaign for direct election, see generally Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165 (1997) (offering public choice account for Amendment's ratification).

58. U.S. CONST. amend. XVII (emphasis added).

were decidedly less informed than the former constituents, particularly concerning the maintenance of state prerogative against federal intrusion. They also proved far more variable in their turnout for elections. They inherently became far more difficult to organize for purposes of ousting malfeasant incumbents.

Young himself recognizes that federalism political safeguards should focus on protecting states' *institutional interests* rather than merely private interests that happen to be concentrated within particular states.<sup>59</sup> His careful observation contrasts with Wechsler's equivocation between the people of the states, i.e., representation of people grouped in the states, and representation of states as state institutions. Indeed, Wechsler had obstinately insisted that "the shift to popular election of the Senate" changed nothing from Madison's original analysis.<sup>60</sup> His *ipse dixit*, however, committed "the mistake of equating state representation with the protection of state sovereignty."<sup>61</sup> Other opponents of robust judicial enforcement of federalism, however, have more candidly observed the Seventeenth Amendment's effects on the political safeguards of federalism. For example, nationalist Justice David Souter noted that the Amendment's effect was to "lessen[ ] the enthusiasm of the Senate to represent the States as discrete sovereignties . . ."<sup>62</sup> Souter also commented that relatedly "the power of the States has been drawn down by the Seventeenth Amendment."<sup>63</sup> That assessment strikes me as largely correct. The Amendment killed any hope of meaningful process federalism by actual representation.

But did Congress and the states really intend that neither the political process nor the judicial process would meaningfully enforce federalism? A healthy dose of skepticism would question the claim that the states intended to slit their own throats in ratifying the Seventeenth Amendment. Nonetheless, that is what Justice Souter claimed in his dissent in *United States v. Morrison*,<sup>64</sup> when he carelessly asserted that the federalism dimension of the Amendment "was no secret in 1913."<sup>65</sup> He characterized the Amendment as representing some kind of conscious rejection of federalism. The historical record supports no such claim. The Amendment's ratification debate focused on *non-federalism* considerations.<sup>66</sup>

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59. See Young, *supra* note 1, at 1357–58.

60. See Wechsler, *supra* note 8, at 546.

61. See Prakash & Yoo, *supra* note 7, at 1478.

62. *United States v. Morrison*, 529 U.S. 598, 652 (2000) (Souter, J., dissenting).

63. *Id.* at 650.

64. 529 U.S. 598 (2000).

65. See *id.* at 650.

66. Four principal issues animated the push for direct Senate election: state legislative deadlock over election of senators, charges of bribery and corruption in the state legislative election of senators, the populist movement against the Senate as an unresponsive "millionaires club," and "progressivism's belief in the redemptive powers of direct democracy." See Ralph A. Rossum, *The Irony of Constitutional*

Moreover, contrary to Souter's suggestion, the Amendment's federalism consequences figured vanishingly little in the ratification debate. Professor Ralph Rossum, the expert on the Amendment whose same article Souter had cited in support of his *Morrison* dissent, concluded that "[w]hat is particularly noteworthy of the lengthy debate over the adoption and ratification of the Seventeenth Amendment is *the absence of any serious or systematic consideration of its potential impact on federalism.*"<sup>67</sup> In fact, Rossum noted that "[a]lmost no one (not even among the opposition) paused to weigh the consequences of the Amendment on federalism."<sup>68</sup> Amendment opponent Senator Elihu Root (R-NY) alone raised a federalism objection to the proposal that became the Seventeenth Amendment.<sup>69</sup> That Amendment, then, with its very weighty federalism consequences and yet hardly with any word about federalism during its ratification debate, proved something of a thief in the night stealing away from federalism.

In light of the states' formal elimination from the political safeguards, should the Amendment be treated as mandating or counseling less vigorous *judicial* enforcement of federalism? In a word, "no." Young, himself a former Souter law clerk, noted that Souter's reading of the meaning of the Seventeenth Amendment proposed a "radical" hermeneutic for constitutional amendments—"that we ought to change the way we read other provisions of the Constitution, such as the Commerce Clause, based on collateral effects of constitutional amendments designed to achieve a wholly different purpose."<sup>70</sup> One can candidly acknowledge the devastating effect that the Seventeenth Amendment had on federalism's political enforcement without any necessary implication for *judicial enforcement* of federalism. In reality, in response to the elimination of the political safe-

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*Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 706–08 (1999) (internal quotation marks omitted).

67. *Id.* at 711 (emphasis added).

68. *Id.* at 712. The three historical data points that Souter suggestively cites as representative of "public comment" are particularly telling when considered closely. Apparently they are the *only* comments made on direct election's federalism impacts, and two were not even in response to the Seventeenth Amendment. The opposition remark by House Representative Franklin Bartlett (D-NY), whom Souter cited, was made two decades before the ratification of the Seventeenth Amendment. See *Morrison*, 529 U.S. at 650–51 (citing 26 CONG. REC. 7774 (1894)). Bartlett's opposition concerned a prior direct election proposal, which was soundly defeated. Bartlett passed away before the 1912 proposal that was eventually ratified, so perhaps, had he lived, he might have been vocal in opposing it too and reminding the later Congress of the federalism issue he alone had raised. Similarly, Senator George Hoar (R-MA) defended indirect election as "a great security for the rights of the States" against earlier proposals for direct election. See *id.* at 651 (quoting S. DOC. NO. 59-232, at 21 (1906)) (internal quotation marks omitted). Like Bartlett, Senator Hoar raised these arguments in the context of debate over a prior proposed amendment, which was also soundly defeated. The senator left the Senate and passed away eight years before the proposal that would become the Seventeenth Amendment.

69. See *Morrison*, 529 U.S. at 651 (citing 46 CONG. REC. 2243 (1911)).

70. See Young, *supra* note 1, at 1355 n.28.

guards, litigants resort more frequently to judicial enforcement compared to a past when robust political safeguards culled overreaching bills before they could become Article III cases-and-controversies.

## 2. *No Virtual Representation*

Despite the absence of any actual representation, Young claims “process arguments can take us a long way toward restoring balance in the federal system” and prescribes that “important governmental decisions actually have to be made *through channels in which the states are represented*.”<sup>71</sup> Why and how process federalism would restore balance in the federal system without formal state representation implies that Young might contemplate states as effectively represented, even if *not* actually represented. Barring actual representation, Ely’s *Democracy and Distrust* suggests a possible avenue for the states’ political vindication, i.e., “the protective device of guaranteeing ‘virtual representation’ by tying the interests of those without political power to the interests of those with it,” that is “by constitutionally tying the fate of outsiders to the fate of those possessing political power . . . .”<sup>72</sup> In the federalism context, virtual representation suggests state governmental “outsiders” find representation in the national political process by those “possessing political power.”

One theory of virtual representation might conceptualize the states as participating in the national political franchise through state governmental associations that petition Congress. For example, the National Conference of State Legislatures (NCSL), the National Governors Association (NGA), the National Center for State Courts (NCSC), and the National League of Cities (NLC) all supplicate Congress to remember the states’ sovereign prerogatives when legislating. Of course, these associations cast no votes; they simply lobby those who do vote. Moreover, their considerable advocacy efforts amount to mere drops in a sea of interest-group activity. Competitor interests that favor centralized power may represent very powerful political tides that, at least on particular issues, amount to tidal waves crashing against state governmental interests. This form of virtual “representation,” which constitutes nothing more than interest group participation, amounts neither to systematic attention nor to truly virtual representation.

A more fundamental reason, political self-interest, explains why members of Congress will fail to represent the political “outsiders” virtually, whether petitioned by governmental associations or directly by the states themselves, collectively or individually. As Young observes, federal and state legislators are more likely to view each other as political competitors or rivals than as collaborators, and popular representatives’ self-interest in reelection means that Congress will “favor central intervention,” not State

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71. *See id.* at 1358–59 (emphasis added).

72. ELY, *supra* note 39, at 83.

regulatory prerogatives.<sup>73</sup> Members of Congress want voting constituents to view them as addressing their interests “whether centralized attention to the issue is required or authorized.”<sup>74</sup> That political reality explains well why Article I, Section 3 had originally subordinated U.S. Senators to state legislative election.

### 3. *Anecdotal Evidence of the Political Safeguards?*

If neither actual nor virtual state representation exists in Congress, then we would not expect to see evidence of Congress protecting state institutional interests—at least not when at odds with the national government’s interest. But Young, once more positing state representation in Congress, finds “[a]t least some anecdotal evidence [ ] that the states’ representation in Congress protects state institutional interests some of the time . . . .”<sup>75</sup> As his anecdote, he points to the passage in 1995 of the Unfunded Mandates Reform Act (UMRA). Surely, UMRA—legislation addressing state grievances over federal obligations without corresponding federal funds to pay for the new duties—constitutes proof that States can adequately safeguard their interests in the national legislative process. Justice Stevens cited UMRA for that proposition in his *Printz v. United States* dissent.<sup>76</sup> If the UMRA anecdote withstands scrutiny, then we would need to reconsider the possibility that states *are* somehow virtually represented in Congress.

Taxpayer savings, however, is a far more straightforward explanation for UMRA’s enactment than the counterintuitive explanation of “state representation in Congress.” Unfunded federal mandates burden state and local governments, but, more importantly, they also saddle state and local *taxpayers*. They must pick up the tab for the unfunded mandates, the costs of which state and local governments pass along to the taxpayers in the form of tax increases. Here, individual taxpayers’ financial interests align with states’ institutional interests in remaining free from the federal impositions. The purse, however, does not invariably marry taxpayers’ interests with the interests of the states. Taxpayers may equally oppose, rather than support, states’ institutional interests because of their pocket-books. Consider the scenario where states may duplicate federal regulatory programs. If the state functions were eliminated and enforcement transferred to the central government, then state taxpayers would save money, particularly if federal regulators enjoyed economies of scale, such that federal tax increases did not simply offset decreases in state taxes. State taxpayers’ burdens would be lessened, even if at the cost of state

73. See Young, *supra* note 1, at 1358 n.43 (citing Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1357 (1997); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1510–11 (1994)).

74. *Id.* (quoting Gillette, *supra* note 73, at 1357) (internal quotation marks omitted).

75. See Young, *supra* note 1, at 1358.

76. 521 U.S. 898, 939–70 (1997) (Stevens, J., dissenting).

regulatory autonomy. Another scenario could involve the federal government preempting costly and more onerous state-level regulation. Deregulatory federal preemption might cost regulated state taxpayers less, but would curb state regulatory autonomy.

Moreover, UMRA is too exceptional in its origins and too shallow in its accomplishments to bear the anecdotal weight placed on it as an exemplar of workable process federalism. To begin, UMRA was not the product of an ordinary legislative process. The Republican Party's 1994 campaign cycle featured the "Contract with America," which had promised an anti-tax and fiscal responsibility agenda and proposed substantial reform of unfunded mandates. The midterm elections resulted in a 1994 Republican landslide and the seating of the first Republican House majority in forty years. UMRA, the first bill enacted during that 104th Congress, represented the new majority's effort to deliver on the symbolic "Contract" and to attempt to do so within the first 100 days of the new Congress.

Further, UMRA is more bark than bite. Although UMRA enjoyed broad bipartisan support, it came at a significant cost. First, UMRA accomplished far less than the soaring campaign rhetoric promised. By its terms, the Act applied to only a very narrow definition of federal "mandates"; required only that the Congressional Budget Office "inform" Congress of the costs of what it was doing when issuing mandates; and grandfathered substantial categories of mandates as exceptions to UMRA's narrow scope.<sup>77</sup> Thus, Congress watered down the law from its categorical "no money, no mandate" billing to merely a law that occasionally required supplemental factual findings and satisfaction of procedural hurdles before legislating mandates. Second, UMRA, for as little as it accomplished, represented the culmination of years of lobbying efforts by the governmental associations that represent state and local governments. UMRA was too little, too late, at too great a cost.

#### B. *The Malfunction in the Political Marketplace for Popular Loyalty*

Proper functioning of the political safeguards of federalism requires that the political market for popular loyalty functions efficiently by getting information to market participants. We the People, the political marketplace participants, require correct information so we can intelligently allocate power between the states and the national government according to their popular loyalty preferences. However, non-transparency, political ignorance, apathy, and the ballot box's inefficiencies all make it unlikely that any output from the political process can be trusted as representing a deliberative process.

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77. See generally ROBERT JAY DILGER & RICHARD S. BETH, CONG. RESEARCH SERV., R40957, UNFUNDED MANDATES REFORM ACT: HISTORY, IMPACT, AND ISSUES (2015), available at <https://www.fas.org/sgp/crs/misc/R40957.pdf> [<https://perma.cc/2NHW-DEGP>].



1. *Non-Transparency*

Young recognizes that the people “must have adequate information about the interaction of federal and state governments” for the political safeguards to operate and allow the people’s sentiments and sanction to “bring popular pressure to bear when appropriate.”<sup>78</sup> This information’s adequacy and availability to the People constitute “transparency.”<sup>79</sup> Transparency about how Congress fulfills its legislative duties obviously would be necessary to the political safeguards (e.g., how legislators vote, the amendments made, the deals struck, etc.). But equally relevant to transparency is how the *executive branch* interprets federal statutes and enumerated powers. The federalism dimensions of legislation may concern less the unadorned, enacted text than the preemptive constructions that federal agencies attempt to press in the name of congressional intent.

Federal transparency law, however, exempts Congress from its scope. The Freedom of Information Act (FOIA), the national government’s open records law, covers only “agency records,” which excludes Congress and the courts of the United States from its definition and also excludes some executive branch departments.<sup>80</sup> As a result, any information obtained from Congress is a matter of legislative grace, not legal right. Ultimately, political safeguards depend on principled transparency at odds with our modern premise of self-interested rational actors. Accordingly, it is unsurprising that Senate anonymous holds, omnibus “Christmas Tree” spending bills with earmarked funds, backroom brokered deals, and interest group dark money remain opaque topics not well illuminated.

Moreover, even where FOIA generally does apply, such as with executive agency records, agencies may invoke statutory exemptions to hide documents from the public’s view.<sup>81</sup> These documents may include information that would reveal national governmental abuses of power, corruption or similarly embarrassing and unflattering information, and wastes of resources.<sup>82</sup> FOIA requesters can shake these records loose, but the government can “slow walk” disclosure through protracted request delays and litigation, blunting disclosures by rendering them untimely, “yesterday’s news.” Recent years have witnessed an unprecedented backlog in FOIA requests. In addition, the White House has increasingly centralized FOIA review to attempt to control the flow of politically sensitive information that might concern the White House, i.e., so-called White House equi-

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78. See Young, *supra* note 1, at 1360.

79. See *id.* Young distinguishes between transparency and “notice.” “Notice” is that information transmitted to governmental actors, “like congressional representatives.” See *id.*

80. See 5 U.S.C. §§ 551(1)(A), 552(f) (2012).

81. See *id.* § 552(b).

82. See, e.g., *Samahon v. FBI*, 40 F. Supp. 3d 498, 502, 526 (E.D. Pa. 2014) (ordering release of FBI records about “abuse of governmental power by senior officials in the federal government”).

ties.<sup>83</sup> In short, executive transparency has proved begrudging at best and increasingly an illusory promise.

## 2. *Political Ignorance, Apathy, and Ballot Box Inefficiency*

Political ignorance helps explain why political safeguards will inevitably fail to protect federalism. The sentiments and sanction of the people are supposed to guide the allocation of power between the states and the national government, but process federalists harbor an ill-placed assumption of a well-informed electorate. Even improvidently assuming transparency, the people may fail to inform themselves. The Seventeenth Amendment granted individual voters both the right and the duty to directly register their sentiments and sanction. Yet individual voters, unlike the former constituency of state legislatures, fail to stay abreast of how their U.S. Senators have voted on legislation and may even be unable to identify the senators. Indeed, it is beyond cavil that the American voter is woefully ignorant of how government operates.<sup>84</sup> Some theorists charitably describe this phenomenon as “rational ignorance” in a center-seeking system.<sup>85</sup> Others explain it less sanguinely as citizen incompetence, apparently resistant to education.<sup>86</sup> Whatever the causes for the ignorance, the Federalists favored indirect Senate election “as a defence to the people

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83. See Memorandum from Gregory Craig, Counsel to the President, to Exec. Dep’t & Agency Gen. Counsels (Apr. 15, 2009), *available at* <http://causeofaction.org/assets/uploads/2013/06/White-House-memo-equities.pdf?92f52c> [<https://perma.cc/24QN-G4WG>] (“[E]xecutive agencies should consult with the White House Counsel’s Office on all document requests that may involve documents with White House equities.”).

84. See, e.g., MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* 62 (1996) (providing various statistics and numerical figures from surveys regarding what Americans know about politics); W. RUSSELL NEUMAN, *THE PARADOX OF MASS POLITICS* 15 (1986) (citing examples of political ignorance in American society such as results from surveys showing Americans know little to nothing about composition of national legislature).

85. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238–59 (1957) (introducing concept of “rational ignorance” as it relates to political and voting ignorance); ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 12–15 (2013) (presenting voter knowledge stats, arguing political ignorance is rational behavior, and proposing solutions such as “limits on the franchise, improved civic education, changes in media coverage of politics, delegation of greater authority to experts, and proposals for requiring citizens to engage in greater deliberation”).

86. See Samuel L. Popkin & Michael A. Dimock, *Political Knowledge and Citizen Competence*, in *CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS* 117, 142 (Stephen L. Elkin & Karol Edward Soltan eds., 1999) (“The dominant feature of non-voting in America is lack of knowledge about government; not distrust of government, lack of interest in politics, lack of media exposure to politics, or feelings of inefficacy.”); see also NORMAN H. NIE, JANE JUNN & KENNETH STEHLIK–BARRY, *EDUCATION AND DEMOCRATIC CITIZENSHIP IN AMERICA* 111–66 (1996) (presenting evidence that increasing education levels over past several decades has not led to higher levels of political knowledge).

against their own temporary errors and delusions.”<sup>87</sup> This indirect election had the benefit of concentrating responsibility for correct decision-making about U.S. Senators and their records on a relatively small group of well-informed and motivated people.

What’s more, individual voters, even some who surely would revolt if stripped of their voting rights, willingly fail to exercise their franchise, thereby effectively surrendering those voting rights. This apathy may be a function of voter opportunity cost or a result of political ignorance combined with an ethos that one should not participate in voting without enjoying some baseline knowledge about candidates and issues. By contrast, state legislators, when they were the voting constituency for the U.S. Senate, dutifully and uniformly voted, whether during midterm or presidential year elections. That stands to reason. Those “voters,” in part, were elected to vote. They also enjoyed partisan and institutional incentive to become and remain informed.

Finally, political accountability for U.S. Senators was greater when state legislatures selected them. Organizing millions of voters to show up and vote to oust malfeasant Senate incumbents is very costly. These transaction costs create collective action problems that problematize political accountability and favor incumbents.

In sum, the political marketplace for popular loyalty operates inefficiently. The market operates without adequate information in a state of obscured transparency. Moreover, even when information becomes available, voters fail to avail themselves of it and are politically ignorant. Finally, relative to the regime of indirect Senate election, direct election struggles to hold incumbents accountable for their decisions. The outcomes of this political marketplace cannot be trusted as representing any sort of considered allocation of power between the states and the national government.

#### IV. CONCLUSION

This Essay can offer no praise for process federalism if understood as a substitute for substantive and substantial judicial review. Judicial review of federalism assumes far greater importance in a world without the key political safeguard of U.S. Senator election by state legislatures to guarantee state *institutional* representation. Claims that state institutions are represented in the national political process, either actually or virtually, are illusory, nothing more than a mirage. Moreover, the modern national political process provides little hope that the political safeguards of federalism could work even if somehow it could be considered to represent the

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87. See THE FEDERALIST NO. 63, at 327 (James Madison) (George W. Carey & James McClellan eds., Gideon ed. 2001).

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States. The system fails to guarantee transparency to the public, making the contest for popular loyalty an uneven one. Moreover, voter political ignorance and the direct election ballot box's inefficiency assure that our national political process will almost never safeguard federalism.