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## Three Faces of Federalism: Finding a Formula for the Future

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# Three Faces of Federalism: Finding a Formula for the Future

*Deborah Jones Merritt\**

I. INTRODUCTION .....	1563
II. THE SEARCH FOR A COHERENT THEORY OF FEDERAL- STATE RELATIONS: THREE MODELS OF FEDERALISM.....	1564
A. <i>The Territorial Model</i> .....	1564
B. <i>The Federal Process Model</i> .....	1566
C. <i>The Autonomy Model</i> .....	1570
III. ASSESSING THE AUTONOMY MODEL.....	1573
A. <i>Value of the Autonomy Model</i> .....	1573
B. <i>The Price of Freedom</i> .....	1576
C. <i>Constitutional Anchors for the Autonomy Model</i> ..	1581
IV. CONCLUSION .....	1584

## I. INTRODUCTION

The relationship between state and federal power has puzzled jurists since the nation began.<sup>1</sup> During the last twenty years alone, the Supreme Court has fashioned three different—and discordant—faces for federalism. After two decades of turmoil, it is time to assess the Court's three models of federalism and to determine whether any of them provides an appropriate principle to guide future federal-state relations. As I will argue below, the Court's first two models of federalism are outdated or incompatible with political reality. The third model, however, holds some promise for adjudicating the future bounds of state and federal power.

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1. See, for example, *New York v. United States*, 112 S. Ct. 2408, 2414 (1992) (observing that a dispute over the bounds of state and federal sovereignty "implicates . . . perhaps our oldest question of constitutional law"); *id.* at 2420 (citing many of the Court's conflicting precedents in this area).

## II. THE SEARCH FOR A COHERENT THEORY OF FEDERAL-STATE RELATIONS: THREE MODELS OF FEDERALISM

### A. *The Territorial Model*

The first, and oldest, of the Supreme Court's concepts of federalism is the territorial model. This model recognizes that there is a discernible boundary between the subjects fit for national regulation and those reserved for state governance. Territorialists argue that the national government is supreme in some areas, while states reign sovereign in others. Adherents of this model, for example, might declare that the national government directs foreign affairs while the states control domestic relations.<sup>2</sup>

Under the territorial model, federalism violations occur when the national government attempts to invade a substantive area of law reserved to the states. The Supreme Court's 1976 decision in *National League of Cities v. Usery*<sup>3</sup> drew heavily on this model, especially as the decision was interpreted by lower courts and commentators. In *Usery*, the Court held that Congress could not regulate the wages and hours of state and local employees working in areas of "traditional governmental functions."<sup>4</sup> This emphasis on traditional functions evoked a territorial concept. State employees working in "traditional" spheres (such as "fire prevention, police protection, sanitation, public health, and parks and recreation")<sup>5</sup> were subject to state regulation while workers in other "nontraditional" fields—such as railroad operation—submitted to national legislation.<sup>6</sup>

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2. For a classic articulation of the territorial model, see Herbert Storing's description of federalism in Herbert J. Storing, ed., 1 *The Complete Anti-Federalist* 24, 32 (U. of Chicago, 1981) (stating: "Within its sphere the general government is a complete national government, but that sphere is limited; and within their own spheres the states act as constitutionally independent entities"). H. Jefferson Powell persuasively argues that this model most closely captures the Framers' understanding of the federal system, which was aided by the Framers' assumption that the national government's power was sufficiently limited to leave clearly demarcated spheres of authority for the states. See H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633, 655-57 (1993).

3. 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

4. *Id.* at 852.

5. *Id.* at 851. The Court provided this partial list of "line and support activities which are well within the area of traditional operations of state and local governments." *Id.* at 851 n.16.

6. In distinguishing several earlier cases, *Usery* observed that operation of an interstate railroad "was not . . . an area that the States have regarded as integral parts of their governmental activities." *Id.* at 854 n.18. Six years later, the Court confirmed this result, allowing

By dividing government functions into state-regulated zones and nationally dominated spheres, *Usery* endorsed a territorial approach and spawned a decade of lawsuits attempting to distinguish “traditional governmental functions” from nontraditional ones.<sup>7</sup>

The territorial model of federalism is problematic because it conflicts with modern concepts of Congress’ power under the Commerce Clause, Spending Clause, and other constitutional provisions. The Supreme Court has interpreted congressional power so broadly under those clauses that virtually no substantive area of law is now beyond the national government’s reach.<sup>8</sup> Education, domestic relations, local transit, health care—all of these areas affect interstate commerce in our modern economy or receive sizable subsidies of federal tax money.

In order to preserve a territorial vision of federalism, therefore, it is necessary to interpret the Tenth Amendment (or some other constitutional provision) as an affirmative limit on congressional

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Congress to regulate the employees of a state-owned railroad engaged in interstate commerce. *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982).

7. On remand from the Supreme Court’s decision in *Usery*, the district court held that the High Court’s decision did not shelter all state and local employees from the provisions of the Fair Labor Standards Act. Instead, the Department of Labor and courts had to make case-by-case determinations of whether particular employees worked within “integral operations of the States [or] their political subdivisions in areas of traditional governmental functions.” *National League of Cities v. Marshall*, 429 F. Supp. 703, 706 (D.D.C. 1977), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Other courts followed the same lead. See, for example, *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1036 (6th Cir. 1979) (stating “the Supreme Court confined the parameters of [its] sovereignty limitation to those public services or activities which involve traditional or integral governmental functions. . . . The meaning of this limitation is the controlling question in the present case”), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); D. 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, 808-10 n.115, 896-97 n.454 (1982) (citing cases adjudicating the distinction between traditional and nontraditional governmental functions). The emphasis in these cases heightened the impression (consistent with a territorial model) that *Usery* reserved dominance to the states in some areas while ceding power to the national government in others.

Scholarly commentary similarly focused on the Court’s distinction between traditional and nontraditional governmental functions. See generally Frank I. Michelman, *States’ Rights and States’ Roles: Permutations of “Sovereignty” in National League of Cities v. Usery*, 86 Yale L. J. 1165 (1977); Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065 (1977). Once again, this perspective enhanced the territorial image of *National League of Cities*.

8. See *New York v. United States*, 112 S. Ct. 2408, 2418-19 (1992) (describing growth of congressional power under the Commerce, Spending, and Necessary and Proper clauses); Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 4.8 at 394 (West, 2d ed. 1992). But see notes 73-77 and accompanying text (discussing recent cases in which lower courts have breathed life into the territorial model by refusing to find congressional power over certain private activities).

power under the Commerce and Spending clauses. The Tenth Amendment must serve as a shield, protecting areas of governance (such as the wages of fire fighters) that otherwise would fall within the Commerce or Spending powers. This is what the Supreme Court attempted to do when it revived the Tenth Amendment in *Usery*.<sup>9</sup>

As the Court ultimately discovered, however, the Tenth Amendment simply is not adequate to that task. The amendment's language is too weak to constitute an impenetrable barrier against national regulation. Instead, the Tenth Amendment seems merely to state a truism, that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>10</sup> Neither the language of the Tenth Amendment nor political theory, moreover, have succeeded in defining a unique circle of "traditional governmental functions" reserved to the states.<sup>11</sup> Without a ready principle to distinguish national fields of regulatory authority from state areas of responsibility, the territorial model of federalism has failed to retain favor.

### B. *The Federal Process Model*

Frustrated with the shortcomings of territorial federalism, the Supreme Court abandoned territorialism in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>12</sup> and adopted its second model, the "federal process" theory of federalism. This theory derives from the work of Herbert Wechsler, Jesse Choper, and others.<sup>13</sup> According to this model, the Constitution's Framers protected the integrity of state governments through the structure of the national government rather than through judicially enforceable limits on the scope of national regulatory power. In particular, advocates of this model maintain that the U.S. Senate protects state interests by guaranteeing equal

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9. "Appellants in no way challenge these decisions establishing the breadth of authority granted Congress under the commerce power. Their contention, on the contrary, is that . . . Congress . . . [has] transgress[ed] an affirmative limitation on the exercise of its power. . . ." *National League of Cities*, 426 U.S. at 841.

10. U.S. Const., Amend. X. The Court first dubbed the Tenth Amendment a "truism" in *United States v. Darby*, 312 U.S. 100, 124 (1941). See also *New York*, 112 S. Ct. at 2417-19.

11. See *Garcia*, 469 U.S. at 538-39, 546-47.

12. 469 U.S. 528 (1985).

13. See generally Jesse H. Choper, *Judicial Review and the National Political Process* 171-259 (U. of Chicago, 1980); La Pierre, 60 Wash. U. L. Q. 779 (cited in note 7); 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). See also *Garcia*, 469 U.S. at 551 n.11 (citing the works of these scholars).

representation to each state.<sup>14</sup> Because the federal legislative process adequately protects state interests, federal process theorists conclude that the states need no further protection from the courts.

In the 1985 *Garcia* decision, the Supreme Court enthusiastically embraced this federal process model. The Court declared: “[W]e are convinced that the 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.”<sup>15</sup> In the years following *Garcia*, lower courts routinely rejected Tenth Amendment challenges to national legislation by holding that state and local interests demanded no judicial protection because they were shielded adequately by the national political process.<sup>16</sup>

Under some circumstances, the federal process model accurately describes the political relationship between state and national governments. State governments have powerful lobbying groups to assert their interests, and national representatives frequently heed those voices. The history of national legislation demonstrates that the states frequently influence the legislative process and that they have achieved exemption from many important national laws.<sup>17</sup>

The cases that come to court, however, are the ones in which state governments have failed to achieve their ends.<sup>18</sup> The question is whether the structure of the national government is sufficiently sensi-

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14. See, for example, *Garcia*, 469 U.S. at 555. The Court listed three other structural guarantees that it believed would protect state interests: (1) the fact that state legislatures originally chose United States senators; (2) the fact that states control electoral qualifications for the House of Representatives; and (3) the fact that state legislatures prescribe the manner of choosing electors for the President and Vice President. *Id.* The Seventeenth Amendment overturned the first of these guarantees in 1913. See note 19 and accompanying text. State legislatures today also refrain from controlling the selection of presidential or vice presidential electors; citizens vote for those electors directly. This procedure, however, is a matter of state law; the Constitution would permit state legislatures to appoint electors themselves. See Retunda and Nowak, *Treatise on Constitutional Law* § 9.12 at 704-05 (cited in note 8).

15. *Garcia*, 469 U.S. at 554.

16. See, for example, *Oklahoma ex rel. Comm’rs of the Land Office v. Crook*, 966 F.2d 539 (10th Cir. 1992); *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991); *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990).

17. See *Garcia*, 469 U.S. at 552-54; Choper, *Judicial Review* at 185-88 (cited in note 13).

18. For examples of legislation in which the political process failed to protect state interests, see Mark V. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law 74* (Harvard U., 1988) (citing the Education for All Handicapped Children Act of 1975, in which Congress imposed significant costs on local school systems); Tom Diemer, *States Take Dim View of D.C.’s Bright Ideas*, Cleveland Plain Dealer 4A (Feb. 6, 1994) (citing a variety of unfunded federal mandates to states); Senator Judd Gregg, Testimony before Senate Committee on Governmental Affairs (Nov. 3, 1993) (citing examples of legislation burdening states and noting that the Senate has not been performing its “historic job” of protecting states).

tive to state interests to leave the important task of policing federal-state relations entirely to Congress, the President, and the administrative agencies.

When measured against this yardstick, the federal process model suffers from several fatal flaws. The most fundamental of these flaws is the model's very assumption that the political process contains safeguards that systematically protect the interests of state governments. The composition of the Senate does not protect the institutional interests of state governments; instead it protects the private interests of *citizens* from less populous states. Farmers from North Dakota have the same voice in the Senate as apartment dwellers from New York; each group has a chance to advance their concerns on the national agenda.

Nothing in the structure of the Senate, however, insures a voice for state governments from either New York or North Dakota. The selection of senators by state legislatures might have had that effect, but the Seventeenth Amendment repealed that mechanism more than eighty years ago.<sup>19</sup> Today, individual senators may care about the autonomy of state government, but they are just as likely to care about the environment, welfare reform, health care, mass transit, or farm subsidies. Many senators have no experience in state government, and their reliance on state political machines for reelection is declining.<sup>20</sup> Under these circumstances, there is no formal or informal structural guarantee that senators (or anybody else) will represent the interests of state governments in Washington.<sup>21</sup>

More important, even if senators and other national officials maintain some loyalty to the institutional interests of state governments, that commitment is only one of several competing interests in

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19. The Seventeenth Amendment, providing for the direct election of senators, took effect in 1913.

20. See Frank Codispoti, *The Governorship-Senate Connection: A Step in the Structure of Opportunities Grows Weaker*, *Publius* 41 (Spring 1987); 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); Lewis B. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 *Colum. L. Rev.* 847, 862-65 (1979); *High Court Ruling Source of Dismay to Local Officials*, *N.Y. Times* A1 (Feb. 21, 1985) (reporting preliminary findings of a study conducted by the Advisory Commission on Intergovernmental Relations that suggest "Congress ha[s] become an assembly of independent operators little influenced by party officials or elected officials in [their] respective states").

21. For further criticism of the federal process model's theory that features of the national political process protect state interests, see Tushnet, *Red, White, and Blue* at 73-75 (cited in note 18); Stewart A. Baker, *Federalism and the Eleventh Amendment*, 48 *U. Colo. L. Rev.* 139, 183-85 (1977).

the national political process. Politics is a process of compromise, in which one interest rarely triumphs absolutely over all others. If state autonomy is an important component of our government—one that should be preserved whatever the countervailing pressures—then we cannot trust that principle solely to the political process.

There are some circumstances, in fact, in which the interests of congressional representatives clearly conflict with the institutional needs of state governments. When pressed to accomplish national goals without raising taxes, members of Congress have an incentive to force state governments to administer national programs at state expense. By following this technique, congressional representatives can reap credit for the popular benefits of national programs while making state governments bear the anger generated by the increased local taxes needed to pay for federally mandated programs.<sup>22</sup>

The recently enacted “motor voter” bill may be an example of this slippage between reaping the benefits and paying the costs of social legislation.<sup>23</sup> Congress and President Clinton will reap any electoral benefits associated with passing this bill.<sup>24</sup> Easing voter

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22. See *New York v. United States*, 112 S. Ct. at 2424; *Texas v. United States*, 730 F.2d 339, 354 (5th Cir.) (observing that when Congress compels the states to implement federal law, Congress “evades responsibility for the resulting regulation and thereby circumvents the political check on infringements of state sovereignty” and that under these circumstances “it is inappropriate for the courts simply to rely on the political process”); Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 17 (1988); Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 Duke L. J. 979, 1018-19 (1993); Diemer, *Cleveland Plain Dealer* at 4A (cited in note 18).

23. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993), codified at 42 U.S.C.A. § 1973gg et seq. (1994).

24. Clinton administration officials repeatedly cite the motor voter bill as one of the accomplishments of their administration. See, for example, Hillary Clinton, Remarks on Health Care to the League of Women Voters (June 14, 1994) (available on LEXIS, NEWS library, FEDNEW file); Michael Murphy and Chris Fiscus, *Gore: “Things Have Changed for the Good,”* Phoenix Gazette B1 (Apr. 8, 1994) (reporting a speech by Vice President Albert Gore); Susan Page, *Clinton: Let’s Get Moving!*, Newsday 6 (Jan. 26, 1994) (summarizing Clinton’s State of the Union address). Other representatives similarly touted their support of motor voter legislation to constituents, and commentators have lauded these national politicians for their role in enacting the bill. See, for example, Mike Brown, *News*, Courier-Journal 7A (Nov. 27, 1993) (reporting that Senator Wendell Ford included his support for motor voter legislation on a list of personal accomplishments); Jordan Moss, *Nice Drive to the Ballot Box*, N.Y. Times A23 (May 10, 1994) (applauding Clinton’s approval of the motor voter bill as “the final achievement of the 1960s’ voting rights revolution” and noting that “Mr. Clinton . . . rightly invokes the bill as one of his important achievements in office”); Owen Bieber, Labor Day Message (Sept. 3, 1993) (available on LEXIS, NEWS library, PRNEWS file) (reporting that the president of the United Auto Workers publicly praised Clinton and his national supporters for enacting the motor voter bill).



registration by allowing adults to register to vote when they obtain their automobile licenses is an attractive idea. Congress, however, directed the states to accomplish this end without allocating any money to support the new initiative.<sup>25</sup> In assessing the value of this legislation, therefore, Congress was able to measure the benefits without paying much attention to the costs; someone else was going to pay those costs.

Estimates of the costs imposed by motor voter legislation vary widely.<sup>26</sup> Even the highest estimated costs may be justified if the program achieves widespread voter registration. The point is not that motor voter registration is a bad idea—it may prove to be an excellent idea. The point is that the legislative body adopting this legislation had no incentive to probe the costs of the bill because someone else was going to pay the tab. That is not responsible lawmaking.

For these and other reasons, the federal process theory fails to protect adequately the health of state governments within the federal system.<sup>27</sup> In 1992, the Supreme Court appeared to recognize these flaws, to abandon the federal process theory, and to embrace its third model of federalism.

### C. *The Autonomy Model*

This third, most recent, model of federalism is the state autonomy model that debuted in *New York v. United States*.<sup>28</sup> Once again, the model rests on the work of several commentators, including my own work on the Guarantee Clause.<sup>29</sup> According to autonomy theo-

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25. See Senate Committee on Rules and Administration, *National Voter Registration Act of 1993*, S. Rep. No. 103-6, 103d Cong., 1st Sess. 50 (1993) (minority views).

26. The Congressional Budget Office estimated that motor voter would cost the states approximately \$20 million a year during the statute's first five years. *Id.* at 41 (CBO cost estimate). Computerization would entail additional costs, although the states would also reap some savings under the bill. *Id.* Several states submitted considerably higher cost estimates to Congress, and states beginning to implement the bill have complained of higher costs. See *id.* at 51 (minority statement); Ben Smith, *Legislature '94: House and Senate Pick Up the Pace*, Atlanta Constitution E13 (Feb. 20, 1994) (reporting that the implementation of motor voter in Georgia will cost \$6 million).

27. For a more extensive critique of *Garcia's* process theory, see Merritt, 88 Colum. L. Rev. at 15-22 (cited in note 22).

28. 112 S. Ct. 2408 (1992).

29. See generally Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425 (1987); Merritt, 88 Colum. L. Rev. 1 (cited in note 22). Since *New York v. United States*, at least two other scholars have registered support for the autonomy model, although with some caveats. See Powell, 79 Va. L. Rev. at 689 (cited in note 2) (describing the autonomy model articulated in *New York v. United States* as "promising," although lacking a "fully persuasive

rists, courts should intervene in the political process to protect the independence of state governments, but only when the federal government has tampered with the independent relationship between a state government and its voters. That sort of interference occurs when the federal government dictates the structure of state governments, commandeers the energy of state administrators, or forces state enactment of particular laws—all without offering state governments the option of nonparticipation.<sup>30</sup>

When the federal government acts in this manner, it does more than simply exercise its power under the Supremacy Clause to regulate a particular field of private conduct and preempt contrary state laws. Instead, these actions destroy the essential autonomy of state governments by forcing those governments to respond to the commands of Congress rather than to the dictates of their voters.

It is important to recognize that the autonomy model of federalism does not guarantee state governments the power to regulate private behavior in any particular area. Autonomy theorists recognize the power of Congress to preempt virtually any field under the Commerce Clause and other constitutional provisions.<sup>31</sup> State governments, under this theory, are sovereigns who rule over a domain that is not only limited, but forever shifting. If Congress chooses to preempt a regulatory field, the states have no choice but to acquiesce. Congress can always narrow the orbit of state power, but it must leave the states free to govern autonomously in whatever areas are left to them.

Autonomy theorists also recognize that state governments cooperate in a wide variety of federal programs and are heavily dependent upon tax dollars.<sup>32</sup> As long as states retain the right to say “no” to the federal government, they remain responsible to their voters and preserve their ability to negotiate with the federal government over the terms of federal-state programs. The key distinction for autonomy theorists is between state governments that answer

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justification”). See generally Saikrishna Banalove Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957 (1993) (endorsing the conclusion in *New York* that the national government may not commandeer state legislatures, but arguing that Congress should be able to direct state executive officers to administer federal law).

30. For further discussion of these mechanisms, see Merritt, 88 Colum. L. Rev. at 40-50, 60-70.

31. See, for example, *New York v. United States*, 112 S. Ct. at 2418-19; Merritt, 88 Colum. L. Rev. at 58-59.

32. *New York*, 112 S. Ct. at 2419, 2423-24; Merritt, 88 Colum. L. Rev. at 46-50.

ultimately to their voters, although they may choose to participate in federal initiatives, and state governments that have become field offices of the national government, directly compelled to administer federal programs.<sup>33</sup>

In *New York v. United States*, the Supreme Court endorsed the autonomy model of federalism, while dealing fatal blows to both the territorial and federal process models.<sup>34</sup> The Court struck down one provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985,<sup>35</sup> not because Congress had invaded a substantive field reserved to the states, but because Congress had attempted to “commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”<sup>36</sup>

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33. The Supreme Court has repeatedly used phrases like “field office” to condemn forbidden types of federal regulation. See, for example, *New York*, 112 S. Ct. at 2434 (declaring that states are not “mere political subdivisions,” “regional offices,” or “administrative agencies of the Federal Government”). See generally Prakash, 79 Va. L. Rev. 1957 (cited in note 29) (discussing “field office federalism”).

34. In implicitly rejecting the territorial model, the Court noted that “[a]s the Federal Government’s willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished,” *New York*, 112 S. Ct. at 2419, so that Congress today may govern private conduct even in “areas of intimate concern to the States.” *Id.* at 2421.

Likewise, the Court refused to follow *Garcia*’s process model. *Id.* Indeed, the result in *New York* constitutes a surprisingly strong departure from *Garcia*. State governments and officials actually participated in—and supported—enactment of the federal law challenged in *New York*. In fact, the law emerged from an extensive dialogue among federal regulators and state officials. *Id.* at 2431; *id.* at 2435-38 (White, J., concurring in part and dissenting in part). If the federal process theory ever could block a state challenge to a congressional enactment, *New York* seemed to be just that case.

The Court, however, brushed aside these arguments, noting that “[t]he Constitution does not protect the sovereignty of States for the benefit [simply] of the States or state governments as abstract political entities.” *Id.* at 2431. Instead, “the Constitution divides authority between federal and state governments for the protection of individuals.” *Id.* Federalism is essential to diffuse political power and to check “the accumulation of excessive power” at the national level. *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). Thus, state officials could not ratify an unconstitutional intrusion into state sovereignty, even if they did so knowingly and purposely.

The Court’s rejection of the federal process theory in *New York*, of course, does not foreclose reliance on the theory in certain types of cases. The Court might find that, for some types of cases, the federal process theory provides a convenient presumption of constitutionality. See *id.* at 2420 (suggesting that different rules might govern cases in which “Congress has subjected a State to the same legislation applicable to private parties”). *New York* makes clear, however, that such a presumption must always be open to question—a fundamental departure from *Garcia*, in which the Court indicated that it would rely upon process except in the rare case in which a litigant could show “possible failings in the national political process.” *Garcia*, 469 U.S. at 554.

35. Pub. L. 99-240, 99 Stat. 1842 (1986), codified at 42 U.S.C. § 2021b et seq. (Supp. 1994).

36. *New York*, 112 S. Ct. at 2420 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

Even when the Constitution empowers Congress "to pass laws requiring or prohibiting certain acts" by private citizens, the Court held, Congress "lacks the power directly to compel the States to require or prohibit those acts."<sup>37</sup> Throughout the *New York* opinion, the Court declared its concern with protecting the autonomous processes of state government and the political accountability of both state and federal governments.<sup>38</sup> These concerns are central to the autonomy model.<sup>39</sup>

### III. ASSESSING THE AUTONOMY MODEL

What are we to make of the Court's latest attempt to reconcile national power and state sovereignty? Does the autonomy model of federalism serve important values? Is the model consistent with contemporary needs for a strong central government? And, even if the autonomy model is politically sound, does it derive any support from the constitutional text? I will briefly address these questions below.

#### A. *Value of the Autonomy Model*

To assess the value of the autonomy model, it is necessary to ask first whether state governments confer any benefits on our society. Should we attempt to protect the vitality of these governments, or should we allow Congress to whittle them away?

I see at least four values in the continued existence of autonomous state governments. First, independent state governments check the power of the federal government. As long as they remain autonomous, states can muster considerable lobbying and litigation

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37. *Id.* at 2423.

38. *See id.* at 2420-21, 2424.

39. *New York*, of course, was not the first intimation of an autonomy model in the Supreme Court's jurisprudence. In fact, the Court's opinion in *National League of Cities v. Usery* contained numerous phrases redolent of the autonomy model. In particular, the Court's references to the "attributes of sovereignty attaching to every state government," 426 U.S. 833, 845 (1976), and its condemnation of national attempts to regulate the "States as States" evoked an autonomy concept. *Id.* at 842, 845. These reverberations, however, were overshadowed by the Court's territorial reference to "traditional governmental functions," a phrase that dominated judicial decision making under *National League of Cities*. *Id.* at 852.

More definite intimations of the autonomy model appeared in *FERC v. Mississippi*, 456 U.S. 742, 775-97 (1982) (O'Connor, J., concurring in part and dissenting in part), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

forces to challenge national regulation.<sup>40</sup> With the power to reject participation in national programs, state governments can also negotiate with national representatives to affect the content of those programs. And state governments serve as political breeding grounds, where parties and factions excluded from national power rebuild their strength and new political forces gain footholds.<sup>41</sup> Without these checks, our powerful national government could become overbearing.<sup>42</sup>

Second, state governments help diversify participants in the political process. These governments seem more adept than the national government at drawing in new political faces. Almost every political minority in the United States—from Irish Americans at the beginning of this century to women today—has gained experience in state or local politics before climbing into national prominence.<sup>43</sup>

Third, despite the homogenizing force of McDonald's and other chain enterprises from coast to coast, state governments continue to provide choices in living conditions. Some states are friendly to the environment, while others are more friendly to business. The amount of money expended on education, welfare, and health care varies widely from state to state.<sup>44</sup> For a nation composed of diverse racial, cultural, and religious groups, this opportunity to express multiple social values is essential.<sup>45</sup>

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40. See Merritt, 88 Colum. L. Rev. at 5-6 (cited in note 22).

41. See *id.* at 7.

42. For further discussion of the ways in which state and local governments check the national government, see Amar, 96 Yale L. J. at 1500-03 (cited in note 29); Merritt, 88 Colum. L. Rev. at 4-7; Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, in Mark V. Tushnet, ed., *Comparative Constitutional Federalism: Europe and America* 77, 103 (Greenwood, 1990); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 380-95.

43. See Merritt, 88 Colum. L. Rev. at 7-8; Laura Mecoy, *State Offers Highest Hopes for Year of the Woman, Part II*, Sacramento Bee A1 (July 9, 1993) (noting that women comprise only 6% of the United States Senate and 11% of the House of Representatives, but 20% of all state legislators); Daniel B. Wood, *National Women's Caucus Gathers to Find Strength for Election Challenges*, Christian Science Monitor 1 (July 12, 1993) (reporting that the president of the National Women's Political Caucus traced the growth of women in politics from success in local elections during the mid-seventies through wins in state legislatures during the mid-eighties to bids for governorships and federal offices during the nineties). For a related point, see Powell, 79 Va. L. Rev. at 685-87 (cited in note 2) (suggesting that state governments preserve opportunities for participatory democracy, which are necessary both to preserve democratic government and to reduce feelings of alienation in a large nation-state).

44. New Jersey, for example, spends \$10,219 annually per pupil for elementary and secondary education, while Utah spends only \$3,092. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States: 1993* at 164 (113th ed. 1993).

45. See also Tushnet, *Red, White, and Blue* at 9 & n.24 (cited in note 18); Howard, 19 Ga. L. Rev. at 795 (cited in note 20); Kaden, 79 Colum. L. Rev. at 854 (cited in note 20); Richard B. Stewart, *Federalism and Rights*, 19 Ga. L. Rev. 917, 918 (1985).

Finally, states offer the laboratories for social experimentation immortalized by Justice Brandeis's quotable words.<sup>46</sup> Those words proved so quotable that they have become a cliché; yet they retain substantial truth. Unemployment compensation, anti-discrimination laws, no-fault compensation schemes, and other social programs emerged from state experiments.<sup>47</sup> Echoes of Brandeis' statement can be heard today as state initiatives in health care policy and welfare reform influence national debates over those issues.<sup>48</sup>

The autonomy model of federalism is useful because it recognizes just these values in state governments. State governments forced to implement federal commands are unlikely to check the power of their commanding officer. Nor are such governments likely to give political newcomers the training they need to succeed in national politics. Middle managers who lack autonomy to govern their own domains never have been known for promoting diverse living conditions or social experiments. In management theory, autonomy means innovation and diversity, while central control is synonymous with sameness and rigidity.<sup>49</sup> To promote the four values of federalism, states must retain some measure of autonomy.

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Some commentators have argued that state autonomy is not necessary to produce this diversity, because a strong central government could achieve the same result by delegating power to branch offices or consciously cultivating diverse provinces. See, for example, Arthur W. MacMahon, *The Problems of Federalism: A Survey*, in Arthur W. MacMahon, ed., *Federalism: Mature and Emergent* 3, 11 (Russell & Russell, 1962). The incentives for uniformity in any centralized organization, however, are powerful and may overwhelm any desire for diversity. The attempt to create diversity from above, moreover, may foster superficial but sterile differences—a Disney World of provinces in which the facades differ but the underlying values are identical.

46. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (suggesting that each of the states "serve[s] as a laboratory" that may "try novel social and economic experiments without risk to the rest of the country").

47. See Merritt, 88 Colum. L. Rev. at 9 (cited in note 22). See also *FERC v. Mississippi*, 456 U.S. 742, 788-89 (1982) (O'Connor, J., concurring in part and dissenting in part); Charles Fried, *Federalism—Why Should We Care?*, 6 Harv. J. L. & Pub. Pol. 1, 2-3 (1982); Henry J. Friendly, *Federalism: A Foreword*, 86 Yale L. J. 1019, 1034 (1977); Kaden, 79 Colum. L. Rev. at 854-55 (cited in note 20).

48. See, for example, Janice Somers, *States Pave Way on Managed Competition*, Am. Med. News 1 (Mar. 15, 1993) (describing state innovations that are leading the way in health care reform); James P. Gannon, *Washington: Get Out of Way While States Reform Welfare*, Gannett News Service (Feb. 3, 1994) (available in LEXIS, NEWS library, GNS file) (noting state contributions to welfare reform and stressing the importance of those contributions).

49. See, for example, Thomas J. Peters and Rebert H. Waterman, Jr., *In Search of Excellence* 200-34 (Warner, 1982).

*B. The Price of Freedom*

The autonomy model promotes important values, but does it also exact unacceptable costs? In particular, will the autonomy model prevent the federal government from acting decisively in areas demanding national attention? For at least four reasons, the autonomy model does not impose undue costs on the national government; instead, the model leaves the central government ample power to regulate private behavior.

First, as mentioned above, the autonomy model does not prevent Congress from preempting virtually any area of state law.<sup>50</sup> The model attempts to preserve the control of state voters over their governments, rather than the control of state governments over particular substantive areas. Congress, therefore, is free to address any problems of national scope by preempting state law. In particular, and in contrast to *National League of Cities*, the autonomy model allows Congress to regulate the hours and wages of most state and local employees.<sup>51</sup> Application of the Fair Labor Standards Act, therefore, is unlikely to raise problems under the autonomy model of federalism.<sup>52</sup>

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50. See note 31 and accompanying text.

51. The autonomy model would protect state power to set wages and hours only for employees directly related to the state's conduct of republican government. Congress, for example, should not be able to dictate the wages and hours of state governors, legislators, or judges. Compare *Gregory v. Ashcroft*, 501 U.S. at 460 (holding that the federal Age Discrimination in Employment Act does not apply to state court judges, and stating "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign"). Congress itself appears to have recognized this principle, because it has never attempted to control the wages or hours of these officials.

Regulation of wages and hours for police officers might also be reserved to the states under the autonomy model. See Merritt, 88 Colum. L. Rev. at 57 (cited in note 22). Congress, however, has subjected police officers to the Fair Labor Standards Act and the courts have upheld that application since *New York*. See note 52.

52. Lower courts hearing challenges to the Fair Labor Standards Act after *New York* have uniformly rejected those challenges. See *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993); *May v. Arkansas Forestry Comm'n*, 993 F.2d 632 (8th Cir. 1993); *Yourman v. Dinkins*, 826 F. Supp. 736 (S.D.N.Y. 1993); *Parr v. California*, 811 F. Supp. 507 (E.D. Cal. 1992); *Ahern v. New York*, 807 F. Supp. 919 (N.D.N.Y. 1992). See also *Southeastern Pennsylvania Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, 826 F. Supp. 1506, 1519 (E.D. Pa. 1993) (holding that a federal statute exempting a state-owned railroad from state taxation was consistent with *New York's* principles of federalism because "Congress [was] in no sense commandeering state regulatory processes").

As described in note 51, the autonomy model might prohibit federal regulation of the wages and hours of state police officers. At least two lower courts have upheld application of the Fair Labor Standards Act to police officers since *New York v. United States*, but without considering the impact of *New York* or the potentially special status of police officers under that decision.

Second, the autonomy model allows Congress to continue using the tool of conditional preemption. Under this type of statute, Congress allows the states to choose whether to participate in a regulatory scheme. If the states choose nonparticipation, Congress promises to assume the regulatory burden. This type of choice preserves state autonomy; the states remain independent decision makers responsible to their voters.<sup>53</sup>

Third, the autonomy model places no special constraints upon Congress' Spending Clause power. As long as Congress abides by the rules established in the Court's Spending Clause cases,<sup>54</sup> the autonomy model allows Congress to tempt the states into following federal directives. The size of the federal purse is daunting, but the states retain the power to reject federal largesse. Once again, that power to say "no" distinguishes an autonomous government, or independent decision maker, from a captive field office in the federal bureaucracy.<sup>55</sup>

Finally, the autonomy model recognizes that Congress has special powers to enforce provisions of the federal Constitution designed to achieve fair and democratic forms of government. Congress can, for example, enforce the Fifteenth and Nineteenth amendments (which bar discrimination in setting the franchise) even though the power to define the electorate is a power normally associated with independent governments.<sup>56</sup> In fact, the motor voter legislation discussed above might survive scrutiny under this rationale, although it

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See *Ahern v. New York*, 807 F. Supp. 919 (N.D.N.Y. 1992); *Marie v. New Orleans*, 612 S.2d 244 (La. Ct. App. 1992).

53. Compare *New York*, 112 S. Ct. at 2424; Merritt, 88 Colum. L. Rev. at 59 (cited in note 22).

54. The Court has held that Congress exceeds its Spending Clause authority only when: (1) it fails to state conditions clearly; (2) the conditions are not related "to the federal interest in particular national projects or programs," *South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)); or (3) the inducement is "so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

55. See *New York*, 112 S. Ct. at 2423; Merritt, 88 Colum. L. Rev. at 46-50 (cited in note 22). But see generally Thomas R. McCoy and Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1989 Sup. Ct. Rev. 85 (criticizing the effect of the Supreme Court's Spending Clause doctrine on state sovereignty).

56. See Merritt, 88 Colum. L. Rev. at 38-40. See also *Gregory v. Ashcroft*, 501 U.S. at 468 (noting that "the principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments"); *EEOC v. Wyoming*, 460 U.S. 226, 243 & n.18 (1983); *City of Rome v. United States*, 446 U.S. 156, 179 (1980).

The Fifteenth Amendment bars racial discrimination in setting the franchise, while the Nineteenth Amendment extends the vote to women.



would be a much closer case than some other congressional attempts to enforce these amendments.<sup>57</sup>

The autonomy model poses only one threat to congressional regulatory power: Under this model, Congress cannot directly command state governments to implement federal programs or to adopt particular laws. Some commentators have argued that it is inefficient and costly to force Congress to build new national agencies designed to implement important programs.<sup>58</sup> These commentators would prefer to give Congress the power to commandeer state agencies to enforce those programs. Congress itself occasionally has succumbed to that temptation.

In 1990, for example, Congress directed several states to adopt regulations preventing the export of unprocessed timber from public lands.<sup>59</sup> Congress may have had several motives in directing the states to perform this regulation: It may have wanted to save the time of federal regulators, it may have wanted to shift responsibility for potentially unpopular provisions to the states, or it may even have wanted to give the states a role in regulating conduct they historically had controlled. The effect, however, was to force the states (with no opportunity to refuse) to regulate the conduct of third parties, including timber purchases between wholly private companies.<sup>60</sup>

*New York v. United States* forbids such direct commands to the states, and the autonomy model supports that result. As long as the

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57. The Senate Report on motor voter registration explicitly invoked Congress' power to enforce the Fourteenth Amendment as support for the legislation. Senate Comm. on Rules and Administration, *National Voter Registration Act of 1993*, S. Rep. No. 103-6, 103d Cong., 1st Sess. 3 (1993). Similarly, the House Report described motor voter registration as a response to restrictive and discriminatory registration techniques. H.R. Rep. No. 103-9, 103d Cong., 1st Sess. 2-5 (1993). These reports, however, do not provide a particularly strong factual basis for linking motor voter registration to the conquest of discriminatory voting practices.

58. See, for example, James E. Pfander, *A Comparative Assessment of Environmental Regulation Through the Agency of Member States in Europe and the United States*, in Thomas Ulen, John Braden and Henk Folmer, eds., *Environmental Federalism: The European Union and the United States* (Elgar, 1994); Prakash, 79 Va. L. Rev. at 2005-06 (cited in note 29).

59. Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. § 620c(d)(3) (Supp. 1994).

60. In order to achieve the Act's purpose of "effect[ing] a net increase in domestic processing of timber harvested from public lands," 16 U.S.C. § 620c(d)(3)(A), states had to do more than simply prohibit the direct export of timber harvested from public lands; they also had to regulate the substitution of timber harvested from private lands for timber grown on public lands. See *id.* at § 620b(a)-(b) (prohibiting direct or indirect substitution of timber harvested from private lands for timber harvested from federal land); *id.* at § 620c(d)(3)(B) (applying direct and indirect substitution rules to timber harvested from state-owned lands). Regulating indirect substitution of timber requires regulation of transactions between two or more private parties. *Id.* at § 620b(b).

autonomy model prevails, the national government will not be able simply to command state governments to administer national programs. In *Board of Natural Resources v. Brown*,<sup>61</sup> the Ninth Circuit properly struck this provision of the Forest Resources Conservation Act under the autonomy model.<sup>62</sup>

Similarly, two district courts recently struck a provision of the Brady Handgun Violence Prevention Act that requires local law enforcement officers to "make a reasonable effort to ascertain within 5 business days" whether the potential purchaser of a handgun is legally entitled to possess such a gun.<sup>63</sup> Once again, this provision violates the autonomy principle articulated in *New York v. United States*. Despite its laudable goals, the Brady Act "commandeers" local law

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61. 992 F.2d 937 (9th Cir. 1993).

62. *Id.* at 946-47. Several lower courts reached a similar conclusion in cases challenging environmental regulations promulgated during the 1970s. The regulations struck in those cases required states to establish automobile inspection programs and to administer other portions of a federal environmental program. See *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), vacated and remanded for consideration of mootness sub nom. *EPA v. Brown*, 431 U.S. 99 (1977) (per curiam); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), vacated and remanded for consideration of mootness sub nom. *EPA v. Brown*, 431 U.S. 99 (1977) (per curiam); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), vacated and remanded for consideration of mootness, *EPA v. Brown*, 431 U.S. 99 (1977) (per curiam). The Supreme Court granted certiorari in all three cases, but remanded for consideration of mootness when the Environmental Protection Agency rescinded some of the regulations and conceded that the rest were "invalid unless modified in certain respects." *EPA v. Brown*, 431 U.S. at 103 & n.3. Long before *New York v. United States*, therefore, some lower courts sensed that "commandeer[ing] the regulatory powers of the states, along with their personnel and resources," would violate the Constitution. *Train*, 521 F.2d at 992.

More recently, three lower courts have reached varying conclusions about whether the Indian Gaming Regulatory Act impermissibly forces states to negotiate gaming compacts with Indian tribes. Compare *Ponca Tribe v. Oklahoma*, 834 F. Supp. 1341 (W.D. Okla. 1992) (holding that the Act violates the Tenth Amendment by compelling states to negotiate compacts) and *Pueblo of Sandia v. New Mexico*, No. CIV 92-0613 JC, 1992 WL 540817 (D.N.M. Nov. 13, 1992) with *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) (holding that the Act does not violate the Tenth Amendment because states may choose to avoid negotiation; in that event, a mediator imposes the tribe's proposed compact if it accords with federal law). See also Jerome L. Wilson, *State Should Challenge Indian Casino Law*, N.Y. L. J. 2 (July 15, 1994) (arguing that the Indian Gaming Regulatory Act violates the Tenth Amendment as interpreted in *New York*).

63. 18 U.S.C. § 922(s)(2) (Supp. 1994). This determination must include "research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." *Id.* The two decisions holding this provision unconstitutional are *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994), and *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994). See also Jerome L. Wilson, *State Sovereignty Case Shoots at Brady Law*, Nat'l L. J. A21 (July 11, 1994) (praising the *Printz* decision). A third district court has upheld the provision against a Tenth Amendment challenge. See *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994).

enforcement officers to "enforce a federal regulatory program."<sup>64</sup> In doing so, the Act both absorbs government resources that the states might direct elsewhere and confuses the lines of political accountability.<sup>65</sup> This provision of the Brady Act, like the offending provision of the Forest Resources Conservation Act, unconstitutionally intrudes upon state autonomy.

Recognizing these flaws in the Brady Act, the Forest Resources Conservation Act, and other federal statutes would not hamper Congress's ability to achieve important national goals. The autonomy model allows Congress ample room to achieve those objectives through federal grants or conditional preemption.<sup>66</sup> That is the path Congress chooses for most regulatory programs. Indeed, when the Ninth Circuit struck down the timber provision in *Brown*, Congress promptly remedied the situation by adopting a new version of the Act that relies upon conditional preemption.<sup>67</sup> Similarly, Congress could remedy the defect in the Brady Act by offering federal funds in exchange for enforcement of the Act, establishing a scheme of conditional preemption, or assigning the Act's duties to federal officers.<sup>68</sup>

Commanding state governments to administer federal programs is a short-sighted strategy. It is true that state governments

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64. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 290, 288 (1981) (quoted with approval in *New York v. United States*, 112 S. Ct. at 2420). The federal government has attempted to distinguish the Brady Act from the provision struck in *New York* by arguing that the Brady Act merely requires states to administer a federal program, rather than to enact that program into state law. See, for example, *Printz*, 854 F. Supp. at 1513. As one court has pointed out, however, the provision condemned by *New York* required states either to enact legislation or to take title to radioactive wastes. The latter option—as unconstitutional in the Supreme Court's eyes as the former choice—required administrative rather than legislative enactment. *Id.* Federal attempts to command state administrative energies, moreover, threaten state autonomy in the same manner as attempts to compel state legislative enactments. In both cases, the federal intrusion interferes with the ability of state citizens to control their governmental representatives.

65. *Printz*, 854 F. Supp. at 1514-15. The Brady Act raises at least three accountability issues: (1) the lack of federal funds to support the Act's mandates may force local law enforcement agencies to cut other essential services, leading voters to blame local officials for those cuts; (2) voters opposed to gun control may identify the Act with the local officials charged with administering it, and blame those officials for the statute's enactment; and (3) citizens may blame law enforcement officers for erroneous applications of the Act. Although the Act specifically exempts local officers from civil liability for erroneous determinations, 18 U.S.C. § 922(s)(7), it does not shield them from popular criticism or electoral retaliation for those decisions. *Printz*, 854 F. Supp. at 1514-15.

66. See *New York*, 112 S. Ct. at 2423-24; Merritt, 88 Colum L. Rev. at 68-69 (cited in note 22).

67. Forest Resources Conservation and Shortage Relief Amendments Act of 1993, Pub. L. No. 103-45, 107 Stat. 223 (July 1, 1993) (current version at 16 U.S.C. §§.620-620j).

68. See *Wilson*, Nat'l L. J. at A21 (cited in note 63).

sometimes appear to offer a quick, inexpensive means of implementing an urgent program. As a nation facing ever-changing and ever more challenging social ills, however, we are better off preserving the checking power and innovative energies of state governments than sacrificing those resources to balance today's budget. As autonomous decision makers, state governments will help us devise lasting solutions to the problems of both today and tomorrow. To put it bluntly, we need long-term sources of regulatory creativity more than we need short-term efficiency.

### C. *Constitutional Anchors for the Autonomy Model*

I have saved the most important question for last: Even if the autonomy model promotes important values, and imposes no substantial costs on the central government, does the model derive from the constitutional text? Without a constitutional anchor, the Supreme Court lacks power to strike down any federal statute, no matter how well crafted the Court's political theory. Can we, then, tie the autonomy model to the Constitution?

In *New York*, the Supreme Court rooted its autonomy theory in a symbiotic reading of the Commerce Clause and Tenth Amendment. The Court recognized that the Tenth Amendment contains no language that could be read as an affirmative limit on the powers conferred by Article I of the Constitution.<sup>69</sup> At the same time, the Court suggested that the existence of the Tenth Amendment implies inherent limits in the powers conferred by that article.<sup>70</sup> The Tenth Amendment and Commerce Clause together, in other words, achieved what the Tenth Amendment alone could not.<sup>71</sup>

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69. *New York*, 112 S. Ct. at 2417-18.

70. See *id.* at 2417 (stating "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred upon Congress [in the Commerce Clause or elsewhere]"); *id.* at 2418 (noting "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of sovereignty is protected by a limitation on an Article I power"); *id.* at 2423 (stating "[t]he allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce").

71. At some points, the Court appeared to rely upon the combined force of these two constitutional provisions, but at others it appeared simply unwilling to choose between them. See, for example, *id.* (noting: "[i]n the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the

In this way, the *New York* Court seemed to use the Tenth Amendment as a rule of construction for interpreting the Commerce Clause: Because the Tenth Amendment affirms the reservation of unenumerated powers to the states or people, the Court must exercise caution in construing the scope of Article I powers. In particular, although the Commerce Clause empowers Congress "to regulate interstate commerce," it does not allow Congress "to regulate state governments' regulation of interstate commerce."<sup>72</sup>

This reading of the constitutional text, however, is confusing. In particular, it is likely to confuse lower courts into thinking the Court has revived the territorial model of federalism. A lower court reading the Supreme Court's language in *New York* might conclude that it should interpret the Commerce Clause conservatively, not only with respect to Congress' methods of regulating interstate commerce, but with respect to the subjects of its regulation.

Indeed, one lower court already has made this mistake. In *United States v. Lopez*,<sup>73</sup> the Fifth Circuit reversed a conviction under the Gun-Free School Zones Act of 1990, a federal statute that bars the knowing possession of a firearm within one thousand feet of a primary or secondary school.<sup>74</sup> Relying upon *New York*, and stressing that "the management of education, and the general control of simple firearms possession by ordinary citizens, have traditionally been a state responsibility,"<sup>75</sup> the court ruled that Congress had not shown a sufficient nexus between interstate commerce and this crime.<sup>76</sup>

*Lopez* demonstrates the danger that lower courts will read *New York's* juxtaposition of the Tenth Amendment and Commerce Clause as a license to curtail the fields of private conduct open to

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Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment"); *id.* at 2429 (stating: "[w]hether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution").

72. *Id.* at 2423.

73. 2 F.3d 1342 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (Apr. 18, 1994) (No. 93-1260).

74. 18 U.S.C. § 922(q) (Supp. 1994).

75. *Lopez*, 2 F.3d at 1364.

76. In particular, the court faulted Congress for failing to make any findings about the impact on interstate commerce of either primary and secondary education generally or gun possession near schools specifically. *Id.* at 1366-67. The court expressly reserved the question whether a statute like the Gun-Free School Zones Act might be valid if premised on sufficient congressional findings of a nexus to interstate commerce. *Id.* at 1368.

federal regulation.<sup>77</sup> To avoid this problem, the autonomy model demands a constitutional base that embodies more precisely its concerns with the processes of state government.

As I have argued elsewhere, the guarantee of republican government contained in Article IV, Section 4, of the Constitution offers that groundwork.<sup>78</sup> If the national government pledges to maintain a republican form of government in each state, as it does in the Guarantee Clause, then *a fortiori* the national government must promise to maintain governments within those states. A republican government, moreover, is accountable to its electorate: It is not responsible to divine power, an inherited monarchy, or even the national government. Through the Guarantee Clause, therefore, the national government pledges to maintain autonomous governments in each state—governments that are responsible to the people of that state rather than to the national government.

I have described elsewhere the historical support for this interpretation of the Guarantee Clause and the reasons why this interpretation should be held justiciable.<sup>79</sup> The language of the Guarantee Clause not only supports the result in *New York*; it requires that result. In future cases, the Guarantee Clause would tie the courts more securely to the autonomy model by focusing their attention on the features of republican government—especially the right of state voters to set their own legislative agendas and choose tasks for their own government administrators.<sup>80</sup>

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77. See also *United States v. Cortner*, 834 F. Supp. 242 (M.D. Tenn. 1993) (holding, without citation to *New York*, that Congress lacked authority under the Commerce Clause to enact a federal carjacking statute), overruled by *United States v. Johnson*, 22 F.3d 106 (6th Cir. 1994).

Many lower courts, of course, have properly recognized the Supreme Court's focus on the autonomy of state governmental processes in *New York*. See, for example, *Southeastern Pennsylvania Transp. Auth. v. Pennsylvania Pub. Util. Comm'n*, 826 F. Supp. at 1519 (acknowledging that "*New York* stands for a much more limited proposition: that when Congress desires to regulate, it must do so directly and cannot enlist the States to do its bidding").

78. The Guarantee Clause promises that "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4. I first developed this theory in Merritt, 88 Colum. L. Rev. 1 (cited in note 22). See also Deborah J. Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. Colo. L. Rev. \_\_\_ (forthcoming 1994).

79. See Merritt, 88 Colum. L. Rev. at 29-36, 70-78. See also Merritt, 65 U. Colo. L. Rev.

80. More than a century ago, the Supreme Court observed that the "distinguishing feature" of the republican form of government preserved by the Guarantee Clause is "the right of the people to choose their own officers for governmental administration, and pass their own

In *New York*, the Supreme Court recognized the possibility that the Guarantee Clause might limit federal power to regulate the states.<sup>81</sup> Unfortunately, the Court refused to rest its holding on the Guarantee Clause, preferring its combined reading of the Tenth Amendment and Commerce Clause.

In *Lopez*, which the Court has just agreed to review, the Court has an opportunity to embrace the Guarantee Clause and thus correct the misunderstanding generated by *New York's* focus on the Tenth Amendment. Adoption of the Guarantee Clause in *Lopez* would both reverse the result in that case (because federal regulation of gun possession does not threaten republican government) and provide a more secure foundation for the Court's autonomy model of federalism. That model constitutes the most promising attempt to fashion a judicially enforceable federalism principle.

#### IV. CONCLUSION

I have argued that autonomous state governments are political assets that require judicial protection against national intrusion, that the Supreme Court's autonomy model offers the best possibility of providing that protection, and that the autonomy model is best rooted in the text of the Guarantee Clause rather than in the shadows of the Tenth Amendment and Article I. The autonomy model of federalism promises the best of two constitutional worlds. It promotes a strong national government free to regulate any field of private endeavor, while also preserving healthy state governments to regulate the fields Congress avoids, opening political doors to new faces, promoting diverse living conditions, and spawning innovative programs. This

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laws in virtue of the legislative power reposed in representative bodies." *Duncan v. McCall*, 139 U.S. 449, 461 (1891). See also Federalist No. 39 (Madison), in Clinton Rossiter, ed., *The Federalist Papers* (Mentor, 1961) (stating that "we may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the People, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a Government, that it be derived from the great body of the society").

81. *New York*, 112 S. Ct. at 2432-33. See also *Gregory v. Ashcroft*, 501 U.S. at 463 (noting that both the Tenth Amendment and the Guarantee Clause secure "the authority of a state's people to determine the qualifications of their most important government officials"); *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (recognizing "a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders," and citing the Guarantee Clause as support for this proposition).

update of an eighteenth century vision is the best formula for the future of federalism.



