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## Why the Supreme Court Overruled "National League of Cities"

Mark Tushnet

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# Why the Supreme Court Overruled *National League of Cities*

Mark Tushnet\*

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## I. INTRODUCTION

We are now in the midst of a confused era for federalism doctrine. A court of appeals has read the Supreme Court's precedents for at least as much as they are worth in holding that Congress, in enacting the Gun-Free School Zones Act of 1990, exceeded the power the Commerce Clause grants it.<sup>1</sup> The Supreme Court itself has been un-

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\* Professor of Law, Georgetown University. I would like to thank Peter Byrne, Michael Gottesman, Steve Goldberg, Vicki Jackson, Mike Seidman, and participants in the Vanderbilt Law Review Symposium for their comments on a draft of this Article.

1. *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (1994). See also *United States v. Cortner*, 834 F. Supp. 242 (M.D. Tenn. 1993), reversed

able to develop a stable constitutional doctrine about the roles of Congress and the courts in protecting federalism.

Every time the Supreme Court has wandered into the federalism forest, it has gotten lost. For a while, scholars believed we understood why. Elaborating for modern times a Madisonian theme, Herbert Wechsler persuaded us that the Constitution's three structures—national power, federalism, and judicial review—fit together comfortably.<sup>2</sup> Because the interests of states as states were represented in the national political process, it was unnecessary to deploy judicial review to protect their interests against normatively unconstitutional assertions of national legislative power.<sup>3</sup>

Justices Lewis Powell and Sandra Day O'Connor provided powerful counterarguments to that understanding. Whatever was true about the *original* Constitution, they argued, the constitutional system under which we now live is different. Formal constitutional amendments had limited the representation of states as states in the national political process, and extra-constitutional developments, such as the emergence of a national two-party system, further reduced the practical political power of states. Constitutional formalists might describe the result as an unconstitutional regime, too entrenched to be eliminated completely.<sup>4</sup> Constitutional revisionists might describe the present system as the result of informal constitutional amendments.<sup>5</sup> In either case, those concerned about ensuring an appropriate distribution of power between nation and states might want to reexamine the role of judicial review: If the national political process no longer protects the interests of states to the degree the Framers thought appropriate, perhaps the courts should assume a role that they did not have in the initial scheme of things.

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and remanded, No. 93-6398, 1994 U.S. App. LEXIS 19221, 1994 WL 389210 (6th Cir. July 26, 1994) (holding unconstitutional the Anti Car Theft Act of 1992, 18 U.S.C. § 2119) (Supp. 1992), rev'd *United States v. Osteen*, 30 F.2d 135 (6th Cir. 1994). These holdings go beyond prior federalism decisions such as *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *New York v. United States*, 112 S. Ct. 2408 (1992), which found statutes unconstitutional because, though within the authority delegated to Congress by Article I, they nonetheless violated structural federalist principles.

2. Herbert Wechsler, *The Political Safeguards of Federalism*, in Herbert Wechsler, *Principles, Politics, and Fundamental Law* 49 (Harvard U., 1961).

3. More precisely, the interests of states as states were well enough represented, so that efforts to enhance their representation through judicial review were likely to limit national power in a normatively unconstitutional way. On balance, normative constitutionalism would then be protected better by abjuring judicial review than by exercising it.

4. See Peter McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 Cornell L. Rev. \_\_\_ (forthcoming Nov. 1994).

5. See Bruce Ackerman, *We The People: Foundations* (Harvard U., 1991).

In this Article, I contend that the argument offered by Justices Powell and O'Connor should be rejected, despite its manifest attractions. The present confusion is likely to be resolved as it has been in the past: The Supreme Court will definitely reject the proposition that the Constitution authorizes it to invalidate national laws on the ground that they violate principles of federalism.<sup>6</sup>

My argument has two parts. First, I examine the Supreme Court's deliberations in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>7</sup> to see how and why the Court overruled its earlier decision in *National League of Cities v. Usery*<sup>8</sup> asserting its power to invalidate national laws on federalism grounds. Most of the reasons for overruling *National League of Cities* were provided by the *Garcia* opinion itself: Justice Blackmun explained that the Court had found itself unable to draw the lines suggested by *National League of Cities* in a sensible way. Some other reasons, though, can be found in the interpersonal dynamics of the Supreme Court, and indicate why federalism doctrine may have been particularly unstable.<sup>9</sup>

Second, I examine how similar considerations may undermine the Court's newest federalism doctrine, as articulated in *New York v. United States*.<sup>10</sup> Of course we cannot know now the interpersonal dynamics of the present (and future) Court. But we can make some guesses about whether its members will be able to use the doctrine to arrive at sensible results. By examining several recent developments, I argue that the prospects of developing a doctrine out of *New York v. United States* that would yield stable and sensible judicial decisions limiting national power in the name of federalism are quite bleak.

## II. GARCIA INSIDE THE SUPREME COURT

We need only a quick look at *Garcia's* background. In 1976, almost a decade before *Garcia*, the Supreme Court in *National League of Cities* held that Congress' attempt to force state and local govern-

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6. The word *definitively* here has a special meaning, though: The decision will reject that proposition until some later Supreme Court decides that Congress has gone too far this time, and needs to be reined in again.

7. 469 U.S. 528 (1985).

8. 426 U.S. 833 (1976).

9. My analysis relies on the papers of Justice William J. Brennan and Justice Thurgood Marshall, both in the Manuscript Division of the Library of Congress. Justice Brennan's files on *Garcia* are in *Brennan Papers*, Box 666, file 5 ("*Brennan Papers*") (on file with the Library of Congress). Unless otherwise indicated, subsequent material on the Court's deliberations in *Garcia* are from this file.

10. 112 S. Ct. 2408 (1992).

ments to comply with the federal Fair Labor Standards Act violated principles of federalism.<sup>11</sup> The Court's precise holding was unclear in 1976. Congress went wrong, somehow, because its regulatory effort impaired the states' "ability 'to structure integral operations in areas of traditional governmental functions.'"<sup>12</sup> The Court's opinion could be read to mean that the function was setting wages for state employees generally, or that the function was operating basic state institutions. Justice Blackmun's concurring opinion offered a balancing test, although he failed to indicate exactly what went into the balance or why the statute at issue was on balance an unjustifiable intrusion on state authority.<sup>13</sup>

The Court struggled with *National League of Cities* for a decade, never finding another federal statute unconstitutional on federalism grounds. It upheld federal regulations of strip mining whose aim was to restore the land to its original contours—a function that might have seemed quintessentially local, but which somehow came to have interstate environmental overtones.<sup>14</sup> It also upheld federal energy policies that forced state agencies to consider specific approaches to rate-making, pursuant to federally prescribed procedures, and to enforce other federally prescribed rules.<sup>15</sup> And, moving to the employment area at issue in *National League of Cities*, it upheld the application of federal age discrimination laws to state employees.<sup>16</sup> Even more closely related to *National League of Cities* was *United Transportation Union v. Long Island Railroad*.<sup>17</sup> There the Court upheld the constitutionality of applying federal collective bargaining rules to a state-owned commuter railroad. By the early 1980s, it seemed that, as Chief Justice Warren Burger put it, the *National League of Cities* doctrine was "at [a] cross-roads."<sup>18</sup> Was it to be a serious restraint on congressional power? Or, was it to be effectively abandoned or even formally overruled?

The Supreme Court heard argument in *Garcia v. San Antonio Metropolitan Transit Authority* on March 19, 1984. Chief Justice Burger opened the discussion of the case at the Court's next confer-

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11. *National League of Cities*, 426 U.S. at 851.

12. *Garcia*, 469 U.S. at 537 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 287-88 and n.29 (1981) (quoting *National League of Cities v. Usery*, 426 U.S. at 845)).

13. *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring).

14. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981).

15. *FERC v. Mississippi*, 456 U.S. 742 (1982).

16. *EEOC v. Wyoming*, 460 U.S. 226 (1983).

17. 455 U.S. 678 (1982).

18. Conference Notes, in *Brennan Papers* (cited in note 9).

ence with a typically rambling statement. He pointed out that federal funds subsidized seventy-five percent of public mass transit.<sup>19</sup> Still, he said, "transit systems are essentially local . . . like water."<sup>20</sup> He thought that the federal government "can attack conditions."<sup>21</sup> But, he said, he did think that the *Long Island Railroad* case "controls this."<sup>22</sup>

Justice William J. Brennan, relying as he usually did on a typescript statement, said that public mass transit was not a "traditional state function" for purposes of the Tenth Amendment.<sup>23</sup> He relied on the *Long Island Railroad* case as well. For him, "history played a vital role in this inquiry."<sup>24</sup> As he saw it, "if the states have not traditionally performed a particular function, they have, of course, survived as independent entities without performing that function at all."<sup>25</sup> He therefore found it "difficult to see how federal regulation of that function can threaten the states' independent existence."<sup>26</sup> Because mass transit systems had traditionally been privately operated, public operation was not a traditional state function. Additionally, the "recent large scale entry of the states into the mass transit field [was] a joint venture with the federal government, rather than a matter of purely local concern."<sup>27</sup> He also pointed out that the vast majority of public transit systems "became public after 1966," when the federal Fair Labor Standards Act was amended to apply to them.<sup>28</sup>

Justices Byron White and Thurgood Marshall endorsed Brennan's comprehensive statement.<sup>29</sup> Justice Harry Blackmun spoke next. He found it a "tough case" after his separate opinion in *National League of Cities*.<sup>30</sup> For him, "[m]unicipal mass transit reeks of localism, like police [and] fire" services.<sup>31</sup> Although he believed that a "good opinion can be written either way," he "c[a]me down on [the] side that this was local."<sup>32</sup> Justice Powell diplomatically agreed with

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19. Conference Notes, in *Brennan Papers* (cited in note 9).

20. *Id.*

21. *Id.*

22. *Id.*

23. Justice Brennan Statement 1, in *Brennan Papers* (cited in note 9).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 2.

28. *Id.* at 3.

29. Conference Notes, in *Brennan Papers* (cited in note 9).

30. *Id.*

31. *Id.*

32. *Id.*

Blackmun that a "principled decision" could be written either way, but also agreed with Blackmun's bottom line.<sup>33</sup> "We're talking here," he said, about "moving people to [and] from their work—a service that it's essential to provide."<sup>34</sup>

Justice John Paul Stevens sounded the Wechslerian theme. He thought it "anomalous" that cities "with their political powers should be protected against Congress."<sup>35</sup> The issue, for him, was "[h]ow much should be entrusted to [the] democratic process."<sup>36</sup> Justice O'Connor inverted Stevens' concerns. For her the test was "whether Congress goes too far."<sup>37</sup>

When the vote was taken, the Justices divided four-to-four, with Chief Justice Burger passing.<sup>38</sup> A few days later he decided to vote that it was unconstitutional to apply the Fair Labor Standards Act to municipal transit systems,<sup>39</sup> and assigned the opinion to Justice Blackmun as the "least persuaded" of that result. Justice Brennan told his dissenting colleagues that he would do the dissent himself.<sup>40</sup>

Two months later, on June 11, Justice Blackmun surprised his colleagues when he circulated a draft opinion coming out *against* his conference vote to affirm the constitutionality of applying the Fair Labor Standards Act to the transit system.<sup>41</sup> His cover memorandum said that he "ha[d] been able to find no principled way in which to affirm."<sup>42</sup> He rejected the Court's previous reliance on whether a function had been "traditional" or "historical," and proposed "something more fundamental . . . to eliminate the widespread confusion in the area."<sup>43</sup>

Justice Blackmun argued that "the fundamental limitation that the constitutional scheme imposes . . . is one of process rather than one of result."<sup>44</sup> It followed, he said, that "[a]ny additional substantive restraints . . . must find their justification in the procedural nature of this basic limitation, and they must be tailored to compen-

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Justice Brennan Memorandum to Justices White, Marshall, and Stevens (April 2, 1984), in *Brennan Papers* (cited in note 9).

41. Justice Blackmun Memorandum to the Conference (June 11, 1984), in *Brennan Papers*.

42. *Id.*

43. *Id.*

44. Justice Blackmun, 2d Draft of Opinion in *Garcia v. San Antonio Metropolitan Transit Authority* 25 (June 13, 1984), in *Brennan Papers* (cited in note 9).

sate for possible failings in the national political process."<sup>45</sup> This led him to propose a "requirement that Congress not attempt to single out the States for special burdens or otherwise discriminate against them."<sup>46</sup> Where federal regulations affect private parties as well as the states, "[t]he constitutional mechanisms for safeguarding the role of the States are unlikely to be at risk," because "the outcome will reflect not only the States' own interests, but the interests of all those who are similarly situated. In those circumstances, the structural features of the Constitution designed to protect the States can be trusted to have served their purpose."<sup>47</sup> The federal Fair Labor Standards Act did not single out the states for special regulation, and was therefore constitutional.

Justice O'Connor called Blackmun's circulation "unexpected."<sup>48</sup> The fact that no one appears to have anticipated Blackmun's shift says something about the state of interpersonal relations on the Court. When he circulated his draft, Justice Blackmun said that his new position meant that "the cases should be reassigned"<sup>49</sup>—although presumably that meant only that Justice Brennan ought to say immediately that the case was now assigned by him to Justice Blackmun to affirm—and that "some of you may feel the cases should go over for reargument."<sup>50</sup> Chief Justice Burger immediately picked up on the latter suggestion. "[A] 30 page opinion coming out contrary to the Conference vote on a very important issue," Burger wrote, "places those who may dissent in a difficult position," with the impending conclusion to the Court's term.<sup>51</sup> Justice O'Connor, concerned that the "summer recess [was] right around the corner," agreed,<sup>52</sup> as did Justice William Rehnquist.<sup>53</sup>

Then the other side weighed in. Justice Brennan "s[aw] no necessity for reargument."<sup>54</sup> Justice Byron White wrote back: "As would

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45. Id.

46. Id.

47. Id.

48. Justice O'Connor Memorandum to the Conference (June 11, 1984), in *Brennan Papers* (cited in note 9).

49. Justice Blackmun Memorandum to the Conference (June 11, 1984), in *Brennan Papers*.

50. Id.

51. Chief Justice Burger Memorandum to Justice Blackmun (June 11, 1984), in *Brennan Papers*.

52. Justice O'Connor Memorandum to the Conference (June 11, 1984), in *Brennan Papers*; Justice Rehnquist Memorandum to Justice Blackmun (June 11, 1984), in *Brennan Papers*.

53. Justice Rehnquist Memorandum to Justice Blackmun (June 11, 1984), in *Brennan Papers*.

54. Justice Brennan Memorandum to Justice Blackmun (June 11, 1984), in *Brennan Papers*.



be indicated by my vote in previous cases . . . I am much taken with your opinion and could join it if the case is not to be reargued."<sup>55</sup> But, Justice White said, he would prefer not to vote yet if the case was to be reargued.<sup>56</sup> He did say that he "would be inclined to follow [Justice Blackmun's] lead" on whether the case should be reargued.<sup>57</sup>

The most substantial intervention came from Justice Stevens, and it can be understood only in a somewhat broader context. Justice Stevens and some of his other relatively liberal colleagues periodically got upset with Chief Justice Burger's leadership style. Burger was something of a bumbler, often confused about what had happened at the Court conference and sometimes inept at the personal relations needed to smooth over the inevitable tensions that characterize the operation of a nine-person Court dealing with hard and divisive issues. Burger's colleagues generally put up with the way he operated, though they never were entirely comfortable with it. Occasionally, though, they got irritated. Their irritation typically took the form of attributing confusion not to Burger's ineptitude but to a deeper Machiavellian strategy designed to push the Court in a more conservative direction.

One such outbreak of irritation was occurring as the Court considered *Garcia*. A week and a half after hearing oral argument in *Garcia*, the Court heard argument in *New Jersey v. T.L.O.*<sup>58</sup> Apparently the Court's conservatives had believed that the case would be a good vehicle for articulating standards for school searches that would send a signal to school authorities that they could expand their efforts to control crime and disorder in the schools. At the oral argument, though, it became clear that the state's lawyers were asking for something quite different. The state's petition for certiorari had accepted the state supreme court's standard for conducting school searches, which was "reasonable suspicion."<sup>59</sup> It sought an exception from the exclusionary rule for evidence found as a result of school searches conducted with less than reasonable suspicion. Even the Court's conservatives were unwilling to go that far. Still, they had to do something about *T.L.O.* itself. At first Chief Justice Burger appeared to go along with the suggestion that the Court should dismiss the writ of certiorari improvidently granted. Others, though, pressed to have the case re-argued, with the parties invited to address the

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55. Justice White Memorandum to Justice Blackmun (June 13, 1984), in *Brennan Papers*.

56. *Id.*

57. *Id.*

58. 468 U.S. 1214 (1984).

59. *Id.* at 1214-15.

question of whether the search in *T.L.O.* violated the "reasonable suspicion" standard.

Once the decision to reargue was made, Justice Stevens circulated a draft dissent from the reargument order. The Chief Justice sent Stevens a note indicating his astonishment that Stevens was proposing to publish a dissent from what was at that point an interim order.<sup>60</sup> Stevens was adamant, even a bit snippy. He told the Chief Justice, "Your first vote . . . was to dismiss the writ as improvidently granted. It baffles me that you can consider a case worth either no argument or two arguments."<sup>61</sup> Stevens' dissent from the order directing reargument in *T.L.O.* said that the majority, "[e]vidently unable or unwilling to decide the question presented by the parties," was "[v]olunteering unwanted advice" in asking the parties to address an issue they had "no desire to seek reversal" on.<sup>62</sup>

The question of what to do with *T.L.O.* was still in the air as Stevens considered the suggestion that *Garcia* be reargued. He wrote the Chief Justice a pointed letter saying that the conference ought to discuss the standards to be applied to motions for reargument.<sup>63</sup> Stevens described "four alternative grounds for reargument."<sup>64</sup> He ruled out the possibility of a change in membership over the summer as a permissible ground for reargument,<sup>65</sup> and similarly indicated that reargument would not be proper simply because one Justice was "not certain as to his vote . . . unless the vote became critical to the disposition."<sup>66</sup> Reargument would be proper, he suggested, "[i]f five justices are unable to agree on the proper disposition of a case before the end of June."<sup>67</sup>

His sharpest comments were directed at the situation posed by *Garcia*, where "the circulation of the majority opinion comes so late that there is not adequate time in which to prepare a dissent."<sup>68</sup> Here he mentioned some recent experiences. In one case, Stevens said, he did not circulate his proposed majority opinion until June 6; Justice Rehnquist circulated a dissent on June 20 "and on the following day

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60. Chief Justice Burger Memorandum to Justice Stevens (July 2, 1984), in *Marshall Papers*, Box 361, file 5 (hereinafter *Marshall Papers*) (on file with the Library of Congress).

61. Justice Stevens Memorandum to Chief Justice Burger (July 3, 1984), in *Marshall Papers*.

62. 468 U.S. 1214, 1215 (1984) (Stevens, J., dissenting).

63. Justice Stevens Memorandum to Chief Justice Burger 1 (June 12, 1984), in *Brennan Papers* (cited in note 9).

64. *Id.* at 1-3.

65. *Id.* at 2-3.

66. *Id.* at 2.

67. *Id.* at 1.

68. *Id.* at 1-2.

you [the Chief Justice] changed your vote."<sup>69</sup> A week later Rehnquist circulated a draft opinion for the Court, and Stevens converted his opinion into a dissent.<sup>70</sup> In 1976, Stevens pointed out, he had circulated a proposed majority opinion on June 18, Justice White circulated a dissent on June 21, the Chief Justice changed his vote on June 25, and White converted his opinion into a majority opinion by June 28.<sup>71</sup> Stevens drove the point home: "In the case under discussion now, I find it difficult to believe that the four Justices who have supported the motion to reargue do not have the capacity to prepare a dissent in the time which remains this month."<sup>72</sup> He did not have to say so, but Justice Blackmun's June 11 circulation was two weeks earlier than the Chief Justice's earlier vote switches, which Justice Stevens had managed to deal with.

Stevens' letter apparently stiffened Blackmun's resolve, and he voted against reargument for *Garcia*. To diffuse the tensions, though, Justice White went along with the reargument order. Justices Powell and O'Connor drafted an order requesting that the parties address the question of whether "the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery* . . . should be reconsidered."<sup>73</sup> Justice Blackmun, saying that having voted against reargument he lacked "standing to suggest changes in the proposed form of order," nonetheless "venture[d] to say . . . that if the question is to be presented, *National League of Cities* just might end up being overruled. In the opinion I prepared this Term, and as to which some took umbrage," he pointed out, "it was not overruled."<sup>74</sup>

By the time of reargument, it was all over but the writing. The discussion at the Court's conference was cursory.<sup>75</sup> The Chief Justice said only that "[m]ass transit cannot be subject to federal control."<sup>76</sup> Justice Powell tried out a new standard: "whether [a subject was] essentially [a] matter of local or national concern."<sup>77</sup> He did not think the federal interest in *Garcia* was "that great."<sup>78</sup> Justice O'Connor

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69. *Id.* at 2.

70. *See id.*

71. *Id.*

72. *Id.*

73. Justice Powell Memorandum to the Conference (July 3, 1984), in *Brennan Papers* (cited in note 9).

74. Justice Blackmun Memorandum to Justice Powell (July 3, 1984), in *Brennan Papers*.

75. *See* docket sheet on reargument, in *Brennan Papers*. Justice Brennan's notes on the reargument docket sheet are substantially shorter than those on the initial argument's sheet.

*Id.*

76. *Id.*

77. *Id.*

78. *Id.*

called *Garcia* "a watershed case."<sup>79</sup> The Framers, she said, "envisaged a system of state [and] federal sovereignty," and the "pay of state employees is for states."<sup>80</sup>

Justice Brennan indicated that he was ready to go along with the analysis Blackmun had offered the first time around.<sup>81</sup> "It is a splendid piece of scholarship," he said, "and it properly emphasizes that the federalism restraints on Congress' Commerce Clause power lie *primarily* in the political process."<sup>82</sup> He did add, though, that "if there is sentiment for *expressly* overruling *National League of Cities*, I would join in such a disposition without hesitation."<sup>83</sup> He suggested that overruling *National League of Cities* might, "in fact, be required" by Justice Blackmun's analysis.<sup>84</sup> Justices White and Marshall endorsed overruling *National League of Cities*.<sup>85</sup> Justice Blackmun said merely that the oral arguments had been "disappointing."<sup>86</sup> Finally, Justice Stevens, perhaps concerned about tying down Justice Blackmun's vote to overrule *National League of Cities*, said explicitly that "[b]alancing here is for Congress as [Justice Brennan] arg[ues]. Indeed," he continued, this was "a classic case where it's wrong for [the] judiciary to intervene."<sup>87</sup>

Justice Blackmun's opinion in *Garcia* did overrule *National League of Cities*. Its criticisms of the unworkability of the *National League of Cities* approach tracked what he had written earlier. The opinion articulated somewhat more clearly than the first version the Wechslerian argument that Justice Stevens had been pressing. As many have observed, though, probably the most notable aspects of *Garcia* are the comments by Justices Rehnquist and O'Connor. Although a central focus of Justice Blackmun's opinion was the inability of the Court to design a workable constitutional doctrine limiting national power in the name of federalism, Justice Rehnquist refrained from discussing "the fine points of a principle that will, I am confident, in time again command the support of a majority of the Court."<sup>88</sup> Justice O'Connor indicated that she "share[d] Justice Rehnquist's be-

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79. *Id.*

80. *Id.*

81. Brennan Statement (on reargument), in *Brennan Papers* (cited in note 9).

82. *Id.* (emphasis in original).

83. *Id.* (emphasis in original).

84. *Id.*

85. Reargument Notes, in *Brennan Papers* (cited in note 9).

86. *Id.*

87. *Id.*

88. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting).

lief that this Court will in time again assume its constitutional responsibility.”<sup>89</sup>

These express promises to disregard stare decisis issues occurred, I believe, because of the internal maneuverings that led to the *Garcia* opinion. The dissenters were annoyed at Justice Blackmun who, as they saw it, had “sandbagged” them by voting one way and circulating a draft opinion coming out the other way, all without notice to them; their decision to treat *Garcia* as a precedent without weight resulted from that annoyance. And Justice Blackmun in turn was annoyed at the dissenters who, as he saw it, failed to appreciate his honest reconsideration of his position as he tried to work on an opinion; his decision to overrule rather than distinguish *National League of Cities* resulted from *that* annoyance.

### III. TRYING AGAIN

In 1991, Justice O'Connor revived the federalism debate. An extended essay on the constitutional bases of federalism served to justify a stringent “clear statement” rule of statutory interpretation in *Gregory v. Ashcroft*.<sup>90</sup> By the next Term, Justice O'Connor was in a position to carry through on her promise to revisit the constitutional question. *New York v. United States*<sup>91</sup> did not quite overrule *Garcia*.<sup>92</sup> Rather, it tried once again to articulate a judicially enforceable limitation on congressional power to regulate the activities of state governments. In the remainder of this essay, I explore whether the new formulation is likely to founder on the same difficulties that attended the *National League of Cities* formulation.

Judges attempting to develop judicially enforceable limitations on congressional power have to solve two problems. First they must explain why such limitations ought to be devised, and second they must design limitations that courts actually can enforce. The dissents in *Garcia* did a decent job in addressing the first question, and—as dissents—properly put aside the second. Justice O'Connor got a majority to accept her earlier analysis of the first problem. The issue I

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89. *Id.* at 589 (O'Connor, J., dissenting).

90. 501 U.S. 452 (1991).

91. 112 S. Ct. 2408 (1992).

92. For the most substantial discussions, see generally H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633 (1993); Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 U. Kan. L. Rev. 493 (1993); and Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957 (1993).

take up is whether she solved the second one. That is, assuming for now that federalism is a desirable way to organize a government and that embedding a commitment to federalism in a constitution is a good idea, will courts be able to enforce such a constitutional commitment through a judicially administrable doctrine?

The bulk of *New York v. United States* is an exposition of the proposition that federalism is a principle embedded in our constitutional structure. Why, though, is that principle to be enforced by the courts? Perhaps, as Justice Powell suggested in *Garcia*, the answer is that another principle of our constitutional structure is that courts stand ready to enforce *all* constitutional principles.<sup>93</sup> That proposition, however, is inconsistent with, among other things, the political questions doctrine, which identifies constitutional principles the enforcement of which the courts leave to the other branches.

Perhaps the answer lies in a proper Wechslerian analysis. That is, it may be true, as Wechsler argued, that federalism principles need not be enforced by the courts as long as the interests of the states as states are adequately represented in the national political process. But, contrary to Wechsler, it may not be true today that those interests are represented adequately.<sup>94</sup> And, judicial review is designed to deal with precisely those situations in which the interests constitutional principles are designed to protect are not adequately represented in the political process.<sup>95</sup> Preserving state competence in the face of centralizing legal doctrine and the obvious failure of the structural guarantees on which Wechsler relied leads recurrently to a search for informal means by which state interests are protected.<sup>96</sup>

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93. See *Garcia*, 469 U.S. at 565 n.8 (Powell, J., dissenting) (stating that "[o]ne can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights").

94. The reasons one might have for rejecting the Wechslerian position may be inconsistent with some of the reasons that Justice O'Connor offered to *defend* the doctrinal formulation she suggested in *New York v. United States*. See text accompanying note 91.

95. For the classic modern statement of this general theory of judicial review, see generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U., 1980). Note that this theory can account for the political questions doctrine if one believes that the doctrine is properly invoked only in cases where the political process is adequate to protect the relevant interests, as it may be, for example, in connection with impeachments. See *Nixon v. United States*, 113 S. Ct. 732 (1993) (holding that Senate has sole discretion to choose impeachment procedures).

96. See generally Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485 (1994).

Those informal means, however, are not themselves embedded in the Constitution and are always vulnerable to drift and change.<sup>97</sup>

### A. General Considerations

Suppose, then, that we are convinced that the courts must be available to enforce federalism principles against congressional overreaching. Then the second problem must be addressed. What precisely are the principles the courts are to enforce?

#### 1. Functionalist Tests

Adopting terms familiar from discussions of separation of powers, where similar problems arise, we might distinguish between functional and formalist versions of federalism principles.<sup>98</sup> Justice Blackmun's support for a balancing test in *National League of Cities*, and the informal comments during the Court's deliberations over *Garcia* that the question was whether Congress had "gone too far," are examples of functional tests.

These proposals indicate almost transparently the problems with functional tests. A balancing test must assess the relative importance of the federal interest that Congress sought to advance and the state interest its action affected. But how are the courts to determine just how important a federal interest is? Justice Powell's comment after the reargument in *Garcia*, that he did not think that the federal interest was "that great," illustrates the problem. Was the federal interest enforcing minimum wage standards on public employers, or on employers generally? And, even if it was the more limited interest, on what basis could Justice Powell defend his assertion that the federal interest was not "that great"?

Balancing tests are familiar from many contexts, including First Amendment law.<sup>99</sup> Their very familiarity may be misleading, though. In most contexts, balancing tests are invoked against actions of governments at every level. A balancing test for federalism is different, however, because it is invoked only against Congress. State

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97. Consider, for example, the various mutations the national party system has undergone, with their potential impact on the ability of party structures to protect the interests of states.

98. The terms are most familiar from their use in Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488 (1987).

99. For a general discussion, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L. J. 943 (1987).

and local governments have widely varying agendas, and some government somewhere is likely to try almost anything. As a result, some ill-considered laws and regulations may slip through the political process.

Congress, in contrast, is so busy that it can do only a few, quite important things. Wechsler's analysis may be inadequate to justify a complete regime of judicial abstention from federalism cases, but no one denies that states as states have some substantial political influence on the national political process. If these practical political considerations can be taken into account, as a functionalist analysis would suggest, they undermine the case for judicial balancing. The practical political constraints, coupled with burdens on Congress' time, make it seem quite unlikely that Congress would adversely affect the interests of states without a pretty good reason for doing so.

Modern criticisms of unfunded mandates reject this argument. According to critics, Congress is attracted to unfunded mandates—programs that impose substantial costs on the operation of state governments without imposing federal taxes to cover those costs—because they allow Congress to get the political benefit of imposing a regulation without having to bear the political cost of raising taxes. If voters are fully informed and rational, however, it is quite unclear how this can happen.<sup>100</sup> Voters elect members of Congress and state legislators, and they pay taxes to the national and state governments. It ought not matter to any voter *which* of the people he or she elects actually decides to create a program that takes money from the voter's pocket, nor should it matter to such a voter *what* the address on the envelope is in which the relevant tax payment is included. If voters are informed and rational, that is, enacting an unfunded mandate garners members of Congress no immunity from voter concern about increased taxes.

Perhaps, though, voters are not fully informed. If this is the case, however, we ought to wonder why the misinformation systematically favors the national government against the state. That is, we would need to know how often voters mistakenly believe that programs they favor, which Congress has enacted, were "actually" adopted by the state legislature. True, state legislatures may lose political points when Congress commands them to enforce an unpopular federal regulatory program, but they may gain political points when

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100. For an effort to explain unfunded mandates along these lines (which in my view requires quite strong assumptions about voter ignorance), see generally Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 Vand. L. Rev. 1355 (1993).



Congress commands them to enact a popular one. Moreover, if Congress adopts the strategy of having the national government directly administer all the popular programs while passing the unpopular ones off on the states, state officials will have an *easier* time of pinning responsibility where it lies, on the national government.

Coupled with judges' unease about their capacity to determine reliably whether a federal interest really does outweigh the adverse impact on states, the foregoing considerations are likely to lead courts routinely to uphold federal laws when they balance the relevant interests. That is what happens in separation-of-powers cases, and it is what happened under the regime established by *National League of Cities*, where Justice Blackmun, a supporter of balancing, provided the fifth vote to uphold every law that the Court considered after *National League of Cities*.

## 2. Formalist Tests

### a. Nondiscrimination

What might be some formalist alternatives? Consider first the regime under *National League of Cities* as it would have been modified by Justice Blackmun's initial proposal in *Garcia* that Congress may not single states out for discriminatory treatment. This approach raises a host of problems. Under this regime, Congress could regulate states if they fell into a larger class that included some individuals, but it could not regulate the states alone. (See Diagram A.)

**Diagram A**

Congress → →	Individuals + states	Permitted
Congress → →	States only	Not Permitted

Justice Blackmun's draft opinion in *Garcia*, as well as the published final version, pointed out one problem with this regime. States engage in many activities that private individuals do not engage in. Traditionally those activities were called "governmental" to distinguish them from the "proprietary" activities that individuals as well as governments engaged in. Yet, experience in cases involving intergovernmental tax immunities had shown that courts cannot reliably administer a line distinguishing between governmental and pro-

proprietary activities.<sup>101</sup> Justice Blackmun could not have been proposing a rule that would have treated as “discriminatory” a regulation that applied only to the states because only they engaged in the regulated activities.

His proposal might be salvaged by pointing out that the traditional “governmental/proprietary” distinction actually did not distinguish between activities that *only* governments engaged in and those that both governments and individuals did. Modern state action cases serve as a relevant analogy here. These cases hold that the Constitution imposes obligations on governments only with respect to functions that are “exclusively” governmental.<sup>102</sup> That category has proven to be nearly empty, however, because in the modern United States, with widespread practices of “contracting out” traditional government functions, almost no government function is performed only by governments.<sup>103</sup> Thus, although Justice Blackmun’s proposal might be augmented by the analogy to state action cases to avoid his own criticisms of the “governmental/proprietary” distinction, it would then actually impose no limits on Congress’ power.

A further difficulty arises from the preemption doctrine, which, roughly stated, gives Congress free reign to displace state authority to regulate some private activity when the private activity affects interstate commerce. Consider an express preemption provision in its typical form, stating that “no State may impose a requirement” inconsistent with prescribed federal standards. Such a provision “singles the states out” for special treatment. It bars them from doing something—imposing a regulatory requirement—that no private entity is barred from doing (because, of course, no private entity has the legal capacity to impose such requirements). Here, then, is a prototypically governmental function that, one assumes, Justice Blackmun could not have meant to immunize from federal regulation.<sup>104</sup>

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101. See *Garcia*, 469 U.S. at 540-42.

102. See, for example, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974).

103. But see *Edmondson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) (holding that exercising the right to peremptory challenges is exclusive state function).

104. Indeed, a footnote in Justice Blackmun’s draft specifically preserved the stronger implication of preemption doctrine that, as he put it:

[C]ongress’ undisputed authority to pre-empt state regulation of private activities entails the additional authority to forgo pre-emption and to require instead that States consider specified federal interests in regulating the same conduct, see *FERC v. Mississippi*, 456 U.S. 742, 763-768 and nn. 29-30 (1982), even though the exercise of the latter authority requires Congress to address its commands to the States alone.

Blackmun 2nd Draft, June 13, 1984 at 27-28 n.20, in *Brennan Papers* (cited in note 9).

*b. Anticommandeering*

“Discrimination,” then, is unlikely to be a judicially enforceable standard for picking out impermissible federal action. The problem of preemption poses difficulties as well for Justice O’Connor’s formulation in *New York v. United States*. Her concluding formulation is deceptively simple: “The Federal Government may not compel the States to enact or administer a federal regulatory program.”<sup>105</sup> Earlier, Justice O’Connor provided a somewhat more elaborate version: Congress may neither “commandeer” state governments into the service of federal regulatory purposes,” nor may it “present a simple command to state governments to implement legislation enacted by Congress.”<sup>106</sup> What is crucial, it would seem, is that states are being called on to do something to their citizens—in *New York v. United States*, to their producers of low-grade nuclear wastes. (See Diagram B.) Congress could, however, preempt state regulations by itself prescribing federal regulations.

**Diagram B**

Congress →	Individuals		Permitted
Congress →	States		Permitted
Congress →	States →	Individuals	Not Permitted

Justice O’Connor offered two kinds of reasons for this result. One, which she labelled “formalistic,”<sup>107</sup> was that this simply *was* the regime established by the Constitution. Others have pointed out that the historical account Justice O’Connor offered to defend the formalistic analysis is plainly inaccurate.<sup>108</sup> On her account, the Framers replaced the Articles of Confederation with the Constitution because they believed that the Articles were a failure. The Articles were a failure, the Framers believed, because they allowed Congress to impose obligations only on the states, and did not allow it to impose obligations directly on individuals. They therefore created a constitution granting power to Congress to regulate individuals directly, without the states as intermediaries. All of this account is true enough, but it fails to show that the Framers thought the Articles of

105. *New York v. United States*, 112 S. Ct. at 2435.

106. *Id.* at 2428.

107. *Id.* at 2434.

108. See, for example, Powell, 79 Va. L. Rev. at 652 (cited in note 92).

Confederation were a failure because they *did* allow Congress to impose obligations on states. For all Justice O'Connor's history establishes, the Framers wanted to *supplement* national power to regulate the states directly with national power to regulate individuals, not to *supplant* national power to regulate the states.<sup>109</sup>

A formalist might note another difficulty with Justice O'Connor's formalist defense of her doctrine. She permits preemption, but preemption is a "command" to the states that they regulate an area in a specified way—by permitting only the regime that Congress prescribes. So, for example, a state legislature responding to citizen demand might enact a statute imposing special liabilities on employers who manipulate their pension and benefits plans to their workers' detriment. If Congress preempts the power to regulate pension plans, it thereby directs state courts to ignore what the state's citizens desire.

The problem is quite general, but appears in its starkest form in "field" preemption. Field preemption occurs when Congress has totally occupied a field. It has its special bite when Congress, having totally occupied a field, does not prescribe a regulation of some subject within that field. The result is that a regime of complete private freedom from regulation prevails with respect to that subject: Congress has not prescribed a rule, and the states may not do so because the field has been totally occupied by Congress. Field preemption, that is, commands the states to put up with a regime of complete private freedom from regulation—to "implement" the federal regime of non-regulation by barring its courts from enforcing otherwise applicable tort or contract law, for example.<sup>110</sup> In this way state governments

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109. Prakash, 79 Va. L. Rev. 1957, labors to show that the Framers did not intend to supplement national power to act on states, but to supplant it. According to Prakash, the Framers believed that the experience under the Confederation had shown that attempting to exercise national power by coercing state governments was "futile, unjust, and potentially explosive," which led "the Founding Generation [to] renounc[e] the concept." *Id.* at 1975. All Prakash's evidence shows, however, is that the Framers believed it to be generally unwise to attempt to implement national policy by coercing state legislatures, not that they "renounced" their ability to do so if circumstances might persuade Congress that it would be efficacious, fair, and acceptable to the people of the states subject to coercion.

110. It might be thought that field preemption differs from directing a state to regulate because the latter requires the states to spend money (albeit perhaps not much money), while field preemption does not. However, Prakash stated:

Of course, the congressional ability to commandeer state executives does help Congress to tap into state treasuries as well. To the extent that state officers are burdened with federal duties, they neglect state responsibilities, thus necessitating the state legislatures to hire more executives. This indirect commandeering of state funds is a *far cry* from the ability to requisition state legislatures.

79 Va. L. Rev. at 2036 (emphasis added).

must "respond to the commands of Congress rather than the dictates of their voters."<sup>111</sup>

In addition to her formalistic defense of the "no commanding or commandeering" rule, Justice O'Connor offered a functional defense. She began that defense by pointing out that Congress can "encourage a State to regulate in a particular way" and may "hold out incentives . . . as a method of influencing a State's policy choices."<sup>112</sup> She continued that offering grants to states on the condition that they regulate in a prescribed manner was permitted, as was giving the states a choice between regulating "according to federal standards or having state law pre-empted by federal regulation."<sup>113</sup> Either of these methods allowed "state officials [to] remain accountable to the people"<sup>114</sup> by declining conditional grants when their constituents disagree with the conditions, or by insisting that state enforcement activities be directed to the issues local constituents care more about. If Congress can compel states to regulate, Justice O'Connor argued, "the accountability of both state and federal officials is diminished."<sup>115</sup> Congress can preempt state law, "but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular."<sup>116</sup> She continued: "But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."<sup>117</sup>

This passage seems attractively realistic, but it is attended by all the problems of functionalism. First, how does Justice O'Connor know that political responsibility will be diffused as she says?

Why it is "a far cry" is obscure. Even more important, emphasizing only the cost of administering a regulatory scheme treats as relevant only the costs state residents bear through their taxes and not the costs they bear from the unregulated activity. If, however, the analysis of commandeering ultimately rests on a distinction between the costs of government "action" and the absence of costs associated with government "inaction," it relies on another formalism, the extensive criticisms of which I need not recount here. See, for example, Symposium, *The Public/Private Distinction*, 130 U. Pa. L. Rev. 1289 (1982).

111. Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1561, 1569 (1994). For a discussion of the possible distinctions between national commands to state courts and national commands to state legislatures, see Prakash, 79 Va. L. Rev. at 2007-32.

112. *New York v. United States*, 112 S. Ct. at 2423.

113. *Id.* at 2424.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

Consider again field preemption. An outraged public may say to its state officials, "Why are you letting these people get away with that sort of thing?" The state officials reply, "We would like to regulate their activities, but the federal government won't let us." According to Justice O'Connor's analysis, that reply is sufficient to place responsibility where it ought to be. Now consider a federal program requiring state officials to regulate in a locally unpopular way. Why could the state officials not reply to the outraged public, "We would like to regulate—or not regulate—as you want, but the federal government is forcing us to do this"? If the analogous reply is sufficient to locate political responsibility in the field preemption context, why is this one not sufficient in the regulatory context?

Second, Justice O'Connor's political analysis is conditional. Political responsibility "may" be diffused; state officials "may" suffer public disapproval. But, of course, that they "may" suffer disapproval means that they may not. What warrant is there for Justice O'Connor to embed her analysis of contemporary politics in the Constitution?

In Justice O'Connor's defense, one might reply that a program with a *national* majority behind it might not have local majorities everywhere in the country. What is nationally popular might be locally unpopular, and officials in states where the program is unpopular will suffer the political consequences with which she is concerned. If the program is locally popular, state officials would have adopted it on their own.

Again, though, the constitutional response to this argument is, not just how we can tell whether a nationally popular program is locally unpopular,<sup>118</sup> but why *judges* are the ones to make that assessment. Perhaps a majority actually cannot get its way in some states because of peculiar local circumstances, like the dominating role of a local political machine. "The people" of those states would be happy to have the program, and will praise their officials when the officials are commanded to do the right thing. More important, though, why should the local unpopularity of a program prevail over its national popularity? Justice O'Connor's analysis overlooks the fact that democratic federalism means that people rule themselves through *two* governments. As the Civil Rights Act of 1964 showed, programs that are popular with national majorities acting within the spheres of author-

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118. For an argument that we cannot take the fact that state officials decide to litigate to challenge a program on federalism grounds as an indication that the program is locally unpopular, see Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 *Urban Lawyer* 301 (1988).

ity they have given the national government ought to prevail in the face of local unpopularity—or, at least, that this idea is as defensible a formalistic conception of our federalism as the one Justice O'Connor offered.

Finally, Justice O'Connor's analysis has an internal tension that should be noted. She rejects the Wechslerian argument on formalist grounds: The structures of the constitutional system no longer provide adequate representation of the states as states in the national political process. This failure justifies a judicial role even in the face of credible evidence that the actual operations of the national government include representation of state interests as significant as occurred before, for example, the adoption of direct election of Senators in 1913. Why might Justice O'Connor adopt this formalist defense of a judicial role? One possibility is that she simply does not believe the "realistic" political argument about how well states do in national politics. If this is true, however, we might ask her to provide an alternative realistic account rather than a formalist one. On the other hand, perhaps Justice O'Connor believes that the kind of realistic political analysis a modernized Wechslerian argument requires is inappropriate for judges. Then, however, we might ask her to explain why she put forth her functional defense of the rule against commanding or commandeering.

*c. State autonomy*

Professor Merritt argues that states require some immunity from national commands if they are to be autonomous governing authorities, and that state autonomy is desirable because it serves the valuable functions of checking national power, diversifying the participants in government, providing people with choices among government policies, and serving as laboratories for experimentation.<sup>119</sup> She acknowledges that Congress has complete authority to displace the choices state governments make through direct exercise of its power to regulate and preempt conflicting state laws. But, she argues, Congress should be forced to make an all-or-nothing choice when it regulates.<sup>120</sup> Otherwise Congress will show state residents that their government deserves no respect.

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119. See Merritt, 47 Vand. L. Rev. at 1571-74 (cited in note 111).

120. Congress' power to condition spending on compliance with federal demands differs from direct regulation of states, in Professor Merritt's view, because the states' bargaining position against the national government is strengthened when the states have the absolute power to refuse the conditions. *Id.* at 1572.

One might fairly wonder, though, about the appeal of protecting state autonomy as a purely formal matter. The respect state residents give "their" government surely depends far more on what happens inside the state capital building than on where the building is located.<sup>121</sup> Yet, if Congress has full power to preempt state-imposed regulations, the states can do what is needed to gain that respect only at the sufferance of Congress.

I have argued that the rule adopted in *New York v. United States* is not easily defended either formally or functionally. Is it, though, a rule that courts can administer?

### B. Doctrinal Tensions After *New York v. United States*

To see whether a rule can be administered, we need to consider the occasions on which it is likely to be invoked. What doctrinal lines might lower courts and the Supreme Court follow in the aftermath of *New York v. United States*?

#### 1. Pure Federalism Limits

Some lower courts have already interpreted *New York v. United States* to indicate greater receptivity on the Supreme Court to classical federalism arguments to the effect that Congress simply lacks the power to regulate certain subjects.<sup>122</sup> As Professor Merritt notes, these decisions emphasize the language in *New York v. United States* that justifies its rule with some combination of the specific terms of Congress' enumerated powers and the language of the Tenth Amendment.<sup>123</sup>

#### 2. Distinguishing Among Congress' Powers

Existing federalism jurisprudence suggests that some courts will be tempted to distinguish among Congress' powers. The fact that *New York v. United States* is a "Commerce Clause" case might lead courts to consider whether the same federalism limits apply when

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121. Compare with *Coyle v. Smith*, 221 U.S. 559 (1911) (denying Congress power to limit state's ability to locate state capital where it chooses).

122. See *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), cert. granted, 114 S. Ct. 1536 (1994); *United States v. Cortner*, 834 F. Supp. 242 (M.D. Tenn. 1993), rev'd, *United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994).

123. See Merritt, 47 Vand. L. Rev. at 1580-81 (cited in note 111); notes 107-20 and accompanying text.



Congress acts pursuant to its power to enforce the Reconstruction Amendments,<sup>124</sup> or pursuant to some other power.

For example, Congress prefaced the National Voter Registration Act of 1993, the so called "Motor Voter" bill,<sup>125</sup> with findings that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities."<sup>126</sup> This finding appears to invoke Congress' powers to enforce the Fourteenth and Fifteenth Amendments,<sup>127</sup> but its limitation to "Federal office" suggests an attempt to invoke Congress' power to prescribe rules for the "Times, Places and Manner of holding Elections for Senators and Representatives."<sup>128</sup>

Among its other provisions, the Act requires states to establish procedures to register voters at state public assistance agencies, which must make a number of "services" available to registrants, including "assistance . . . in completing voter registration application forms."<sup>129</sup> This requirement seems to demand that states allocate their workers' time in ways that might differ from the states' own preferences: Instead of spending all of their time implementing state policies about public assistance, the workers must spend some time doing what the federal government requires.

Perhaps the "motor voter" statute is unconstitutional under *New York v. United States*. Yet, the statute seems different from the relatively minor provision held unconstitutional there. At the least, it seems to advance interests that go to the core of the democratic system of which federalism is only a part. So, perhaps the courts will say that federalism concerns have a different bite when Congress acts to enforce the Reconstruction amendments. That determination, however, would be difficult to reconcile with Justice O'Connor's formalism in *New York v. United States* and would, again, suggest that federalism concerns dictate that courts use a functional balancing test.

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124. Compare *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (suggesting such a distinction under the regime of *National League of Cities*).

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

126. National Voter Registration Act § 2(a)(3), 107 Stat. at 77, codified at 42 U.S.C.A. § 1973gg (a)(3).

127. It invokes the Fifteenth Amendment through the invocation of "racial minorities" and the Fourteenth Amendment through the implicit reference to others of the "various groups."

128. U.S. Const., Art. I, § 4.

129. National Voter Registration Act § 7(a)(4)(A)(ii), 107 Stat. at 80.

The Indian Gaming Regulatory Act<sup>130</sup> raises a pair of related issues. Some unpublished district court opinions have held the Act unconstitutional.<sup>131</sup> The Act defines three classes of gambling activity, and requires states to negotiate in good faith with Indian tribes that want to establish the third, most regulable form of gambling on their land.<sup>132</sup> The courts holding the statute unconstitutional say that Congress has, once again, commanded the states to do something—negotiate in good faith. Those holding it constitutional say that the states simply have to negotiate, but need not agree to anything. Yet, an obligation to negotiate in good faith imposes limits on what the states can do, as everyone familiar with the labor law duty to negotiate in good faith knows. Again, *New York v. United States* does not offer much guidance on whether the Act unconstitutionally “commands” or permissibly regulates the states.

Perhaps the rule of *New York v. United States* is inapplicable because Congress acted under its power to regulate commerce “with the Indian Tribes.” Like the power to regulate foreign commerce, the power to regulate commerce with Indian tribes is ordinarily thought to be “greater” than the power to regulate interstate commerce.<sup>133</sup> Interestingly, one court of appeals has held that Congress lacked power under the Indian Commerce Clause to abrogate the states’ Eleventh Amendment immunity, indicating that in its view Congress’ power here was *less* than its power under the Interstate Commerce Clause.<sup>134</sup> This reasoning would suggest that the Act’s negotiating requirement might still fall.

### 3. Distinguishing Between Commandeering the Legislature and Commandeering the Executive and the Judiciary

In an important article, Saikrishna Prakash argues that *New York v. United States* was correctly decided because the Constitution

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130. 25 U.S.C.A. §§ 2701 et seq. (West, Supp. 1994).

131. See, for example, *Ponca Tribe of Oklahoma v. State*, 834 F. Supp. 1341, 1345-46 (W.D.Okla., 1992), for a discussion of all the decided cases. See also William T. Bisset, *Tribal-State Gaming Compacts: The Constitutionality of the Indian Gaming Regulatory Act*, 21 *Hastings L. Q.* 71 (1993).

132. 25 U.S.C.A. § 2710(d)(3)(A).

133. See, for example, John E. Nowak and Ronald D. Rotunda, *Constitutional Law* 130 (West, 4th ed. 1991) (stating that “even during periods when the justices were debating whether to significantly restrict the congressional power to regulate intrastate activities under the commerce power, there was no serious advocacy of restrictions on the federal power in these other areas”).

134. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (5th Cir. 1994), cert. petition filed, No. 94-35 (July 1, 1994).

does erect a barrier to congressional commandeering of state *legislative* processes, but that it was wrong to intimate that the same barrier exists when Congress forces state administrative or judicial actors to comply with its commands.<sup>135</sup> After all, *Testa v. Katt*<sup>136</sup> shows that Congress can force state courts to entertain cases that they otherwise would decline to decide.<sup>137</sup> Prakash demonstrates that the Framers expected Congress to rely on state executives to administer federal law as well.

This distinction might allow courts to uphold the "Motor Voter" bill, which imposes obligations not on state legislatures but on state administrators.<sup>138</sup> Consider, though, the Forest Resources Conservation and Shortage Relief Act,<sup>139</sup> some provisions of which the Court of Appeals for the Ninth Circuit held unconstitutional.<sup>140</sup> The Act regulates the export of timber from public lands. For present purposes, the complex substantive provisions of the statute can be simplified: The statute prohibits all exports of timber from state-owned public lands, and requires "the Governor of each State" to issue regulations implementing the export prohibition.<sup>141</sup> The ban costs Washington State approximately \$50 million per year in lost profits from overseas sales.<sup>142</sup> Emphasizing the word "shall" in the statute, the Ninth Circuit held unconstitutional provisions that "[e]ach State shall determine the species, grade, and geographic origin of unprocessed timber . . . and shall administer such prohibitions consistent with the intent" of the statute, and that the governors "shall . . . issue regulations to carry out [the statute's purposes and] shall enter into formal consultation . . . with appropriate State officials."<sup>143</sup> The regulations would be designed to allow the states to

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135. See generally Prakash, 79 Va. L. Rev. 1957 (cited in note 92).

136. 330 U.S. 386 (1947).

137. Prakash offers two interpretations of *Testa*, which he apparently believes to be identical. According to one, *Testa* articulates "a nondiscrimination principle: Do not discriminate against federal law or federal cases." Prakash, 79 Va. L. Rev. at 2011-12 (cited in note 92). His next sentence purports to restate the principle: "If you discriminate against federal cases, you are not treating federal law as though it were the law of your state." *Id.* at 2012. The state courts in *Testa* did not, however, discriminate against *federal* claims alone. They refused to enforce the treble damages provision of federal law pursuant to their general rule against enforcing the penal law of another government; when applied to penal laws of other states, the Court assumed, that rule does not violate the Full Faith and Credit Clause.

138. But see *Printz v. United States*, 62 U.S.L.W. 2725 (D. Mont., May 16, 1994) (holding unconstitutional provision of Brady Handgun Violence Prevention Act that requires local law enforcement officials to conduct background checks of handgun buyers).

139. 16 U.S.C. §§ 620 et seq. (Supp. 1992).

140. See *Board of Natural Resources v. Brown*, 992 F.2d 937, 947 (9th Cir. 1993).

141. 16 U.S.C. § 620c(d)(3)(A).

142. *Board of Natural Resources v. Brown*, 992 F.2d at 941.

143. *Id.* at 947 (quoting 16 U.S.C. §§ 620c(d)(2) & (d)(3)(A) (Supp. 1992)).

sell timber domestically, and presumably would have to work out ways of ensuring that timber would not leak into the international market. According to the Ninth Circuit, these provisions were "direct commands to the states to regulate according to Congress' instructions."<sup>144</sup>

At least in the sense that *shall* is a command, the Ninth Circuit was certainly correct. Whether the provisions are commands "to regulate," though, is a more complicated question. If *New York v. United States* rests, as I have suggested, on a distinction between regulation of the states and commands to the states that they regulate their citizens, it is unclear that the provisions are "regulations." Here, third parties are not directly implicated by the federal statute, as they were in *New York v. United States*.

Suppose, for example, the state's governor issues regulations directing that its forester require timber purchasers to certify that they will not export the timber. Some purchaser might object to this regulatory imposition. Would the purchaser blame the state forester, or the governor, or Congress? The purchaser might ask, "Why do I have to?" The forester would reply, "Because those damned feds make me ask."<sup>145</sup> I doubt that political responsibility would be seriously diffused by the statutory provisions that the Ninth Circuit held unconstitutional.

Alternatively, the national government could argue plausibly that Congress was acting on the states in their proprietary capacities, as owners and sellers of timber, and that regulation of states as owners and sellers does not implicate the basic federalism concerns about which Justice O'Connor wrote. Of course, the state would reply that it sold the timber as a fiduciary for its citizens, the proceeds being used—as required by the 1889 statute admitting the state of Washington to the union—to support the state's schools and universities. If we see the timber in that way, the federal statute regulates a governmental rather than a proprietary activity. This sort of problem is precisely why the Court found the "governmental/proprietary" distinction untenable. A third possibility is to note that Congress did not single out the states for regulation; it banned export of timber from federally owned lands as well.

Finally, Prakash's theory suggests the possibility that the statute was constitutional because the congressional directive ran to

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144. *Board of Natural Resources v. Brown*, 992 F.2d at 947.

145. An astute forester would have a disclaimer—"THIS CERTIFICATE REQUIRED BY FEDERAL LAW"—prominently printed on the form.

the Governor rather than to the state legislature. At the very least, however, this seems unduly formalistic: Whatever concerns one might have about federalism seem equally applicable to such a directive as they would if Congress had directed the state legislature to adopt the regulations itself. Perhaps the distinction, then, is not between state legislatures and state executives, but between those who, under local law, have final lawmaking authority over the relevant subject, and those who take the law given to them and administer it.<sup>146</sup> Where, as is inevitably true, a governor's actions, even those taken in her lawmaking capacity, are subject to displacement by state legislatures, this will unlikely be a comfortable rule for courts to administer.

None of this is to say that the Ninth Circuit was "wrong" in its application of *New York v. United States*. Rather, it is to illustrate the points at which Justice O'Connor's standard might buckle under pressure. I suspect that the outcome in the timber case turns on whether the judges think that Congress has simply "gone too far" in trying to protect the nation's timberlands, an interest that the judges themselves may see as less pressing than Congress apparently did. That is, the application of *New York v. United States* turns on an unstated functional or balancing test. The experience under *National League of Cities* suggests that such tests will turn out to be failures.

#### 4. Defining State Autonomy

Professor Merritt's proposal requires the courts to define what attributes of state governments make them autonomous. Particularly because she rests her proposal on the "republican form of government" clause,<sup>147</sup> which has received essentially no judicial exposition, it is hard to know how courts would develop the proposal.

Congress amended the Forest Resources Conservation Act in response to the Ninth Circuit's decision. Instead of requiring the state to develop regulations, Congress authorized the Secretary of Commerce to exempt states from the federal rules if the state's governor "submit[s] a program . . . for approval" that

implements, with respect to unprocessed timber originating from public lands in that State, the prohibition on exports . . . and ensures that the species,

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146. Compare with *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (holding that municipal liability under § 1983 arises only for actions taken by officials with "policymaking authority").

147. See Merritt, 47 Vand. L. Rev. at 1580-81 (cited in note 111).

grades, and geographic origin of unprocessed timber prohibited from export within the State is representative of the species, grades, and geographic origin of timber comprising the total timber sales program of the State.<sup>148</sup>

Because this provision gives the states the choice between presenting a plan for approval and submitting to preemptive federal regulation, on Professor Merritt's view it appropriately preserves state autonomy. Again, however, I wonder whether the residents of Washington state see the "choice" as something that preserves their state's autonomy or rather as something that further symbolizes the submission of their government to the national one.

### *C. Criticisms of Potential Doctrinal Developments*

In describing these post-*New York* doctrinal tensions, I have already begun to sketch the reasons for my skepticism about their stability. Historical experience has shown, for example, that pure federalism limits on congressional power are unlikely to provide satisfactory solutions to the problem of accommodating state authority and national power to the extent that devising such an accommodation is seen as a problem suitable for judicial solution. Similarly, experience shows that attempts to distinguish among congressional powers tend to generate quite unstable lines. Until the Fifth Circuit decision on the Eleventh Amendment and the Indian Gaming Regulatory Act, for example, it would have been quite odd to suggest that Congress had less power under the Indian Commerce Clause than under the Interstate Commerce Clause. What now about Congress' power under the Foreign Commerce Clause? And, are the implications of the distinction different where federalism/Tenth Amendment restrictions are involved than where the Eleventh Amendment is involved? Exploring these questions and the related ones that would inevitably arise under either the "pure federalism limits" or "distinctions among powers" approaches is, again, unlikely to provide much enlightenment about federalism or the Constitution.

The difficulties with the proposals by Prakash and Merritt are both less and more serious. They are less serious because, as academic proposals, they have been worked out in some detail and with an academic's attention to their implications. They are more serious,

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148. Forest Resources Conservation and Shortage Relief Amendments Act of 1993, Pub. L. No. 103-45, § 2, 107 Stat. 223 (July 1, 1993), codified at 16 U.S.C. §§ 620 et seq. (Supp. 1993).

however, precisely because they are academic proposals.<sup>149</sup> That is, they draw lines and make distinctions that are quite unlikely to appeal to the judges who make constitutional law.<sup>150</sup> People have found federalism attractive in the past because it allows states a domain within which they are free to choose whatever policies their citizens like. Yet, neither of the academic proposals is closely tied to that reason for finding federalism attractive.

Professor Merritt's acknowledgement that Congress can accomplish whatever substantive goals it wishes so long as it acts directly, for example, is likely to leave judges wondering about exactly what they are accomplishing in exercising what most judges are likely to regard as the important power of judicial review: certainly not any actual alteration of the potential power of Congress and the states; perhaps a shift in the bargaining positions within Congress; perhaps, as Professor Merritt suggests, some prophylactic effect with respect to policies someone might propose in the future. This is not a great deal.

In theory, then, *New York v. United States* might be the basis for doctrinal development. In practice, however, it is unlikely to produce a stable body of law. It is unlikely, that is, to be the foundation of a useful constitutional law of federalism. And, in the end, that is exactly why the Supreme Court overruled *National League of Cities*.

#### IV. CONCLUSION

After a decade, Philip Bobbitt's observation about *National League of Cities* remains the most astute in the critical commentary.<sup>151</sup> For Bobbitt, the Court there did not truly articulate a legal doctrine that we should expect to be applied in a range of cases over succeeding years. Rather, the Court was exercising a "cueing function," reminding Congress that it ought to "renew its traditional role as protector of the states."<sup>152</sup> Yet, as Bobbitt recognizes, the Court did

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149. In this they are reminiscent of nothing as much as the efforts by Professors Tribe and Michelman to make sense out of *National League of Cities*. See Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065 (1977); Frank Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 Yale L. J. 1165 (1977).

150. This is perhaps most apparent in Prakash's treatment of congressional commandeering of the state judiciary, which, he argues, is constitutionally permissible but only if Congress imposes judicial duties on only those *state* judges who have been appointed by the President and confirmed by the Senate. Prakash, 79 Va. L. Rev. at 1032 (cited in note 92).

151. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 191-95 (Oxford U., 1982).

152. *Id.* at 194.

not say, and I believe never has said, that some of its invalidations of congressional acts are exercises of this peculiar function. Rather, the Court presents its decisions as merely an exercise of its ordinary powers of judicial review.

One might dispute the contention that Congress needed such a reminder when *National League of Cities* or *New York v. United States* was decided. The real difficulty with "cueing" decisions, though, is that readers outside Congress, including lawyers for state governments and lower court judges, will take the decisions to be ordinary exercises of judicial review, articulating doctrines that should be applied consistently to problems sufficiently analogous to the ones in *New York v. United States* and other "cueing" decisions. After they do, the Supreme Court, having presented the initial decision as ordinary judicial review, will be unable to say that these readers have misunderstood the point of the Court's action. Instead, the Court will have to explain why these readers misinterpreted the precedent. Perhaps it will distinguish the "motor voter" case from *New York v. United States*, for example, by noting that Congress was acting to enforce the Reconstruction amendments. As these explanations accumulate, the notion that *New York v. United States* articulates a constitutional doctrine will dissipate. Eventually, the decision will become a relic.

One route to that end might be the following: The precise contours of health care reform legislation are yet to be defined, but I am reasonably confident that somewhere embedded in whatever Congress adopts will be provisions that are vulnerable under *New York v. United States*. For example, at least some versions of the suggested state oversight agencies are likely to be federal commands to state governments with respect to regulation of private individuals: These agencies, some proposals indicate, will define insurance packages, prescribe reimbursement rates, and otherwise regulate the provision of health care.

Because we do not know what provisions will be vulnerable, I do not raise the health care reform proposals to show that *New York v. United States* has clear implications for those proposals. Instead, I use the example to deepen the points previously made. In *New York v. United States*, the Court held unconstitutional a provision, not yet in force, that was the last step in Congress' effort to deal with the serious problem of how to dispose of low-level nuclear wastes. Yet, no matter how important the problem is, I doubt that the public gener-



ally, or even a substantial segment of the interest group community, was truly upset by the decision.<sup>153</sup> The “motor voter” statute and health care reform are, I believe, different. If the courts were to invalidate significant provisions of those statutes, adverse public reaction would be substantial. And, precisely for that reason, the courts will be inclined to develop ways to explain why the provisions are not unconstitutional under *New York v. United States*. The Court may muddle through the process, using *New York v. United States* as the starting point for its analysis, just as in the years after *National League of Cities* that decision was the starting point for analyses that regularly upheld what Congress had done. As Justice Blackmun explained in *Garcia*, on the doctrinal level that is why the Court overruled *National League of Cities*; as the cases arose, the Supreme Court found it impossible to apply the *National League of Cities* doctrine consistently, impossible to invalidate legislation that the justices thought more important than the Fair Labor Standards Act.

By invoking a criterion of “public importance,” I am of course alluding to broader issues.<sup>154</sup> In the present context, I think it worth noting that the forces that drove the Supreme Court to abandon its pre-New Deal effort to limit congressional power in the name of federalism—that is, the nationalization of the economy—have become even more potent. The globalization of the economy is surely more important in determining what happens in the lives of residents of the United States than the intricacies of federalism doctrine. And, if that is so, I wonder why we constitutional scholars spend our time working over one admittedly interesting Supreme Court opinion rather than devoting time to thinking about what it would mean to have a constitutional democracy in a global economy.

Some years from now, *New York v. United States* might formally survive, unreversed by the Supreme Court. If so, it will not be the foundation of a revitalized constitutional federalism.<sup>155</sup> At most it will be a reminder of the federalism that we used to have, but have no

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153. The relative lack of academic commentary on *New York v. United States* is, I think, suggestive.

154. On one level, for example, my argument could be taken simply as an illustration, worked out in doctrinal detail, of the proposition that law is ultimately politics. On that level, there would be nothing particularly distinctive about the doctrinal difficulties I have been concerned with in this Article; they would attend any effort to develop a coherent, “nonpolitical” constitutional law about any subject.

155. As a canon of statutory interpretation, the rule in *Gregory v. Ashcroft* may survive, and have some significant effects on bargaining within Congress. Whether federalism-based rules of statutory construction should be regarded as aspects of constitutional federalism raises interesting questions about the scope of “constitutional law” which I cannot explore here.

longer. Neither the decision, nor constitutional federalism itself, will be important components in the operation of the government under which we live.

