ETIQUETTE TIPS: SOME IMPLICATIONS OF "PROCESS FEDERALISM"

CALVIN R. MASSEY*

I. INTRODUCTION 175
II. THE MODES OF LEGALLY ENFORCEABLE FEDERALISM ... 180
A. *Confining the Scope of the Enumerated Powers of the Federal Government* 180
B. *Judicially Created State Immunities from Federal Legislation* 186
III. THE DEVELOPMENT OF "PROCESS FEDERALISM" 195
A. *The Doctrinal Roots of Process Federalism* 198
B. *The Logic of Process Federalism* 207
IV. SOME IMPLICATIONS OF PROCESS FEDERALISM 211
A. *Predictable Future Elements of Legislative Process Federalism* 212
B. *Towards a More Substantive Legally Enforceable Federalism* 216
1. Tinkering with Deference to Congress Under the Commerce Power 216
2. Treating the Conditional Spending Power More Skeptically 220
3. Considering a Blanket Immunity for States from Federal Regulation Under the Commerce Power 222
V. CONCLUSION 225

I. INTRODUCTION

When the United States Supreme Court decided *Garcia v. San Antonio Metropolitan Transit Authority*,[1] it was widely regarded as having consigned to the realm of politics the issue of the proper scope of federal legislative authority over the states, at least insofar as the commerce power is concerned. Although *Garcia* has undoubtedly increased the leeway with which Congress may regulate state activities that affect interstate commerce, the Court has

---

* Professor of Law, University of California, Hastings College of the Law. Thanks to Hastings for financial and other support of this project and to the Northwestern School of Law of Lewis & Clark College, which provided a pleasant summer environment for some of the thought that went into this endeavor. Thanks also to Paul Mishkin for discussion of some of these ideas with me.

1. 469 U.S. 528 (1985).

nonetheless continued to probe the outer boundaries of this power. In so doing the Court has begun to reconceive the method by which the Constitution imposes limits on the ability of the Congress to exert its legislative will upon the states. In the words of Justice O'Connor, on behalf of the Court, the "Federal Government may not compel the States to enact or administer a federal regulatory program,"[2] nor has the Constitution ever "been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[3] In short, "federalism requires that the federal government respect the autonomy of state governments as the possessors of independent institutional processes, even when Congress legislates in an area in which it has the constitutional authority completely to preempt state choices."[4]This reconception—that federal power may not be used to intrude upon the autonomous and independent process of state governance—is an unfinished work, and while its general outlines are now available for study, much embellishing detail remains to be done. This is an opportune moment to reflect upon the implications of this apparent new mode of judicial preservation of some modicum of state autonomy amidst the flood of federal legislative power under the Commerce Clause.

From the moment the Constitution created the then-radical axiom that the federal government was one of enumerated powers, and that the powers not delegated to it remain with the states,[5] the Court was faced with the choice of whether to treat this new federalism as enforceable only (or primarily) through political channels or to create a legally enforceable federalism, by policing the boundaries of federal and state power in lawsuits appropriately presenting the question for decision. Years ago, Professor Charles Black reminded us of the distinction between a legally enforceable federalism, containing a "core of constitutional right that courts will enforce,"[6] and a politically enforceable federalism, one that has its "basis in the political structure of the national government,"[7] and that is not susceptible to judicial

2. New York v. United States, 112 S. Ct. 2408, 2435 (1992).
3. *Id.* at 2421.
4. H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633, 641 (1993). Professor Powell is the originator of the "autonomy of process" label.
5. Except, of course, for the welter of prohibitions upon state authority that are expressly or impliedly sprinkled throughout the Constitution.
6. CHARLES L. BLACK, JR., PERSPECTIVES IN CONSTITUTIONAL LAW 29 (rev. ed. 1970).
7. *Id.*

review. Both forms of federalism are coherent, but their mechanisms of development are quite different.

Virtually from the beginning of American constitutional law, the Supreme Court chose to fashion a legally enforceable federalism, perhaps most dramatically in *McCulloch v. Maryland*.[8] But it need not have done so. It is, of course, idle to speculate upon what might have been our constitutional history had the question of the proper scope of federal power been left from the beginning to the vicissitudes of ordinary politics. When in *Garcia* the Court embraced the strategy of a politically enforceable federalism, it did so upon a background of nearly two centuries of attempted legal enforcement of the allocation of power between the states and the central government. To be sure, the Court's turn toward a politically enforceable federalism may have resulted in part from the perceived difficulties attendant to principled legal enforcement of federalism. But even in doing so the Court in *Garcia* left the door open for subsequent judicial review of the federalism outcomes produced by the political process. In subsequent cases, particularly *Gregory v. Ashcroft*[9] and *New York v. United States*,[10] the Court has begun to articulate the judicial restraints that still fetter congressional attempts to impose its will upon the states. The net result is the emergence of a hybrid form of federalism, neither completely political nor wholly legal. Rather, the emerging "process federalism" is one characterized by a willingness to let Congress impose its will upon the states so long as that imposition is performed in a procedurally restrained fashion.

In this article I explore some of the issues raised by this methodological move of the Court. What objectives are sought by the Court's "process federalism" limits? Are those objectives in fact being realized? If not, are there other judicially imposed limits on congressional power that might be better means to the desired ends, and if so, are those substitutes capable of practical implementation? If the Court's objectives underlying process federalism are not being realized, is it because we are pursuing the wrong objectives, and if so, are there other objectives that are worthwhile to accomplish and that would be well-served by "process federalism"? I do not hope to answer everything about feder-

8. 17 U.S. (4 Wheat.) 316 (1819).
9. 501 U.S. 452 (1991).
10. 112 S. Ct. 2408 (1992).

alism (that would surely be both a forlorn hope and a preposterous ambition), but I do hope to raise some difficult questions and, by doing so, prod the constitutional community to re-examine some of the doctrinal scaffolding appurtenant to American federalism.

My plan of attack is simple. Part I briefly examines the methods employed by the Court to enforce federalism limits upon Congress as a matter of law. The purpose for so doing is to expose the perceived flaws in the legally enforceable strategy of federalism that led to its practical demise and apparent outright rejection in *Garcia.* This is familiar history, and I do not intend to rehearse it in laborious detail.

Part II will detail the development of process federalism by noting the doctrinal structure that has been created in the wake of *Garcia* and relating that structure to a congeries of prudential and constitutional doctrines that operate to confine the sphere of federal judicial authority. It is my contention that a slightly different but quite related version of process federalism has been at work for some time with respect to the allocation of judicial power between state and federal courts. The seemingly emergent process federalism that operates to shape congressional exercise of legislative authority upon the states is derived from the preexistent judicial federalism. Part II will describe those developments and attempt to forge the connection between judicial federalism and Justice O'Connor's process federalism.

Part III explores the objectives sought to be attained by process federalism and attempts to answer a number of questions raised by identification of those objectives. Are the identified objectives worth attaining? If so, might those objectives be better attained by additional restraints upon Congress? What restraints? Are these additional restraints practicable? If the identified objectives are not worth attaining, should we scrap the entire venture of process federalism or are there other objectives which are worthy of pursuit?

The conclusions proffered may be briefly summarized. One principal objective of process federalism is to insure that federal legislators are held politically accountable for their actions. To that end, they should not be permitted to foist their own hard choices off on state legislatures with the resultant misimpression that the states are responsible for political choices that are, in fact, dictated from Capitol Hill. This may well be a worthwhile

ambition, but the present mechanisms for causing it to occur are inadequate. Perhaps the most glaring omission is the failure of the Court to fashion some more meaningful set of restraints upon congressional exercise of the conditional spending power, currently a powerful device by which Congress can dangle cash as irresistible bait for state legislatures. The political consequences of rising to the bait are, however, largely visited upon the states.

Another principal objective of process federalism is to remain faithful to the constitutional plan of dual sovereignties, each holding plenary authority within its legitimate sphere. This idea permeates the structure of the Constitution; to discard it as not worth pursuing is to repudiate a reasonably clear core principle of our Constitution. Accordingly, process federalism attempts to insulate some sphere of state sovereignty from federal control. The problem, however, is that the devices employed by process federalism are lacking in substance. The sovereignty that is left is solely the product of congressional grace. *Noblesse oblige* may not hurt quite so much as brutal tyranny, but the effect on the serf's autonomy is hardly distinguishable. In the extreme, process federalism leaves the state legislatures with little more true sovereignty than a high school model United Nations. Ultimately the conflict between legal federalism and political federalism becomes irreconcilable. If the Court is to believe in political federalism, it will abandon any attempt to erect rigid barriers to the exercise of congressional power over the states, contenting itself with procedural obstacles that force Congress merely to act with deliberate and evident purpose whenever it desires to compel state conformity. At this point process federalism is reduced to a set of etiquette tips for foxes entrusted with the job of guarding the henhouse. The hens may all be missing in the morning, but so long as the fox has observed the proper protocol nobody will inquire of the bulge in the fox's stomach. In the alternative, if the Court chooses to protect directly some vestige of state sovereignty, it must rethink the legally enforceable substantive barriers to the exercise of congressional authority over the states. A return to *National League of Cities v. Usery*[11] will not do; the distinction between the state as government and the state as proprietor was hopelessly chaotic and incoherent, deserving the *coup de grace* administered by *Garcia.*

11. 426 U.S. 833 (1976).

But substantive limits on congressional power to regulate the states can be created. Congress might be required to justify more stringently its use of the commerce or conditional spending powers when exercising them to regulate the states than when regulating the behavior of private citizens. This proposal, discussed in more detail in Part III, is a modest alteration to existing doctrine. A much more radical proposal would be to grant the states a complete immunity from the scope of the commerce power. That is not to suggest that states would possess the power to thumb their noses at the Constitution. States would continue to be bound by all the strictures that invalidate their actions, most notably (but not exclusively) the Fourteenth Amendment. And the negative or dormant aspect of the Commerce Clause would continue to inhibit states from undertaking initiatives that would be perniciously destructive of national economic union. Though admittedly radical surgery, this idea is worth some consideration; the doctrinal retooling necessary to administer such a blanket immunity without destructive effect upon the national polity is not likely to be as enormous an undertaking as might be reflexively assumed. But the game may not be worth the candle. On this point, and with respect to this objective, that may be the Court's ultimate choice.

II. The Modes Of Legally Enforceable Federalism

Two principal strategies for accomplishing legally enforceable federalism have preoccupied the Court. One of these has been the effort to confine the scope of the federal government's enumerated powers sufficiently to permit to the states some effective zone of exclusive legislative authority. The other has been to concede a virtually unlimited scope to federal legislative authority but to identify zones of immunity granted the states from the authority of Congress.

A. *Confining the Scope of the Enumerated Powers of the Federal Government*

The earliest approach was to fasten seriously upon the Constitution's enumeration of federal powers as both sources of federal authority and, by implication, limits on the exercise of federal authority. Although that approach has fallen into judicial disfavor as a result of the constitutional revolution occasioned by Franklin Roosevelt's New Deal, its vestigial elements remain pep-

pered throughout constitutional law, usually as quite weak limitations upon the scope of any given federal power. For example, in examining the proper scope of the commerce power, "when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational."[12] So long as some minimally plausible after-the-fact claim can be made that the regulated activity affects interstate commerce, the Court will likely presume that Congress might have relied on that state of affairs, even when it is perfectly evident that Congress was totally unconcerned with the regulated activity's connection with interstate commerce.

An even more shrunken test applies to judicial examination of the scope of the federal taxing power. Although *Bailey v. Drexel Furniture Co.*[13] invalidated a tax on profits derived from the use of child labor on the ground that it was a "penalty," imposed simply for the purpose of regulating behavior, the Court has consistently shied away from labeling taxes as penalties. In upholding a tax on firearms dealers the Court conceded that "[e]very tax is in some measure regulatory," but concluded that incidental regulation does not vitiate congressional power to tax.[14] So long as the tax "is productive of some revenue . . . it operates as a tax . . . [and] is within the taxing power."[15] Thus if it quacks like a duck, it must be a duck, even if it looks like an 800 pound gorilla.

Limits on the spending power of Congress are similarly weak. Even in *United States v. Butler*,[16] when the Court struck down Franklin Roosevelt's Agricultural Adjustment Act as an invalid exercise of the spending power, Congress was conceded the power to spend for the general welfare rather than for any of the specifically enumerated powers of Congress. Congressional discretion in spending is now virtually unencumbered; the Court will inter-

12. Hodel v. Virginia Surface Mining Ass'n., 452 U.S. 264, 277 (1981). The limitation is even weaker; indeed, it is apparently not even necessary that "Congress . . . make particularized findings in order to legislate." Perez v. United States, 402 U.S. 146, 156 (1971). *See also* United States v. Edwards, 62 U.S.L.W. 2424 (9th Cir., Dec. 21, 1993) (upholding the power of Congress under the commerce clause to enact legislation prohibiting the possession of firearms on school grounds or within 1000 feet thereof despite the lack of factual findings that the activity affected interstate commerce or express invocation of the commerce power). *But see* United States v. Lopez, 2 F.3d 1342 (5th Cir., 1993) (invalidating the same statute on the grounds that in the absence of a specific factual finding by Congress that the activity affected interstate commerce, Congress lacked authority under the commerce clause to enact the statute), *cert. granted*, 114 S. Ct. 1536 (1994).

13. 259 U.S. 20 (1922).

14. Sonzinsky v. United States, 300 U.S. 506, 513 (1937).

15. *Id.* at 514.

16. 297 U.S. 1 (1936).

vene only if the congressional choice is "a display of arbitrary power, not an exercise of judgment."[17] The only potentially meaningful limit on the spending power that Congress faces is when it conditions the receipt of federal funds upon state compliance with some specified action. To do so validly, Congress may only impose conditions that are related to federal interests in "particular national projects or programs," that do not coerce the states, that are not violative of some other constitutional provision, and then only if Congress expresses the condition "unambiguously."[18] These limits are not terribly stringent. Congress may withhold highway construction funds if a state fails to conform to a federally mandated minimum drinking age.[19] Congress may withhold federal funds for a wide variety of health programs if the states fail to enact legislation requiring the state's health planning agency to supervise and approve major capital development projects by hospitals.[20]

Similarly weak judicial limits attend the war power. Though not often asserted by Congress as a source of regulatory authority, the power of Congress to declare war appears to confer upon it power far beyond that momentous enough decision. In *Woods v. Cloyd W. Miller Co.*,[21] the Court concluded that "this vague, undefined and indefinable 'war power' "[22] was sufficient to sustain nationwide rent-control legislation. Although the Court recited that "the question whether the war power has been properly employed . . . is open to judicial inquiry," it nevertheless opaquely observed that the congressional judgment concerning the propriety of its exercise was "entitled to the respect granted like legislation enacted pursuant to the police power."[23] But the Constitution never once uses the term "police power," much less explicitly confers upon Congress this source of legislative authority. It is, however, a term to describe "an inherent attribute of sovereignty"[24] and, as such, it raises the troubling question of whether the federal legislative powers are bounded at all. The Court's cavalier equation of the "war power" with this ill-defined,

17. Helvering v. Davis, 301 U.S. 619, 640 (1937).
18. South Dakota v. Dole, 483 U.S. 203 (1987).
19. *See id.*
20. *See* North Carolina v. Califano, 435 U.S. 962 (1978).
21. 333 U.S. 138 (1948).
22. *Id.* at 146 (Jackson, J., concurring).
23. *Id.* at 144.
24. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 108 (1985).

atextual, inherent-in-all-government police power is an unfortunate suggestion that, at bottom, Congress can do pretty much what it wants so long as it seems to have some plausible reason for so acting.

Congressional power to implement treaties is bounded only by the "prohibitory words to be found in the Constitution."[25] Whatever Justice Holmes meant by this enigmatic pronouncement, later Justices have concluded that the treaty power of Congress must conform to the individual rights limitations of the Constitution, but that the power of Congress to implement treaties is not bounded by any limitations preservative of state authority.[26]

Nor is congressional power under the Reconstruction amendments particularly confined. In *Katzenbach v. Morgan*,[27] the Court concluded that Congress could declare New York's English literacy predicate for voting a violation of equal protection despite the fact that the Court had earlier concluded[28] that such literacy requirements did not violate either the 14th or 15th Amendments. So long as the Court can "perceive a basis upon which Congress *might* predicate a judgment that the [subject matter of the legislation] constituted an invidious discrimination in violation of the Equal Protection Clause"[29] and the congressional action, in the Court's opinion, does not "restrict, abrogate, or dilute" equal protection,[30] Congress is free to redefine the substantive content of equal protection. This, of course, is in marked contrast to the power of the states. Current doctrine holds that the identical action—voluntary adoption of race-conscious remedies in the absence of specific past racial discrimination—when undertaken by the states violates equal protection, but when undertaken by Congress is a legitimate redefinition of equal protection.[31]

---

25. Missouri v. Holland, 252 U.S. 416, 433 (1920).

26. *See* Reid v. Covert, 354 U.S. 1 (1957) (finding the treaty power limited by the Sixth Amendment's jury trial requirement).

27. 384 U.S. 641 (1966).

28. *See* Lassiter v. Northampton Election Board, 360 U.S. 45, 50-51 (1959).

29. *Katzenbach*, 384 U.S. at 653.

30. *Id.* at 651, n.10.

31. *Compare* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 470 (1989) (city's race based set-aside program violated Fourteenth Amendment) *with* Metro Broadcasting, Inc. v. Federal Comm. Comm'n., 497 U.S. 547, 552 (1990) (FCC's race based set-aside program does not violate Fourteenth Amendment). The issue raised in *Metro Broadcasting* will be revisited by the Court this term. *See* Adarand Construction v. Pena, 93-1841.

To be sure, there may be some federalism limits applicable to this source of congressional power. In *Oregon v. Mitchell*,[32] the Court invalidated an amendment to the Voting Rights Act that prohibited the states from establishing a minimum voting age of more than 18 years in state elections. Writing for the Court, Justice Hugo Black noted that

> [a]s broad as the congressional enforcement power [under the Reconstruction Amendments] is, it is not unlimited.... [T]he power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation.[33]

Although Congress certainly has the authority to limit state authority in order "[t]o fulfill [the Reconstruction Amendments'] goal of ending racial discrimination and to prevent direct or indirect legislative encroachment on the rights guaranteed by the amendments,"[34] Justice Black's opinion in *Oregon v. Mitchell* stands as a sharp reminder that Congress may not use its enforcement powers under the Reconstruction Amendments to redefine the substance of equal protection as it pleases. Some ill-defined federalism limits remain; at least Congress may not use its power over the substance of equal protection to gut the autonomous governance processes of a state. Less clearly articulated are the limits imposed on congressional ability to use the Reconstruction Amendments as a device to extend the scope of federal authority without invading the domain of state governance. Perhaps Congress is disabled from using these enforcement powers to redefine state action by declaring state failure to act to be state action. Perhaps not. Justice Black is not around to tell us, and his successors are mum on this point. But more recent Courts do exhibit a willingness to defer to Congress when it acts in a fashion that is a possible exercise of Reconstruction Amendment enforcement powers. In *Metro Broadcasting*, Justice Brennan, for the Court, asserted that "deference was appropriate in light of Congress' institutional competence as the national legislature."[35] Here emerged a new and wondrous fount of legislative authority, unbounded in its scope and embarrassingly capacious. Is it possible

32. 400 U.S. 112 (1970).
33. *Id.* at 128.
34. *Id.* at 127.
35. *Metro Broadcasting*, 497 U.S. at 563, (1990).

that the Court meant to suggest that any connection between congressional legislation and an enumerated power of Congress is mere superfluity? Or is this "institutional competence" simply an added reason to defer to the congressional determination of the scope of its authority? No demonstration of actual competence need be made, for Congress possesses an institutional competence that is the result of its very existence. Surely this limitless conception of the powers of Congress was not what anyone had in mind when the scheme of enumerated and delegated powers was concocted out of the fertile brains of James Madison and his cohorts.

It is hardly contestable that the strategy of limiting the scope of federal authority was the original conception of the founding generation. Alexander Hamilton, in Federalist No. 84, argued against the inclusion of a Bill of Rights on the ground that "[t]hey would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted."[36] James Madison observed, in Federalist No. 45, that

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[37]

How wrong Madison must have been if the "institutional competence of Congress" is all that is now necessary to justify the exercise of congressional power.

Despite the best of intentions, the original scheme of a central government of legally bounded authority has all but disappeared.[38] Perhaps the complex network of relationship and dependence that describes the modern polity and economy inevitably mandated some considerable accretion of federal power. Perhaps the seeming plasticity of Commerce Clause doc-

---

36. THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

37. THE FEDERALIST No. 45 at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

38. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (providing a useful exposition of this phenomenon).

trine in the pre-1937 era undermined the legitimacy of legally enforceable federalism limits, although, if so, it is odd that the Court's vigorous application of the equally malleable concepts of equal protection and due process has not yet undermined the legitimacy of judicial review in those areas. Perhaps it is merely the result of the Supreme Court's abdication of its constitutional responsibilities in the face of a hostile and popular President. Whatever the answer, the traditional restraints of legally enforceable federalism have been carted off to the legal antique shop, leaving only a few and pallid replicas in their place.

B. *Judicially Created State Immunities from Federal Legislation*

Another method by which the Court has sought to protect federalism is to create state immunities from federal regulation or intervention. These immunities are of two types: "soft immunities" and "hard immunities."

Soft immunities are not entirely separate from the prior approach, since one way to divine the scope of a state's immunity is by reference to the scope of the enumerated federal powers. If this is all there is to it, however, a soft immunity approach is no different from the foregoing discussion of the scope of enumerated powers. If there is any "immunity" aspect to soft immunity, it lies in the assumption that there is some core of state sovereignty that can be used as a departure point from which to measure the proper extent of federal power. It is true that this assumption was once very much at work in the Court's determination of the scope of the commerce power,[39] but it no longer has any vitality in the area. By contrast, there remain some areas of constitutional law in which this assumption is still alive. The Court's interpretation of the Eleventh Amendment in *Hans v. Louisiana*[40] as instantiating an original constitutional understanding of state immunity from suit in federal court is an example of soft immunity, although it has some conceptual fuzziness that makes that description necessarily qualified.

Hard immunities can be regarded as zones of authority in which the federal enumerated powers exist but are suspended by virtue of the state immunity. *National League of Cities v. Usery*[41] is the paradigmatic modern example of hard immunity. Both ver-

39. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918).
40. 134 U.S. 1 (1890).
41. 426 U.S. 833 (1976).

sions of the immunity strategy have surfaced in American constitutional law and merit brief discussion.

The judicial approach to the scope of the commerce power, particularly during the late nineteenth century and early twentieth century, was heavily influenced by the soft immunity concept of presuming some core of state sovereignty from which reasoning about the scope of federal power could begin. *Hammer v. Dagenhart* is perhaps the paradigmatic example. Even though Congress prohibited the interstate movement of articles of commerce manufactured by child labor, the Court found an outer limit to the commerce power that was based almost entirely upon suppositions about the proper sphere of state authority.

But there are more modern examples of soft immunity than the thoroughly discredited approach of *Hammer v. Dagenhart.* Eleventh Amendment jurisprudence is a particularly interesting example. The intended meaning of the Eleventh Amendment has been the subject of extended scholarly debate in recent years,[42] one effect of which is to cast considerable doubt on whether the amendment was ever intended to serve as a general fount of state sovereign immunity from suit in the federal courts. But, of course, that was the construction given to the Eleventh Amendment by Justice Joseph Bradley, writing for the Court in *Hans v. Louisiana.* The result has been the creation of a zone of state immunity, although it is not an immunity that sweeps across all the possible separate heads of federal legislative power. It is now established that Congress may abrogate a state's Eleventh Amendment immunity under its enforcement powers granted in Section Five of the Fourteenth Amendment[43] and pursuant to its

42. *See, e.g.,* CLYDE JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972); JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987); Martha Field, *The Eleventh Amendment and Other Immunity Doctrines,* 126 U. PA. L. REV. 515 (1978); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction,* 35 STAN. L. REV. 1033 (1983); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics,* 56 U. CHI. L. REV. 1261 (1989); William A. Fletcher *Exchange on the Eleventh Amendment,* 57 U. CHI. L. REV. 117 (1990); John Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 COLUM. L. REV. 1889 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity,* 98 YALE L.J. 1 (1988); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment,* 102 HARV. L. REV. 1342 (1989); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation,* 102 HARV. L. REV. 1372 (1989); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments,* 56 U. CHI. L. REV. 61 (1989); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case,* 98 HARV. L. REV. 61 (1984).

43. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

authority to regulate interstate commerce.[44] Beyond that, however, all bets are off. The Eleventh Circuit has recently concluded, in *Seminole Tribe of Florida v. Florida*,[45] that Congress lacks abrogation authority under the Indian Commerce Clause, although its reasons for so concluding are a blend of *National League of Cities* style hard immunity and Justice O'Connor's new process federalism.

When Congress enacted the Indian Gaming Regulatory Act,[46] it sought to establish a framework for resolution of conflicts between states and Indian tribes over the increasingly common practice of Indian tribes establishing gambling operations on their reserved lands. A subsection of the Act provides Indian tribes a remedy in federal court if states fail to enter into good faith negotiations concerning establishment of a compact governing Indian gaming.[47] The Court of Appeals reasoned that the Supreme Court

> has allowed federal jurisdiction over states only when the states partake in an activity typical of private individuals . . . [or] when the state's conduct is outside the typical realm of state authority. As negotiations with tribes certainly are not outside that realm of state authority, the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent Congress from abrogating the states' immunity.[48]

The rationale seems tinctured with the distinction, repudiated in *Garcia*, between the "traditional" or "governmental" activities of a state and its "commercial" or "proprietary" activities,[49] but it is possible that the real rationale for decision is the view, expressed by Justice O'Connor in *New York v. United States*, that Congress may not issue mandates to the states to govern in a particular

44. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

45. 11 F.3d 1016 (11th Cir. 1994).

46. 25 U.S.C. §§ 2701-2721 (1994). Pub. L. No. 100-497, 102 Stat. 2467 (1988).

47. *See* 25 U.S.C. § 2710(d)(7) (1994).

48. *Seminole Tribe of Florida*, 11 F.3d at 1028.

49. But note that the Supreme Court continues to observe a similar such distinction when it exempts state activity from the scrutiny of the dormant, or negative, Commerce Clause whenever the state is a "market-participant" rather than a market regulator. *See, e.g.*, Reeves, Inc. v. Stake, 447 U.S. 429, 436 (1980) ("The basic distinction . . . between States as market participants and States as market regulators makes good sense and sound law."); South-Central Timber Development v. Wunnicke, 467 U.S. 82, 97 (1984) ("[T]he market-participant doctrine . . . allows a State to impose burdens on commerce within the market in which it is a participant, but . . . [it] may not impose conditions . . . that have a substantial regulatory effect outside of that particular market."). There is no post-*Garcia* indication that the Court intends to repudiate the market-participant doctrine.

fashion. It may be that *Seminole Tribe of Florida* is in fact an attempt by the Court of Appeals to guard the autonomous process of state governance. As in *New York*, Congress might regulate directly by preempting contrary state law, but it may not tell the states to enter into a compact and subject them to suit in federal court if they do not. Thus, even the best current example of soft immunity turns out to be laced with elements of hard immunity and with process federalism. Perhaps then there is no such thing as pure soft immunity.

National League of Cities is the classic case of hard immunity.[50] When Congress extended the Fair Labor Standards Act in 1966 to apply to state schools and hospitals, a divided Supreme Court in *Maryland v. Wirtz*[51] upheld congressional power to do so, rejecting the argument that the commerce power "must yield to state sovereignty in the performance of governmental functions."[52] When Congress exercises a constitutionally "delegated power," said the Court, it "may override countervailing state interests whether those be described as 'governmental' or 'proprietary' in character."[53] But this construct was squarely repudiated in *National League of Cities*. Not only did the Court expressly overrule *Maryland v. Wirtz*, it noted "that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce."[54] *National League of Cities* sought to find those limits in the distinction between a state's exercise of its "governmental" powers from its performance of merely "proprietary" functions but, as the Court in *Garcia* noted when it overturned *National League of Cities*, that distinction proved to be "unsound in principle and unworkable in practice."[55]

The conventional wisdom is that *Garcia* vested in the national political process virtually complete control over the extent to which Congress might use its delegated powers to displace state sovereignty. That is a misreading. *Garcia* was premised on the principle that, in general, "[s]tate sovereign interests . . . are . . . protected by procedural safeguards inherent in the structure of

50. It has, of course, since been overruled by *Garcia*.

51. 392 U.S. 183 (1968).

52. *Id.* at 195.

53. *Id.*

54. *National League of Cities*, 426 U.S. at 842.

55. *Garcia*, 469 U.S. at 546.

the federal system. . . ."[56] Those safeguards consist entirely of the fact that Congress is a congeries of legislators elected by the people of the various states. Thus, the states' interests are protected by the fact that federal legislation is the product of state representatives.[57] Yet even in *Garcia* itself, the Court acknowledged that federalism was not to be entrusted entirely to the political process, for it left open the possibility that

> [a]ny substantive restraint on the exercise of [Article I, section 8] powers must find its justification in the procedural nature of [the national political process], and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."[58]

A fair amount of case law has squeezed through this opening, with the result that the Court seems to envision several different ways in which those failings might manifest themselves. Initially, the Court sought only to lend more precision to the "possible failings in the national political process" that might merit judicial intervention in the name of federalism. In *South Carolina v. Baker*,[59] the Court rejected South Carolina's contention that Congress had stretched its commerce power too far by eliminating the tax exemption on interest received from state bearer bonds, thus effectively prohibiting state governments from issuing bearer bonds. The Court acknowledged that "*Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid," although in doing so it suggested that a failure of the national political process might inhere in a state's deprivation "of any right to participate in the national political process" or as a result of a state's being "singled out in a way that left it politically isolated and powerless."[60] These limits are limits of substance. In the unlikely event that Congress were to exclude an entire state's congressional delegation,[61] any legislation that fell with peculiar impact upon that state would presumptively be invalid. But if the Congress simply decided that since Nevada is rather barren and its underground already badly polluted by nu-

56. *Id.* at 552.
57. *See id.* at 550-54.
58. *Id.* at 554 (quoting E.E.O.C. v. Wyoming, 460 U.S. 226, 236 (1983)).
59. 485 U.S. 505 (1988).
60. *Id.* at 512.
61. It probably could not. *See* Powell v. McCormack, 395 U.S. 486, 522 (1969).

clear tests it ought to be the sole national repository for nuclear waste, would that decision be one that singled out Nevada in such a way as to render it politically isolated and powerless? The *Baker* Court suggests a substantive limit; is this it?

In *Gregory v. Ashcroft*,[62] the Court did not reach the constitutional issue of whether Congress could prohibit Missouri from forcing its appointed judges to retire at a specified age; rather, the Court concluded that in passing the Age Discrimination in Employment Act[63] Congress had not sought to bar the Missouri mandatory retirement policy because there was no unmistakably clear manifestation of a congressional intent to interfere with the judgment of the Missouri polity regarding the age qualifications of its appointed judges.[64] The Court fashioned the rule that Congress may use its delegated powers to "upset the usual constitutional balance of federal and state powers"[65] only when its intention to do so is made "unmistakably clear in the language of the statute."[66] The Court declared that its requirement of a "plain statement" of congressional intent to intervene in state affairs was required by *Garcia*'s apparent consignment of federalism to the political arena:

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for law-making on which *Garcia* relied to protect states' interests."[67]

Moreover, the Court in *Gregory* plainly intimated that if Congress had unequivocally expressed its intent to bar mandatory retirement of state judges it would have exceeded its constitutional authority. "[T]he authority of the people of the States to determine their most important government officials . . . lies at 'the heart of representative government,' [and] . . . is a power reserved to the States under the Tenth Amendment and guaranteed them by"

62. 501 U.S. 452 (1991).
63. 29 U.S.C. §§ 621-34.
64. *See Gregory*, 501 U.S. at 460-469.
65. *Id.* at 460.
66. *Id.* (quoting Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985))).
67. *Id.* at 464 (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 480 (2d ed. 1988)).

the Guarantee Clause.[68] Although the Constitution expressly carves out some exceptions from this principle, most notably via the Fourteenth Amendment, "the authority of the people of the States to determine the qualifications of their government officials may be inviolate" from congressional invasion via the Commerce Clause.[69]

This plain statement rule was not created in a vacuum; it is derived, as the *Gregory* Court acknowledged, from a similar such requirement imposed upon Congress when it seeks to abrogate state immunity from suit under the Eleventh Amendment,[70] or when Congress assertedly pre-empts the "historic powers of the States,"[71] or when Congress intends to enforce the guarantees of the Fourteenth Amendment upon states.[72] The result of the *Gregory v. Ashcroft* plain statement rule is that aspects of the soft immunity approach have crept back into the post-*Garcia* jurisprudence. In order to determine when the "usual constitutional balance of federal and state powers" has been altered, it is necessary to start from some original conception of the scope of those powers. The inquiry is not merely historical, for the Court in *Gregory* noted that the provision at issue in that case—whether Congress had denied to the states the power to force appointed judges to retire—"goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."[73] The plain statement rule is one which forces Congress to act with unmistakable clarity whenever it wishes to displace the core of sovereignty of the states. Up to this point the rule is simply procedural, another etiquette directive to Congress requiring that the states' sovereignty be gobbled up only in a precisely ritualized manner. But the plain statement rule only operates when the substance of the congressional ac-

68. *Id.* at 463 (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)).

69. *Id.* at 464.

70. *See, e.g.*, Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985).

71. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

72. *See* Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16 (1981) ("Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."); *see also Gregory*, 501 U.S. at 470 ("[T]he *Pennhurst* rule looks much like the plain statement rule we apply today.").

73. *Gregory*, 501 U.S. 460.

tion is one which bites into the core of state sovereignty, a core that can only be known by defining it independently of the federal power seeking to operate upon it. The triggering of the rule is a form of soft immunity; its application is a form of process federalism.

The various devices used by the Court—the notion of "extraordinary defects" in the political process or the plain statement rule—are an attempt to preserve some modicum of legally enforceable federalism for the Court. Even in its ardor to commit the issue of the proper scope of federal legislative power to the political process, the Court has preserved the possibility of substantive and legally enforceable limits to correct palpable failings in that process. The plain statement rule is softer, a legally enforceable procedural limit. But there is room in the interplay between these rules to pose some fascinating and hard questions. Suppose that a federal administrative agency, plausibly acting within the scope of its statutory authority, decides to promulgate regulations that direct the states to act in a certain fashion. The agency regulations are not commanded, or even reasonably certain to be inferred, from the governing statute. Given the demise of the non-delegation doctrine, the agency is acting lawfully. Given the *Chevron* rule of judicial deference to agency interpretation of regulatory statutes the agency's regulations are not subject to judicial review as beyond the agency's statutory authority.[74] The apparent result is that administrators, electorally accountable to nobody, are free to command the states to alter their practices, even in the absence of the required plain statement by Congress. A plain statement by the agency of its intent to direct state behavior should not be sufficient, because the reason for the plain statement rule is to ensure that the national political process of Congress is conscious of its decision to intrude upon state sovereignty. There is no similar assurance of the consciousness of the national political process, consisting of state representatives deciding the issue, when federal administrators act pursuant to vaguely worded statutory authority. Is the agency action barred because it is not a product of the national political process, or is it infirm because it is a product of a failed political

74. *See* Chevron U.S.A. Inc. v. Natural Resource Defense Council, 467 U.S. 837, 842-44 (1984) (holding that agencies must conform to any precisely discernible congressional intent but that if the statute does not clearly resolve the "precise question at issue," courts must accept any "reasonable" agency interpretation of the statute).

process, or is the problem simply the procedural defect that Congress failed to make the required plain statement? Could that procedural defect be cured by a congressional preface to the vaguely worded governing statute that simply stated the congressional intent to "upset the usual constitutional balance of federal and state powers" by vesting the agency with power to do so? In the wake of *Gregory* and *Baker* the Court will be asked some version of these very questions.

Finally, despite the seeming sweep of *Garcia*'s consignment to the national political process of federalism limits upon congressional power, there do seem to be some remaining (and perhaps isolated) substantive, legally enforceable, limits upon the exercise of congressional power. There is no doubt that Congress controls the admission of new states into the Union, yet when it has done so the newly admitted states are deemed to be admitted on an equal footing with pre-existing states.[75] In conformity with this rule Congress has no power to insist that a newly admitted state, as a condition of its admission, refrain from moving its capital.[76] Nor could Congress compel one of the original thirteen states to relocate its capital.[77] All this flows from the Court's conclusion that the congressional power to admit states is one that comes with no strings attached.[78] But could Congress assert its power to regulate interstate commerce as a basis for requiring all state capitals to be located in the most populous city in the state? If there is no hard immunity left after *Garcia*, it would seem that so long as Congress has acted explicitly and has not unfairly picked on one state, it would be permissible so to act. That conclusion seems wrong instinctually, however, and, if so, it must because the states enjoy some hard immunity in this area. But if they do, why should it matter a great deal whether the issue is the expenditure of state money to relocate the capital on federal demand rather than the expenditure of state money to pay federally mandated overtime wages to police officers? The latter is surely within the competence of Congress and may in reality be of more fiscal and policy consequence than the physical location

75. *See* Coyle v. Smith, 221 U.S. 559, 573 (1911). *See also* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).

76. *See id.* at 573-74.

77. *See id.* at 565.

78. *But cf.* Fain Land & Cattle Co. v. Hassell, 163 Ariz. 587, 790 P. 2d 242 (1990) (unamendable provision of Arizona Constitution incorporating terms of congressional act enabling Arizona's admission and which was required by Congress as a condition of admission given effect as a matter of Arizona constitutional law).

of the state's capital. Perhaps all this suggests that there is simply no hard immunity of any kind left to the states. Perhaps it suggests that federalism limits are of a different coinage.

III. The Development Of "Process Federalism"

Process federalism is a device to retain some legally enforceable federalism limits upon the legislative powers of Congress when Congress uses those powers to invade the processes of state governance. It is both a recognition of the Court's preference for the national political process as the primary determinant of the scope of federal legislative power and the Court's hesitancy to abandon all judicial control over the functioning of that process.

One might claim that the Court's process federalism is functionally analogous to the Court's retention of judicial control over the scope of the Article I, section 8 powers of Congress: both are severely attenuated but theoretically extant. There is, however, an important difference. When essaying the scope of the enumerated powers, the Court has generally been confronted with congressional attempts to regulate the activities of the citizenry, and, by virtue of the preemptive effect of the Supremacy Clause, displace the States as possible regulators. The problem becomes more acute when Congress uses those powers to regulate the States directly. Of course, *National League of Cities* was a failed attempt to forge an immunity based on this distinction and, with its repudiation, one might reasonably suppose that the distinction between the States and the citizenry is of no significance. But the Court has not been content to leave it at that. Almost from the moment that *Garcia* was decided, the Court set about devising doctrines to limit the discretion given Congress to invade some zone of state autonomy. Whether these doctrines are substantive barriers to congressional action, as suggested in *South Carolina v. Baker*,[79] or whether they are primarily procedural, as was the case in *Gregory v. Ashcroft*,[80] they have combined to limit both the mode and range of congressional action invasive of state autonomy.

These post-*Garcia* limits have coalesced into a third, and by far the most currently robust, strategy of legally enforceable federalism. This strategy, process federalism, regards the constitutional

79. 485 U.S. 505 (1988).
80. 501 U.S. 452 (1991).

structure of federalism as implicitly mandating limits upon the scope of the enumerated federal powers in order to prevent the federal government from usurping the autonomous processes of state governmental institutions. This strategy has been employed for some time to curb the limits of federal judicial authority (although the Court typically—but not always—refuses to recognize why it does what it does in this area) and with respect to federal legislative authority, is developing under the tutelage of Justice Sandra Day O'Connor. Its most current blossoming is in *New York v. United States.*[81]

At issue in *New York v. United States* was the validity of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.[82] In order to facilitate the disposal of radioactive waste, Congress in 1980 authorized states to negotiate regional compacts that, once ratified by Congress, would permit member states to share a common disposal site and deny access to waste originating from non-member states.[83] Perhaps because the original act provided neither inducements for the creation of such compacts nor penalties for the failure to create compacts, very few states entered into disposal compacts, and those compacts that were created involved the three existing disposal sites.

The 1985 amendments at issue in *New York* were the product of a compromise between sited and unsited states fashioned by the National Governors' Association and largely adopted by Congress. The amendments provided three combinations of incentives and penalties to spur the creation of compacts. Two of these—a scheme of monetary incentives and another involving access incentives—turned out to be constitutionally valid. The monetary incentives involved congressional authorization of a surcharge to be levied by sited states on waste originating from out of state.[84] The surcharge was then taxed by the federal government and spent in the form of payments to non-sited states that had complied with various deadlines involved in the creation of new disposal sites.[85] The Court in *New York* regarded this scheme as an unobjectionable use of the congressional power to authorize states to discriminate in interstate commerce, to tax,

81. 112 S. Ct. 2408 (1992).

82. Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified at 42 U.S.C. §§ 2021b-2021j).

83. *See* Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, § 4(a)(2)(B), 94 Stat. 3347-49 (1980).

84. *See* 42 U.S.C. § 2021e(d)(1).

85. *See* 42 U.S.C. § 2021e(d)(2).

and to spend conditionally.[86] The access incentives consisted of congressional permission being given to sited states and compacts to deny access to waste originating from outside the sited compact states.[87] The Court regarded this scheme as a straightforward example of the "power of Congress to authorize the States to discriminate against interstate commerce."[88]

The problem was the third scheme, which required states that had failed to create a disposal site or to enter into a disposal compact to make a choice between either taking title to all the waste generated within the state, and consequently assuming liability for all damages suffered by waste producers as a result of any state tardiness in doing so, or to regulate the disposal of waste in accord with congressionally specified instructions.[89] According to Justice O'Connor, both the mandate to take title and assume liability, on the one hand, and the mandate to enact waste disposal regulations in conformity with congressional requires, on the other, were beyond the power of Congress to accomplish. That is,

> [e]ither type of federal action would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments . . . Whether 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.[90]

The heart of the Court's approach in *New York* is a distinction between federal legislation which "subject[s] a State to the same legislation applicable to private parties"[91] and legislation which operates "solely on the activities of the States."[92] By reason of *Garcia,* the validity of the former is largely consigned to the national political process; any judicial interference with that process is entirely procedural, e.g., the presence of the plain statement re-

86. *See New York,* 112 S. Ct. at 2425-2427 ("[This] step is an unexceptionable exercise of Congress' power to authorize the States to burden interstate commerce. . . . [and] is thus well within the authority of Congress under the Commerce and Spending Clauses.").

87. *See* 42 U.S.C. § 2021d(c); *see also New York,* 112 S.Ct. at 2416 (providing a summary of the various penalties for States that fail to meet deadlines).

88. *New York,* 112 S. Ct. at 2427.

89. *See* 42 U.S.C. § 2021e(d)(2)(C).

90. *New York,* 112 S. Ct. at 2428-29.

91. *Id.* at 2420.

92. *Id.* at 2441 (White, J., dissenting).

quired by *Gregory*,[93] or limited to the weak substantive test suggested by *South Carolina v. Baker*.[94] But when the federal legislation impinges only upon the activities of the States, a different legally enforceable federalism limit applies: Congress may not command the States to enact and enforce a particular regulatory scheme.

In the course of registering his dissent in *New York*, Justice White contended that this distinction, and the rule built upon it, was both "insupportable and illogical."[95] There is, however, more doctrinal support for the rule than Justice White admits and even more than Justice O'Connor argues. The logic of the distinction and the rule is more debatable.

A. *The Doctrinal Roots of Process Federalism*

In their respective *New York* opinions, Justices O'Connor and White debated whether the "commandeering" rule could be fairly implied from *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*[96] and *FERC v. Mississippi*.[97] *Hodel* involved the question of whether Congress could use its commerce power to pre-empt a field of activity—strip mining and reclamation of strip mined land—that could also be subject to state regulation; it did not involve an attempt by Congress to command states to impose regulations dictated by Congress. Justice White is correct that the *Hodel* Court's statement that Congress may not "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"[98] "was classic dicta."[99]

FERC, on the other hand, is a slightly different matter. In the Public Utility Regulatory Policies Act of 1978 ("PURPA"),[100] Congress required the States to consider federal standards in the course of regulating public utilities within state jurisdiction.[101] The court in *FERC* upheld the validity of PURPA because it did not constitute "a federal command to the States to promulgate

93. 485 U.S. 505 (1988).
94. 501 U.S. 452 (1991).
95. *New York*, 112 S. Ct. at 2441.
96. 452 U.S. 264 (1981).
97. 456 U.S. 742 (1982).
98. *Hodel*, 452 U.S. at 288.
99. *New York*, 112 S. Ct. at 2442 (White, J., dissenting) (quoting *Hodel*, 452 U.S. at 288).
100. Pub. L. No. 95-617, 92 Stat. 3117 (codified at 16 U.S.C. § 2601 *et. seq.*)
101. *See* 16 U.S.C. § 2622.

and enforce laws and regulations."[102] Although Justice White sought to make a great deal out of the fact that the *FERC* Court also noted that "there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or refrain from taking certain actions,"[103] the authority cited by the Court in *FERC* was *Fry v. United States*,[104] a case upholding federal legislation which imposed wage limits on both private and public employers. In that respect, *Fry* is simply another version of a run-of-the-mill Fair Labor Standards Act case, like *Garcia*, which involves congressional regulation of employment terms of both private and public employers.

This debate, relevant though it may be, misses a larger point. A set of principles equally relevant to the distinction and rule at issue in *New York* is not to be found in slivers of dicta and implications from prior holdings involving the operation of the legislative powers of the federal government, but rather in the voluminous doctrines that, in the name of federalism, operate to confine the scope of the federal judicial power. The real question debated in *New York* is whether any legally enforceable federalism limit applies when Congress legislates only with respect to the governance processes of a state. As *FERC*, *Hodel*, and *New York* demonstrate, the issue is relatively new with respect to federal attempts to dictate the processes of state legislative deliberation. But the problem is, if not old hat, at least familiar when considering the extent to which either Congress or the federal courts may command state officials to carry out federal mandates. A brief examination of these principles of judicial federalism will add needed context to the *New York* debate.

Congress may enact laws which are enforceable in state courts. *Testa v. Katt*,[105] which arguably required states to open their courthouse doors to entertain federal causes of action when analogous claims premised on state law would be heard, is the principal example. Such legislation involves, as Justice O'Connor noted, "congressional regulation of individuals, not congressional requirements that States regulate."[106] Moreover, judges, as expositors of law, are peculiarly bound by the strictures of the

102. *FERC*, 456 U.S. at 762.
103. *New York*, 112 S. Ct. at 2442 (White, J.) (quoting *FERC*, 456 U.S. at 762).
104. 421 U.S. 542 (1975).
105. 330 U.S. 386 (1947) (upholding a federal statute requiring state courts to adjudicate claims under a federal statute).
106. *New York*, 112 S. Ct. at 2430.

Supremacy Clause's explicit requirement that "the Judges in every State shall be bound" by paramount federal law.[107] To the extent that a state desires to deny individuals a state forum for resolution of federal claims when Congress has expressed a contrary desire, the state's policy preferences are pre-empted just as surely as if the state desired to select a minimum wage at variance with that set by the federal Fair Labor Standards Act.

Federal courts may also order state officials to comply with federal law. That proposition is little more than a restatement of the Supremacy Clause. A Governor's refusal to extradite a fugitive to a sister state in violation of federal law requiring extradition is no less susceptible to federal judicial correction[108] than would be a state legislature's attempt to prohibit the operation of federal law within its borders. In neither case, however, is there an attempt to compel the state to alter its own internal governance processes to conform to federal commands.

Even more germane to the question of whether federal attempts to control state governance processes are constitutionally improper are the congeries of supposedly prudential doctrines, rooted in principles of "comity and federalism,"[109] that restrain the federal judicial power from interfering with the independent governance processes of the States. *Younger* abstention is a vivid example.

Younger v. Harris[110] and its companion cases[111] held that, in the words of Justice Hugo Black, "Our Federalism, . . . a system in

107. U.S. CONST. art. VI, cl. 2.

108. *See, e.g.*, Puerto Rico v. Branstad, 483 U.S. 219 (1987)(holding that federal courts may enjoin unconstitutional action by state officials, including the refusal to extradite fugitives). *Cf.* Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979)(holding that state law cannot interfere with preferential fishing rights given Indian tribes by federal treaties); Illinois v. City of Milwaukee, 406 U.S. 91 (1972)(applying federal common law to abate a public nuisance in Illinois waterways caused by four Wisconsin cities); Cooper v. Aaron, 358 U.S. 1 (1958)(holding that a state cannot deter federal enforcement of desegregation orders regardless of its individual position on the issue).

109. Mitchum v. Foster, 407 U.S. 225, 243 (1972).

110. 401 U.S. 37 (1971).

111. *See* Samuels v. Mackell, 401 U.S. 66, 69 (1971)(holding that a federal litigant may not obtain declaratory relief if he has already initiated a state proceeding where he can raise the constitutional issue in question); Boyle v. Landry, 401 U.S. 77 (1971)(a federal court is not permitted to intervene with an injunction where no immediate irreparable injury was present pursuant to the enforcement of an Illinois statute); Perez v. Ledesma, 401 U.S. 82 (1971)(holding that federal injunctive relief against pending state prosecutions is inappropriate unless there are extraordinary circumstances present); Dyson v. Stein, 401 U.S. 200 (1971)(holding that unless there is the possibility of irreparable harm with a pending state criminal prosecution, there can be no injunctive relief); Byrne v.

which there is . . . a proper respect for state functions"[112] prevented federal courts in most instances from enjoining state criminal prosecutions. Although the *Younger* Court made no claim that abstention was constitutionally required, its discussion of the applicable principles of "comity" that compelled abstention proceeded from constitutional norms.[113] The Court emphasized that

> the entire country is made up of a Union of separate state governments, . . . [and] the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[114]

The Court's implicit recognition of a constitutional barrier to the exercise of federal judicial power in a manner that would block the functioning of independent state processes of governance may be seen clearly by noting the contours of the *Younger* doctrine.

To begin, in *Hicks v. Miranda*,[115] the Court concluded that

> where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, [*Younger* abstention] should apply in full force.[116]

Younger abstention as refined by *Hicks* can usefully be thought of as the Court's way of defining the frontier between federal and state judicial authority in the context of state criminal proceedings. Direct interference in such proceedings, or the prevention of their commencement, is thought by the Court to be an uncon-

---

Karalexis, 401 U.S. 216 (1971) (judgment vacated and remanded for failure to meet the *Younger* requirement of irreparable injury).

112. *Younger*, 401 U.S. at 44.

113. *See id.* at 43-48.

114. *Id.* at 44. *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 3-30, at 203-04 n.9 (2d ed. 1988) ("it is certainly clear . . . that the most basic underpinning of the *Younger* doctrine is *not* any special equity concept but, rather, a federalism-based notion of comity.") (emphasis in original); Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1488-89, 1531-34 (1987) (at the core of the *Younger* doctrine is a concern for protecting the role of state courts as independent adjudicators of state and federal constitutional issues).

115. 422 U.S. 332 (1975).

116. *Id.* at 349. The *Hicks* rule has been interpreted by some of the leading commentators in the federal jurisdiction field to mean that "once a state criminal prosecution is filed, federal courts may not decide issues properly before the state court, unless it has already done so . . ." 17A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE, § 4253, at 228 (2d ed. 1982) (quoting Note, *Federal Court Intervention in State Criminal Law Proceedings When Charges Are Brought After Filing of the Federal Complaint*, 37 OHIO ST. L.J. 205, 214-15 (1976)).

stitutional interference with the retained sovereign prerogatives of the States to maintain independent governance processes.[117]

Moreover, *Younger* abstention is not limited to state criminal proceedings. In *Huffman v. Pursue, Ltd.*,[118] the Court first guardedly extended the scope of *Younger* abstention to state civil proceedings "akin to a criminal prosecution."[119] In *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*,[120] the Court extended the *Younger* policies to encompass "noncriminal judicial proceedings when important state interests are involved."[121] However, in *Juidice v. Vail*,[122] the Court noted that it was saving "for another day" the broader question of whether *Younger* applies to all civil proceedings.[123] But ten years later, the Court in *Pennzoil Co. v. Texaco, Inc.*[124] applied *Younger* abstention to foreclose a federal forum for Texaco's claim that Texas' judgment lien and appeal bond requirements in civil actions violated its federal constitutional rights. In concurrence, Justice Blackmun indicated that *Pennzoil* broadened the scope of *Younger* sufficiently to apply "whenever any state proceeding is ongoing, no matter how attenuated the State's interests . . . ."[125]

In *New Orleans Public Service, Inc. v. Council of City of New Orleans*,[126] the Court refused to uphold *Younger* abstention in a case challenging the validity of the New Orleans City Council's refusal to reimburse fully a utility for costs incurred in the construction of a nuclear power plant, despite a contrary determination by the Federal Energy Regulatory Commission. The Court conceded that utility rate regulation is "one of the most important [state] functions"[127] but nevertheless found *Younger* abstention inapplicable because the state interest implicated was neither a "civil enforcement proceeding[ ]" nor an "order[ ] . . . uniquely in

117. To the extent that there are federal statutory or constitutional objections to the manner in which the States are exercising their sovereign authority, and those objections have been resolved erroneously by the state courts themselves, the Supremacy Clause preserves to the federal courts the power to review and revise such determinations.

118. 420 U.S. 592 (1975).

119. *Id.* at 604.

120. 457 U.S. 423 (1982).

121. *Id.* at 432.

122. 430 U.S. 327 (1977) (applying *Younger* abstention to a case where appellees had the opportunity to have their federal claims heard in state contempt charge proceedings).

123. *Id.* at 336 n.13.

124. 481 U.S. 1 (1987).

125. *Id.* at 27 (Blackmun. J., concurring).

126. 491 U.S. 350 (1989).

127. *Id.* at 365 (quoting Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983)).

furtherance of the state courts' ability to perform their judicial functions."[128]

New Orleans Public Service reveals that *Younger* abstention is truly an exercise in defining the constitutional limits of the federal judicial power. By identifying two categories of civil cases in which *Younger* abstention should apply, the Court articulated the core principle of *Younger* abstention in civil matters: States, through their judicial systems, are entitled to be free from federal interference in the process by which they fashion and enforce state law. The identified categories reflect a recognition that the States possess a core of sovereign judicial authority with which the federal courts may not interfere. Of course, the *substance* of such state determinations, at least when the result impinges upon federal statutory or constitutional authority, is not beyond federal judicial review. *Younger* abstention merely reaffirms that a state's *process* is insulated from federal interference, that so long as the States do not violate paramount federal law, they retain authority to enforce their chosen public policies and to control the processes of their own judicial systems.

The constitutional foundations of the *Younger* doctrine are further buttressed by an examination of the intersection between the Anti-Injunction Act[129] and *Younger* abstention. The Anti-Injunction Act prohibits federal courts from enjoining state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[130] In *Mitchum v. Foster*,[131] the Court concluded that a federal court in a section 1983 action may enjoin a state court. The Court construed section 1983 to impliedly contain sufficient "express authorization" of Congress to escape the statutory bar of the Anti-Injunction Act.[132] While it may have rea-

128. *Id.* at 368.

129. 28 U.S.C. 2283 (1988) (a court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.).

130. *Id.* The Anti-Injunction Act has been a continuous limitation upon the power of the federal courts to invade state sovereignty since its enactment as part of the Judiciary Act of 1793. Act of March 2, 1793, § 5, 1 Stat. at 334, 335 (1793) ("a writ of injunction [shall not] be granted to stay proceedings in any court of a state.") This provision has been codified as Rev. Stat. § 720 (1878); Judicial Code § 265 (1911); 28 U.S.C. § 379 (1940); and finally, in 1948, at 28 U.S.C. § 2283 (1988).

131. 407 U.S. 225 (1972).

132. *Id.* at 240-41. This finding in section 1983 of an " 'implied' express exception" to the bar of the Anti-Injunction Act has been labeled a "bizarre contortion[ ]" and "an oxymoron if ever there was one." Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L. J. 71, 87 (1984).

soned illogically as a matter of statutory construction,[133] the Court was quite explicit in its view that the statutorily memorialized desires of Congress do not "qualify in any way the principles of equity, comity, and federalism that *must* restrain a federal court when asked to enjoin a state court proceeding."[134] As a result, even if a plaintiff states a claim under section 1983, the Court's view is that *Younger* abstention must apply, even though the section 1983 claim is one which would entitle a federal court to enjoin a state court under the Anti-Injunction Act.[135]

This is a state of affairs that has been criticized by one abstention foe as "an effective reversal of the congressional decision to make section 1983 an exception to the Anti-Injunction Act."[136] In this view,

> the combined effect . . . of . . . *Younger* and *Mitchum* is that the federal judiciary has arrogated to itself the authority to decide when to enjoin state court proceedings. It is difficult to imagine a starker illustration of judicial usurpation of legislative authority.[137]

But if *Younger* abstention is treated as compelled by the Constitution, the interplay between *Younger, Mitchum,* and the Anti-Injunction Act becomes more understandable.

In the constitutional view of *Younger* abstention, *Mitchum* is simply a case of statutory construction. It may be that the Court in *Mitchum* erred in its construction of both section 1983 and the Anti-Injunction Act, but that is of no significance to the constitutional issues. If *Younger* is a constitutional decision, it makes perfectly good sense that the Court would hold that, even though a federal plaintiff has stated a claim under section 1983 (thus escaping the *statutory* bar of the Anti-Injunction Act), the *constitutionally* mandated principle of *Younger* requires the federal court to abstain from exercising jurisdiction. That is precisely what the Court has done in such cases as *Pennzoil.*[138] If a federal court in a section 1983 action has the *power* to enjoin a state court (because Congress has authorized it to do so) but may not *exercise* that power due to principles of "equity, comity and federalism," it ap-

133. *See, e.g.,* Martin H. Redish, *The Anti-Injunction Statute Reconsidered,* 44 U. CHI. L. REV. 717, 733-39 (1977); Redish, *Abstention, supra* note 132, at 86-87.

134. *Mitchum,* 407 U.S. at 243 (emphasis added). This principle was emphatically reaffirmed in Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).

135. *See, e.g., Pennzoil,* 481 U.S. at 10-11.

136. Redish, *Abstention, supra* note 132, at 88.

137. *Id.*

138. 481 U.S. at 10-11.

pears that something necessarily exists which vetoes congressional attempts to exercise its powers. That "something" may be simply an exercise of judicial prudence. However, given the principle that the federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given,"[139] it seems far more likely that it is not judicial prudence, arguably "treason to the constitution,"[140] but instead a judicial recognition that Congress is acting beyond its delegated powers or, what is virtually the same thing, a recognition that retained state sovereignty occupies a sphere that, in some instances, trumps congressional power.

The constitutional view of *Younger* also explains the often criticized rigidity of *Younger* abstention. The Court has declared that "[w]here a case is properly within [the scope of *Younger* abstention], there is *no discretion* to grant injunctive relief."[141] Critics of *Younger* abstention typically charge that "[t]his rigidity has eliminated the discretionary balancing at the heart of equity."[142] But *Younger* abstention is not simply an equitable doctrine. Rather, *Younger* composes a portion of the hard outer shell of Article III; federal jurisdiction cannot expand beyond its confines. Equity cannot operate to expand constitutional authority; thus, it makes more sense to regard *Younger* as rooted in the Constitution, not in principles of equity. *Younger* abstention is more than a monument to customary norms of comity and federalism; it is an embodiment of the Constitution's tacit postulates of twin sovereignties.

However forceful the *Younger* doctrine may be to establish the principle that Congress may not dictate to the States the form of their governance, it was never alluded to in *New York v. United States*. That omission undoubtedly occurred because *Younger* is, despite evidence to the contrary, still regarded as having nothing to do with constitutional limits upon the power of the federal government to control the processes of state governance. For the

139. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

140. *Id. See also* Redish, *Abstention*, *supra* note 132, at 76 (arguing for the abolition of judge-made abstention); Donald L. Doernberg, *You Can Lead a Horse to Water. . .: The Supreme Court's Refusal to Allow the Exercise of Original Jurisdiction Conferred by Congress*, 40 CASE W. RES. L. REV. 999, 1016-21 (1989-90) (criticizing the federal judiciaries jurisdictional abdication under abstention doctrines).

141. Colorado River Water Conservation District v. United States, 424 U.S. 800, 816 n.22 (1976) (emphasis added).

142. Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1143 (1977).

New York majority to have used *Younger* to bolster the process federalism limit announced in *New York* they would have been forced to acknowledge *Younger's* constitutional underpinnings. The Court may have been unwilling to do so out of fear that a clear recognition of *Younger's* status as a constitutional limit on federal judicial power would prevent Congress from ever conferring on the federal courts the power to enjoin ongoing state judicial proceedings.

But *Younger* might be thought of as having a constitutional status not unlike the Dormant Commerce Clause: In the absence of congressional action, the Court's judgments concerning the implied limitations of the Commerce Clause are provisional. *Younger* might be thought of as possessing a similar quality: In the absence of some legitimate and exceedingly explicit congressional directive to oust the state courts of jurisdiction, *Younger* abstention is a provisional constitutional judgment of the courts. Even so conceived, *Younger* is nevertheless constitutionally grounded, and its constitutional foundation is similar to the process federalism of *New York. New York*-style process federalism permits Congress to oust the States' legislative authority by preempting a field, but until and unless Congress clearly does so, Congress is barred from accomplishing the same end by the more indirect route of compelling the States so to act.

Acknowledging *Younger's* constitutional pedigree, in whatever form, may have been just a bit much for the Court to swallow at one sitting, but it does not prevent the family of constitutional commentators from noting the relationship between Justice O'Connor's *New York*-style process federalism and Justice Hugo Black's *Younger* version of "Our Federalism."

The ability of states to control their own processes of governance, free from federal interference, is also protected by the adequate and independent state grounds doctrine. That is, "from the time of its foundation [the United States Supreme Court] has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."[143] Unfortunately, the Court has never provided a definitive answer to whether the doctrine is constitutionally required, statutorily compelled, or, perhaps, merely prudential. This is partly because

143. Herb v. Pitcairn, 324 U.S. 117, 125 (1945).

Congress has never seen fit to bestow the Court with jurisdiction over matters of pure state law.

In *Murdock v. City of Memphis*,[144] the Court treated a Reconstruction-era amendment to the Judiciary Act of 1789 as lacking a sufficiently clear statement of intent to confer jurisdiction over state law issues, thus avoiding the question of whether Congress possessed the constitutional authority to do so.[145] Such modern commentators as Professor Laurence Tribe assert that a congressional attempt to confer jurisdiction over issues of pure state law would violate constitutionally rooted "principles of state autonomy."[146] Similarly, Professor Deborah Merritt argues that, unless the States "retain sufficient autonomy to establish and maintain their own forms of government,"[147] they are deprived of the federal government's pledge to "guarantee to every State in this Union a Republican Form of Government."[148] Were the Court to decide issues of state law, the States, to the extent the Court actually did so, would be stripped of the autonomy to fashion their own law. Of course, ever since *Luther v. Borden*,[149] the Guarantee Clause has been treated as nonjusticiable, but it is intriguing to note that in *New York v. United States* Justice O'Connor, along with five other members of the Court, hinted that the Guarantee Clause might be justiciable on just such a theory as Professor Merritt has proposed.[150]

B. *The Logic of Process Federalism*

In his *New York* dissent, Justice White contended that the distinction between federal legislation applicable only to states and such legislation applicable to both private entities and states was "illogical" and "not based on any defensible theory."[151] To Justice White

> [a]n incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that 'commands' spe-

144. 87 U.S. (20 Wall.) 590 (1874).
145. *See id.* at 619, 630.
146. Tribe, *supra* note 114, at § 3-24, 163.
147. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 2 (1988) (arguing that the Guarantee Clause in the U.S. Constitution includes a principle of federalism and implies a modest restraint on federal power to interfere with state autonomy.")
148. U.S. Const. art. IV, § 4.
149. 48 U.S. (7 How.) 1 (1849).
150. *See New York*, 112 S. Ct. at 2432-33.
151. *Id.* at 2441.

> cific action also applies to private parties. The alleged diminution in state authority over its own affairs is not any less because the federal mandate restricts the activities of private parties.[152]

The flaw in this objection is that legislation directed generally at all persons almost certainly lacks any command that the States exercise their independent governance processes in a particular fashion. A statute like that at issue in *Fry v. United States*[153]—imposing a wage freeze on public and private employers alike—does not direct the state's legislative process to do so; it prohibits the state as employer, in common with other employers, from raising wages except as permitted by Congress. Quite a different situation would be presented if Congress instead directed the States to enact legislation freezing all wages within the state at their existing levels. Although the result is identical—wages are frozen—the mechanism for doing so is vastly different in the two cases. In the first, Congress is clearly seen as the body articulating public policy under its constitutional authority to regulate interstate commerce. In the second, Congress is far less clearly perceived as the legislative actor; rather, it is acting as a sort of legislative commander-in-chief, issuing orders for execution by subordinates. The nominal manufactory of public policy, the state legislature, is in fact a mere subaltern with no discretion but only an obligation to obey.

Permitting Congress to command state legislative action distorts the accountability of public officials. State legislators are apt to be held electorally accountable for actions with respect to which they have no discretion; and conversely, members of Congress are apt to escape electoral accountability for policy decisions that are entirely their own. Electoral accountability is an important cog in the elaborate mechanism of representative democracy. Filing off a few teeth from that gear has the effect of throwing the entire works into disorder. As Justice O'Connor put it:

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be preempted under the

152. *Id.*
153. 421 U.S. 542 (1975).

> Supremacy Clause if it is contrary to the national view, 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. 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. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.[154]

Perhaps the electorate would be sophisticated enough to see through the charade of federal compulsion upon the state legislative process. Indeed, elites have a tendency to assume that the people are dumber than they actually are. But even if the people are able correctly to perceive that what appears to be state policy is actually dictated by Congress, there is another, and even more insidious way in which federal compulsion upon the state legislative process would destroy the principle of electoral accountability.

With the virtual demise of the non-delegation doctrine, Congress is free to create broad statutory guidelines and bestow upon unelected administrators the power to formulate precise rules governing behavior. Congress is thus arguably free to enact a statute that, in quite explicit terms, empowers a cabinet Secretary to promulgate regulations that command the States to create implementing legislation. The hand of Congress is now even more obscured, further undermining electoral accountability, by vesting in an unelected federal administrator the judgment concerning precisely what the States should be commanded to do. That administrator may in theory be accountable to Congress or the President, though the level of real accountability will vary markedly in practice, but the administrator has almost no accountability to the courts with respect to her interpretation of the statute she administers.[155] This congressional command by administrative proxy is far more likely to escape the critical scrutiny of

---

154. *New York*, 112 S. Ct. at 2424.

155. *See* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-44 (1984) (agencies must conform to any precisely discernible congressional intent, but if the statute does not clearly resolve the "precise question at issue" courts must accept any "reasonable" agency interpretation of the statute).

either the federal or the state electorate, badly damaging the mechanism of representative democracy.

Process federalism not only prevents erosion of the principle of electoral accountability, it also helps to ensure that politically enforceable federalism will actually work. Given the reality that the limits of federal legislative authority are largely governed by the political process, and only loosely overseen by courts, it is imperative that the political process operate without distortions that would render it an unreliable caretaker of federalism. The Court was already attentive to those possibilities, as evidenced by its *South Carolina v. Baker obiter dictum* concerning "extraordinary defects" in the political process and the plain statement rule announced in *Gregory v. Ashcroft*. The *New York* prohibition upon federal compulsion of state legislative processes is, in one sense, merely an extension of that concern.

For the national political process to remain a reliable custodian of legislative federalism, the workings of that process must be kept strictly accountable to the people. Indirect methods of legislation are inimical to that aspiration. Thus, it makes sense for Congress to be able to work its will directly, even if it entails displacing state regulatory authority and regulating the States in the same fashion as other actors, while nevertheless being unable to force the States to do its work for it.

The process federalism that has developed in the aftermath of *Garcia* is not, as Justice White would characterize it, without foundation in precedent or connection to constitutional logic. Rather, it is very much related to legally enforceable federalism limits applicable to the federal judicial power. The nature of those judicial federalism limits is remarkably similar to post-*Garcia* process federalism, and the long existence of legally enforceable judicial federalism limits lends strong support to the precedential pedigree of contemporary legislative process federalism. Moreover, given the pronounced preference in modern constitutional law for politically enforceable limits on the scope of federal legislative power, there are sound reasons for the emergence of process federalism to prevent distortions of the political process, which is relied upon to assess the relative merits of a more centralized or more decentralized version of federalism.

IV. Some Implications Of Process Federalism

The premises upon which the Court in *New York* constructed the latest phase of legislative process federalism suggest the likelihood of both further developments in process federalism and provide reason to consider alterations in existing doctrines of legally enforceable federalism. There are two major premises underlying process federalism.

First, process federalism is thought to ensure greater electoral accountability of the people's representatives in both the federal and state governments.[156] As we have seen, an aspect of this rationale is also the concept that process federalism operates to ensure, in ways other than electoral accountability alone, that the national political process, to which the constitutionally mandated structure of federalism has been largely consigned, operates in a fashion that is responsive to federalism concerns.[157]

Second, federalism is thought to be a positive virtue as well as constitutionally required. Justice O'Connor has described the "federalist structure of joint sovereigns" as one which

> preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry . . . Perhaps the principal benefit of the federalist system is a check on abuses of government power.[158]

But the

> task [of the Court] would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution.[159]

---

156. *See* text accompanying notes 154-155 *supra.*

157. *See* text accompanying notes 59-78 *supra.*

158. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). *See also,* Merritt, *supra* note 147, at 3-10 (outlining the values of federalism that have survived over 200 years: (1) the ability of state governments to check the federal government, (2) the ability of state governments to draw citizens into the political process, (3) the political and cultural diversity of state governments, and (4) the ability of the States to experiment without consequence to the rest of the nation); Michael W. McConnell, *Federalism: Evaluating the Founders' Design,* 54 U. Chi. L. Rev. 1484, 1491-1511 (1987)(discussing the intellectual justification for federalism).

159. *New York,* 112 S.Ct. at 2418.

Accordingly, process federalism is claimed to be necessary to insure the continuation of a federalism that really exists—one in which states possess ample substantive authority to make differing policy choices on issues that do not adversely implicate constitutionally guaranteed individual liberties.

There are different implications that flow from each of these separate premises. The first premise and its corollary proposition suggest the likelihood of further refinements in the emerging doctrine of a legislative process federalism. The second premise implies a far broader role for the Court in enforcing federalism principles as a matter of substantive limitation upon the federal legislative power, rather than treating legally enforceable federalism as primarily, if not exclusively, a process phenomenon.

A. *Predictable Future Elements of Legislative Process Federalism*

Given the Court's embrace of the national political process as the principal arbiter of legislative federalism, it is hardly surprising that the Court has continued to use legally enforceable federalism as a device to ensure that the political process is in fact responsive to state concerns. The plain statement rule of *Gregory* attempts to do so by making sure that Congress is aware of federalism concerns when it enacts legislation impinging upon the States. The *New York* commandeering rule, built upon the premise of electoral accountability, is of the same pattern. These rationales are highly instructive to the problem of federal agency action purporting to bind the States.

Administrative agencies promulgate vast quantities of regulations, many of which are binding upon all persons, states and private citizens alike. After *New York,* it is clear that neither Congress nor administrative agencies may use their regulatory power to command legislative actions by the States. But what if a federal agency uses its rule-making power to bind the States in common with all other persons? *Gregory* requires a plain statement of the congressional intent to bind the States. But what kind of plain statement (and by whom) is sufficient? Congress could, of course, deliver an adequate plain statement in legislation which precisely delineates the fashion in which states are required to comply. Congress could also enact legislation with no such statement, but which devolves rule-making power upon an agency. Would the agency's plain statement of its intent to bind the States by regulation be sufficient?

This problem appears to be answered in several ways by the emerging process federalism. First, agency action in the absence of a *congressional* plain statement of intent to bind the States, even when the agency plainly states its own intent to govern states, seems to be the product of a defective political process because there has been no effective input into the immediate agency decision by state representatives. Administrators are not responsible to states; at best, they are responsible to the President or to Congress. The President is, unlike Congress, not responsible to states but to the national polity. To be sure, both the constitutional mechanics (the electoral college) and the realities of presidential politics require the President to pay some attention to state concerns, but that concern is necessarily and properly subordinated to concern for national interests.

Agencies truly accountable only to the President are, thus, defective parts of the political process, in the sense that *Garcia* assessed such defects. To the extent that agencies are accountable to Congress, the defect is hardly less. Congress is an institution as much as a collection of disparate representatives from the States. Administrative agencies must be responsible to the institution rather than to every member. True, some members are more important than others, but that fact only suggests that any federalism concerns pondered by an agency upon the demand of a powerful member of Congress are likely to be skewed in that member's direction, rather than being the product of the input of all the States' representatives.

Moreover, many agencies are quite independent from either Congress or the President. The expectation of the Court in *Garcia* that the States' interests would be fully and fairly considered in a body composed of state representatives to the federal government is simply not met with respect to agencies operating with any degree of independence. And even agencies directly and strongly accountable to Congress are not reasonably expressive of the Court's assumption in *Garcia* about the nature of the political process because their decisions, at bottom, are not the product of contending interests from the several States expressed through the medium of the people's elected representatives.

Furthermore, this problem is even more pronounced when an agency acts pursuant to an ambiguous statute. When an agency plausibly interprets ambiguous terms of a statute there is no opportunity for judicial review of the propriety of that agency inter-

pretation.[160] Accordingly, to permit agencies to promulgate regulations binding the States in the absence of a plain statement of congressional intent and pursuant to a vague statutory directive is to ignore the national political process as a body deliberating upon the federalism concerns of the States. That cannot be what the Court in *Garcia* had in mind.

Can this be corrected by a perfectly clear statement in the statute that the agency is empowered to promulgate regulations binding on the States, but with little or no statutory indication of the precise requirements that the States must meet? Resolution of this problem is not as simple. While Congress has failed to make a plain statement of the specific manner in which it wants the States regulated, it has been perfectly clear that it indeed wants the States regulated. If the statute is not an impermissible delegation of congressional lawmaking authority, it would otherwise be permissible for administrative agencies to formulate the specifics. In this context, one can be reasonably certain that the national political process has acted as *Garcia* envisioned, but only at a level of generality that is so removed from the specifics of later agency-created rules that one might doubt whether the congressional representatives of the States would have adopted those specific rules themselves.

Moreover, the principle of electoral accountability is compromised since members of Congress are accountable only for the broad mandate—clean air, clean water, "fair" wages—while unaccountable administrators formulate the specifics that pinch the States. Though it may be cognitively dissonant, electors may well applaud the general mandate and deplore the specific applications. Making the connection between the broad mandate and the specific rules more obvious would surely improve electoral accountability and, insofar as this principle is a keystone of process federalism, one is entitled to question whether the Court would permit such agency regulations to bind the States.

The foregoing problem is made even more interesting by the fact that the principle of electoral accountability leads to consideration of altering existing doctrine in an area that does not implicate federalism. While it remains constitutionally axiomatic that Congress may not delegate its legislative power, the practical effect of this non-delegation doctrine is quite weak. As we all

160. *See* Chevron U.S.A., Inc v. NRDC, 467 U.S. 837 (1984).

know, Congress may invest administrative agencies with an enormous quantity of authority to makes rules that look just like laws. In *Yakus v. United States*[161] the Court declared that

> [t]he essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.[162]

But decisions since *Yakus*, none of which have found Congress to have impermissibly delegated its lawmaking power, suggest that Congress need not even establish policies and factual predicates which trigger the policies.[163] Or, if Congress must do so, because *Yakus* is still good law, it is free to do so at an extremely high level of generality.[164]

Even if we do not wish to push electoral accountability so far as to restrict *generally* the ability of Congress to palm off on administrative agencies many of its own hard choices, we ought to tighten the non-delegation doctrine so that it does not allow agencies to enact regulations binding upon states without any

161. 321 U.S. 414 (1944).

162. *Id.* at 424-25.

163. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 149-157, 160-66 (2d ed. 1978).

164. An example is *Industrial Union Dept.*, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980), in which the Court found no impermissible delegation of legislative power in a statute that defined occupational health and safety standards as those "reasonably necessary or appropriate to provide safe or healthful employment" and then gave the Secretary of Labor power to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health . . ." *Id.* at 612 (quoting the Occupational Safety and Health Act of 1970, 84 Stat. 1594, 29 U.S.C. § 655(b)(5)). If we really desire to improve electoral accountability we ought to rethink the degree of delegation we permit. As then-Justice Rehnquist put it, concurring in *Industrial Union*:

> It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet so politically divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge . . . . [T]he very essence of legislative authority under our system . . . is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people.

Id. at 687 (Rehnquist, J., concurring).

corresponding congressional mandate of the specific content of the regulations. At least with respect to federalism concerns, we can be reasonably sure that the infirmities of a weak non-delegation doctrine operate to vitiate the expectations of the Court in *Garcia* when it pinned its hopes for federalism on the political process.

B. *Towards a More Substantive Legally Enforceable Federalism*

A large part of the rationale for process federalism is the perceived substantive benefits inherent in federalism. If that is the goal, process federalism is imperfectly suited to its accomplishment. Process federalism is only a protocol manual. To achieve the perceived benefits of federalism it is necessary to have substantive, legally enforceable limits upon the ability of Congress to claim all regulatory authority for itself. We know that the current limits are exceedingly weak, so weak as to form no practical barrier to the steady extension of congressional authority over what might, at any given moment, be thought to be the proper domain of state authority. Caution ought to be observed in imagining some new legally enforceable limits, for the history of the Court's attempts to restrict the scope of congressional power reveals a fair amount of expediency and manipulation of doctrine to suit desired ends, rather than reflecting a principle consistently applied and reasonably distant from partisan politics.

At least three new limits of substance might be imagined. The first two are modest alterations of existing doctrine, designed to respond narrowly to the implications of process federalism and the realities of the national political process, reliance upon which has spurred the growth of process federalism. The third is a radical proposal that deserves discussion if not adoption. There are significant difficulties with its implementation, and those may prove to be insuperable or so large as to render the attempt implausible.

1. *Tinkering with Deference to Congress under the Commerce Power*

So long as Congress acts rationally in deciding that the class of activities it regulates has a substantial effect on interstate commerce, the courts will not disturb the congressional judgment. Embedded in that test are several limits, but none of them amount to much in practice. It might be thought that a measure of congressional rationality is its *actual*, or *intended*, purposes,

rather than any purposes asserted after the fact. Or rationality might inhere in congressional findings of fact on the question of the substantial effect on interstate commerce of the proposed class of regulated activities. "Substantial effect" might be measured independently of the congressional determination but generally is not. In practice, Congress has *carte blanche* to regulate what it wants. There may be nothing objectionable about the scope of this power as applied to private individuals,[165] but as applied to the States there are some more forceful objections.

First, given that *Garcia* declared that no viable distinction can be made between the States as businesses and the States as autonomous governments, Congress has been invited to extend its immense commerce power to include every aspect of the States as governments. But there must be limits on that power. In fact, there are, and they are etiquette tips to Congress for attending a constitutional supper party hosted by the States. Congress must declare what it intends to devour before eating. Congress has actually to do the eating; it won't do to demand that the host state eat what Congress puts on its plate. But it is acceptable for Congress to go back to the host state's kitchen and plan the meal right down to who is served what. If we really believe in the constitutionally mandated structure of federalism and in the perceived benefits of federalism, we ought to devise a slightly more challenging substantive burden for Congress to overcome when it proposes to regulate the activities of the States.

Justice O'Connor declares that it is the constitutional obligation of the Court to monitor congressional regulation of the States, even in the absence of benefits from federalism.[166] She is surely correct, but there may be a great deal of argument about the substance of judicial monitoring. If our goal is to preserve the States as autonomous sources of public policy with sufficient jurisdiction actually to make a difference in the landscape of public policy, while simultaneously remaining committed to the national political process as the primary caretaker of legislative federalism, it is necessary to insist that Congress consider seri-

165. But there might be, too. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) (arguing for a return to the days of Gibbons v. Ogden where the scope of the Commerce Clause was limited to interstate transportation, navigation, and sales and the activities closely incidental to them. All else should be left to the states.).

166. *New York*, 112 S.Ct. at 2418.

ously the question of extending regulatory authority over the States.

When Congress enacts legislation that binds private citizens, the usual test of rationality applies. Under that test, Congress apparently may regulate the States whenever it plainly declares its intent to do so and might rationally have concluded that the activity it seeks to regulate is one which significantly affects interstate commerce. But when the question is whether to displace state authority over the state's own operations, whether or not governmental or proprietary, Congress should be required to make a much stronger showing of justification for binding the States than when regulating private citizens. *Congress should be required to bear the burden of proving that it actually acted upon substantial evidence tending to establish that, unless the States were to be regulated in the manner at issue, the States would be able to capture benefits locally at the disproportionate expense of outsiders, or that there exists a compelling reason of national unity to regulate the States, and that compelling reason of national unity can only be accomplished by the regulation at issue.*

This draws upon two other principles that guide our determination of the commerce power. When Congress has not acted and the Court is attempting to chart the implied limits of the commerce power upon state power to regulate, the Court attempts to ferret out and invalidate protectionist legislation,[167] statutes that are designed to burden outsiders for the benefit of insiders,[168] or statutes that are obstacles to needed unity or, at least, comity.[169] When those principles are applied in Dormant Commerce Clause jurisprudence, the Court is attempting provisionally to delineate the outer boundaries of state power. As Justice O'Connor has noted in *New York*,

167. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (striking down a state law barring importation of solid waste from other states because it impermissibly discriminated against articles of commerce originating outside of the state).

168. *See, e.g.*, Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) (North Carolina law requiring all apples sold or shipped in the state to be marked only with a federal grade violated the Commerce Clause because it discriminated against the display of Washington's more stringent grade); Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662 (1981) (invalidating Iowa ban on the use of 65-foot double trailers on its highways as a violation of the Commerce Clause because of the disturbance it would have on interstate trucking traffic when such a length was permissible in surrounding states).

169. *Cf. Kassel, supra* note 168; Bibb v. Navajo Freight Lines, Inc. 359 U.S. 520 (1959) (invalidating Illinois safety measure specifying certain mud flaps for trucks operated within Illinois, disrupting the free flow of interstate trucking because such flaps were legal in 45 other states).

> [t]hese questions can be viewed in either of two ways.... [Is an] Act of Congress ... authorized by one of the powers delegated to Congress ... [or does it] invade[ ] the province of state sovereignty reserved by the Tenth Amendment[?] ... [T]he two inquiries are mirror images of each other.[170]

Because there are two roads leading to the same intersection, it might make sense to use the method by which we determine the limits of state power to gain some insight on the corresponding reach of federal power. This is emphatically not to say that the States would enjoy an unlimited range of immunity from federal regulation. But it would be far broader than that existing today.

Thus, for example, states would be generally free from conforming to the Fair Labor Standards Act. That act, which regulates maximum hours and minimum wages, has produced much litigation about the scope of the congressional power to regulate the States, culminating in *Garcia*. There is likely to be nothing in a state's hour and wage policies with respect to its employees that is calculated to capture benefits locally at the expense of outsiders. Nor would compelling reasons of national unity unachievable in any other fashion be present. The wage and hour conditions of state employees is simply not the stuff of which national unity is fabricated. National unity is hardly threatened if California decides to require its highway patrol officers to work a longer work week without overtime pay than the FLSA permits. On the other hand, Congress would be likely to sustain its burden of proving that a state's failure to comply with the Clean Air or Water Act would produce benefits locally (in the form of cheaper energy production or lower industrial production costs) with the costs falling disproportionately on outsiders. For example, Ohio's burning of dirty coal is likely to produce acid rain in New England; Missouri's discharge of pollution into the Mississippi River adversely affects each of its downstream sisters. For that matter, any state discharges of spent hydrocarbons is likely to contribute to the global problem of a warming atmosphere.

None of this would restrain congressional ability to regulate private citizens. The proposed additional burden on Congress would only apply when Congress plainly indicates its intent to regulate the States. Rather than contenting ourselves with a limit upon Congress that is purely protocol, the proposed test would ask Congress to justify its regulation of a state in terms of the pre-

170. *New York*, 112 S. Ct. at 2417.

existing doctrine that serves to describe the outer limits of state authority under the Commerce Clause.

2. *Treating the Conditional Spending Power more Skeptically*

If the only alteration in the existing doctrine that operates to impose substantive limits on congressional authority to regulate the States is to the commerce power, the changes would be ineffectual to solve the perceived problem. The conditional spending power—the power of Congress to impose conditions along with the funds it expends—is an equally powerful source of federal authority to regulate the States. The doctrine arose at a time when federal spending programs were relatively few and the expenditures upon those programs relatively minor. But as the federal budget has grown ever larger, federal spending initiatives have steadily increased in number and expenditures, and states have become increasingly reliant upon the federal purse. If it was ever true, as a practical matter, that states could simply reject federal money if they disliked the regulatory conditions attached, that is certainly not the reality of today. Nonetheless, the legally enforceable limits upon congressional power to regulate the States by way of conditions attached to federal spending are not particularly strong.

Congress may only impose conditions that are related to federal interests in "particular national projects or programs," that do not coerce the States, are not violative of some other constitutional provision, and then, only if Congress expresses the condition "unambiguously."[171] But under these limits, or their precursors, Congress has been able to exclude political party officials from some positions in state government,[172] alter existing state governments and compel the creation of new such departments,[173] or require changes to the allocation of executive and

171. South Dakota v. Dole, 483 U.S. 203, 207 (1987) (upholding a federal statute that conditioned each state's receipt of federal highway funds upon the adoption of a minimum drinking age, because the condition related to the purpose of the federal grant, that is, safer highways, and it did not compel the States to forfeit any sovereignty reserved to them by the 10th or 21st Amendments).

172. *See* Oklahoma v. United States Civil Service Comm'n., 330 U.S. 127 (1947) (upholding Congress' power to withhold federal highway funds unless a state removed a state official who engaged in political activities prohibited by the Hatch Act).

173. In the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794, Congress conditioned various types of aid to the handicapped on the States' creation of new agencies to assist the handicapped, regardless of whether state statutory or constitutional law assigned those functions elsewhere or even forbade the creation of the new agency. This exercise of the conditional spending power was upheld in Florida Dep't. of Health and Rehabilita-

legislative authority within a state or between the state and its political subdivisions.[174]

All of these conclusions would seem suspect in principle with the advent of *New York*-style process federalism, for each seems to compel the States to change their structure or internal policies to conform to a federal command. True, the States are required to do so only if they take the money, and the courts naively presume them to be free to decline, however impracticable that may be. The answer may be to take coercion seriously and deny to Congress the power to impose regulatory conditions on federal spending where such conditions are coercive in the sense that the States could not reasonably be expected to forego the federal bait.[175] A dose of reality would be injected into the otherwise artificial construct of coercion.

---

tive Serv. v. Califano, 449 F. Supp. 274 (N.D. Fla. 1978), *aff'd per curiam*, 585 F. 2d 150 (5th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979).

In the National Health Planning and Resources Development Act of 1974, 42 U.S.C. §§ 300k-300n, Congress required the States to reorganize their governmental departments and alter their policies in order to receive federal funds for health planning services. This was upheld as to North Carolina even though the required changes were explicitly forbade by North Carolina's Constitution. *See* North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978)(Congress' power to condition the receipt of federal health funds on the existence of certain standards for health care facilities in each state is not limited by state sovereignty).

174. *See* Shapp v. Sloan, 391 A. 2d 595 (1978), *appeal dismissed sub nom.*, Thornburgh v. Casey, 440 U.S. 942 (1979)(upholding condition to receipt of federal grant requiring reallocation of legislative and executive authority); Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256, 269-70, 105 S. Ct. 695, 702-03 (1985)(federal conditions on receipt of federal funds by political subdivisions of a state held to override more restrictive state laws on the use of such monies).

175. In the case of conditional spending by Congress, coercion occurs whenever Congress has induced the States to rely upon the federal tap, only to have a condition attached once that reliance has become well-established. If Congress wants to condition spending it had better do so at the outset of the program and not at some point after the fact when the States can not reasonably be expected to spurn funds and programs upon which they have relied in making their remaining public policy choices.

This limit makes sense in terms of our post-*Garcia* commitment to the national political process as the principal agent for resolution of legislative federalism. As Albert Rosenthal has put it,

> [w]hether or not there is enough political influence at the state and local government level to prevent the more intrusive direct threats to the autonomy of those governments, the same process may not work effectively to forestall similar interference through coercive conditions. A continued high level of federal financial assistance will often be of great importance to state and local governments and a focus of substantial lobbying activities on their part; these governments may not find it politically expedient to dilute their efforts to obtain such funds by simultaneously campaigning against the conditions, however objectionable they may appear to be.

Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1141 (1987)(analyzing the relationship between the permissibility of conditional spending and the powers of the federal government).

Another way in which the conditional spending power might be restrained is to require a much closer connection between the condition imposed and the asserted federal interest in the spending initiative to which the condition is attached. Instead of simply contenting itself with the existence of "some" connection, the Court might insist that Congress demonstrate that the connection is substantial and well-suited to the accomplishment of the asserted federal interest. This would force Congress to specify conditions that actually have something to do with how federal money is spent, rather than simply using the swollen federal purse as an excuse for imposing regulatory conditions upon the States. Dissenting in *South Dakota v. Dole,* Justice O'Connor sought to distinguish between conditions that specify how the money is to be spent and those which lack such specification. The former should be presumptively valid spending conditions; the latter should be subject to much more searching inquiry as regulatory conditions not presumptively connected to the federal interest in spending.[176]

3. *Considering a Blanket Immunity for States from Federal Regulation under the Commerce Power.*

A radical suggestion, and one that is offered more for discussion than with the intent of urging its adoption, is to consider creation of a blanket immunity for states. Justice Blackmun, writing for the Court in *Garcia,* noted that

> [t]he essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal .... Any rule of state immunity

Moreover, federal spending has the effect of purchasing the independent judgment of state and local officials by increasing the patronage available to them, thus making state and local politicians willing participants in the imposition of regulatory conditions upon the States. *See* Robert M. Cover, *Federalism and Administrative Structure,* 92 YALE L. J. 1342 (1983) (arguing that federal grants-in-aid to state and local governments effectively prevents healthy local opposition to national programs and subverts the political process as the only viable restraint upon congressional overreaching. Rather, the federal government should provide funds directly and be responsible for the administration of the programs it funds in order to provoke a state-federal combat as a check on national power). *But see* Susan Rose-Ackerman, *Cooperative Federalism and Co-optation,* 92 YALE L. J. 1344 (1983) (supporting federal grants to state and local governments as a means of protecting the interest of citizens of other states, encouraging responsible behavior by both national and state politicians, and liberating state and local funds for other purposes). The result is that the pressure expected to be brought to bear on the national political process on behalf of state and local interests is unlikely to materialize.

176. *See Dole,* 483 U.S. at 212-218 (1987) (O'Connor, J., dissenting).

> that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.[177]

Although this observation was made in the course of justifying the shift to an almost wholly politically enforceable federalism, it also provides the justification for a blanket immunity. If there is no principled way to distinguish among various state activities, the real question becomes whether to enforce federalism politically or legally. If political enforcement is desired, *Garcia* is the result and the vestigial form of legal enforcement is process federalism. But if one believes, as John Marshall did, that "the very essence of judicial duty" is to enforce the Constitution when legislation collides with it,[178] legal enforcement of federalism is to be preferred to the political brand.

Acknowledging the inability to distinguish among the various functions of a state, the result is to admit that the States enjoy a complete immunity from federal regulation under the Commerce Clause. This is radical, and perhaps ultimately not a satisfactory alternative, but it deserves some reflective rather than reflexive thought.

In an earlier *New York v. United States,*[179] the Court upheld a federal tax on New York's sale of bottled mineral water, but only because it thought that the tax did not "infringe . . . the performance of its functions as a government which the Constitution recognizes as sovereign."[180] That distinction has, of course, largely been rendered obsolete by *Garcia.* But in dissent, Justices Douglas and Black contended that

> [t]he fact that local government may enter the domain of private business enterprise and operate a project for profit does not put it in the class of private enterprise . . . Local government exists to provide for the welfare of its people . . . If the federal government can place the local governments on its tax collector's list, their capacity to serve the needs of their citizens is at once hampered or curtailed . . . Many state activities are in marginal enterprises where private capital refuses to

177. *Garcia,* 469 U.S. at 546 (1985).

178. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)(all laws in conflict with the Constitution are void).

179. 326 U.S. 572 (1946).

180. *Id.* at 588 (Stone, C.J., concurring).

> venture. Add to the cost of these projects a federal tax and the social program may be destroyed before it can be launched.[181]

Under this view, the States must be free to fashion public policy for the benefit of all its citizens by using any particular method. If the States wish to establish public ownership of all industrial enterprise within their borders, and accomplish that objective in a constitutionally permitted fashion, they should be free to operate those enterprises for the public benefit, free from federal oversight.

But, objectors would declare, this would strip Congress of nearly all control over the activities of the States. The States would, however, continue to be subject to all the constitutional restraints that apply to them. They could not engage in racial discrimination or, absent very good reason, sex discrimination. But they could fix prices, objectors might cry, or engage in inside trading of securities, or pollute air and water with impunity.

However, this list of horribles, and others too, are susceptible to control by application of existing constitutional principles. Our understanding of the Dormant Commerce Clause is that one of the implicit limits upon the States is that they are not free, absent congressional authorization, to impose costs on outsiders in order to reap benefits locally. Each one of the horribles just paraded is susceptible to control by application of that principle. State price fixing is likely to impose costs on outsiders, to the extent that the affected consumers are outside of the state, with benefits accruing locally in the form of higher profits. In the unlikely event that all the costs and benefits of state price fixing were to be contained within the state, the choice of that as beneficial public policy is one for the state to decide. Inside trading of securities is virtually certain to impose costs widely, upon all contemporaneous traders of the affected securities, with the benefits captured locally in the form of trading profits. Similarly, air and water pollution by states is highly likely to impose substantial costs on outsiders (downstream and downwind states or nations) with whatever benefit, usually in the form of lower operating costs, captured locally.

True, this scheme would impose a substantial burden on courts to apply this constitutional analysis consistently and accurately, and it would require some distinction between the cases

181. *Id.* at 593-94 (Douglas, J., dissenting).

just mentioned and those in which costs and benefits are partially, but not disproportionately, borne by outsiders.

Is this feasible? Perhaps not. The record of the courts in sorting out the Dormant Commerce Clause on this basis is not one to inspire great confidence. Courts are not always able to see the incidence of costs and benefits when they are not obviously displayed via the mechanism of protectionist legislative intent. Nonetheless, the idea is one that could usefully be debated, before being discarded as unworkable and undesirable.

But we need not reach out for the radical stroke in order to add some substantive strength to legally enforceable federalism. A wholesome check upon the power of Congress to regulate the States would be created by requiring Congress to demonstrate more clearly the national benefits to be obtained by direct regulation of the States under its commerce power. Similarly, viewing the conditional spending power more skeptically and realistically, by treating coercion seriously and demanding that Congress demonstrate the connection between the federal interest in spending and the condition attached, would also limit the ability of Congress to regulate the States without a substantial need to do so.

V. Conclusion

Process federalism is the emerging vestigial strain of legally enforceable federalism that has responded to *Garcia*'s consignment of federalism to the national political process. It consists of a judicial warning that some defects in the political process might be so severe as to merit invalidation of legislation which is the product of that defective political process, a requirement that Congress declare explicitly its intent to regulate the States, and a prohibition upon congressional legislation that commands the States to regulate. This emerging process federalism is premised on the need to maintain electoral accountability of both federal and state representatives and on the perceived benefits of decentralized federalism.

Process federalism is rooted in long-standing conceptions of federalism with respect to the judicial power. Such doctrines as *Younger* abstention and the adequate and independent state grounds doctrine are conceptually very similar to the emerging legislative process federalism. Given the current preference for politically enforceable federalism limits upon the federal legisla-

tive power, process federalism makes sense: it keeps the political process accountable to the people and the regions in which they live.

The accountability premise upon which process federalism is constructed suggests at least one avenue of likely extension: prohibiting administrative agency regulations from binding states in most circumstances. The "perceived benefits of federalism" premise suggests possible alterations in existing doctrine: requiring Congress to justify more stringently its use of the commerce power to regulate states, viewing the conditional spending power more skeptically and, more radically, considering adoption of a blanket immunity rule for states. The latter suggestion places upon the Constitution the entire responsibility for curbing state behavior that is inimical to the national welfare. Those problems may not be insuperable but are certainly substantial.

Process federalism is an evolving thought; one important value of its existence is that it will force us to consider both the value of a truly federal system and the relative virtues of securing that federalism primarily by politics or by law. It has the seeds of radicalism embedded in it. We ought to rejoice at that and consider the positive aspects of a more legally enforceable and decentralized federalism. But in doing so we ought to be realists and ask of the Constitution and its judicial patrolmen only what they can reasonably deliver.