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Federalism and Judicial Review: An Update

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Commentary

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For nearly two decades, I have urged that the Supreme Court should not decide constitutional questions respecting the power of the national government vis-á-vis the states; rather, the issue of whether federal action is beyond the authority of the national government and thus violates states' rights should be treated as nonjusticiable, with the final resolution relegated to the political branches.[1] When I began seriously developing this Federalism Proposal in the early 1970s,[2] nearly forty years had passed since an opinion of the Court had held that national legislative or executive action violated the Tenth Amendment's assurance of states' rights.[3] Although the Court had by no means adopted my Federalism Proposal in theory, it had done so in practice—consistently upholding broad congressional exercises of regulatory power since the mid-1930s that affected both state and municipal governments themselves, as well as private persons and businesses located within the states.[4]

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1. First published as Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977) [hereinafter Choper, *The Scope of National Power*], this proposal became a chapter in JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980) [hereinafter CHOPER, JUDICIAL REVIEW].

2. For an earlier suggestion, see Jesse H. Choper, *On the Warren Court and Judicial Review*, 17 CATH. U. L. REV. 20, 39-41 (1967).

3. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Justices ruled (5-4)—without an opinion for the Court—that Congress had no power under section five of the Fourteenth Amendment to lower the voting age to eighteen in state and local elections. This outcome was overturned in less than a year with the ratification of the 26th Amendment.

4. *See* WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 98-154 (7th ed. 1991).

A dramatic change occurred, however, in 1976. In the celebrated decision of *National League of Cities v. Usery*,[5] the Court held that Congress lacked power under the Commerce Clause to regulate the wages and hours of all state and municipal employees, including those in police and fire departments, schools, and hospitals. Although affirming that federal minimum wage legislation is plainly permissible under the Commerce Clause as applied to private businesses within the states, the Court—overruling its 1968 decision in *Maryland v. Wirtz*[6]—reasoned that it was unconstitutional if federal action (1) regulated the "States qua States" and (2) interfered with integral government functions traditionally performed by state and local governments.[7] The Court defined "integral operations of state governments" as those that were essential to the separate and independent existence of the states.[8]

During the next six years, the Court wrestled with this amorphous constitutional standard, finding that a series of congressional enactments did not abridge it.[9] For instance, in 1981, the Court upheld a federal statute that regulated the activities of coal mining companies, even though the act of Congress displaced analogous state regulations unless the states themselves imposed the federal standards.[10] The Court reasoned that this was not "directed to States as States."[11] The following year, the Court approved federal regulation of the labor-management relations of a railroad owned by the state of New York, opining that the operation of a railroad was not a function "traditionally performed by state or local governments."[12] A year later, the Court held that a federal statute forbidding age discrimination could be applied to bar Wyoming's mandatory-retirement-at-age-55 rule for fish and game wardens, concluding that this did not "directly impair the State's ability to structure integral operations."[13] In the instance probably most intrusive to the states of all, the Court upheld a federal

5. 426 U.S. 833 (1976).

6. 392 U.S. 183 (1968).

7. *National League of Cities*, 426 U.S. at 851-55.

8. *Id.* at 851-52. For the view that this result "runs counter to the accepted and historically accurate reading of the tenth amendment," and is "supported neither by the framers' intent nor by any constitutional language," see Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 100, 103 (1985).

9. *See* Field, *supra* note 8, at 91-95.

10. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 305 (1981).

11. *Id.* at 265.

12. United Transp. Union v. Long Island R.R., 455 U.S. 678, 686 (1982).

13. Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 238-39 (1983) (internal quotation omitted).

law that required state agencies regulating power companies to (1) adjudicate disputes concerning federal policies, (2) consider adopting substantive federal policies and to give reasons for their decisions with respect to this, and (3) afford certain procedural rights with respect to all of these activities.[14] Finally, in 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*,[15] the Court—recognizing that the *National League of Cities* standard was "unsound in principle and unworkable in practice"[16]—overruled its earlier decision. Reasoning that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power,"[17] a majority of the Justices relied on the seemingly radical theory of my Federalism Proposal.[18]

The reach of the Court's doctrine, however, was specifically confined to national regulation of the "States as States;"[19] it clearly did not apply—as did the Federalism Proposal—to federal regulation of private persons or activities within the states.[20] Moreover, the Court hesitated to follow the logic of the Federalism Proposal to its ultimate conclusion, even in respect to national regulation of the states as states. Rather than unconditionally delegating final resolution of the constitutional issue to the national political branches, the Court implied that it would consider "the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment."[21] Despite these restrictions, the *Garcia* ruling evoked a heated dissent from four members of the Court, with then-Justice Rehnquist plainly implying that the decision would be overruled just as soon as the *Na-*

14. Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982).

15. 469 U.S. 528 (1985).

16. *Id.* at 546.

17. *Id.* at 552.

18. *Id.* at 551 n.11, 554 n.18.

19. *Id.* at 537.

20. Paradoxically, *Garcia*'s greater deference to the federal legislative process in respect to congressional regulation of state government operations (in contrast to the activities of private persons and businesses within the state) was directly opposed to *National League of Cities*' enhanced judicial protection for the "integral operations of state governments."

21. South Carolina v. Baker, 485 U.S. 505, 512 (1988). For discussion of this opening for judicial intervention, see Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341.

tional League of Cities principle "again command[ed] the support of a majority of this Court."[22]

Garcia represented the Federalism Proposal's high-water mark. Even during the period that its five-Justice majority remained on the bench, the Court declined to avail itself of several opportunities to extend its rationale beyond exercises of federal authority under the Commerce Clause. Thus, in *South Dakota v. Dole*,[23] where Congress had withheld 5% of federal highway funds from any state that did not raise its minimum drinking age to 21, rather than apply the *Garcia* principle to the federal spending power and hold that "the fundamental limitation that the constitutional scheme imposes . . . to protect the 'States as States' is one of process rather than one of result,"[24] Chief Justice Rehnquist, assigning the opinion to himself, upheld the conditioned expenditure *on the merits*. Although conceding that Congress could act "indirectly under its spending power to *encourage*"[25] state action that it could not *compel* under its regulatory powers, the Court's ruling explicitly affirmed the existence of a judicially enforceable substantive restriction on federal expenditures: "[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[26] Justices White, Marshall, Blackmun, and Stevens—all adherents to *Garcia*—joined the Chief Justice's opinion with neither comment nor protest, despite the fact that *Dole*'s promise of substantive judicial review in favor of states' rights for exercises of the spending power, which *Garcia* had withheld for exertions of the commerce power, was glaringly inconsistent with the *National League of Cities* caveat that the Tenth Amendment strictures on the commerce power that it had created were inapplicable to the spending power.[27] Most surprisingly, Justice Brennan—the fifth *Garcia* supporter—dissented in *Dole*, urging a *judicial* finding that "regulation of the minimum age

22. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting). Justice Rehnquist was joined by Chief Justice Burger and Justices Powell and O'Connor. *See also* Justice O'Connor's "belief that [the] Court will in time again assume its constitutional responsibility." *Id.* at 528 (O'Connor, J., dissenting).

23. 483 U.S. 203 (1987).

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

25. *Dole*, 483 U.S. at 206 (emphasis added).

26. *Id.* at 211.

27. *National League of Cities*, 426 U.S. at 852 n.17. *See also* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1140 (1987). Although it has been suggested that the protections for state interests in the national political process may be less effective in countering burdensome conditions on spending than in preventing intrusive direct regulations, *id.* at 1141, I know of no supporting evidence for this thesis, either empirical or anecdotal.

of purchasers of liquor falls squarely within the ambit of those powers reserved to the States by the Twenty-first Amendment."[28] This line of reasoning, of course, flatly contradicts the core of the Court's position in *Garcia* that "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in . . . [judicially enforceable] limitations on the objects of federal authority."[29]

A year later, the Court, following a slightly different path, reached the same conclusion as *Dole* with respect to the taxing power. In *South Carolina v. Baker*,[30] the Court upheld a provision of the Tax Equity and Fiscal Responsibility Act of 1982 which denied federal income tax exemption for interest earned on unregistered (or bearer) state bonds. First, the Court ruled that, even though Congress had acted here through use of the tax laws, the provision effectively *compelled* states to issue only registered bonds.[31] Still, this regulation was held to be constitutional under the *Garcia* analysis.[32] More significant for purposes of this discussion, the Court then responded to South Carolina's contention that congressional exercise of the taxing power in this instance violated the intergovernmental immunity of the states.[33] The five Justices who unqualifiedly joined the opinion of the Court in *Baker*, written by Justice Brennan, were the same five Justices who comprised the majority in *Garcia*.[34] Nonetheless, rather than relying on the Federalism Proposal and invoking "[t]he effectiveness of the federal political process in preserving the States' interests"[35] as they had in *Garcia*, these five Justices rejected South Carolina's claim of a limited congressional taxing power *on the merits.*

Whatever the reasons for the *Garcia* majority's hesitancy to apply that decision beyond the relatively narrow confines of the Commerce

28. *Dole*, 483 U.S. at 212 (Brennan, J., dissenting).

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

30. 485 U.S. 505 (1988).

31. *Id.* at 511.

32. *Id.* at 512-15. In a separate concurrence, Justice Scalia took the occasion to dissociate himself from "the proposition attributed to . . . [*Garcia*] in today's opinion, . . . that the 'national political process' is the States' only constitutional protection, and that nothing except the demonstration of 'some extraordinary defects' in the operation of that process can justify judicial relief." 485 U.S. at 528 (Scalia, J., concurring). Thus, Justice Scalia left little doubt as to his identifying with his indirect predecessor, Chief Justice Burger, in the camp of the *Garcia* dissenters. Justice Kennedy, who had succeeded Justice Powell, another *Garcia* dissenter, did not participate in the *Baker* decision.

33. *Id.* at 515-27.

34. Justices Brennan, White, Marshall, Blackmun, and Stevens.

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

Clause, the continued vitality of the fundamental premise for the *Garcia* rationale became seriously endangered on Justice Brennan's retirement in 1990. Within the year, the Court held in *Gregory v. Ashcroft*[36] that the Federal Age Discrimination in Employment Act did not apply to state judges, and therefore did not preempt a provision of the Missouri Constitution mandating retirement at age 70. The new majority, speaking through Justice O'Connor, invoked a principle of statutory interpretation that had been articulated in cases challenging congressional action as violative of the Eleventh Amendment as well as other instances of alleged federal intrusion into "the historic powers of the States:"[37] "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[38] Although the four remaining Justices who had comprised the prevailing five in *Garcia* all dissented in *Gregory*, the Court's "plain statement" rule furthered the Federalism Proposal's theme that the national judiciary should continue to play a substantial role in articulating the constitutional values of American federalism, by, for instance, following "its customary procedure of assuming, in the absence of clear contrary evidence, that Congress (or the executive) either did not intend or did not consider applications of its enactments that appear to test the limits of national power."[39] Moreover, contrary to the *Gregory* dissenters' criticism, the fact that the Court primarily relied on cases concerning the Eleventh Amendment[40] rather than the Tenth Amendment does not affect the analysis because both constitutional provisions similarly involve the scope of national power versus states' rights.[41] Nonetheless, the overall tenor of the *Gregory* opinion, which carried much of the flavor of the *Garcia* dissent, may have justified the *Gregory* dissenters' complaint that the Court's approach was "contrary to . . . our Tenth Amendment jurisprudence" and "contravene[d] our decisions in *Garcia*."[42]

Although *Gregory* clearly reflected a change in the attitude of the new majority (which now included Justice Souter in place of Justice Brennan), the Court made no significant doctrinal modifications of

36. 111 S. Ct. 2395 (1991).

37. *Id.* at 2401.

38. *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

39. CHOPER, JUDICIAL REVIEW *supra* note 1, at 240.

40. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

41. CHOPER, JUDICIAL REVIEW, *supra* note 1, at 395-97.

42. *Gregory*, 111 S. Ct. at 2408, 2410.

the *Garcia* principle. That came about one year later. In *New York v. United States*,[43] the Court, again speaking through Justice O'Connor, held that a part of the Federal Low Level Radioactive Waste Policy Amendments Act of 1985—which stipulated that any state failing to provide for the disposal of the waste generated within its borders by 1996 would be deemed to take title to and be responsible for it—unconstitutionally invaded the "'residual and inviolable sovereignty' . . . reserved explicitly to the States by the Tenth Amendment."[44] The six-Justice majority for this judgment—only the second since 1936 to invalidate national action under the Tenth Amendment[45]—was made up of those who had prevailed in *Gregory* (the four *Garcia* dissenters and Justice Souter) joined by Justice Thomas, who had replaced Justice Marshall at the beginning of the Term. The three remaining members of the *Garcia* Court dissented.

The essence of the *New York* Court's rationale was as follows: "Congress has substantial powers to govern the nation directly," and may "encourage a State to regulate in a particular way."[46] For example, Congress may place conditions on the receipt of federal funds pursuant to the spending power, or require that the states either regulate according to federal standards or have state rules preempted by federal law under the commerce power.[47] However, "Congress may not simply 'commandeer' the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[48] The Court then asserted that, because "the Constitution would not permit Congress either simply to transfer radioactive waste from generators to state governments,"[49] or to "requir[e] . . . the

43. 112 S. Ct. 2408 (1992).

44. *Id.* at 2435.

45. *See supra* note 3 and accompanying text.

46. *Id.* at 2421, 2423.

47. *Id.* at 2423-24.

48. *Id.* at 2420. As to the contention that this policy derives from a "'lively debate among the Framers' on 'the question whether the Constitution should permit Congress to employ state governments as regulatory agencies,'" it "seems almost directly contradictory to views expressed by Madison and Hamilton. On at least four occasions, *The Federalist* appears to assert that the proposed federal government would have the authority to use state officers to carry out federal activities." H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 661 (1993).

49. *New York*, 112 S. Ct. at 2428. The sole reason offered by the Court to support this pronouncement was that "such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers." *Id.* But it may be similarly contended that application of the minimum wage requirement of the Fair Labor Standards Act to state and local governments, upheld in *Garcia*, "would in principle be no different than a congressionally compelled subsidy from state governments to" their employees.

States to become liable for the generators' damages," the statute's alternative afforded no constitutionally permissible "choice" at all. Rather, it instructed state governments to "regulat[e] . . . pursuant to Congress' direction."[50] The Court found no need to "revisit" *Garcia* because, like *National League of Cities* and *Wirtz*, that decision "concerned the authority of Congress to subject state governments to generally applicable laws," whereas *New York* was "not a case in which Congress ha[d] subjected a State to the same legislation applicable to private parties."[51] But, as Justice White pointed out in dissent, "[i]n no case has the Court rested its holding on such a distinction" and "an incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that 'commands' specific action also applies to private parties."[52] Indeed, the idea of a restriction on Congress' ability to regulate the "States qua States" was at the core of the *National League of Cities* approach rejected in *Garcia*.

The primary justification advanced by the Court for its edict against congressional mandates of state regulations was that "the accountability of both state and federal officials is diminished" thereby: "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."[53] There is good reason to doubt this hypothesis, particularly because "[i]n an age of high-powered special interest groups and mass communication, a truly disgruntled local electorate should not have problems in determining which governmental body is actually responsible."[54] But even if it were true, the Court's opinion offers no reason as to why this

50. *Id.* at 2413.

51. *Id.* at 2419-20.

52. *Id.* at 2441 (White, J., dissenting). Moreover, there is neither evidence nor reason to believe that the security of states' rights or the values of federalism will carry any greater or lesser force in the dynamics of the national political process, *see infra* note 60, depending on whether the congressional action is generally applicable rather than only targeting the states. *See infra* text accompanying notes 60-66; *see also* CHOPER, JUDICIAL REVIEW, *supra* note 1, at 176-90.

53. *New York*, 112 S. Ct. at 2441.

54. Wayne O. Hanewicz, Note, New York v. United States: *The Court Sounds a Return to the Battle Scene*, 1993 WIS. L. REV. 1605, 1625. A recent full page political advertisement on the subject of waste disposal sponsored by twenty major California organizations—including the Chamber of Commerce, the principal power companies, and labor union councils—contained no ambiguity as to which level of government was blameworthy: "For 30 years, California's waste was shipped to safe disposal facilities in Washington and Nevada . . . . The same federal law that allowed these two states to close their borders to California made each state responsible for taking care of its own waste." S.F. CHRON., Jan. 24, 1994, at A13.

particular value of federalism, as compared to the many other benefits that flow from our system of territorial division of power, should be secured by judicial review rather than by "[t]he effectiveness of the federal political process"[55] as decided in *Garcia*.

It is true, as Professor Hoke points out, that *New York*'s approach may be distinguished from the *National League of Cities* regime that was discredited in *Garcia*: *New York* provides a "legal standard"[56]—Congress may not commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program—that is "judicially discoverable and . . . manageable"[57] in that it would "seem to permit reasoned, consistent application."[58] At the same time, however, Professor Hoke demonstrates the analytic and normative weakness of this newly announced legal standard: despite *New York*, "[a] multitude of methods remain available to the Federal government, either by direct regulation [preempting state law] or by indirect coaxing, to generate State participation in intergovernmental regulatory partnerships."[59] Indeed, it may be fairly asked whether the values of federalism are not better served when the national government enlists state cooperative efforts in resolving locally sensitive issues, in contrast to Congress' handling the matter through agents sent directly from Washington.

The difficulty in articulating a judicially enforceable principle for constitutional issues of federalism was one of the major justifications for the development of the Federalism Proposal,[60] as well as for the Court's adoption of the *Garcia* doctrine.[61] But the primary force that drove the Federalism Proposal (and that led to the Court's pronouncement in *Garcia*) was not just that "federalism issues involve considerations of practicality rather than principle,"[62] but that "state interests are forcefully represented in the national political process—

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

56. Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489, 495 (1994).

57. *Id.*

58. *Id.* at 574.

59. *Id.* at 496.

60. Because of the "highly pragmatic nature of federal-state questions," in that the "fundamental issue turns in large measure on the relative competence of different levels of government to deal with societal problems;" "the Court is no more inherently capable of correct judgment than its companion federal branches. Indeed, the judiciary may well be less capable" as to these matters in contrast to questions of individual rights which involve "government according to principle." CHOPER, JUDICIAL REVIEW, *supra* note 1, at 201-02.

61. The Court was troubled by "the elusiveness of objective criteria for 'fundamental' elements of state sovereignty." *Garcia*, 469 U.S. at 548.

62. CHOPER, JUDICIAL REVIEW, *supra* note 1, at 2.

which is peculiarly capable of fairly reconciling the competing interests . . . . When democratic processes may be generally trusted to produce a fair constitutional judgment, it advances the democratic tradition to vest that judgment with popularly responsible institutions."[63] The major development of my argument for the Federalism Proposal involved an effort to demonstrate this thesis both logically and empirically. Similarly, in *Garcia*, after first explaining that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself,"[64] the Court documented its conclusion that "[t]he effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation"[65] by noting that "at the same time that the States have exercised their influence to obtain . . . a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid, . . . they have been able to exempt themselves from a wide variety of obligations imposed by Congress."[66]

Since *Garcia*, the record of the states' ability to secure their vital interests against federal encroachments without the aid of judicial review has been consistent with their earlier successes. Perhaps the most dramatic confirmation came within eight months after *Garcia* when Congress amended the Fair Labor Standards Act to substantially reduce its financial impact on state and local governments.[67]

63. *Id.* at 2, 203. In addition to the factors of (1) complexity in fashioning a standard for judicial review, (2) strong representation of state interests in the national political branches, and (3) ameliorating the conflict between judicial review and majoritarian democracy, I also observed that "the Court, in employing the power of judicial review and thus thwarting popular will by rejecting judgments of electorally responsible political institutions, expends its limited capital and diminishes its ability to gain compliance with the decisions it renders." *Id.* I pointed out that "[j]udicial validation of federal power as against states' rights has often placed the Court at the center of a storm of controversy . . . [as] have the Court's rulings invalidating such national action." Choper, *The Scope of the National Power*, *supra* note 1, at 1579. Thus, I urged that the Court's adoption of the Federalism Proposal would permit it both to avoid "needless adjudication of a troublesome category of constitutional issues . . . [and to strengthen] judicial review's central function of curbing majoritarian abuse of the constitutional liberties of the individual." *Id.* Although I stand by the importance of this consideration, if I were permitted only one clarifying statement in respect to the entire book, it would be to emphasize that this factor was supplementary to the others—a significant but nonetheless derivative benefit of my effort "to advance a principled, functional, and desirable role for judicial review in our democratic political system." CHOPER, JUDICIAL REVIEW, *supra* note 1, at 2.

64. *Garcia*, 469 U.S. at 550.

65. *Id.* at 552.

66. *Id.* at 552-53.

67. For a case study, see Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB.

The point, of course, is not that Congress *never* overcomes state-voiced protests to proposed national actions that burden local interests.[68] According to a recent study of the processes and outcomes of several congressional endeavors in this area, "the 'political safeguards of federalism' do not operate automatically to protect important state interests .... To assure that the values of federalism will be considered in Congress, state and local governments must make active efforts to protect their own interests."[69] But, the study reports, when they do, they often succeed.[70]

Ironically, the radioactive waste disposal legislation at issue in *New York* provides a powerful example of Congress' responding to state wishes when attacking a serious national problem. As Justice White's dissent recounts in detail, the federal provisions "resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem" through "congressional sanction of interstate compromises they had reached."[71] As Professor Hoke confirms, the effort was to "guarantee that all State governments assumed responsibility for disposal of the [low-level radioactive waste] generated within their borders,"[72] and not simply to have the states of Washington, Nevada, and South Carolina be the dumping grounds for the entire nation. A task force of the National Governors' Association had "urged that 'each state should accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders' and that 'the states should pursue a regional approach to the low-level waste disposal problem.'"[73] The state of New York had "participated and supported passage of this [*unanimously* approved congressional] legislation at both the gubernatorial and federal representative levels, and then enacted state laws specifically to comply with the deadlines and timetables agreed upon by the States in the 1985 Act."[74] Although the "take-title" provision held invalid by the

LAW 301 (1988). For another example of this type of congressional response, see *Hospital Ass'n of N.Y. State, Inc. v. Toia*, 435 F. Supp. 819, 823, 825 (S.D.N.Y. 1977) (noting that after governors and state attorneys general complained, and New York was ordered to pay a judgment of forty million dollars, Congress repealed the requirement that states waive their Eleventh Amendment immunity as a condition for receiving Medicaid grants).

68. For illustrations of congressional rejections of state objections, see Lee, *supra* note 67, at 325, 333.

69. *Id.* at 333-35.

70. *Id.*

71. *New York*, 112 S. Ct. at 2435 (White, J., dissenting).

72. Hoke, *supra* note 56, at 530.

73. *New York*, 112 S. Ct. at 2436 (White, J., dissenting).

74. *Id.* at 2444.

Court had not been itself considered or recommended by state officials,[75] the Governors' Task Force had plainly approved of congressional "sanctions to compel the establishment of new disposal sites"[76] within as few as two years after the 1985 amendments were passed. "If the structural theory ever should insulate congressional action from judicial review, surely *New York* was that case. The states had participated fully in the political process, and they had won the political battle."[77] That some states suffered distinctive burdens because of the shared responsibilities imposed upon them by the state-prompted federal legislation[78] is by no means unusual. A great many indisputably valid national regulations have a highly uneven impact on various states and regions of the country.[79]

Professor Hoke's article carefully reviews various models for national health regulation in light of possible constitutionally-based federalism defects that she sensitively and persuasively derives from the Court's analysis in *New York*, occasionally offering creative (although not illogical) extensions of the opinion's rationale.[80] In my view, however, a number of the constitutional problems that she discerns sharply illustrate additional shortcomings[81] of the renewed effort in *New York* to afford judicial protection for states' rights. Two examples stand out.

First, Professor Hoke examines the technique of imposing a federal tax "on private citizens and entities in any State that refuses to institute the Federal regulatory program." If this tax assesses a charge "that . . . far exceed[s] the costs of instituting the Federal program . . . States will again be faced with an ephemeral choice: either institute a regulatory program that meets Federal standards or take the political responsibility for substantially increased taxes on their citizenry."[82] Although I have no quarrel with Professor Hoke's assessment of the reality, this move would appear plainly to be within Congress' spending power under longstanding principles. Indeed, it mirrors the provision of the Social Security Act of 1935 relating to unemployment compensation that was upheld by the Court in the landmark decision

75. *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 177 n.37 (1992).

76. *New York*, 112 S. Ct. at 2436 (White, J., dissenting).

77. Deborah J. Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. (forthcoming 1994).

78. Hoke, *supra* note 56, at 559-60.

79. *See* CHOPER, JUDICIAL REVIEW, *supra* note 1, at 190-93.

80. *See, e.g.*, Hoke, *supra* note 56, at 550-573.

81. *See supra* note 49.

82. Hoke, *supra* note 56, at 565-66.

of *Steward Machine Co. v. Davis*:[83] A federal tax, payable into the general funds of the Treasury, was imposed on all employers of eight or more persons. If the taxpayer contributed to a state-created unemployment fund that was certified as meeting certain minimum federal standards, the taxpayer was entitled to credit such contributions up to an amount of ninety percent of the federal tax. But if the employer's state chose not to institute a system of unemployment compensation, no benefits flowed to anyone in the state.[84] Faced with a "Hobson's choice" similar to that described by Professor Hoke, all the states quickly fell into line.[85]

Second, Professor Hoke reviews the model whereby "the Federal government commands States to engage in a particular regulatory activity . . . . If the State fails to do so . . . the Federal government implements the program within the noncomplying State and charges the State a 'fee' or tax for the regulatory program."[86] She concludes, "*New York* clearly undermines the constitutionality of this strategy, for the scheme again presents States with ephemeral 'choices.'"[87] Because "the provisions do not impose any structural incentive upon the Federal government to keep the costs of programs reasonable,"[88] the states must "either accept the open-ended liability of paying the Federal government's expenses in establishing and maintaining the program or 'regulate according to the instructions of Congress.'"[89] As a practical matter, however, the state's choice here is realistically no more restricted nor its liability more open-ended than when it is told, as in *Dole*, that the spending power authorizes Congress to withhold federal highway funds if the state does not raise its drinking age;[90] or, as in *Baker*, that the taxing power enables Congress to deny federal income tax benefits for any state bonds that are unregistered;[91] or, as in *Garcia*, that the commerce power permits Congress to require the states to pay all its employees the minimum hourly wage as well as overtime rates if they work more than forty hours per week.[92] Indeed, rather than formally imposing a "tax" or "fee" on the states under either the taxing or regulatory powers, Congress might instead

83. 301 U.S. 548 (1937).
84. *Id.* at 574-76.
85. *Id.* at 587.
86. Hoke, *supra* note 56, at 558.
87. *Id.* at 561.
88. *Id.* at 560.
89. *Id.* at 561 (quoting *New York*, 112 S. Ct. at 2428).
90. *Dole*, 483 U.S. at 211-12.
91. *Baker*, 485 U.S. at 511-15.
92. *Garcia*, 469 U.S. at 554-56.

achieve the identical result by invoking its even broader conditioned spending power and simply reducing certain federal subsidies to the state by the amount that it costs the federal government to administer its health program within the noncomplying state.

A majority of the Justices now on the Supreme Court are plainly unsympathetic to the *Garcia* approach.[93] Thus, it appears that the Court will be inclined to invalidate national executive or legislative actions that it feels "go too far" in curtailing state sovereignty, either by chipping away at *Garcia*, as it did in *New York*, or by directly overruling that decision as originally promised by then-Chief Justice Rehnquist. Professor Hoke evidently finds this to be a "salutary result,"[94] believing that "the very survival of State governments as independent sources of law and policy is seriously threatened if the Tenth Amendment is not justiciable."[95]

In my view, however, this apocalyptic judgment is neither supported by the actual data nor avoided by the Courts' reinstatement of *National League of Cities*. First, I do not believe that the Federalism Proposal is the product of "a legal and political culture that finds federalism outmoded and its underlying values . . . unpersuasive."[96] The fact is that state and local governments have flourished and expanded greatly[97] during the sixty years that the Court has operated on "the proposition that the political process alone sufficiently protects federalism and its underlying values."[98] It would be a serious mistake to equate the enormous growth of the national government during this period with a diminution of state and local power. Moreover, while disillusionment with the efficacy of the national government has increased dramatically in the opinion of the general public, as well as many of its elected representatives in the political branches, perhaps because, as Professor Hoke herself recognizes, "the *American people* realize that their ability to assure a government responsive to their values and desires will be difficult to achieve if most or virtually all

93. The only identified remaining adherents are Justices Blackmun and Stevens. Justice Ginsburg—who has now replaced Justice White, one of *Garcia*'s most enthusiastic backers—has clearly perceived *Garcia*'s implications, see Brock v. Washington Metro. Area Trans. Auth., 796 F.2d 481, 484 n.6 (D.C. Cir. 1986), but has yet to indicate her view of the matter.

94. Hoke, *supra* note 56, at 574.

95. *Id.* at 575.

96. *Id.*

97. CHOPER, JUDICIAL REVIEW, *supra* note 1, at 188-90.

98. *Id.*

power to decide policy resides in one national capital."[99] Second, even the most avid proponents of the Court's return to a more activist posture in regard to states' rights usually acknowledge, as Professor Hoke has written,[100] that judicial enforcement of the Tenth Amendment serves the cause of federalism largely as a matter of form rather than substance.[101]

99. Hoke, *supra* note 56, at 547 (emphasis added).

100. *See supra* text accompanying note 59.

101. For consideration of how judicial review may actually work to the detriment of state sovereignty, see CHOPER, JUDICIAL REVIEW, supra note 1, at 226-28.