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New York v. United States¹: Constitutional Order or Commerce Clause Chaos?

In quiet majesty a roman centurion guards the doorway to the national archives where the Constitution is displayed and honored. The inscription beneath him proclaims the message of a bygone age, that "[e]ternal vigilance is the price of liberty." This Note examines the conflict between the practical exigency of the moment and the long term security of the republic. On one hand, hazardous waste disposal presents a national crisis. On the other hand, measures designed to remedy this crisis pose serious threats to the constitutional division of power between federal and state governments.

New York v. United States addresses a fundamental question of the separation of powers between the federal government and states.² In New York, the Supreme Court struck down a provision of The Low Level Radioactive Waste Policy Amendments Act of 1985. This provision required states not complying with the Act to "take title" to offending waste within their borders, and be liable for resulting damage.³

This Note examines the federalism values of local control and state sovereignty, and the impact of New York on these values. Part I of this Note examines the law Prior to New York. Part II is devoted to case history. Part III treats the Court's reasoning, and Part IV appraises that reasoning.

I. PRIOR LAW

The Court's opinion in New York is based on the Tenth Amendment protection of states' rights.⁴ In crafting her opinion, Justice O'Connor relied heavily on analysis found in Hodel v. Virginia Surface Mining & Reclamation⁵ for the proposition

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2. Id.
4. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.
that the federal government may not “commandeer state legislative processes.” In interpreting National League of Cities v. Usery, the Hodel Court set forth a three part test to determine whether congressional power is abused in violation of state’s rights. This approach, known as the state autonomy principle, serves as a barrier to federal regulation in areas of “traditional governmental functions.”

The Usery Court’s state autonomy barrier was an attempt to preserve federalism in the face of a broadly expanding commerce power. That power had become so enlarged that Congress could regulate anything bearing on commerce no matter how remote the effect. Usery was the culmination of a line of opinions that demonstrated increasing sensitivity to state autonomy.

The Usery decision was explicitly overruled in Garcia v. San Antonio Metropolitan Transit Authority. The Garcia Court held that “a rule of State immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional’” is “unsound in principle and unworkable in practice.”

We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress’ Commerce Clause powers over States merely by relying on a priori definitions of State sovereignty. In part, this is because of the

7. The Court wrote:

First, there must be a showing that the challenged statute regulates the “States as States.” Second, the federal regulation must address matters that are indisputably “attribute[s] of state sovereignty.” And, third, it must be apparent that the States’ compliance with federal law would directly impair their ability “to structure integral operations in areas of traditional governmental functions.”


8. Id.
12. Id.
elusiveness of objective criteria for "fundamental" elements of State sovereignty, a problem we have witnessed in the search for "traditional governmental functions." Rather than relying on "judicially created limitations on federal power," the Court held that "procedural safeguards inherent within the structure of the federal system" would stand alone in protecting state autonomy. Essentially, the Garcia Court rejected the Tenth Amendment as a judicially enforceable safeguard for state sovereignty and trusted in congressional restraint.

The state autonomy defense began its resurgence in Gregory v. Ashcroft. In that case the Court upheld Missouri's constitutional requirement that judges retire at age seventy against a challenge that the provision violated the Age Discrimination in Employment Act of 1967 (ADEA). Hearkening back to the "traditional governmental functions" approach, the Gregory Court found that determining the qualifications of state officers was "essential to the independence of the States," and that Congress could override this function only by making a "plain statement" declaring its intent to do so.

II. HISTORY

The Low-Level Radioactive Waste Policy Amendments Act of 1985 was enacted pursuant to a proposal by the National Governors' Association. The statute contained three provisions intended to encourage states to develop policies for the disposal of low-level radioactive waste either individually or pursuant to interstate agreements. The first of these provisions was a "monetary incentive," which authorized states with disposal sites to collect a surcharge for accepting waste during a

13. Id. at 548.
14. Id. at 553-554. The Court specifically mentioned the states' direct role in the selection of the President and the Senate; their indirect role in choosing House members by virtue of their control of electoral qualifications; and the equal representation of all states in the Senate.
seven-year period. These surcharges would be taxed with the proceeds held in escrow and then disbursed to states complying with the Act.\textsuperscript{20} The second provision was an "access incentive," which allowed states with waste disposal sites to gradually multiply the authorized surcharges, and eventually to deny access to disposal sites.\textsuperscript{21} The third provision required states failing to meet statutory deadlines to "take title" to, and possession, of the offending waste, thus rendering those states liable for resulting damages.\textsuperscript{22}

The State of New York and Allegheny and Cortland counties sought a declaratory judgment that the stated provisions violated the Tenth Amendment and the constitutional guarantee of "a republican form of government."\textsuperscript{23} The U.S. District Court for the Northern District of New York dismissed the complaint\textsuperscript{24} and the Second Circuit affirmed.\textsuperscript{25} Finally, the U.S. Supreme Court upheld the "monetary incentives" and the "access incentives," but struck down the "take title" provision on Tenth Amendment grounds.\textsuperscript{26}

III. THE COURT'S REASONING

In \textit{New York}, Justice O'Connor relied on \textit{Hodel}\textsuperscript{27}, which was founded on \textit{Usery}\textsuperscript{28}. For this reason \textit{Garcia}\textsuperscript{29}, which explicitly overruled \textit{Usery}, has been called into question. \textit{New York}, accordingly, gives reason to reexamine the state autonomy principle which was rejected in \textit{Garcia}.

The important difference between the Court's reasoning in \textit{New York} and its pre-\textit{Garcia} cases is the absence of the "traditional function" analysis in \textit{New York}. In pre-\textit{Garcia} cases, the Court focused on whether an activity was a "traditional function" of states in order to determine whether that activity warranted Tenth Amendment protection.\textsuperscript{30} \textit{New York}, by contrast,
can be read as a structural partition of federal and state governments, without regard to a substantive division of authority to regulate certain classes of issues.

The intrusiveness of a regulation on state autonomy is determined by a series of principles. First, Congress may not simply "commandeer" a state's legislative process.\(^{31}\) Second, Congress may give states the option to implement a federal regulatory program or have their laws preempted by direct federal regulation.\(^{32}\)

No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the states to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to preempt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.\(^{33}\)

Third, when Congress gives the states an alternative, one of the two options must be constitutional when considered without alternatives. Fourth, Congress may attach conditions to the receipt of federal funds collected under the spending power to encourage states to regulate.\(^{34}\) Fifth, the foregoing principles are premised on the theory that the Constitution authorized the federal government to regulate individuals directly, but lacks the power to compel states. Finally, Congress lacks the power to regulate states' regulation of interstate commerce, but may regulate interstate commerce directly.\(^{35}\)

In *New York*, the Court found the "monetary" and "access" incentives constitutional because they provided constitutionally permissible alternatives to federal regulation. In the case of the "monetary" incentives, the Court characterized collection of a portion of the surcharge paid by waste depositors as a "federal tax on interstate commerce."\(^{36}\) The re-distribution of those funds to states complying with the federal program is authorized under the spending power.\(^{37}\)

\(^{31}\) *New York*, 112 S. Ct. at 2420.

\(^{32}\) *Id.* at 2428.

\(^{33}\) *Id.* at 2429.

\(^{34}\) *Id.* at 2423.

\(^{35}\) *Id.* at 2423.

\(^{36}\) *Id.* at 2426.

\(^{37}\) *Id.* at 2426; U.S. CONST. art. I, § 8, cl. 1.
The "access" incentives authorized by Congress were similarly characterized. The Court found authorization of an increasing surcharge and eventual denial of access for hazardous materials traveling across state lines to be within Congress' power to discriminate against interstate commerce. As with the "monetary" incentives, the Court characterized the "access" incentives as an option to regulate according to federal guidelines, or to subject the state's radioactive waste producers to a regulation of interstate commerce.38

The Court declared the "take title" provision unconstitutional because "Congress ha[d] crossed the line distinguishing encouragement from coercion."39 The Court reasons that the "take title" provision is a forced subsidy to waste producers because it relieves the producer of its duty to dispose of the waste as a cost incident to doing business, and transfers that duty to state governments. Justice O'Connor reasoned that either the "take title" provision or a federal regulatory scheme directly imposed on the states, standing alone, is a violation of state sovereignty. This is so because both options "commandeer" states 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".40

IV. ANALYSIS

A. Federalism Principles

Any discussion of states' rights is incomplete without a review of the federalism values that prompt the discussion. This Note will argue that local control provides efficient problem solving, greater safety for liberty, and an important check against federal tyranny.

In Federalist 46, James Madison argued for local control of matters that directly concern the citizens of the several states. This argument is premised on the notion that a government near the people is better equipped to meet their unique needs.

Many considerations, besides those suggested on a former occasion, seem to place it beyond doubt, that the first and most natural attachment of the people will be to the govern-

39. Id. at 2428.
40. Id. at 2428.
ments of their respective states... By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. 41

Second, local control of problems allows states to act as safe repositories of individual liberty. Since state domains are much smaller than the nation at large, they are easier to escape. It is difficult for a government to become oppressive if individuals can freely escape its control and have a choice among varied regimes under which to live. 42

Madison's counter-argument suggests that local majority factions, which can prove threatening to individual liberty, can be checked by a strong national government. 43 In balancing these two arguments, one must weigh the likelihood that idiosyncratic factions will achieve a majority (which is more likely at the state level), against the potential damage of such a majority (which is far more dangerous at the national level because escape is more difficult).

An example of the tension between state and federal control manifested itself in early debates over religious freedom. Madison believed that a strong federal government would operate against the political power of religious factions prominent within individual states. 44 Contrary to Madison's desire, the language of the first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This language prevented "Congress," from taking any steps to check the power of local religious factions, but states were not limited. 45 If a particular religion dominated in an individual state, dissenters were at liberty to travel to a more tolerant state, and in the past have done so in great numbers. 46

The controlling principle for dividing power between the federal government and states is to expressly enumerate the

41. THE FEDERALIST NO. 46, at 238 (James Madison) (Bantam ed., 1982).
43. THE FEDERALIST NO. 10 (James Madison).
44. THE FEDERALIST NO. 10, at 48-49 (James Madison) (Bantam ed., 1982); JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 76 (address by James Madison) (W.W. Norton & Co. 1966).
45. U.S. CONST. amend. I.
46. McConnell, supra note 41, at 1505-06.
federal government’s powers when there is broad national consensus. The formula for ascertaining the existence of such a consensus is written into the Constitution which requires two-thirds of both houses of Congress and three-quarters of the states to agree to give the federal government the powers in question.\(^{47}\) Where such consensus is lacking, it is proper to reserve those powers to the several states.\(^{48}\)

Third, an important federalism doctrine is the division of power between units of government. It is, today, a popular practice to disparage the “gridlock” in Washington D.C. Republicanism is, however, inherently the least efficient among the forms of government. A monarch or dictator can be far more efficient in addressing national problems, needing no one’s consent but his own. The virtue of republican government is not its efficiency, but rather, its safety. A system of checks and balances essential to protect liberty is, by definition, a system of “gridlock.” Madison purposely formed a plan under which a degree of paralysis would prevail as a check on ambitious government power.

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among the distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul [sic] each other; at the same time each will be controuled [sic] by itself.\(^{49}\)

To hold, as the Court did in *Garcia*, that checks and balances solely within the national government protect states rights, is to ignore a fundamental element of the federal plan. That is, that the rights of sovereign states are a second check against ambitious federal power.

Aside from the “procedural safeguards” to states’ rights referred to in *Garcia*,\(^{50}\) the balance between state and federal government is articulated in the Tenth Amendment and in the Constitution’s Supremacy Clause.\(^{51}\) The Tenth Amendment

\(^{47}\) U.S. CONST. art. V.

\(^{48}\) McConnell, *supra* note 41, at 1507 (referring to the formula for amending the Constitution).

\(^{49}\) The Federalist No. 51, at 263-64 (James Madison) (Bantam ed., 1982).


\(^{51}\) The Supremacy Clause reads:
makes the federal government an institution of enumerated powers. On one hand, those powers not explicitly granted to the federal government may not be implied; they are reserved to the states or to the people. On the other hand, the supremacy clause makes federal law preeminent to state law where enumerated powers are concerned. The theory behind this design is to prevent too large a concentration of power in a single sovereign.

B. A Dilemma For Federalism

The majority opinion in New York v. United States could be read to interpret the Tenth Amendment as a direct protection of state sovereignty which proclaims only that the federal government may not commandeer the states. This reading is problematic for three reasons:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

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

52. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

53. Texas v. White, 74 U.S. 227, 237 (1868). The following statements illustrate that Tenth Amendment principles were part of the framers original design, despite the fact that they were not written into the original text:

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 [sic] and foreign commerce; with the 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.

THE FEDERALIST No. 45, at 236 (James Madison) (Bantam ed., 1982);

54. An intire [sic] consolidation of the states into one complete national sovereignty would imply an intire [sic] subordination of the parts; and whatever powers remain in them would be altogether dependent on the general will. But as the plan of the Convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act exclusively delegated to the United States.

THE FEDERALIST No. 32, at 152 (Alexander Hamilton) (Bantam ed., 1982);

55. None of these reasons should be read to suggest that the federal govern-
First, the notion that the federal government may not “commandeer” the states is based on a mistaken premise. The majority relied, for its conclusion, on the theory that the federal government may act on individuals but not on states. If this were true, the Court should have found the “monetary incentives” unconstitutional, since they tax states and distribute federal funds directly to state governments. Further, this theory implies that the federal government operates on a direct grant of power from the people and not from the states. Although this was the position of some who attended the federal convention, these arguments were made by those who favored proportional representation in both houses of Congress. Others had favored a confederation where the federal government existed only to preserve the states. The Court’s premise is mistaken because the federal government derives its powers from a mixed grant of authority from the people and the from the states. House members represent proportional numbers of individuals, thus giving the federal government an element of direct majority rule. Madison explained that each of the states is equally represented in the Senate, giving states a voice equal to the citizens at large. Madison further points out that the bicameral system creates a second check on legislation since “[n]o law or resolution can now be passed without first the concurrence of a majority of the people, and then a majority of the states.”

56. Id. at 2423, Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1868).
57. See also, New York, 112 S. Ct. at 2446 (Stevens, J., dissenting) (listing areas in which Congress issues “a simple command” to state governments to legislate).
Second, if Congress is to "regulate commerce . . . among the several states," it must necessarily place restraints upon the activities in which states are free to engage, which has the effect of "commandeer[ing]." To regulate, by very definition, is to "commandeer." In *New York*, the Court found that denying a state federal funds and requiring its citizens to pay a tax as an alternative to regulating was "encouragement," but imposing title and liability for hazardous waste was "coercion." While there may be a formal distinction between denying affirmative grants of funding, and requiring the state to make expenditures out of its own coffers, there is little substantive difference. As Justice White pointed out in his dissenting opinion, "the Court isolates the measure analytically and proceeds to dissect it in a syllogistic fashion." This is illustrated by the theoretical possibility that the federal government could offer disbursements of several billion dollars to the states as incentives to regulate. Alternatively, the federal government could impose a fine of a few thousand dollars on states that refuse to regulate. If both of these possibilities were offered as "incentives" to regulate, reason dictates that the denial of several billion dollars is more persuasive than the possibility of being required to spend a few thousand. Whether any alternative to regulation is "encouragement" or "coercion" to regulate is less a matter of form than of degree.

Third, the independence of powerless states is useless. Since 1937, the Court has been laboring under an interpretation of the Commerce Clause that allows Congress unlimited authority to legislate virtually any issue, and to preempt state law on that issue. The rule that the federal government cannot "commandeer" the states might preserve the independence of states, but leaves them no constitutionally guaranteed reservoir of power. This contaminates the federalism principle that power should be divided between two independent sovereigns, each with enough constitutional power to exercise

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63. See *The Federalist No. 11* (Alexander Hamilton).
65. Id. at 2438, (White, J., dissenting).
leverage against the other. Ideally, the federal government has powers on which the states cannot encroach because of the supremacy of federal law over state law. In turn, the states have powers on which the federal government cannot encroach, because they are not specifically enumerated, and therefore, are beyond federal reach under the Tenth Amendment.

Fourth, the rule that the federal government may not “commandeer” the states sacrifices one federalism value (local control) to one of its counterparts (the independent sovereignty of the state). If the federal government’s only regulatory option is to exercise an unlimited commerce power to preempt state law, then it will do so at the expense of “local solutions.” On the other hand, if Congress is permitted to force states to regulate, federalism values of local control will be nourished while the federalism principle of state autonomy is sacrificed.

C. Escaping the Dilemma

One of two possible readings of New York, will govern in future cases. One reading is formalistic, and the other substantive. The formalistic reading decides the case according to the state autonomy principle. Such a reading takes a structural approach to state autonomy, allowing the federal government to “encourage,” but not to “coerce” state legislatures. Such a reading gives rise to all of the aforementioned problems.

A preferrable reading of New York decides the matter based on a substantive analysis of the Commerce Clause. Prior to Garcia, the Hodel Court attempted a substantive analysis of states’ rights. Hodel adopted a three-pronged test interpreting Usery, holding that the federal government could not legislate issues that were traditionally functions of state law. Subsequent cases also held that the state autonomy defense would not apply to previously unregulated areas because they were not “traditional function[s]” of state government. Usery was erroneous because it relied on the “general structure of the Constitution,” rather than on the language of

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67. "The ultimate irony of the decision today is that in its formally rigid obeisance to 'federalism,' the Court gives Congress fewer incentives to defer to the wishes of state officials in achieving local solutions to local problems." New York, 112 S.Ct. at 2446 (White, J., dissenting).
68. U.S. CONST. art. I, § 8, cl. 3.
69. See supra, note 6.
the Tenth Amendment or some other express constitutional provision.\textsuperscript{71} The \textit{Usery} Court effectively rewrote and reversed the presumption of the Tenth Amendment, giving the federal government the residue of all powers not previously assumed by the states.\textsuperscript{72} Although misguided, at least “traditional function” analysis recognized a substantive limit to federal power, which was explicitly overruled in \textit{Garcia}.\textsuperscript{73} The Court later made an attempt to limit \textit{Garcia} by requiring a “plain statement” of intent to preempt an “essential state function.”\textsuperscript{74}

In determining whether a regulation is constitutional, one must ascertain whether it falls within one of the Constitution’s substantive powers. The language of the Tenth Amendment teaches that if a power is not “delegated to the United States by the Constitution,” it belongs to the states unless specifically “prohibited.”\textsuperscript{75} Congress does not overreach its powers by the manner or form in which it legislates, but rather by legislating on issues that fall outside its Constitutional grant of power. \textit{New York}, therefore, should be read as an inquiry into whether the provisions at issue are within Congress’ enumerated power to “regulate commerce among the several states.”\textsuperscript{76}

In characterizing the “monetary incentives,” the Court held that, “[t]he [monetary incentive] is an unexceptionable exercise of Congress’ power to burden interstate commerce.”\textsuperscript{77} In explaining its holding the Court reasoned that, “[w]hether or not the states would be permitted to burden the interstate transport of low level radioactive waste in the absence of Congress’ approval, the states can clearly do so with Congress’ approval, which is what the Act gives them.”\textsuperscript{78} Most important of all, the Court held that “[b]ecause the first set of incentives is supported by affirmative constitutional grants of power to Congress, it is not inconsistent with the Tenth Amendment.”\textsuperscript{79}

\textsuperscript{72} \textit{Id}.
\textsuperscript{75} U.S. CONST. amend. X.
\textsuperscript{76} U.S. CONST. art. I, § 8, cl. 3.
\textsuperscript{77} New York, 112 S. Ct. at 2425-26.
\textsuperscript{78} Id. at 2426.
\textsuperscript{79} Id. at 2427.
The foregoing analysis permits the reader to conclude that the "monetary incentives" at issue in New York were constitutional because they fall within an enumerated power as required by the Tenth Amendment.\(^{80}\)

The Court's Commerce Clause analysis of the "access incentives" was similar to its analysis of the "monetary incentives." The majority held that the "access incentives" fall "within Congress' power to discriminate against interstate commerce."\(^{81}\) After concluding that the "access incentive" was within an enumerated power, the Court held that it satisfied the demands of the Tenth Amendment.\(^{82}\)

The Court struck down the "take title" provision of the Act because the provision "commandeers" state legislative processes.\(^{83}\) In explaining its ruling, the Court painstakingly analyzed the "choice" offered to the states. Essentially, the "choice" is between regulating radioactive waste according to federal guidelines, or being forced to take title to, and liability for the offending waste.\(^{84}\)

A commerce clause reading of New York suggests that Congress does not have power to mandate the regulation of waste generated within the borders of a state as long as the waste remains in the state. Under this reading, the federal government's enumerated commerce powers can only prevent waste from becoming an article of interstate commerce or regulate it after it has become an article of interstate commerce. The "take title" alternative is subject to similar analysis. The federal government attempts to require states to "take title" to matter generated within their borders, not conditioned upon

80. The enumerated power referred to is the Commerce Power from U.S. Const. art. I, § 8, cl. 3. It is noteworthy that the Court also undertakes a lively discussion of justification for the disbursement of funds under the spending power and the taxing power enumerated in U.S. Const. art. I, § 8, cl. 1. For purposes of this Note, it is sufficient to observe that the provision was justified according to enumerated powers. Commentary centers more on the expansion of a single enumerated power (the Commerce Clause) as creating a federalism dilemma.


82. Justice O'Connor wrote:

The Act's second set of incentives thus represents a conditional exercise of Congress' commerce power along the lines of those we have held to be within Congress' authority. As a result, the second set of incentives does not intrude on the sovereignty reserved to the states by the Tenth Amendment.

New York, 112 S. Ct. at 2427.

83. Id. at 2420.

84. Id. at 2428.
the matter leaving the state, or in any other way being thrust into the stream of commerce.

Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. 85

Reading New York to establish that regulations must fit within substantive enumerated powers is preferable to construing it as a formalistic resurrection of the state autonomy defense. If New York is read as a structural protection for state autonomy, it might provide for the independence of states, but would not restrict how far the federal government could reach in preempting state law. It is not enough for states to be independent of federal influence if they retain no power to act. If the commerce power is all inclusive, then congressional authority to overrule states remains unlimited and federalism values are without protection. The Court recognized in Garcia that limits could not be placed on the commerce power by an appeal to definitions of state autonomy. 86

1. The Scope of the Commerce Power

If the Court reads New York as deciding the fate of regulations according to whether or not they fall within the commerce power, at least four conclusions may be drawn about the commerce power. First, Congress may exercise it to burden or discriminate against articles of interstate commerce, or to prevent items from becoming articles of interstate commerce. 87 Second, Congress may not place regulations on goods outside the stream of interstate commerce, except to prevent them from coming into the stream of interstate commerce, or to burden them after they arrive. 88 Third, Congress may not compel states to subsidize or regulate local industries. 89 Fourth, if

85. Id. at 2428.
87. See New York, 112 S. Ct. at 2425-27.
88. See Id. at 2428-29.
89. Id. at 2428.
articles become the subject of interstate commerce, the federal government may regulate them directly. 90

The establishment of these four principles would constitute a significant retreat from the line of cases culminating in Garcia which grossly expanded the commerce power. 91 The Court began this expansion in an effort to avoid President Roosevelt's famous "court packing plan" during the "New Deal" era. 92 This landslide of expansion leading up to Garcia broadened the reach of the commerce power and eventually relinquished the authority to review federalism questions altogether. By adopting a substantive reading of New York, the Court can bring the commerce power within reasonable limits, and preserve state sovereignty under the Tenth Amendment's mechanism for apportioning power.

2. The Substance of the Commerce Power

Originally, the commerce power was intended to promote positive commercial relationships, and for the most part free trade, among the citizens of the several states. 93 This would, in turn, facilitate bargaining power for the Union and more advantageous trade agreements with other nations. 94 In this pursuit, the states had the power to impose tariffs and duties "absolutely necessary for the execution of its inspection laws." 95 This provision would allow states a reasonable convenience in regulating their imports and exports, but allow for a federal check on abuses. 96 Furthermore, the founders understood the relationships between such things as manufacturing, trade and real estate values, and crafted the commerce clause to provide for uniformity in America's trade strategy. Such uniformity was to be achieved primarily by federal regulation of tariffs, duties and interstate trade routes and resources. 97

90. Id. at 2429.
93. THE FEDERALIST NO. 41 (James Madison) No. 22 (Alexander Hamilton).
94. Id.
95. U.S. CONST. art. X, cl. 2.
97. THE FEDERALIST NO. 11, 12 (Alexander Hamilton); JAMES MADISON, NOTES
Consistent with this Note’s suggested reading of *New York* and with the framers of the Constitution, the commerce power could be reduced to the power to regulate: (1) The mechanisms of interstate commerce; and (2) The objects of interstate commerce while they are in the sphere of interstate commerce. Certain articles of commerce, such as rivers and other natural resources that transcend state boundaries are perpetually in the sphere of interstate commerce and would always be within federal control. Other objects are in the sphere of interstate commerce only during commercial transactions that cross state boundaries.

V. CONCLUSION

The commerce clause is a general power and was created in vague terms to accommodate the many complexities of commerce. Nonetheless, no enumerated power should be limitless, and the foregoing principles can provide a positive direction for future limits intended to restore balance in the federal system. Merely protecting states from federal intervention will not provide the checks and balances of the federal design. Instead, the federal government must be limited to its enumerated powers. Such powers, themselves, must be limited, leaving the states a substantial reservoir of power.

Some have argued that past centralization of government power has “fatally compromised” the intentions of the federal plan. It is true that many institutionalized abridgments of the federal design are so deeply entrenched that their removal would be nearly impossible. Having conceded this, it remains unwise to further consolidate power in a federal head in violation of the Constitution. Fidelity to the Constitutional order is critical for preserving freedom to future generations. In his dissenting opinion in *New York*, Justice White seemed to disagree:

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100. *Id.*
Ultimately, I suppose, the entire structure of our federal constitutional government can be traced to an interest in establishing checks and balances to prevent the exercise of tyranny against individuals. But these fears seem extremely far distant to me in a situation such as this. We face a crisis of national proportions in the disposal of low-level radioactive waste . . . .

However tempting it may be, it is unwise to allow present expediencies and the seductive appeal of streamlined government to override the checks and balances necessary to maintain the rights of American citizens.

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