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Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Power Hurdles

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ARTICLES

Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles

By CANDICE HOKE*

Table of Contents

| | |
|---|-----|
| Introduction | 491 |
| I. The Reform Proposals and Their Problematic | |
| Commands to State Governments | 496 |
| A. Background Policy Issues | 497 |
| 1. Public or Private Insurance | 497 |
| 2. Universal Coverage | 498 |
| 3. Cost Containment | 498 |
| 4. Financial Responsibility | 499 |
| 5. The Role of State Government | 499 |
| B. The Modest or Incremental Approaches | 503 |
| 1. The Medical Savings Accounts Approach (Coats-Gramm-Lugar) | 503 |
| 2. The House Republican Plan (Michel) | 504 |

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In this Article, I have chosen to capitalize "State" and "Federal" to signify the particular political entities these words designate and to emphasize their distinct constitutional status and roles in our federal system of government.

| | | |
|------|---|-----|
| 3. | The “Pure Managed Competition” Plan (Cooper)..... | 508 |
| C. | The Ambitious Plans | 510 |
| 1. | The Clinton Plan | 511 |
| 2. | The Senate Republican Task Force Proposal (Chafee) | 515 |
| 3. | The “Consumer Choice” Plan (Nickles-Hatch) . | 518 |
| 4. | The Single-Payer Plan (McDermott-Wellstone) . | 522 |
| D. | The Models Summarized | 525 |
| II. | Federal Control of State Legislative Power | 526 |
| A. | Background to <i>New York</i> : The Public Policy Problem of Low-Level Radioactive Waste | 529 |
| B. | State Reliance on <i>Hodel</i> and <i>FERC</i> | 532 |
| C. | <i>New York’s</i> Import | 536 |
| 1. | Justiciable Claims | 537 |
| 2. | Permissible Incentives | 538 |
| 3. | Limiting <i>Garcia</i> | |
| D. | <i>New York’s</i> Deficiencies | 540 |
| 1. | Underlying Problems | 541 |
| 2. | The “Mirror Image” Fallacy | 542 |
| 3. | Alternatives..... | 544 |
| a. | Commerce Clause | 544 |
| b. | Structural Federalism | 545 |
| III. | Applications: The Constitutionality of the Health Plans’ More Novel Forms of Interaction with State Governments | 550 |
| A. | Federal Regulation of Non-Federal Public Sector Employee Benefits..... | 550 |
| B. | Untethered Regulatory Command | 552 |
| 1. | Use of the Untethered Regulatory Command .. | 552 |
| 2. | Objections to the Untethered Regulatory Command | 553 |
| C. | Command Plus Conditional Preemption | 555 |
| D. | Command, Conditional Preemption, Plus State “Fee” | 558 |
| 1. | Use of Command, Conditional Preemption, Plus State Fee Model | 558 |
| 2. | Objections to Command, Conditional Preemption, Plus State Fee | 560 |
| E. | Command, Conditional Preemption, Plus Private Sector Tax | 562 |

- 1. Use of Command, Conditional Preemption, Plus Private Sector Tax 562
- 2. Constitutional Questions..... 564
- 3. Avoiding Circumvention of *New York* 565
- F. Private Sector Penalties for State Nonparticipation . 567
- G. Command Plus Extraordinary Inducement/Penalty . 569
 - 1. Use of Command Plus Extraordinary Inducement/Penalty 569
 - 2. Constitutional Questions..... 571
- Conclusion 573

Introduction

Inequities in the provision of basic health care services and the continued resilience of the health care industry to cost restraints have led to the first omnibus presidential proposal for national health care reform.¹ Health care policy is currently fashioned via a multitude of interdependent and overlapping regulatory programs enacted by the Federal and State governments,² with implementation left in the hands of a highly decentralized set of actors, including physicians, hospitals, and local mental health agencies. Elements comprising the

1. The Bush Administration proposed a much less ambitious health reform plan in 1990, *see, e.g.*, 138 Cong. Rec. S. 8659-65 (1990) (discussing President Bush’s proposals), but it received far less attention than has the Clinton plan. Prior to the most recent legislative efforts, discussed in Part I, national regulatory programs have focused on particular subsets of the American citizenry, such as the elderly via Medicare. *See* 42 U.S.C. §§ 1395-1395ccc (1998, Supp. 1990). The Clinton Administration released a lengthy “description” of its Federal health care reform plan, titled the Health Security Act of 1993, on September 7, 1993. *See* Clinton Administration’s Description of President’s Health Reform Plan (BNA-Westlaw ver. Sept. 14, 1993), part 2 [hereinafter Clinton Description]. News reports suggest that the original plan was produced primarily by health care policymakers and experts, and that the advice of Justice Department attorneys on legal issues such as the plan’s constitutionality was not sought until after the description’s publication. *See* Robert Pear, *Clinton’s Health Plan; Officials Predict Deluge of Suits on Health Plan*, N.Y. TIMES, Sept. 27, 1993, at A1.

2. Prominent Federal health care regulatory efforts include the Public Health Service Act, 42 U.S.C. §§ 201-238 (1988 Supp. 1990), Medicare, 42 U.S.C. §§ 1395-1395ccc (1988 Supp. 1990), and Medicaid, 42 U.S.C. §§ 1396-1396u (1988 Supp. 1990). *See, e.g.*, Maxwell J. Mehlman & Karen A. Visocan, *Medicare and Medicaid: Are They Just Health Care Systems?* 29 HOUS. L. REV. 835 (1992). In addition to their administrative involvement in both of these Federal programs, States have enacted a wide range of regulatory programs, including attempts to control hospital costs, provide subsidized health insurance for the working poor, and proscribe balance billing. *See generally* GENERAL ACCOUNTING OFFICE, ACCESS TO HEALTH CARE: STATES RESPOND TO THE GROWING CRISIS (1992) (identifying and evaluating States’ initiatives); Wendy E. Parmet, *Regulation and Federalism: Legal Impediments to State Health Care Reform*, 19 AM. J.L. & MED. 121 (1993); *see also* Public Health Service Act, 42 U.S.C. § 201 (Supp. 1990).

health care system might have been permitted to meander along their self-determined paths indefinitely, impervious to national policymakers' effective reach, but for the confluence of a persistent economic recession and steadily rising health care costs.³ Reacting to the perceived inability of the present system to guarantee to each citizen adequate health care at a reasonable cost, President Clinton has proposed to unite virtually all entities and programs that deliver health care under one comprehensive Federal administrative structure. Other political leaders have also advanced their own initiatives, leading to a veritable "orgy" of bill-writing.⁴

The President's plan, however, does not propose to federalize the entirety of health care policy creation, implementation, and service delivery. The substantive approach publicly typed "managed competition"⁵ would be effectuated via an administrative structure the President advances as an instance of cooperative federalism.⁶ The

3. See Clinton Description, *supra* note 1, at 2 (detailing rate of increase of health care costs and their continuous growth as a proportion of GNP).

4. Cf. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982) (describing an "orgy of statute-making" that fundamentally changed American law").

5. Professor Alain Enthoven pioneered this market reform theory. Theories from his book, ALAIN C. ENTHOVEN, *HEALTH PLAN: THE ONLY PRACTICAL SOLUTION TO THE SOARING COST OF MEDICAL CARE* (1980), were purportedly applied in a variety of ways within the various health reform bills. Enthoven has rejected many of these applications, including most prominently the Clinton bill. See Robert Pear, *Warning on Clinton Health Proposal From Idea's Originator*, N.Y. TIMES, Jan. 13, 1994, at B8.

6. The President's Health Security Act, S. 1757, 103d Cong., 2d Sess. § 2(h) (1993), recommends a congressional finding that health care reform should proceed from a "partnership" between the Federal and State governments. The Supreme Court has denominated examples of "cooperative federalism" those regulatory programs in which the Federal and State governments combine their efforts (both financial and administrative) to govern an activity. See, e.g., *New York v. United States*, 112 S. Ct. 2408, 2424 (1992) (evaluating the constitutionality of various penalties against States for noncompliance with the Low-Level Radioactive Waste Policy Acts); *King v. Smith*, 392 U.S. 309, 316 (1968) (striking down Alabama's ban on Aid to Families with Dependent Children where an able-bodied man cohabited with the family). Some joint Federal-State regulatory efforts are initiated by the Federal government under its spending power and take the form of grant programs. Other proceed under the commerce power and incorporate the penalty of preempting any nonparticipating State from the particular regulatory field. This latter type, known as conditional preemption programs, sometimes also include Federal grant monies to facilitate States' compliance. See Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987); Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289 (1984); Lewis Kaden, *Politics, Money, & State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979). Some State officials have labeled some joint regulatory programs more akin to "coercive federalism" than cooperative federalism. See, e.g., *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986) (ruling that the Constitution did not bar Congress from preventing States and public agencies from withdrawing from Federal old age, survivors, and disability insurance benefits programs if they

President's plan charges States to undertake significant regulatory and financial responsibilities, and promises some funds to assist in the effort. Its contours, its proponents assert, follow those of other established regulatory and benefit programs such as Medicaid and Aid to Families with Dependent Children;⁷ it is merely new wine in old vessels. Hence, its advocates submit, the plan's constitutional validity cannot seriously be questioned.

But the constitutional questions about a Federal intrusion on State power are not so easily dismissed.⁸ In light of *New York v. United States*,⁹ national regulatory programs are subject to new scrutiny under the Tenth Amendment¹⁰ if they command States to implement Federal policy and impose significant duties and costs on State governments. The Supreme Court has also cautioned that a program promulgated pursuant to Congress' spending power,¹¹ though subject to a deferential standard of review, will offend the Constitution when its incentives to adopt national policy become so "coercive" of State participation that it "pass[es] the point at which 'pressure turns into compulsion.'"¹² The President's health reform program, as well as the many competing alternatives, contains numerous measures overtly

were participating on the effective date of the statutory amendment); see also THE ACADEMY FOR STATE & LOCAL GOVERNMENT, *PREEMPTION: DRAWING THE LINE* (1986); ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *FEDERAL STATUTORY PREEMPTION OF STATE & LOCAL AUTHORITY: HISTORY, INVENTORY, & ISSUES* (1992).

7. Title 42 U.S.C. §§ 601-662 (1988, Supp. 1990). The Federal and State governments have shared responsibility for determining the eligibility criteria, benefits levels, and funding of the Aid to Families with Dependent Children (AFDC) program. See Frank S. Bloch, *Cooperative Federalism and the Role of Litigation in the Development of Federal AFDC Eligibility Policy*, 1979 WIS. L. REV. 1.

8. This Article is limited to evaluating a segment of the constitutional implications of the pending health proposals, and thus does not survey the entire range of constitutional issues present in the current debate. E.g., Thomas W. Merrill, *Constitutional Limits on Physician Price Controls*, 21 HASTINGS CONST. L.Q. 635 (1994); William S. Brewbaker III, *Health Care Price Controls and the Takings Clause*, 21 HASTINGS CONST. L.Q. 669 (1994).

9. 112 S. Ct. 2408 (1992) (ruling, *inter alia*, that the Tenth Amendment prohibited Congress from forcing States to take title to nuclear waste produced within their borders as a penalty for noncompliance with the Federal effort to establish low-level radioactive waste facilities).

10. The Tenth Amendment provides: "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.

11. Article I expressly confers the power to "lay and collect Taxes . . . , to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

12. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

designed to coerce State financial and administrative participation that raise serious constitutional questions.

This Article proceeds in four Parts. The first briefly summarizes the approach of each of the pending health reform bills and distills those portions relevant to current Tenth Amendment and Spending Clause analysis. Provisions that would impose on States the financial and administrative responsibility for achieving Federal regulatory objectives or that specify punitive measures to be taken against States choosing not to participate in the cooperative program are critical features for the inquiry. Employing these criteria, the first Part identifies seven distinct and largely novel models of problematic regulatory instructions that warrant more probative analysis.

The second Part briefly outlines the Court's erratic path to *New York* and evaluates its approach for assessing whether Federal law unconstitutionally usurps State power in the service of national regulatory goals. National health reform raises again the substantive policy issue that has generated grave concern from constitutional scholars, who have divided into separate camps over the justiciability of the Tenth Amendment.¹³ In its latest decision, the Court has taken the route the dissenters in *Garcia v. San Antonio Metropolitan Transit Authority*¹⁴ predicted and found the Amendment justiciable in some re-

13. Compare JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) [hereinafter CHOPER, JUDICIAL REVIEW]; Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977) (arguing that the policy-oriented aspects of legislative decisions on federalism issues render them inappropriate for judicial review and thus properly committed to the political branches) [hereinafter Choper, *Scope of National Power*]; and Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985) (arguing that the Court has many ways to protect State interests without invoking the Constitution) with William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985) (arguing that the Court has erred gravely in relegating protection of federalism to the political processes of Congress) and William W. Van Alstyne, *Federalism, Congress, the State and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769 (1987).

In part traceable to the opportunistic manner the Reagan Administration employed in its call for a "New Federalism," some commentators continue to be skeptical about the actual goals of federalism's proponents. They perceive political or substantive hostility to Federal goals to be the real motivation, masked in structural constitutional garb. See generally S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 701 n.70 (1991) (discussing the Nixon and Reagan Administrations' records on federalism). Their fears are buttressed by opposition to Federal civil rights enforcement in the 1950s and 60s, which was veiled in similar rhetoric. See, e.g., Garrett Epps, *The Littlest Rebel: James J. Kilpatrick and the Second Civil War*, 10 CONST. COMM. 19 (1993).

14. 469 U.S. 528 (1985).

spects,¹⁵ an outcome endorsed here. Although taking care not to overrule *Garcia*,¹⁶ the *New York* opinion identified one boundary beyond which the Congress may not tread though exercising otherwise legitimate commerce power.¹⁷ Moreover, the *New York* Court implicitly rejected the proposition that if Congress can legitimately preempt States from the regulatory field, any means it chooses to induce States to participate in the Federal-State cooperative venture is permissible.¹⁸ Thus, the greater power does not ipso facto incorporate the lesser. Finally, this Part hazards some thoughts in response to Professor Erwin Chemerinsky's view that the new federalism jurisprudence does not serve any of the traditional values of federalism, offering a justification for *New York's* conclusion while criticizing its reasoning.

Part III turns to evaluate the seven problematic models of Federal regulatory instructions in light of *New York* and related precedent. This Article argues that some of these models fail under the Court's current approach to the Tenth Amendment and others are open to serious question. Some modifications to pending bills may be warranted to ensure their constitutionality under the Tenth Amendment. Those models implicating primarily the spending power, rather than the Tenth Amendment, are substantially better insulated from constitutional attack. Some uses of this power, however, raise questions about the continuing adequacy of the Court's deferential standard of review given their impact on republican citizenship and representative government.

The close analysis of the pending bills' problematic provisions leads to some reflections, with which the Article concludes. First, whatever criticisms may be leveled at the *New York* opinion, by it the Court has achieved what was so elusive in *New York's* predecessors, the *National League of Cities*¹⁹ line of cases: legal standards that are both judicially discoverable and reasonably manageable. This achievement undermines some of the claims of those who maintain that the Tenth Amendment should be nonjusticiable. In addition, some tacitly worry that rendering the Tenth Amendment justiciable

15. See *id.* at 579-80 (Rehnquist, J., dissenting); *id.* at 580-82 (O'Connor, J., dissenting).

16. See *New York v. United States*, 112 S. Ct. 2408, 2420 (1992).

17. The Court held that Congress may not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a Federal regulatory program." *Id.* at 2420 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

18. See *id.* at 2424.

19. *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

will obstruct Congress in implementing national programs. *New York*, however, removes only a small range of the potential tools that the nation might employ to achieve its ends. A multitude of methods remain available to the Federal government, either by direct regulation or by indirect coaxing, to generate State participation in intergovernmental regulatory partnerships. While *New York* produces an ironic doctrine for federalism values,²⁰ it provides an important basis for refurbishing the federal structure of our Republic.

I. The Reform Proposals and Their Problematic Commands to State Governments

While campaigning for the Presidency, then-Governor Clinton promised to introduce health reform legislation within his first 100 days in office. That timetable proved too ambitious. But he did establish a White House task force on health reform, entrusting its leadership to the First Lady, Hillary Rodham Clinton. The principles of health reform subsequently established by the White House have generally set the terms for the political debate. The President's six foundational principles—security (“guaranteeing comprehensive benefits to all Americans”), simplicity (“simplifying the system and cutting red tape”), savings (“controlling health costs”), quality (“making the world's best care better”), choice (“preserving and increasing the options you have today”), and responsibility (“making everyone responsible for health care”)²¹—surface repeatedly in the promotional

20. The doctrine is ironic because, although the Federal government cannot command the States to implement a Federal program, it can preempt a field falling within the commerce power, and thereby oust the States from jurisdiction over the area. So long as the Federal regulatory statute has general applicability to both the private sector and the states, it will not violate the Tenth Amendment. Thus, the more a Federal legislative provision treats States as though they were just private entities, the more likely the Court will approve its constitutionality. This is a curious rule for protecting the distinctive constitutional role of the States. See *Garcia*, 469 U.S. 528.

21. THE WHITE HOUSE DOMESTIC POLICY COUNCIL, HEALTH SECURITY: THE PRESIDENT'S REPORT TO THE AMERICAN PEOPLE 17-20 (1993) [hereinafter HEALTH SECURITY]; see also Health Security Act, S. 1757, 103d Cong., 1st Sess. § 3 (1993) (listing six “purposes”). Earlier, in a narrative description of its incipient health reform bill, the Administration included a statement of the “ethical foundations of health reform,” which stated: “The values and principles that shape the new health care system reflect fundamental national beliefs about community, equality, justice, and liberty. These convictions anchor health reform in shared moral traditions.” See Clinton Description, *supra* note 1, at Part 2. This narrative description amplified the foundational principles at issue: universal access to health care; comprehensive benefits for all; choice of provider and treatment; equality of care for all; fair distribution of costs across the community; personal responsibility for the protection and promotion of health and for contribution to the cost of health care; intergenerational justice responsive to the unique health care needs across the life span; a

statements written in support of competing legislative proposals.²²

A. Background Policy Issues

Basic policy issues in the health care debate form the necessary backdrop against which to examine the constitutionality of the reform programs. Significantly, although the reform proposals generally confront the same set of policy questions, their answers differ widely.

1. *Public or Private Insurance*

The threshold structural question faced by health reform proponents is whether to maintain some system of private health insurance. The advocates of a single-payer system²³ part company with all the rest at this juncture, and propose to abolish private health insurance for the comprehensive "standard" coverage that would be made available to all.²⁴ Those advocating retention of private health insurers face a variety of subsidiary questions, including how the insurance marketplace can be reformed to permit the participation of those who are effectively excluded under the current system. Here, small business entities and individuals comprise the focus. The reform plans' prototypical response lies in some version of the insurance purchasing cooperative.²⁵ Some proposals move further by mandating certain additional insurance reforms, including barring "experience rating" of insureds in favor of "community rating."²⁶ Under these approaches,

balancing of health care costs in the context of other national priorities; effective health care delivery and management; quality of care; protection of professional medical judgment; fair procedures in the operation of the health care system; and retention of the role of States and localities for development of systems of care to serve their communities. *Id.*

22. See, e.g., OFFICE OF SENATOR DON NICKLES, CONSUMER CHOICE HEALTH SECURITY ACT FACT SHEET 1 (listing "security of universal health coverage," "maximum choice of health insurance plans," and "control [of] rising health care costs"); OFFICE OF SEN. JOHN CHAFEE, SUMMARY OF THE "HEALTH EQUITY AND ACCESS REFORM ACT OF 1993" 1 (listing "secure and equitable health insurance coverage"); *id.* at 4 (listing "quality assurance"); OFFICE OF REP. ROBERT MICHEL, THE AFFORDABLE HEALTH CARE NOW ACT OF 1993 2 (listing "security" and "controlling the growth of health care costs").

23. A "single-payer" system is structured so that all bills for medical and health services are paid by a single entity, normally a governmental agency or government contractor. For a discussion of the primary single-payer bill pending in Congress, see *infra* text accompanying notes 143-155.

24. Presumably, private health insurance would continue to be available for supplemental benefits.

25. This idea was pioneered by Professor Enthoven. See Enthoven, *supra* note 5, at 126-30. See also Victor Cohn, *New Deal on Health Care; Advice From the Jackson Hole Gang*, WASH. POST, Nov. 3, 1992, at 27; Roger Thompson, *Health Reform Takes Shape*, NATION'S BUS., April 1993, at 44.

26. "Experience rating" permits health insurers to offer more favorable premium rates to groups of individuals that are statistically healthier than the American population as a

Federal law would forbid discrimination in premium cost or coverage availability on the basis of health, status, illness, age, and the like, and would require an insurance company to write and renew the policy of any person or group which paid premiums in a timely fashion.

2. *Universal Coverage*

A substantial number of Americans are not covered by any type of health insurance. Lack of coverage occasionally has a devastating impact on a family's finances. Thus, many of the reform proposals advocate universal health insurance coverage, although they advocate widely varying timetables for achieving that goal. One strategy is to expand eligibility for Medicaid coverage to insure those just above the poverty line, who are often termed the "working poor." Another approach is to provide subsidies to assist those who are currently uninsured in paying for private insurance coverage. The single-payer bill would dispense with both of these techniques and provide direct coverage to all American citizens and legal residents.

3. *Cost Containment*

Because the health services industry currently consumes 17% of the gross national product and is growing at a rate substantially higher than the overall inflation rate,²⁷ "cost containment" has become a major goal of all reformers. Federal law currently permits employers to deduct from income all money spent on employees' health insurance. Some reformers would restructure these tax incentives so that employers can deduct only the cost of a basic insurance plan offering basic benefits, even if the employer in fact purchases or subsidizes for employees far more expensive and generous plans. Other proposals would seek to achieve cost containment in a different fashion. The President's plan seeks to establish a regulatory default of a cap on insurance premiums in case market-produced savings are insufficient.²⁸ He also proposes global national budgeting for health expenditures, so as to place a ceiling on the amount of GNP that can be

whole. For example, experience rating permits health insurers to offer less expensive rates to universities for insuring their employees than to most other employers. "Community rating" forbids experience rating and requires uniform rates to all subscribers. Under this rating approach, healthier and younger individuals effectively subsidize the ill and elderly. See SYLVIA A. LAW, *BLUE CROSS: WHAT WENT WRONG?* 5, 12, 20-30 (1974).

27. Clinton Description, *supra* note 1, at 7.

28. See HEALTH SECURITY, *supra* note 21, at 58. This aspect of the President's proposal has been criticized as leading to new forms of rationing of health services.

consumed by the health services industry.²⁹ To lower the costs of malpractice insurance and, in turn, place a brake on the rising cost of medical care, virtually all plans provide for some kind of malpractice reform.

Given the rising cost of Federal entitlement programs such as Medicare and Medicaid, one goal of all reform proposals is to stabilize, if not reduce, the Federal government's financial costs for these programs. Imposing general cost controls on hospital and medical services is a strategy employed by some reformers. An alternative approach is to abolish Medicare and Medicaid and fold their recipients into a reformed private health system, possibly with subsidies for the indigent. Yet another lies in modifying the programs so as to transfer more of the financial responsibility onto State governments.

4. *Financial Responsibility*

Regardless how the system is reformed, questions arise regarding who pays for the reforms and through what means. The President's plan seeks to expand the current voluntary system of employer-paid insurance to a mandatory system that requires employers to pay for up to 80% of premiums for all employees. Under the President's plan, employers would continue to receive tax deductions for their outlays. Other plans build upon voluntary employer-provided insurance, but back up that option with an individual mandate requiring all persons who do not receive employer-subsidized coverage to purchase basic health insurance. Most proposals seek to realize savings from other Federal health programs and from standardizing insurance forms, so that the overall cost of establishing the new system is reduced. Proposals for new taxes surface frequently, chiefly in the form of "sin" (excise) taxes on tobacco and alcohol. The single-payer plan departs from the rest, however, by advocating new income and employment taxes to pay for universal coverage.

5. *The Role of State Government*

In fashioning a new health system, the reformers also must confront the question of how much regulatory discretion to experiment and programmatic diversity to permit among State governments. The reformers differ widely here as well. Some proposals seek to eliminate virtually all regulatory differences among States in order to pro-

29. See *infra* note 98.

duce a unitary health care system, while others plan to accord States significant policy discretion.³⁰

Notably, however, no plan attempting to achieve a unitary health care system seeks to utilize the most obvious available structure: preempting State and local regulatory authority and substituting a nationally funded and operated administrative agency dedicated to achieving Congress' goals.³¹ Such an approach would be initiated by a constitutionally unexceptional use of the commerce power,³² despite the wide-ranging Federal preemption engendered. Instead, all of the proposals seeking to create a unitary health care system attempt in some fashion to compel State governments to shoulder both the initial administrative implementation and ongoing operational responsibility for this system.³³

The asserted rationales for maintaining a significant regulatory role for State governments in a reformed health care insurance and service delivery system would likely vary. Yet given the radical differences manifested in the bills on other key points, it is at least curious to find significant agreement on this matter. The similarity between proposals here, despite their diverse origins across the ideological and political spectrum, likely lies in a basic fact of political economy: the Federal government is strapped for cash. In order to eliminate or severely restrict the politically unpalatable alternative of raising Federal taxes,³⁴ each of the ambitious reform proposals either attempts to en-

30. Not known previously as an advocate of decentralized policymaking, Professor Jerry Mashaw has recently written in the popular press to caution health reform leaders of the detriments attending the elimination of State discretion and experimentation. See Ted Marmor & Jerry Mashaw, *Perspective on Health Care: It's Rube Goldberg, Not Roosevelt*, L.A. TIMES, Sept. 22, 1993, at B7; Ted Marmor & Jerry Marshaw, *Perspective on Health Care: Creating a Plan for "Us-Us" Medicine*, L.A. TIMES, Mar. 26, 1993, at B7.

31. This basic structural outline could embrace a wide range of reform approaches, including the single-payer system and the managed competition proposals. Like many other Federal entities, the agency could maintain regional and local offices across the nation.

32. See, e.g., *United States v. Darby*, 312 U.S. 100, 114 (1941) (The "power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution.'") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)).

33. The less ambitious proposals, which only tinker with the status quo, do not depend upon the creation of any new regulatory agency such as a National Health Board, nor upon ongoing regulatory supervision of the system at either the State or local levels. For prime examples, see *infra* text accompanying notes 43-64 (Michel bill); 39-42 (Coats-Gramm-Lugar bill).

34. Only the single-payer plan states explicitly that its program will require raising Federal income taxes. See *infra* note 149. Its proponents argue that this burden will be offset by, *inter alia*, its elimination of separate health insurance premiums. The abilities of

tice State governments to ante up funds they currently employ for health administration or health services, or orders them to implement the Federal system, implicitly conscripting a portion of the States' personnel and budgets.³⁵ Some proposals do include authorization for appropriation of Federal funds to offset some of the costs State governments would incur in complying with the Federal enactment.³⁶ Yet the appropriations would be a separate budget issue for the Congress, and amounts appropriated might very well not be available in the sums necessary to compensate State governments for the costs of complying with the Federal mandate. Two bills further distinguish themselves by including a direct assessment of "fees" from the State governments to offset the Federal government's costs of maintaining the Federal regulatory scheme within the State.³⁷

Federal intrusions into the State legislative domain and the State fisc that the proposed health plans authorize raise the issue of the constitutionality of these plans under the Tenth Amendment and the spending power. This Article finds that the pending health reform plans challenge the constitutional boundaries of Federal power in at least seven distinct ways:³⁸

1. *Federal regulation of non-Federal public-sector employee benefits*: The Federal government establishes health program requirements, and permits a State to choose whether to enact enabling legislation and regulations in order to participate in the program and receive certain regulatory authority under the plan. The Federal health program, however, covers not only all private employers within the State but also all public employers, including State and local governments—even those of nonpar-

other plans, particularly the President's, to avoid or limit broad-based Federal tax increases remain one significant point of debate.

35. President Clinton has issued an executive order restricting the issuance of unfunded mandates. See Exec. Order No. 12,875, 58 Fed. Reg. 58,093 (1993). The reform plans predicated upon a Federal-State partnership also have the merit from the federal standpoint of limiting the creation of a new Federal health care bureaucracy. The establishment of another unwieldy Federal bureaucracy is another fear of those resisting the more ambitious health care plans. See *infra* note 68.

36. See, e.g., the Clinton bill, the Health Security Act, S. 1757, 103d Cong., 1st Sess. (1993).

37. The Michel bill, see *infra* text accompanying notes 43-64, and the Cooper bill, see *infra* text accompanying notes 65-74, would tax State governments for the Federal program.

38. This Part of the Article only discusses those models of Federal-State relations in the health care plans that may transgress the Tenth Amendment or the spending power. Many of the proposed reform plans provide for grants to States to entice them into performing certain activities. As a general matter, this Part does not highlight these more routine uses of the Federal power to offer conditional grants, but marks for inquiry only the instances testing the outer limits of this power.

ticipating, unconsenting States—and imposes significant additional costs on them.

2. *Untethered regulatory command*: The Federal government commands States to institute a particular regulatory program. The Federal government, however, has no default system by which to institute the program within the State if the State fails to comply. The Federal government's command to States to regulate is unaccompanied by either financial incentives for compliance or penalties (such as loss of Federal funds) for noncompliance.

3. *Command plus conditional preemption*: The Federal government orders States to enact a regulatory system that adopts Federal standards. If a State does not comply, the Federal government implements the standards within the state, ousting the State from regulatory jurisdiction over the matter. No other penalty (such as loss of Federal funds) is assessed against a non-complying, nonparticipating State.

4. *Command, conditional preemption, plus State fee*: The Federal government commands States to engage in a particular regulatory activity. If the State fails to do so or declines the "invitation" to regulate according to Federal norms, the Federal government implements the program within the noncomplying State and charges the State a fee or tax for the regulatory program.

5. *Command, conditional preemption, plus private sector tax*: The Federal program commands States to undertake regulation in a particular arena according to Federal standards. Where a State declines to employ its powers in the Federally defined manner, the Federal government implements its program within the State. The Federal government then levies a special tax against private individuals and entities resident within the non-complying State who are related in some way to the Federal regulatory program.

6. *Private sector penalties for State nonparticipation*: The Federal government invites but does not command State participation in a Federal regulatory program. In States declining to participate, the Federal government does not institute a default regulatory program. It exacts certain penalties (excluding direct taxes) not against the State but against activities of private individuals and entities within the noncomplying State.

7. *Command plus extraordinary inducement/penalty*: The Federal government instructs States to implement Federal standards and attempts to induce them to comply by extraordinary financial incentives. If a State chooses not to comply, the Federal government neither implements the program within the State nor exacts financial penalties other than the withdrawal of eligi-

bility for certain significant Federal grant programs. The Federal strategy is to give sufficiently high rewards for participation, and penalties for nonparticipation, such that politically and economically no State finds it possible to refuse.

The balance of this Part establishes the nature and role of these models by examining their function within the larger objectives and mechanics of the pending health reform plans. Because the more ambitious reform proposals tend to borrow features from the more "modest" or incremental approaches, the modest approaches are discussed first; the distinction between the two groups is whether a plan contains mechanisms to achieve universal coverage.

B. The Modest or Incremental Approaches

Three of the seven pending health reform plans are based on the argument that thoughtful restructuring of the health insurance marketplace, combined with reformed tax incentives, will conduce to achieve broader health insurance coverage. These reforms deserve to be tested, their proponents submit, before determining whether further reform is required to expand coverage still more broadly.

1. The Medical Savings Accounts Approach (Coats-Gramm-Lugar)

One of the most limited bills pending thus far seeks to employ one mechanism—preferential tax treatment for contributions to individual medical savings accounts—to facilitate both broader access to health insurance and reduced overall health spending. The Coats-Gramm-Lugar bill³⁹ would create tax incentives for individuals to become self-insurers for routine medical matters via medical savings accounts (MSAs). These medical accounts, which are modeled after individual retirement accounts (IRAs), would be funded by pre-tax income, rendering the amounts employees contribute free from Federal income tax.⁴⁰ The plan provides that if the account balance is not exhausted during the calendar year, the taxpayer can roll the funds over into an IRA or maintain them in the MSA for use in the following year. Only employed individuals and their families would be eligi-

39. S. 1105, 103d Cong., 1st Sess. (1993). When the bill was introduced on June 15, 1993, it was sponsored by three Republicans, Senators Coats, Gramm, and Lugar. Senator Gramm later introduced a separate health reform bill that incorporated the medical savings account approach and added some provisions to redress problems identified in other bills, including malpractice litigation and Medicaid reform. See S. 1807, 103d Cong., 2d Sess. (1994). Senator Gramm's bill was co-sponsored by 10 Senators as of February 23, 1994. *Id.* Its late date of introduction barred more detailed analysis in this Article.

40. Employers may also make tax-sheltered contributions to the savings accounts, up to specified annual maximums. See S. 1105 § 1(a).

ble to use this medical account device, and only if the employer maintained a catastrophic health insurance policy for such employees.⁴¹ Thus, employees who remained on a fee-for-service indemnity plan, such as traditional Blue Cross, for example, could not set up tax-free medical savings accounts.

The theory of the plan is relatively simple. First, it seeks to expand access to health care among those not currently covered under an employer's plan by providing incentives for employers to offer a new low-cost option for health insurance. Second, without creating an expensive new government bureaucracy, the bill attempts to restructure some consumers' behavior so that they will cease bidding up medical prices. Finally, the plan aims to utilize Federal funds to expand access to health care in a manner having low governmental transaction costs. Otherwise, the plan would leave the status quo alone. Thus, both governmental programs, such as Medicare and Medicaid, and the private health insurance system would not be directly affected by the Coats-Gramm-Lugar proposal.⁴² It avoids the contentious debates surrounding universal coverage and cost containment controls simply by sidestepping these and the other more ambitious objectives of other plans.

Nor would State governments be affected; the plan bypasses all of the policy thickets that involve State regulatory apparatus. Medical malpractice litigation reform and State regulation of health insurance, for instance, are not mentioned in the plan. Nor does it seek any Federal preemption of State law. The most succinctly written of the pending proposals evaluated here, it would effect amendments only to the Internal Revenue Code. None of the models of potentially problematic Federal legislation are at issue in this bill.

2. *The House Republican Plan (Michel)*

Republican leaders of the House of Representatives⁴³ have introduced a bill that ostensibly offers "simple and common sense" re-

41. S. 1105 § 529(b)(1)(A)(1). Catastrophic insurance incorporates large annual deductibles, such as \$2000 or \$5000. Its premiums are far cheaper than either fee-for-service or managed health care (health maintenance organization and preferred provider organization) plans, thus providing an incentive for employers to provide basic health insurance for their employees.

42. By creating additional financial incentives for employers not presently purchasing insurance for their employees to buy catastrophic health insurance, this reform program would engender new business for private health insurers.

43. This bill parts company from the bill of the Senate Republican leadership, who formed the Task Force on Health Reform to fashion a singular Republican alternative to the President's Plan. See *infra* text accompanying notes 103-24 (Chafee bill).

forms.⁴⁴ The “Affordable Health Care Now Act of 1993”⁴⁵ attempts to achieve most of the august goals of the more elaborate plans. Its strategy differs somewhat, however, for it employs existing structures and programs, and does not impose any mandates on employers to subsidize or purchase health insurance for their employees.⁴⁶ Nevertheless, hidden in the plan lie relatively radical Federal incursions into State government control over the State’s purse and over certain State regulatory matters, including most prominently medical malpractice actions.

Certain features of the Michel Bill are somewhat less intrusive to State authority. It focuses on reforming aspects of the insurance market in order to enhance the market power of small business and lower their costs of purchasing health insurance. It permits small employers to join voluntary purchasing cooperatives to spread the risk over a larger pool of insureds and to facilitate joint efforts to negotiate prices and terms.⁴⁷ The bill requires every health insurer to offer at least one standard health insurance option, and one catastrophic plan, for all employers in its geographic area having between two and fifty employees.⁴⁸ Premium increases for small employers are limited.⁴⁹ The bill also proposes certain health insurance reforms to expand coverage further, such as constraining insurers’ treatment of pre-existing conditions, and guaranteeing the renewability of insurance.⁵⁰

Like the Coats-Gramm-Lugar bill, the Michel proposal uses tax incentives to expand access to health insurance coverage. It adopts the individual medical savings account approach as one option for expanding access and offering a limited government subsidy. All employers are required to offer their employees the option of at least one standard coverage insurance plan⁵¹ and one catastrophic insurance

44. See 1993 Daily Lab. Rep. 178, d22 (Westlaw BNA ver., Sept. 16, 1993) (comment of Rep. Robert Michel in introducing the bill, H.R. 3080, on September 15, 1993). The bill was co-sponsored by 106 House members.

45. H.R. 3080, 103d Cong., 1st Sess. (1993).

46. Nor would it impose a mandate on individuals to purchase health insurance, as does the Senate Republican Task Force bill. See *infra* text accompanying note 108.

47. Some States have already established these purchasing cooperatives. Like most other bills that utilize the purchasing cooperatives idea, the Michel bill would provide a Federal regulatory structure governing the creation and operation of these cooperatives. H.R. 3080 § 1211

48. H.R. 3080, 103d Cong., 1st Sess. § 1001(a) (1993).

49. *Id.* §§ 1011-13.

50. *Id.* § 1001(c)(2).

51. The benefits package of the standard acute-care plan is not specified in the bill but would be determined by the National Association of Insurance Commissioners. *Id.* § 1103(a)(1).

plan which incorporates the tax-free medical savings account.⁵² To further expand access to health care services (as opposed to health insurance), community and migrant health centers receive substantially expanded budgets for direct health services delivery. Although the plan does not achieve universal health insurance coverage, it arguably greatly expands access to health services.⁵³

Much of the Michel bill borrows from other earlier proposals, but in one area—its directions to State governments—it charts relatively new territory. The bill raises colorable Tenth Amendment or spending power issues under four of the models of problematic Federal-State relations.

The bill directly orders the States to “implement and enforce” Federal regulatory standards by enacting their own regulatory system that adopts the Federal substantive and procedural standards.⁵⁴ If a State does not comply, the Federal Department of Health and Human Services (HHS) implements the standards within the State and ousts the State from regulatory jurisdiction over the subject matter until the State regulates in accordance with the Federal standards.⁵⁵ For this first set of commands, no penalties, such as loss of Federal funds, are assessed against noncomplying states.⁵⁶ This is an example of the *command plus conditional preemption* model of Federal-State relations.

The Michel bill’s second type of problematic instruction commands State governments to engage in a particular activity, and instructs that if any fails to do so, an agency of the Federal government will intercede to realize the statutory objectives. But distinguishing

52. Requiring employers to offer their employees certain insurance options does not require them to pay any portion of the premiums. To encourage employers to subsidize employees’ purchase of the catastrophic insurance plan, the bill exempts employer contributions from social security and unemployment taxes. See *id.* at H.R. 3080 § 2202(d). The bill also permits employees to pay premiums for catastrophic insurance from pretax income. *Id.* § 2201.

53. The plan proposes to achieve its financing primarily from reducing Medicare subsidies, shifting funds from existing government programs, and reducing other Federal programs.

54. H.R. 3080 § 1103(b)(1)(A) provides: “Each State shall submit to the Secretary [of HHS], by the deadline specified in subparagraph (B), a report on steps the State is taking to implement and enforce the consumer protection standards with respect to insurers, and MedAccess plans offered, not later than such deadline.” See also *id.* § 1103(b)(2)(A) (requiring report to HHS on steps State is taking “to implement and enforce MedAccess standards”).

55. H.R. 3080 § 1103(b)(2).

56. This feature, as well as the bill’s other language, suggests that Congress would enact these standards as instances of the commerce power.

this model from the first, the Federal government charges the State government a fee for the costs incurred in the Federal intercession. This is the model of *command, conditional preemption, and State fee*.

The Michel bill employs this model's techniques in two discrete areas. In one instance, it commands States to fashion an alternative dispute processing system in accordance with specified procedural and substantive Federal medical malpractice standards. In particular, the bill mandates that as a jurisdictional prerequisite to filing a medical malpractice claim in any court, a plaintiff must first submit the dispute to a qualified Alternative Dispute Resolution (ADR) panel.⁵⁷ Any State that does not enact an ADR system for medical malpractice cases consistent with the Federal procedural and substantive standards will find itself saddled with the statutory default mechanism: the United States Department of Justice establishes and subjects the State to the ADR system. In addition, a Federal tax is assessed against the State government to cover the costs of operating the Federal ADR system.⁵⁸

In the other instance, the Michel bill mandates State governments to develop and implement a program to collect and distribute comparative information on health care services and insurance plans. While the bill authorizes some Federal grant money to coax States in developing the program, it directs the Federal government to charge non-complying States for its services in implementing the Federal information program.⁵⁹ While it is not unknown for the Federal government to charge private entities for the cost of the regulatory system supervising their activities,⁶⁰ levying a charge exclusively against State governments for the costs of maintaining a Federal regulatory apparatus appears unique.⁶¹

57. The constitutionality of the Federal government instituting a jurisdictional prerequisite to a State claim in State court is itself problematic. That question is beyond the boundaries of this Article, however.

58. H.R. 3080 at § 2032(b)(3)(A).

59. *See id.* § 2122.

60. *See, e.g.*, 21 C.F.R. § 431.53 (1989) (noting fees specified for FDA review of antibiotic drug applications); John Henkel, *User Fees to Fund Faster Revenues*, FDA CONSUMER, Oct. 1993, at 19 (describing FDA charges to drug companies); *Massachusetts v. United States*, 435 U.S. 444 (1978) (upholding aircraft regulatory fee levied against private and government actors).

61. The Michel bill includes an additional sanction for noncompliance besides the monetary assessment for ADR costs: the State (including its local government units) is ineligible for funds under the Public Health Service Act. H.R. 3080 § 2032(b)(3)(B). This provision may suggest that the ADR mandate actually proceeds as spending power cooperative federalism.

The third model of problematic Federal-State relations in the Michel bill lies in its order that States establish a reinsurance mechanism.⁶² If the State does not comply, the Federal government provides a regulatory default, funded by a special Federal tax placed exclusively on insurers offering health insurance within the nonparticipating State.⁶³ This bill thus employs the model of *conditional pre-emption and private sector tax*.

The fourth problematic model employed by the Michel bill directly commands States to institute a “risk management program”—to be imposed upon both medical service providers and insurers.⁶⁴ It differs from the first model in that, should a State not comply, the Federal government will not institute the program itself. The command to States to regulate is not fortified with either incentives (such as new funds) to encourage the States to undertake the regulation, nor with penalties for a State’s failure to comply (such as debarment from certain grant programs). This is the model of *untethered regulatory command*.

3. The “Pure Managed Competition” Plan (Cooper)

Like most other bills, the one sponsored by Representative James Cooper⁶⁵ seeks to reform the insurance market for small business and individuals and to revise tax incentives to restructure consumers’ behavior. The mechanism found in most other proposed bills, the regional cooperative through which small businesses and individuals may purchase insurance, also forms a centerpiece of this reform plan. For those employers already paying the premiums for their employ-

62. H.R. 3080 § 1106(b)(1). Various techniques have been fashioned, predominantly by statutory law, to provide coverage for risks that the insurance industry declines to cover within the voluntary market. These residual or secondary market techniques, such as assigned risk pools and reinsurance, have been developed over the last half-century. Assigned risk pool statutes force insurers to contribute funds to a pool providing coverage for groups or individuals who would otherwise be unable to obtain coverage from private insurers. They have been employed in auto insurance, *see, e.g.*, Cal. Ins. Code §§ 11620-11627 (West 1988), and workers’ compensation, *see, e.g.*, N.M. Stat. Ann. §§ 59A-33-1 to 59A-33-15 (Michie 1992). Secondary market techniques are discussed in INSURANCE SERVICES OFFICE, OVERVIEW: RESIDUAL MARKET MECHANISMS (1988), *reprinted in* Kenneth S. Abraham, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 710-15 (1990).

63. *Id.* § 1106(b)(2)(d).

64. *See id.* § 2043.

65. H.R. 3222, 103d Cong., 1st Sess. (1993). Senators Breaux, Durenberger, Lieberman, and Nunn introduced a companion bill in the Senate, S. 1579, 103d Cong., 1st Sess. (Oct. 21, 1993). The Senate bill bore the same short title as the Cooper bill, the Managed Competition Act of 1993. While it differs in some respects from the Cooper bill, those differences are generally not germane to the problems explored in this Article.

ees' health insurance, the reform plan modifies Federal tax incentives to encourage employers to reduce their financial contributions, concomitantly reducing the benefits of the plans they offer employees. Because under the plan the tax deductibility of employer contributions is no longer unlimited, employers cannot deduct premium costs in excess of the basic plan's cost. The plan purports, however, to rely upon individual and business choice, for it does not compel either individuals or employers to purchase insurance. By restructuring the marketplace in a variety of ways, the plan's proponents believe the cost of insurance will fall and the number of purchasers of health insurance will increase. Hence, they argue, the goal of attaining virtually universal access to health coverage will eventually be achieved through market forces and tax incentives, at lower cost to the taxpayers and with less havoc for those currently insured.⁶⁶

In introducing his bill,⁶⁷ Representative Cooper asserted his view of the appropriate role of State governments in achieving health reform. Criticizing the President's plan, Representative Cooper contended that no bill should authorize "excessive State flexibility," and specifically rebuked those who would accord States the option to institute a single-payer plan.⁶⁸ His bill would constrain State regulatory power significantly, in part by broad preemption provisions. But potential Tenth Amendment trouble arises not from preemption but from provisions that largely track Representative Michel's bill.⁶⁹

The Cooper bill contains a version of the model of *untethered regulatory command* where it commands States to enact enabling legislation under which the insurance purchasing cooperatives can be

66. In other features, the plan would replace Medicaid with a new Federal subsidy for the indigent to assist them in purchasing their own insurance coverage through the regional cooperatives. H.R. 3222 § 2002 (authorizing subsidies); § 2301 (repealing Medicaid). It implicitly forswears price controls, such as premium caps and a global national health care budget. It would further encourage the group or network practice of medicine. *Id.* § 1222(a)(6).

67. When introduced, the bill was co-sponsored by 27 Democrats and 19 Republicans.

68. *Rep. Cooper's Managed Competition Bill Draws Bipartisan Support of 46 Lawmakers*, 1993 Daily Lab. Rep. 193 d14 (Oct. 7, 1993). Proponents of this bill contend it safely charts a course between the Scylla of a laissez-faire health services marketplace and the Charybdis formed by the other option, the single-payer system, which managed care proponents perceive as an execration. They believe the single-payer system's replacement of private insurers with a government regulatory behemoth would undermine the paramount values of health care quality and economy. *Id.*

69. The substantial overlap may thus indicate some successes of a trade lobby—here, the health insurance industry.

established,⁷⁰ but does not specify that a Federal program will ensue should any State not enact the requisite enabling legislation.⁷¹ The bill also employs the model of *command, conditional preemption, plus State fee* in a manner similar to Representative Michel's bill. As in the Michel bill, the Cooper plan requires States to establish an ADR system that satisfies Federal standards for medical malpractice cases,⁷² and mandates as well that if a State does not comply, the statutory default mechanism will be triggered: the Federal ADR system will be instituted within the State.⁷³ Also, like the Michel bill, the Cooper bill proposes to transfer the costs of maintaining this default mechanism to the State government, but in a different manner from the Michel plan. The Cooper bill specifies that the State will have to pay HHS a liquidated amount for this regulatory "service": 110% of the actual costs incurred by the Federal government per annum in maintaining the Federal ADR system in the State.⁷⁴

C. The Ambitious Plans

Four bills that explicitly seek to achieve universal coverage are currently pending in Congress.⁷⁵ While their timetables and strategies

70. H.R. 3222 § 1101(b)(1) provides: "Each State shall provide, by legislation or otherwise, for the establishment by not later than July 1, 1994, as a not-for-profit corporation, with respect to [each geographic area] a health plan purchasing cooperative. . . ."

71. Because the purchasing cooperatives constitute a pivotal part of the reform package, perhaps the omission was inadvertent. Its constitutionality may change depending upon the type of incentives or default mechanism an amended bill would propose.

72. Whether a State's ADR system satisfies the Federal requirements, and thus permits the State to avoid the Federal ADR and its direct taxation of State government, is left solely in the hands of the Secretary of HHS, who is requested to consult with the Attorney General. *Id.* § 5202(a). The Cooper bill also features prototypical and noncontroversial Federal grant programs to entice State governments into certain activities, but without any sanctions if they decline the offers. *See, e.g.*, § 5203.

73. H.R. 3222 § 5202(b).

74. H.R. 3222 § 5202(b)(3) provides:

If the alternative Federal ADR system established under this subsection is applied with respect to a State for a calendar year, the State shall make a payment to the United States (at such time and in such manner as the Secretary may require) in an amount equal to 110% of the costs incurred by the United States during the year as a result of the application of the system with respect to the State.

75. Two of the more ambitious plans are sponsored primarily by Democrats—the Clinton bill and the single-payer (Wellstone-McDermott) plan. Senate Republicans willing to undertake a complete overhaul of the health care system and who commit to universal coverage have likewise split into two groups. The Senate Republican Task Force on Health Care, led by Senators Chafee and Dole, produced "HEART"—the Health Equity and Access Reform Today Act of 1993. Senators Nickles and Hatch introduced a bill that attempts to straddle the political fence between the incremental approaches and the Senate Republican Task Force's bill. S. 1743, 103d Cong., 1st Sess. (1993).

differ substantially, they tend to share some regulatory structures in pursuit of that goal.

1. *The Clinton Plan*

By far the most comprehensive and ambitious proposal for health care reform is that produced by the Clinton Administration. The President campaigned in part on a platform promising an overhaul of the health care system to assure greater access and reduced costs. In September 1993 a narrative description of the President's proposed omnibus plan was released unofficially, later followed by the bill itself.⁷⁶ Spokespersons openly acknowledged that the original plan had been formulated and proposed without the benefit of constitutional analyses.⁷⁷ Excepting only the single-payer bill, the Clinton bill accords the most policy discretion to States of any major reform bill.⁷⁸

The Administration describes its proposal as based on "managed competition," a theory contending that, if structured properly, market forces can provide sufficient options for quality care at lower costs. Its advocates maintain that the savings accruing from increased competition can be plowed back into the system to finance expansion of coverage to the uninsured and underinsured. Reform of the health insurance marketplace is thus a paramount regulatory goal, achieved in this program through the establishment of regional purchasing cooperatives—termed "alliances." Under the President's plan, however, membership in an alliance is mandatory for all unemployed individu-

76. See Clinton Description, *supra* note 1. Although prior reports had denominated Clinton's plan "The American Health Security Act of 1993," see, e.g., *id.*, the President was forced to relinquish that title because the single-payer bill claimed it first. It is now denominated the "Health Security Act," S. 1757, 103d Cong., 1st Sess. [hereinafter HSA].

As this Article goes to press, the House Ways and Means Health Subcommittee, chaired by Representative Pete Stark, approved by a close vote a marked up version of the President's bill. The subcommittee's bill deleted the President's proposal for mandatory health alliances and fashioned different mechanisms to contain spiraling prices for health services. A significant amount of the President's proposals, however, remains intact at this early stage, including the commitment to universal coverage, although the provisions delineating financing and regulatory oversight are expected to undergo major revision. See *Ways-Means Panel's Experience Shows Congress Ready to Scale Back Plan*, Daily Lab. Rep. (BNA) No.50, at D-20 (Mar. 29, 1994).

77. See Pear, *supra*, note 1, at A1. In contrast to the narrative description of the President's program, see Clinton Description, *supra* note 1, the proposed bill seems to have received the benefit of sophisticated constitutional lawyers' evaluation, for it departs in several ways from the prior presentation.

78. In the proposed congressional findings, the bill States that as one principle for any health reform plan, "a partnership between the Federal Government and each State should allow the State and its local communities to design an effective, high-quality system of care that serves the residents of the State . . ." HSA § 2(2)(H).

als and for businesses employing fewer than a certain number of people.⁷⁹ The alliance exercises certain regulatory powers, including the ability to select which insurance plans will be offered to the alliance's members. To ensure fair "community rating" of insurance, alliances would be quite large. A State could choose, for example, to establish only one alliance covering its entire population. Larger corporations could opt out of the alliance structure and negotiate directly with insurers over the plans they would offer to their employees.⁸⁰ A new Federal regulatory agency, the National Health Board, would have rulemaking and enforcement powers over significant portions of the Act.⁸¹ Other provisions define the comprehensive benefit package,⁸² permit States to establish single-payer systems,⁸³ require the integration of mental health and substance abuse services,⁸⁴ establish new public health initiatives for preventive medicine and biomedical and health services research,⁸⁵ reform Medicare and Medicaid,⁸⁶ institute an ADR mechanism as a prerequisite to medical malpractice actions,⁸⁷ modify certain tax incentives,⁸⁸ and create private rights of action against various governmental entities for enforcement of rights created under the Act.⁸⁹

Breathtakingly broad in scope, the Clinton Plan begins by creating an individual entitlement to health benefits.⁹⁰ The benefits, however, will be available only where the new regulatory and market apparatus has been established. States ostensibly may choose whether to enact enabling legislation and regulations under which to become a

79. The President's plan currently states that employers with between 100 and 5000 employees are required to join alliances. *Id.* §§ 1311(c)(1)(B), 1311(e)(3). Recent news reports suggest the President is willing to compromise on the employer size required to join alliances. Gwen Ifill, *Clinton Defends Insurance Pools in Health Plan*, N.Y. TIMES, Mar. 4, 1994, at A8. Medicare beneficiaries would retain their benefits unless the State opts to fold them into the alliances and their approved insurance policies. Medicaid coverage would be retained for individuals receiving long-term nursing care but other beneficiaries would be shifted to the alliances.

80. *Id.* § 1311.

81. *See, e.g., id.* §§ 1151-1154.

82. *Id.* § 1101(a).

83. *Id.* § 1221.

84. *Id.* § 3511(a).

85. *Id.* §§ 3301-3334.

86. *Id.* §§ 4000-4301.

87. *Id.* § 5302(a).

88. *Id.* §§ 7801-7802.

89. *Id.* §§ 5235-5243.

90. HSA § 1001(a) ("Entitlement to Health Benefits") provides: "[E]ach eligible individual is entitled to the comprehensive benefit package . . . through the applicable health plan in which the individual is enrolled consistent with this title."

“participating state”⁹¹ or to forfeit both the regulatory field to the Federal government and the substantial funds that would be appropriated. If a State applies to become a participant, it would find its regulatory power and responsibilities greatly expanded over the status quo.⁹²

According to States the option whether to participate would seem to bring the plan into the conventionally approved scope of the spending power.⁹³ But a closer reading highlights some potentially problematic aspects. The Clinton act applies to all employers—including State and local governments.⁹⁴ It extends Medicare coverage and the hospital insurance tax to all State and local employees.⁹⁵ While *Garcia v. San Antonio Metropolitan Transit Authority*,⁹⁶ lends support for concluding that these are permissible uses of Federal power, this approach—*Federal regulation of non-Federal public sector employee benefits*—nevertheless deserves attention as a separate model of Federal-State relations.

A second potential Federal-State problem of the Clinton plan lies in the array of sanctions the plan visits upon States that choose not to participate. The bill provides for Federal assumption of responsibilities to create and monitor the alliances within States that are nonpar-

91. *Id.* § 1006; see also *id.* § 1200(a) (defining “participating State” and its prerequisites). This bill’s tone differs dramatically from the other bills. It is careful not to issue commands to States; it invites the States to participate in the new reforms. Given the severe penalties for not participating, this tone of “invitation” may seem more formal than substantive.

92. The Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, has a broad preemption provision, *id.* § 1144, which in concert with other sections has been interpreted to bar State regulation of various aspects of employee health insurance purchased by employers. See, e.g., Parmet, *supra* note 2, at 132-40 (1993). Some of this regulatory power would be delegated to States via the Clinton proposal.

HSA § 1201 purports to summarize State responsibilities under the Act: establishing one or more regional alliances; certifying health plans according to certain criteria jointly fashioned between Federal and State law; assuring the financial solvency of health plans; coordinating the State program with Federal law; conforming State laws to the provisions of workers’ compensation and automobile insurance reform specified in the Federal act. But the HSA is replete with instructions and mandates to States; section 1201’s summary is by no means exhaustive.

93. Modern courts have upheld spending power legislation as long as its substantive provisions do not violate a specific check on the Federal power. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 5.6 (4th ed. 1991); see also Buckley v. Valeo, 424 U.S. 1 (1976) (upholding establishment of a Presidential Election Campaign Fund); *Helvering v. Davis*, 301 U.S. 619 (1937).

94. HSA § 7301; see also *id.* § 1001.

95. Given *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986), and *Garcia*, 469 U.S. at 528 (1985), these additional employment taxes are not problematic.

96. *Garcia*, 469 U.S. at 528.

ticipants, or that have had their status as a participant terminated.⁹⁷ In States subject to Federal operation of the system, the insurance premiums sold through the regional alliances will be subject to a 15% surcharge, ostensibly to reimburse HHS for its administrative costs in establishing and operating the system.⁹⁸ The bill further specifies that the surcharge shall be treated as part of the premium cost for purposes of complying with the Federally set global budget and per capita insurance limits.⁹⁹ Because the plan proposes to collect the surcharge from individuals and employers obtaining insurance through regional alliances rather than directly from the State,¹⁰⁰ it generates a distinct model for analysis, termed here *command, conditional preemption, plus private sector tax*.

A third potentially problematic section of the Clinton bill lies in the provisions encouraging a State to develop for Federal approval a regulatory program that governs the sale of long-term care insurance. The bill handles this by an ingenious form of conditional preemption: if a State fails to establish a Federally approved State plan for this activity, “no insurer may sell or offer for sale any long-term care insurance policy” in the State.¹⁰¹ This provision is enforceable via a civil action against insurers.¹⁰² This novel approach to compelling State participation will be termed the model of *private sector penalties for State nonparticipation*.

97. See HSA §§ 1521-1522.

98. HSA § 1523(a) reads:

If this subpart [Responsibilities in Absence of State Systems] applies to a State for a calendar year, the premiums charged under the regional alliance established and operated by the Secretary in the State shall be equal to premiums that would otherwise be charged under a regional alliance established and operated by the State, increased by 15 percent. Such 15 percent increase shall be used to reimburse the Secretary for any administrative or other expenses incurred as a result of establishing and operating the system.

Note that the surcharge would be assessed only against the premiums of plans sold through the regional alliances, not through the private corporate alliances.

99. *Id.* § 1523(b). This proviso could result in a net reduction of health benefits.

100. *Id.* § 1523(a). The President’s bill contemplates that State and local employees, like their Federal counterparts, would obtain their insurance through the regional alliances. This is inferred from the provisions exempting only the employees of corporate alliances from regional alliances, see *id.* § 1311; see generally *id.* §§ 1300-30; Clinton Description, *supra* note 1. Combined with the mandate for employers to pay 80% of insurance costs for their employees, the surcharge would be felt directly by employees and employers—which include all the governmental entities that employ.

101. HSA § 2346.

102. *Id.* § 2346(b).

2. *The Senate Republican Task Force Proposal (Chafee)*

Recognizing the priority that both the public and President Clinton place on health care reform, in early 1993 Republican Senators formed a task force to develop an alternative comprehensive reform plan. Led by Senator Chafee, the Senate Republican task force worked during roughly the same period as President Clinton's staff. Shortly after the White House released a description of the President's proposal in September 1993, Senator Chafee announced that the task force bill would be introduced in a few weeks.¹⁰³ At one time, the Republicans hoped to unite their party in support of the task force's bill. On November 22, 1993, months after its expected introduction, the bill was finally presented,¹⁰⁴ but with far fewer sponsors than originally expected and after many of its most innovative ideas had been borrowed by sponsors of competing bills filed earlier.¹⁰⁵

Like the Clinton bill, the Chafee proposal attempts to achieve comprehensive health reform, including universal coverage, but plans to do so without creating a new Federal entitlement to health care. While this may seem a contradiction in terms, the bill creates a regulatory system under which every citizen and lawful permanent resident is provided access to health insurance coverage.¹⁰⁶ Like most of the other pending bills, it would maintain the private health insurance system but reform the market in order to achieve a managed competition system. It relies upon insurance purchasing cooperatives, termed here "purchasing groups," but only for small employers (under 100 employees) and individuals. In contrast to the Clinton plan, the Chafee bill does not mandate employer or individual participation in a purchasing group. Moreover, the bill permits more than one purchasing group to be established within the same geographic area, thus permitting competition between groups to retain their members.

103. See Senate GOP Unveils Reform Plan with Tax Cap, Individual Mandate, 1993 Daily Lab. Rep. d 14 (Westlaw BNA ver. Sept. 16, 1993).

104. S. 1770, 103d Cong., 1st Sess. (1993).

105. When S. 1770 was introduced, only 18 Senators listed their names as sponsors. All are Republicans and virtually all known as moderates. More conservative Republican Senators withdrew their support earlier in the fall of 1993. See Jack Anderson and Michael Binstein, *Health Reform Divides GOP Senators*, WASH. POST, Aug. 12, 1993, at S12. Conservative Republican Senators objected to a wide range of the Task Force's conclusions, with Senator McCain "quipping that North Korea and Cuba were the only places left on earth where cooperatives were still in vogue." *Id.*

106. S. 1770 § 1001 provides: "Each individual or lawful permanent resident of the United States is provided access to health insurance coverage under a qualified health plan under this title."

Even with these and other reforms of the insurance market, a significant number of individuals will be unable to afford the costs of basic health insurance without government assistance. The bill maintains Medicaid and Medicare, with certain reforms, in order to provide insurance coverage for substantial numbers of individuals. For the balance of low-income, uninsured individuals, the Chafee bill provides a decade-long phase-in of Federally funded vouchers with which individuals and families can purchase insurance through the purchasing groups.¹⁰⁷

The Chafee bill also parts company with the Clinton bill regarding who pays for health insurance for the employed. Unlike the Clinton plan, which directs employers to pay most of the premium costs of health insurance for their employees, the Chafee bill does not contain an employer mandate. Instead, after the decade long phase-in, individuals are required to maintain health insurance, suffering significant tax penalties if they do not.¹⁰⁸ The Chafee bill continues the existing system of voluntary employer-provided health insurance, but places a cap on the tax deductibility of these expenses, per employee, to encourage employers to pay for only standard coverage. Any employer payments for health insurance beyond the standard coverage is taxable to the employee as ordinary income.¹⁰⁹ The bill does require employers to make enrollment in a health plan available to all their employees, regardless of who pays the premiums, and to administer payroll deductions for insurance premiums. Large employers, which apparently include State governments and many municipal governments,¹¹⁰ are permitted three options: form purchasing groups with other large employers, negotiate directly with insurers over the plans they want to offer their employees, or self-insure. As with the small employer and individual plans, the plans that large employers offer to employees must meet specified standards.¹¹¹

107. To permit the Federal government to realize savings from the reforms as a whole and thus pay for the vouchers without requiring substantially increased taxes, the voucher phase-in period runs from the date of enactment to 2005. *Id.* § 1003.

108. *See id.* § 2401. This individual mandate to maintain health insurance is analogous to the established mandate to purchase automobile liability insurance as a prerequisite to driving an automobile.

109. *Id.* § 2001.

110. *See id.* § 1601(24)(a) (defining a small employer as one with less than 100 employees on a typical business day); § 1601(17) (defining a large employer as anything other than small employer). No special rules for States or State instrumentalities as employers are established in the bill.

111. These standards include: guaranteed availability to all employees (with specified exceptions for collectively bargained plans), *id.* §§ 1202(a)(2)(D), 1203(a)(3); no discrimination on the basis of health status, *id.* § 1202(B); standardized information for evaluating

The bill would establish a Federal regulatory system over which three major entities will exercise jurisdiction: two existing Departments, Health and Human Services and Labor, and a new Benefits Commission.¹¹² Other provisions specify the items and services required in the standard and catastrophic benefit packages,¹¹³ prohibit States from establishing single-payer systems,¹¹⁴ establish a new public health trust fund for biomedical research,¹¹⁵ reform Medicare and Medicaid,¹¹⁶ and modify certain tax incentives primarily to expand the availability of health insurance.¹¹⁷ Notably, once the plan is fully phased in, the bill plans to impose a special tax on any uninsured individuals.¹¹⁸

While the Chafee bill seeks to establish a partnership with State governments and to vest them with significant regulatory responsibility, in contrast to virtually all of the other pending bills evaluated here,¹¹⁹ it contains a remarkable paucity of provisions that putatively offend the Tenth Amendment or spending power. The bill does command States to establish the regulatory system necessary to implement the Federal reforms,¹²⁰ but States ostensibly retain the option not to participate. The bill provides that where a State fails to undertake or maintain its role, the Secretary of Health and Human Services will "assume, with respect to insured health plans and groups in the State, the responsibilities of the State with such a program. . . ."¹²¹ Hence, the bill creates a Federal default mechanism in case of State noncompliance. Notably absent from the bill are any financial or other penal-

plans' performance, *id.* § 1202(a)(2)(E); the offering of both standard and catastrophic benefit plans, *id.* § 1203; financial solvency criteria, *id.* § 1202(b)(2)(A); and, mediation procedures for hearing and resolving malpractice claims, *id.* § 1202(b)(2)(C).

112. *Id.* §§ 1311-1315.

113. *Id.* § 1301.

114. *Id.* § 1421(d).

115. *Id.* § 6097.

116. *Id.* §§ 6011, 6021, 6031 (Medicaid), 6101-6139 (Medicare).

117. *Id.* §§ 1002, 2002.

118. *Id.* § 2401(b)(1).

119. One exception is the Medical Savings Account plan (Coats-Gramm-Lugar). S. 1105.

120. S. 1770 § 1401(a) reads: "Each State shall establish a program (in this part referred to as a "State program") to carry out State responsibilities specified in this part." The bill specifies the responsibilities placed on States, which include: certification of insurance plans as "qualified insured health plans"; enforcement of the insurance reform standards; dissemination of certain types of information about available health insurance plans; establishment of procedures for creating and operating purchasing groups; creating a risk adjustment program; development of a binding arbitration process; and specification of an "open-season" for annual enrollment in health plans. *See id.* § 1401(b)(1)-(7).

121. *Id.* § 1401(d)(3).

ties for State noncompliance; after notice and a forbearance period, the Federal government simply assumes the regulatory jurisdiction and shoulders its costs. Thus, the Chafee bill employs the *command plus conditional preemption* model here.

The bill employs the *command plus conditional preemption* model in another area as well. Like many other bills, it outlines several permissible formats for the ADR system and commands States to establish such a process for medical malpractice claims.¹²² If a State fails to do so, “the Secretary [of HHS] shall provide for the operation of an approved alternative dispute resolution method in such State until such time as a system under this part is adopted.”¹²³ Again, the bill forgoes the strategies of the other bills to extract payments from State governments to fund the Federal regulatory program.

The last potential Federal-State problem of the Chafee plan lies in its application to all employers—including State and local governments.¹²⁴ Under *Garcia*, these apparently are permissible exercises of the Federal commerce power. Nevertheless, this approach will receive further scrutiny as an instance of *Federal regulation of non-Federal public sector employee benefits*. Given that the Chafee bill is an ambitious and comprehensive plan to overhaul the nation’s health care system, it is truly exceptional for eschewing the aggressive actions against State governments that pervade most of the other bills.

3. *The “Consumer Choice” Plan (Nickles-Hatch)*

A latecomer to the health reform sweepstakes, the “Consumer Choice Health Security Act”¹²⁵ seeks to chart a middle course between Senator Chafee’s bill for the Senate Republican task force, with its mandate on individuals to purchase health insurance, and the Coats plan, which contains the most modest reforms of all pending bills. Senator Nickles’s plan is driven by the proposition that consumers are more frugal when they are spending their own money than when spending money from some other source, such as that from their employers or the government. Thus, the Nickles plan has employers, who are currently paying for employee health insurance, allocate those funds directly to individual employees’ medical savings accounts.¹²⁶ Individual employees then decide how to use the money,

122. *See id.* § 4013(b)-(c).

123. *Id.* § 4013(e).

124. The bill does not single out State and local government employees from the operation of the plan, nor does it provide any special rules for them, as does the Clinton plan.

125. S. 1743, 103d Cong., 1st Sess.

126. *See id.* § 102.

including how much to spend on health insurance versus uninsured health services. The medical savings accounts into which these contributions would flow form a principal element of the Nickles plan. But the holder of the account is not entitled to a tax exclusion on its balance or on accruing interest.¹²⁷ Under the Nickles plan, tax credits are available only to the contributors of monies to the accounts,¹²⁸ regardless of whether the contributions come from employers or employees.

To encourage all individuals to purchase health insurance, whether through their employer or, if unemployed, on the open market, the plan accords all individuals, regardless of employment status, a tax credit for their health expenses.¹²⁹ Proponents of this plan argue that this restructuring of tax incentives and benefits awards the largest government subsidy directly to those most in need of it—the indigent and the very ill; the value of the tax credit increases both as income drops and as health costs rise as a percentage of income.¹³⁰

Nickles's proposal contains an ingenious technique for guaranteeing that most individuals will purchase basic health insurance coverage. His bill permits the personal exemption from Federal income tax to be taken only by those individuals who list on their Federal tax form the policy number of the "Federally qualified health plan" in which they are enrolled.¹³¹ Furthermore, to augment the threat/incentive, employers are mandated to take into account the employee's health insurance status when figuring individual withholding.¹³² Thus, an uninsured employee immediately faces the effects of that choice

127. *See id.* § 102(b). On this point, the account differs quite sharply from the Coats proposal, which permits contributors to exclude from income any contributions to the account, up to a defined maximum. *See S. 1105 § 1(a)*.

128. S. 1743 § 101(a). Contributions entitled to the tax credit would be capped at some maximum level, in order to encourage frugal consumer and employer behavior and reduce the loss to the Federal treasury.

129. *Id.* § 102(a).

130. Under Senator Nickles's plan, the tax credits are refundable so that if the credit's value is higher than the taxpayer's tax liability, the government refunds the difference. The tax credit thus functions like the Earned Income Tax Credit. The bill specifies that the tax credit is worth 25% of qualified health costs (insurance and unreimbursed expenses for medical care) which do not exceed 10% of the adjusted gross income; 50% of qualified health costs which exceed 10% but are below 20% of adjusted gross income; and 75% of qualified health costs which exceed 20% of adjusted gross income. S. 1743 § 101(a).

131. *Id.* § 103(a)(1). In § 112, the bill details the minimum requirements for an insurance plan to be "Federally qualified." Acute medical care, including physician, hospitalization, and laboratory services, comprises the core requirement. *Id.* § 112(b). The provision also limits deductibles, co-payments, and co-insurance. *Id.* § 112(c). Other provisions limit nonenrollment for preexisting conditions, *id.* § 114(a)(1), and guarantee renewability, *id.* § 115.

132. *Id.* § 121(a).

via reduced net pay. Senator Nickles can therefore truthfully submit that his plan does not rely on an individual or employer mandate; he simply raises substantially the individual's cost for being uninsured.¹³³

In addition to modifying the tax incentives and subsidies, the Nickles plan targets many of the same arenas for reform as other plans, sometimes reiterating the exact legislative strategy of another bill. It includes provisions for reform of medical malpractice and product liability laws, Medicaid and Medicare, antitrust laws relating to the health services and health insurance industries, and long-term care for the disabled and those with terminal illnesses.¹³⁴ The bill sidesteps other proposals' ADR jurisdictional prerequisites in favor of more aggressive incursions both into the substantive law of malpractice and product liability and into procedural matters governing these claims, such as statutes of limitations and attorneys fees.¹³⁵

Introduced well after most of the other plans, the Nickles bill seems to have critically assessed earlier bills' commands to State governments and avoided some of their most problematic language. Nevertheless, the bill resorts to some variants of prior problematic provisions. States are commanded to establish a regulatory program for certifying that health insurance plans offered in the State meet specified Federal standards.¹³⁶ The order is not combined with any loss of Federal funds or other spending provision, but is backed up with the proviso that in unqualifying States, the Secretary of HHS will

133. The plan seems predicated upon the economic model of human behavior: as rational self-maximizers, individuals will organize their conduct so to receive the tax credits and the personal exemption—potentially several thousand dollars. Additionally, to enlist immediate insurer and employer compliance with certain named provisions, the plan imposes a “tax” for noncompliance. For employers, the IRS would charge \$50 per day per employee for the failure to comply. See *id.* § 126(a).

134. See *id.* § 303 (malpractice); § 304 (product liability); §§ 201-214 (Medicare and Medicaid); §§ 601-608 (antitrust); § 701-704 (long-term disability).

135. The bill bars strict liability recovery for medical products liability claims where the FDA had approved the product for the market. *Id.* § 304(a). It also bars claims alleging breach of the duty to warn where an appropriate warning was issued to the medical professional treating the injured patient. *Id.* § 304(b). In malpractice cases, the bill mandates an offset against damages for any benefits received, for example, from a health insurance carrier, *id.* § 303(c), imposes an aggressive statute of limitations, *id.* § 303(d), and limits attorney's fees, *id.* § 303(e). For both types of actions, the bill caps noneconomic damages, *id.* § 305(a), and limits punitive damages, *id.* § 306.

136. Section 117(a) reads, “Each State shall establish no later than January 1, 1997, a regulatory program which meets the standards [stated below].”

assume responsibility for the activity.¹³⁷ This proviso thus tracks the *command plus conditional preemption* model.¹³⁸

The bill also commands State governments to fashion a program for collecting and distributing comparative information regarding health insurance plans offered in the State. Similar to the Michel plan, the Nickles bill provides that if HHS finds the State has failed to institute an acceptable program, HHS will do so.¹³⁹ And HHS may charge the State for this activity.¹⁴⁰ Charging the State for the Federal substitute program brings this provision within the model of *command, conditional preemption, plus State fee*.

One novel feature concerning States and the State purse may be found in the Nickles bill. In order to remain eligible for "receiving Federal funds for health care programs,"¹⁴¹ a State must provide health insurance coverage equal to the Federally qualified plans to all of the residents of the State who are not insured privately. The bill accords States four options for doing so, including coverage under the State's Medicaid program. States are permitted to charge individuals for the coverage premium, in light of the cost of the premium and the individual's ability to pay.¹⁴² In order to be eligible for significant grants of Federal funds under the spending power, States must institute this program consistent with Federal standards. The plan does not supply any default mechanism in case a State does not establish the program, but the loss of millions in Federal funds creates a situation where politically and economically a State may have no effective ability to refuse. This approach may be termed the *command plus extraordinary inducement/penalty* model.

137. *Id.* § 117(b).

138. The provision does not explicitly preempt States from their normal insurance regulatory activities, but because of the Federal tax incentives for purchasing only Federally "qualified" insurance coverage (for example, tax credit) and the penalties (loss of personal tax exemption) for not doing so, as a practical matter State insurance bureaus may be left with little regulatory work. Moreover, HHS might issue an interpretive rule preempting the State from the field of health insurance regulation.

139. S. 1743 § 422(a).

140. *Id.* § 422(b). The bill does not explicitly provide that fees may be assessed against the State—in part because the provision uses passive, not active, voice. For example, the bill provides, "Fees may be charged by the Secretary for the information provided pursuant to a program under this sections." *Id.* The whole of § 422, however, appears to imply the State will be the target of fees. From a policy standpoint, one could inquire why the fees would not be better assessed against the insurers, as a regulatory cost of their doing business in the State.

141. *Id.* § 131(a).

142. *Id.* § 131(c).

4. *The Single-Payer Plan (McDermott-Wellstone)*

Anathema to the private insurance industry,¹⁴³ advocates of the single-payer plan contend that market forces have failed the nation in the health care arena and should therefore be abandoned as the mechanism for equitably delivering health services at a reasonable cost. The single-payer bill is co-sponsored by ninety-one Representatives.¹⁴⁴

The rudiments of the proposed single-payer system are rather simple and largely track the Canadian health program.¹⁴⁵ A standard benefit package free of co-payments, deductibles, and all consumer record-keeping is specified by a national board. Some State discretion as to supplemental benefits is contemplated, generally if the State supplies the additional funds for the benefit. Payments for all health services covered under the standard package that are provided within a geographical area, namely one State, are made by a single State governmental agency.¹⁴⁶ In a sense, the whole political community self-insures to cover the cost of delivering health services to its entire citizenry. Under the McDermott-Wellstone proposal, the entire nation self-insures via a national trust fund, whose monies would be allotted on a State-by-State basis. All legal residents are covered under the program.¹⁴⁷

143. Certain other elements of the health services industry also oppose this bill. Although the plan does not eliminate their business in toto, as it would the private health insurance companies, many doctors and hospitals deem the bill unacceptable because it contains provisions for the State to set the fees payable for certain services. For instance, the McDermott-Wellstone bill permits government determination of reasonable prices for pharmaceuticals and for dispensing services. H.R. 1200, 103d Cong., 1st Sess. §§ 615(b), 615(c) (1993). Government price-fixing strikes fear in many. Others oppose on principle this type of governmental control over the market. Currently, in many states, the insurers (including the Federal government via Medicare) effectively exercise the power to set some prices. In other states, such as Massachusetts, which bans balance billing, the power to set compensable fees is largely shared by the State and Federal governments with the private insurers. See MASS. GEN. L. ch. 176B, § 7 (1993).

144. H.R. 1200. The October 1993 version of the bill lists 87 co-sponsors, nearly one-quarter of the entire House. This support may be an important reason why the Clinton Administration has preserved in its bill a State option to institute a single-payer program. HSA § 1221.

145. For a general introduction to the Canadian single-payer system, see GAO Report to the Chairman, House Committee on Government Operations, Canadian Health Insurance: Lessons for the United States, GAO/HRD-91-90, June 4, 1991.

146. H.R. 1200 § 611. Whether consumers would still be permitted to purchase private insurance to cover services beyond the standard benefit package is a matter still debated.

147. *Id.* § 102(a). A single-payer plan might distinguish between some classes of residents, such as those legally resident within the nation and those not. The McDermott-Wellstone plan, for instance, explicitly covers "lawful resident aliens" and "certain nonimmigrants" but not those otherwise within the country. See *id.* § 102.

Adoption of a single-payer plan entails the abolition of Medicare and Medicaid; the payroll taxes currently assessed for these programs constitute some of the revenue to fund the new system. Significant administrative savings for the health services sector is achieved by mandating a single form and single system of billing codes in filings for payment from the administrator.¹⁴⁸ The numbers of specialized billing personnel currently required in doctors' offices, hospitals, and other service providers would be sharply reduced. Those savings, and the savings that accrue from not having to pay to cover profits for the private insurance industry, are expected to assist in funding the streamlined single-payer system. Though the plan eliminates the need for payment of health insurance premiums from both employers or employees, the costs of the system would be paid by substantial additional taxes,¹⁴⁹ which has produced significant opposition to the bill.

Unlike the Clinton bill, McDermott-Wellstone would not leave to State discretion whether to establish a single-payer system. The bill mandates that all State governments establish a regulatory apparatus that complies with specified Federal standards and submit a regulatory plan to HHS for approval.¹⁵⁰ The bill does not contain a Federal default system for noncomplying States. Hence, the bill assumes all States will comply with the regulatory mandate. Once HHS approves the State's apparatus, the State is eligible to receive funds from the Federal Health Security Trust Fund to pay for providers' bills for services submitted to the State.¹⁵¹ The bill specifies the Federal contribution as not less than 81% nor more than 91% of the annual health budget authorized for the State. The balance of the program is to be paid from State funds.¹⁵²

148. It is sometimes assumed that under a single-payer plan some government agency would process and pay claims. This structure, however, is not essential to a single-payer system and H.R. 1200 does not mandate State governments to process claims. A key alternative lies in the government contracting with a private entity, a health insurance firm, for instance, to process claims and deal with the insureds. The governmental agency can retain supervisory and policy-making power. This structure is currently used on a smaller scale by firms that self-insure for health and medical coverage; they delegate operational authority via contract to an administrative firm, normally a health insurance entity.

149. *See id.* §§ 811-814, 821, 831-837, 841-847, 851-852, 861-862, 871, 881, 981.

150. H.R. 1200 § 101(a) reads: "There is hereby established in the United States a State-based American Health Security Program to be administered by the individual States in accordance with the Federal standards specified in, or established under, this Act" Section 405(a) commands the States to develop an administrative system to effectuate the Federal program: "Each State shall submit to the [National Health] Board a plan for a State health secretary program for providing for health care services to the residents of the State in accordance with this Act."

151. *Id.* § 604.

152. *Id.* § 604(b).

Not having fashioned a Federal backup apparatus in case of a State rebuff, the co-sponsors of the plan must believe State consent is a rather safe bet. Indeed, they appear to have included more effective incentives to assure State participation than do most of the other reform plans. First, the entire national population will be taxed to pay for the health system, so any State government that does not qualify to receive its share of funds will likely suffer heavy political costs at the hands of its citizenry; standing on the principle of State sovereignty will hardly be much of a practical defense.¹⁵³ Second, the bill seems to assuage State concerns about continued Federal funding of Federal programs. Frequently in the past two decades, the Federal government has appeared to provide States a gift horse, but later sharply reduced Federal support, leaving to the States the financial costs of program continuation or the political costs of the program's elimination.¹⁵⁴ By contrast, the express terms of the single-payer bill arguably create State entitlement to Federal funding at a high level.¹⁵⁵

Although this Federal funding offer may seem at first blush a routine exercise of the spending power, it may raise some spending power difficulties under current approaches. It is another example of the model of *command plus extraordinary inducement/penalty*: to be eligible for Federal funds, the State must establish a regulatory program consistent with Federal standards, and the State arguably has little effective choice but to comply.

153. See David Bryden & Daniel Farber, *The Third Death of Federalism*, 3 CONST. COMM. 293 (1986) (contending that federalism is no longer a principle Congress deems entitled to political respect when fashioning legislative programs).

154. The most recent examples may be found in President Clinton's 1995 budget, which proposes to cut by 50% the Federal funds available for low-income heating assistance and approximately 200 other Federal programs. See John A. Farrell & Jill Zuckman, *Clinton Budget Would Cut Deficit to a Six-year Low; \$1.5 Trillion Plan Calls for Slashing 200 U.S. Programs*, BOSTON GLOBE, Feb. 8, 1994, at 1. For a general discussion of the effort to combine Federal funding programs into Federal block grants for State governments, which provide substantially increased programmatic discretion but also substantially diminishing Federal funds, see CLAUDE E. BARFIELD, *RETHINKING FEDERALISM: BLOCK GRANTS AND FEDERAL, STATE, AND LOCAL RESPONSIBILITY* (1981). See also, 2 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *SIGNIFICANT FEATURES OF FISCAL FEDERALISM: REVENUES AND EXPENDITURES*, 60 (1992) (providing table of Federal grant money awarded to States and localities from 1955-1997).

155. H.R. 1200 § 604(b) provides that the National Health Board will "establish a formula for the establishment of a Federal contribution percentage for each State," taking into account "a State's per capita income and revenue capacity and . . . other relevant economic indicators. . . . The weighted-average Federal contribution percentage for all States shall equal 86 percent and in no event shall such percentage be less than 81 percent nor more than 91 percent."

D. The Models Revisited

As detailed, the currently proposed health care plans present seven types of Federal-State relations whose constitutionality under the Tenth Amendment and spending power is potentially problematic:¹⁵⁶

- I. *Federal regulation of non-Federal public sector employee benefits*
- II. *Untethered regulatory command*
- III. *Command plus conditional preemption*
- IV. *Command, conditional preemption, plus State fee*
- V. *Command, conditional preemption, plus private sector tax*
- VI. *Private sector penalties for State nonparticipation*
- VII. *Command plus extraordinary inducement/penalty*

These health reform bills demonstrate that Congress is aggressively seeking to expand its regulatory power over health services and delivery. And it has fashioned ingenious strategies to avoid paying many of the regulatory costs. Whether its attempts to transfer the administrative and other financial costs to the States, or to induce compliance from State governments, are permissible exercises of the Federal legislative power pose troublesome questions. Table I summarizes the problematic aspects of the seven pending bills. The next Part of this Article briefly develops the current constitutional framework for evaluating Tenth Amendment and spending power questions and Part III assesses the constitutionality of these seven models of problematic Federal-State relations.

Table I

| Problematic Aspects of the Seven Pending Bills | Models | | | | | | |
|---|--------|----|-----|----|---|----|-----|
| | I | II | III | IV | V | VI | VII |
| Medical Savings Accounts, S. 1105 | | | | | | | |
| Michel, H.R. 3080 | | | | | | | |
| • ADR for medical malpractice | | | | X | | | |
| • comparative information program | | | | X | | | |
| • tax for reinsurance mechanism | | | | | X | | |
| • risk management program | | X | | | | | |
| • command to establish and maintain regulatory system | | | X | | | | |

156. See *supra* text accompanying note 38.

| | | | | | | | |
|--|---|---|---|---|---|---|---|
| Cooper, H.R. 3222 <ul style="list-style-type: none"> • command to enact insurance cooperative • ADR for medical malpractice | | X | | | X | | |
| Clinton, S. 1770 <ul style="list-style-type: none"> • application to State and local employees • State "fee" for Feds operating alliances • long term care insurance penalty | X | | | | | X | X |
| Chafee, S. 1170 <ul style="list-style-type: none"> • application to State and local employees • command to establish regulatory system • ADR for medical malpractice | X | | | X | | | |
| Nickles-Hatch, S. 1743 <ul style="list-style-type: none"> • command to establish regulatory program • comparative information program • provide health coverage to all uninsured residents | | | X | | X | | X |
| Single-Payer, H.R. 1200 <ul style="list-style-type: none"> • command to establish regulatory program and monies available | | | | | | | X |

II. Federal Control of State Legislative Power

From the New Deal until *New York v. United States*,¹⁵⁷ substantive principles of constitutional federalism generally did not fare well in the Supreme Court.¹⁵⁸ The Tenth Amendment began losing ground during the New Deal, with the advent of a revised public conception of the proper scope of Federal power.¹⁵⁹ More recently, during the Civil Rights era, the Amendment lost further luster when southern opponents of desegregation used it to defend "States' rights." With Federal objectives expanding to guarantee civil rights against both

157. 112 S. Ct. 2408 (1992). *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), foreshadowed the *New York* shift and may also be considered to deviate from the Court's previous path.

158. The obvious but short-lived exception, *National League of Cities v. Usery*, 426 U.S. 833 (1976), is briefly discussed *infra* at text accompanying notes 165-71. Some lower courts also took positions more respectful of federalism values. See *infra* text accompanying notes 200-02.

159. See *United States v. Darby*, 312 U.S. 100 (1941). Grave social dislocation caused by the Great Depression, and social acceptance of President Roosevelt's "New Deal" involving new Federal political institutions to remedy the economic crisis, led to substantially enlarged conceptions and applications of Federal legislative power. See Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1052-53 (1984).

public and private power,¹⁶⁰ the Federal government earned the reputation of being *the* government on the side of justice, possessing a type of moral *cum* intellectual superiority. State governments and their subdivisions appeared to be increasingly obsolete hindrances,¹⁶¹ opposing progressive substantive ends such as those embodied in Federal civil rights, employment, and education laws. It seemed that for most legal scholars and many in the wider public, the Federal move toward subordinating States to Federal regulatory choices was cause for applause. Ideas of progress and public virtue were tacitly viewed as inherently connected with “unconditional national power”;¹⁶² opposition to the latter was taken as opposition to the other commitments as well. During this period, it is not surprising that the Supreme Court held the Tenth Amendment to present no obstacle to the Federal government’s application of the Fair Labor Standards Act¹⁶³ (FLSA) to the States.¹⁶⁴

*National League of Cities v. Usery*¹⁶⁵ jolted the secure view that constitutional federalism as an affirmative limit on congressional power had been retired. Expressly overruling precedent of only a few years’ duration, the Court held that principles of federalism barred application of the FLSA to State and municipal employees.¹⁶⁶ The opinion articulated criteria to determine when Congress had overstepped its Commerce Clause powers and had entered the reserved powers of the States.¹⁶⁷ Fears arose of a new *Lochnerian* age; judicial intrusion, under the guise of the Tenth Amendment, into the policy choices of Congress appeared analogous to limits once generated by

160. The Civil Rights Act of 1964 is one of the best examples of the Federal commitment to civil rights. Separate titles created judicially enforced individual statutory rights to be free from discrimination in employment, public education, public accommodations, and other aspects of life. See 42 U.S.C. §§ 1981 to 2000h-6 (1988).

161. Professor Richard Briffault has suggested that States and localities, and especially the latter, retain substantial lawmaking powers that are unlikely to be deeply affected by the vicissitudes within Federal constitutional law such as detailed here. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 *passim* (1990).

162. Choper, *Scope of National Power*, *supra* note 13, at 1595.

163. 29 U.S.C. §§ 201-219 (1988).

164. See *Maryland v. Wirtz*, 392 U.S. 183, 201 (1968).

165. 426 U.S. 833 (1976).

166. 426 U.S. at 853-55 (overruling *Wirtz*). The Court’s ruling might have been predicated upon implied structural principles flowing from the Constitution as a whole, or it might have been implicitly tethered to the Tenth Amendment, as the dissent presumed. See *id.* at 861-63 (Brennan, J., dissenting).

167. See *id.* at 845-46.

“liberty of contract” principles.¹⁶⁸ Given that the expositors of the Court’s new federalism jurisprudence also evinced limited support for protection against discrimination and other civil rights goals,¹⁶⁹ their professed solicitude for federalism appeared somewhat tainted. Few legal scholars applauded the doctrinal turn in print;¹⁷⁰ the Amendment’s renaissance faced a largely critical academic response.¹⁷¹

Between 1976 and 1985, both lower courts and the Supreme Court attempted to refine and apply the *National League of Cities* criteria for determining when congressional action intruded into the States’ reserved powers.¹⁷² In 1985, however, the Court ruled in *Garcia v. San Antonio Metropolitan Transit Authority*¹⁷³ that the *National*

168. See *Lochner v. New York*, 198 U.S. 45 (1905). See generally Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1355 (1988); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 877 (1987); Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L.Q. 91 (1983).

169. This close association tarred federalism, suggesting it was merely a shield for oppressive State action rather than a constitutional concept and structure having independent normative value.

170. Professors Robert Nagel and Kathryn Abrams praised aspects of *National League of Cities* and the general thrust of reviving judicially enforceable federalism norms. See Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81; Kathryn Abrams, Note, *On Reading and Using the Tenth Amendment*, 93 YALE L.J. 723 (1984) [hereinafter Abrams Note].

171. See, e.g., Choper, *Scope of National Power*, *supra* note 13; Martha A. Field, *supra* note 13; Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1 (1987). Two scholars suggested that *National League of Cities* foreshadowed the recognition of new substantive constitutional rights for individuals. Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); Frank I. Michelman, *States’ Rights and States’ Roles: Permutations of “Sovereignty” in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977).

172. As later summarized, the inquiry involved a four-part test:

First, . . . the Federal statute at issue must regulate “the ‘states as states.’” Second, the statute “must address matters that are indisputably ‘attribute[s] of state sovereignty.’” Third, state compliance with the Federal obligation must “directly impair [the States’] ability ‘to structure integral operations in areas of traditional governmental functions.’” Finally, the relation of state and federal interests must not be such that “the nature of the federal interest . . . justifies state submission.”

Garcia, 469 U.S. at 540 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 287-88 n.29 (1981) (quoting *National League of Cities*, 426 U.S. at 845, 852)). See also *EEOC v. Wyoming*, 460 U.S. 226 (1983); *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982); *Federal Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742 (1982). For reference to the numerous lower courts which struggled to apply the enunciated criteria, see *Garcia*, 469 U.S. at 538-39 (citing cases).

173. 469 U.S. 540 (1985).

League of Cities criteria were unworkable¹⁷⁴ and not faithful to the national political process, to which, the Court concluded, the Constitution had committed the preservation of federalism.¹⁷⁵ Then-Justice Rehnquist and Justice O'Connor, writing in separate dissents, predicted the Court would revisit its conclusion that the Tenth Amendment was nonjusticiable.¹⁷⁶

Indeed it did. In *New York v. United States*,¹⁷⁷ the Court revived the Tenth Amendment's justiciability. With the security of a 6-3 majority, the opinion bolstered the principles of constitutional federalism reflected in the Tenth Amendment. Because of the Court's emphasis on unconstitutional coercion of the States, the decision also intimated that historic spending power restrictions, thus far merely hortatory, may be given serious weight.

New York's significance is greatest where a Federal enactment attempts to command certain State legislative or administrative activity to achieve Federal regulatory goals. A justiciable Tenth Amendment claim will be available in such circumstances. *New York*, however, plows no new ground under the spending power. At most, it signals solicitude for federalism values, which may be impaired by particular exercises of the spending power. The *New York* Court moved away from *Garcia*,¹⁷⁸ limiting its import in two respects.

A. Background to *New York*: The Public Policy Problem of Low-Level Radioactive Waste

By the end of 1985, when Congress enacted the Low-Level Radioactive Waste Policy Amendments Act (LLRWPA),¹⁷⁹ only three states, South Carolina, Washington, and Nevada, had facilities actively receiving low-level radioactive waste (LLRW) for disposal.¹⁸⁰ The

174. The decision centered on the difficulty of applying the criterion regarding a State's "traditional governmental functions." *Id.* at 538.

175. *See id.* at 547-54. In concluding that federalism embraced a set of policy decisions committed to Congress and protected by "procedural safeguards inherent in the structure of the Federal system," *id.* at 552, the Court relied principally on the work of Professors Jesse Choper and Herbert Wechsler. *See, e.g., id.* at 551 n.11, 554 n.18 (citing JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1954)).

176. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting).

177. 112 S. Ct. 2408 (1992).

178. *Garcia*, 469 U.S. 528.

179. 42 U.S.C. §§ 2021b-j (1988).

180. Unless otherwise stated, the description of the facts in *New York* is taken from the Court's decision. *See* 112 S. Ct. at 2414-17. Congress has classified waste according to its

balance of the nation was shipping its waste into these states. Officials in the burdened States considered it unfair for their States alone to be the repositories of the nation's LLRW,¹⁸¹ with the collateral burdens imposed by shipping these wastes through the "sited States."¹⁸² An earlier Federal effort to promote voluntary regional compacts between States had, five years later, produced little movement toward construction of new waste facilities.¹⁸³

The LLRWPA ensued, with three types of incentives designed to guarantee that all State governments assumed responsibility for disposal of the LLRW generated within their borders.¹⁸⁴ First, the Act authorized the sited States to collect a series of surcharges, graduated over time, on waste shipped to their States.¹⁸⁵ One-quarter of the surcharges were to be held by the Secretary of Energy in an escrow account. The Act directed the Secretary to make incentive payments to a State for each of the five statutory milestones it satisfied in its effort to create or obtain other disposal options. These payments were designed to help offset the significant costs of conducting the siting activities. The Act further mandated that any State which failed to meet a specified deadline must either take title to the waste gener-

level of radioactivity. Classes A, B, and C are considered "low-level." The Federal government has assumed responsibility for disposing of radioactive waste with levels higher than C. See 42 U.S.C. § 2021c(b)(1)(D) (1988, Supp. 1990).

181. See Brief for Respondent, *New York v. United States*, 112 S. Ct. 2408 (1992) (Nos. 91-543, 91-558, 90-563).

182. The Supreme Court uses the term "sited State" to designate those States which maintain within their borders a certified disposal site for LLRW that is operational and able to accept LLRW for storage. See *New York*, 112 S. Ct. at 2415-16.

183. In 1980, Congress enacted the Low Level Radioactive Waste Policy Act, Pub. L. 96-573, 94 Stat. 3347, which authorized the establishment of State compacts for disposal of low level radioactive waste, but provided no penalties for nonparticipation. In 1985, one year before the Act would have allowed States in such compacts to exclude waste from other States, only three compacts had been formed, all of which were centered around States already containing low level radioactive waste disposal sites. See *New York*, 112 S. Ct. at 2414-15.

184. Two of these incentives—those *New York* ruled constitutional—were largely fashioned upon a proposal from the National Governors' Association. The one held unconstitutional, the "take-title" provision, owed its legislative genesis to a "Dear Colleague" letter circulated by Senator Thurmond of South Carolina. See 131 CONG. REC. S18, 105-06 (daily ed. Dec. 19, 1985) (statement of Senator Thurmond). Senators Thurmond and Johnston introduced the take-title provision as an amendment to the pending LLRWPA bill during the hurried last hours of the legislative session, on December 19, 1985. That same day, both Houses voted to enact the LLRWPA. See *id.*

185. Normally States are prohibited from discriminating against commerce originating from sister States. But in this instance, Congress employed its Commerce Clause powers to encourage that discrimination, in order to raise the incentives for unsited States to conduct the specified regulatory activities.

ated within its borders or forfeit to the waste generators (who generally had paid the surcharges) the incentive payments it had received.

The second set of statutory incentives primarily concerned access to the existing three LLRW facilities and additional monetary incentives. Repository States were permitted to charge generators of LLRW located in noncompliant States twice the ordinary surcharge and to bar access to the repository thereafter. Noncompliance with a later deadline (imposing additional regulatory responsibilities) could produce, at the sited recipient State's option, double surcharges for the first half of the year, quadruple surcharges for the second half of the year, and no access thereafter. States which completed all the regulatory responsibilities imposed by earlier dates, but which did not meet the January 1992 date for filing a complete application to operate a LLRW disposal facility, and States which belonged to compacts that did not file a complete application by that date, were subject to triple surcharges on the LLRW waste generated within their borders.

The final inducement for States to comply with the Federal Act involved a different type of incentive. If, by January 1996, a State was not able "to provide for the disposal of all" LLRW generated within its borders,

upon the request of the generator or owner of the waste, [the State] shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner [by the State's refusal] to take possession¹⁸⁶

Unlike other Federal statutes, this provision did not give the States an opportunity to exit the regulatory field and relinquish responsibility to the Federal government with no penalty other than the loss of State power over the issue.¹⁸⁷ Many States perceived the two options accorded the States here—to take title to the waste or be liable for damages—as no choice at all.

While the "unsited" States acknowledged the burden on the three States which were shouldering the waste burden for the nation, they generally disputed that each State should bear the financial responsibility for the waste generated within its borders. For instance, the Act mandated that States take responsibility for LLRW generated within its borders by Federal government sources as well as by private indus-

186. LLRWPA § 2021e(d)(2)(C).

187. The *New York* Court described this quality of the provision as unique. *New York*, 112 S. Ct. at 2429.

try.¹⁸⁸ Connecticut's situation demonstrates some of the larger objections.¹⁸⁹ In Connecticut, over 99% of the annual amount of LLRW is generated by privately owned nuclear power plants, which are regulated by the Federal Nuclear Regulatory Commission and whose electricity is sold over interstate grids regulated by the Federal Energy Regulatory Commission. States were forbidden to regulate the production of radioactive waste from these private sources, even in the interest of reducing it.¹⁹⁰ Having been preempted from that aspect of the regulatory field, the LLRWPA's imposition of long-term responsibility for the hazardous waste products of private industry—a significant liability—struck the State as particularly unfair.¹⁹¹ The Act permitted Congress to claim credit for solving the nation's LLRW crisis, without shouldering any of the political or financial costs. Connecticut asserted that the citizen protests that followed would be (and were) directed at the State government—not at the Federal government—for the latter's mandate that States engage in the publicly condemned regulatory activity of siting a nuclear dump. With an enormous and increasing Federal budget deficit, State officials additionally perceived in the LLRWPA a menacing precedent for future Federal legislation.

B. State Reliance on *Hodel* and *FERC*

The States contesting the constitutionality of the statute at issue in *New York* relied heavily on two cases decided between *National League of Cities* and *Garcia*. In both *Hodel v. Virginia Surface Mining & Reclamation Association*¹⁹² and *Federal Energy Regulatory Commission v. Mississippi*,¹⁹³ the challenged statutes arguably commanded State governments to implement a Federal regulatory scheme. In

188. LLRWPA § 2021c(a)(1)(B). The Court's opinions in *New York* never mention this point.

189. See Amicus Curiae Brief for the State of Connecticut, Statement of Interest, *New York v. United States*, 112 S. Ct. 2408 (1992) (Nos. 91-543, 91-558, 91-563) [hereinafter "Connecticut Brief"].

190. Reduction of hazardous waste is a primary goal of major environmental organizations. Radioactive waste poses special hazards, for its radioactivity can persist for at least 500 years. See Dan M. Berkovitz, *Waste Wars: Did Congress "Nuke" States' Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 HARV. ENVTL. L. REV. 437 (1987).

191. Connecticut submitted it had already paid \$6.2 million in costs incurred in complying with the LLRWPA. See Connecticut Brief, *supra* note 189, at Statement of Interest. The State did not note how much it received back in surcharge rebates for compliance with all the specified timetables.

192. 452 U.S. 264 (1981).

193. 456 U.S. 742 (1982).

neither case were the putatively offending statutes applicable to both private and public actors; they singled out State governments for special responsibilities. Although the State challengers did not succeed in either case, the decisions did provide some recognition that the Tenth Amendment restricted Congress' power to issue direct orders to States pursuant to the commerce power.

A trade association initiated the *Hodel* litigation¹⁹⁴ to restrain the Federal Surface Mining Act's imposition of significant new costs on "steep-slope" strip mining. The Act required mining companies to return their sites to "approximate original contour"¹⁹⁵ and not to dump refuse material in downslope gullies,¹⁹⁶ requirements some companies found prohibitively expensive. Plaintiffs contended the regulatory system violated numerous constitutional provisions, including the Tenth Amendment as interpreted and applied by *National League of Cities*. The Court was not persuaded, noting that the Act's affirmative obligations fell exclusively on private actors, well within the commerce power.¹⁹⁷

With regard to the provisions addressed to States alone, the Court had no difficulty concluding the Federal act was a prototypical conditional preemption statute. It did not compel a State to regulate surface mining but if a State chose to do so (or wanted to continue that activity), the Act mandated the State to conduct its regulatory program in a manner consistent with minimum Federal standards. If it did not, it would be preempted from the field, relinquishing surface mining regulation to an agency of the Federal government. The Court specifically ruled that the threat of preemption, even in an arena traditionally entrusted to the States under their police powers, did not offend the Tenth Amendment.¹⁹⁸

Hodel may have initially appeared to undermine States' interests in reinvigorating the Tenth Amendment because it upheld conditional preemption even under the newer, stricter standards of *National League of Cities*. But in assessing whether the Federal regulatory scheme was constitutionally permissible, the Court emphasized that the statute did not "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a Federal regulatory program."¹⁹⁹ The Court contrasted the Surface Mining Act

194. Virginia later intervened. *Hodel*, 452 U.S. at 273.

195. 30 U.S.C. §§ 1265(d)(1)-(d)(3) (1988).

196. 30 U.S.C. § 1265(d)(1) (1988); see *Hodel*, 452 U.S. at 273.

197. *Hodel*, 452 U.S. at 289-93.

198. *Id.* at 289-91.

199. *Id.* at 288 (citations omitted).

with the regulations the Environmental Protection Agency had promulgated to enforce the Clean Air Act,²⁰⁰ which three circuits had ruled unconstitutional intrusions into the reserved powers of the States.²⁰¹ The circuits had held that the nation's commerce power did not extend so far as to permit the EPA to compel States to implement and enforce a Federal regulatory program.²⁰²

In the Term immediately following *Hodel*, the Court faced a more difficult case regarding the reach of the commerce power into State government. *Federal Energy Regulatory Commission v. Mississippi*²⁰³ tested the constitutionality of a Federal regulatory program arguably far closer to the line the circuits held to have been crossed by the EPA.²⁰⁴ Portions of the Public Utility Regulatory Policies Act of

200. 42 U.S.C. §§ 7401-7671 (1988).

201. See *Hodel*, 452 U.S. at 288-89 (citing *EPA v. Brown*, 431 U.S. 99 (1977); *Maryland v. EPA*, 530 F.2d 215, 224-28 (4th Cir. 1975), *vacated and remanded sub nom.*; *District of Columbia v. Train*, 521 F.2d 971, 990-94 (D.C. Cir. 1975), *vacated and remanded sub nom.*).

202. The regulations at issue imposed affirmative obligations upon several States to adopt vehicle inspection and maintenance programs and to require the retrofit of certain classes of vehicles with pollution control devices. The following language from the D.C. Circuit decision in *Train* is representative of the courts' holdings:

[T]he [EPA] Administrator, in the exercise of federal power based solely on the commerce clause, cannot against a State's wishes compel it to become involved in administering the details of the regulatory scheme promulgated by the Administrator. For example, the attempt to require the state to "establish" . . . retrofit programs . . . is an impermissible encroachment on state sovereignty and goes beyond "regulation" by the Congress. It seeks, under the guise of the commerce power, to substitute compelled state regulation for permissible federal regulation. If the federal government wants to impose a program under federal authority, it is limited by the restrictions applicable thereto. . . .

In essence, *the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program* against the owners of motor vehicles. . . . Under the regulations here, the states are to function merely as departments of the EPA, following EPA guidelines and subject to federal penalties if they refuse to comply or if their regulation of vehicles is ineffective. We are aware of no decisions of the Supreme Court which hold that the Federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.

Train, 521 F.2d at 992 (emphasis added).

When these three cases reached the Supreme Court, the Solicitor General underscored the constitutional limitation. In his brief on behalf of the Federal parties he disavowed "any power to compel the State to carry out its governmental responsibilities" as by "direct[ing] the State to adopt laws and regulations . . . that comply with" federal law. With this Federal concession, the Court held it had little choice other than to dismiss the appeal. *EPA v. Brown*, 431 U.S. 104 (1977) (vacating the judgment and remanding for consideration of mootness).

203. 456 U.S. 741 (1982).

204. See *supra* note 201.

1978²⁰⁵ required State utility commissions to consider whether to adopt and enforce under State law a dozen separate and highly detailed Federal standards. It also minutely prescribed various procedural requirements that the State agency was to follow in any proceeding relating either to these standards or to electric utility rates generally. The Court found none of the mandates offensive to the Tenth Amendment because the State was free to relinquish the regulatory field rather than regulate according to congressional directives. Having fit the challenged act within the conditional preemption model, the conclusion of constitutionality easily followed.²⁰⁶

Justice O'Connor, however, was not persuaded by the Court's reasoning. Joined by two others, she advanced propositions foreshadowing the approach of her majority opinion in *New York*. She contended:

State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and Federal statutes define the boundaries of that domain, they do not harness State power for national purposes.²⁰⁷

Plainly, Justice O'Connor would have enunciated a bright-line rule to govern this and future cases: the Tenth Amendment bars the Federal government from issuing orders to State governments that require them to enact or implement Federal law.²⁰⁸ She urged that the State governments' formal ability to exit the regulatory field rather than

205. Pub. L. 95-617, 92 Stat. 3117 (codified at various parts of the United States Code). The State of Mississippi challenged the constitutionality of the Act under both the Tenth Amendment and the Commerce Clause. All Justices agreed that the Act presented no Commerce Clause problems. *FERC*, 456 U.S. at 753-58.

206. *FERC*, 456 U.S. at 758-71.

207. *FERC*, 456 U.S. at 777 (O'Connor, J., dissenting). Though more vigorously rhetorical, the dissent generally restates the *Train* court's view. See *supra* note 202. Ultimately, Justice O'Connor argued that the Act at issue in *FERC* violated each of the criteria of the *National League of Cities-Hodel* framework. *FERC*, 456 U.S. at 781 n.8.

208. The *FERC* majority cited *Testa v. Katt*, 330 U.S. 386 (1947), as authority for the Federal government's power to issue binding orders to State governments. The majority generalized from the legitimacy in *Testa* of enlisting the State judiciary to serve national goals (through enforcing Federal law) to the broader principle that the Federal government can require such service from any branch of State government. *FERC*, 456 U.S. at 762-63. While Justice O'Connor responded to the majority's citation of *Testa*, see *FERC*, 456 U.S. at 784-85 (O'Connor, J., dissenting), she failed to recognize any distinctions between the Constitution's treatment of different branches of State government. It is true that, owing to the Supremacy Clause, the Constitution does directly attempt to "harness" the power of one branch of State government—the judiciary—in service of national objec-

comply with the Federal mandate did not cure the predicate constitutional violation when the option to exit was in fact largely illusory.²⁰⁹ Though this latter point was not adopted in *New York*, the Court did approve the bright-line rule Justice O'Connor fashioned over one decade ago.

C. *New York's* Import

The holding in *New York* validated the States' argument that the Federal government's reach had exceeded its constitutional authority. Moreover, it revived the justiciability of the Tenth Amendment, thus permitting the courts to forestall such Federal excesses. No longer could the courts view the Federal commerce power as virtually limitless; one constraint was now recognized and enforceable.

The statute at issue, the Low-Level Radioactive Waste Policy Act, included a broad and unambiguous regulatory directive to State governments: "Each State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste."²¹⁰ The State of New York contended that the statute as a whole was a Federal command for the States to undertake regulatory responsibility for a particular matter in a particular way. The Court ducked this facial constitutional attack and construed the statute in a manner that permitted it to avoid striking down the statute as a whole.²¹¹

tives. But there is no basis for generalizing from one branch to all, especially in light of larger federalism values.

209. *FERC*, 465 U.S. at 781-84. Even the majority agreed that in the instant case "it may be unlikely that the States will or easily can abandon regulation of public utilities to avoid [the Act's] requirements." *Id.* at 767. Justice O'Connor did not clarify whether the realistic availability of exit from a regulatory field might change her analysis; such an option was, in any event, not present in the Act.

210. 42 U.S.C. § 2021c(a)(1)(A); *see also New York*, 112 S. Ct. at 2425.

211. The asserted basis for its approach lay in the settled interpretive rule directing courts faced with two plausible readings of a statute, one constitutional and one arguably not, to interpret the statute in a manner designed to avoid deciding the constitutional question. *New York*, 112 S. Ct. at 2425 (citing *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). *Cf. Gregory v. Ashcroft*, 111 S. Ct. 2395, 2403 (1991) (invoking plain statement rule to avoid constitutional question). Although hard evidence is lacking, there are intimations in Justice O'Connor's discussion that she may have been sympathetic to the State of New York's claim that the statute as a whole was ultimately not a set of incentives from Congress to the States but in fact a direct command. Perhaps especially telling in the statute is the absence of any default mechanism to achieve Federal control of low-level radioactive waste disposal where States failed to comply. No such default is necessary where the penalties prescribed leave the States virtually no option but to comply. It may be that the Court decided to invoke the prudential interpretive rule and not hold the entire statute unconstitutional so that it could approve at least part of the LLRWPA and thus not cripple the interstate effort to resolve the LLRW problem. To reach this policy objective, however, the Court may have had to side-

Nevertheless, the *New York* Court unequivocally announced that the power to regulate commerce does not confer upon Congress the power to issue direct orders to the States to employ their regulatory powers in service of Federal goals.²¹² The opinion pervasively underscored this point, mentioning some version of it a dozen times.²¹³ Applying this principle, the Court ruled that the take-title provision was unconstitutional. By characterizing the other two provisions as according States the option of participating in the Federal program, but not compelling them to do so, the Court concluded that these provisions were properly analyzed under the spending power.²¹⁴

1. *Justiciable Claims*

What, then, conduces to raise a justiciable Tenth Amendment claim? One type of claim arises from a Federal legislative command that States employ their legislative or executive branches in a manner designed to facilitate Federal regulatory objectives. The other type of Tenth Amendment issue arises when any Federal regulatory program

step the mandatory nature of the major statutory phrase requiring “[e]ach State [to be] responsible for providing . . . for the disposal of . . . low-level radioactive waste.” 42 U.S.C. § 2021c(a)(1)(A).

212. See *New York*, 112 S. Ct. at 2428. The import of this proposition for cases such as *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1992), is unclear but will undoubtedly be faced in coming years.

213. See *New York*, 112 S. Ct. at 2420 (“Congress may not simply ‘commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”) (citation omitted); *id.* (noting that “‘this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations’”) (citation omitted); *id.* at 2421 (distinguishing a prior case, where “[t]here [wa]s nothing in [the statute at issue] ‘directly compelling’ the States to enact a legislative program’”) (citation omitted); *id.* (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”) (citations omitted); *id.* at 2423 (“Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”) (citations omitted); *id.* (“Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.”); *id.* at 2428 (holding unconstitutional “federal action [that] would ‘commandeer’ state governments into the service of federal regulatory purposes”); *id.* (noting the unconstitutionality of statutes that “present a simple command to state governments to implement legislation enacted by Congress”); *id.* (noting the unconstitutionality of a statute that “commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program”) (citation omitted); *id.* at 2429 (“[T]he Constitution simply does not give Congress the authority to require the States to regulate”); *id.* at 2430-31 (“[T]he Framers did *not* intend that Congress should exercise [the commerce] power through the mechanism of mandating state regulation”); *id.* at 2435 (“The Federal Government may not compel the States to enact or administer a Federal regulatory program.”)

214. See *infra* notes 223-32 and accompanying text.

compels State government involvement by offering to the State an ephemeral choice between two options: either pursue the federally desired involvement, or undertake an alternate activity that Congress is not constitutionally empowered to compel of the States. These techniques, the Court instructed, have the effect of conscripting State governments' resources for national purposes and subordinating them to national objectives. The Court feared that unless halted, Congress would convert the States into mere bureaucratic offices for the national government, and strip them of the ability to be effective republican governments in their own right.²¹⁵ This republican role of the States, in service both to their constituencies and to the nation, which depends on their efficacy in this role,²¹⁶ constitutes part of the core values and activities protected by the Tenth Amendment. The *New York* Court also pointed to the promotion of political accountability as a constitutionally cognizable value, fostered by the Tenth Amendment principle and safeguarded by its justiciability.²¹⁷

For a justiciable Tenth Amendment claim to arise, a State must be presented with either (1) a direct Federal order compelling it to engage in regulatory activity that is beyond Congress' Article I enumerated powers to issue and that is not an otherwise permissible incentive to regulate in accordance with congressional objectives,²¹⁸ or (2) a set of regulatory options from which States are ordered to choose at least one, where all options are beyond the enumerated powers of Congress to compel through a direct order to a State.²¹⁹ Presenting States with a "choice between two unconstitutionally coercive regulatory techniques is no choice at all."²²⁰

2. *Permissible Incentives*

What are the otherwise permissible "incentives" to regulate in accordance with Federally defined objectives? This question requires assessment of the boundaries of the spending power.²²¹ The Court has long held that the scope of subjects for which Congress can appropriate money is not delimited by its enumerated powers.²²² *New York*

215. See *supra* note 213.

216. *New York*, 112 S. Ct. at 2421, 2431; see also Andrej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 380-414.

217. *New York*, 112 S. Ct. at 2432.

218. See *id.* at 2425, 2428-29.

219. *Id.*

220. *Id.* at 2428.

221. U.S. CONST. art. I, § 8, cl. 1.

222. See, e.g., *U.S. v. Butler*, 297 U.S. 1 (1936); *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937). See generally Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988);

did not disturb this point. Inquiring into the conditional grant program's permissibility,²²³ the *New York* Court did not traverse any new ground, but simply rehearsed the summation of principles presented in *South Dakota v. Dole*.²²⁴ As in *Dole*, the *New York* Court underscored the deferential nature of the inquiry and stated four independent requirements for validating a congressional spending program: (1) it must be in pursuit of the general welfare; (2) it must unambiguously state any conditions governing the States' receipt of funds; (3) its conditions, if any, should be related to the Federal interest in particular national projects or programs; and (4) its conditions must not transgress any independent constitutional bar.²²⁵

The primary reason that *New York* did not generate further gloss on this inquiry is attributable to its plaintiffs, who did not question the *Dole* requirements for a valid conditional Federal grant.²²⁶ Rather, they raised the esoteric question whether the release of trust funds held in escrow for the States pursuant to an act of Congress could properly be evaluated as a conditional grant under the spending power.²²⁷ The Court's cursory answer to the States' query may have been justified, but it leaves untouched certain questions about the outer reaches of the spending power authorization to provide conditional grants to states.²²⁸

3. *Limiting Garcia*

Thus, while remaining relatively sterile regarding the outer limits of the spending power, *New York* generates important new Tenth Amendment principles which seem to undermine *Garcia*. Two distinct principles of *Garcia* and its offspring, *South Carolina v. Baker*,²²⁹ have been circumscribed. First, the supposed nonjusticiability of the Tenth Amendment has been qualified: where a State seeks to question a direct order from the Federal government to use its purse or personnel in a Federally defined manner to serve Federal regulatory goals, a

Kaden, *supra* note 6; Rosenthal, *supra* note 6, at 112-13; ROTUNDA & NOWAK, *supra* note 93, § 5.7.

223. *New York*, 112 S. Ct. at 2425-26.

224. 483 U.S. 203 (1987).

225. *New York*, 112 S. Ct. at 2426 (citations and quotations omitted).

226. *Id.*

227. *Id.*

228. These questions are explored in Part III, *infra*.

229. 485 U.S. 505 (1988).

justiciable Tenth Amendment claim will be stated.²³⁰ Importantly, however, other conceivable types of Tenth Amendment claims are not necessarily rendered justiciable by this ruling. The Court's second limitation of *Garcia* underscores this point. Congressional enactments ordering affirmative State conduct can be bifurcated. Those that attempt "to subject State governments to generally applicable laws"²³¹ apparently will continue to be governed by *Garcia* principles, perhaps even as to justiciability. Only the other type of enactment, Federal acts which seek to subject States to orders not having general applicability to other entities and individuals, are addressed by *New York*.²³² The continuing vitality of this bifurcation is a necessary condition if State government employees are permissibly covered by the provisions of the national health reform proposals.

D. *New York's* Deficiencies

With the *New York* Court's ruling in view, we now have the basis for assessing its implications for the pending health care proposals in Congress. Before turning to that subject in Part III, however, a few additional words on the *New York* opinion are necessary. The decision in *New York* has been greeted with such significant criticism that arguments based on *New York* may not have a stable foundation.²³³ The facile response is that *New York* is now the law, and the health reform proposals should be alert to that fact. The constitutional framework established by *New York* is, of course, the basis for the evaluation in Part III of the various health reform plans.

This rejoinder is insufficient, though, because, were the issue presented, the Court might re-examine *New York* in the context of a challenged health reform program.²³⁴ A more sophisticated defense

230. This outcome should satisfy in part the concerns stated by scholars including William Van Alstyne, Martin Redish and Robert Nagel. See Van Alstyne, *supra* note 13; Redish & Drizin, *supra* note 171; Nagel, *supra* note 170.

231. *New York*, 112 S. Ct. at 2420.

232. As noted earlier, see *supra* note 20, this principle is ironic. The more the Federal government treats States as if they were indistinguishable from private commercial entities rather than having a distinct constitutional status, the more likely the Federal law will be held a valid exercise of Federal power.

233. See Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577 (1994); Martin H. Redish, *Doing it with Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593 (1994); Richard Briffault, *Federalism and Health Care Reform: Is Half a Loaf Really Worse Than None?*, 21 HASTINGS CONST. L.Q. 611 (1994).

234. This is unlikely to occur in the near future, because the only Justices to announce their retirement since *New York* was issued, Justices Blackmun and White, dissented in pertinent part from the 6-3 decision.

of *New York* should cover two bases: the merits of the substantive conclusion and the means by which the Court reached it. Because this Article is primarily dedicated to evaluating the constitutionality of the health reform plans, an extended justification here would distract from larger goals. This Article does suggest, however, that while the Court's substantive result is correct, its analysis in *New York* is errant. This Part identifies a few core methodological deficiencies in the Court's opinion and suggests why alternative approaches nevertheless permit one to join in the Court's conclusion.

1. *Underlying Problems*

The most glaring problem lies in the opinion's substitution of repetitious assertions for reasoned legal argument. For instance, the opinion restates some version of its central principle, that the Federal government's power does not extend to compelling States to implement Federal regulatory programs, a dozen times.²³⁵ Yet even for someone persuaded that the conclusion is constitutionally correct, the opinion is woefully thin in reasoning. The opinion bypasses an opportunity to present a powerful refortification of federalism.

If well-reasoned arguments were available,—and Justice O'Connor has shown herself easily capable of crafting them—what explains the neglect? The answer probably lies in the disparate jurisprudential commitments of the Justices. It is difficult, for instance, to explain why Justice O'Connor would expend considerable effort in *Gregory v. Ashcroft*²³⁶ to outline a functional justification for federalism only to reject such arguments as inherently unsound and beside the point one year later.²³⁷ Thus, the opinion fails to present persuasive reasons why, 200 years later, we should still recognize some type

235. See *supra* note 213 (quoting all versions of its principle). Often the reasoning appears circular; the holding is justified in terms that largely paraphrase the holding. See, e.g., *id.*

236. 111 S. Ct. 2395, 2404-05 (1991).

237. In *New York*, O'Connor wrote:

The benefits of this Federal structure have been extensively catalogued elsewhere . . . but they need not concern us here. Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of our devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution.

New York, 112 S. Ct. at 2418 (citations omitted). This language might have been urged by another Justice, such as Justice Scalia, as a condition of joining the opinion.

The Court did rely on originalist justifications, writing that the Founders never intended the Federal government to issue orders directly to State governments requiring them to use their legislative powers to achieve Federal ends. *Id.* at 2418-19. This argument is reminiscent of *Hans v. Louisiana*, 134 U.S. 1 (1890), where the Court wrote that the very

of federalism as constitutional.²³⁸ That omission may unfortunately require the Court to intercede repeatedly on policy matters as critical as health reform. Had the Court properly utilized the opportunity presented by *New York*, it might have persuaded Members of Congress to avoid attempts to assimilate the budgets, personnel, and political agenda-setting of the State governments. Certainly, few pending health reform bills evidence a view of the States as potential partners to be enticed into a joint effort; they instead reflect a union more akin to a shotgun wedding.

2. The "Mirror Image" Fallacy

The *New York* opinion also handles precedent poorly. The signal example lies in the purported "mirror image" theory of Commerce Clause and Tenth Amendment interaction. The doctrinal approach to this interaction had been settled since *Darby v. United States*.²³⁹ Given that the Tenth Amendment is a residuary clause,²⁴⁰ the Court's practice was to assess whether the disputed Federal statute fell within

idea that Congress could issue such orders was sufficiently foreign to the understanding of the day that, were the power intended, it would have been specified plainly. *Id.* at 18-19.

The Court could have adduced additional historical support for its holding in the records of the Constitutional Convention, where a congressional veto over State laws was discussed and rejected several times in favor of the Supremacy Clause. See S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 861-74 (1992). The power to veto State law is neither as broad or intrusive to State governments as the ability to issue affirmative orders to their legislatures or executives; the former is reactive, the latter proactive and potentially possessory.

The Court underscored its originalist and textual arguments with an empirical point. The historical constitutional tradition has never suggested that Congress possessed the challenged power. Indeed, the Court found that the little existing authority on the question directly supported its conclusion. See *New York*, 112 S. Ct. at 2421 (citing *Coyle v. Smith*, 221 U.S. 559 (1911) (ruling Congress lacked the power to force a State to move its State capital as a condition of statehood)).

Even being faithful to its own originalism, the Court should have acknowledged the lack of definitive historical and textual support for its conclusion. Because the Court was answering a question of first impression, one on which the Constitution's text speaks ambiguously at best, the historical and textual arguments the Court advanced only confirm what we already know: that there is some evidence—not necessarily conclusive—to support the Court's view.

238. Sometimes the Court asserts a connection between some recognized constitutional value and federalism without arguing for their interrelation. See *New York*, 112 S. Ct. at 2422-23, 2431 (asserting that federalism was designed to secure the peoples' liberties and the republic itself).

239. 312 U.S. 100 (1941).

240. "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.

the scope of a delegated power.²⁴¹ The Court then analyzed the question as merely a Commerce Clause challenge; no special criteria applied simply because federalism values—whether implied from general constitutional structure or embedded in the Tenth Amendment—were implicated. If a Federal act were a valid exercise of the commerce power, the Tenth Amendment inquiry ended concurrently. As a residuary provision, the Amendment protected as powers reserved to States and individuals all those not delegated to the nation; nothing further was left to adjudicate as a matter of the Tenth Amendment.

In *New York*, however, Justice O'Connor modified this inquiry in a subtle but critical manner. She contended that, in cases adjudicating "the division of authority between Federal and State governments," it matters not whether the Court inquires "whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I" or "whether an Act of Congress invades the province of State sovereignty reserved by the Tenth Amendment."²⁴² According to the Court, the two inquiries "are mirror images of each other": "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the states; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."²⁴³

Having laid this foundation, the Court next determined that the Tenth Amendment, like the First and Fifth Amendments, subjects even the expressly delegated powers of Congress to certain constraints. Thus, it frames the inquiry as "whether an incident of State sovereignty is protected by a limitation on an Article I power."²⁴⁴ Given that the Tenth Amendment is expressly structured as a residuary clause, it is at least curious that the Court should be deciding what affirmative content is contained within the Amendment and then employing that conception to limit Congress' commerce power.

Through the use of its "mirror image" theory, the Court both turned the inquiry on its head and obscured the import of its move. The Tenth Amendment by its terms reserves to the States only those powers that have not been granted to the nation. It seems beyond

241. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

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

243. *Id.* (citations omitted).

244. *Id.* at 2418.

cavil that the first step in the inquiry, if proceeding textually, is to ascertain whether the Federal act falls within a delegated power. But the Court represented that the inquiry can proceed from either direction without in any way affecting the conclusion. The Court thus implicitly denied that it has transformed the analysis. Yet the effect was to reconstruct the Tenth Amendment to embrace and enforce a judicially created content that placed affirmative limits on national powers, including those expressly delegated.²⁴⁵

3. *Alternatives*

To revive federalism as a fundamental constitutional structure with operative, judicially enforceable content, the Court might have selected one of at least two alternative approaches. Under one, the Court could have undertaken a Commerce Clause analysis and applied time-honored principles in a new manner. The Court still could have stricken the take-title provision without appearing to violate the residuary approach embedded in the Tenth Amendment. Under the other, the Court could have derived its holding from implied structural principles of federalism. Both routes have their difficulties,²⁴⁶ but are not as vulnerable to criticism as that chosen by the Court.

a. Commerce Clause

Chief Justice Marshall originally provided the broad and often quoted standard for determining the validity of an exercise of the commerce power in conjunction with the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the [C]onstitution, and *all means which are appropriate*, which are plainly adapted to that end, which are not prohibited, *but consist with the letter and spirit of the [C]onstitution*, are constitutional."²⁴⁷ A century later, in another case concerning the interaction of the Tenth Amendment and the Commerce Clause, the Court summarized national power as embracing "all means for the exercise of a granted power which are *appropriate* and plainly adapted to the permitted end."²⁴⁸

245. As apparent from his article in this issue, see Redish, *supra* note 233, both the inversion of the Amendment's text and the ultimate impact on delegated national powers troubles insightful textualists such as Professor Redish.

246. Because the ultimate purpose of this Article is to assess the implications of the Court's new federalism jurisprudence for national health reform, presentation and assessment of the Court's approach are perforce abbreviated. For a more sustained evaluation of the deficiencies in *New York*, see the responsive commentaries by Professors Choper, Redish and Briffault *supra* note 233.

247. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).

248. *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941) (emphasis supplied).

The interpretive pressure point lies in determining what are “appropriate” means.

In exercising this limitation, the Court need not have stated the range of means Congress may have employed. It only needed to demarcate what lies beyond the constitutional boundary via careful explication of “the letter and spirit of the Constitution.” The *New York* opinion offered several salient points here. The commerce power authorizes Congress to regulate commerce; it does not authorize or contemplate national power compelling State governments to regulate commerce according to nationally prescribed norms. Thus, Federal laws that seek, “under the guise of the commerce power, to substitute compelled State regulation for permissible Federal regulation”²⁴⁹ are not employing appropriate means. Such means are outside both the letter and spirit of the Constitution, with reference to the purposes of federalism and the promise of republican State governments.²⁵⁰ The opinion’s concerns for effective representation and political accountability at both State and national levels could have been more powerfully developed and presented as constitutional values that justify ruling this small set of congressional strategies unconstitutional. Congress could have regulated, and even barred, the generation of any new LLRW—an article in commerce—under the commerce power;²⁵¹ it could have built national disposal facilities, created certain incentives for States to undertake regulatory programs consistent with Federal goals, or undertaken many other strategies. But the means available for regulating commerce have limits imposed by other aspects of the Constitution, limits that were exceeded by the take-title provision.

b. Structural Federalism

In addition to the Commerce Clause alternative, the Court could have further developed the functional requirements of the structural federalism implied in the Constitution as a whole, which it began elaborating in *Gregory*.²⁵² The Court’s authority to protect the Constitution properly includes the defense not only of individual rights as

249. *District of Columbia v. Train*, 521 F.2d 971, 992 (1975). The opinion continued: “If the Federal government wants to impose a program under Federal authority [to regulate commerce], it is limited by the restrictions applicable thereto.” *Id.*

250. See *infra* text accompanying notes 256-60 for further explication of republican constitutional values.

251. See *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

252. See generally *Gregory*, 111 S. Ct. 2395.

traditionally conceived but also of principles such as federalism.²⁵³ From its earliest days, the Court has not considered itself bound by a strict textualism bordering on literalism, nor should it. It has long recognized that “[b]ehind the words of the constitutional provisions are postulates which limit and control.”²⁵⁴ Yet the postulate of federalism as an operative, enforceable structure and set of values has largely remained unexplored during the Constitution’s third century.²⁵⁵ The reasons for this lack of development are complex, ranging, for instance, from the fear federalism might be used to restrict individual liberties to a desire to permit the constitutional structure to continue to evolve with the times. And so long as States *exist* in some fashion, nationalists can argue that federalism is alive and well, and does not require the Court’s intrusion into the political decisions of Congress.

But these notions of federalism—minimalist federalism—are formalistic. Federalism was fashioned to achieve certain types of goals and objectives; it should be understood in functional terms.²⁵⁶ These understandings of federalism should not be restricted to the antique, 200-year-old *realpolitik* recognition that no national government could have been ratified if it failed to provide for the continuing existence of the States and their retention of significant powers. Rather, we should

253. See, e.g., ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES* 60-83 (1989); Paul Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

254. *Monaco v. Mississippi*, 292 U.S. 313, 318 (1934). Many if not most of Chief Justice Marshall’s opinions actively apply this principle.

255. By contrast, individual rights, including implied constitutional rights of privacy, reproductive freedom, and minimum habitability, have received an abundance of attention. For discussion of structural/functional constitutional argumentation, see PHILIP BOBBITT, *CONSTITUTIONAL FATE* 74-92 (1982); CHARLES L. BLACK JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* *passim* (1969). A noteworthy use of structural/functional argument in the federalism context may be found in Melvyn Durchslag, *Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?*, 43 DePaul L. Rev. (forthcoming 1994). Regarding the Tenth Amendment, see Abrams Note, *supra* note 170.

256. Functionalism is not inimical to the positivism endorsed by the majority of the Court’s current members. No less auspicious a positivist than H.L.A. Hart advocates judicial recognition of the values and purposes behind a law in determining its proper interpretation.

[T]o be rational, a judicial decision must be made in the light of some conception of what ought to be, [and] the aims, the social policies and purposes to which judges should appeal if their decisions are to be rational, are themselves to be considered as part of the law. . . .

H.L.A. Hart, *Legal Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). Professor Erwin Chemerinsky argues that, indeed, values-based jurisprudence has been the primary method of American constitutional jurisprudence and that we must recognize that a value-free interpretive method is impossible to achieve or practice. See ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* 133-38 (1987).

endeavor to understand federalism as a value and structure within which other constitutional values and objectives—both historic and contemporary—can be safeguarded.

Why was it a political impossibility to abolish the States in 1787 and why is it at least imprudent to permit Congress to tread on that path today? Because 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 power to decide policy resides in one national capital. Practical problems abound, ranging from the cumbersome size of the national political agenda, to the effort required for citizens or small groups to gain the nation's attention, to the concern that certain regions' political power would dwarf others' and lead to neglect of the latter's interests, to the fear that concentration of power would ineluctably lead to grave abuses against individual and national interests.

The division of power and responsibility wrought by the Constitution under the rubric of federalism is designed to enhance and, indeed, guarantee the republican process, which in turn minimizes the otherwise persistent political externalities outlined above. These process values include the opportunity to participate in political affairs, to have one's participation *matter*, to forge communities that inculcate particular sets of values and seek ends different in some respects from other communities', and to fashion and push for acceptance on a national basis certain public values, objectives, and programs. Federalism was inspired by commitments to a dynamic political society; it provides a structure by which, even in today's complex world, these process values can be achieved while giving wide berth to the nation's needs as defined by the President and the Congress.

All other justifications for federalism are traceable to the basic commitment to actualizing republican process values, whether they argue greater diversity of cultures, greater innovation in government, or reduced threat of tyranny. This is the essential link between federalism and individual rights to which Justice O'Connor adverted, but which she did not develop; the notion of individual rights as exhausted by the First through Eighth and Fourteenth Amendments simply misses a critical group of rights. Indeed, we may term these process values protected by federalism "meta-constitutional rights" because they provide the grounding from which the movements seeking to defend existing constitutional rights or to expand them must spring.²⁵⁷ If

257. See, e.g., *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

we truly desire to ensure that we will have enduring yet an evolving Constitution, one which can and will be responsive to the people²⁵⁸ during the next century and thereafter, then we must protect the structures which shelter and foster the people's dialogue with the public world.

Thus, the constitutional values most directly revealed in the Guarantee Clause²⁵⁹ actually underlie and inspire the entire document. In turn, the federalism reflected most directly, but by no means exclusively, in the Tenth Amendment is the structural mechanism by which these meta-constitutional values are secured. Understood in this manner, the Court's decision to enforce the Guarantee Clause's values via the Tenth Amendment is defensible if not overdue.²⁶⁰

But even accepting this functional understanding of the Constitution, can *New York* be justified? Is the take-title provision endangering any of these values or the Federal structure itself to such a degree that *New York's* precepts and boundaries are warranted? Clearly, without these boundaries, the integrity of representative State government would diminish markedly. Recall that, without *New York*, federalism structures and values are nonjusticiable; federalism can be traded away according to current expediency.²⁶¹ The combination of a nonjusticiable federalism and a constricted national budget leads to exactly the kinds of incursions into the State fisc and policy-making apparatus that pervade the pending health reform bills. Rather than define national goals and raise funds directly through its taxing power, with the attendant political costs, many of the plans seek to achieve national goals by pushing the costs onto the State governments. Both the States and their officials would bear the brunt of popular concern over raised taxes or slashed services caused by national orders. Though the explanation State leaders offer may be "the Feds made us do it," technically that would be a misstatement; the Federal government simply would have pilfered the State's coffers for its own projects and potentially left the cupboard bare for the State's projects and self-determined needs. Any justification that Congress and the

258. This thought contemplates both the formal amendment process and judicial "updating." Both methods begin with important political movements in their support. The Supreme Court simply cannot update constitutional principles, as per *Brown v. Board of Education*, 347 U.S. 483 (1954), without political support.

259. U.S. CONST. art. IV, § 4.

260. For a general discussion of republican values and their interrelation with federalism, see Hoke, *supra* note 13, at 701-14, and sources cited therein.

261. See CHEMERINSKY, *supra* note 256, at 29-30 (observing that constitutions are written to protect deeply held beliefs and values from the pressures of passing political, economic, or military expediency).

nation can engage in these actions would seem at best counterintuitive. Certainly the constitutional explanation would be long and involved, and ultimately unpersuasive.

The practical import of these incursions would be quite broad.²⁶² The States' personnel, fisc, and control over their political agendas would be greatly impeded, for presumptively, the Supremacy Clause would make liabilities to the nation take precedence over local objectives. Only the remainder would be left for the States to direct in accordance with their citizen's values and needs. The "our-personnel-are-your-personnel" rule might also chill State efforts to engage in experimentation with new programs. If new programs were fashioned, their personnel could be utilized by the nation, and the new program might also become the fodder for the latest Federal mandate.

Political accountability would also suffer because the legislative power of the State could be conscripted and directed by the nation, presumably either via Congress directly or via power delegated to a Federal administrative agency. Tracing the responsibility for an action undertaken by a State's government could become quite complex. Under the new regime State officials' accountability would not lie primarily to their constituents but would be divided between them and national administrators. Holding elected representatives at each level of government politically accountable to their constituents would be difficult if not impossible.

Political participation and its role in constructing individuals' commitment to their government would also be harmed by the new Federal incursions. As the information and other transaction costs at the national political level are being far greater than at the State and local levels, the consequence of the nation becoming the only political entity with real power to set goals and values will be that the range of persons engaged in direct participation (rather than through interest groups) will likely fall substantially. The *New York* Court properly seeks to ensure that the political structures by which effective participation can transpire continue to have integrity and power.

Thus, *New York's* transformation of the inquiry governing adjudication of Commerce Clause and Tenth Amendment interaction did not produce a troubling result. The Court, however, should have openly revised precedent rather than having employed illusions like the "mirror image." This analysis also suggests that revival of the

262. This differs with Professor Chemerinsky's view that the principles *New York* announces do not serve any of the traditional values of federalism. See CHEMERINSKY, *supra* note 256.

Tenth Amendment's justiciability is warranted and that rendering cognizable the Guaranty Clause's values and objectives via the Tenth Amendment is creative and justifiable. In light of the Tenth Amendment's importance, the Court correctly abjured a strict textualist approach. Moreover, the Court has refused to be so constrained elsewhere in constitutional interpretation. Finally, *New York's* identification of unfunded Federal mandates as problematic will open an array of litigation that legitimately forces Congress to revise members of notions of the States as little more than instruments to be employed for national projects.

III. Applications: The Constitutionality of the Health Plans' More Novel Forms of Interaction with State Governments

The pending health reform plans employ seven potentially problematic models of regulatory interaction with State governments. Congress' development of these strategies seems attributable, as suggested, to the Federal budget deficit and perhaps as well to the green light it perceived *Garcia* to have given for issuing Federal orders to the States.²⁶³

If the health reform proposals are an indicator, Congress does not appear to truly appreciate *New York's* reevaluation of Federal-State relations nor its renewed assertion of justiciability for some Tenth Amendment claims. Several models transgress the most unambiguous principles of *New York*. Others test the margins of both that case and the accepted breadth of the spending power. Though the outer reaches of these principles may remain somewhat murky, it seems the Court has fashioned the foundation for a body of manageable standards for adjudicating this genre of Tenth Amendment claims. This Part examines the constitutionality of each model of Federal-State interaction that the health reform bills advance.

A. Federal Regulation of Non-Federal Public Sector Employee Benefits

Many of the health care reform proposals have not directly addressed whether their provisions would include employees of State and local governments. The Clinton and Chafee plans, on the other hand, would clearly cover all employees. In particular, the President's

263. The LLRWPA, which *New York* ruled unconstitutional in part, was enacted in December 1985, just months after *Garcia* was decided.

plan emphasizes that all governmental employees, regardless whether Federal, State, or local, would be covered under its provisions.²⁶⁴ This mandate poses the question whether Federal legislation can require State governments to comply with the general requirements placed upon all employers, such as paying 80% of health insurance premiums.²⁶⁵ Does the Tenth Amendment bar this Federal mandate?

Despite the interposition of *New York, Garcia* clearly and correctly controls the outcome of this question. According to *New York, Garcia* did not find a Tenth Amendment obstacle to legislation under the commerce power where the legislation has general applicability to the private sector and has not singled out the States for special burdens.²⁶⁶ *New York* explicitly left this proposition untouched.²⁶⁷ Because the Clinton bill would compel all employers of a particular size to pay the same percentage of the employment benefit, treating State governments in the same fashion as private employers in virtually all respects,²⁶⁸ the mandate is permissible.

The Chafee bill requires all employers, including governments, to offer their employees insurance coverage and to handle the administrative overhead for payroll deductions.²⁶⁹ Again, because this mandate has general applicability to both the private and public sectors, it satisfies the Tenth Amendment under *Garcia*.

264. See HSA § 1001 (defining scope of Act's coverage); See also Clinton Description, *supra* note 1, at 7.

265. See HSA §§ 6121-6122.

266. *New York*, 112 S. Ct. at 2420 (citing *Garcia*, 469 U.S. 528).

267. *New York*, 112 S. Ct. at 2420. In *New York*, the Court explained that the case did not require revisiting the holding in *Garcia* because the legislation at issue in *New York* was directed exclusively at the States and so did not impose obligations of general applicability. *Id.* Professor Chemerinsky has quite correctly argued, however, that despite this disclaimer some of the larger principles and underlying values of *New York* implicitly undermine *Garcia*. Erwin Chemerinsky, *Federalism as Constitutional Structure*, unpublished paper delivered to the Association of American Law Schools, Conference on Constitutional Law (June 16, 1993).

268. The exception is that States are barred from forming an exclusive insurance purchasing cooperative ("corporate alliance"), though other large employers are permitted to do so. The plan excludes all governmental employers other than the United States Postal Service from the provision permitting large employers to form their own exclusive alliances. See HSA § 1311(b)(2). Because State and Federal governments are treated in the same fashion, it is unlikely that this singular exception will support a finding that the Clinton plan does not subject State governments "to the same legislation applicable to private parties." *New York*, 112 S. Ct. at 2420.

269. S. 1770 § 1004.

B. Untethered Regulatory Command

Under this model, the Federal government commands States to institute a particular regulatory program, but if a State does not comply, the Federal government does not institute the program within the State. The Federal government's command to States to regulate is further unaccompanied by either financial incentives for compliance or penalties for noncompliance. Thus, under this model, the Federal government employs neither of the two constitutional methods for coaxing States to regulate in a specific manner.²⁷⁰

1. Use of the Untethered Regulatory Command

The Michel bill employs this model in one area, the creation and enforcement of "risk management" programs.²⁷¹ States are simply ordered, as a matter of Federal law, to use State law to compel health care professionals' participation in a program designed to warn them and other State agencies, such as licensing boards, that particular practices may injure patients. The bill also requires States to compel insurers of health professionals to institute risk management programs as specified.²⁷² The bill does not specify a Federal default mechanism should a State not comply.

The Cooper bill also employs the untethered regulatory command. Unlike the Michel bill, which uses this model to achieve a tangential objective, Representative Cooper utilizes it to establish a

270. The two methods adjudicated as permissible under *New York* are conditional preemption and conditional grants. See *New York*, 112 S. Ct. at 2425-27. There may be other constitutionally permissible methods of inducing States to undertake certain actions that do not impair the integrity of State legislative functions. Under one such method, likely never to be adjudicated, a branch of the Federal government enunciates national goals and distributes ideas and information in their support, but does nothing more. For example, the proposed Gender Equity in Education Act, H.R. 1793, 103d Cong., 1st Sess. (1993), seeks to end sexual harassment at all educational levels. Yet while the Act permits schools to utilize Federal money otherwise obtained for this instructional purpose, it does not require or separately finance this use. See Catherine S. Manegold, *Bill Seeks Equality of Sexes in School*, N.Y. TIMES, Feb. 13, 1994, at 34.

271. See H.R. 3080, 103d Cong., 1st Sess. § 2043 (1994) (emphasis added):

(a) Requirements for Providers. — *Each State shall* require each health care professional and health care provider providing services in the State to participate in a risk management program to prevent and provide early warning of practices which may result in injuries to patients or which otherwise may endanger patient safety.

(b) Requirements for Insurers. — *Each State shall* require each entity which provides health care professional or provider liability insurance to health care professionals and health care providers in the State to —

(1) establish risk management programs

272. *Id.*

mechanism central to his reform plan. The Cooper “Managed Competition” bill relies on the creation of insurance purchasing cooperatives to reform the health insurance market and drive down costs of insurance. But his bill commands States to set up the purchasing cooperatives without the plan employing either financial inducements or the threat of preemption.²⁷³ Even though the cooperatives constitute the pivotal part of his plan, Representative Cooper does not specify a Federal default mechanism in case a State does not comply. This omission suggests that the Cooper bill conceives of State governments as subject to direct orders by the Federal government mandating that they undertake a particular Federal regulatory scheme as a matter of State law.

2. *Objections to the Untethered Regulatory Command*

To avoid ruling directly on the constitutionality of an untethered regulatory command, one approach the Court takes is to construe the offending provision as a request rather than a command.²⁷⁴ Under this approach, the choice available to the State is either to accede to the Federal request or to exit the field. The Court has previously upheld such a choice because it does not “directly compel[]’ the State[] to enact a [Federal] legislative program.”²⁷⁵ *FERC* ruled this a permissible choice to present to States even where the Federal government “has failed to provide an alternative regulatory mechanism to police the area” in the event a State exits the field.²⁷⁶

New York, however, repeatedly emphasizes that the Federal commerce power does not encompass direct orders to State governments commanding them to utilize their governmental powers in service of Federal legislative objectives.²⁷⁷ Federal statutes containing such orders do not merely misconceive the scope of the commerce power; they also exhibit a conception of State governments not countenanced by the Constitution. Such statutes’ commands are predicated upon the erroneous view that State governments may be ordered about like subordinates, and that their budgets and personnel are fair game for the national legislature.

273. H.R. 3222, 103d Cong., 1st Sess. § 1101(b)(1) (1994) provides: “Each State shall provide, by legislation or otherwise, for the establishment by not later than July 1, 1994, as a not-for-profit corporation, with respect to [each geographic area] a health plan purchasing cooperative”

274. *FERC*, 456 U.S. at 765.

275. *Id.*

276. *Id.* at 766.

277. *See supra* note 213.

Untethered regulatory commands violate not only this core *New York* principle but also one of the central rationales for its recognition. Approving this type of command transgresses the constitutional value of political accountability. Arguably, the State's option to exit the field rather than regulate according to Federal standards is an "alternative" which, under *FERC*, would render an untethered regulatory command constitutional.²⁷⁸ But the "option" of exit is illusory—and in many more fields than the utility rate-setting at issue in *FERC* or the regulation of medical professionals. Because no Federal regulatory default exists in case of State nonconsent, a State's "choice" to exit would lead to a regulatory vacuum having significant public policy and perhaps public safety consequences.²⁷⁹ Should this occur, whom would the public properly hold accountable? The Federal government would deny responsibility, asserting the choice was the State's. The State would also deny responsibility, asserting that the Federal government sought to impose huge costs on the State's citizenry, who could only be protected by the State's exit. Thus, each government would be able to blame the other, and political accountability, as well as the public interest, would suffer.²⁸⁰

If the Court declines to interpret untethered regulatory orders as implying an alternative for the State to exit the regulatory field, Congress would effectively be required to specify this option explicitly, along with any alternatives a State might have other than regulating according to Federal standards. Such a rule would promote political responsibility in a variety of ways, analogous to the accountability and precision that arise from requiring the Federal government to state explicitly any conditions on Federal grants.²⁸¹ Indeed, it would be tantamount to a rule recognizing conditional preemption only where Congress has stated its intent explicitly—which would not be particularly exceptional.²⁸²

This recommendation is warranted for an additional reason: the Court will presume "Congress did not intend to preempt State law"

278. *FERC*, 456 U.S. at 766.

279. See, e.g., Susan Foote, *Regulatory Vacuums: Federalism, Deregulation, and Judicial Review*, 19 U.C. DAVIS L. REV. 113 (1985); Hoke, *supra* note 13.

280. See *New York*, 112 S. Ct. at 2432.

281. Cf. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (requiring conditions on Federal grants to be stated explicitly).

282. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, *passim* (1992).

unless it does so explicitly.²⁸³ The *FERC* approach—implying from untethered regulatory commands an option for States to be preempted from and exit a regulatory field—runs directly counter to the preemption axioms the Court has repeatedly emphasized in recent years.

Thus, it is improper for the Court to manipulate an untethered regulatory command into an implied conditional preemption provision. Congress may not have considered the alternative of requiring a State to exit a field if it did not regulate according to Federal standards. Moreover, by definition, an untethered regulatory command provides no Federal regulatory default, so a Court's attempt to transmute it into a form of conditional preemption ineluctably generates a regulatory vacuum. By refusing to imply conditional preemption in such situations, and requiring Congress to state explicitly not only any Federal conditions to be met but also the preemptible field targeted if the State declines to meet the conditions, the Court can enhance the values of political accountability and follow its otherwise sound constitutional rules disfavoring judicial implication of preemption.

Applying this approach to the provisions using this model in the Michel and Cooper bills, neither would be saved, because under *New York*, courts will not imply a State option to exit the regulatory field. The offending Michel provision can likely be severed from the balance of the bill.²⁸⁴ But the Cooper bill employs the model to institute the pivotal portion of its reform plan. Because it cannot be severed from the bill,²⁸⁵ if enacted as written, it would properly be held facially invalid.

C. Command Plus Conditional Preemption

Under this model, the Federal government orders States to enact a regulatory program that adopts specified Federal standards. If the State does not comply, the Federal government implements the standards within the state, ousting the State from regulatory jurisdiction over the matter.

Conditional preemption alone is generally not problematic: “[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer

283. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190, 206 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).

284. See, e.g., *New York*, 112 S. Ct. at 2425-27.

285. See *id.*

States the choice of regulating that activity according to Federal standards or having State law preempted by Federal regulation.”²⁸⁶ The only serious question posed by this model is whether the inclusion of a proscribed command constitutionally taints the otherwise permissible conditional preemption.

Senator Chafee’s bill employs conditional preemption in two separate instances. The bill commands States to establish the regulatory system necessary to implement the Federal health reforms, specifying such tasks as certifying health plans if they satisfy Federal standards and enforcing the reform standards.²⁸⁷ If a State declines to accept the Federal role, or if its compliance lapses after agreeing to participate, the Secretary of HHS assumes the responsibilities that would otherwise be entrusted to the State. The bill also orders States to establish a medical malpractice ADR process that complies with one of the Federally specified formats stated in the bill, with the States to be preempted if they do not.

Senator Nickles’s bill is somewhat ambiguous on a critical point. The bill technically provides the preemption default of HHS “assum[ing] responsibility with regard to health insurance plans within the State” only for those States that were once in compliance with the Act.²⁸⁸ Thus, the bill could be interpreted to impose an untethered regulatory command,²⁸⁹ which would arguably violate Tenth Amendment principles.²⁹⁰ Because the Nickles bill envisions the Federal default element for “noncomplying” States, this analysis assumes the bill meant to include as “noncomplying” all States declining to comply with the command. Interpreted in this way, both the provision and the plan as a whole may survive a Tenth Amendment challenge.

The Michel bill indulges in conditional preemption in two core portions of the plan. Two provisions directly order the States to engage in certain regulatory activity; in each, States are ordered to sub-

286. *New York*, 112 S. Ct. at 2424. See also Rotunda, *supra* note 6.

287. See *supra* text accompanying notes 119-24.

288. Senator Nickles’s bill provides:

The Secretary [of HHS] periodically shall review each State regulatory program to determine if such program continues to meet and enforce the standards referred to in section 118. . . . If the Secretary makes a final determination that the State regulatory program fails to meet and enforce such standards, . . . the Secretary shall decertify such program and assume responsibility with respect to health insurance plans in the State.

S. 1743 § 117(b) (emphasis added). This provision immediately follows that commanding the States to “establish a regulatory program which meets the standards” delineated in a later section of the act. *Id.* § 117(a).

289. See generally *supra* text accompanying notes 270-85.

290. *Id.*

mit to HHS “a report on steps the State is taking to implement and enforce” Federal regulatory standards. The bill explicitly contemplates that State legislation will be required in some cases,²⁹¹ and the plan accords extra time for State legislatures to meet to enact the necessary laws.²⁹² Unlike the Nickles bill, the Michel bill explicitly provides for a Federal regulatory default in case of State noncompliance, whether at the outset or subsequent to prior compliance. If a State has been persistently noncompliant, the bill provides, the Secretary of HHS will assume responsibility “for the implementation and enforcement of [Federal] standards in the State as the Secretary determines to be appropriate.”²⁹³

The question, then, is whether the bills’ language commanding the States to engage in certain regulatory conduct according to Federal regulatory standards constitutionally corrupts the otherwise permissible conditional preemption structure of the bills. The most direct authority on this question is provided by *New York*, although it still fails to yield a clear answer to the question of taint. On the one hand, *New York* repeatedly emphasized that the Federal government’s commerce power does not extend to conscripting State governments in service of the national regulatory objectives.²⁹⁴ Commands to State governments, even if softened by language creating a Federal regulatory default, still bespeak “a fundamental misunderstanding of the role state governments play in our regulatory system.”²⁹⁵ Yet *New York* also employed an interpretive principle that permitted the Court to deny the literal import of statutory language apparently asserting a congressional power to conscript the State legislatures and administrators to perform Federal regulatory tasks. Instead, the Court read the putatively offending provision within the context of the statute as a whole.²⁹⁶ Thus, at a holistic interpretive level, a potentially problematic statute still can be fitted into the conditional preemption model.

291. The relevant language of H.R. 3080 § 1103(b)(1)(A) reads: “Each State shall submit to the Secretary, by the deadline specified in subparagraph (B), a report on steps the State is taking to implement and enforce the consumer protection standards with respect to insurers, and MedAccess plans offered, not later than such deadline.” See also *id.* § 1103(b)(2)(A) (requiring same conduct of States in identical language but pertaining to creation and enforcement of other standards).

292. See *id.* § 1103(b)(1)(B)(ii) (detailing a longer period of time for State legislatures to act).

293. *Id.* § 1103(b)(2).

294. See *supra* note 213 and accompanying text.

295. *FERC*, 456 U.S. at 777 (O’Connor, J., dissenting).

296. See *New York*, 112 S. Ct. at 2425 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988)) (endorsing avoidance of constitutional question when an alternate reading of the statute is reasonably available).

By this approach, the Court avoids exalting form over substance, and does not expend scarce institutional resources²⁹⁷ on a philosophical point. Because *New York* continues to approve reading a Federal command as merely hortatory within an otherwise unexceptionable conditional preemption statute, the *command plus conditional preemption* model will continue to survive Tenth Amendment scrutiny.²⁹⁸

D. Command, Conditional Preemption, Plus State “Fee”

This model arises where the Federal government commands States to engage in a particular regulatory activity according to Federal norms. If the State fails to do so or declines the “invitation,” the Federal government implements the program within the noncomplying State and charges the State a “fee” or tax for the regulatory program. Three of the reform bills, the Michel, Cooper, and Nickles bills, employ some version of this novel regulatory model.

As discussed above, the Court is likely to continue to find no Tenth Amendment obstacles to otherwise permissible uses of conditional preemption; the Court may grouse about the erroneous presumption of Federal authority to mandate State legislative enactments, but it will conceive statutes holistically as instances of conditional preemption. This model does, however, raise two novel questions: Will such a statute still be constitutional if Congress seeks to compel a State government to pay for a regulatory program the State refused to adopt as a matter of State law? Further, does the answer to the previous question change depending upon whether the Federal government seeks reimbursement for monies beyond its actual costs in instituting the program within the state?

1. *Use of the Command, Conditional Preemption, Plus State Fee Model*

The Michel and Cooper bills both use this model in mandating that States institute a Federally approved alternative dispute processing (ADR) system for medical malpractice cases. The Michel bill specifies that if a State does not comply, HHS is to implement the

297. See Redish & Drizin, *supra* note 171; Choper, *supra* note 13.

298. Given the aggressiveness with which Congress is attempting to expand its regulatory control over the nation without paying the costs, the Court will eventually have to consider Justice O’Connor’s concern that the States’ formal option to exit the field does not cure Federal commands to State governments of Tenth Amendment problems. “[D]ismemberment of State government is [not] the correct solution to a Tenth Amendment challenge.” *FERC*, 456 U.S. at 782 (O’Connor, J. dissenting).

Federal ADR system within the State.²⁹⁹ The bill also provides for the Federal government to recoup directly from the noncomplying State its costs of providing this service.³⁰⁰ The Cooper bill differs only in that it commands the State to pay "110% of the costs incurred by the United States" for instituting and maintaining the ADR system.³⁰¹

The other instances of conditional preemption and imposition of a fee on State governments appear in identical language in the Michel and Nickles bills.³⁰² The fee they impose upon State governments is contingent upon whether a State complies with the requirement to institute a Federally approved regulatory program under which the State would collect comparative information about the success and monetary value of various health insurance plans offered within its jurisdiction. The obvious goal is to lower information costs and raise the likelihood that consumers will select their health insurers prudently. If the State itself chooses to provide the regulatory service under Federal supervision, then it will not owe monies to HHS under the provision.³⁰³

The reasoning behind this State fee model merits some attention. To its credit, the approach addresses the free rider problem.³⁰⁴ This problem arises because the States would be situated differently with

299. H.R. 3080 § 2032(b)(1).

300. The provision reads: "the State shall reimburse the United States (at such time and in such manner as the Secretary may require) for the costs incurred by the United States during the year as a result of the application of the system with respect to the State." *Id.* § 2032(b)(3)(A). The Michel bill additionally provides that no State using a Federal ADR system may be paid funds "pursuant to the Public Health Service Act." *Id.* § 2032(b)(3)(B). The curtailment of State eligibility for an important pot of Federal health monies is in addition to the fees charged to the State and therefore does not modify this analysis.

301. H.R. 3222 § 5202(b)(3). The Cooper bill also provides a financial incentive for compliance: for States that are in compliance with the provision, HHS may provide grants to offset some of the costs of maintaining the ADR program. *See id.* § 5203(a). Unlike the Michel bill, it does not curtail State eligibility for Public Health Service monies as a penalty for noncompliance.

302. *See* S. 1743 § 422(b); H.R. 3080 § 2122(b).

303. The bills oddly depart from stating the fees requirement in the normal active voice, so as a technical matter the bills do not clearly state that they intend noncomplying States to repay HHS. Because the context suggests States are the targets of this fee, this analysis assumes the bills intend that result. If only private sector entities will be charged these fees, such as insurers as a cost of doing business in the State, the Tenth Amendment will not be triggered.

304. For a classic statement of the free rider problem, see *THE MIT DICTIONARY OF MODERN ECONOMICS* 162 (David W. Pearce ed., 3d ed. 1986). For a philosophical discussion of free riding, see *JOHN RAWLS, A THEORY OF JUSTICE* 267-70 (1971). For a more theoretical discussion of incentive compatibility, of which the free rider problem is a subset, see 2 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 739-40 (John Eatwell *et al.* eds. 1987). *See also* *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 55 (1977).

regard to implementing new Federal regulatory programs. Some States presumably would still shoulder the regulatory duties sought to be imposed by these bills, perhaps because they already have similar programs that could be easily adapted to meet the Federal requirements. Other States, particularly those having to design and create the program from scratch, would face significant costs that may require new revenues. Where the Federal government considers it critical to apply of the particular regulatory program, a State could decide not to institute (and pay for) the apparatus itself, knowing the Federal government would supply a program in the wake of the State's refusal, courtesy of the Federal fisc instead of its own. The State would thus receive the Federal program's benefits without having to pay for it out of its own coffers, effectively spreading the program's costs to the nation rather than to its own citizenry. The State's officials would not suffer politically from either raising State taxes or reducing funds to existing programs, its citizens would retain additional marginal disposable income (which is potentially beneficial to the State's economy), and the State as a whole would benefit at the expense of the nation, raising a distributive justice problem.³⁰⁵

2. *Objections to Command, Conditional Preemption, Plus State Fee*

Despite the fact that it addresses the free rider problem, even a cursory analysis of the State fee model raises serious objections. The provisions at issue seek to impose an open-ended liability on unconsenting States. States would have to pay whatever costs are incurred by the Federal government in creating and maintaining the particular regulatory program. The provisions do not impose any structural incentive upon the Federal government to keep the costs of programs reasonable.³⁰⁶ It has statutorily guaranteed access to the State's purse, for whatever sums the Federal government spends.³⁰⁷ The primary

305. See, e.g., Rawls *supra* note 304, at 258-332; MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 66-103 (1982); ERNEST BARKER, *THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE* 338-43 (1959).

306. For example, first class airfare, expensive realty, office furnishings, excessive phone bills, and other costs could be charged to the State. The noncomplying States would also presumably find themselves charged a percentage of HHS and perhaps even White House overhead costs. For an analogue, recall the debate over universities charging the Federal government excessive percentages of overhead as a cost of Federal grants received. See, e.g., Michael K. Frisby, *U.S. Review Finds Colleges Misused \$14M*, *BOSTON GLOBE*, May 10, 1991, at 3; *Auditors Viewing Yale's Books*, *BOSTON GLOBE*, Feb. 1, 1991, at 37; *U.S. to Audit 4 Schools That Receive Grants*, *CHICAGO TRIBUNE*, April 5, 1991, at 10.

307. The lack of restraint inherent in this model might be mitigated by imposing a duty of frugality on the Federal government, or otherwise limiting the States' liability to liquidated

economic goal of efficient use of resources—a persistently elusive goal for the Federal government—would be obstructed structurally to an even greater degree.

Notwithstanding the possible economic imprudence of the strategy, though, does the Tenth Amendment pose a barrier to Federal legislation adopting this model? It would seem that *New York* clearly undermines the constitutionality of this strategy, for the scheme again presents States with ephemeral “choices.” Recall that the take-title provision in *New York* explicitly offered State governments a choice either of accepting an open-ended liability or of regulating according to Congress’ instructions. The health care provisions employing this model offer State governments a similar choice: 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.”³⁰⁸

Under *New York*, the first analytical step is to assess whether Congress can “impose either option as a freestanding requirement.”³⁰⁹ The Court noted Congress was barred from effecting a “forced transfer” of the waste there at issue because it was essentially “a congressionally compelled subsidy from State governments” to waste producers. Nor could the Act compel the State to become liable for the generators’ damages. Such a provision “would be indistinguishable from an Act of Congress directing the States to assume the liability of certain State residents.”³¹⁰ Does it make a difference that the problematic health reform provisions would have unconsenting States assume the liabilities of the Federal government?

The explicit rationale offered for *New York*’s invalidation of the take-title provision renders these subtleties to be distinctions without a difference. The Tenth Amendment bars Federal requirements that would “commandeer” State governments into the service of Federal regulatory purposes.”³¹¹ National health reform pursuant to congressional enactment is unquestionably a Federal regulatory effort. That it is the Federal government’s expenses rather than those of private entities that the Acts would authorize to be collected from State governments intensifies rather than diminishes the Tenth Amendment of-

amounts. These measures would not eliminate the constitutional question, but would serve to lessen somewhat the impact of this model on a State’s fisc.

308. *New York*, 112 S. Ct. at 2428.

309. *Id.*

310. *Id.*

311. *Id.*

fense,³¹² for it subordinates the State's fisc to the Federal government.³¹³ In short, "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all."³¹⁴ These strategies violate the Tenth Amendment as interpreted by *New York*.

E. Command, Conditional Preemption, Plus Private Sector Tax

Under this model of Federal-State relations, if a State declines to employ its governing powers in a manner defined by a Federal conditional preemption statute, the Federal government unilaterally implements its program within the State, then levies a special tax against private individuals and entities within the noncomplying State who are related in some way to the Federal program. Two bills employ this mechanism. They differ dramatically, however, in their economic impact within a noncomplying State.

1. Use of Command, Conditional Preemption, Plus Private Sector Tax

The Michel bill seeks to have each State adopt a Federally approved reinsurance or allocation of risk mechanism, largely for the purpose of covering any employers who pose unusually high costs for an insurer.³¹⁵ Similar mechanisms, widely adopted in the automobile insurance industry, assist in spreading among all insurers a fair allotment of the higher risk insureds. Under the Michel bill, any State that does not comply with this particular mandate will find HHS instituting the mechanism within its borders.³¹⁶ The bill specifies further that the Federal program within the State will be paid for by a flat tax on all insurance sold to employers to cover employees in a particular noncomplying state, of a percentage estimated by HHS "as generating sufficient revenues" to implement the Federal risk program.³¹⁷ No particular surcharge level is specified in the bill; it defers the exact rate of the tax to HHS.

312. The lack of choice cannot be cured by according States substantial discretion. See *New York*, 112 S. Ct. at 2428-29.

313. *Massachusetts v. United States*, 435 U.S. 444 (1978), neither undermines this conclusion nor is undermined by it. There the Court ruled that a Federal aircraft tax imposed on each plane used in United States airspace, whether owned by a private entity or a State government, did not offend the intergovernmental tax immunity doctrine. Such a tax is permitted under *Garcia* principles, which are not displaced by *New York*. See *supra* text accompanying notes 264-69.

314. *New York*, 112 S. Ct. at 2428.

315. See H.R. 3080 § 1106.

316. *Id.* § 1106(b)(2).

317. *Id.* § 1106(b)(2)(D)(i).

One core section of the Clinton bill also employs this model. In States that do not choose to become “participating States,” or which later fall out of compliance, HHS takes over the task of establishing and monitoring the insurance purchasing cooperatives (“alliances”) through which most persons would obtain insurance. In such States, the insurance premiums sold through the regional alliances will be subject to a 15% surcharge, ostensibly to reimburse HHS for its administrative costs in establishing and operating the system.³¹⁸ The peculiarity of the size of the surcharge is that the administrative costs of establishing and monitoring the alliances should be quite small. The normally sizable costs of administering the health plans themselves would continue to be borne by insurance carriers.³¹⁹ The 15% surcharge therefore seems punitive in nature, because it is presumptively far higher than the cost to the Federal government of forming and monitoring the alliances. A concrete indicator that the 15% charge is punitive rather than merely compensatory (of administrative costs) lies in comparing it against the maximum administrative fee a regional alliance is permitted to charge—2.5% of the value of premiums expected to be sold.³²⁰ Moreover, the Secretary is entitled to receive a flat rate per year regardless of the actual costs incurred.³²¹ In an average State, the income to the Secretary would appear to be several billion dollars *per year*.³²²

318. HSA § 1523(a) reads:

If this subpart [Responsibilities in Absence of State Systems] applies to a State for a calendar year, the premiums charged under the regional alliance established and operated by the Secretary in the State shall be equal to premiums that would otherwise be charged under a regional alliance established and operated by the State, increased by 15 percent. Such 15 percent increase shall be used to reimburse the Secretary for any administrative or other expenses incurred as a result of establishing and operating the system.

The surcharge would be assessed only against the premiums of plans sold through the regional alliances, not through the private corporate alliances. The bill further specifies that the surcharge shall be treated as part of the premium cost for purposes of complying with the Federally set global budget and per capita insurance limits. *Id.* § 1523(b). This proviso could result in a net reduction of health benefits.

319. It is, of course, one of the aims of the Clinton plan that “managed competition” and the alliances will reduce these administrative costs.

320. *See* HSA § 1352(c).

321. Oddly, the bill also includes authorization of \$100 million for planning grants to help States become “participating,” HSA § 1515(a)(3), and \$1.25 billion in grants for States’ regulatory start-up costs, HSA § 1515(b)(4). Although authorization hardly is equivalent to an actual budget allocation, the bill clearly contemplates that the Secretary will have substantial new sums for implementation.

322. For example, consider a medium sized State with approximately 8 million persons buying health insurance directly or indirectly through the regional alliances. Assuming the average annual cost of the President’s comprehensive health insurance for a family is

2. *Constitutional Questions*

Placing the surcharge on health insurance sold through the regional cooperatives rather than directly on the noncomplying State may be an attempt both to sidestep Tenth Amendment problems and to generate substantial political costs for any State administration declining to participate. The question, then, is not simply whether Congress may assess a special tax of private individuals and entities within a State to fund a particular regulatory effort there, but whether the Tenth Amendment interposes any obstacles to such regulatory techniques where the special tax has the purpose or effect of coercing the State to accede to the particular regulatory duties Congress seeks to impose.

In statutes using this model of Federal-State relations, Congress exercises two of its enumerated powers. Congress' power to tax is explicitly granted,³²³ and few restrictions on that broad power have been recognized.³²⁴ For purposes of this analysis, this Part assumes no restriction other than the Tenth Amendment would apply.³²⁵ Congress also employs the commerce power in setting up this type of regulatory program. Thus, the technique of taxing private individuals and entities in nonconsenting States seems to fall easily within broadly enumerated Federal powers and not to pose any Tenth Amendment

\$5000, with 2 million families purchasing it, and for an individual is \$2500, with 2.5 million persons purchasing that coverage, the 15% surcharge ostensibly for paying for the administration of the alliances in this State would produce several billion dollars (roughly \$1.5 billion in charges from family coverage and \$.94 billion in individual coverage, for a total of \$2.44 billion). These charges substantially exceed the costs of maintaining the alliances within a State, or of compensating the Secretary for reasonable *annual* Federal costs in monitoring the alliance. These administrative charges also tend to belie President Clinton's description of alliances: "they are not supposed to be government groups—they are co-ops of purchasers that are private." See Ifil, *supra* note 79, at A8.

323. U.S. CONST. art. I, § 8, cl. 1.

324. See *Regan v. Taxation with Representation*, 461 U.S. 540, 547-48 (1982) (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)).

325. Two potential theories which are beyond the scope of this paper but which may pose independent obstacles to the punitive and coercive use of the taxing power toward particular States are the uniformity requirement imposed by Article I, § 8, clause 1, and the bar on discriminatory taxation, a branch of the intergovernmental tax immunity. As to the latter, the vigor of the States' side of the intergovernmental tax immunity is currently in doubt, see *South Carolina v. Baker*, 485 U.S. 505 (1988), but may be revitalized in an egregious situation. See also *New York v. United States*, 326 U.S. 572, 587 (1946) (Stone, C.J. concurring) (Some taxes, when applied to states, would "impair the sovereign status of the State quite as much as a like tax imposed by a State on . . . activities of the national government. This is not because the tax [is] discriminatory but because a sovereign government is the taxpayer, and the tax, though non-discriminatory, may be regarded as infringing its sovereignty.") (citations omitted).

problems.³²⁶ The Tenth Amendment analysis arguably ends there, especially since the Court has counseled that judicial inquiry into the congressional motives underlying tax legislation is improper.³²⁷

3. *Avoiding Circumvention of New York*

Although it may be difficult to craft manageable judicial standards for achieving meaningful heightened scrutiny of this technique, sound reasons support that effort. At stake is whether the Federal government can achieve through the back door what it is barred from doing through the front. At present, the Federal government is permitted to coax States into the activities the Federal government desires by either of two basic methods: conditional grant programs, pursuant to the spending power, or conditional preemption, under the commerce power.³²⁸ These are the front door methods. If the States do not accept a grant or voluntarily legislate in accordance with Federal norms, the Federal government may implement its own regulatory program and pay for it directly.³²⁹ State residents can then direct their State government to “devote its attention and resources to problems other than those deemed important by Congress, [and] may choose to have the Federal Government bear the expense of a Federally mandated regulatory program. . . .”³³⁰

Under the technique in question, as an adjunct to conditional preemption, the Federal government imposes a special tax on private citizens and entities in any State that refuses to institute the Federal regulatory program. But it is not a small charge to offset some of the added expenses the Federal government may shoulder in instituting the program within the state; it is a charge that may far exceed the costs of instituting the Federal program. State officials know their citizens will learn of the taxation differential, and they also know they will be blamed for making the decision that caused taxes to rise. Yet it

326. See *New York*, 112 S. Ct. at 2417 (The inquiries are “mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. . . .”); but see Redish & Drizin, *supra* note 171, at 13 (“Under the structure imposed by the text, any analysis of whether the national government has unconstitutionally encroached upon State authority must focus solely on the nature of the national activity. If the activity falls within the scope of a checklisted power, it is legitimate.”).

327. See *McCray v. United States*, 195 U.S. 27, 59-60 (1904). See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-9, at 320 (2d ed. 1988).

328. See *New York*, 112 S. Ct. at 2423-24. For consideration of additional possible Federal methods, see *supra* text accompanying notes 210-62.

329. See *New York*, 112 S. Ct. at 2424.

330. *Id.*

would have been Federal officials who instituted the regulatory and conditional taxation requirements. As troubled the *New York* Court, lines of political responsibility for the tax will thus be confused, and political accountability will be disrupted.³³¹ Ultimately, by this “conditional taxation” 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.

The accountability problems in this technique may be magnified significantly if Congress begins to employ this approach more broadly. Congress need not find the monies to pay for regulatory programs, or for grants to entice States to shoulder the programs under Federal supervision, but only need fashion a special tax to fall upon citizens in States declining to comply with Federal regulatory commands. If this technique were permitted in the regulatory situation at issue in *New York*, for instance, the Federal government could legislate that either the State comply with all of the radioactive waste siting activities and timetables or its citizens would find themselves faced with a 25% surcharge on all utilities bills. Federal legislation could also be written such that if a State did not comply with the regulatory statute at issue in *FERC*³³² governing rate-setting procedures for electric utilities, then its citizens would be charged a 15% surcharge on power bills to facilitate the Federal government’s program. Because of citizen resistance to these taxes, States may be compelled to institute the Federal program. Virtually all Federal regulatory programs could be effectively transferred to the States’ purses by this technique. The ultimate result would be to convert State governments into bureaucratic field offices for the Federal government—the exact conception of federalism that *New York* properly repudiated³³³—only it would be achieved via the back door method of coercion.³³⁴

331. *Id.*

332. *Federal Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742 (1982).

333. *New York*, 112 S. Ct. at 2434.

334. Another less veiled way of achieving the same kind of end would be for the Federal government to bar tax deductions for health care insurance unless the taxpayer is domiciled in a State that has assumed the regulatory responsibilities for the Federal health reform program. The better doctrinal solution to these problems lies not in the Tenth Amendment but in refurbishing some version of the branch of intergovernmental tax immunity doctrine barring discriminatory taxation, as mentioned *supra* note 325. *See generally* *South Carolina v. Baker*, 485 U.S. 505 (1988) (discussing the intricacies of the doctrine but perceiving it to be an incident of the Tenth Amendment). Although the discretion committed to the legislature in exercising the taxing power and in fashioning distinctions is quite broad, *see* *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), this might be the sounder doctrinal course.

This model's constitutionality is not directly addressed and governed by *New York*, and tests the boundaries of that decision. Under current commerce power precedent as presented in *New York*, the technique could be held valid, though this analysis suggests the Court's principles concerning commandeering State legislative power would be thwarted by such a result.

F. Private Sector Penalties for State Nonparticipation

In this unusual approach to coaxing a State to undertake Federally assigned regulatory responsibilities, a State government that does not comply is not directly penalized. Rather, penalties are exacted against activities of private individuals and entities within the noncompliant State. The tacit objective behind this strategy appears to be to provoke intrastate political pressure sufficient to compel the State to assume the regulatory burden the Federal government has delineated. The distinction between the previous model, *command, conditional preemption, plus private sector tax*, and the present model is that while both exert pressure on individuals and entities within a State to induce State compliance, the former model exerts this pressure by special taxation, and the present model does so by other types of penalties.

Only one plan employs this model, and in only one area. The President's reform plan contains a section that seeks to induce States to develop Federally-approved regulatory programs to govern the sale of long-term care insurance. The bill authorizes significant monies to be used exclusively for State grants, which serves as the carrot for instituting this program.³³⁵ Yet if a State fails to establish a federally-approved program, no Federal regulatory default would be activated. Instead, "no insurer may sell or offer for sale any long-term care insurance policy" in the offending State.³³⁶

The proponents of the constitutionality of this regulatory technique would reason that it employs the broad commerce power in a manner that cannot be questioned. It does not exercise regulatory power against State governments but orders the conduct of private actors, the purveyors of long-term health insurance. Given the "mirror-image" analysis concerning the intersection of the Tenth Amendment and the Commerce Clause, the conclusion that the regulation

335. HSA §§ 2342, 2346.

336. *Id.* §§ 2344, 2346. Moreover, this provision barring the sale of long-term care insurance is enforceable by HHS via a civil money penalty for the greater of either \$10,000 or three times any commission for each policy sold or offered in violation of this section of the act. *See id.* § 2346(b).

falls well within the Commerce Power ends the constitutional inquiry.³³⁷

But *should* it? Suppose Congress desires that the States shoulder regulatory responsibility for the cleanup of hazardous waste sites, pursuant to Federal EPA supervision. Any State that does not accept this important “cooperative federalism” venture will not have any direct penalties exacted against it; the Federal Act will merely bar private persons and entities from applying for permits to build new homes within the State. Acting under the Commerce Clause, Congress need not offer much of a rationale for the law; it can find that such construction generates new hazardous wastes and that those “products”³³⁸ should not be created until hazardous waste sites are cleaned up. The objective and effect would be to extort an agreement from the State to accept the Federally defined regulatory responsibility. Again, by barring certain activities in the State’s private sector should the State government fail to assume a Federal regulatory goal, Congress can ensure that the administrative and financial burdens of the Federal program are transferred to the States. As expected, the economic and political impact of the proscription on certain private activity would be too great for the State government to withstand.

If the Court retains its mirror-image approach to questions concerning the intersection of the Commerce Clause and federalism values as reflected in the Tenth Amendment, the only recourse is to find some implied restrictions in the commerce power—assertedly a difficult and perhaps mistaken task.³³⁹ It may be possible, however, to fashion a bright-line rule barring Congress from linking private sector penalties to the contingency of State agreement to assume Federal

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

338. See *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (ruling garbage is a product that moves in commerce and thus subject to the Commerce Clause and its dormant implications). Hazardous wastes generated by new construction include remainders of paint and other finishings, pressure treated lumber (containing, inter alia, arsenic), and chemical sealants and caulking.

339. In *Hodel v. Virginia Surface Mining and Reclamation Ass’n*, 452 U.S. 264 (1981), the Court wrote:

The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. This established, the only remaining question for judicial inquiry is whether “the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.”

Id. at 276 (citations omitted).

regulatory responsibilities.³⁴⁰ Such a rule would promote political accountability at both the Federal and State levels, and would keep Congress from manipulating the system of representative government in the States, a salutary outcome for federalism and republican government,³⁴¹ but not one now within the Court's precedents.³⁴²

G. Command Plus Extraordinary Inducement/Penalty

Under this model, the Federal government instructs States to implement Federal standards and attempts to induce them to comply by extraordinary financial incentives. If a State does not comply, the Federal government neither implements the program within the State nor exacts financial penalties other than the withdrawal of eligibility for certain significant Federal grant programs. The Federal strategy seems to lie in specifying sufficiently high rewards for participation, and penalties for nonparticipation, that all States find it politically and economically impossible to refuse. While all of the bills other than Senator Coats's contain some versions of the basic conditional Federal grant program, two bills exact such significant monetary penalties for noncompliance as to deserve separate consideration.

1. Use of Command Plus Extraordinary Inducement/Penalty

The McDermott-Wellstone single-payer plan mandates that all State governments establish a single-payer regulatory apparatus that complies with specified Federal standards and also requires States to

340. Such a rule could also embrace the mechanism of imposing a conditional tax on State residents to pay for a regulatory system their State refused to implement itself. *See supra* text accompanying notes 315-34.

341. *See id.*

342. An appropriate basis could lie in the Guarantee Clause, around which the Court has repeatedly been dancing since *Gregory v. Ashcroft*. *See Gregory*, 111 S. Ct. at 2402-03; *New York*, 112 S. Ct. at 2432-33. The Guarantee Clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." U.S. CONST. art. IV, § 4. The Clause enshrines the constitutional values of republican citizenship and effective representative government, *see generally New York*, 112 S. Ct. at 2432-33; *Baker v. Carr*, 369 U.S. 186 (1962), arguably two of the most foundational values within the original Constitution. Civic republican literature has developed these points. *See, e.g.*, Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 *YALE L.J.* 1623 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *VA. L. REV.* 543 (1986); Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 *Nw. U. L. REV.* 74 (1989); Hoke, *supra* note 13. For a thoughtful development of the issues surrounding the justiciability of the Guarantee Clause, *see* Deborah Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *COLUM. L. REV.* 1 (1988).

submit a plan describing the system to HHS for its approval.³⁴³ The bill does not specify a Federal default system for noncomplying States. Only after HHS approves the State's plan is it eligible to receive funds from the Federal Health Security Trust Fund to pay for providers' bills for services submitted to the State.³⁴⁴ The bill specifies the Federal contribution as not less than 81% nor more than 91% of the annual health budget authorized for the State. The balance of the program would be paid from State funds.³⁴⁵

The Nickles bill contains the other example of this model. In order to remain eligible for "receiving Federal funds for health care programs,"³⁴⁶ the bill mandates that a State must provide health insurance coverage equal to the Federally qualified plans to all of the residents of the State who are not insured privately.³⁴⁷ The bill accords States four options by which they may execute this obligation, including the alternative of providing coverage under the State's Medicaid program.³⁴⁸ It also permits States to charge individuals for the insurance premium, in light of the cost of the premium and the individual's ability to pay.³⁴⁹ The model does not supply any default mechanism in case a State does not establish the program; the State would simply lose millions in funds from the Public Health Service Act and other Federal health programs such as Medicaid.³⁵⁰

343. H.R. 1200 § 101(a) reads: "There is hereby established in the United States a State-based American Health Security Program to be administered by the individual States in accordance with the Federal standards specified in, or established under, this Act." The States are commanded to develop the administrative system to effectuate the Federal program in § 405(a): "Each State shall submit to the [National Health] Board a plan for a State health secretary program for providing for health care services to the residents of the State in accordance with this Act."

344. *Id.* § 604.

345. *Id.* § 604(b).

346. S. 1743 § 131(a).

347. *Id.*

348. *Id.* § 131(b).

349. *Id.* § 131(c)(2)(b)(A). Although the bill does not specify the range of Federal rulemaking authorized to implement the bill, it is reasonable to expect that HHS would provide some guidelines as to how much money a State would be permitted to charge persons at differing income levels.

350. Yet if a State agrees to participate in the new Federal program, that agreement apparently creates a health insurance entitlement for the uninsured running against the State. If interpreted to create an entitlement, the substantive and procedural liability thereby created would be enormous. While the bill does authorize the State to attempt to recoup some of its costs from the uninsured themselves, such a tax would be aimed at those who can least afford it. The State's alternative would be to increase other taxes and bear the political costs for so doing.

2. Constitutional Questions

If we assess these bills under the four-part analysis that normally governs spending power questions,³⁵¹ the conclusions are not problematic; both would easily satisfy the inquiry as currently conceived. The degree of persuasiveness of the sanctions/inducements, while engendering cautionary words from the Court,³⁵² has yet to render an enactment unconstitutional. This lax scrutiny permits the national government to formulate and achieve objectives which are not strictly within its delegated powers. An expansive reading of the spending power and a deferential standard of review permit the Federal government to adapt to changing times. A broad spending power can, moreover, be justified within the larger theory of popular control of government through the political process.³⁵³

Yet State governments continue to express concern via litigation that some limits should be recognized and enforced to reduce the coercion of Federal conditional grant programs. In *Nevada v. Skinner*,³⁵⁴ for instance, certain legislation required, as a condition of receiving money from the Federal Highway Trust Fund, each State to post road signs specifying a maximum speed limit of 55 m.p.h. Any State that did not conform would be debarred from "all future Federal highway grants."³⁵⁵ Nevada submitted that 95% of its annual highway budget derived from the trust fund and thus contended that the particular condition passed the line separating persuasion from coercion.³⁵⁶ The Ninth Circuit was unimpressed, however, emphasizing that Nevada was still free to raise revenues from other sources to fund its

351. The recognized spending power inquiry requires that: (1) the expenditure must be for the general welfare; (2) the conditions imposed upon States receipt of the Federal grant must be unambiguous; (3) "the conditions imposed are reasonably related to the purpose of the expenditure"; and (4) the conditions imposed by the Federal act do not violate any independent constitutional prohibition. See, e.g., *New York*, 112 S. Ct. at 2426; *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

352. The Court has noted, "Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *South Dakota*, 483 U.S. at 210-11 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)); see also *New Hampshire Dep't of Employment Sec. v. Marshall*, 616 F.2d 240, 246 (1st Cir. 1980) ("[T]he carrot has [not] become a club because rewards for conforming have increased.").

353. See generally, Choper, *supra* note 13; JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

354. 884 F.2d 445 (9th Cir. 1989).

355. *Id.* at 446.

356. *Id.* By contrast, the statutory penalty in *Dole*, 483 U.S. at 211, would deprive a State of merely 5 percent of its highway trust fund allotment.

highway needs.³⁵⁷ Moreover, the court found it difficult to fashion a “principled definition” of “coercion.”

Does the relevant inquiry turn on how high a percentage of the total programmatic funds is lost when federal aid is cut-off? Or does it turn, as Nevada claims in this case, on what percentage of the federal share is withheld? Or on what percentage of the state’s total income would be required to replace those funds? Or on the extent to which alternative private, state, or federal sources of highway funding are available?³⁵⁸

The court concluded the inquiry sought under a “coercion theory” was inappropriate for the judiciary.³⁵⁹

If, presumptively, some constitutional limits on the outer reaches of the spending power are appropriate, yet a coercion theory is unavailing, the alternative basis for such limits remains unclear. One potentially promising alternative, however, lies in Professor Sunstein’s “model of reasons: an approach that asks whether the [Federal] government has constitutionally sufficient justifications for affecting constitutionally protected interests.”³⁶⁰ The constitutionally protected yet putatively injured interests at stake in conditional grant programs concern the ability of State governments to function as separate and independent representative governments for their citizens. The strategic use of Federal grant programs threatens the constitutional role of States; the grants may be employed to reduce or eliminate the independence of and regulatory experimentation by State governments. Federal minimum standards, for instance, can be restyled as “ceilings” or mandatory national standards. Because of the lure of Federal monies, States may further accede to the movement toward homogenization of the nation’s law and regulatory programs. Professor Sunstein’s approach would not raise insurmountable barriers to conditional grants but would abandon the Court’s highly deferential approach in favor of somewhat greater scrutiny. The Court seems a long way, however, from questioning its spending power precedent

357. See *Skinner*, 884 F.2d at 448 n.5.

358. *Id.*

359. *Id.* (drawing on *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)). Kathleen Sullivan agrees that the focus on “coercion” is inappropriate, for it “is an inevitably normative inquiry Moreover, coercion does not exhaust the modes through which government can impermissibly pressure preferred liberties.” Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1420 (1989). See also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 300 (1993) (“[T]he development of a baseline to distinguish between penalties and subsidies is neither necessary nor sufficient.”); Rosenthal, *supra* note 6, at 1122-23.

360. SUNSTEIN, *supra* note 359, at 292.

and mode of review, so the two provisions exemplifying this model will face no serious constitutional challenges in the immediate future.

Conclusion

The novel models of Federal-State relations found in the health reform bills highlight the increasingly tight financial strictures within which Congress must act. To engender overdue fiscal responsibility, Congress has enacted an internal rule requiring that no bill that would exert a negative impact on the Federal treasury can be introduced without including a proposal for generating those revenues.³⁶¹ This requirement, and the mushrooming of the Federal deficit, unquestionably have led to more creative and aggressive congressional attempts to locate new sources of revenue, such as recourse to State governments to supply funds, personnel, and political prestige for new Federal regulatory initiatives.

Analysis of these new regulatory and revenue techniques which seek to use State governments as tools for achieving larger Federal purposes reveals their detrimental impact on constitutional values reflected in the Tenth Amendment. To the extent that the Federal mandates are constitutionally permissible, a State's satisfaction of Federal revenue requirements would reasonably take priority over State-defined purposes, and a State's enforcement of Federal norms would limit its own scope of independent authority. On both counts the ability of the States to address local problems and to serve as "laboratories of experiment" would be diminished. Citizen interest in and solicitude for State and local governments would decline even more precipitously because the real power over the State fisc, and over the State's law, would reside in Washington. The threat thus posed without *New York's* intercession is the transmutation of States into little more than the bureaucratic field offices of the nation—a representative government in form not substance.³⁶² These concerns are of constitutional dimension and fall well within the values the Tenth Amendment embraces.

New York permits judicial examination under the Tenth Amendment of Federal attempts to utilize or confiscate portions of a State

361. The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) (codified as amended, throughout Titles 2, 31 and 42 of the United States Code).

362. Taking such a path would not only effectively eliminate States as governments but might also intensify the grip on Congress held by interest groups. See generally Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 34-42 (1992) (criticizing factional control of Congress and administrative agencies achieved by interest groups).

government's purse or administrative personnel. Although one rationale behind *Garcia's* apparent abdication of the Amendment's justiciability lay in the inability to fashion judicially manageable standards, the application of *New York* to the proposed health plans suggests the Court may have reached its previously elusive goal. The foundational principles enunciated in *New York* seem to permit reasoned, consistent application. While undoubtedly they will require further elaboration in additional cases, the *New York* opinion provides principled guidance in dealing with matters falling in the margins.

Perhaps the most salutary result of *New York*, however, lies in its structural support for the maintenance of republican process values and multiple legal and political *nomoi*.³⁶³ Across virtually all legal fields today, there appears to be an incessant movement toward legal consolidation, toward unitary law. Model laws and restatements have facilitated this movement, the benefits of which continue to be heralded.³⁶⁴ The values behind maintaining a multiplicity of legal norms originating from different legal cultures seem increasingly remote to legal scholars, citizens, and legislators alike; reflexive dismissal of multiple legal *nomoi*, for imposing undue transaction costs continues unabated. Yet we must question whether or not legal progress rests with legal consolidation, with unitary law. In our own nation, the power to issue uniform law lies exclusively with the Federal government. To the degree that we associate legal progress and justice with unitary law, the more likely we are to embrace unrestricted Federal power. Ironically, as the move for centralized, unitary law becomes more vigorous, the epistemological foundations for the position are sustaining much greater scrutiny and criticism.³⁶⁵ Few arguments are advanced urging that the noneconomic, noncommodity values involved in multi-

363. Robert Cover insightfully argued in favored of recognizing and maintaining multiple independent units, or *nomoi*, by which community values may be recognized and protected through legal rules. See generally Robert Cover, *The Supreme Court 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

364. See *Symposium: One Hundred Years of Uniform State Laws*, 89 MICH. L. REV. 2073 (1991) (celebrating model State laws). The Uniform Commercial Code is designed in part to lower transaction costs, especially for interstate trade, and to institute a wiser law than the prior patchwork of inconsistent State laws. Unitary international trade laws, such as the General Agreement on Tariffs and Trade and the North American Free Trade Agreement, assert the goals of lowering the transactional costs of trade and benefitting consumers thereby. General Agreement on Tariffs and Trade, art. III, 61 Stat. A5 (1947); North American Free Trade Agreement, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

365. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); ELIZABETH KAMARCK MINNICH, *TRANSFORMING KNOWLEDGE* (1990).

ple legal norms be recognized and maintained—that perhaps a plurality of legal cultures within our nation is a distinctive benefit.³⁶⁶

New York was issued into a legal and political culture that finds federalism outmoded and its underlying values, including the protection of multiple legal *nomoi*, unpersuasive. Perhaps the legislative strategies found in the proposed health plans show that the very survival of State governments as independent sources of law and policy is seriously threatened if the Tenth Amendment is not justiciable. Perhaps they will move us to rethink our commitments to the proposition that the political process alone sufficiently protects federalism and its underlying values.

366. Notable exceptions include Professors Robert Cover, *supra*, note 363, Martha Minow, *MINOW*, *supra* note 365, and Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985).

