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State, Federal Appellate Judges Will Meet in Washington in March to Focus on Judicial Roles Beyond Courtroom

by James G. Apple

The appellate judiciary "at the dawn of a new century" will be the focus of a three-day meeting of state and federal appellate judges March 28–31, 1996, in Washington, D.C.

The symposium is sponsored by the Appellate Judges Conference of the American Bar Association in cooperation with the Federal Judicial Center.

The official title of the meeting is "The Community of Courts: The Compleat Appellate Judge." Federalism is a primary topic on the agenda. The panel for the first session will discuss "Federalism and the Courts at the End of the Century: Taking Stock of Shifting Jurisdictions and Caseloads."

Justice Elizabeth B. Lacy
Virginia Supreme Court

The conference is being organized by Justice Elizabeth B. Lacy (Va. Sup. Ct.) and Judge Deanell R. Tacha (U.S. 10th Cir.).

Judge Tacha said the meeting represents an "effort to bring together state and federal appellate judges to consider the role of the judge beyond his or her case-deciding role."

"We are breaking new ground," she said, "by going beyond the usual agenda for a judicial conference of updates on existing law. We will focus on how we can all work together to be spokespersons for the broad principles that underlie our justice system, such as an independent judiciary and the rule of law, access to courts, and citizen confidence in the system. These seem to be missing from the national dialogue. The emphasis will be on the role of the judge beyond the courtroom."

Judge Tacha noted that the conference will include non-judges, including Catherine Crier, ABC News; Linda Greenhouse, *New York Times*; Sam Evans, international director of the YMCA; Frances K. Zemans, the American Judicature Society; U.S. Representative Henry J. Hyde (Ill.); and U.S. Senator Russell D. Feingold (Wis.). Roberta C. Ramo, president of the American Bar Association, will make a presentation at a dinner at the U.S. Supreme Court. The dinner will be hosted by Associate Justice Stephen Breyer.

According to Judge Tacha, the conference will focus on four areas:

- relationships of state and federal courts in shifting patterns of federalism;
- the three branches of government working together;
- collegiality as a qualitative factor in appellate decision making; and
- judges as civil educators of citizens about the broad purposes of the judiciary.

Justice Lacy heads the symposium's planning committee, which consists of six state appellate judges and four federal appellate judges. She said that the symposium will provide state and federal appellate judges a "unique opportunity to meet and exchange ideas" on these kinds of issues.

Judge Deanell R. Tacha
U.S. Court of Appeals for 10th Circuit

"It will provide a forum for learning from each other about the institutional challenges we all face," she said. "The format will be very interactive."

In addition to plenary sessions, the symposium will include breakout periods where state and federal judges can exchange ideas and enter into a dialogue.

The initial first-day session will cover constitutional issues involved in jurisdictional shifts between federal and state courts. The faculty for this session will be Justice Christine Durham (Utah Sup. Ct.), Judge Patrick E. Higginbotham (U.S. 5th Cir.), Chief Justice Stanley G. Feldman (Ariz. Sup. Ct.), Judge Pamela A. Rymer (U.S. 9th Cir.), and Prof. Francis E. McGovern of the University of Alabama Law School.

Appellate advocacy, not for lawyers but for judges, is the subject of the second session on the first day. A presentation by Abner Mikva, former Counsel to the President and former chief judge of the U.S. Court of Appeals (D.C. Cir.) will lead off discussions on "relationships between the three branches of government—to what extent should appellate judges be advocates for the third branch." Other panelists for this session, officially titled "Shall We Dance?—The Reality of the Judiciary as a Co-Equal Branch of Government," include Justice Shirley S. Abrahamson (Wis. Sup. Ct.), Sen. Feingold, Rep. Hyde, Ms. Crier, Justice Charles Fried (Mass. Sup. Ct.), and Prof. Stephen Gillers of New York University Law School.

On the second day, Judge Martha Craig Daughtrey (U.S. 6th Cir.) and Dr. Dale Lefever (University of Michigan) will lead morning discussions on "Collegiality: A Force for Fair and Efficient Justice: A Myth, A Strength, and a Weakness."

The final session, "From Chambers to Community," will include an address by Judge Guido Calabresi (U.S. 2d Cir.) and comments by Justice Ann K. Covington (Mo. Sup. Ct.), Prof. Gillers, and Judge Tacha.

A "commencement" featuring a summation of the conference by former University of Virginia law professor emeritus Daniel J. Meador and a farewell brunch will be held on Sunday, March 31.

Members of the planning committee for the symposium, in addition to Justice Lacy and Judge Tacha, are Justice Durham, Judge Higginbotham, Chief Judge Martin M. Doctoroff (Mich. Ct. App.), Judge Sarah D. Grant (Ariz. Ct. App.), Justice Carl W. Anderson (Cal. Ct. App.), Justice Leah J. Sears-Collins (Ga. Sup. Ct.), Judge Betty B. Fletcher (U.S. 9th Cir.), and Judge Diarmuid F. O'Scannlain (U.S. 9th Cir.).

The symposium will be funded in part by a grant from the State Justice Institute.

Further information about and registration for the symposium can be obtained from Cara M. Cavallini, Judicial Administration Division, American Bar Association, 541 North Fairbanks Ct., Chicago, IL 60611, phone (312) 988-5700, fax (312) 988-5709. ❑

National Roundup of State–Federal Judicial Councils

California—The spring meeting of the California State–Federal Judicial Council was held in Palm Springs on April 28, 1995. Chief Justice Malcolm M. Lucas (Cal. Sup. Ct.) presided over the meeting.

Council members voted to add a U.S. bankruptcy judge to the council. They also engaged in a discussion of capital habeas corpus issues and, in particular, delays in processing these cases.

The council heard reports on the status of metropolitan councils. The Los Angeles, eastern California, and southern California metropolitan councils all met in the late winter and spring. No meeting of state and federal judges in northern California was held.

Other topics taken up at the meeting included proposed legislation on lawyers' duty of confidentiality and participation by judges in the national town hall video conference as part of the council's "public confidence in the judiciary" program.

The council met again on October 13, 1995, in Pasadena, and was chaired by Chief Judge J. Clifford Wallace (U.S. 9th Cir.). It created a new subcommittee on civil and prisoner pro se litigation and appointed members to the new subcommittee and the following existing subcommittees: Capital Habeas Corpus, Council Structure, Coordination of Large Cases/Resources, and Long-Range Planning.

Judge Wallace asked the judges in each district to prepare brief reports on the status of the capital habeas corpus cases in their districts, and to advise the council of the main causes for delay and give any suggestions for how to overcome them.

Associate Justice H. Walter Croskey (Cal. Sup. Ct.) reported on two regional state–federal judicial council meetings held in Los Angeles, one of which was held to discuss bankruptcy issues with state judges. An attempt will be made to institutionalize quarterly or semiannual meetings of the regional council meetings in each of the federal districts of the state.

Chief Justice Lucas reported on the state government's efforts to consolidate municipal and superior court operations for greater economies and efficiencies. David Halperin (Cal. A.O.) advised that the California Judicial Council had approved a new procedural rule requiring counsel to notify the court of any related cases that have been filed in the state or federal courts in California. A committee of the council chaired by Judge Fern M. Smith (U.S. N.D. Cal.) assisted in the drafting of this new rule. The council heard additional reports on public confidence in the judiciary, Indian tribal courts, legislation to split the Ninth Circuit, funding for race and gender bias studies, and a seminar on bankruptcy law for California state judges to be held in November 1996.

Florida—The Florida State–Federal Judicial Council met on January 13, 1995, in Miami and again on June 23, 1995, in Orlando.

Attending the January meeting, in addition to the member judges, were the attorney general of Florida, the president of the Florida Bar Association, and a representative of the criminal law section of the Florida Practice Committee of the Florida Bar Association. In the January meeting, Chief Justice Stephen H. Grimes (Fla. Sup. Ct.) emphasized the importance of the council as a vehicle for the exchange of valuable ideas between the state and federal judiciaries. In other business, the council adopted a resolution relating to calendar conflicts and case priorities. The resolution established the following case priorities: (1) criminal cases should prevail over civil cases; (2) jury trials should prevail over nonjury trials; (3) appellate arguments, hearings, and conferences should prevail over trials; and (4) the case in which the trial date has been first set should take precedence. The resolution also contained procedures, in the event of a calendar conflict, for attorney notification to opposing counsel, the clerks of the courts involved, and the presiding judge in each case. The resolution was published in the Florida Rules of Court.

Justice Ben F. Overton (Fla. Sup. Ct.) reported on the Office of the Capital Collateral Representative in the offices of the Supreme Court of Florida. This office, created as a result of actions of the Florida State–Federal Judicial Council, compiles data on all death penalty cases and assists in the recruitment of death penalty counsel. Members of the council participated in a discussion of the office's work and the operations of the resource center for capital cases at Florida State University, and funding problems for both organizations.

Other topics discussed at the January meeting included joint discovery activities (which was working well in multidistrict and antitrust cases), misfiling of cases in state and federal courts, and sharing of judicial education programs.

In opening remarks at the June meeting, held during the meeting of the Florida Bar Association, Chief Judge Gerald B. Tjoflat (U.S. 11th Cir.) encouraged the council to consider again joint education programs and suggested that a joint program on death penalty cases would be appropriate.

Representatives of the Office of the Capital Collateral Representative raised the issue of recruitment of private counsel for capital cases and conflicts in representation. Various methods of recruitment were discussed, as were funding issues.

Chief Judge Maurice M. Paul (U.S. N.D. Fla.) reported on a proposal for joint education programs for state and federal judges, to be conducted in cooperation with the Federal Judicial Center. This matter will be pursued by the Florida state court education program personnel.

Other matters discussed at the meeting were fact-finding procedures in habeas cases in state courts, new uniform rules in the federal district courts in the northern and

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Diversity Jurisdiction: Statistics Defy Conventional Wisdom About Preferences

by Dr. Victor Eugene Flango
Acting Vice President of Research
National Center for State Courts

Proponents of federal courts' diversity-of-citizenship jurisdiction argue that a basic reason to retain such jurisdiction is protection of out-of-state litigants. In *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938), the U.S. Supreme Court acknowledged that "diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state." This perceived bias against out-of-state residents is compounded by a perceived bias against large corporations. Based on these perceived biases, one would expect that the most likely diversity-of-citizenship cases filed in federal court would be those brought against an in-state individual by an out-of-state corporation. But how often does this situation occur?

In 1993, 28% of diversity cases in federal courts (14,470 cases) were originally filed in state court and then removed to federal court. Not surprisingly, out-of-state businesses accounted for 61% (10,608) of the removals.

What was unexpected, however, was the distribution of the 30,399 cases originally filed in U.S. district court. The accompanying table shows that 43% (13,003) of the original petitions filed in 1993 were filed by in-state individuals and 11% (3,470) by in-state businesses. In other words, in-state residents filed more cases in federal courts, rather than in the presumably more friendly state courts, than did out-of-state residents. In most of these cases filed by in-state residents, the defendant was an out-of-state corporation. These facts should at least cause reflection on one argument for diversity-of-citizenship jurisdiction and encourage more research to discover why in-state individual plaintiffs chose federal courts, given the supposed advantages of in-state plaintiffs confronting out-of-state defendants in the local, "friendly" state courts. ❑

Distribution of Parties in Diversity Cases in Federal Courts, 1993
(figures provided by William T. Rule of the Administrative Office of the U.S. Courts)

Plaintiffs \ *Defendants*	In-State Individual	Out-of-State Individual	Foreign Individual	In-State Business	Out-of-State Business	Foreign Nation	Total
In-State Individual	77	3,285	1,107	603	7,832	99	13,003
Out-of-State Individual	3,140	506	164	1,684	2,152	14	7,660
Foreign Individual	463	121	29	311	119	4	1,047
In-State Business	230	739	209	52	2,197	43	3,470
Out-of-State Business	2,467	186	35	1,912	503	18	5,121
Foreign Nation	30	1	1	50	14	2	98
Total	6,407	4,838	1,545	4,612	12,817	180	30,399

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A note to our readers

The *State–Federal Judicial Observer* welcomes comments on articles appearing in it and ideas for topics for future issues. The *Observer* will consider for publication short articles and manuscripts on subjects of interest to state and federal judges. Letters, comments, and articles should be submitted to Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

OBITER DICTUM

The Three Faces of Federalism

by Deborah Jones Merritt
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(A longer version of this commentary appeared in the Vanderbilt Law Review, *vol. 47, no. 5, Oct. 1994. The portions appearing here are reprinted with the permission of the* Vanderbilt Law Review.*)*

The relationship between state and federal power has puzzled jurists since this nation began. During just the last twenty years, the Supreme Court has fashioned three different—and discordant—faces for federalism. It is time to assess the Court's three models of federalism and determine whether any of them provide an appropriate principle to guide future federal–state relations. The Court's first two models of federalism are outdated or incompatible with political reality. The third model, however, holds some promise for adjudicating the future bounds of state and federal power.

The Territorial Model

The first and oldest of the Supreme Court's concepts of federalism is the territorial model. This model recognizes that there is a discernible boundary between the subjects fit for national regulation and those reserved for state governance. Territorialists argue that the federal government is supreme in some areas, while states reign sovereign in others. Adherents of this model, for example, might declare that the federal government directs foreign affairs while the states control domestic relations.

Under the territorial model, federalism violations occur when the federal government attempts to invade a substantive area of law reserved to the states. The Supreme Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), drew heavily on this model, especially as the decision was interpreted by lower courts and commentators. In *Usery*, the Court held that Congress could not regulate the wages and hours of state and local employees working in areas of "traditional governmental functions." This emphasis on traditional functions evoked a territorial concept. State employees working in traditional spheres (such as fire prevention, police protection, sanitation, public health, parks, and recreation) were subject to state regulation while workers in other "nontraditional" fields, such as railroad operation, submitted to national legislation. By dividing government functions into state-regulated zones and nationally dominated spheres, *Usery* endorsed a territorial approach and spawned a decade of lawsuits attempting to distinguish traditional governmental functions from nontraditional ones.

The territorial model of federalism is problematic because it conflicts with modern concepts of Congress's power under the Commerce Clause, Spending Clause, and other constitutional provisions. The Supreme Court has interpreted congressional power under those clauses to the effect that virtually no substantive area of law is now beyond the federal government's reach. Education, domestic relations, local transit, health care—all of these areas affect interstate commerce in our economy or receive sizable federal subsidies.

The Federal Process Model

In 1985, frustrated with the shortcomings of territorial federalism, the Supreme Court abandoned territorialism in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 525 (1985), and adopted its second model, the federal process theory of federalism. According to this model, the Constitution's framers protected the integrity of state governments through the structure of the federal government rather than through judicially enforceable limits on the scope of national regulatory power. In particular, advocates of this model maintain that the U.S. Senate protects state interests by guaranteeing equal representation to each state. Because the federal legislative process adequately protects state interests, federal process theorists conclude that the states need no further protection from the courts.

In the *Garcia* decision, the Supreme Court enthusiastically embraced this federal process model. The Court declared "[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."

Under some circumstances, the federal process model accurately describes the political relationship between state and federal governments. State governments have powerful lobbying groups to assert their interests, and federal representatives frequently heed those voices. The history of federal legislation demonstrates that the states frequently influence the legislative process and that they have achieved exemption from many important federal laws.

The cases that come to court, however, are the ones in which state governments have failed to achieve their ends. The question is whether the structure of the federal government is sufficiently sensitive to state interests to leave the important task of policing federal-state relations entirely to Congress, the President, and administrative agencies.

When measured against this yardstick, the federal process model suffers from several fatal flaws. The most fundamental of these flaws is the model's very assumption that the political process contains safeguards that systematically protect the interests of state governments. The composition of the U.S. Senate does not protect the institutional interests of state governments; instead, it protects the private interests of citizens of less populous states.

More important, even if senators and other national officials maintain some loyalty to the institutional interests of state governments, that commitment is only one of several competing interests in the national political process. Politics is a process of compromise, in which one interest rarely triumphs absolutely over all others. If state autonomy is an important component of our government—one that should be preserved whatever the countervailing pressures—then we cannot trust that principle solely to the political process.

The federal process theory fails to protect adequately the health of state governments within the federal system. In 1992, the Supreme Court, in a case from New York, appeared to recognize these flaws, abandoned the federal process theory, and embraced its third model of federalism.

The Autonomy Model

This third and most recent model of federalism is the state autonomy model, which arose from *New York v. United States*, 505 U.S. 144 (1992). According to autonomy theorists, courts should intervene in the political process to protect the independence of state governments, but only when the federal government has tampered with the independent relationship between

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State, Federal Judges Should Preserve Private Records; Chambers Papers Provide Valuable Historic Materials

By preserving chambers papers, state and federal judges can contribute to a better understanding of the judiciary, which is necessary for the proper functioning of a democracy. Chambers papers include private judicial correspondence, private notes and memoranda, drafts of opinions and other judicial papers, appointment calendars, and similar personal and professional papers. These papers support scholarly research, which in turn can enhance and influence public opinion about the judicial system.

Chambers papers are useful in several ways:

• They can be a valuable source of information for judicial administration matters, such as judicial workloads and their effects on judges.

• They may be particularly important where docket records have been lost to fire, flood, or war. Under such circumstances, they may be the only extant source of information about the workload of a court.

• They can provide supporting material for judicial education programs by providing insights into particular judicial problems.

• They are useful sources of information about public reaction to decisions. Some judges receive correspondence from the public in response to their decisions. Other judges use their own memoranda to note and preserve information about public reactions to particular cases and their impressions about such reactions.

• They provide insight about a particular historical period.

• They are valuable even from judges not involved in highly visible litigation. They reveal how new judges adapt to the judicial role, the range of judicial and other professional colleagues who may influence judges' views of their jobs, and the variety of administrative and other demands that help shape the lives of judges.

• They can benefit not only history but the judge. Once an agreement is reached with a repository, noncurrent records can be shipped out of chambers for storage at the repository on a regular basis, freeing chambers space. Most repositories will return records if the judge needs them.

Chambers papers of a judge are generally considered to be the judge's personal property to be preserved at his or her discretion, although different jurisdictions may have different rules governing which materials judges create are official records and which are for the judge to dispose of as he or she wishes. Even where judges have unfettered authority to dispose of their chambers papers, few have deposited them in archives. For example, chambers papers for only 10% of the federal judges appointed during the 206-year history of the federal courts are currently in archival collections.

Judges usually say that their reason for not preserving their chambers papers is that the papers contain little of value. Judges, like others in government office, generally underestimate the historical usefulness of their words and deeds. Even Chief Justice John Marshall asserted in a note to Joseph Story, "The events of my life are too unimportant, and have too little interest for any person not of my immediate family, to render them worth communicating or preserving."

The judicial branch has suffered because of such neglect—it has not received the historical attention it deserves, especially in comparison to the other two branches of government.

With access to the papers of judges, scholars can document the rich fabric of the judicial process in America. Such scholarly work, in turn, becomes the basis for textbooks and other curriculum, which gradually can broaden students' and citizens' views of the courts.

The process of preserving chambers papers as a historical resource is not complicated. Judges who desire to make their papers available should contact a suitable repository—e.g., a state archive, a university or a state historical society. While the archive will assess the collection to determine its potential historical usefulness and thus the merits for retention, such an assessment should not discourage judges from seeking to deposit their papers. Archivists are not just looking for chambers papers from judges who were involved in prominent litigation or significant judicial events. Even the papers of judges whose careers were thoroughly prosaic may be of interest to researchers. Nevertheless, the final determination as to the suitability of preserving a collection rests with the repository.

If a judge is not successful in making preservation arrangements with one archive, other depositories should be sought.

Once an archive has agreed to accept a collection of chambers papers, the transfer can be accomplished by a Deed of Gift or by provision in a will. Deeds of gift or wills should include provisions to restrict access until a date when the release of the papers would not adversely affect individuals or institutions mentioned—judges can determine when access to their collection should be granted. Judges can even arrange to send chambers papers to an archive on a continuing scheduled basis. This relieves them of having to maintain space for the papers but provides an opportunity to retrieve them. It also spares staff and family the burden of having to decide hastily about chambers papers at the time of death.

Federal courts and some state courts can pay, under most circumstances, for the cost of shipping papers to a repository. ❑

Judges Meet to Discuss Mass Tort Litigation

The Mass Tort Litigation Committee (MTLC) of the Conference of Chief Justices regularly meets to discuss and make recommendations concerning judicial handling of toxic substance and other mass-disaster cases with a national scope. The committee is composed of state court judges who regularly hear such cases, and a federal judge who serves as committee liaison to the federal judiciary. Judge Charles R. Wolle (U.S. S.D. Ia.), currently serving as federal judiciary liaison for the committee, urged judges at the most recent meeting of the committee in Denver in November 1995 to organize and become active in state–federal judicial councils as a means of promoting judicial cooperation. Pictured above are, from left, three members of the committee: Judge Robert H. Alsdorf (Wash. Super. Ct.), Judge Margot Botsford (Mass. Super. Ct.), and Judge Hiller B. Zobel (Mass. Super. Ct.).

Tribal Courts, Judges Given Increased Attention in Judiciary Affairs

by James G. Apple

State and federal judiciaries around the country are giving increased attention to tribal courts, judges, affairs, and issues, including tribal representation on state–federal judicial councils.

An example of this trend is the recent adoption of a resolution by the U.S. Ninth Circuit Judicial Council relating to the inclusion of tribal judges on state–federal judicial councils of the states within the circuit.

The resolution was submitted to the council by its task force on tribal courts, chaired by Judge William C. Canby, Jr. (U.S. 9th Cir.). The resolution states:

"The Judicial Council of the Ninth Circuit, continuing its 15 years of support for strengthening the viability of state–federal judicial councils, encourages the councils of this circuit, to the extent that they have not already done so, and to the extent that there are vital and functioning court systems of federally recognized Indian tribes in the state, to invite judges or other representatives of those tribal courts to fully participate in the state–federal councils' deliberations as equal members of such councils. The judicial council offers the services of its Task Force on Tribal Courts to assist councils in identifying appropriate tribal court representatives, in articulating tribal court issues for council agendas, and in providing such other assistance as will facilitate inclusion of tribal court judges and full and fair consideration of issues of mutual concern to the tribal, state, and federal court systems."

The Ninth Circuit Council adopted this resolution at its meeting on November 21, 1995. According to Chief Judge J. Clifford Wallace (U.S. 9th Cir.), the resolution was sent to the state–federal judicial councils in all of the states of the Ninth Circuit.

In his report accompanying the resolution, Judge Canby stated that the task force over the past several years has devoted its efforts "toward easing jurisdictional tensions, promoting comity, and building mutual understanding and respect between the federal courts and the tribal courts of the various Indian nations that reside within Ninth Circuit boundaries."

Judge Canby noted the increased attention of federal and state judiciaries to tribal courts and tribal judges in recent years. He attributed this increased attention to federal judges like Judge Wallace and Judge Monroe G. McKay (U.S. 10th Cir.) who wish to stimulate activity involving tribal courts and tribal judges at the local level. Judge Canby also cited U.S. Attorney General Janet Reno's interest in tribal courts and law enforcement issues in Indian country, and the "increased complexity of life on tribal reservations and increased contacts between Indians and non-Indians, especially among those tribes that are involved in gambling casinos."

Judge Canby said that many state judiciaries (e.g., Arizona's) have had a long and continuing interest in Indian matters and have been engaged in activities designed to lessen tensions between Indians and non-Indians.

Several state–federal councils in the western United States have acted on the issue of tribal representation. In November 1993, the Oregon State–Federal Judicial Council invited the chief judges of the Warm Springs and Umatilla tribal courts to become full voting and participating members. The Washington State–Federal Judicial Council recently invited Chief Justice Elbridge Coochise of the Hopi tribe to its meeting. The Arizona State–Federal Judicial Council will consider in early 1996 changes to its charter to include representatives of tribes within its borders.

In 1994, the Conference of Chief Justices changed the name of its committee on federal–state relations to the Standing Committee on Federal–State–Tribal Relations. The Conference adopted a resolution relating to a National Center for State Courts (NCSC) project, "The Tribal Courts and State Court: The Prevention and Resolution of Jurisdictional Disputes," which was funded by the State Justice Institute. The resolution expressed support for a proposal of the NCSC to the Bureau of Justice Assistance of the U.S. Department of Justice to fund further initiatives in the area of resolving disputes among tribal, state, and federal courts.

Future projects would be guided by four basic principles previously approved by the chief justices:

1. Tribal, state, and federal courts should continue cooperative efforts to enhance relations and resolve jurisdictional disputes;

2. Congress should provide resources to tribal courts consistent with their current and increasing responsibilities;

3. Tribal, state, and federal authorities should take steps to increase the cross-recognition of judgments, final orders, laws, and public acts of the three jurisdictions; and

4. The goal of future federal, state, and tribal courts' efforts should be to define what is the appropriate jurisdiction of tribal courts over conduct in Indian country by tribal members, nonmember Indians, and non-Indians.

The new project, involving federal as well as state and tribal courts, would support the creation of tribal-state-federal court forums, promote communication and cooperation, and develop intergovernmental agreements that would provide for the following: (1) cross-use of facilities, programs, and personnel in each of the systems, (2) exchange of justice system records information, and (3) extradition to and from Indian country.

The Judicial Education Division of the Federal Judicial Center and the U.S. Department of Justice are planning a joint seminar for the fall of 1996 that will involve federal and tribal judges (and possibly state judges or other state officials as faculty members) on the issue of Indian child sexual abuse and jurisdictional and substantive law issues relating to such crimes. The goals of that program are (1) strengthening generally relationships among federal and tribal judges and increasing appreciation among federal judges of Indian law and culture; (2) developing a protocol for federal–tribal court cooperation in the handling of such cases; and (3) development of a model training curriculum that would be tested in one locality and then be replicated in other appropriate settings. ❑

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a state government and its voters. That sort of interference occurs when the federal government dictates the structure of state governments, commandeers the energy of state administrators, or forces state enactment of particular laws—all without offering state governments the option of nonparticipation.

When the federal government acts in this manner, it does more than simply exercise its power under the Supremacy Clause to regulate a particular field of private conduct and preempt contrary state laws. Instead, these actions destroy the essential autonomy of state governments by forcing those governments to respond to the commands of the U.S. Congress rather than to the dictates of their voters.

In *New York v. United States*, the Supreme Court endorsed the autonomy model of federalism, while dealing fatal blows to both the territorial and federal process models. The Court struck down one provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, not because Congress had invaded a substantive field reserved to the states, but because Congress had attempted to "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Even when the Constitution empowers Congress "to pass laws requiring or prohibiting certain acts" by private citizens, the Court held that Congress "lacks the power directly to compel the States to require or prohibit those acts." Throughout the *New York* opinion, the Court declared its concern with protecting the autonomous processes of state government and the political accountability of state and federal governments.

To assess the value of the autonomy model, it is necessary to ask first whether state governments confer any benefits on our society.

There are at least four values in the continued existence of autonomous state governments. First, independent state governments check the power of the federal government. As long as they remain autonomous, states can muster considerable lobbying and litigation forces to challenge federal regulation. With the power to reject participation in federal programs, state governments can also negotiate with federal representatives to affect the content of those programs. And state governments serve as political breeding grounds, where parties and factions excluded from national power rebuild their strength and new political forces gain footholds. Without these checks, our powerful national government could become overbearing.

Second, state governments help introduce a diversity of participants into the political process. These governments seem more adept than the national government at drawing in new political faces. Almost every political minority in the United States—from Irish Americans at the beginning of this century to women today—has gained experience in state or local politics before climbing into national prominence.

Third, despite the homogenizing force of McDonald's and other chain enterprises from coast to coast, state governments continue to provide choices in living conditions. Some states are friendly to the environment, while others are more friendly to business. The amount of money expended on education, welfare, and health care varies widely from state to state. For a nation composed of diverse racial, cultural, and religious groups, this opportunity to express multiple social values is essential.

Finally, states offer the laboratories for social experimentation immortalized by Justice Brandeis. His words have become a cliché, yet they speak a substantial truth. Unemployment compensation, antidiscrimination laws, no-fault compensation schemes, and other social programs emerged from state experiments.

The autonomy model of federalism is useful because it recognizes just these values in state governments. State governments forced to implement federal commands are unlikely to check the power of their commanding officer. Nor are such governments likely to give political newcomers the training they need to succeed in national politics. Middle managers who lack autonomy to govern their own domains never have been known for promoting diverse living conditions or social experiments. In management theory, autonomy means innovation and diversity, while central control is synonymous with sameness and rigidity. To promote the four values of federalism, states must retain some measure of autonomy.

The Most Important Question

I have saved the most important question for last: Even if the autonomy model promotes important values and imposes no substantial costs on the federal government, does the model derive from constitutional text? Without a constitutional anchor, the Supreme Court lacks power to strike down any federal statute, no matter how well-crafted the Court's political theory.

In *New York*, the Supreme Court rooted its autonomy model in a symbiotic reading of the Commerce Clause and the Tenth Amendment. The Court recognized that the Tenth Amendment contains no language that could be read as an affirmative limit on the powers conferred by Article I of the Constitution. At the same time, the Court suggested that the existence of the Tenth Amendment implies inherent limits in the powers conferred by that article. The Tenth Amendment and Commerce Clause together, in other words, achieve what the Tenth Amendment alone could not.

If the federal government pledges to maintain a republican form of government in each state, as it does in the Guarantee Clause, then *a fortiori* the federal government promises to maintain governments within those states. A republican government, moreover, is accountable to its electorate. It is not responsible to divine power, an inherited monarchy, or even the federal government. Through the Guarantee Clause, therefore, the federal government pledges to maintain autonomous governments in each state—governments that are responsible to the people of the state rather than to the federal government.

Conclusion

I have argued that autonomous state governments are political assets that require judicial protection against national intrusion, that the Supreme Court's autonomy model offers the best possibility to provide that protection, and that the autonomy model is best rooted in the text of the Guarantee Clause rather than in the shadows of the Tenth Amendment and Article I. The autonomy model of federalism promises the best of two constitutional worlds. It promotes a strong federal government free to regulate any field of private endeavor, while also preserving healthy state governments to regulate the fields Congress avoids, opening political doors to new faces, promoting diverse living conditions, and spawning innovative programs. This update of an eighteenth century vision is the best formula for the future of federalism. ❑

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southern regions, dispositional guidelines for judges, and the growing number of pro se prisoner cases.

Iowa—Marshalltown was the site of the September 28, 1995, meeting of the Iowa State–Federal Judicial Council, attended by three federal and three state judges. Topics discussed included the following:

• qualified interpreters in both state and federal courts (members of the council noted the telephone interpreting project in the U.S. District Court in New Mexico);

• the Iowa State–Federal Pictorial Directory, a project of the Iowa Judges Association, containing photographs of all state and federal judges in the state—the directory will be made available to those judges (the Chief Deputy Clerk of the U.S. District Court for the Southern District of Iowa, Rob Raker, provided most of the photography for the project);

• state judge assistance in providing search warrants, arrest warrants, initial appearance hearings, and preliminary hearings and other judicial services for federal law enforcement officers in areas where federal judicial officers are unavailable;

• support for renewed funding for the State Justice Institute; and

• the status of the long-range plan for the federal courts.

Louisiana—New Orleans was the site of the October 1, 1995, meeting of the State–Federal Judicial Council of Louisiana. Chief Justice Pascal F. Calogero presided. Five issues were discussed at the meeting: (1) Congress's elimination of funding for post-conviction defender organizations; (2) certification of questions of law from U.S. district judges; (3) state judge participation in pretrial conferences of Louisiana prison cases in federal district courts to determine the number of state inmates that can be housed in parish jails; (4) change in scheduled time for execution of prisoners given the death penalty to the same time as the State of Texas; and (5) a proposal to schedule a panel of some members of the council for the spring meeting of Louisiana state judges. Council members were generally opposed to allowing district judges to certify questions of law to the Louisiana Supreme Court, but supported continuation of certification of state law questions by U.S. Courts of Appeals.

Virginia—Chief Justice Harry L. Carrico (Va. Sup. Ct.) presided over the meeting of the Virginia State–Federal Judicial Council on September 28, 1995, held in the Supreme Court Building in Richmond. Following a general discussion on the transformation of the American judiciary, Judge H. Emory Widener (U.S. 4th Cir.) led a discussion on saving the federal judiciary from the federalization of state crime. The discussion included comments from Justice Carrico and Judge Tristram T. Hyde IV (Va. Dist. Ct.). Justice Carrico reviewed actions at the most recent meeting of the Federal–State Jurisdiction Committee of the Judicial Conference of the United States, including proposals for change in diversity jurisdiction. Bankruptcy Judge David H. Adams (U.S. E.D. Va.) addressed the issue of state judges' difficulties with automatic stay provisions of the bankruptcy code, the need for training, and the possibility of development of a benchbook. Judge Adams also reviewed an upcoming program of the Virginia Bar Association on judicial independence.

Washington—Seattle was the site of the November 7, 1995, meeting of the Washington State–Federal Judicial Council. Chief Justice Barbara Durham (Wash. Sup. Ct.) introduced Judge Otto R. Skopil, Jr. (U.S. 9th Cir.), Chair of the Long-Range Planning Committee of the Judicial Conference of the United States, who discussed the long-range plan with council members. The plan was presented to the Judicial Conference in March 1995. Judge Skopil explained the plan and heard comments from state judges who were concerned with some of the implications of the plan, including its proposed reallocation of caseloads to shift more burdens to the state courts. In other business the council elected Judge William F. Nielsen (U.S. E.D. Wash.) as new chair of the council, succeeding Justice Durham, whose two-year term as chair ended. ❑

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