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NOTES

Does the Tenth Amendment Pose Any Judicial Limit on the Commerce Clause After *Garcia v. San Antonio Metropolitan Transit Authority* and *South Carolina v. Baker*?

I. Introduction

For the past half-century, state sovereignty has posed virtually no judicial limits on Congress' commerce clause power.[1] In *Garcia v. San Antonio Metropolitan Transit Authority*, Justice Blackmun of the United States Supreme Court, speaking for a 5-4 majority, stated: "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action."[2] This conclusion in *Garcia*, that states must find their primary protection from congressional regulation in the national political process, was recently reaffirmed in *South Carolina v. Baker*.[3]

This note examines the Supreme Court's decision in *Baker*. Part II briefly summarizes the Supreme Court decisions that provide the background for *Baker*. Part III then introduces the facts of the *Baker* case and sets forth the Court's reasoning on the commerce clause-tenth amendment issue. Part IV analyzes the *Baker* decision by focusing on how *Baker* expands the holding in *Garcia*. This note concludes that *Baker* narrows the possibility that the tenth amendment and constitutional principles of federalism will provide any judicially enforceable limits on Congress' commerce clause power.[4]

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1. *See* L. Tribe, American Constitutional Law 378 (2d ed. 1988). Congress' commerce clause power is found in the U.S. Const. art. I, § 8, cl. 3.

2. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985).

3. South Carolina v. Baker, 108 S. Ct. 1355 (1988).

4. The Supreme Court in *Baker* explains, "[w]e use 'the tenth amendment' to encompass any implied constitutional limitation on Congress' authority to regulate state

II. Background: State Sovereignty and the Commerce Clause

Since 1937, the Supreme Court has placed no judicial limits on Congress' power to regulate private activities under the commerce clause.[5] When Congress reached beyond private activities and began to regulate state activities, the Supreme Court found that the commerce power was broad enough to override state sovereign prerogatives.[6] For example, in 1968 the Supreme Court held that amendments to the Fair Labor Standards Act of 1938 (FLSA) were constitutional, even though these amendments allowed Congress to regulate the wages of state employees working in state hospitals, institutions, and schools.[7] With this encouragement, Congress in 1974 extended the FLSA coverage to almost all public employment including state police and fire departments.[8]

In 1976, however, the Supreme Court changed directions and placed limits on Congress' power to regulate state activities under the commerce clause. In *National League of Cities v. Usery*,[9] the Court held that the 1974 amendments to the FLSA operated directly to displace the states' abilities to structure employer-employee relationships in areas of traditional governmen-

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activities, whether grounded in the tenth amendment itself or in principles of federalism derived generally from the Constitution." *Id.* at 1360 n.4. When "the tenth amendment" is referred to in this note the same meaning will apply.

5. Since 1937, the Supreme Court has not held unconstitutional any congressional statute enacted under the commerce clause which regulates the activities of private citizens. L. Tribe, *supra* note 1, at 307 n.8. In Wickard v. Filburn, 317 U.S. 111 (1942), the Supreme Court found the commerce clause power was so broad that Congress could control a farmer's wheat production even if the wheat was intended to be used solely for home consumption. The Court concluded that Congress could regulate this activity because the cumulative effect of all wheat production intended for home consumption might affect interstate commerce. 317 U.S. at 127-28.

6. This note treats local governments as appendages of state governments. Therefore, local and state governments will collectively be referred to as the "states." *See Baker*, 108 S. Ct. at 1358 n.1.

7. Maryland v. Wirtz, 392 U.S. 183 (1968). The original FLSA passed in 1938 specifically excluded the states and their political subdivisions from its coverage. The 1938 version of the Act provided: " 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State." The Fair Labor Standards Act of 1938, 29 U.S.C. § 203 (d) (1940). Under the 1966 amendments to the FLSA, the exemption previously extended to the states and their political subdivisions was removed with respect to employees of state hospitals, institutions, and schools. 29 U.S.C. § 203 (d) (Supp. II 1964).

8. 29 U.S.C. § 203 (d)(x).

9. 426 U.S. 833 (1976).

tal functions. Consequently, the amendments were held to be outside Congress' commerce clause authority.[10] Justice Rehnquist, speaking for a 5-4 majority, stated, "Congress may not exercise [the commerce] power so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[11]

Six years after *National League of Cities*, the Court decided *FERC v. Mississippi*, which also dealt with the tenth amendment and the commerce clause.[12] The federal statute at issue in *FERC*, the Public Utility Regulatory Policies Act of 1978 (PURPA), was enacted under Congress' commerce power and was intended to combat the energy crisis.[13] The disputed sections of PURPA were titles I and III,[14] and section 210 of title II.[15] Titles I and III compelled state utility commissions to consider adopting federal regulations and required these agencies to

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10. *Id.* at 839-852.

11. *Id.* at 855. The Supreme Court established guidelines to help define state activities that could not be regulated by the commerce power. The Court identified four prerequisites necessary for state governmental immunity. Hodel v. Virginia Surface Mining & Recl. Ass'n., 452 U.S. 264 (1981). These four conditions were, first, the federal statute must regulate "the States as States"; second, the statute must "address matters that are indisputably attributes 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"; and fourth, the relation of state and federal interests must not be such that "the federal interest . . . justifies state submission." *Hodel*, 452 U.S. at 287-288 (quoting National League of Cities, 426 U.S. at 845, 852, 854). The *National League of Cities* test is to a large extent "a balancing test for determining whether commerce clause enactments transgressed constitutional limitations imposed by the federal nature of our system of government." *Garcia*, 469 U.S. at 562 (Powell, J., dissenting).

The task of determining which activities were "traditional governmental functions" proved to be a difficult one, and the results were varied. For example, the Sixth Circuit in Amersbach v. Cleveland, 598 F.2d 1033, 1037-38 (6th Cir. 1979), held that operating a municipal airport was a traditional governmental function and therefore immune from the FLSA. However, the Ninth Circuit in Hughes Air Corp. v. Public Utilities Comm'n, 644 F.2d 1334, 1340-1341 (9th Cir. 1981), held that the regulation of air transportation was not immune from the FLSA. Moreover, the Supreme Court itself narrowly construed *National League of Cities*. In Transportation Union v. Long Island R.R., 455 U.S. 678 (1982), the Supreme Court ruled that a commuter rail service operated by the state-owned Long Island Rail Road was not immune from congressional regulation under the Railway Labor Act, because operation of the railroad did not constitute a traditional governmental function. Then, in EEOC v. Wyoming, 460 U.S. 226 (1983), the Court held that the Discrimination Employment Act applied to the states.

12. FERC v. Mississippi, 456 U.S. 742 (1982).

13. *Id.* at 742

14. Public Utility Regulatory Policies Act of 1978, titles I & III, 16 U.S.C. § 2611 (1982); 15 U.S.C. § 3201 (1982).

15. 16 U.S.C. § 2611, 824a-3 (1982).

adopt federal procedures when entertaining disputes or acting on the proposed federal utility standards.[16] Section 210 of title II required state authorities to implement rules promulgated by the Federal Energy Regulatory Commission (FERC). This section further required the states to settle disputes arising under PURPA.[17]

In *FERC*, Mississippi alleged that the disputed sections of PURPA violated the tenth amendment because these sections forced the states to exercise their state regulatory machinery to advance federal goals.[18] The Court concluded that PURPA did not violate the tenth amendment because PURPA did not compel the exercise of the states' sovereign powers.[19] The Court held that PURPA simply established minimal procedural requirements for continued state activity in an otherwise pre-empted field and required the states to consider (but not necessarily implement) federal regulatory standards.[20] However, the Court in *FERC* left open the possibility that the tenth amendment might limit the power of Congress to compel the states to regulate on behalf of federal interests.[21]

FERC is related to *National League of Cities* because both cases deal with the commerce clause and the tenth amendment, but there is a significant difference between the two cases.[22] In *National League of Cities*, the issue was whether Congress, under its commerce clause powers, could directly regulate the activities of the states.[23] The issue in *FERC*, on the other hand, was not to what extent Congress could regulate the activities of the states, but rather, to what extent the Congress could impose on state regulatory machinery to advance federal goals.[24] In *FERC* the Supreme Court recognized the distinction between the two cases and stated: "In PURPA, in contrast [to the statute at issue in *National League of Cities*], the Federal Government attempts to use state regulatory machinery to advance federal goals. To an extent, this *presents an issue of first impression*."[25]

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16. *FERC*, 456 U.S. at 761-771.
17. *Id.* at 743.
18. *Id.* at 752.
19. *Id.* at 758-771.
20. *Id.*
21. *Id.*
22. *Id.* at 757-758.
23. *Id.*
24. *Id.* at 759.
25. *Id.* (emphasis added).

The Supreme Court's distinction between *FERC* and *National League of Cities* is an important part of the Supreme Court's analysis in *South Carolina v. Baker*.[26]

Three years after *FERC*, the Supreme Court decided *Garcia v. San Antonio Metropolitan Transit Authority*.[27] The issue in *Garcia*, like the issue in *National League of Cities*, was to what extent the tenth amendment shielded the states from otherwise applicable congressional legislation enacted under the commerce clause. In *Garcia*, the San Antonio Metropolitan Transit Authority (SAMTA), a publicly owned and operated mass-transit authority, alleged that the tenth amendment as interpreted by *National League of Cities* shielded SAMTA from the overtime provisions of the FLSA.[28] The Supreme Court concluded that the tenth amendment did not shield SAMTA.[29] The Court expressly overruled *National League of Cities* and stated that drawing boundaries of state regulatory immunity in terms of "traditional governmental functions" was unworkable and inconsistent with established rules of federalism.[30] The Court concluded that the continued role of the states in the federal system is primarily guaranteed by the structure of the national political process, not by judicially defined terms of traditional state governmental functions.[31]

Since 1985, the tenth amendment limits on Congress' authority to regulate state activities under the commerce clause have been defined by *Garcia*. Consequently, in 1988, when the Supreme Court decided *South Carolina v. Baker*, *Garcia* provided the foundation for the *Baker* Court's tenth amendment analysis.

III. *South Carolina v. Baker*

A. *The Facts*

Congress enacted section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982[32] to help prevent tax evasion.[33]

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26. *See infra* notes 85-94 and accompanying text.

27. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

28. *Id.* at 533-34. SAMTA claimed that it was immune from the congressional regulation set out in the FLSA even though SAMTA received over $51 million in federal subsidies between 1970 and 1980. *Id.* at 532.

29. *Id.* at 554-557.

30. *Id.* at 531.

31. *Id.* at 556.

32. Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. § 103(j)(1) (1982)

Section 310 removes the federal income tax exemption for the interest earned on all bonds (including bonds issued by the states), unless the bonds are in registered form.[34] Congress assumed that section 310 would force the states to issue their bonds in registered form because without the tax exemption for the interest earned on bearer bonds, the states would have to increase the interest paid on state-issued bearer bonds by twenty eight to thirty five percent.[35] Almost all state bonds previous to the enactment of section 310 were issued in bearer rather than registered form.[36]

South Carolina invoked the original jurisdiction of the Supreme Court[37] and alleged that section 310 violated the tenth amendment and the doctrine of intergovernmental tax immunity.[38] A Special Master was appointed to make findings of fact and suggest conclusions of law.[39] The National Governors' Asso-

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[hereinafter section 310].

33. 108 S. Ct. 1355, 1359 (1988). Forcing both the federal and state governments, along with private corporations to issue all bonds in registered form would allegedly prevent tax evasion because, "bearer bonds often represent unreported and untaxed income that, without a system of recorded ownership, the IRS has difficulty reconstructing." *Id.* (quoting the testimony of then Assistant Secretary of the Treasury for Tax Policy, John Chapoton in *Compliance Gap: Hearings before the Subcomm. on Oversight of the Internal Revenue Service of the Senate Committee on Finance*, 97th Cong., 2d Sess., 126 (1982)).

34. *Id.* at 1358. Bearer bonds and registered bonds differ with respect to the mechanisms used for transferring ownership and making payments. *Id.* Ownership of bearer bonds is assumed by possession and is transferred by a physical transfer of the bond. Ownership of Registered bonds is recorded on a central list and is transferred by changing the name on the list. Payments are made to the owners of registered bonds by electronic transfer or by check, whereas the owners of bearer bonds are paid by presenting the bonds to the bank who then presents the bonds to the issuer's paying agent for payment. *Id.*

35. *Id.* at 1360. The Court concluded that section 310 effectively forced the states to issue registered, rather than bearer bonds because no state had issued a bearer bond since section 310's inception. *Id.*

36. *Id.*

37. South Carolina v. Regan, 465 U.S. 367 (1984). This suit was originally filed against Secretary Regan, the Secretary of the Treasury, and the suit was changed to *South Carolina v. Baker* when Secretary Baker became the Secretary of the Treasury.

38. *Baker*, 108 S. Ct. at 1359. South Carolina also alleged that section 310 is inconsistent with Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895). South Carolina further argued that section 310 violated the doctrine of intergovernmental tax immunity, by taxing the interest earned on unregistered state bonds. 108 S. Ct. at 1362. The Supreme Court held against South Carolina on this issue. 108 S. Ct at 1368. Although the two issues in this case are somewhat related, this note will focus on the Supreme Court's analysis of the states' sovereign rights under the tenth amendment and principles of federalism in general rather than the doctrine of intergovernmental tax immunity.

39. The Honorable Samuel J. Roberts was appointed as Special Master. South Carolina v. Regan, 465 U.S. 948 (1984).

ciation (NGA) intervened[40] and alleged that section 310 was unconstitutional because it coerced the states into enacting legislation authorizing bond registration and administering the federal regulatory scheme.[41] The Master found that section 310 did not violate the tenth amendment, and the Supreme Court affirmed the decision.[42]

B. *The* Baker *Court's Reasoning*

The Supreme Court treated section 310 as if it directly regulated the states by prohibiting outright the issuance of bearer bonds.[43] South Carolina argued that section 310 implicated the tenth amendment because the states' sovereignty was not protected in the national political process when section 310 was enacted.[44] South Carolina claimed that the political process failed because section 310 was "imposed by an uninformed Congress relying upon incomplete information."[45]

The Supreme Court's resolution of the tenth amendment issues in *Baker* was premised on the reasoning set forth in *Garcia.*[46] Using the precedent set in *Garcia*, the *Baker* Court reasoned that the states must find their protection from congressional legislation through the national political process.[47] The Court further reasoned that South Carolina, by claiming that section 310 was imposed by an uninformed Congress relying upon incomplete information, was actually attacking the substantive basis underlying section 310 and not the political process itself.[48] The majority in *Baker* rejected South Carolina's ar-

40. South Carolina v. Regan, 469 U.S. 1083 (1984).

41. *Baker*, 108 S. Ct. at 1361. The NGA argued that under *FERC v. Mississippi*, section 310 violated the tenth amendment. *Id.*

42. *Id.* at 1362.

43. *Id.* at 1360. Even though section 310 only removed the tax exemption from the interest paid on bearer bonds, the Court assumed, and all parties agreed, that the practical effect of section 310 was to prohibit the States from issuing bearer bonds. *Id.*

44. *Id.* South Carolina further argued that section 310 was an ineffective remedy to cure tax evasion because most brokers must file an information report regardless of the bond form, and because "beneficial ownership of registered bonds need not necessarily be recorded." *Id.*

45. *Id.*

46. *Id.* at 1360-1362. In *Baker*, the Supreme Court stated that *Garcia* held "that states must find their protection from congressional regulation through the national political process." *Id.* at 1360.

47. *Id.* at 1360.

48. *Id.* at 1361. In *Baker*, Justice Brennan did not define the "substantive basis for congressional legislation." However, Justice Brennan claimed that South Carolina attacked the substantive basis for congressional legislation. *Id.* South Carolina claimed

gument, and Justice Brennan stated for the majority: "nothing in *Garcia*, or the tenth amendment authorizes courts to second-guess the substantive basis for congressional legislation."[49]

The Supreme Court in *Baker* did not attempt any definitive articulation of a defect in the national political process that would allow the judiciary to protect the states under the tenth amendment, because the Court concluded that South Carolina did not attack the political process.[50] The Court stated, "[i]t suffices to observe that South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless."[51] The Court concluded that the political process did not operate in a defective manner and that therefore the tenth amendment was not implicated.[52]

In *Baker*, The NGA intervened and argued that section 310 was invalid "because it commandeer[ed] the state legislative and administrative process by coercing states into enacting legislation authorizing bond registration and into administering the registration scheme."[53] The Court recognized that *FERC* left open the possibility that the tenth amendment might set some limits on Congress' power to compel states to regulate on behalf of federal interests, but the Court distinguished *Baker* from *FERC*.[54] The Court reasoned that section 310, unlike the statute at issue in *FERC*, was not designed to use the state regulatory machinery to advance federal goals.[55]

After the Court resolved the tenth amendment issues in *Baker*, the Court then discussed whether section 310 violated the doctrine of intergovernmental tax immunity because it im-

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that there was no concrete evidence to support Congress' conclusion that the enactment of section 310 was necessary to avoid tax evasion, and that Congress chose an ineffective remedy to solve the tax evasion problem. *Id.* Thus, the evidentiary or factual basis supporting congressional legislation, and the remedy which Congress chooses to solve an apparent problem, must be part of the "substantive basis for congressional legislation."

49. *Id.*

50. *Id.*

51. *Id.* (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1982)).

52. *Baker*, 108 S. Ct. at 1361.

53. *Id.*

54. *Id.*

55. *Id.* The Court went on to reason that even if *FERC* applied in this case, section 310 was constitutional. The Court concluded that federal regulations demand compliance, and it is not unconstitutional to require the states to take administrative and legislative action to comply with federal regulatory standards. *Id.* at 1362.

posed a tax on the interest earned on a state bond.[56] This note does not discuss the intergovernmental tax immunity issue raised in *Baker*, rather, the Court's resolution of the tenth amendment issues will be analyzed.

IV. Analysis

Seven out of the eight Supreme Court Justices who took part in the *Baker* decision concurred in the Court's judgment.[57] However, only five Justices joined the Court's tenth amendment analysis.[58] Thus, the main source of controversy in *Baker* was the Court's resolution of the tenth amendment issues.

One reason why three Justices did not join the tenth amendment analysis in *Baker* was that these Justices were not completely convinced that *Garcia*, rather than *National League of Cities*, should define the limits which the tenth amendment imposes on Congress' commerce clause power.

The three Justices also disagreed with the Court's tenth amendment analysis because *Baker* significantly narrowed the possibility that the tenth amendment would in any way limit the power of Congress to regulate state activities. The *Baker* Court narrowed the scope of the tenth amendment by expanding the holding in *Garcia*. The *Baker* Court expanded *Garcia*, by first concluding that the national political process is the states' *only* source of constitutional protection against congressional legislation. Second, the Court claimed that only *extraordinary defects* in the political process (rather than possible findings in the political process) might render congressional regulation of state activities invalid. Third, the Court failed to give a definitive articulation of what it meant by "extraordinary defect." Fourth, the Court claimed that the substantive basis of Congressional legislation could never be used to find an extraordinary defect. Fifth, the Court unnecessarily narrowed the scope of *FERC*, and sixth, the Court implied that it was ready to expand the holding of *Garcia* beyond the commerce clause.

The remainder of this note will analyze the tenth amendment issues in *Baker*. First, the status of *Garcia*, and *National League of Cities* will be discussed. Then, the *Baker* decision will by examined to see how it expands *Garcia* and thereby narrows

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56. *See supra* note 38.
57. Justice Kennedy took no part in the consideration or decision of the case.
58. *See infra* note 59 and accompanying text.

the possibility that the tenth amendment will pose any judicially enforceable limits on congressional legislation.

A. *The Status of* Garcia *and* National League of Cities

In *Baker*, three Justices did not agree with the majority's view of the tenth amendment.[59] With respect to the tenth amendment, Chief Justice Rehnquist (and probably Justice Scalia) concurred in the Court's judgment because the Master determined that the outcome of the case would be the same using the more expansive conception of the tenth amendment espoused in *National League of Cities v. Usery*.[60]

In dissenting opinions in *Garcia*, Chief Justice Rehnquist and Justice O'Connor both expressed the opinion that *Garcia* would eventually be overruled and that the tenth amendment would be protected by the balancing approach set forth in *National League of Cities*.[61] However, the majority opinion in *Baker* confirms that *Garcia* still commands the support of a majority of the Supreme Court, even though the three Justices in *Baker* who disagreed with the Court's view of the tenth amend-

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59. *Baker*, 108 S. Ct. at 1369-1372. (Rehnquist, C.J., concurring only in the Court's judgment, Scalia, J., concurring in the opinion except with respect to Part II (the Court's tenth amendment analysis), and O'Connor, J., dissenting).

60. If the Master had found that section 310 affected the states' power to borrow, there is little doubt that Chief Justice Rehnquist and Justice Scalia would have joined Justice O'Connor in dissenting from the judgment of the Court, because the power to borrow money is treated like an integral operation in an area of traditional governmental functions. *Id.* at 1370 (Rehnquist, C.J., dissenting); Smyth v. United States, 302 U.S. 329, 362-363 (1937) (Stone, J., concurring); Willcuts v. Bunn, 282 U.S. 216, 225 (1931); Pollock v. Farmers Loan & Trust Co., 157 U.S. 429, 585 (1895). However, the Special Master determined that section 310 "has not changed how much the states borrow, for what purposes they borrow, how much the states decide to borrow, or any other *obviously important aspect of the borrowing process*." Report of the Special Master, at 118, *Baker*, 108 S. Ct. 1355 (1988) (emphasis added).

Chief Justice Rehnquist demonstrated that he concurred in the Court's judgment only because section 310 was found to be constitutional by the Master using the *National League of Cities* balancing test, when he stated:

> Even the more expansive conception of the tenth amendment espoused in *National League of Cities v. Usery*, 426 U.S. 833 (1976), recognized that only congressional action that "operate[s] to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions," runs afoul of the authority granted Congress. . . .The Special Master determined that no such displacement has occurred through the implementation of the TEFRA requirements; I see no need to go any further. . .

Baker, 108 S. Ct. at 1370 (Rehnquist, C.J., dissenting).

61. *Garcia* 469 U.S. 528, 580-589 (1985) (Rehnquist, C.J., dissenting and O'Connor J., dissenting).

ment confirm that *National League of Cities* is not yet entirely dead.[62]

B. *How the* Baker *Court Expands the Holding of* Garcia *and Narrows the Scope of the Tenth Amendment*

1. *The* Baker *Court expands* Garcia *by making the political process the only limit on the commerce clause*

The holding in *Garcia* and the holding which the *Baker* Court assigns to *Garcia* are not identical. The actual holding in *Garcia* has two parts. First, the *Garcia* Court held that *National League of Cities* was overruled.[63] There is little confusion over this portion of the holding.[64]

The confusion is over the second portion of the holding in *Garcia*. The majority in *Baker* restates the second portion of the *Garcia* holding as a rule that "states *must* find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."[65] Justice Scalia, in his dissent in *Baker*, explains that the second portion of the holding *Garcia* is not that states *must* find their protection through the national political process.[66] Rather, Justice Scalia reads the second portion of the holding in *Garcia* as saying that the national political process is only a *principal* limit on Congress' commerce power.[67] In Justice Scalia's view, the principal limit on the commerce clause identified in *Garcia* (the national political process) was qualified by other "affirmative limits the constitutional structure might impose."[68]

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62. The Court held seven to one that section 310 was constitutional, but as stated, the majority opinion concerning the tenth amendment which was based on *Garcia* was supported by only five votes. Justice Stevens wrote a brief concurring opinion and stated that he agreed that the majority properly found support for its holding in *Garcia*, but he also indicated that the dissent was correct in concluding that the case was equally clear under *National League of Cities. Baker*, 108 S. Ct. at 1361 (Stevens, J., concurring).

63. *Garcia*, 469 U.S. at 531. The Court in *Garcia* stated: 'the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism . . . ." *Id.*

64. The majority went on to state, "that case [*National League of Cities*] accordingly is overruled." *Id.*

65. *Baker*, 108 S. Ct. at 1361 (emphasis added).

66. *Id.* at 1369 (Scalia, J., dissenting).

67. *Id.* (emphasis added).

68. *Garcia*, 469 U.S. at 556. Justice Scalia extends the limits that the "constitutional structure" places on the commerce clause beyond simply "the national political process"

Justice Scalia's view has merit. In *Garcia*, the majority stated that the "*principal* and *basic* limit on the federal commerce power is that inherent in all congressional actions—the built in restraints that our system provides through state participation in federal governmental action."[69] The majority then qualified this statement. The Court stated that the constitutional structure might provide some affirmative limits on the commerce clause,[70] and then the Court cited *Coyle v. Oklahoma* as authority.[71] *Coyle* is an example of an affirmative limit on Congress' commerce power that is not based on a defect in the political process.[72] In *Coyle*, the Supreme Court held that Congress cannot tell a state where to locate its capitol.[73]

Thus, by stating that the constitutional structure might impose affirmative limits on the commerce clause, and then citing a case which limits congressional power without referring to defects in the political process, the Court in *Garcia* does seem to be saying that the national political process is a principal (but not the only) limit on congressional legislation enacted under the commerce clause. If Justice Scalia's view is the more accurate, then the Supreme Court in *Baker* has expanded the holding in *Garcia* by concluding that the national political process is the only limit on the commerce clause.

2. *Extraordinary defects in the national political process as a limit on the commerce clause*

Justice Scalia's argument to the contrary notwithstanding, the majority in *Baker* reads *Garcia* as holding that the only limit on Congress' commerce power is the national political process.[74] If this is what *Garcia* meant, then it follows *a fortiori* that the states must find their protection from congressional

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which the Constitution creates. *Baker*, 108 S. Ct. at 1359 (Scalia, J. concurring in part and concurring in the judgment). The majority, on the other hand, implies that the limits in the constitutional structure are only the limits imposed by the "national political process" which the Constitution creates. 108 S. Ct at 1361.

69. *Garcia*, 469 U.S. at 556 (emphasis added).

70. *Id.*

71. *Id.* (citing Coyle v. Oklahoma, 221 U.S. 559 (1911)).

72. *Id.*

73. 469 U.S. at 565. *See* L. TRIBE, *supra* note 1, at 380.

74. This view is also based on the language found in the *Garcia* case. 469 U.S. at 554.

regulation enacted under the commerce clause through the political process.[75]

After the Court concluded that the political process is the states' only source of protection against congressional regulation, the Court then narrowed the possibility that the political process will protect the states by concluding that only *extraordinary defects* in the political process might invalidate congressional legislation.[76] In *Baker*, the Court bases this conclusion on *Garcia*, but this is not what *Garcia* held.[77] The Court in *Garcia* stated that any tenth amendment limit imposed on the exercise of Congress' commerce clause powers must be tailored to compensate for *possible failings* in the national political process.[78]

Nevertheless, the *Baker* Court concludes that only extraordinary defects in the political process (rather than possible failings) might render congressional legislation invalid under the tenth amendment.[79] This conclusion expands the holding in *Garcia*, and limits the scope of the tenth amendment, because finding an extraordinary defect in the national political process is no doubt more difficult than finding a possible failing in that process.

In *Baker*, the Court not only made it more difficult to prove that the political process was defective, the Court also fails to give a definitive articulation of the nature of an extraordinary defect.[80] The Court still has yet to explain what is an extraordinary defect in the political process, and what criteria the court uses to determine whether an extraordinary defect exists. Indeed, if the tenth amendment poses more than just a theoretical limit on the commerce clause, then the Court will have to explain how to find an extraordinary defect in the political process because, according to *Baker*, this is the only judicially enforceable source of protection that the states have.

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75. *Baker*, 108 S. Ct. at 1361.

76. *Id.*

77. The Special Master in *Baker*, not the *Garcia* Court, concluded that only *extraordinary defects* in the national political process can provide the states with any substantive judicial relief. *Id.* (Report of the Special Master, at 117). Possibly this is the basis for the Court's conclusion that only extraordinary defects implicate the tenth amendment.

78. *Garcia*, 469 U.S. at 554 (emphasis added).

79. *Baker*, 108 S. Ct. at 1361. The Court stated, "*Garcia* left open the possibility that some *extraordinary defect* in the national political process might render congressional regulation of state activities invalid under the tenth amendment." *Id.*

80. *Baker*, 108 S. Ct. at 1361. A similar statement was made in *Garcia*. *Garcia*, 469 U.S. at 556.

3. *The substantive basis for congressional legislation*

The *Baker* Court further narrowed the possibility that the political process will afford the states protection by stating that "nothing in *Garcia*, or the tenth amendment authorizes courts to second-guess the substantive basis for congressional legislation."[81] If the states must find their protection from congressional regulation through the political process, it is hard to believe that the substantive basis for congressional legislation can *never* be used to prove that the political process failed. It seems likely that extraordinary defects might be manifest in the substantive basis that underlies congressional legislation, as well as in the political process itself.[82] Moreover, the question remains, what does the Court consider to be "the substantive basis" of congressional legislation, and what does the Court consider to be "the process," and is there always a difference between the two?[83]

4. *How the* Baker *decision expands* Garcia *by limiting the scope of* FERC

The issue in *FERC* was whether PURPA (the federal statute at issue in *FERC*) implicated the tenth amendment by forc-

81. *Baker*, 108 S. Ct. at 1361. The Court has not defined the substantive basis of congressional legislation, but the evidentiary or factual basis supporting congressional legislation, and the remedy which Congress chooses to solve an apparent problem, seem to be a part of the substantive basis of congressional legislation. *See supra* note 48.

82. Professor Tribe has said, "[i]f there is any danger it lies in the tyranny of small decisions - in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." L. TRIBE, *supra* note 1, at 381, *cited with approval in*, *Baker*, 108 S. Ct. at 1370 (O'Connor, J., dissenting). One logical way that Congress could nibble away at state sovereignty would be to enact legislation that lacks any real substantive basis—*i.e.*, legislation that is based on frivolous evidentiary and factual conclusions or provides remedies that are completely ineffective.

83. The Special Master in *Baker* identifies three reasons why the "political process" was not defective in section 310's enactment: First, the registration provision did not surface late in the process so as to "sandbag" the states; second, the states had accepted more intrusive legislation with respect to their debt obligations in the past; and third, Congress did not single out the states, because section 310 was to be applied to the United States, private citizens and the states. Report of the Special Master at 134-137, *Baker*, 108 S. Ct. 1355 (1988).

It is difficult to determine whether these situations deal strictly with the "the process," or whether the Master had to evaluate the "substantive basis" of the congressional legislation in arriving at his conclusions. For example, the Master concluded that the political process did not fail in section 310's enactment because the law applied to the United States as well as the states. The Master, it seems, uses substance to prove the political process did not fail because the fact that section 310 applies to the United States is a *substantive* characteristic of section 310.

ing the states to use state legislative and administrative resources to advance federal goals.[84] PURPA sought to influence or control the manner in which the states regulate private parties.[85] The issue in *National League of Cities*, on the other hand, was not to what extent Congress could use state regulatory machinery to advance federal goals and regulate private activities, but whether the tenth amendment shielded the states from the sections of the FLSA that applied to the states.[86] The FLSA attempted to regulate the activities of the states. Because the issues in *National League of Cities* and *FERC* were different, the Supreme Court distinguished the two cases.[87]

In *Baker*, the Court reasoned that Congress intended section 310 to regulate the activities of the states by prohibiting the states from issuing bearer bonds.[88] Thus, the issue in *Baker*, like the issue in *National League of Cities* and *Garcia*, was to what extent the tenth amendment shielded the states from a generally applicable federal statute.[89] The Court concluded that, unlike PURPA, section 310 did not attempt to compel the states to regulate on behalf of federal interests.[90] Therefore, the Court distinguished *Baker* from *FERC*.[91]

Even though the Court in *Baker* correctly distinguished *Baker* from *FERC*, the Court in *Baker* simultaneously questioned whether the tenth amendment claim left open in *FERC* survives *Garcia* or poses constitutional limits independent of *Garcia*.[92] By questioning whether *FERC* survives *Garcia*, the *Baker* Court unnecessarily casts doubt upon *FERC*,[93] and more importantly, the Court ignores the fact it has in essence distinguished *FERC* and *Garcia*.[94]

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84. FERC v. Mississippi, 456 U.S. 742, 759 (1982).

85. *Baker*, 108 S. Ct. at 1361.

86. National League of Cities v. Usery, 426 U.S. 833, 839 (1976).

87. *Baker*, 108 S. Ct. at 1361; *see supra* note 25 and accompanying text.

88. *Baker*, 108 S. Ct. at 1361.

89. *Id.* The NGA's argument focused on, among other things, the fact that the legislative and administrative time and costs would be extensive and therefore burdensome and oppressive to the states, and the Master actually concluded that the time and cost "would not be insignificant". *Id.* (Report of the Master at 36-40).

90. *Id.* at 1362.

91. *Id.* at 1361-1362.

92. *Id.* For a discussion of the tenth amendment claim left open in *FERC*, *see supra* notes 18-21 and accompanying text.

93. *Baker*, 108 S. Ct. at 1369 (Scalia, J., concurring in part and concurring in the judgment).

94. The Supreme Court distinguished *FERC* from *National League of Cities*, not *Garcia*. *FERC*, 456 U.S. at 758-759. However, the issue in *Garcia* was the same as the

The *Baker* Court's analysis with respect to *FERC* is disturbing for another reason—the majority rejected a proposition which it readily accepted in *Garcia*. In *Garcia*, the majority "noted and accepted" Justice Frankfurter's observation in *New York v. United States*:[95]

> The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. *Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court.*[96]

Then, the *Baker* Court did exactly what it said it should not do in *Garcia*. The Court in *Baker* questioned whether *FERC* survives *Garcia*, and then refused to address that issue because, "the claim discussed in *FERC* [was] inapplicable to section 310 [the statute at issue in *Baker*]."[97] Thus, the Court in *Baker* raised an issue that went beyond what was required for a reasoned disposition of the controversy before it. In Baker the Court, it seems, no longer accepted the statement which it used to justify its actions in *Garcia*.[98]

5. The expansion of Garcia's *holding beyond the commerce clause*

The holding in *Garcia* was that the states must find their protection from congressional regulation enacted under the *commerce clause* in the national political process.[99] In *Baker*, however, the Court holds that states must find their protection "from congressional legislation" in the national political process, without apparent restriction to the commerce clause.[100] The language in *Baker* implies that the political process is the states' only source of tenth amendment protection from all congres-

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issue in *National League of Cities*, to what extent state sovereignty shields the states from generally applicable federal regulations. *Garcia*, 469 U.S. 528, 534-535 (1985). Thus, the Supreme Court in effect also distinguished *FERC* from *Garcia*.

95. New York v. United States, 326 U.S. 572, 583 (1946) (Frankfurter, J.).

96. *Garcia*, 469 U.S. at 556 (emphasis added).

97. *Baker*, 108 S. Ct. at 1361.

98. Chief Justice Rehnquist expressed his disapproval of the Court's statements concerning *FERC*, and *Garcia* in his dissent. He stated: "Those issues [whether *FERC* survives *Garcia*] intriguing as they may be, are of no moment in the present case and are best left unaddressed until clearly presented". *Id.* at 1370 (Rehnquist, C.J., dissenting).

99. *Garcia*, 469 U.S. at 554-557 (emphasis added).

100. *Baker*, 108 S. Ct. at 1361.

sional legislation, not just legislation enacted under the commerce clause.[101] Moreover, the Court seems willing to expand the holding in *Garcia*, even though the Court had previously cautioned that the standard against which it measures statutes enacted under the commerce clause might not apply to statutes enacted under other provisions of the Constitution.[102]

V. Conclusion

The Supreme Court in *Baker* expands the holding in *Garcia*, and thereby limits the possibility that the tenth amendment will provide any judicially enforceable limits on the commerce clause. The Court in *Baker* accomplishes this expansion by concluding that only extraordinary defects in the political process implicate the tenth amendment.[103] The Court further expands *Garcia* by concluding that the substantive basis for congressional legislation can not be used to find extraordinary defects in the political process[104] and by implying that *Garcia* might eliminate the tenth amendment claim left open in *FERC*.[105] Finally, the language that the Court uses in *Baker* suggests that the Court might be expanding the holding in *Garcia* beyond commerce clause legislation.

In summary, *Baker* holds that the tenth amendment imposes theoretical limits on congressional regulation enacted under the commerce clause. However, as a practical matter, those limits will only be judicially enforceable under the most extraordinary of circumstances, if at all.

This conclusion is disturbing because the Supreme Court's reasoning in both *Garcia* and *Baker* is arguably based on a false premise. The Court in *Garcia* concluded that "[t]he political process ensures that laws that unduly burden the states will not

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101. One of South Carolina's main contentions in this case was that the issue in *Baker* dealt with Congress' taxing power, not with the commerce power, and therefore *Garcia* was not applicable to *Baker*. South Carolina, in its petition for rehearing, stated: "The majority fails to recognize the distinction recognized historically between the taxing power and the commerce power, as illustrated in Hill v. Wallace, 259 U.S. 44 (1922), and Chicago Bd. of Trade v. Olsen, 262 U.S. 1 (1923)." Brief for Petitioner (Petition for Rehearing) at 22, South Carolina v. Baker 108 S. Ct. 1355 (1988).

102. *National League of Cities*, 426 U.S. at 852 n.17; *see* Brief for Defendant (on report of the Special Master), at 25 n.16, South Carolina v. Baker, 108 S. Ct. 1355 (1988).

103. *Baker*, 108 S. Ct. at 1360-1361; *see supra* notes 63-80 and accompanying text.

104. *Id.*; *see supra* notes 81-83 and accompanying text.

105. *Id.* at 1361; *see supra* notes 84-93 and accompanying text.

be promulgated."[106] Does the national political process ensure that Congress will *never* promulgate laws that unduly burden the states, even in areas such as taxation where Congress is in open competition with the states to obtain the resources necessary to accomplish its goals? The Supreme Court itself has acknowledged that the doctrine of intergovernmental tax immunity is based on the possibility that Congress might exercise undue influence over the states, or vice versa.[107]

The *Baker* Court's conclusion, that the states must find their protection from congressional legislation in the national political process, is not disturbing as long as the states' sovereign interests are adequately protected in that process. However, *Baker* is alarming because the Supreme Court forces the states to look to the political process for protection, then the Court significantly narrows the possibility that the states can enforce their sovereignty in the event that the political process fails. If the political process is the states' exclusive source of protection under the tenth amendment, then constitutional principles of federalism require the courts to cautiously preserve the states' right to protect their sovereignty in the event that the political process fails. In *Baker*, the Supreme Court does just the opposite.[108]

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106. *Garcia*, 469 U.S. at 556.

107. In Graves v. New York *ex. rel.* O'Keefe, 306 U.S. 466 (1939), the Supreme Court itself acknowledged that the states and Congress compete for revenues, and the Court recognized the possibility that one government might attempt to exercise undue influence over the other government. The Court in *Graves* stated:

> The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue influence, through the exercise of that power, with the governmental activities of the other.

Graves, 305 U.S. at 477-478.

108. It should be noted that although at the present time the Supreme Court is diminishing the possibility that the tenth amendment will provide any judicially enforceable limits on Congress' powers, one Justice hints that she is ready to expand judicial enforcement of state autonomy through another means—the guarantee clause. U.S. CONST. art. IV, § 4. This constitutional provision guarantees the states the right to have a republican form of government. In both *FERC* and *Baker*, Justice O'Connor indicated that she feels that the states' autonomy is protected from substantial federal incursions by virtue of the republican form of government guaranteed in the United States Constitution. *Baker*, 108 S. Ct. at 1370 (O'Connor, J., dissenting); *FERC*, 456 U.S. at 489 (O'Connor, J., dissenting); *see*, L. TRIBE, *supra* note 1, at 397-398. Consequently, judicial enforcement of the states' sovereignty may in the future be reborn under the guarantee clause.