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Constitutional Federalism Revisited: Garcia v. San Antonio Metropolitan Transit Authority

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CONSTITUTIONAL FEDERALISM REVISITED: *Garcia v. San Antonio Metropolitan Transit Authority*

Constitutional federalism is the basis on which the United States government was created.[1] However, the concept of constitutional federalism has not yet been clearly defined, and as a consequence, conflicting viewpoints on federalism have arisen.[2] These conflicting viewpoints are best illustrated by the law concerning the commerce clause.[3]

With the recent expansion of the commerce clause,[4] the United States Supreme Court was faced with defining constitutional federalism, in order to evaluate the legitimacy of commerce clause legislation.[5] The task of defining constitutional federalism, however, only served to create a dispute over federalism among the Supreme Court Justices.[6] In 1985, the Supreme Court renewed the continuing debate over the definition of constitutional federalism in *Garcia v. San Antonio Metropolitan Transit Authority.*[7]

THE CONCEPT OF FEDERALISM

Constitutional federalism has been defined as "a principle of government which provides for the division of powers between a national government and a collection of state governments operating over the same geographical area."[8] This definition does not, however, provide a guide to the proper division of power allocated to the national and state governments respectively. It is this lack of clarity in definition that has created the conflict surrounding the concept of federalism.

Essentially, two views of constitutional federalism exist.[9] These views

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[1]Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government* 54 COLUM. L. REV. 543, 543 (1954) (hereinafter cited as Wechsler).

[2]*See infra* notes 6-22, and accompanying text.

[3]O'Fallon, *The Commerce Clause: A Theoretical Comment,* 61 OR. L. REV. 395, 395 (1982) (hereinafter cited as *O'Fallon).* U.S. CONST. art. I, §8, cl. 2 provides:

"The Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" U.S. CONST. art. I, §8.

[4]*See infra* notes 38-40, and accompanying text.

[5]*See infra* notes 40-46, and accompanying text.

[6]*See infra* notes 53-54, and 81, and accompanying text.

[7]*Garcia,* 105 S.Ct. 1005 (1985).

[8]H. CHASE & C. DUCAT, CONSTITUTIONAL INTERPRETATION, CASES-ESSAYS-MATERIALS 371 (2d ed. 1979) (hereinafter cited as CHASE).

[9]These views represent the dominant theories expressed concerning federalism. They are not, however, exclusive. One theory is that the role of states should be used to protect its citizens' rights. Unlike dual and cooperative federalism, this view finds a middle ground between: (1) reliance on the tenth amendment to create state sovereignty; and (2) the dismissal of the tenth amendment as being meaningless. Beschle, *Defining the Scope of State Sovereignty Under the Tenth Amendment: A Structural Approach* 34 DE PAUL L. REV. 163, 185 (1985) (hereinafter cited as Beschle).

have been termed "dual federalism,"[10] and "cooperative federalism."[11] "Dual federalism" envisions the powers of the federal and state governments to be "mutually exclusive,"[12] with the federal government possessing very limited powers.[13] The remaining powers are to be retained by the states.[14] Dual federalists cite the tenth amendment as evidence of the constitutional limits on federal governmental powers.[15]

The second approach to federalism is "cooperative federalism," which is appropriately described as "a concept of partnership between the national and state governments which acknowledges the fact of national supremacy and the reality that the terms of the partnership are almost entirely fixed by the strength and power of the central government."[16] Advocates of cooperative federalism believe that the states surrendered a large majority of their sovereignty when joining the Union.[17] Cooperative federalists regard the tenth amendment as a "mere truism,"[18] which is lacking in any grant of power to the states.[19]

At the inception of our nation, the constitutional framers sought a compromise between the conflicting principles of dual and cooperative federalism.[20] As a product of that search, the Constitution and the first ten

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[10]Corwin, *Congress's Power To Prohibit Commerce,* 18 CORN. L.Q. 477, 481 (1933) (coining the term "dual federalism").

[11]CHASE, *supra* note 8, at 373-74. *See also* Matsumoto, *National League of Cities — From Footnote to Holding,* 35 ARIZ. ST. L.J. 35, 38-39 (1977) (utilizing the same theories but using different terms; traditional state function model and federal power model). These two views have also appeared in interpretations of the enactment of the tenth amendment. Percy, *National League of Cities v. Usery: The Tenth Amendment is Alive and Doing Well,* 51 TUL. L. REV. 95, 98-99 (1976) (hereinafter cited as Percy).

[12]CHASE, *supra* note 8, at 373.

[13]Wechsler, *supra* note 1, at 544.

[14]*Id. See also* Tribe, *Unraveling National League of Cities: the New Federalism And Affirmative Rights to Essential Government Service,* 90 HARV. L. REV. 1065, 1070 (1977) (hereinafter cited as Tribe). Dual federalists feel that the national government was granted limited delegated powers. These limits were supplemented by limits on the power of the national government implied from the necessity of the states' independent existence. *Id. supra.*

[15]CHASE, *supra* note 8, at 374. Another theory proposed in support of dual federalism is the contractual origin of the Constitution itself. Under this theory, the states are seen as giving up portions of their power while retaining the rest. *Id.* at 373.

Supporters of the dual federalist theory include James Madison, Thomas Jefferson, Robert Hayne (Webster-Haynes debate), John Calhoun, Chief Justice Taney, Justice Van Devanter, Justice McReynolds, Justice Sutherland, and Justice Butler. *Id.* at 374. *See also,* O'Fallon, *supra* note 3.

[16]CHASE, *supra* note 8, at 374.

[17]Note, *Constitutional Limitations of Congress' Commerce Clause Power,* 58 CHI.-KENT L. REV. 109, 119 (1982) (hereinafter cited as *Constitutional Limitations*).

[18]United States v. Darby, 312 U.S. 100, 124 (1941).

[19]*Id.* at 124. Other constitutional provisions cited in support of this theory are the enumerated powers in conjunction with the necessary and proper clause, and the supremacy clause. *See e.g.,* CHASE, *supra* note 8, at 374-76.

Supporters of the cooperative federalist theory have been Alexander Hamilton, Daniel Webster, Abraham Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Chief Justice John Marshall. CHASE, *supra* note 8, at 374-76.

[20]Comment, *National League of Cities and The Parker Doctrine,* 8 FORDHAM L. REV. 301, 301 (1980).

amendments were adopted.[21] Notwithstanding this attempt to resolve the conflict, the dispute between dual and cooperative federalism has not ended.[22] The latest controversy concerning these theories is illustrated in the Supreme Court case of *Garcia v. San Antonio Metropolitan Transit Authority.*[23]

HISTORICAL BACKGROUND

In order to better understand the significance of the Supreme Court's ruling in *Garcia,* it is necessary to review briefly the history of the commerce clause as well as the tenth amendment.

In 1819, *McCulloch v. Maryland*[24] set the stage for the expansion of cooperative federalism.[25] In this landmark decision, Chief Justice John Marshall espoused a broad interpretation of all enumerated powers of the federal government.[26] The basis of his expansive view was the necessary and proper clause of article I §8.[27] The decision's significance is that it prohibited the use of the tenth amendment in challenging the exercise of federal implied powers.[28]

Several years later, in *Gibbons v. Ogden,*[29] the Supreme Court expanded the views expressed in *McCulloch* into the commerce clause area. The *Gibbons* opinion authored by Justice Marshall, held that Congress' commerce power was plenary and not to be restrained by tenth amendment state sovereignty claims.[30] Although "commerce" was not to include *intra*state com-

[21]The Bill of Rights were added because of the objections raised by dual federalists. Chief among these objections were the need to preserve individual liberties and state autonomy. While the first nine amendments can be seen to establish such individual liberties as freedom of speech (first amendment), freedom from unreasonable searches and seizures (fourth amendment), and the right to jury trial (seventh amendment), the tenth amendment is thought to establish undefined states' rights. Beschle, *supra* note 9, at 178.

[22]*See e.g.*, Percy, *supra* note 11 (dual federalist notion that the tenth amendment acts as an obstacle to the exercise of delegated federal powers); Comment, *When The Walls Come Tumbling Down: What Remains Of National League Of Cities?*, 53 U. CIN. L. REV. 625 (1984). (hereinafter cited as *Tumbling Down)* (the use of the tenth amendment to block the exercise of the commerce clause will only cause the development of other methods to control state activities).

[23]105 S.Ct. 1005 (1985).

[24]17 U.S. (4 Wheat.) 316 (1819).

[25]*Constitutional Limitations, supra* note 16, at 117.

[26]*McCulloch,* 17 U.S. (4 Wheat.) at 406.

[27]The necessary and proper clause of U.S. CONST. art. I, §8 provides:
"The Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, §8.

[28]*McCulloch,* 17 U.S. (4 Wheat.) at 406. *But see* BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 282 (1975) (hereinafter cited as BREST). In *McCulloch,* Chief Justice Marshall observed . . .

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but *consistent with the letter and spirit of the constitution,* are constitutional . . . ." (emphasis added).

McCulloch, 17 U.S. (4 Wheat.) at 421. By stating that constitutional exercises must be consistent with the "spirit of the Constitution," the Chief Justice may have been suggesting that unwritten constitutional limitations exist beyond the tenth amendment. BREST, *supra* at 282.

[29]22 U.S. (9 Wheat.) 1 (1824).

[30]Note, *State Sovereignty and the Commerce Power,* 9 CONN. L. REV. 691, 692 (1977).

merce,[31] it was to be broadly defined under the Marshall scheme.[32]

The Supreme Court's acceptance of cooperative federalism continued without significant departure until the 1930's. It was during the 1930's that the Supreme Court limited the reach of the commerce power through the concept of dual federalism.[33] The emergence of dual federalism and state rights, however, did not develop. Changes in the Court's composition,[34] coupled with the threat of President Roosevelt's "court packing plan" in 1937,[35] brought about the re-emergence of cooperative federalism.[36] This re-emergence came about in *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*,[37] where the Supreme Court held that the federal government could reach intrastate activities that had a practical effect on interstate commerce.[38]

Jones & Laughlin Steel was the beginning of the trend which allowed the federal commerce power to substitute its regulation for that of the states.[39] That trend continued until it reached a zenith in *Wickard v. Filburn*,[40] where the commerce clause was interpreted to its greatest extent.[41] After *Wickard*, dual federalists could no longer challenge the existence of commerce power over state activities affecting interstate commerce.[42] Rather, the arguments began focusing on possible limits to the federal commerce power. One such

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[31]*Gibbons*, 22 U.S. (9 Wheat.) at 194-95.

[32]*Id.* at 189.

[33]Comment, *The Commerce Power and State Sovereignty: Restriction Of National League of Cities v. Usery*, 20 WAKE FOREST L. REV. 459, 460 (1984) (hereinafter cited as *Restriction*). *See also Constitutional Limitations, supra* note 17, at 113. In a series of cases the Supreme Court struck down several attempts to institute New Deal legislation. *See, e.g.*, Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935). (The Railroad Retirement Act was held to be invalid because it was not an appropriate exercise of power on an otherwise federally regulated activity.); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). (Chicken Slaughterhouses engage in intrastate commerce alone, and therefore, can not be reached by the National Industrial Recovery Act.); Carter v. Carter Coal Co., 298 U.S. 238 (1936). (The mining of coal precedes all aspects of interstate commerce so that it does not have a direct effect on interstate commerce. Therefore, the Bituminous Coal Conservation Act is not a valid exercise of federal commerce power.).

[34]Justice Willis Van Devanter retired in June of 1937. He was replaced by Justice Hugo Black who remained on the bench from 1937 until 1971. BLANFORD & EVANS, 2 SUPREME COURT OF THE UNITED STATES 1789-1980, 1128-31 (1983) (hereinafter cited as BLANFORD).

[35]S. REP. NO. 711, 75th Cong., 1st Sess. (1937) (Reorganization of the Federal Judiciary). This Act would have allowed the President the power to appoint additional Justices to the Supreme Court when a sitting Justice reached seventy years of age. The only limitation on the President's power was that there be a total of fifteen Justices on the Court. The purpose of the Act was to force any Justice over seventy years of age into an early retirement so that President Roosevelt could add pro-New Deal Justices to the Court. This Act would have given the President additional control over the Supreme Court.

[36]*Restriction, supra* note 33, at 461.

[37]301 U.S. 1 (1937).

[38]*Id.* at 41-42.

[39]*Restriction, supra* note 33, at 467; *See also Constitutional Limitations, supra* note 17, at 114.

[40]371 U.S. 111 (1942); *See Restriction, supra* note 33, at 467.

[41]*Restriction, supra* note 33, at 461. Any intrastate activity which has an effect on interstate commerce, regardless how slight, may be regulated by the federal government.

[42]*Id.* at 467.

argument was predicated on the tenth amendment.[43]

In *Maryland v. Wirtz,*[44] the Supreme Court overruled the tenth amendment arguments and upheld the regulation of state operated schools and hospitals through the Fair Labor Standards Act.[45] The Court reasoned that when the federal government used its delegated powers, the federal government could override state interests regardless of their nature.[46] That expansive view of the commerce power continued until 1976,[47] when the Supreme Court again restricted the federal government powers by invoking the doctrine of dual federalism in *National League of Cities v. Usery.*[48]

National League has been called "one of the most controversial, most written about and least followed Supreme Court rulings, of the past decade."[49] The controversy surrounding *National League* originated because, for the first time since the 1930's, the Supreme Court used the concept of state sovereignty as a limit to the commerce clause.[50]

In *National League,* the Court again faced the validity of the Fair Labor Standards Act. In 1974, Congress amended the Act to extend its minimum wage and overtime provisions to nonsupervisory state and municipal employees.[51] That 1974 amendment was challenged in *National League* on the basis that it bypassed "an affirmative limitation on the exercise of its power. . ." .[52] In a five to four decision,[53] the majority accepted that argument. The majority

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[43]*See e.g.*, United States v. Darby, 312 U.S. 100, 124 (1941) (In refuting the appellant's tenth amendment argument the Court stated, "The amendment states but a truism.").

[44]392 U.S. 183 (1968).

[45]Fair Labor Standards Act of 1938, ch. 676, §203(d), 52 Stat. 1060 (codified at 29 U.S.C. §203(d) (1978)). In actuality, the challenged regulations involved the 1961 and 1966 amendments of the FLSA which had removed exemptions for state activities. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65 (1961) (codified at 29 U.S.C. §203(s)(2) (1978); Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (1966) (codified at 29 U.S.C. §§203(s)(4), 203(d), and 203(r)(1) (1978)).

[46]Beaird & Ellington, *A Commerce Power Seesaw: Balancing National League of Cities* 11 GA. L. REV. 35, 38-39 (1975). The Court had previously held that wage and overtime provisions of the FLSA had an "effect on interstate commerce," and therefore, were proper subjects of commerce regulation. United States v. Darby, 312 U.S. 100 (1941).

[47]In Fry v. United States, 421 U.S. 542 (1975), the hardline position taken by the Supreme Court in United States v. Darby, 312 U.S. at 124, was slightly relaxed. In *Fry,* the Supreme Court, in a footnote, stated that "while the tenth amendment has been characterized as a 'truism' it is not without significance." Fry, 421 U.S. at 547 n. 7. In *Fry,* the Court did not, however, give any indication what significance the tenth amendment did retain.

[48]426 U.S. 833 (1976). *See also* CHASE, *supra* note 8, at 374.

[49]Lauter, *Court Overrules 'National League of Cities',* 7 NAT'L. L.J., March 4, 1985, at 5, col. 1 (hereinafter cited as *Lauter*).

[50]*Tribe, supra* note 14, at 1067. In addition, the Court expressly overruled the case of Maryland v. Wirtz, 392 U.S. 183 (1968).

[51]Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974) (codified at 29 U.S.C. §203(x) (1978)).

[52]*National League,* 426 U.S. at 842.

[53]Justice Rehnquist delivered the opinion of the Court joined by the Chief Justice, Justice Powell, and Justice Stewart. Justice Blackmun filed a concurring opinion. Justice Brennan, with whom Justice White, and Justice Marshall joined, filed his dissent. Justice Stevens issued a separate dissent.

held that federal regulations would be upheld only if the regulations did not "displace the states' freedom to structure integral operations in areas of traditional governmental functions."[54]

Following the Court's decision, the controversy between dual and cooperative federalists was renewed.[55] Not only had the decision contradicted numerous cases which rejected challenges based on the tenth amendment, but it also gave limited guidance as to what was meant by "integral operations" and "traditional governmental functions."[56] Therefore, in 1981, the Supreme Court began the task of clarifying *National League.*[57] The first case to attempt such clarification was *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*[58] In *Hodel,* the Court developed a three pronged standard for determining whether the state activity was exempt from regulation. In order to invalidate a congressional regulation under *National League,* all three requirements had to be met:

> First, there must be a showing that the challenged statute regulates the 'states as states'. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty'. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional functions.[59]

The *National League* standard enunciated in *Hodel* was clarified further in *United Transportation Union v. Long Island Railroad Co.*[60] Specifically, *Long Island* attempted to define "traditional state functions" as set out in the

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[54]*National League,* 426 U.S. at 853.

In his concurrence, Justice Blackmun suggested that the Court had meant to institute a balancing test between state and federal interests. *Id.* at 856 (Blackmun, J., concurring). This viewpoint is important in that it was adopted in later decisions. Eventually, however, Blackmun abandoned that view. *See infra* notes 87-113, and accompanying text.

Justice Brennan, in dissent, insisted that the majority had departed from the views of federalism that existed from Marshall's time. *Id.* at 858 (Brennan, J. dissenting). He also disagreed with the majority's view of the role of the tenth amendment. *Id.* at 862-63.

[55]*See supra* note 22, and accompanying text. *See generally, Tribe, supra* note 14.; Michelman, *States Rights and States Roles: Permutations of "Sovereignty" in National League of Cities v. Usery* 86 YALE L.J. 1165 (1977). (hereinafter cited as Michelman).

[56]*Constitutional Limitations, supra* note 17, at 122-23. The small bit of guidance that the Court gave was in a footnote. In this footnote, Justice Rehnquist stated that fire protection, police protection, sanitation, public health, and parks and recreation were an unexhausted list of protected state activities. *National League,* 426 U.S. at 851 n. 16. This lack of guidance is most apparent in lower court decisions which took divergent paths. Some lower courts accepted the balancing test suggested in Justice Blackmun's concurring opinion. *See e.g.,* Remmick v. Barnes County, 435 F. Supp. 914 (D.N.D. 1977); Usery v. Edward J. Meyer Memorial Hosp., 428 F. Supp. 1368 (W.D.N.Y. 1977). Other lower courts have utilized Justice Rehnquist's strict unqualified standard. *See, e.g.,* Amersbach v. City of Cleveland, 598 F. 2d 1033 (6th cir. 1979); Alewine v. City Council of Augusta, 505 F. Supp. 880 (S.D. Ga.), *modified,* 699 F.2d 1060 (11th Cir. 1981).

[57]Beschle, *supra* note 9, at 169.

[58]452 U.S. 264 (1981).

[59]*Id.* at 288-89.

[60]455 U.S. 678 (1982).

third prong of the *Hodel* test.[61] The decision did not provide a concise definition, but, it did establish that history and tradition were not the sole determinates in defining traditional state functions.[62]

Following *Long Island,* the Supreme Court again seemingly narrowed the position of *National League* in *FERC v. Mississippi.*[63] In *FERC,* the Court accepted the argument that the states were merely required to consider, not adopt, federal policies. The challenged regulation, therefore, failed to fulfill the three requirements expressed in *Hodel.*[64] This case was indicative of the forming trend which disregarded those views expressed in *National League,* and began to support the cooperative federalist viewpoint.[65]

The next step in this trend was evident in *EEOC v. Wyoming.*[66] Using the balancing test set out in Justice Blackmun's *National League* concurrence,[67] the Court upheld a federal regulation due to its minimum significance and impact on state sovereignty.[68] While this ruling followed the pattern set out by its predecessors, it caused many to question the continued validity of *National League* and the viewpoints of dual federalism.[69] These questions were answered by *Garcia v. San Antonio Metropolitan Transit Authority.*[70]

THE FACTS

Originally, the transportation systems in San Antonio were privately owned.[71] In the early 1900's, Texas authorities and municipalities began to enact legislation to regulate the transportation businesses.[72] The system of privately owned, publicly regulated, transportation continued until 1959, when San Antonio purchased a transit company and created a public authority known as the San Antonio Transit System (SATS). In 1978, SATS was later transferred to another public authority known as the San Antonio Metropolitan Transit Authority (SAMTA).[73] Like many other public transportation systems, SAMTA and SATS were the recipients of massive federal subsidies.[74]

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[61] *Id.* at 684.

[62] *Id.* at 687.

[63] 456 U.S. 742 (1982).

[64] *Id.* at 761.

[65] Lauter, *supra* note 49, at 5 col. 2.

[66] 460 U.S. 226 (1983).

[67] *National League,* 426 U.S. at 857 (Blackmun, J., concurring). *See supra* note 54, and accompanying text.

[68] *EEOC,* 460 U.S. at 238-39.

[69] Lauter, *supra* note 49, at 5 col. 2.

[70] 105 S.Ct. 1005 (1985).

[71] *Id.* at 1007.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 1008. From December of 1970 until February of 1980, SAMTA received over $51,000,000 in subsidies from the Urban Mass Transportation Act of 1964.

In 1966, when Congress amended the Fair Labor Standards Act (FLSA) to include public mass transit, SATS fully complied with all minimum wage and overtime provisions. However, ten years later, following *National League,* SATS rescinded the FLSA overtime provisions.[75] SATS informed its employees that *National League* had relieved it from all regulation under the FLSA.[76]

This situation continued until 1979, when the Wage and Hour Administration of the Department of Labor issued an opinion stating that SAMTA was not within the state functions covered by *National League.*[77] Immediately following issuance of this opinion, SAMTA filed suit in federal district court against the Secretary of Labor, seeking a declaratory judgment that SAMTA was within the ambit of *National League.*[78] That suit was joined by an employee of SAMTA, Joe Garcia, who made a counterclaim for overtime pay under the FLSA.[79] The district court without opinion granted summary judgment for SAMTA relying on *National League.*[80]

Garcia and the Secretary of Labor immediately appealed the district court decision to the United States Supreme Court. The Supreme Court vacated the district court ruling, and remanded the case to the district court for reconsideration in light of the Court's decision in *Long Island.*[81] The Court in *Long Island* had held that state owned railroad systems were not traditional state functions as defined in *National League.*[82]

On remand, the district court once again ruled for SAMTA.[83] Distinguishing public mass transit from the state owned railroads in *Long Island,* the district court stated that the public mass transit was traditionally a state function. It also held that public mass transit was similar to the cited examples of *National League,* and therefore, could not be distinguished.[84]

The Secretary of Labor and Garcia again appealed the district court's decision to the United States Supreme Court.[85] The question argued before the Court was "[w]hether or not the principles of the tenth amendment as set forth

[75]*Id.* at 1009. While rescinding the overtime provisions, the Court notes that SATS kept a wage scale higher than provided by the FLSA minimum wage regulation. *Id.* at 1009 n. 3.

[76]*Id.* at 1009.

[77]Opinion WH-499, 6 LAB. REL. REP. (BNA) 91:1138 (1979).

[78]*Garcia,* 105 S.Ct. at 1009.

[79]*Id.*

[80]*Id.*

[81]*Garcia,* 457 U.S. 1102 (1982) *vacated and remanded.* Long Island was decided in between the district court's decision and the Supreme Court's order. It had held that state owned railroad systems were not traditional state functions. *Long Island,* 455 U.S. at 686.

[82]*Long Island,* 455 U.S. at 686.

[83]San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445 (1983).

[84]*Id.* at 448.

[85]After the Supreme Court noted probable jurisdiction and the initial arguments, the Court scheduled rearguments. *Garcia,* 104 S.Ct. 64 (1983); *Garcia,* 104 S.Ct. 30 (1984).

in *National League of Cities v. Usery,* . . . should be reconsidered."[86]

THE REASONING IN GARCIA

In a five to four decision, the Court's majority in *Garcia*[87] set forth two propositions as to why the standard of *National League* should be reconsidered. Those propositions were: (1) that the standards of *National League* had proven to be unworkable;[88] and (2) that the ruling in *National League* was not consistent with accepted concepts of federalism.[89]

First, the majority focused on the third prong of the *Hodel* test, which provided "that the states' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.'"[90] Applying this prong to the facts in *Garcia,* the Court's majority attacked *National League* and its progeny as being unworkable.[91] In support of that argument, the majority cited examples of other federal cases which had attempted to apply the *National League* standards.[92] Of these cases, half were protected activities under *National League,* and the other half were not. Yet, the Court stated that it could not find any distinguishing facts which would justify the differences in outcome of these cases.[93]

The majority also pointed out the Supreme Court itself had experienced difficulty in developing a workable standard in *Long Island.*[94] There, the Court had grappled with defining "traditional" without relying rigidly on history. The Court acknowledged that although numerous constitutional standards were difficult to apply, other standards had evolved through a case by case

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[86]*Garcia,* 104 S.Ct. at 3582.

[87]Justice Blackmun delivered the opinion of the Court joined by Justice Brennan, Justice White, Justice Marshall, and Justice Stevens. Justice Powell dissented joined by the Chief Justice. Justice Rehnquist and Justice O'Connor issued separate dissents. It is of some interest to note that four members of the Court's majority in Garcia had dissented in *National League.* Justice Blackmun, who authored the majority opinion in Garcia, had concurred in *National League.* This is significant in that the changing views of Justice Blackmun have so dramatically altered the concept of federalism and state rights.

[88]*Garcia,* 105 S.Ct. at 1010.

[89]*Id.* at 1016.

[90]*Hodel,* 452 U.S. at 288.

[91]*Garcia,* 105 S.Ct. at 1016. *See also Tumbling Down, supra* note 22, at 646.

[92]*Garcia,* 105 S.Ct. at 1011. Some of these cases include Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956, 967-69 (W.D.Mo. 1982), *aff'd on other grounds,* 705 F. 2d 1005 (8th Cir. 1983), *cert. pending,* No. 83-183; United States v. Best, 573 F.2d 1095, 1102-1103 (9th Cir. 1978); Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1196 (6th Cir. 1981); Woods v. Homes and Structures of Pittsburgh, Kansas, Inc., 489 F. Supp. 1270, 1296-97 (Kan. 1980); Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 700-701 (1st Cir. 1977); Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1470-72 (9th Cir. 1983); Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir.), *cert. denied,* 434 U.S. 902 (1977).

But see Garcia, 105 S.Ct. at 1023 (Powell, J., dissenting). Justice Powell points out that many of the cases listed were not applying the *National League* standards, and that other cases were wrongly decided.

[93]*Garcia,* 105 S.Ct. at 1011. For example, the majority was troubled that under the *National League* standards there was a constitutional distinction between licensing drivers, as in United States v. Best, 573 F.2d 1095, 1102-1103 (9th Cir. 1978) (a traditional state function), and regulating traffic, as in Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir.), *cert. denied,* 434 U.S. 902 (1977) (non-traditional state function).

[94]*Garcia,* 105 S.Ct. at 1012; *See also supra* note 61, and accompanying text.

development.[95] The majority felt that the standards of *National League* had not evolved,[96] and analogized this to the similar problems experienced in the state tax immunity cases.[97]

Finally, the Court supplemented its reasoning by explaining why the historic and nonhistoric definitions of "traditional state functions" were as equally unworkable as *National League.*[98] The Court felt the problems defining "traditional" were the product of a standard which was not faithful to our constitutional principles.[99]

Next, the majority attacked the constitutional basis of *National League.* The Court stated that there are few, if any, express elements of state sovereignty in the Constitution. The Court pointed out that there are, however, many examples of powers expressly withdrawn from the state.[100] Although the Court acknowledged that the states do retain rights, the retention itself was not seen as illustrating the extent of the retained state rights.[101]

The majority felt that the principal way for states to ensure their separate existence was the structure of government itself.[102] Most importantly, the political influence of the states was cited as a means of self-preservation.[103] The Court noted that states are given a role in choosing the President through the electoral college;[104] they are in control of electoral qualifications;[105] and each state is given equal representation in the Senate.[106] These roles, in addition to the past achievements of states within the federal system,[107] have helped to ensure their separate existence.

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[95]*Garcia,* 105 S.Ct. at 1012.

[96]*Id.; See also Tumbling Down, supra* note 22, at 646.

[97]*Garcia,* 105 S.Ct. at 1013-14. There, the Supreme Court abandoned an attempt to distinguish between governmental and proprietary functions because it was an unworkable standard. New York v. United States, 326 U.S. 572,73 (1946).

[98]*Garcia,* 105 S.Ct. at 1014-15.

[99]*Id.* at 1015.

[100]*Id.* at 1017. Examples of such withdrawn powers exist in U.S. CONST. art. I §8, the fourteenth amendment application of the Bill of Rights to the states, and the final review by the United States Supreme Court of all state decisions.

[101]*Id.* at 1016.

[102]*Id.* at 1018.

[103]*Id.; See also Constitutional Limitations, supra* note 17, at 119.; Wechsler, *supra* note 1, at 546.; *But see Tribe, supra* note 14, at 1071.

[104]The five hundred thirty eight (538) member electoral college is composed of one elector for each of a state's Senators, and an additional elector for each state's mandatory member of the House of Representatives. The remaining three hundred eighty eight (388) electors are apportioned among the states according to their population. U.S. CONST. art. II, §1.

[105]The electors in the electoral college are chosen by each state legislature. The states may appoint anyone so long as they are not a U.S. Congressman or a U.S. official. U.S. CONST. art. II, §1.

[106]U.S. CONST. art. I, §3.

[107]*Garcia,* 105 S.Ct. 1019 (reference to the federal grant programs).

The Court also acknowledged the changes in circumstances since the formation of the Union; however, it felt that this fact did not justify the result in *National League. Id.* at 1019-20.

Next, the Court determined that there was nothing in the FLSA which could possibly destroy states' autonomy.[108] Citing the massive grants given by the federal government, the Court stated that there were very limited requirements made upon states in exchange for federal grants.[109] The Court did concede that there could be some affirmative limits on federal commerce clause action affecting the states.[110] It did not, however, feel the need to list any such limitations.[111]

Finally, the Court went on to its inevitable overruling of *National League.*[112] While assuring that it did not readily overrule recent precedent, the Court felt that the federal system of government required it to do so in this instance.[113]

Justice Powell, in his dissent, completely disagreed with the majority opinion.[114] First, he felt the majority had not given sufficient deference to the doctrine of *stare decisis.*[115] As an example, he pointed to *FERC v. Mississippi,*[116] where the majority had been the same five Justices that composed the majority in *Garcia.* Yet, in *FERC,* the majority had utilized the principles in *National League,* and had given no hint that the concept underlying *National League* were unsound.[117]

More importantly, however, Justice Powell felt that the Court's decision had reduced the tenth amendment to "meaningless rhetoric when Congress acts pursuant to the Commerce Clause."[118] In fact, Justice Powell pointed out that the majority made only one small reference to the tenth amendment in its opinion.[119]

Next, Justice Powell stated that the majority had misinterpreted *National League.*[120] He pointed out that Justice Rehnquist's opinion in *National League* did not require a balancing test, and further reasoned that there was no need to deal with the unworkable test which had developed afterwards.[121] Powell also

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[108]*Id.* at 1020.

[109]*Id.*

[110]*Id.*

[111]*Id.*

[112]*Id.* at 1021.

[113]*Id.*

[114]Justice Powell was joined by the Chief Justice, Justice Rehnquist, and Justice O'Connor. *See supra* note 87, and accompanying text.

[115]*Garcia,* 105 S.Ct. at 1021.

[116]456 U.S. 742 (1982).

[117]*Garcia,* 105 S.Ct. at 1022 (Powell, J., dissenting).

[118]*Id.*

[119]*Id.* at 1023, 1030.

[120]*Id.* at 1022.

[121]*Id.* at 1024. In fact, it was Justice Blackmun's concurrence in *Garcia* which had advocated a balancing test. *See supra* note 54 for further discussion. Justice Powell also pointed out that the FLSA was involved in both *Garcia* and *National League.* Yet, Justice Blackmun does not cite any reasons why he has had a change

disagreed with the majority on the effectiveness of the political process in protecting states interests.[122] He was especially troubled by the inference that Congress could be the sole check on itself in the commerce clause area.[123]

Finally, Powell expressed his interpretation of federalism. After citing the history of the Constitutional Convention, and several federalist writers,[124] Justice Powell stated that the *Garcia* decision undermined the balance of power mandated by the Constitution.[125] It was his view that democracy was best served at the state and local levels.[126]

Likewise in dissent, Justice O'Connor voiced many of the same concerns and viewpoints as Justice Powell. Justice O'Connor felt that there was a need for affirmative limits on the commerce clause power, especially in light of the recent growth of federal regulation.[127] As a result of the overruling of *National League,* however, she suggested that the only limit on Congress was its own, seldom used, self-restraint.[128]

Not surprisingly, the author of *National League,* Justice Rehnquist, also filed a dissent. In his brief opinion, Justice Rehnquist agreed in principle with Justice Powell and Justice O'Connor, he did not, however, accept the balancing tests seemingly suggested by them.[129] He also stated he believed that the position espoused by the *Garcia* dissenters was "a principle that will, . . . in time again command the support of a majority of this Court."[130]

FEDERALISM AFTER GARCIA

The future of dual federalism remains uncertain with the overruling of *National League.* Strict adherence to the majority opinion in *Garcia* seems to suggest that the states should sit back and let the political processes run their course. However, several other theories have been suggested to determine the future of federalism.

One author suggests that the concept of federalism be abolished altogether.[131] At the other extreme, another author suggests that Congress

of mind about the effect of the statute.

[122]*Garcia,* 105 S.Ct. at 1026.

[123]*Id.* at 1027.

[124]*Id.* at 1028.

[125]*Id.* at 1029.

[126]*Id.* at 1031-32. Justice Powell's view on federalism significantly parallels those of the dual federalists.

[127]*Garcia,* 105 S.Ct. at 1037 (O'Connor, J., dissenting). Unlike Justice Rehnquist's strict *National League* standard, Justice O'Connor supports a balancing test with state sovereignty as a factor against commerce clause power.

[128]*Id.*

[129]Garcia, 105 S.Ct. at 1033 (Rehnquist, J., dissenting).

[130]*Id.*

[131]Kinsey, *The Withering Away of the States,* THE NEW REPUBLIC, March 28, 1981, at 21. The author seems to believe that giving back powers to the states, would merely substitute one inefficient government for another. He feels that the federal government is the lesser of the two evils.

should merely attempt to show deference in regulating the states.[132] More realistically, though, states should continue to be given freedom from federal intervention when they are attempting to preserve individual rights.[133]

The most viable theory suggested at this time stems in part from the majority opinion in *Garcia.* In *Garcia,* the majority states that any affirmative limitation on the commerce power should be "tailored to compensate for possible failings in the national political process . . . ."[134] The theory of federalism evolving from this proposition is that states must be given deference in areas where Congress is not politically accountable.[135] These are areas where state and local officials are held politically responsibile for actions mandated by federal regulation.[136] It is an obvious failing of the political system when one level of government is held accountable for the actions of another. This failure may be the future basis for affirmative limits on the commerce clause.

Beyond the theoretical future of federalism, however, is the immediate effect of *Garcia.* One implication of *Garcia* is that now neither the states, nor the judiciary may undermine the federal government when implementing important national policies.[137] The sole limit to Congress in the commerce area will be the standards as set out in *Wickard v. Filburn.*[138] This limitation will prevent the judiciary from taking it upon itself to second guess legislative decisions made in the commerce clause area.[139]

There are also some disturbing implications of the Court's opinion. Since *National League* has been overruled, the Fair Labor Standards Act will now reach all state and local governmental employees.[140] Although the dictates of the FLSA may be considered fair to employees, the imposition of the FLSA will cause difficulties in local governmental operations.[141] These difficulties will be most apparent in local volunteer programs for such areas as police, and fire services.[142]

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[132]Babbitt, *States Rights for Liberals,* THE NEW REPUBLIC, Jan. 24, 1981, at 23. (hereinafter cited as Babbitt).

[133]Beschle, *supra* note 9, at 117; *see generally* Tribe, *supra* note 14. At first, this theory was proposed as a justification for the rationale behind *National League.* However, with the overruling of *National League,* it may now be the basis of a viable theory for applying essential individual rights to the states. This is especially true in light of the continued expansion of "individual rights" exemplified by the first ten amendments.

[134]*Garcia,* 105 S.Ct. at 1019-20.

[135]Michelman, *supra* note 55, at 1173-1176.

[136]*Id.*

[137]Tribe, *supra* note 14, at 1099.; *see also* Michelman, *supra* note 55, at 1192.

[138]317 U.S. 111 (1942). *See supra* note 41, and accompanying text.

[139]Michelman, *supra* note 55, at 1192.

[140]*Garcia,* 105 S.Ct. at 1007. Most importantly, the minimum wage and overtime provisions of the FLSA will apply to state and local governmental employees.

[141]CANTON REPOSITORY, July 28, 1985, at 31, col. 1.

[142]*Id.* The intricacies of the minimum wage and overtime provisions will effectively eliminate many local volunteer programs due to the fact that the law requires compensation for these volunteers. For example, in a program where full-time firefighters volunteer extra hours on their days off, the FLSA will require overtime payment. Another example is when volunteer police are used regularly or used to do the work of regular full-time policemen. The use of these volunteers will require that they be paid at least minimum

In overruling *National League*, the Court has also opened the way for virtually any type of regulation upon the states.[143] The Court has also afforded Congress the opportunity to become needlessly involved in local matters.[144] Also of consequence, the Court has implied that by conditioning federal grant monies Congress may control concerns of state autonomy.[145] The Court perceives these conditions placed upon the states by the federal government as minor inconveniences when compared to the grants received.[146] But the Court, in making such an assertion, seriously risks the imposition of unforseeable and unreasonable conditions on federal funding.[147]

Lastly, it is important to analyze the historical effect of *Garcia*. From *Gibbons v. Ogden*[148] to *Wickard v. Filburn*,[149] Congress' commerce power had grown dramatically, especially in areas traditionally felt to be sovereign to the states.[150] At first, when legislation was enacted to reflect this growth, it was challenged and upheld in cases such as *Maryland v. Wirtz*.[151] Years later in *National League*,[152] however, a differently composed Supreme Court struck down legislation identical to that in *Maryland v. Wirtz*.[153] Now, in *Garcia*, the changing viewpoint of one Justice has reversed *National League*.[154]

This line of cases presents a seesaw of indecision on the part of the Court involving an important constitutional concept. Out of this indecision, there will arise a level of uncertainty as to the meaning of federalism. This uncertainty will be compounded further by the fact that five of the nine Supreme Court Justices are rapidly approaching their eighties.[155] In the near future, there will be many changes in the Courts' composition. It is possible that any change on the Court may reflect itself on viewpoints about federalism, even to the extent

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wage. These requirements will further tax many local governments which are being forced to operate under budget cuts already.

[143]Lauter, *supra* note 49, at 5.

[144]Babbitt, *supra* note 132, at 23.

[145]*Garcia*, 105 S.Ct. at 1020.

[146]*Id.*

[147]*Id.* A program recently proposed by the Reagan Administration is illustrative of the possible conditions that may be imposed on states. The federal government is attempting to condition federal highway grant monies upon the states compliance with federally "suggested" drinking ages. This is especially controversial in that the citizens of several states have recently voted down the federally recommended drinking age of twenty-one. Yet, the federal governments policy may override the citizens' choice because of the dire need for federal highway monies. Highway Safety Amendments of 1984, Pub. L. No. 98-363, 98 Stat. 437 (codified at 23 U.S.C. §158 (1985)).

[148]22 U.S. (9 Wheat.) 1 (1824).

[149]371 U.S. 111 (1942).

[150]*Restriction*, *supra* note 33, at 467.

[151]392 U.S. 183 (1968).

[152]*National League*, 426 U.S. 833 (1976).

[153]*Id.* at 855.

[154]*See supra* note 81, and accompanying text.

[155]BLANFORD, *supra* note 34, at 1128-31. William Brennan, Jr. will be 80 years old in 1986. Chief Justice Warren Burger, and Lewis Powell, Jr. will be 80 years old in 1987. Thurgood Marshall and Harry Blackmun will be 80 years old in 1988.

that *Garcia* would suffer a similar fate as *National League of Cities.*

CONCLUSION

The definition of constitutional federalism, as set out in *Garcia,* has again given the federal government extensive powers over areas of state sovereignty. The definition has also effectively surpressed the tenth amendment into insignificance. While the Court's decision will assist Congress in implementing important policies, without the limitations of *National League,* it will also give Congress the opportunity to become excessively involved in state affairs.

The majority opinion in *Garcia* did not attempt to create a new standard, redefine the old standard, or suggest any new ideas on the concept of federalism. The majority merely set out to destroy the flawed application of, perhaps, an otherwise valid principle of state sovereignty. With this goal accomplished, the majority has left the states at the mercy of the federal government.

LESLIE ANN IAMS