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State Immunity from Federal Regulation - Before and After *Garcia*: How Accurate Was the Supreme Court's Prediction in *Garcia v. SAMTA* That the Political Process Inherent in Our System of Federalism Was Capable of Protecting the States against Unduly Burdensome Federal Regulation?

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State Immunity from Federal Regulation—Before and After *Garcia*: How Accurate Was the Supreme Court's Prediction in *Garcia v SAMTA* that the Political Process Inherent in Our System of Federalism Was Capable of Protecting the States Against Unduly Burdensome Federal Regulation?

I. INTRODUCTION

The authority of Congress to regulate the private sector under its Commerce Clause[1] power has long been settled and is not subject to dispute.[2] This comment looks at: (1) the situations where the federal government has attempted to regulate the states as states through its Commerce Clause power; (2) the various positions taken by the United States Supreme Court on this issue; (3) how the issue stands today in light of the Supreme Court's prediction in *Garcia v San Antonio Metropolitan Transit Authority*,[3] that the political process was the mechanism by which the states could protect themselves against unduly burdensome federal regulation; and (4) whether the political process is the proper mechanism to protect the states against unduly burdensome federal regulation.

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1. US Const, Art I, § 8, cl 3. The Commerce Clause states in pertinent part that Congress shall have power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Id.

2. As early as 1824 in *Gibbons v Ogden*, 21 US (8 Wheat) 1 (1824), the United States Supreme Court held that the Commerce Clause gives Congress plenary power to regulate interstate commerce. The court later reaffirmed the power of Congress to regulate very extensively through the Commerce Clause in *National Labor Relations Board v Jones & Laughlin Steel Corp.*, 301 US 1 (1937). In that case, the Court held that Congress had the power to regulate any activity, even intrastate production if the activity had an appreciable effect, either direct or indirect, on interstate commerce. *Jones & Laughlin Steel Corp.*, 301 US at 37. Such extensive authority for Congress to regulate under its Commerce Clause power was also highlighted in *US v Darby*, 312 US 100 (1941), where the Supreme Court stated that Congress has the power to regulate the hours and wages of workers who were engaged in the production of goods destined for interstate commerce and could prohibit the shipment in interstate commerce of goods manufactured in violation of such wage and hour provisions. *Darby*, 312 US at 123.

3. 469 US 528 (1985).

II. Background

A. Maryland v Wirtz[4] *(1968): United States Supreme Court upheld application of Fair Labor Standards Act to state and local government schools, hospitals, nursing homes, and transit employees.*

In 1938 Congress enacted the Fair Labor Standards Act ("FLSA").[5] The purpose of the FLSA was to establish a nationwide minimum wage and maximum hours standard. Congress wanted to ensure "the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[6] In 1966 Congress amended the FLSA by extending its coverage to various schools, hospitals, nursing homes, and transit companies of state and local governments.[7]

In 1968 the extension of the FLSA to state and local government entities was challenged in the case of *Maryland v Wirtz*. In *Wirtz*, the state of Maryland, "joined by 27 other states and one school district, brought an action against the Secretary of Labor to enjoin enforcement of the Act insofar as it appl[ied] to schools and hospitals operated by the states or their subdivisions."[8] Specifically, the state of Maryland contended that the Commerce Clause power did not permit Congress a constitutional basis for extension of the FLSA to schools and hospitals operated by the states or their subdivisions.[9]

In a 7-2 decision, the Court refused to accept Maryland's argument that the commerce power must yield to state sovereignty in the performance of traditional governmental functions and upheld the extension of FLSA coverage to state schools and hospitals. Justice Blackmun, writing for the majority, stated the judiciary "will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the states for

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4. 392 US 183 (1968).

5. Fair Labor Standards Act ("FLSA"), 29 USC §§ 201 et seq (1978 and Supp 1992). The FLSA requires, *inter alia*, that a covered, non-exempt employee be paid a statutorily prescribed minimum wage and an overtime premium of time-and-one-half for each hour worked in excess of 40 per week.

6. Fair Labor Standards Act Amendments of 1985 ("FLSAA"), Legislative History, 99th Cong, 1st Sess (1985) reprinted in 2 USCCAN 652.

7. FLSA of 1966, Pub L No 89-601, 80 Stat 830 (1966), codified at 29 USC § 203(S)(1)(B) (1966).

8. *Wirtz*, 392 US at 187.

9. *Id* at 193.

the benefit of their citizens."[10] Thus, the Court concluded that the 1966 amendments to the FLSA, which regulated labor conditions in public schools and hospitals, was constitutional under the Commerce Clause.[11]

B. National League of Cities v Usery[12] *(1976): United States Supreme Court expressly overruled* Maryland v Wirtz.

In *Maryland v Wirtz,*[13] the Court came as close as it had ever come to expressly saying that there is no such thing as state immunity from federal regulation. Eight years later, however, in *National League of Cities v Usery,*[14] the United States Supreme Court not only said that there was such a thing as a state regulatory immunity, but it actually applied such an immunity and found an exercise of federal regulation over the states unconstitutional.

The factual background to *National League of Cities* was as follows: in 1974 Congress had expanded the FLSA to cover all state and local government employees with the exception of a small number of workers who were specifically exempt.[15] As a result, almost all state and local government employees were required to be paid the applicable minimum wage[16] for each hour worked and were required to receive time and one-half for each overtime hour worked.[17]

Within two years of enactment of the 1974 amendments to the FLSA, the validity of its applicability to state and local governments was again challenged in *National League of Cities v Usery.*[18] The argument raised by the state and local governments was that Congress had infringed upon a constitutional prohibition running in favor of the states as states when it sought to apply the provisions of the FLSA to employees of state and local

10. Id at 198, 199.

11. Id at 200, 201.

12. 426 US 833 (1976).

13. Cited in note 4.

14. Cited in note 12.

15. FLSAA of 1974, Pub L No 93-259, §§ 6 (a)(1), (6), 88 Stat 58 (1974), currently codified at 29 USC § 203(S)(1)(C) (1974).

16. 29 USC § 206 is the provision of the FLSA dealing with minimum wage. At the time of the 1974 amendments to the Act, the minimum wage was $3.35 per hour. 29 USC § 206(a)(1) (1978).

17. 29 USC § 207(a)(1) (1965 and Supp 1992) is the overtime provision of the FLSA.

18. *National League of Cities v Usery*, 426 US 833 (1976).

governments.[19]

In a 5-4 decision overruling Wirtz,[20] the Supreme Court agreed with the state and local governments and held that both the 1966 and the 1974 FLSA amendments were unconstitutional to the extent they interfered with "integral" or "traditional" governmental functions of the states or their political subdivisions.[21] Justice Rehnquist, writing for the majority, held that the power to determine the wages and hours of state and local employees was an undoubted attribute of state sovereignty, which application of the FLSA would significantly alter or displace, thereby improperly interfering with the states' right to structure employer-employee relationships in traditional governmental activities.[22] The Court was of the opinion that there would be little left of the states' "separate and independent existence" if Congress could withdraw from the states the authority to make such fundamental employment decisions as how much to pay their employees for carrying out their governmental functions.[23] By asserting FLSA coverage over state and local governments, the Court held that Congress had attempted to improperly exercise its Commerce Clause power over the states as sovereign governments, and had used such authority "in a fashion that would impair the States' ability to function effectively within a federal system."[24] The Court further found that such an exercise of Congressional authority directly displaced the freedom of the states to structure integral operations in areas of traditional governmental functions and, as such, was contrary to the federal system of government embodied in the Constitution.[25]

C. Garcia v SAMTA[26] *(1985): United States Supreme Court expressly overruled* National League of Cities[27] *and upheld applica-*

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19. *National League of Cities*, 426 US at 837. The argument was that Congress had infringed upon the sovereignty of the states by regulating the wages such states must pay their employees.

20. Cited in note 4.

21. FLSAA, 2 USCCAN at 653 (cited in note 6).

22. *National League of Cities*, 426 US at 845, 851. Examples of traditional governmental activities given by the Court included fire prevention, police protection, sanitation, public health, parks, and recreation. Id.

23. Id at 851.

24. Id at 852.

25. Id.

26. 469 US 528 (1985).

27. Cited in note 18.

tion of FLSA to state and local governments.

On December 21, 1979, in keeping with the traditional governmental activity versus non-traditional governmental activity distinction laid down by the Court in *National League of Cities,*[28] the United States Department of Labor issued its final regulations defining traditional and non-traditional functions of state and local governments for purposes of determining whether the F.L.S.A. would be applicable in a given case or not.[29] ThDepartment of Labor defined mass transit systems as a non-traditional government function which therefore was subject to the provisions of the FLSA.[30] Subsequently, a number of public transit authorities challenged the Department of Labor's position in *Garcia v San Antonio Metropolitan Transit Authority.*[31]

In *Garcia*, the United States Supreme Court listed the prerequisites for governmental immunity under *National League of Cities* as summarized by the Court in *Hodel v Virginia Surface Mining.*[32] Specifically, the court stated that four conditions had to be satisfied before a state activity could be deemed immune from a given federal regulation under the Commerce Clause:

> (1) the federal "statute. . .must regulate the states as states";
> (2) the federal "statute must address matters that are indisputably attributes of state sovereignty";
> (3) state "compliance with the federal obligation must directly impair the states' ability to structure integral operations in areas of traditional governmental functions"; and
> (4) "the relation of state and federal interests must not be such that the nature of the federal interest justifies state submission."[33]

The issue in *Garcia* focused on the third requirement — whether the challenged federal statute entrenched upon "traditional governmental functions."[34] The Court overruled *National League of Cities* and upheld application of the FLSA to state and local governments. In doing so, the Court rejected as "unsound in principle" and "unworkable in practice" a rule of state immunity from federal regulation that turned on a judicial appraisal of whether a

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28. Id.
29. FLSAA, 2 USCCAN at 654 (cited in note 6).
30. Id.
31. 469 US 528 (1985).
32. *Garcia*, 469 US at 537 citing *Hodel v Virginia Surface Mining*, 452 US 264, 287-88 (1981).
33. *Garcia*, 469 US at 537.
34. Id at 538.

particular governmental function was "integral" or "traditional."[35] The Court stated that it had "no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."[36] In describing the "traditional governmental function test" as "unsound" and "unworkable," the Court held that the procedural safeguards inherent in the structure of the federal system were better able to protect the states' sovereign interests than were judicially created limitations on federal power.[37] That is, the Framers of the federal Constitution gave the states a role in the selection of both the executive and the legislative branches of government and that role would best protect their sovereign interests.[38] According to the *Garcia* Court:

> . . . the Framers chose to rely on a federal system in which special restraints on federal power over the states inhered principally in the working of the national government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.[39]

Thus, according to the *Garcia* Court, the fundamental limitation that the constitutional scheme imposes on Congress' Commerce Clause power to protect the "states as states" is one of process rather than one of result.[40] The Court was clearly of the opinion that the protection of the states' interest was to come from the structure of the decision-making process in Congress. This structure is the "political process"—the idea that Congress is organized by states, and that the senators and representatives will be mindful of and support their own states.

III. Has the Political Process Worked to Protect State Interests?

Not long after *Garcia* was decided, Congress confirmed the effectiveness of the political process in preserving the states' interests. Less than nine months after the United States Supreme Court upheld application of the FLSA to state and local governments in *Garcia*, Congress enacted the 1985 amendments to the FLSA. These amendments substantially lessened the Act's impact on

35. Id at 546, 547.
36. Id at 550.
37. Id at 552.
38. Id at 551.
39. Id at 552.
40. Id at 554.

state and local governments.[41] Specifically, Congress accomplished this by providing an overtime exception for states and their subdivisions. This exception was codified in 29 USC section 207 (O), which, subject to certain requirements, basically permits states and their subdivisions to issue compensatory time off at a rate of one and one-half hours for each overtime hour worked in lieu of having to pay for the overtime work in cash.[42] The fact that state and local governments are permitted to issue compensatory time off in lieu of cash overtime payments is significant, since this is specifically prohibited of employers in the private sector.[43]

As the legislative history to this amendment indicates, "it is essential that the particular needs and circumstances of the states and their political subdivisions be carefully weighed and fairly accommodated."[44] Since the states occupy a special position in our constitutional system, Congress has the responsibility of ensuring federal legislation does not undermine the states' special position or unduly burden the states.[45] According to the legislative history, it is this responsibility, in conjunction with furthering the principles of cooperative federalism, which Congress was seeking to discharge when it enacted the 1985 amendments to the FLSA in response to the *Garcia* decision.[46] It is clear that these amendments were enacted to accommodate the concern the states and their political subdivisions feared that the FLSA would have upon them.[47]

It is likewise clear that the *Garcia* Court's prediction of how the states would protect themselves in our federal system was quite accurate in this instance. The political process inherent in our system of federalism has indeed proven to be capable of protecting the states against unduly burdensome federal regulation. Indeed, it was a relatively quick response, as the *Garcia* decision was handed down February 19, 1985, and 29 USC section 207 (O), containing the overtime exception for state and local governments, was enacted on November 13, 1985.

Utilizing the federal political process to preserve the states' power was not, however, a new discovery or theory upon which the

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41. *Garcia* was decided on February 19, 1985, and the FLSA amendments enacted in response to *Garcia* were passed on November 13, 1985. Pub L 99-150, 99 Stat 787 (1985).

42. 29 USC § 207 (o) (1985).

43. 29 USC § 207 (a), 29 CFR § 778 et seq (1990).

44. FLSAA, 2 USCCAN at 655 (cited in note 6).

45. Id.

46. Id.

47. Id.

Court hit. As the *Garcia* Court itself noted, states have repeatedly been successful in using the federal political process to pursue their own interests against the federal government, such as in obtaining federal grants for state needs, obtaining federal funding for such services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation.[48] The states have also exercised their influence to obtain federal support to exempt themselves from a variety of obligations imposed by Congress under its Commerce Clause power, such as the Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Insurance Security Act, and the Sherman Act, all of which contain express or implied exemptions for states and their subdivisions.[49]

Focusing on the FLSA as an illustration, one can see a number of exceptions and exemptions under the Act which the states had been successful in carving out for themselves even prior to the *Garcia* decision. For example, the 1974 amendments, which extended coverage of the FLSA to state and local governments, also contained a limited overtime exception for police officers, firefighters, and related employees.[50] This exception alleviated the impact of the FLSA on the fire protection and law enforcement activities of state and local governments by providing for work periods of up to twenty-eight days, as opposed to the usual seven day workweek applicable to most private sector employers, thereby providing a higher ceiling on the maximum number of hours an employee could work before a state or local government would be liable for paying overtime.[51] As the legislative history indicates, this special exception was established by Congress in recognition of the special needs of state and local governments in the area of public safety, and the unusually long hours that public safety employees must spend on duty.[52]

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48. *Garcia*, 469 US at 552-53.

49. Id at 553.

50. 29 USC § 207 (K) (1991 Supp). Other exceptions and exemptions from overtime for state and local governments under the FLSA include: 29 USC § § 207 (N), 207 ¶, and 213 (b)(20).

51. FLSAA, 2 USCCAN at 653 (cited in note 6) discussing 29 USC § 207 (K) which was passed in April, 1974 as part of Pub L 93-259.

52. Id.

IV. Conclusion

One could conclude, based upon the foregoing case law, that where Congress attempts to regulate the states as states under its Commerce Clause power, the political process inherent in our system of federalism is capable of protecting the states against unduly burdensome federal regulation. Historically, the states have aggressively made their positions and needs known to Congress, and, for the most part, have been accorded the proper respect and deference due the sovereign states.

Perhaps the larger question one may ask, however, is even if the political process may work in most instances to protect state interests, is it the proper mechanism to protect the states? The *Garcia* Court indicates that for the states to protect themselves within the constitutional system they must look to Congress, not to the courts. This raises serious questions about the role of the Supreme Court as the balancing mechanism in our federal system. It has been suggested that the *Garcia* Court has "abdicated a function that history, principle, and an understanding of the political process strongly argue that the federal judiciary should undertake."[53] As James Madison wrote, "there must be a tribunal empowered to decide controversies relating to the boundary between the two jurisdictions."[54]

The *Garcia* Court reasoned that the judiciary was not the proper vehicle for drawing workable distinctions between what was a traditional governmental function, thereby entitling the state to some protection from federal intrusion, and what was not a traditional governmental function, thereby subjecting the state to federal regulation.[55] Perhaps attempting to distinguish between which activities are "traditional governmental functions" and which are not, is "unsound in principle and unworkable in practice," but does this mean the Court should not attempt to do so and simply defer to Congress to handle the matter in a fair way as dictated by the political process? One scholar, speaking to *Garcia* and the greater issue, has argued "the separation of powers is not to be abandoned simply because it may be inconvenient."[56]

The political process certainly plays an important part in our

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53. A.E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Priciples*, 19 Ga L Rev 789, 790 (1985).

54. Howard, *Garcia*, 19 Ga L Rev at 791 (citing James Madison, *The Federalist No. 39*, 250, 256 (Wesleyan University Press 1961).

55. *Garcia*, 469 US at 546, 547.

56. Howard, 19 Ga L Rev at 795 (cited in note 53).

system of federalism. Congress is elected by the citizens of their respective states, and, may indeed be mindful of and protect the interests of their constituencies. One must ask, however, if catering to the interests and needs of the citizens of a given state is the same as catering to the interests and needs of the states themselves.

The political process, as a mechanism for protecting the states as states, was a much stronger argument prior to the enactment of the Seventeenth Amendment, which altered Article I Section III of the Constitution by transferring the power to elect the Senate from the state legislatures to the people of the states.[57] Since the power to elect is the power to control, one could conclude that perhaps the states' interest may not always be well-served or best-protected by the political process inherent in our system of federalism.

It is true in many cases that the political process may indeed work to protect the states against unduly burdensome federal regulation, as the amendments to the FLSA illustrate. In completely deferring to Congress and the political process, however, one must wonder whether "the *Garcia* majority left an important constitutional sentry post unmanned."[58] Federalism is an intrinsic component of our constitutional system, and safeguarding that process should not be left to the totally unrestrained discretion of the political branches.[59] Instead, it is comforting to know that the Court still serves as a check on Congress, and will step in when such intervention is warranted.[60] One should also bear in mind that *Garcia* was a 5-4 decision, which a changing Court may well overturn when presented with the proper case, thereby accepting the responsibility it shirked in *Garcia*.

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57. US Const, Art I § 3, cl 1. In pertinent part, states: "The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof. . . ." Note, however, the foregoing was significantly altered by US Const, Amend XVII, cl 1, which states in pertinent part: The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof . . .

58. Howard, 19 Ga L Rev at 796 (cited in note 53).

59. Id at 797.

60. Id.