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Garcia v. San Antonio Metropolitan Transit Authority: The Commerce Clause and the Political Process

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Notes and Comments

Garcia v. San Antonio Metropolitan Transit Authority: The Commerce Clause and the Political Process

"The [tenth] amendment states but a truism that all is retained which has not been surrendered."[1]

I. Introduction

In *Garcia v. San Antonio Metropolitan Transit Authority*,[2] the United States Supreme Court recognized that the built-in restraints provided in our system of congressional lawmaking are the principal limitations on the federal commerce power.[3] In emphasizing the political process as a safeguard against encroachments upon state sovereignty,[4] the Court held that municipal transit workers were not exempt from coverage under the minimum wage[5] and maximum hour[6] provisions of the Fair Labor Standards Act (FLSA).[7] The Court thereby overruled *National*

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1. United States v. Darby, 312 U.S. 100, 124 (1941). U.S. CONST. amend. X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

2. 105 S. Ct. 1005 (1985).

3. *Id.* at 1020. This idea was first expressed by Chief Justice Marshall in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824):

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse.

Id. at 197.

4. *See* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

5. Fair Labor Standards Act § 6, 29 U.S.C. § 206 (1982).

6. 29 U.S.C. § 207 (1982 & Supp. III 1985).

7. 29 U.S.C. §§ 201-219 (1982 & Supp. III 1985).

League of Cities v. Usery,[8] which held that certain state and municipal employees were exempt from the FLSA wage and hour protections because Congress' commerce power was not so broad as to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[9] In *Garcia*, a five-to-four Court held that affording state employees wage and hour protections "contravened no affirmative limit on Congress' power under the Commerce Clause."[10] In doing so, the Court refused to recognize any tenth amendment limitation on the federal government's commerce clause power, a long-dormant limitation which had its modern genesis in the *National League of Cities* case.[11]

Part II of this Note examines early decisions interpreting the scope of the commerce clause. Part III discusses the lower court decisions in *Garcia*, both of which held that the tenth amendment constituted a bar against extension of Congress' power to regulate certain state government employees under the commerce clause. Part IV sets forth the Supreme Court's decision and the dissenting opinions. Part V analyzes the opinion, focusing on the use of political safeguards to prevent overreaching by Congress under the commerce clause and the Court's abdication of its duty to review congressional actions that might interfere with state sovereignty. Finally, Part VI concludes that the Court has abdicated its proper role of reviewing congres-

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8. 426 U.S. 833 (1976).

9. *Id.* at 852.

10. 105 S. Ct. at 1020.

11. *Id.* at 1007. *See National League of Cities*, 426 U.S. at 851-52. In *Garcia* the Court returned to a policy it had followed, with few deviations, since two early landmark decisions: McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (where the national government is acting under one of its enumerated powers, it is supreme within that sphere) and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (a federal statute regulating commerce that concerns more than one state supercedes a monopoly granted by a single state). Prior to 1937 the Court found limitations on Congress' power to regulate under the commerce clause. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895) (activities of a sugar manufacturing monopoly regulable by state pursuant to its police power, not by federal regulation under the Sherman Anti-Trust Act since manufacturing was held not to involve interstate commerce); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (federal wage and hour regulations for coal miners under the Bituminous Coal Conservation Act of 1935 held unconstitutional because the Constitution does not grant to Congress the power to regulate for the promotion of the general welfare, and Congress has no power to regulate the conditions in which coal is produced before it becomes an article of commerce).

sional decisions for the possibility of overreaching, the very role that the Framers intended the Court would play.

II. Background Law

A. *The Supreme Court, the Commerce Clause, and Regulation of a State Entity*

1. *Commerce Clause: Unifying Tool for the National Government*

The fundamental issue of allocating power between the federal government and the individual states predates the Constitution.[12] At the Constitutional Convention, debates over the allocation of power between the states and the federal government were heated.[13] Thus, the Constitution that resulted was purposefully vague so as to guarantee its acceptance.[14] As a result, the

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12. EEOC v. Wyoming, 460 U.S. 226, 248 n.8 (1983) (Stevens, J., concurring). *See also*, W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 173 (1908) ("The question of the relation of the States to the federal government is the cardinal question of our constitutional system."). This was the key issue during the writing of the Articles of Confederation. *See* M. JENSEN, THE ARTICLES OF CONFEDERATION, AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781, 161-76 (1940). Historians generally agree that the central government was not powerful enough because it lacked the authority to enforce even the limited powers it had been granted by the Articles. *See* W. MURPHY, THE TRIUMPH OF NATIONALISM - STATE SOVEREIGNTY, THE FOUNDING FATHERS, AND THE MAKING OF THE CONSTITUTION 48 (1967). *See also*, A. MCLAUGHLIN, THE FEDERATION AND THE CONSTITUTION 130 (1962).

13. James Madison's opinion was that:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce. . . . The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people.

THE FEDERALIST No. 45, at 313 (J. Madison) (J. Cooke ed. 1961).

The Virginia Plan, though introduced by Edmund Randolph, was primarily authored by James Madison. It was this plan, calling for a system based on national supremacy, that was the basis of the newly formed government. *See* MURPHY, *supra* note 12, at 145-48. Other delegates, such as Robert Yates and Luther Martin, favored the New Jersey Plan, which would have retained power in the states while only slightly increasing the power of the national government. *Id.* at 146-47.

14. *See* La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779, 789-95 (1982). *See also* Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 852 (1979) (so long as the values of political participation and liberty, central to the design of the Constitution, are enforceable, the relative importance of

Court has been asked over the past two centuries to interpret the document's ambiguities on the question of whether it is the state government or the national government that should reign supreme on certain questions.[15]

2. *Early Interpretations of the Commerce Clause by the Supreme Court: 1824-1888*

The commerce clause[16] was included in the Constitution to bring about commercial reform.[17] The first major case to interpret the scope of the commerce clause was *Gibbons v. Ogden*,[18] in which Chief Justice Marshall set forth a sweeping opinion on congressional power under the commerce clause. He stated that "[t]his power . . . is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are

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political and judicial protection of state autonomy will evolve with the needs of the nation); Note, *Separating Myth From Reality in Federalism Decisions: A Perspective of American Federalism - Past and Present*, 35 VAND. L. REV. 161, 170-71 (1982) (The Founding Fathers were pragmatic men who declined to delineate a rigid allocation of powers and functions between national and state governments. The political branches should make most decisions on allocation of powers and functions in the federal system.).

15. For a discussion of the shifting balance between the power reserved to the states under the tenth amendment and the power granted to the federal government under the commerce clause, see *infra* Part II of this Note.

16. U.S. CONST. art. I, § 8, cl. 3 states: "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

17. EEOC v. Wyoming, 460 U.S. 226, 244-50 (1983) (Stevens, J., concurring). "[T]he rising volume of restraints upon commerce . . . [was] the proximate cause of our national existence down to today." *Id.* at 245. *But see id.* at 266 (Powell, J., dissenting) (although removing trade barriers was *one* of the Constitution's purposes, the central purpose was "to constitute a government"). *See also* THE FEDERALIST No. 22, at 137 (A. Hamilton) (J. Cooke ed. 1961):

> The interfering and unneighborly regulations of some States contrary to the true spirit of the Union, have in different instances given just cause of umbrage and complaint to others; and it is to be feared that examples of this nature, if not restrained by a national controul, would be multiplied and extended till they became not less serious sources of animosity and discord, than injurious impediments to the intercourse between the different parts of the confederacy.

Id.

18. 22 U.S. (9 Wheat.) 1 (1824). New York had granted exclusive rights to Robert Livingston and Robert Fulton to operate steamboats in New York waters each of whom assigned his rights to Aaron Ogden. Ogden obtained an injunction from the New York court ordering Thomas Gibbons, who was operating his boats under a federal license, to stop navigating in New York waters. *Id.* at 2, 7.

prescribed in the constitution."[19] This broad interpretation gave Congress the power to regulate intrastate commerce, providing such intrastate activity had some effect on the commercial affairs of another state.[20]

In *Brown v. Maryland*,[21] the Court invalidated a state statute imposing a tax on wholesale importers. Chief Justice Marshall introduced the "original package" test which imposed a tax on goods imported into the state in their original package.[22] The Court held that such a tax clearly violated article I, section 10,[23] since states are constitutionally prohibited from laying such duties on imports.[24] The tax was also found to be unconstitutional because of Congress' exclusive power under the commerce clause to regulate the sale of imports.[25]

Following *Brown v. Maryland*, there were several decisions during the Taney era in which the Court upheld state regulation of commerce by broadly construing the "police power" of the state.[26] The Court turned away from this approach in 1851 in *Cooley v. Board of Wardens*.[27] In 1803, Pennsylvania had enacted a law which required ships entering or leaving the Port of

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19. *Id.* at 196.

20. *Id.* at 197. Chief Justice Marshall declined to interpret the commerce clause to extend to the purely internal commerce of a state: "The completely internal commerce of a State, then, may be considered as reserved for the State itself." *Id.* at 195.

21. 25 U.S. (12 Wheat.) 419 (1827).

22. *Id.* at 441-42.

23. *Id.* at 445. U.S. CONST. art. I, § 10, cl. 2 states: "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports. . . ."

24. 25 U.S. (12 Wheat.) at 440-45.

25. *Id.* at 446-47. The only other case decided by the Marshall Court that considered the commerce clause and its relationship to state regulatory authority was Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829). Delaware authorized the company to build a dam in Black Bird Creek which flowed into the Delaware River. Obstructing navigation on the river, the dam was damaged when the operators of a federally-licensed sloop attempted to pass through the creek. Allowing the company's suit for damages, Chief Justice Marshall found no conflict between the Congress' power to regulate commerce in its dormant state and state regulation authorizing construction of a dam to improve the property values and the health of the local inhabitants. *Id.* at 246-52.

26. *See, e.g.*, New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) (upholding under the police power of the state, a New York statute that required every shipmaster who arrived in New York from anywhere outside the state to make a report on each passenger). *See also* The License Cases, 46 U.S. (5 How.) 504 (1847) (sustaining state licensing requirements for liquor brought in from outside the state).

27. 53 U.S. (12 How.) 299 (1851).

Philadelphia to employ a local pilot[28] and imposed a penalty for failure to comply. The Court upheld this regulation, stating that Congress' power to regulate commerce did not deprive the states of all power to do so.[29] The Court recognized that Congress had the authority to legislate in areas where the matters were "in their nature national."[30] However, the Court interpreted the Act of August 7, 1789[31] to allow states to legislate in areas where there were peculiarly local concerns, "until Congress shall find it necessary to exert its power."[32]

During the Reconstruction Era, the Court decided few commercial cases.[33] However, it was during this period that the Court, for the first time, invalidated a federal statute on the ground that it exceeded Congress' authority to regulate commerce.[34] The Court soon resumed its trend toward broad interpretation of the commerce clause power in *The Daniel Ball.*[35] The Daniel Ball was a steamer which navigated the Grand River and transported people and goods solely within the state of Michigan.[36] The steamer was fined five hundred dollars for not complying with the federal government's licensing and inspection requirements.[37] The Court upheld the regulation on the grounds that a ship which participates in the interstate transportation of merchandise is an "instrument of . . . commerce"[38] and "subject to the legislation of Congress."[39]

In short, the Court's earliest commerce clause decisions granted to Congress somewhat broad authority to regulate commerce, while at the same time limiting the states' ability to do so.

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28. *Id.* at 311-12.
29. *Id.* at 320.
30. *Id.* at 319.
31. Chapter 9, § 4, 1 Stat. 53, 54 (1789).
32. *Cooley*, 53 U.S. (12 How.) at 319.
33. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 146 (2d ed. 1983) [hereinafter cited as NOWAK].
34. *See* United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870) (federal statute banning certain sales of a petroleum product was struck down on the theory that it was a police regulation relating exclusively to the internal trade of the state).
35. 77 U.S. (10 Wall.) 557 (1871).
36. *Id.* at 565.
37. *Id.* at 558.
38. *Id.* at 565.
39. *Id.*

3. *The Commerce Power Strictly Construed: 1888-1937*

During the years 1888-1937, in which economic regulation became both prevalent and necessary,[40] the Court sought to instill primarily conservative economic and social values into its opinions.[41] The tenth amendment[42] became a popular device with which to limit the reach of federal power over certain state activities.[43]

One mode employed by the Court to limit the scope of federal regulatory power was to define "commerce" narrowly.[44] In *United States v. E.C. Knight Co.*,[45] the American Sugar Refining Company acquired the stock of four Philadelphia refineries, thus gaining virtual control over the nation's sugar refining industry.[46] The government sought cancellation of the stock transfer, alleging that it constituted an illegal combination in restraint of trade under the Sherman Act.[47] The Court in finding the Sherman Act inapplicable, distinguished manufacturing from commerce, noting that "[c]ommerce succeeds to manufacture, and is not a part of it."[48] The Court further noted that commerce "furnishes the strongest bond of union,"[49] while the police power, which includes regulation of manufacturing, "is essential to the preservation of the autonomy of the States."[50]

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40. *See, e.g.*, The Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) and the Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890).

41. R. McCLOSKEY, THE AMERICAN SUPREME COURT 136-74 (1960). *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) wherein the Court held a New York law unconstitutional as violative of the fourteenth amendment. While disclaiming that they had allowed their own views to affect their judgment, the Court stated that "[w]e do not believe in the soundness of the views which uphold this law." *Id.* at 61.

42. *See supra* note 1.

43. *See* McCLOSKEY, *supra* note 41, at 166.

44. *See, e.g.*, Kidd v. Pearson, 128 U.S. 1 (1888) (state regulation prohibiting the manufacture of intoxicating beverages for export to other states was upheld, since manufacturing was not subject to Congress' commerce power).

45. 156 U.S. 1 (1895).

46. *Id.* at 9.

47. *Id.*

48. *Id.* at 12.

49. *Id.* at 13.

50. *Id.* To emphasize just how sharply the Court drew the line between national and state powers, the Court stated: "Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control." *Id.* at 16.

In *Swift & Co. v. United States*,[51] however, the Court upheld application of the Sherman Act to interstate packinghouses. In *Swift*, the combination was held to constitute an illegal restraint of trade even though it was located within a single state.[52] The Court distinguished the packinghouses from the sugar refining monopoly in *E.C. Knight* on the ground that Swift's "effect upon commerce among the States [was] not accidental, secondary, remote or merely probable,"[53] since *Swift* involved the sale of goods, not the manufacture of them.[54]

In the years that followed, the Court upheld many regulations as falling within the commerce power.[55] The Court followed the *E.C. Knight* approach in the area of employer-employee relations during this period.[56] The Court specifically applied the tenth amendment as a limitation on the federal commerce power in *Hammer v. Dagenhart* (The Child Labor Case).[57] Congress sought to prohibit the interstate shipment of products manufactured by companies which employed minors.[58] In distinguishing child labor situations from instances where Congress sought to regulate commerce as a means of attacking an identified "evil,"[59] the Court in *Hammer* viewed the goods

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51. 196 U.S. 375 (1905).

52. *Id.* at 396-97. Although the bidding that fixed the price of meat took place solely within a single state, the Court found that it was but a step in the sales process. *Id.* at 397.

53. *Id.* Although this case has been cited as creating the "stream of commerce" theory for the growth of the federal commerce power, commentators have noted that "the opinion could be interpreted in a restrictive manner because the test required tangible connections and direct relationships to commerce." NOWAK, *supra* note 33, at 153.

54. 196 U.S. at 397.

55. *See, e.g.*, The Lottery Case (Champion v. Ames), 188 U.S. 321, 354 (1903) (upholding the Federal Lottery Act which prohibited something the majority clearly viewed as an "evil" — the interstate movement of lottery tickets). *See also* Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (upholding the Pure Food and Drug Act which prohibited the use of interstate commerce to transport adulterated articles); Hoke v. United States, 227 U.S. 308 (1913) (upholding the Mann Act which prohibited the transportation of women across state lines for the purpose of prostitution).

56. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). *See also* Adair v. United States, 208 U.S. 161 (1908) (striking down a statute that prohibited railroads from firing employees due to their membership in a union).

57. 247 U.S. 251 (1918).

58. *See* Act of Sept. 1, 1916, ch. 432, 39 Stat. 675 (1916). A father of two minor children brought an action on their behalf to enjoin enforcement of the Act. *Hammer*, 247 U.S. at 268.

59. *See supra* note 55.

manufactured by minors as being "themselves harmless."[60] The Court held that the federal statute was a police regulation which unconstitutionally attempted to regulate internal affairs of a state which were "carefully reserved to the States in the Tenth Amendment."[61] Justice Holmes, author of the majority opinion in *Swift*, issued a strong dissent, stating that the statute was clearly within Congress' commerce power,[62] and did not interfere with state prerogatives.[63] Congress could use its commerce power to carry out its views of public policy, Justice Holmes wrote, "with a view to the benefit of the nation as a whole."[64]

The period immediately prior to 1937 was marked by the Court's attempt to limit aggressive federal legislation aimed at national economic reform.[65] A major piece of federal legislation aimed at this end was the National Industrial Recovery Act (NIRA).[66] The NIRA purported to remove obstructions to the free flow of interstate and foreign commerce.[67] The President was authorized under the NIRA to approve and adopt "codes of fair competition" for various trades and industries.[68] In *Schechter Poultry Corp. v. United States*,[69] a unanimous Court held the NIRA to be unconstitutional. The Schechter Poultry Corporation had been convicted of violating of the NIRA's Live Poultry Code.[70] The Court found that regulation of Schechter's activities fell outside the commerce power,[71] because their poultry was slaughtered and sold solely within the state of New York, and thus was outside the "stream of commerce."[72] More-

60. *Hammer*, 247 U.S. at 272.

61. *Id.* at 274.

62. *Id.* at 277-78 (Holmes, J., dissenting).

63. *Id.* at 281. Since the states sought to send their products across state lines, power over such commerce belongs to Congress. *Id.*

64. *Id. But see* The Child Labor Tax Case (Bailey v. Drexel Furniture Co.), 259 U.S. 20 (1922). Justice Holmes joined in that opinion invalidating a tax imposed on anyone who employed child laborers. The Court viewed this tax as an attempt to circumvent its previous ruling in Hammer v. Dagenhart. *Id.* at 27.

65. *See* R. McCLOSKEY, *supra* note 41, 161-69.

66. Chapter 90, 48 Stat. 195 (1933).

67. *Id.* at 195 § 1. *See* NOWAK, *supra* note 33, at 157.

68. Chapter 90, § 3(a), 48 Stat. 195, 196-97 (1933).

69. 295 U.S. 495 (1935).

70. *Id.* at 519.

71. *Id.* at 543.

72. *Id.*

over, the wages and hours under which their employees worked did not have a "direct" effect on interstate commerce.[73] The Court viewed the regulation of these subjects as reserved to the states.[74]

As *Schechter* and other contemporaneous cases demonstrate, immediately prior to 1937, the Court chose to interpret Congress' commerce power narrowly. Claiming that the tenth amendment was a direct limitation on federal commerce power, the Court struck down major pieces of federal legislation.[75]

4. *The Modern View of the Commerce Clause: 1937 to the Present*

Frustrated by the *Schechter* line of cases, President Roosevelt proposed a plan after his first reelection to add up to six new justices to the Supreme Court. Although Roosevelt's proposal was purportedly to aid the problem of an overcrowded docket,[76] it has been suggested that this court-packing plan was a mere pretext in order to justify appointment of justices sympathetic to New Deal legislation.[77] President Roosevelt's scheme never received much support, but the Court's opinions changed, reflecting the political pressure.[78] Recognizing Congress' power to legislate in areas affecting interstate commerce, the Court upheld the National Labor Relations Act,[79] the Social Security

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73. *Id.* at 548.

74. *Id.* at 549-50.

75. In the year following the *Schechter* decision, the Court used the tenth amendment to limit federal regulation in two other cases. In United States v. Butler, 297 U.S. 1 (1936), the Court held the Agricultural Adjustment Act of 1933 unconstitutional finding that it "invades the reserved rights of the states." *Id.* at 68. The Court viewed the regulation of agricultural production as not within any of the powers granted to the federal government. In Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Court invalidated the Bituminous Coal Conservation Act of 1935 which set minimum wages and maximum hours for coal miners. The Court viewed the production of coal as a purely local matter. *Id.* at 303-04. It also viewed employer-employee relations as a purely local issue. *Id.* at 308. Justice Cardozo issued a dissenting opinion, stating that he would have upheld the Act's price-setting provisions because of the direct impact that the price of intrastate coal sales had on the price of interstate coal sales. *Id.* at 325 (Cardozo, J., dissenting).

76. *See* R. McCLOSKEY, *supra* note 41, at 168-69.

77. *See* NOWAK, *supra* note 33, at 40.

78. *Id.* at 40-41.

79. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (The Act did not exceed the commerce power.).

Act,[80] and the Fair Labor Standards Act (FLSA).[81]

In *United States v. Darby*,[82] the Court upheld the minimum wage and maximum hour protections of the FLSA.[83] Delivering the opinion of a unanimous Court, Justice Stone took judicial notice of the statute's legislative purposes: to promote labor peace, to ensure minimum standards of living, to enhance the spending power of workingmen, and to safeguard fair competition in interstate commerce by excluding goods manufactured by workers paid a substandard wage.[84] The Court found that Congress' power over interstate commerce was complete and could be utilized to the full extent granted by the Constitution.[85] Moreover, "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."[86] Regarding the tenth amendment, the Court held that it merely restated the existing relationship between the state and federal governments as established by the Constitution prior to adoption of the tenth amendment.[87] Its purpose was "to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."[88]

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80. Helvering v. Davis, 301 U.S. 619 (1937) (upholding the old age benefits provision); Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (upholding the unemployment compensation tax and payment provisions).

81. United States v. Darby, 312 U.S. 100 (1941).

82. *Id.*

83. *Id.* at 125-26.

84. *Id.* at 109-10.

85. *Id.* at 114 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)).

86. *Id.* at 115.

87. *Id.* at 124.

88. *Id.* When James Madison proposed the tenth amendment at the first Congress, he stated:

> I find from looking into the amendments proposed by the State conventions that several are particularly anxious that it should be declared in the Constitution that the powers not therein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.

Brief for Appellant, Joe G. Garcia at 11, Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985) (quoting *History of Congress* 441 (June 8, 1789)). *See also*

Following *Darby*, the Court has sustained virtually every federal regulation of a commercial subject,[89] unless it lacked some "rational basis within the knowledge and experience of the legislators."[90] Thus, the Court has upheld federal regulation of even seemingly insignificant, strictly local commercial activity.[91]

B. *Fair Labor Standards Act*

In both *National League of Cities v. Usery*[92] and *Garcia v. San Antonio Metropolitan Transit Authority*,[93] the constitutionality of the Fair Labor Standards Act (FLSA),[94] as applied to state and municipal employees, was challenged. Congress enacted the FLSA in 1938 upon finding that, *inter alia*, the existence of substandard labor conditions "burden[ed] commerce and the free flow of goods in commerce."[95] Pursuant to its commerce power,[96] Congress established minimum wage[97] and maxi-

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W. CROSSKEY, 1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, 690-708 (1953) (discussing the wording of the tenth amendment).

89. *See* R. MCCLOSKEY, *supra* note 41, at 184-87.

90. United States v. Carolene Prod. Co., 304 U.S. 144, 152 (1938).

91. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (upholding the application of quotas established by the Agricultural Adjustment Act of 1938 to a small farmer who produced wheat primarily for his own consumption using the "chain of commerce" reasoning). *See also* Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding the application of Title II of the Civil Rights Act of 1964 to a restaurant because the restaurant purchased meat that had moved in interstate commerce).

92. 426 U.S. 833 (1976).

93. 105 S. Ct. 1005 (1985).

94. 29 U.S.C. §§ 201-219 (1982 & Supp. III 1985).

95. Fair Labor Standards Act of 1938, ch. 676, § 2(a), 52 Stat. 1060, 1060 (1938) (current version at 29 U.S.C. § 202(a) (1982)). Congress found that the existence of substandard labor conditions:

> (1) cause[d] commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burden[ed] commerce and the free flow of goods in commerce; (3) constitute[d] an unfair method of competition in commerce; (4) [led] to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interfere[d] with the orderly and fair marketing of goods in commerce.

Id.

96. The FLSA provided that:

> It is hereby declared to be the policy of this [Act], through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Id., at § 2(b), 52 Stat. 1060, 1060 (1938) (current version at 29 U.S.C. § 202(b) (1982)).

97. "Every employer shall pay to each of his employees who is engaged in commerce

mum hour[98] standards in order to eliminate the hardships imposed on the "ordinary workingman."[99] Because the FLSA was enacted pursuant to Congress' commerce power, its scope was necessarily limited to workers engaged in interstate commerce. The Supreme Court's first opportunity to review the constitutionality of the FLSA came in *United States v. Darby*.[100] In upholding the FLSA, the *Darby* Court concurred in the congressional findings embodied in the Act[101] and found the wage and hour requirements to be "means reasonably adapted to the attainment of the permitted end"[102] of eliminating substandard labor conditions.

In the forty-five years since *Darby*, the FLSA has been periodically amended, considerably broadening the class of workers protected by the Act's provisions. Specifically excluded from the original Act's definition of "employer" was "the United States or any State or political subdivision of a State."[103] Also noteworthy, in the context of *National League of Cities* and *Garcia*, was the original Act's exemption of transit workers from FLSA wage and hour provisions.[104] In 1961 the enterprise concept[105] was intro-

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or in the production of goods for commerce wages at the following rates - . . ." *Id.*, at § 6(a), 52 Stat. 1060, 1062 (1938) (current version at 29 U.S.C. § 206(a) (1982)).

98. *Id.*, at § 7(a), 52 Stat. 1060, 1063 (1938) (current version at 29 U.S.C. § 207(a) (1982)) provided that overtime compensation be set at a "rate not less than one and one-half times the regular rate."

99. *See* Wirtz v. Patelos Door Corp., 280 F. Supp. 212, 216 (E.D.N.C. 1968) (The legislation was "[a]imed primarily at protecting the ordinary workingman," exempting from its coverage certain employees such as executives, professionals, administrative personnel, and outside salesmen.).

100. 312 U.S. 100 (1941). In *Darby*, a lumber manufacturer was indicted for violating the FLSA. The district court quashed the indictment and held the FLSA unconstitutional because it permitted federal regulation of a local manufacturing activity.

101. 312 U.S. at 102. "The congressional committees made specific findings which were embodied in the Act . . . . These findings accord with facts of which this Court has already taken judicial notice, and are conclusive." *Id.*

102. *Id.* at 121. The Court further held that the tenth amendment presented no barrier to the FLSA. *Id.* at 123-24. "The amendment states but a truism that all is retained which has not been surrendered." *Id.* at 124.

103. Fair Labor Standards Act of 1938, ch. 676, § 3(d), 52 Stat. 1060, 1060 (1938) (current version at 29 U.S.C. § 203(d) (1982)).

104. "[The provisions of sections 206 and 207 shall not apply with respect to] any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section." *Id.* at § 13(a)(9), 52 Stat. 1060, 1067 (1938) (amended 1961).

105. " 'Enterprise' means the related activities performed (either through unified

duced to the FLSA. Under this concept workers engaged in wholly intrastate activities were brought within the Act's coverage if their employer was an enterprise engaged in interstate commerce.[106] Thus, employees of privately owned mass transit systems were brought within the FLSA's coverage[107] since the 1961 Act treated mass transit systems as enterprises engaged in commerce.[108] Public mass transit systems were unaffected by the 1961 FLSA amendments because state and municipal agencies remained specifically excluded from the Act's definition of employers.[109] The FLSA was further amended in 1966 to extend coverage to state and municipal workers employed by schools, hospitals and mass transit systems,[110] thus marking the first application of the FLSA to public sector employees.

The extension of the FLSA to cover state hospital and

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operation or common control) by any person or persons for a common business purpose . . . ." Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 2(c), 75 Stat. 65, 65 (1961) (current version at 29 U.S.C. § 203(r) (1982)).

106. *See* Brennan v. Wilson Bldg., Inc., 478 F.2d 1090 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973) (Janitors and maids in an office building were covered by the Act because even though they engaged in solely intrastate activites, elevator operators, who handled interstate shipments of mail and goods, brought all the building's employees within the Act's coverage.). *See also* L. WEINER, FEDERAL WAGE AND HOUR LAW 8-9 (1977).

107. "[The provisions of sections 206 and 207 shall not apply with respect to] any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not in an enterprise described in section [20]3(s)(2)." Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 72 (1961) (repealed 1966).

108. " 'Enterprise engaged in commerce' . . . [includes] . . . any such enterprise which is engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motor bus carrier if the annual gross volume of sales of such enterprise is not less than $1,000,000." *Id.* at § 2(c), 75 Stat. 65, 66 (1961) (amended 1966).

109. *See supra* note 103 and accompanying text.

110. The following caveat was introduced into the exemption of state and local employers: "[E]xcept with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830, 831 (1966) (current version at 29 U.S.C. § 203(d) (1982)). The last sentence of subsection (r) provided that the operation of hospitals, schools, and mass transit systems (public or private) "shall be deemed to be activities performed for a business purpose." *Id.*, at § 102(a), 80 Stat. 830, 831 (1966) (current version at 29 U.S.C. § 203(r) (1982)). Section 13(a)(9) of the FLSA was repealed. *Id.* at § 206(a), 80 Stat. 830, 836 (1966).

school employees through use of the enterprise concept was promptly challenged in *Maryland v. Wirtz*.[111] The Court upheld the constitutionality of the enterprise concept as a means of extending FLSA coverage to public sector employees. The Court expounded two theories supporting the constitutionality of the enterprise concept.[112] Under the "competition" theory, the Court found that enterprises which employed workers engaged in wholly intrastate tasks at a substandard wage unfairly reduced operating costs and thereby enjoyed a competitive advantage over more scrupulous employers.[113] Under the "labor dispute" theory, the Court found that when substandard conditions caused workers engaged in wholly intrastate tasks to strike, the resulting disruption of an enterprise's operations had an effect upon interstate commerce.[114] Moreover, because the operation of schools and hospitals had an undoubted impact upon interstate commerce,[115] use of the commerce power to provide coverage to state employees engaged in these enterprises was constitutional.[116] The 1974 amendments to the FLSA extended minimum wage and maximum hour protection to virtually all state and municipal employees.[117] This broadened FLSA coverage was

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111. 392 U.S. 183 (1968).

112. *Id.* at 192.

113. *Id.* at 189-91.

114. *Id.* at 191-92.

115. *Id.* at 194. Maryland schools made 87% of their purchases out-of-state and the state hospitals made 55% of their purchases out-of-state. *Id.* (quoting Maryland v. Wirtz, 269 F. Supp. 826, 833 (D. Md. 1967)).

116. 392 U.S. at 195. The Court held that its decision in United States v. California, 297 U.S. 175 (1936) was "controlling." *Wirtz*, 392 U.S. at 198. In United States v. California, the Court unanimously held that application of federal safety standards to a state-owned railroad was constitutional. 297 U.S. at 185. In considering application of a commerce regulation to a state agency, the Court held: "The state can no more deny the power if its exercise has been authorized by Congress than can an individual." *Id. quoted in Wirtz*, 392 U.S. at 198.

Justice Douglas wrote a vigorous dissent in *Wirtz* which was joined by Justice Stewart. Wirtz v. Maryland, 392 U.S. at 201-05 (Douglas, J., dissenting). Distinguishing United States v. California, Justice Douglas found that the safety regulation involved in that case did not "overwhelm state fiscal policy." *Id.* at 203-04. The dissent was alarmed by the possibility of the commerce clause being used to "devour the essentials of state sovereignty" which the tenth amendment was designed to protect. *Id.* at 205.

117. Under the 1974 FLSA amendments, governmental agencies were no longer excluded from the "employer" definition. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 55, 58 (1974) (current version at 29 U.S.C. § 203(d) (1982)). Only limited exceptions from wage and hour protection were made for such state

challenged in *National League of Cities.*[118]

C. *National League of Cities*

In *National League of Cities v. Usery,*[119] the Supreme Court considered, for the first time, the constitutionality of the 1974 amendments to the FLSA.[120] These amendments elimi-

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"employees" as elected and appointed officials. *Id.* at § 6(a)(2), 88 Stat. 55, 59 (1974) (current version at 29 U.S.C. § 203(e)(2)(C) (1982 & Supp. III 1985)).

118. 426 U.S. 833 (1976).

In the term immediately preceeding *National League of Cities,* the Court decided Fry v. United States, 421 U.S. 542 (1975). *Fry* involved a tenth amendment challenge to the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799 (1970) which granted the President sweeping authority to control wages. 12 U.S.C. § 1904 (Supp. I 1970). Ohio state employees secured a writ of mandamus in state court directing payment of a wage increase in excess of that permitted under the Economic Stabilization Act. The United States sought an injunction in federal district court blocking payment of the increase. The question was certified to the Temporary Emergency Court of Appeals which upheld the Act and enjoined payment of the wage increase. United States v. Ohio, 487 F.2d 936 (Temp. Emer. Ct. App. 1973). The Supreme Court affirmed. The Court held that its decision in *Wirtz* "foreclosed" any argument that commerce regulations were inapplicable to the states. Fry v. United States, 421 U.S. at 548. Although the Court allowed the Act to stand, it did provide recognition to the tenth amendment, observing that although it was a " 'truism' . . . it [was] not without significance." *Id.* at 547 n.7. In his dissent, Justice Rehnquist criticized the erosion of state sovereignty evinced by the Court's opinion and was likewise critical of *Wirtz* and United States v. California. *Id.* at 549-51 (Rehnquist, J., dissenting). In Justice Rehnquist's view, the United States v. California Court gave "short shrift" to the states' rights argument because it has so often been asserted as a ius tertii. *Id.* at 551 ("The claim of 'States rights' had so frequently been invoked in the past as a form of *ius tertii,* not by a State but by a business enterprise seeking to avoid congressional regulation, that the different tenor of the claim made by the State of California may not have impressed the Court."). Justice Rehnquist argued that a state's tenth amendment challenge to a commerce regulation should be treated no differently than an individual's challenge to such a regulation under the first or fifth amendment. *Id.* at 553. Looking to the analogous area of intergovernmental tax immunity, Justice Rehnquist cited Chief Justice Stone for the proposition that a federal tax, nondiscriminatory upon its face, may nevertheless be unconstitutional as applied to a state. *Id.* at 555-57 (citing New York v. United States, 326 U.S. 572, 586-87 (1946) (Stone, C.J., concurring)). In short, Justice Rehnquist urged that "traditional governmental activities" such as those involved in *Wirtz* were "beyond Congress' commerce authority" and advocated "case-by-case" refinement in "gray areas." *Id.* at 557-58.

119. 426 U.S. 833 (1976).

120. Appellants included individual cities and states, the National League of Cities, and the National Governors' Conference. *Id.* at 836. Challenging the 1974 amendments in the federal district court for the District of Columbia, appellants sought both declaratory and injunctive relief. *Id.* at 839. Because the constitutionality of a federal statute was at issue, the case was heard by a panel of three district court judges pursuant to 28 U.S.C. § 2282 (repealed in 1976). The Secretary of Labor's motion to dismiss the complaint for failure to state a claim upon which relief could be granted was sustained. Na-

nated substantially all of the wage and hour exemptions formerly enjoyed by public agencies.[121] The Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3."[122] The majority opinion[123] did not define "traditional governmental functions," but offered "fire prevention, police protection, sanitation, public health, and parks and recreation" as illustrative examples.[124] In reaching its decision the Court expressly overruled *Maryland v. Wirtz*[125] but reaffirmed *United States v. California*[126] and *Fry v.*

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tional League of Cities v. Brennan, 406 F. Supp. 826, 827 (D.D.C. 1974). The three-judge panel dismissed the complaint with reluctance, however, and wrote that appellant's arguments were: "substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of *Wirtz* . . . ." *Id.* at 828. Pursuant to 28 U.S.C. § 1253 (1982), appellants appealed the district court ruling directly to the Supreme Court.

121. " 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and *includes a public agency* . . ." Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 55, 58 (1974) (current version at 29 U.S.C. § 203(d) (1982)) (emphasis added).

122. 426 U.S. at 852. The Court deferred judgment on whether such amendments would have been upheld pursuant to Congress' spending power, U.S. CONST. art. I, § 8, cl. 1, or § 5 of the fourteenth amendment. *Id.* at n.17.

123. Chief Justice Burger and Justices Stewart, Blackmun, and Powell joined in Justice Rehnquist's opinion for the Court. Justice Blackmun, in addition to joining the Court's opinion, filed a separate concurrence. Justices White and Marshall joined the dissenting opinion of Justice Brennan. Justice Stevens filed a separate dissent.

124. 426 U.S. at 851. Because the Court made no significant effort to define a traditional governmental function, it can be implied that the majority would rely upon the case-by-case analysis suggested in Justice Rehnquist's *Fry* dissent. *See supra* note 118.

125. 426 U.S. at 852-55. *See also* text accompanying note 124 (the operation of schools and hospitals was analogous to the exempted functions set forth by the Court, therefore *Wirtz* was overruled). The Court held:

> While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled.

Id. at 855.

126. *National League of Cities*, 426 U.S. at 854 n.18. The Court was critical of "dicta" in United States v. California that equated a state's commerce clause standing with that of an individual. *Id.* at 854-55. Nevertheless, the Court held that operation of a railroad engaged in interstate commerce was not a traditional governmental function. *Id.* at 854 n.18.

United States.[127]

The *National League of Cities* decision did not abridge Congress' power to "pre-empt express state-law determinations" addressed to "wholly private activit[ies]."[128] However, because the 1974 FLSA amendments were directed at the states as employers, the Court reasoned that the tenth amendment acted as an "affirmative limitation" upon the commerce power.[129] Determining the wages and hours of employees engaged in "governmental functions"[130] was held to be an "undoubted attribute of state sovereignty."[131] The Court reviewed the hardships imposed upon the states by compliance with the amendments but declined to rest its holding upon such economic impact.[132] Rather,

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127. *Id.* at 852-53. The majority distinguished *Fry* by finding that the Economic Stabilization Act addressed a national emergency with which only federal action could effectively deal; the Act displaced no important state functions; and the Act "reduc[ed] the pressures upon state budgets rather than increas[ing] them." *Id.* at 853.

128. *Id.* at 840.

Congress may regulate the intrastate activities of similarly situated parties when the accumulated effect of such parties' activities has an impact upon interstate commerce. *Id.* (quoting Fry v. United States, 421 U.S. 542, 547 (1975)).

Congress may exercise its commerce power by any means "reasonably adapted to [an] end permitted by the Constitution." *National League of Cities*, 426 U.S. at 840 (quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964)).

129. *National League of Cities*, 426 U.S. at 841-43. The Court noted that Bill of Rights protections were capable of limiting exercises of the commerce power. *Id.* at 841 (citing United States v. Jackson, 390 U.S. 570 (1968) (provision of the Federal Kidnapping Act, 18 U.S.C. § 1201(a), allowing death penalty only in case of jury trial violates fifth and sixth amendments)); Leary v. United States, 395 U.S. 6 (1969) (disclosures required by the Marihuana Tax Act, 26 U.S.C. § 4741 (1954) (repealed 1970), violate fifth amendment privilege against self-incrimination)).

130. *National League of Cities*, 426 U.S. at 845. Because the Court's opinion does not reach all state activities, a distinction similar to those drawn in the tax immunity cases is made. "This distinction apparently revives what had been believed to be a thoroughly discredited dichotomy between governmental and proprietary activities of state and local governments." NOWAK, *supra* note 33, at 173. *See also* Tribe, *Unravelling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1075 (1977) (This distinction "makes no real sense when considered purely in terms of the state's interest 'qua State' . . . .").

131. *National League of Cities*, 426 U.S. at 845, *See also* NOWAK, *supra* note 33, at 173 ("Unfortunately, the majority failed to specify exactly what aspects of the employer-employee relationship made discretionary authority in this area an attribute of sovereignty.").

132. *National League of Cities*, 426 U.S. at 846-51. Arizona estimated the cost of compliance as $2.5 million; California estimated that compliance would cost between $8 and $16 million. *Id.* at 846. The Court acknowledged, however, that federal action which pressured state budgets posed the risk that basic public services would go unprovided.

the Court found that the determination of wages and hours of governmental workers was a function of state sovereignty which could not be abridged by Congress' commerce power.[133] In short, the states would have no role in the federal system if Congress was permitted to pass legislation which left the states intact but functionally irrelevant.[134] Justice Blackmun provided the pivotal fifth vote for the majority. In his separate concurrence, Justice Blackmun interpreted the Court's decision as essentially a balancing test;[135] when the federal interest involved was "demonstrably greater" than that of the states, regulation pursuant to the commerce clause was constitutional.[136] However, a federal regulation that deprived the states of their essential sovereignty, such as the FLSA, could not pass constitutional muster.[137]

National League of Cities provoked considerable critical comment[138] and proved difficult to apply in the lower

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Id. at 847. *See* Michelman, *States' Rights and States' Roles: The Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977) (an analysis which investigates this aspect of the case). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 312-13 (1978).

133. *National League of Cities*, 426 U.S. at 851-52.

134. L. TRIBE, *supra* note 132, at 310.

135. *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring).

136. *Id.*

137. Although Justice Blackmun expressed some reservations about joining the Court's opinion, he found that "the result with respect to the statute under challenge here is necessarily correct." *Id.*

In dissent, Justice Brennan urged upholding the 1974 FLSA amendments by reasserting the principles of *Fry* and *United States v. California*. *Id.* at 856-80 (Brennan, J., dissenting). He argued for adherence to the long-settled principle that the only limit upon the commerce power was that imposed by the political process. *Id.* at 857 (Brennan, J., dissenting) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824)). Justice Brennan found no state sovereignty restraint upon exercise of the commerce power which would be the equivalent of the individual protections afforded by the Bill of Rights. *Id.* at 858. Calling for judicial restraint, Justice Brennan maintained that the federal government's structure enabled the states to protect their interests. *Id.* at 876-77.

Justice Stevens, in his separate dissent, concluded that the states had no "inherent right to pay a substandard wage." *Id.* at 880 (Stevens, J., dissenting). Like Justice Brennan, Justice Stevens maintained that the states should seek redress through the political process. *Id.* at 881.

138. *See, e.g.*, Schwartz, National League of Cities v. Usery - *The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115 (1978) (The standard proposed by the Court is unworkable and its reliance upon the concept of state sovereignty is particularly ill-advised.); Tribe, *supra* note 130 (No rationale based on state autonomy is possible which could both support the case's holding and sustain the distinctions

courts.[139] In an effort to provide better guidance, the Court in *Hodel v. Virginia Surface Mining & Reclamation Association,*[140] reduced the holding of *National League of Cities* to a three-part test.[141] In order to invalidate legislation under *National League of Cities,* each of the following requirements had to be met: (1) the challenged statute had to regulate the "States as States";[142] (2) the regulation had to address an indisputable attribute of state sovereignty;[143] and (3) compliance had to directly impair a State's ability to perform a traditional governmental function.[144]

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drawn by the Court.); Comment, *Constitutional Law - Commerce Power Limited to Preserve States' Role in the Federal System,* 30 RUTGERS L. REV. 152 (1976) (The Court's test for commerce clause immunity is unworkable and based upon an inappropriate analogy to the tax immunity cases); Comment, *At Federalism's Crossroads:* National League of Cities v. Usery, 57 B.U.L. REV. 178, 197 (1977) ("*National League of Cities* presents the unique situation of a decision that is historically and theoretically justified but incapable of principled application.").

139. *See* Amersbach v. City of Cleveland, 598 F.2d 1033, 1037-38 (6th Cir. 1979) (operation of a municipal airport was a traditional governmental function); Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841, 845-46 (1st Cir. 1982) (operation of a highway authority was a traditional governmental function); Williams v. Eastside Mental Health Center, Inc., 669 F.2d 671, 680-81 (11th Cir.), *cert. denied,* 459 U.S. 976 (1982) (operation of a mental health facility was not a traditional governmental function); Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1472 (9th Cir. 1983) (the provision of in-house domestic services for the aged and handicapped was not a traditional governmental function). *See* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1011 (1985) (analyzing these and other cases).

140. 452 U.S. 264 (1981). At issue in *Hodel* was the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 447 (1977). Under the Act, the states' authority to regulate surface mining operations was pre-empted unless a state program meeting the federal standard was approved by the Secretary of the Interior. *Id.* at 271-72. The Association unsuccessfully challenged the Act which was held not to offend the standards of *National League of Cities. See infra* note 142.

141. *Hodel,* 452 U.S. at 287-88.

142. *Id.* at 287. It was this first prong which was dispositive in *Hodel.* The Act governed "only the activities of coal mine operators who are private individuals and businesses." *Id.* at 288. Because such private individuals and businesses are "necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside" the rule of *National League of Cities* was not offended. *Id.* at 293 (quoting *National League of Cities,* 426 U.S. at 845). The Act, directed at private operators, did not affect the "States as States."

143. *National League of Cities,* 426 U.S. at 287-88.

144. *Id.* at 288. *National League of Cities* implicitly rejected any definitional qualification of a "traditional governmental function" in favor of case-by-case development. *See supra* note 124. However, the Sixth Circuit developed such a definitional approach in Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979). Under *Amersbach,* an immune governmental function was one which: (1) "benefit[ed] the community as a whole . . . at little or no direct expense"; (2) "[was] undertaken for . . . public service

Moreover, an element of balancing was introduced into the *Hodel* formulation by the Court's recognition that in some cases "the nature of the federal interest advanced may . . . justif[y] state submission" regardless of the outcome achieved through applying the three-prong test.[145]

In *United Transportation Union v. Long Island Railroad*,[146] the Court had occasion to apply this three-prong test. At issue in *Long Island Railroad* was the applicability of the Railway Labor Act to state railroad workers;[147] the third prong of the *Hodel* test proved dispositive.[148] The Court held that the operation of a railroad engaged in interstate commerce was not a traditional governmental function.[149] The Court found that the railroad was only recently converted from private to public ownership,[150] that the federal government had a long history of regulating railroads,[151] and that there was no comparable history of

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rather than for pecuniary gain"; (3) was a service provided principally by the government; and (4) was a service the government is uniquely suited to perform. *Id.* The *Amersbach* court applied the above test to hold that the employees of a municipally operated airport were performing a traditional governmental function. *Id.* at 1037-38. *But see* Comment, National League of Cities *Crashes on Takeoff: Balancing Under the Commerce Clause*, 68 GEO. L.J. 827, 849 (1980) ("The road taken in *Amersbach* threatens *sub silentio* to extend *National League of Cities* far beyond its rationale and could lead to an unwarranted erosion of Congress' power to legislate under the commerce power."). The *Amersbach* court gave particular emphasis to the third factor in its test, noting that 473 of 475 airports serving the United States were operated by government agencies. *Amersbach*, 598 F.2d at 1038 n.7.

Regardless of whether a definitional or case-by-case approach is utilized, the finding of a traditional governmental function does not end the inquiry under the third prong of *Hodel*. The direct impairment feature of this prong was dispositive of the issue in EEOC v. Wyoming, 460 U.S. 226 (1983). At issue in *EEOC* was application of the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967), to a state game warden. The management of state parks was held to be a traditional state function but the level of federal intrusion was too insignificant to "directly impair" this state operation. *EEOC*, 460 U.S. at 238-39.

145. *Hodel*, 452 U.S. at 288 n.29 (citing Fry v. United States, 421 U.S. 542 (1975) and National League of Cities v. Usery, 426 U.S. at 856 (Blackmun, J., concurring)).

146. 455 U.S. 678 (1982).

147. *Id.* at 680.

148. *Id.* at 684. If the operation of the railroad was held to be a traditional governmental function, New York's Taylor Law, barring strikes by public employees, and not the Railway Labor Act, would apply to the railroad workers. *Id.* at 681-82.

149. *Id.* at 685.

150. *Id.* at 680. The Long Island Railroad was acquired by New York State in 1966 after 132 years of private ownership. *Id.*

151. *Id.* at 687-88. The Railway Labor Act, passed in 1926, is a manifestation of the

state regulation of railroads.[152] However, the Court warned against interpreting its emphasis upon tradition as "impos[ing] a static historical view of state functions generally immune from federal regulation."[153] *Long Island Railroad* was decisive in removing state-operated railroads from the class of gray areas requiring case-by-case development. A narrow reading of the Court's holding, however, left its impact upon other modes of public mass transit uncertain. Due to the uncertainty over its proper scope, *Long Island Railroad* has an important place in the procedural history of *Garcia v. San Antonio Metropolitan Transit Authority.*

D. *Intergovernmental Immunity: The Federal Tax Cases*

The majority opinion in *Garcia v. San Antonio Metropolitan Transit Authority*[154] overruled *National League of Cities v. Usery*[155] because it was "inconsistent with established principles of federalism,"[156] and because of the problems inherent in applying the holding of that opinion.[157] *National League of Cities* held that Congress did not have the authority to apply the minimum wage and maximum hour provisions of the FLSA to state workers performing "traditional governmental functions."[158] Following that decision, however, courts had difficulty identifying which state functions were "traditional" and therefore immune from federal regulation.[159] The Court in *Garcia* observed that this difficulty was akin to that involved in the area of state immunity from federal taxation.[160]

The doctrine of intergovernmental immunity originated in *McCulloch v. Maryland.*[161] The Court held that a state tax levied upon a United States bank was unconstitutional on the

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federal interest in railroad regulation that dates back to passage of the Interstate Commerce Act in 1887. *Id.*

152. *Id.* at 688.
153. *Id.* at 686.
154. 105 S. Ct. 1005 (1985).
155. 426 U.S. 833 (1976).
156. 105 S. Ct. at 1007.
157. *Id.*
158. 426 U.S. at 852.
159. 105 S. Ct. at 1011. *See supra* note 139 and accompanying text.
160. 105 S. Ct. at 1012-14.
161. 17 U.S. (4 Wheat.) 316 (1819).

ground that it could interfere with Congress' broad authority under the necessary and proper clause.[162] Similarly, the Court in *Collector v. Day*[163] held that Congress had no authority under the Constitution to impose a tax upon a state judge.[164] The Court limited immunity from federal taxation to the "ordinary" and "strictly governmental" instrumentalities of state governments in *South Carolina v. United States*.[165] There the Court upheld federal taxation of liquor sold in state-owned liquor stores, refusing to extend the immunity to state instrumentalities of a proprietary or private nature.[166]

In the years following *South Carolina*, the Court evinced contradictory opinions regarding what constituted "governmental" functions as opposed to "proprietary" functions.[167] In *New York v. United States*,[168] the Court abandoned any attempt to make the distinction.[169] Writing for the Court, Justice Frankfurter found that the distinction was "too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion."[170]

Thus, like the *Garcia* Court reviewing the *National League*

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162. *Id.* at 436.

163. 78 U.S. (11 Wall.) 113 (1871).

164. *Id.* at 128. The Court also noted that the converse was true, pursuant to Dobbins v. Commissioners, 41 U.S. (16 Pet.) 435 (1842), namely, that the states had no authority under the Constitution to impose a tax upon a federal employee. Collector v. Day, 78 U.S. (11 Wall.) at 124.

165. 199 U.S. 437, 451, 461 (1905).

166. *Id.* at 463. Thus, the Court held that the federal license tax on liquor dealers was permissible, even though the dealers here were agents of the state. *Id.*

167. In Flint v. Stone Tracy Co., 220 U.S. 107 (1911), the Court upheld the imposition of a federal corporate tax on a municipal water supply on the ground that it was not an essential state function. *Id.* at 172. Then, in Brush v. Commissioner, 300 U.S. 352 (1937), the Court, without expressly overruling Flint v. Stone Tracy Co., held that the acquisition and distribution of a municipal water supply *was* an essential governmental function. *Id.* at 370. (emphasis added).

168. 326 U.S. 572 (1946) (upholding the federal taxation of state sales of mineral waters from springs owned and operated by the state).

169. *Id.* at 583-84. The opinion of the Court was written by Justice Frankfurter who was joined only by Justice Rutledge. All eight justices who took part in the case, however, stated that the distinction was an untenable one. *See id.* at 586 (Stone, C.J., concurring, joined by Reed, Murphy and Burton, J.J.) and *id.* at 591 (Douglas, J., dissenting, joined by Black, J.).

170. New York v. United States, 326 U.S. at 580. Justice Frankfurter would have left it up to Congress to decide which of the activities of the states should be taxed. *Id.* at 582.

of Cities traditional governmental functions test,[171] the Court in *New York v. United States* was unable to fashion a workable exegesis to determine which functions were entitled to immunity from federal taxation.

III. *Garcia v. San Antonio Metropolitan Transit Authority*: Facts and Procedural History

Following the decision in *National League of Cities v. Usery*,[172] the Secretary of Labor promulgated regulations[173] authorizing the Wage and Hour Administrator of the Department of Labor[174] to determine which operations were subject to FLSA's provisions. The Wage and Hour Administrator held[175] that operations such as those of the San Antonio Metropolitan Transit Authority (SAMTA) were not traditional state functions.[176] SAMTA filed suit, seeking declaratory relief from the FLSA's minimum wage and overtime provisions. The Secretary of Labor counterclaimed against SAMTA for enforcement of the overtime[177] and record-keeping provisions[178] of the FLSA. At the same time, Joe G. Garcia, on behalf of the operators of SAMTA, instituted an action in federal district court against SAMTA seeking unpaid overtime pay and liquidated damages.[179] That suit was stayed pending disposition of the constitutional challenge instituted by SAMTA.[180] Subsequently, Garcia was granted leave to intervene as a defendant in the suit.[181] The District Court for the Western District of Texas held that the rule established by the United States Supreme Court in *National*

171. *See supra* notes 124, 144 and accompanying text.

172. 426 U.S. 833 (1976).

173. 29 C.F.R. § 775.2(b) (1985).

174. 29 C.F.R. § 775.0 (1985) authorizes this department to administer the Act.

175. *See* G. GINSBURG, CASES AND MATERIALS ON FEDERAL LABOR STANDARDS (2d ed. 1976). "The Administrator . . . issues Interpretative Bulletins on provisions of the Act and gives rulings in response to questions." *Id.* at 100.

176. 29 C.F.R. § 775.3(b) (1984).

177. § 7, as amended, 29 U.S.C. § 207 (1982 & Supp. III 1985).

178. § 11(c), as amended, 29 U.S.C. § 211(c) (1982 & Supp. III 1985).

179. § 16(b), as amended, 29 U.S.C. § 216(b) (1982 & Supp. III 1985) provides for liquidated damages in cases where an employer violates § 206 or § 207 of the FLSA.

180. Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1009 (1985).

181. *Id.*

League of Cities barred application of the FLSA's minimum wage and overtime provisions to local public mass transit systems.[182] The court held that the "Final Interpretation" of the Wage and Hour Administrator was "null and void insofar as it lists local public mass transit systems as not being integral operations in areas of traditional governmental functions under *National League of Cities v. Usery*."[183]

Both Garcia and the Secretary of Labor sought a direct appeal to the United States Supreme Court.[184] On June 7, 1982, the Court entered an order[185] vacating the judgment of the district court and remanding the case for reconsideration in light of their decision in *United Transportation Union v. Long Island Railroad*.[186]

On remand, the district court reaffirmed its original decision and summary judgment was entered in favor of SAMTA.[187] The court stated that the issue was whether operation of a local transit authority by SAMTA, "a political subdivision of the State of Texas, is a 'traditional' governmental function entitled to the Tenth Amendment immunity recognized in *National League of Cities v. Usery*."[188] The court then examined three factors from *Long Island Railroad*. Examining the relevant "historical reality," the court found that a long record of state activity indicated that a function was essential and one in which "states have the primary responsibility for performing."[189] The court observed that overseeing, maintaining, and regulating local and regional transportation systems "historically has been a state responsibility."[190] The court further reasoned that even

182. San Antonio Metropolitan Transit Auth. v. Donovan, 25 Wage & Hour Cas. (BNA) 274 (W.D. Tex. 1981).

183. *Id.*

184. 457 U.S. 1102 (1982). These were direct appeals to the Supreme Court pursuant to 28 U.S.C. § 1252 (1982). That section authorizes parties to take a direct appeal to the United States Supreme Court when a district court finds the application of a federal law to be unconstitutional and the United States or any of its agencies is a party to the action.

185. 457 U.S. 1102 (1982).

186. 455 U.S. 678 (1982). For a discussion regarding the *Long Island Railroad* case, see *supra* notes 146-53 and accompanying text.

187. 557 F. Supp. 445, 446 (W.D. Tex. 1983).

188. *Id.* (citations omitted).

189. *Id.* at 447.

190. *Id.*

though the state had acquired the mass transit system only recently, it had nonetheless "chose[n] to manifest [its] interest through regulation of fares, routes, schedules, franchising, and safety."[191]

Second, the court distinguished this case from *Long Island Railroad* on the basis that, unlike the time-honored regulatory scheme in *Long Island Railroad* where federal railway labor relations statutes date back to 1888, the FLSA was only recently amended[192] to include public transit employers.[193]

Third, the court identified factors jeopardizing the state's separate and independent existence.[194] With guidance from Justice Rehnquist's dissent in *Fry v. United States*,[195] the district court sought to analogize public transportation to other essential state functions such as fire prevention, police protection, sanitation, public health, and parks and recreation — traditional state functions enumerated in *National League of Cities*.[196]

Finally, the district court examined the four-part test set forth in *Amersbach v. City of Cleveland*[197] to determine whether

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191. *Id.* at 448. The court cited a 1913 state statute that delegated to cities exclusive control over their streets and highways, including regulation of carriages for hire. *Id.* at n.1.

192. Fair Labor Standards Act of 1938, ch. 676, § 13(a)(9), 52 Stat. 1060, 1067 (1938); Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat 65, 72 (1961); Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 206(a), 80 Stat. 830, 836 (1966).

193. 557 F. Supp. at 449. For further discussion of the applicability of the FLSA, see *supra* notes 104-10 and accompanying text.

194. 557 F. Supp. at 450-54.

195. 421 U.S. 542, 558 (1975) (Rehnquist, J., dissenting).

196. 557 F. Supp. at 450-51. In order to support its reasoning, the court cited statements of Representatives Addonizio and Corbett and Senators Biden and Hart that noted the public necessity for mass transit. The court went on to distinguish Kramer v. New Castle Area Transit Auth., 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983) which appeared to be factually indistinguishable. The *Kramer* court had held that the FLSA applied to bus operators employed by a public transit authority. The court found that the test used by the *Kramer* court was unsatisfactory; they said *Kramer* distinguished public transit based on the large amounts of federal funding. The court found that the level of federal funding was an unsatisfactory distinction as federal funding supports each of the "*Usery* functions" and since federal funding levels tend to shift, "reveal[ing] what the federal government considers its interest to be at any one point in time, but they do not adequately measure a state's sovereign interest." San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. at 452.

197. 598 F.2d 1033 (6th Cir. 1979) (The operation of a municipally owned airport is an integral governmental function within the meaning of *National League of Cities*. Thus, airport employees are not subject to the minimum wage and maximum hour provi-

a state activity constituted a traditional government function. *Amersbach* held that a traditional governmental function was one which: (1) benefited the whole community and was available at little or no expense; (2) was a public service without pecuniary gain; (3) was a function the government was particularly well-suited to provide; and (4) was one in which government was the principal provider.[198] The district court held that SAMTA satisfied the *Amersbach* test, and found that public transit benefits the community as a whole, by helping to eliminate air pollution, alleviate traffic congestion, conserve energy, and stimulate economic development while providing services at a subsidized price.[199] The court also noted that the reality of transit economics is that such services cannot be operated at a profit.[200] Therefore, government provides these services as a public service.[201] Additionally, without the profit motive to attract private enterprise, the "government is the only component of society that can provide the service."[202] Finally, government is the primary provider of transit services today.[203]

The district court concluded that FLSA wage and overtime protections should not be imposed on SAMTA because it would "undermine the states' role as surely as would the imposition of the same provisions on state employees performing police, fire, sanitation, health and recreational services."[204]

IV. *Garcia*: The Supreme Court Opinion

In *Garcia v. San Antonio Metropolitan Transit Authority*,[205] the Supreme Court reconsidered the tenth amendment principles set forth in *National League of Cities v. Usery*.[206] In a five-to-four decision, the Court held the traditional governmen-

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sions of the FLSA.). *See* Comment, *supra* note 144.

198. 557 F. Supp. at 453 (citing Amersbach v. City of Cleveland, 598 F.2d at 1037).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 453-54 (citing Kramer v. New Castle Area Transit Auth., 667 F.2d at 309 as asserting that by 1978 public transit accounted for 91% of total vehicle miles, 91% of linked passenger trips, 90% of revenues generated and 87% of transit vehicles operated).

204. *Id.* at 454.

205. 105 S. Ct. 1005 (1985).

206. 426 U.S. 833 (1976).

tal function standard to be unworkable and expressly overruled *National League of Cities*.[207]

The majority opinion began with a description of SAMTA operations[208] and a review of the case's procedural history.[209] At the outset of its analysis the Court stated that any immunity enjoyed by SAMTA must be based upon its status as a public agency because Congress' commerce power was clearly broad enough to regulate the activities of a private enterprise engaged in such activities.[210] The Court restated the test for intergovernmental immunity developed in *National League of Cities* and summarized in *Hodel v. Virginia Surface Mining & Reclamation Association*[211] focusing upon the "traditional governmental function" strand as the most troublesome aspect of that test.[212] The Court reviewed the efforts of lower courts to distinguish immune from non-immune functions[213] and found that no "organizing principle" existed.[214] Moreover, the Court found that its own opinions were of little use in defining the scope of immune functions.[215] The Court next analogized its commerce

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207. *Garcia*, 105 S. Ct. at 1007. Justice Blackmun, whose concurrence provided the pivotal fifth vote in *National League of Cities*, was the author of the Court's *Garcia* opinion. *See supra* note 135 and accompanying text.

208. 105 S. Ct. at 1007-08. In 1959, the city purchased the privately owned San Antonio Transit Company which became known as the San Antonio Transit System. In 1978, the transit system's facilities and equipment were transferred to the county run San Antonio Metropolitan Transit Authority (SAMTA). SAMTA and its predecessor received significant federal grants principally by means of the Urban Mass Transit Act of 1964. *Id.*

209. *Id.* at 1008-10. *See supra* Part III of this Note.

210. 105 S. Ct. at 1010. "Any constitutional exemption from the requirements of the FLSA . . . must rest on SAMTA's status as a governmental entity rather than on the 'local' nature of its operations." *Id.* (citing Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941)).

211. *Id.* at 1010-11. *See supra* notes 142-44 and accompanying text.

212. "Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult." *Garcia*, 105 S. Ct. at 1011 (quoting San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 447 (W.D. Tex. 1983)).

213. *Id.* at 1011. *See supra* note 139 and accompanying text.

214. 105 S. Ct. at 1011. "The constitutional distinction between licensing drivers [immune function] and regulating traffic, [non-immune function] . . . or between operating a highway authority [immune function] and operating a mental health facility, [non-immune function] is elusive at best." *Id.*

215. *Id.* (citing *National League of Cities*, 426 U.S. at 854 and n.18). *National League of Cities* set forth illustrative examples without explaining how those examples were selected. *See also supra* note 124 and accompanying text.

clause immunity test to the now defunct governmental-proprietary test as it formerly existed in the field of intergovernmental tax immunity.[216] The Court interpreted the forty-year history of the intergovernmental tax immunity cases as militating against continued case-by-case development of the "traditional governmental function" test in commerce clause immunity cases.[217] History,[218] uniqueness,[219] and necessity[220] were likewise rejected as unsuitable standards for classifying immune functions. In short, the Court would not adopt any standard that required the judiciary to make policy decisions which the Court viewed as legislative in nature.[221]

The *Garcia* Court adopted the position of the *National League of Cities* dissenters[222] in finding that the principle limitation upon exercise of the commerce power is that imposed by the states' participation in the federal system.[223] The Court argued that any test of commerce clause immunity based upon concepts of state sovereignty was flawed because the Constitution withdrew a wide range of sovereign powers from the

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216. 105 S. Ct. at 1012-14. *See supra* text accompanying notes 154-70.

217. 105 S. Ct. at 1012-14. In South Carolina v. United States, 199 U.S. 437 (1905), the Court held that only the governmental activities of a state were immune from federal taxation. After 40 years of struggling with the governmental-proprietary distinction, the Court abandoned this test as untenable in New York v. United States, 326 U.S. 572 (1946). *See supra* text accompanying notes 154-70.

218. A purely historical standard for judging immune functions was rejected in United Transport. Union v. Long Island R.R., 455 U.S. 678 (1982). *See supra* text accompanying note 153. Use of a historical standard would not accommodate the states' desire to provide innovative services, *Garcia*, 105 S. Ct. at 1014 and n.9, and the relatively "recent vintage" of most federal regulations, dating from the New Deal era, has no bearing upon the strength of the federal interest. *Id.* at 1014 and n.10.

219. "Uniqueness" was rejected by the Court as a standard in the field of governmental tort liability after it had proved to be unworkable. *Id.* at 1015 (citing Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955)) ("[I]t is hard to think of any governmental activity on the 'operational level' . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed.").

220. Necessity is an unworkable standard to judge immune functions because almost any governmental function could be provided by a private agency operating under contract. 105 S. Ct. at 1015.

221. *Id.* "Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Id.*

222. *See supra* note 137.

223. 105 S. Ct. at 1020.

states.[224] The states retained their sovereign authority "only to the extent that the Constitution has not divested them of their original powers."[225] The Court supported its proposition, that the federal system was designed to protect the states' interests,[226] by citing the legislative history of the Constitution and contemporaneous writings of the Framers.[227] Because *National League of Cities* "underestimated . . . the continued vitality"[228] of these procedural safeguards, it was overruled and the political process was recognized as the "principal"[229] limitation upon exercise of the commerce power.

In dissent, Justice Powell was critical of the majority for ignoring the principle of stare decisis in overruling *National League of Cities*.[230] Justice Powell observed that the rationale of *National League of Cities* had been repeatedly reaffirmed by the

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224. *Id.* at 1017.

> As a result, to say that the Constitution assumes the continued role of the States is to say little about the nature of the role. . . . With rare exceptions, like the guarantee, in Article IV, § 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace.

Id.

225. *Id.* The states have an "indirect" influence over the House of Representatives and the President, as well as a "more direct" influence over the Senate where the equal representation of the states is assured. *Id.* at 1018 (citing U.S. CONST. art. I, § 2; art. II, § 1; art. I, § 3; art. V). "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." *Id.*

226. *Id.*

227. *Id.* "[T]he Federal Government 'will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments.' " *Id.* at 1018 (quoting THE FEDERALIST No. 46, at 332 (J. Madison) (B. Wright ed. 1961)). "[T]he residuary sovereignty of the States [is] implied *and secured* by . . . representation in one branch of the [federal] legislature (emphasis added)." *Id.* (quoting THE FEDERALIST No. 43, at 315 (J. Madison) (B. Wright ed. 1961)).

228. *Id.* at 1021. The Court found evidence of the continued vitality of these procedural safeguards by looking to the states' success in exempting themselves from federal regulations. *Id.* at 1019 and n.17 (citing 29 U.S.C. § 207(k) (1974) (police and firefighters exempted from FLSA overtime provisions)). At the same time the states were successfully securing generous federal grants. *Id.* at 1020. (citing Urban Mass Transit Act of 1964, 49 U.S.C. §§ 1601-1618). However, there is no requirement that "regulation under the Commerce Clause must be accompanied by countervailing financial benefits under the Spending Clause." *Id.* at 1020 n.21.

229. "[T]he 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." *Id.* at 1020.

230. *Id.* at 1021 (Powell, J., dissenting).

Court,[231] most notably in *Hodel* and *United Transportation Union v. Long Island Railroad.*[232]

Justice Powell's dissenting opinion did not focus upon the difficulty of identifying a traditional governmental function[233] but rather, viewed *National League of Cities* as essentially a balancing test.[234] Finding that operation of a mass transit system was "indistinguishable in principle" from other traditional services,[235] Justice Powell favored application of the balancing feature of *National League of Cities* and its progeny to hold that states have a "compelling" interest in controlling labor relations with their employees and balancing their budgets.[236]

Unconvinced that the structure of the federal government adequately preserved state sovereignty,[237] Justice Powell found that the states' success in securing exemptions and funding was

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231. *Id.* at 1021 n.1. Justice Powell distinguished *National League of Cities'* overruling of *Wirtz* from *Garcia's* overruling of *National League of Cities* by observing that "the rationale of *Wirtz* had not been repeatedly accepted by our subsequent decisions." *Id.*

232. *Id.* at 1021-22. In *Long Island R.R.*, the Court applied the principles of *National League of Cities* to unanimously hold that the operation of a railroad engaged in interstate commerce was not a traditional government function. Thus, although the activity involved was found to be non-immune, the application of the principles of *National League of Cities* was not questioned. *Id.* (citing *Long Island R.R.*, 455 U.S. 678 (1982)). *See supra* notes 146-53 and accompanying text.

233. "[T]he luxury of precise definitions is one rarely enjoyed in interpreting and applying the general provisions of our Constitution." *Garcia*, 105 S. Ct. at 1023 n.4 (Powell, J., dissenting). Traditional governmental functions are "the kinds of activities engaged in by state and local governments that affect the everyday lives of citizens." *Id.* at 1031.

234. *Id.* at 1024 (citing *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring)). *See supra* text accompanying notes 135-37.

235. *Garcia*, 105 S. Ct. at 1032 (Powell, J., dissenting). Justice Powell offered "providing and maintaining streets, public lighting, traffic control, water, and sewerage systems" as examples of traditional services. *Id. But see supra* notes 213-14 and accompanying text.

236. *Garcia*, 105 S. Ct. at 1032 (Powell, J., dissenting).

237. "Members of Congress are elected from the various States, but once in office they are members of the federal government." *Id.* at 1025. Furthermore, the direct election of senators, "the weakening of political parties on the local level, and rise of the national media, among other things, have made Congress increasingly less representative of State and local interests, and more likely to be responsive to the demands of various national constituencies." *Id.* at 1025 n.9 (citing ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM 50-51 (1984)).

irrelevant to the resolution of constitutional matters.[238] In short, the states' theoretical ability to protect their own interests is of no consequence[239] since it is the Court's duty "to say what the law is" with respect to the acts of Congress.[240]

Justice Powell faulted the majority not only for abdicating its task of judicial review[241] but also for pointedly ignoring the tenth amendment.[242] Justice Powell cited some of the same sources as the majority to conclude that it was the tenth amendment, and not the structure of the federal government, that was designed to insure the continuing role of the states in the federal system.[243]

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238. *Id.* at 1026. "[P]olitical success is not relevant to the question whether the political *processes* are the proper means of enforcing constitutional limitiations." *Id.* (emphasis in original).

239. *Id.* at 1026 n.12.

240. *Id.* at 1026-27 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

241. "The fact that Congress generally does not transgress constitutional limits on its power to reach State activities does not make judicial review any less necessary to rectify the cases in which it does do so." *Id.* at 1026. "This Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process." *Id.* at 1026 n.12.

242. "[The majority makes] only a single passing reference to the Tenth Amendment." *Id.* at 1023. "[T]he Court barely acknowledges that the Tenth Amendment exists." *Id.* at 1030. "The Court's opinion mentions the Tenth Amendment only once, when it restates the question put to the parties for reargument in this case." *Id.* at 1030 n.16.

243. *Id.* at 1027.

> In our federal system, the States have a major role that cannot be preempted by the national government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding of federalism. Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized.

Id.

"[E]ight States voted for the Constitution only after proposing amendments to be adopted after ratification. All eight of these included among their recommendations some version of what later became the Tenth Amendment." *Id.* (citing 1-4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot 2d ed. 1854)).

> The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; . . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

Justices Rehnquist and O'Connor concurred in Justice Powell's dissent and also wrote separate dissenting opinions.[244] In his brief dissent, Justice Rehnquist noted that he was not in complete agreement with the balancing analysis of Justice Powell but felt that it was not "incumbent . . . [upon the] dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."[245] Justice O'Connor also predicted that the rationale of *National League of Cities* would be re-adopted[246] and wrote separately to denounce the majority's view of federalism and to criticize the Court for shirking its duty.[247]

Justice O'Connor found that the Framers narrowly construed the commerce power,[248] and although she disavowed any continued reliance upon such a narrow construction, her opinion suggested that such construction explained the Framers' belief that the Constitution "assured significant state authority" despite Congress' broad powers.[249] Justice O'Connor noted that the vehicle for expanding the commerce power to matters affecting commerce was the necessary and proper clause[250] and based her criticism of the *Garcia* opinion upon the interpretation of that clause embodied in *McCulloch v. Maryland*.[251] Justice O'Connor maintained that any federal regulation which failed to account for state autonomy contravened the spirit of the tenth amend-

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Id. at 1028. (quoting THE FEDERALIST No. 45, at 313 (J. Madison) (J. Cooke ed. 1961)).

244. *Id.* at 1033 (Rehnquist, J., dissenting). *Id.* at 1033-38 (O'Connor, J., dissenting).

245. *Id.* at 1033 (Rehnquist, J., dissenting).

246. *Id.* at 1038 (O'Connor, J., dissenting).

247. *Id.* at 1033, 1038.

248. *Id.* at 1034-35.

249. *Id.* at 1035.

This perception of a narrow commerce power is important not because it suggests that the commerce power should be as narrowly construed today. Rather, it explains why the Framers could believe the Constitution assured significant state authority even as it bestowed a range of powers, including the commerce power on the Congress.

Id.

250. *Id.*

251. *Id.* at 1036 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)). "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 consist with the letter *and spirit* of the constitution, are constitutional." (emphasis in original) *Id.*

ment and was therefore unconstitutional.[252] Justice O'Connor's proposed test was essentially a balancing test that weighed state autonomy as a factor in considering the scope of Congress' commerce power.[253] In Justice O'Connor's view, the difficulty of applying the teaching of *National League of Cities* did not excuse the Court from "assum[ing] its constitutional responsibility"[254] of stating "what the law is."[255]

V. Analysis

In *Garcia v. San Antonio Metropolitan Transit Authority*,[256] the Supreme Court disposed of a test for intergovernmental commerce clause immunity which it deemed "unworkable."[257] The Court's position that the political process is the "principal" limitation[258] upon exercise of the commerce power is in accord with that of a majority of the commentators.[259]

In the months following the announcement of the *Garcia* decision, municipal interest groups lobbied intensively seeking congressional relief from the economic impact[260] of that opinion.[261] The municipalities succeeded in securing passage of the

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252. *Id.*

253. *Id.* at 1037.

> The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States. It is insufficient, in assessing the validity of congressional regulation of a state pursuant to the commerce power, to ask only whether the same regulation would be valid if enforced against a private party. That reasoning, embodied in the majority opinion, is inconsistent with the spirit of our Constitution. It remains relevant that a *State* is being regulated, as *National League of Cities* and every recent case have recognized. . . . As far as the Constitution is concerned, a State should not be equated with any private litigant.

Id.

254. *Id.* at 1038.

255. *See supra* note 240 and accompanying text.

256. 105 S. Ct. 1005 (1985).

257. *Id.* at 1007.

258. *Id.* at 1020.

259. *See supra* note 138.

260. *Cf. supra* note 132 (estimation of cost of compliance with 1974 FLSA amendments).

261. *See* Cohodas, *Congress Asked to Referee: Labor, Local Governments At Odds on Overtime Pay*, 43 CONG. Q. 1647 (1985); Cohodas, *Public Employers, Unions Join Forces: Fast Congressional Action Solves Worker Overtime Issue*, 43 CONG. Q. 2379 (1985).

1985 amendments to the FLSA which permitted them to compensate their employees with time off in lieu of overtime pay.[262] These events lend credence to the majority's position that the states are capable of protecting their own interests.[263] The dissent, however, could only regard these events as not envisioned by the Constitution and necessitated only by the Court's failure to exercise its responsibility.[264]

The *Garcia* Court could have reached its decision upon far less sweeping grounds. The narrow question presented to the Court was whether the operation of a mass transit system was a traditional governmental function. The case had been briefed and argued in accordance with the teaching of *National League of Cities v. Usery*. The Court, *sua sponte*, raised the additional question of whether the principles of that case should be reconsidered.[265] Prior to its demise, the *National League of Cities* test had been narrowly construed through application of the direct impairment feature of the traditional governmental function prong[266] and through the introduction of an element of balancing.[267] However, overruling *National League of Cities* in its entirety was ill-advised inasmuch as there are functions, difficult to define but well illustrated by the examples set forth in *National*

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262. State workers may accrue compensatory time off at a rate of not less than 1.5 hours per hour of overtime worked. 29 U.S.C. § 207(o)(1) (Supp. III 1985). Public safety, emergency response and seasonal employees may accrue a maximum 480 hours of compensatory time off and all other types of employees are limited to 240 hours. Any hours worked in excess of these limits requires the payment of overtime compensation. 29 U.S.C. § 207(o)(3)(A) (Supp. III 1985).

263. One congressional observer noted that:

> Passage of the bill was one of the faster actions on major legislation in recent years, demonstrating how quickly Congress can move when pressed by outside forces with a common purpose.
>
> In this case it was public employer groups — in particular, the National League of Cities, the U.S. Conference of Mayors and the National Association of Counties—who wanted relief from the Feb. 19 Supreme Court decision. They claimed the ruling, *Garcia v. San Antonio Metropolitan Transit Authority*, would cost them more than $1 billion in overtime pay in the next year.

Cohodas, *Public Employers, Unions Join Forces: Fast Congressional Action Solves Worker Overtime Issue*, 43 CONG. Q. at 2379.

264. *See supra* notes 237-40 and accompanying text.

265. 105 S. Ct. at 1010.

266. *See supra* note 144 and accompanying text.

267. *See supra* text accompanying note 145.

League of Cities,[268] which are so intertwined with concepts of state sovereignty[269] that regulation by the federal government offends the tenth amendment even in its status as a mere "truism." The *Garcia* Court should have disposed of the issue at hand by invoking the teaching of *United Transportation Union v. Long Island Railroad*,[270] to find that operation of a commuter bus service was constitutionally indistinguishable from the operation of a commuter rail service.[271] The necessary result of such a finding would be a holding that SAMTA was not performing a traditional governmental function and therefore was not immune from commerce clause regulation. Had the Court followed such a course, continued strict construction of *National League of Cities* would have provided a viable means of immunizing only those few functions which truly are attributes of state sovereignty.[272]

The *Garcia* Court itself called for a reconsideration of the *National League of Cities* test[273] and the resulting opinion reflects a fundamental division in the Court over the true nature of that test. In his opinion for the majority, Justice Blackmun reasoned that the traditional governmental function prong was flawed because it required members of the judiciary to make the type of policy decisions which were the sole province of the legislature.[274] Furthermore, *National League of Cities* was wrongly decided because there was no state sovereignty restraint upon Congress' commerce power.[275]

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268. *See supra* text accompanying note 124.

269. There is a qualitative difference between the types of services identified by the *National League of Cities* Court as traditional and the operation of a mass transit system. *See supra* note 268. Despite the *National League of Cities* Court's insistence that the examples offered were "not . . . exhaustive," *National League of Cities*, 426 U.S. at 851 n.16, it is conceivable that the functions identified by that Court are *sui generis*.

270. 455 U.S. 678 (1982). *See supra* text accompanying notes 146-53.

271. "It would be surprising, indeed, if the Tenth Amendment draws a constitutional distinction between transporting commuters by bus as opposed to by train." Brief for Appellant, Joe G. Garcia at 14, Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

272. *See supra* note 269.

273. 105 S. Ct. at 1010.

274. *See supra* note 221 and accompanying text.

275. "[W]e have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause." *Garcia*, 105 S. Ct. at 1017.

Justice Blackmun, however, never explained why a court's decision concerning a traditional governmental function is any more legislative in nature than a wide myriad of other determinations routinely made by courts. For instance, the finding of a suspect classification is a necessary element of any equal protection analysis. Furthermore, in characterizing the test of *National League of Cities* as involving a "state sovereignty" restraint upon the commerce power the Court pointedly avoided any mention of the tenth amendment.[276] Although the tenth amendment is but a truism, it is not without significance[277] and indeed, no passage of the Constitution is to be dismissed as mere surplusage.[278] State sovereignty is not the "freestanding concept"[279] Justice Blackmun characterizes it as but a matter of constitutional law enshrined in the tenth amendment and as such it is entitled to the same recognition given to other Bill of Rights protections.[280]

According to the majority, there are residual restraints upon Congress when it legislates based on its authority under the commerce clause.[281] However, the Court offered little in the way of guidance as to what those limits are. Thus the opinion leaves Congress free to legislate as it sees fit within the scope of its authority, limited only by the political process.[282]

The *Garcia* decision thus jeopardizes the increasingly fragile notion of "state sovereignty." Although an argument can be made that in this era of electronic communications and industrialization it makes sense to give the national government complete control over the nation's economy, this is not the way our government was designed to operate. The states were to be left with areas in which they had clear authority to act without federal interference.[283] The reason the Framers chose to leave

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276. *See supra* note 242 and accompanying text.

277. Fry v. United States, 421 U.S. 542, 547-48 n.7 (1975).

278. "It cannot be presumed that any clause in the constitution is intended to be without effect." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

279. *See supra* note 275.

280. *See supra* note 129.

281. 105 S. Ct. at 1020. Justice Blackmun cited Coyle v. Oklahoma, 221 U.S. 559 (1911) as an example. That case held that Congress cannot dictate to a state where to locate its own state capital.

282. 105 S. Ct. at 1020.

283. *Id.* at 1030 (Powell, J., dissenting) (quoting Lane County v. Oregon, 74 U.S. (7

power to govern "the ordinary course of affairs"[284] with the local governments was their awareness that local government is generally more responsive to local needs and more immediately accountable for its actions.[285] The majority in *Garcia* is willing to sacrifice that element of accountability by permitting the federal government a broad grant of authority virtually unchecked by judicial review.[286]

It is clear that the Framers intended that in the event of a conflict, the Constitution should be superior to a statute, and that it should be the Court that should decide whether or not any given statute is constitutional.[287] That concept has been well accepted in our jurisprudence since the early case of *Marbury v. Madison*.[288] After *Garcia*, Congress has been given an open door to define its own authority under the commerce clause, thus leaving only its own self-restraint to keep it in check.[289] Given the fact that today Congress appears to respond more to political action groups and other lobbyists than to its members' constituencies,[290] the voice of the latter may go unheard. The majority in *Garcia* gives no protection to those parties in the event of a "malfunction of the 'political process.' "[291]

Finally, the majority's reading of *New York v. United States*[292] is somewhat disingenuous. While the eight justices who participated in that decision unanimously rejected the governmental-proprietary distinction in the field of intergovernmental

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Wall.) 71, 76 (1868)).

284. *See* THE FEDERALIST No. 45, at 313 (J. Madison) (J. Cooke ed. 1961).

285. *See, e.g.*, THE FEDERALIST No. 17, at 106-08 (A. Hamilton) (J. Cooke ed. 1961).

286. 105 S. Ct. at 1026-27 (Powell, J., dissenting). *See also* Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1720-22 (1985) (arguing that the Supreme Court's yield to Congress, to constitutionally determine the boundaries of federalism, means the "death of federalism").

287. *See* THE FEDERALIST No. 78, at 524-25 (A. Hamilton) (J. Cooke ed. 1961):

> [T]he courts were designed to be an intermediate body between the people and legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. . . . [T]he constitution ought to be preferred to the statute.

Id. at 525.

288. 5 U.S. (1 Cranch) 137 (1803).

289. *Garcia*, 105 S. Ct. at 1037 (O'Connor, J., dissenting).

290. *See id.* at 1025 and n.8 (Powell, J., dissenting).

291. *Id.* at 1025 n.7.

292. 326 U.S. 572 (1946).

tax immunity, no majority opinion was entered. It is difficult to read the four separate opinions entered in *New York v. United States* and arrive at a single unambiguous teaching.[293]

Ironically, it is the *Garcia* dissenters who argue that *National League of Cities* is, at its heart, a balancing test. The dissent noted that the same statute, the FLSA, was at issue in both *National League of Cities* and *Garcia*, and criticized Justice Blackmun, who found the result in *National League of Cities* was "*necessarily correct*" for not explaining why he found that same result "*necessarily wrong*" in *Garcia*.[294]

The dissent's characterization of *National League of Cities* as a balancing test[295] is faithful to the formulation developed in *Hodel v. Virginia Surface Mining & Reclamation Association*.[296] A statute that would fail the three-part test developed in that case may nevertheless be upheld due to an overwhelming federal interest.[297] A further reason for interpreting *National League of Cities* as a balancing test is suggested in the separate dissent of Justice O'Connor.[298] The traditional governmental functions at issue in *National League of Cities* and its progeny do not involve interstate commerce per se but rather are activities "affecting" commerce.[299] Therefore, Justice O'Connor applied the teaching of *McCulloch v. Maryland* regarding the necessary and proper clause and found that any test of the constitutionality of a commerce regulation that equates a state with a private litigant is inconsistent with the spirit of the tenth amendment.[300] Under Justice O'Connor's proposed test, state autonomy would be a factor to be "weigh[ed] . . . in the balance"[301] when Con-

293. Chief Justice Stone's concurring opinion, joined in by three other justices, maintained that a federal tax which was non-discriminatory upon its face, could nevertheless be unconstitutional as applied to the states. New York v. United States, 326 U.S. at 587-88 (Stone, J., concurring). The two dissenters adopted a position which was even more protective of states' rights. *Id.* at 590-98 *cited in National League of Cities*, 426 U.S. at 843 n.13.

294. 105 S. Ct. at 1025 (Powell, J., dissenting).

295. *See supra* text accompanying note 234.

296. 452 U.S. 264 (1981). *See supra* notes 140-45 and accompanying text.

297. *See supra* note 145 and accompanying text.

298. 105 S. Ct. at 1033-38 (O'Connor, J., dissenting). *See supra* notes 246-55 and accompanying text.

299. *See supra* text accompanying note 250.

300. *See supra* notes 251-53 and accompanying text.

301. 105 S. Ct. at 1037.

gress purports to regulate a state activity by means of the commerce clause.[302]

VI. Conclusion

In conclusion, it would appear implicit, despite the majority's protestation to the contrary,[303] that the level of federal grants to state and local governments influenced the Court's opinion. The impact of *Garcia* is therefore likely to be magnified by the effect of proposed reductions in federal aid to the cities.[304] The Court's holding in *Garcia* was overly broad; the Court would have acted more prudently had it reaffirmed *National League of Cities* but limited its application by means of continued strict construction and a balancing of federal and state interests.

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302. *See supra* note 253 and accompanying text.

303. Regulation pursuant to the commerce clause need not "be accompanied by countervailing benefits under the Spending Clause." *Garcia*, 105 S. Ct. at 1020 n.21.

304. *Cf.* Herbers, *Leader of Cities League Calls Plan for Aid Cuts "Disastrous,"* N.Y. Times, Mar. 11, 1986, at A20, col. 3.