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Constitutional Law: Tenth Amendment Implications of the U.S. Supreme Court Rule (Gregory v. Ashcroft, 111 S. Ct. 2395 (1991))

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CONSTITUTIONAL LAW: TENTH AMENDMENT IMPLICATIONS OF THE U.S. SUPREME COURT'S PLAIN STATEMENT RULE*

Gregory v. Ashcroft, 111 S. Ct. 2395 (1991).

Petitioners[1] filed an age discrimination suit against respondent,[2] alleging that Missouri's constitutional provision mandating appointed state judges to retire at age 70[3] violated the federal Age Discrimination in Employment Act of 1967 ("ADEA" or "Act").[4] Respondent moved to dismiss on the grounds that appointed state judges were exempt from the ADEA's protection because they were "appointees on the policymaking level" and therefore were excluded from the ADEA's definition of "employee."[5] Petitioners countered that they were not "appointees on the policymaking level" because they did not make

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* This comment received the *Huber Hurst Award* for the outstanding case comment submitted in the Fall 1991 semester.

1. Petitioners were Missouri state judges who were appointed to office. 111 S. Ct. 2395, 2398 (1991).

2. Respondent was the Governor of Missouri. *Id.*

3. MO. CONST. art. V, § 26(1).

4. 29 U.S.C. § 623(a) (1988). The Act provides that "[i]t shall be unlawful for an employer — (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

Petitioners also alleged that the mandatory retirement provision for appointed judges violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution for two reasons. *Gregory*, 111 S. Ct. at 2398. First, they contended that there was no rational basis for Missouri's decision to distinguish between judges who have reached the age of 70 and those who have not. *Id.* at 2406. Second, there was no rational basis for distinguishing between judges 70 and over and other state employees of the same age who were not subject to mandatory retirement. *Id.*

5. *Gregory*, 111 S. Ct. at 2403. Petitioner relied on § 630(f) of the Act, which provides:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or *an appointee on the policymaking level* or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

Id. (emphasis added).

policy, but resolved factual disputes and decided questions of law.[6] The United States District Court granted respondent's motion.[7] The United States Court of Appeals for the Eighth Circuit affirmed the dismissal.[8] The United States Supreme Court granted certiorari,[9] and HELD, petitioners were exempt from the ADEA's protection because Congress must make its intentions "unmistakably clear" in the language of the Act where interference with core state functions are concerned.[10]

The Tenth Amendment declares that "powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people."[11] This language was an attempt by the Framers of the Constitution to avoid a completely centralized government.[12] The Tenth Amendment implies that the states possess sovereignty concurrent with the federal government.[13] Yet the U.S. Supreme Court has dismissed repeatedly throughout the latter half of this century any Tenth Amendment limitation on congressional power.[14] Thus, Congress has been given free reign to legislate, through enumerated powers such as the Commerce Clause,[15] areas of state governmental functions that were once thought unreachable.

In 1976, however, the Court drastically departed from its longstanding Tenth Amendment jurisprudence. In *National League of Cities v. Usery*,[16] the Court resurrected the Tenth Amendment

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6. *Id.*

7. *Id.* at 2398.

8. *Id.*

9. *Id.* at 2399.

10. *Gregory*, 111 S. Ct. at 2404. The Court also held that Missouri's mandatory retirement provision did not violate the Equal Protection Clause because the people of Missouri "rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate, that they will require all judges to step aside at age 70." *Id.* at 2408.

11. U.S. CONST. amend. X.

12. *See* THE FEDERALIST, No. 45, at 292-293 (James Madison) (Clinton Rossiter ed., 1961).

13. *Id.*

14. *See* United States v. Darby, 312 U.S. 100, 124 (1941) ("The [tenth] amendment states but a truism that all is retained which has not been surrendered."); *but see* Fry v. United States, 421 U.S. 542, 547 n.7 (1975) ("While the Tenth Amendment has been characterized as a truism . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the State's integrity or ability to function effectively in a federal system.").

15. U.S. CONST. art. I, § 8, cl.3. The article provides that Congress has the power to "regulate Commerce . . . among the several States."

16. 426 U.S. 833 (1976).

notion of state sovereignty as an affirmative limit upon the power of Congress to regulate certain governmental functions traditionally reserved to the states. The case arose after Congress amended the Fair Labor Standards Act ("FLSA")[17] to extend federal minimum wage and hours requirements to cover state and local government employees.[18] The petitioners argued that congressional regulation of employment conditions for state and municipal workers infringed on state autonomy by supplanting the state's decision regarding its employment policies.[19] The Court held that the FLSA amendments exceeded congressional authority under the Commerce Clause because it directly impaired the state's freedom "to structure integral operations in areas of traditional governmental functions."[20] According to the Court, the extension of the FLSA amendments to state and local government regulated matters "essential to [the state's] separate and independent existence."[21] Because this employment relationship was deemed an "undoubted attribute of state sovereignty,"[22] the Court found that Congress was not regulating the states as employers, but rather the "States as States."[23]

Nine years later, the Court in *Garcia v. San Antonio Metropolitan Transit Authority*[24] rejected the decision in *National League*.[25]

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17. 29 U.S.C. §§ 201-219 (1982).

18. *See* Fair Labor Standards Amendment of 1974, Pub. L. No. 93-259, § 6(a)(1), (2), 88 Stat. 55, 58-59 (Current Version at 29 U.S.C. § 203(d), (e)(2)(C) (1974)); *see also National League*, 426 U.S. at 836-37.

19. *National League*, 426 U.S. at 840-42.

20. *Id.* at 850-52. The Court listed examples of areas of traditional operation of state and local governments, including fire protection, police protection, sanitation, public health, and parks and recreation. *Id.* It added that these examples were not an "exhaustive catalogue." *Id.* at n.16.

21. *Id.* at 844-46.

22. *Id.*

23. *Id.* The Post-*National League* Court evinced a balancing test developed in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), necessary for a successful Tenth Amendment challenge to congressional legislation. Under this approach, the Court considered whether the challenged federal law regulated the states as states, whether the federal regulation addressed matters that were indisputably attributes of state sovereignty, whether the States' compliance with the federal law directly impaired their ability to structure integral operations in areas of traditional governmental functions, and, finally, whether the relation of state and federal interests was such that the nature of the federal interests justified state submission. *See id.* at 289-90; *see also* EEOC v. Wyoming, 460 U.S. 226, 237-39 (1981) (applying balancing test).

24. 469 U.S. 528 (1985). *Garcia* involved a conflict over Congress' extension of the minimum-wage and overtime provisions of the FLSA to employees of the publicly-owned mass transportation system in San Antonio. *Id.* at 533.

25. *Id.* at 546-47.

Acknowledging that lower courts had failed to identify "principled constitutional limitations" on congressional commerce power by relying on different attributes of state sovereignty,[26] the Court found that this type of judicial appraisal lead "to inconsistent results at the same time that it deserve[d] principles of democratic self-governance."[27] The Court reasoned that the rule invited unelected judges to exert their personal biases in determining the relative merits of state policies.[28]

Because of judicial uncertainty, the *Garcia* decision virtually abdicated judicial review of acts of Congress challenged as invasions of state sovereignty.[29] Instead, the Court held that the states must turn to the political process and "state participation in federal governmental action" for constitutional protection from Congress' exercise of its Commerce Clause power.[30] Therefore, any future substantive restraints which the Court would impose on congressional commerce power should "compensate for possible failings in the national political process rather than . . . dictate a 'sacred province of state autonomy.'"[31]

In *South Carolina v. Baker*,[32] the Court took *Garcia* a step further and eliminated any "possibility" of a state sovereignty limitation on

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26. *Id.* at 538. As to the four post-*National League* cases that applied the balancing test, Justice Blackmun pointed out that it was "difficult, if not impossible, to identify an organizing principle that places each of these cases in the first group on one side of a line and each of the cases in the second group on the other side." *Id.* at 539. According to Justice Blackmun, this result was the necessity of "identifying a traditional state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it." *Id.* (quoting San Antonio Metro. Transit Auth. v. Donovan, 557 F. Supp. 445, 453 (W.D. Tex. 1980), *rev'd*, 469 U.S. 528 (1985)).

27. *Garcia*, 469 U.S. at 547.

28. *Id.* at 546.

29. *See id.* at 556. The *Garcia* dissenters (which included Justices Powell, Rehnquist, and O'Connor) believed that judicial review of conflicts between federalism and the Commerce Clause was necessary because Congress alone could not adequately protect state interests. *Id.* at 564-67 (Powell, J., dissenting), 579-80 (Rehnquist, J., dissenting), and 587-88 (O'Connor, J., dissenting).

30. *Id.* at 556. According to Justice Blackmun, "the principal and basic limit on the federal commerce power is that inherent in all congressional action — the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated." *Garcia*, 469 U.S. at 556.

31. *Id.* at 554 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)). Justice O'Connor criticized the majority's holding that the states must look to the national election process for protection from congressional encroachment. Such protection is unrealistic in light of changes in the national political process that have accentuated Congress' "underdeveloped capacity for self-restraint." *Id.* at 588 (O'Connor, J., dissenting).

32. 485 U.S. 505 (1988).

federal legislation enacted pursuant to the Commerce Clause.[33] The petitioner in *Baker* argued that a federal act removing federal income tax exemptions for interest earned on state and local government-issued bonds[34] violated the Tenth Amendment and constitutional principles of federalism.[35] The Court held that the act was constitutional,[36] reaffirming that neither *Garcia* nor the Tenth Amendment authorized courts to question legislation when "the national political process did not operate in a defective manner."[37] Moreover, petitioners must show "extraordinary defects" in the national political process.[38] Therefore, whenever the political process operates properly, the Court stressed that "the Tenth Amendment is not implicated."[39]

When *Garcia* and *Baker* were decided, the ADEA did not yet reach appointed state judges; but in 1986, Congress amended the Act to protect all employees age forty and above.[40] This amendment brought the ADEA into conflict with many state laws mandating the retirement of appointed state judges at a particular age.[41] Without an upper age cap, the Act appeared on its face to invalidate these state judiciary retirement laws. Nevertheless, some states have argued that the ADEA's application to state judges directly impairs a state's ability to structure its judiciary.[42] Although the lower courts have resolved these cases on purely statutory grounds,[43] implicit in several opinions is the view that such application of the ADEA would impermissibly

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33. *Baker*, 485 U.S. at 510-11.

34. The act in issue was the Tax Equity and Fiscal Responsibility Act, § 310(b)(1) (1982).

35. *Baker*, 485 U.S. at 508.

36. *Id.* at 513.

37. *Id.*

38. *Id.*

39. *Id.*

40. Pub. L. No. 99-592, § 2, 100 Stat. 3343 (1986) (codified as amended at 29 U.S.C. § 630(a) (1988)).

41. *See* Note, *Mandatory Retirement of State-Appointed Judges Under the Age Discrimination in Employment Act*, 76 CORNELL L. REV. 476, 477 n.12 (authored by Alan L. Bushlow) (comprehensive list of the thirty-one states currently having either constitutional or statutory mandatory retirement provisions).

42. *See, e.g.*, EEOC v. Vermont, 717 F. Supp. 261, 267 (D. Vt. 1988), *aff'd*, 904 F.2d 794 (2d Cir. 1990); Schlitz v. Virginia, 681 F. Supp. 330, 332 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988).

43. Three courts have held that appointed judges engage in policymaking activities and are therefore excluded from ADEA protection by the "appointee on the policymaking level" exemption. *See* EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988); EEOC v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989); *In re* Stout, 521 Pa. 571, 559 A.2d 489 (1989). Other courts have held to the contrary. *See, e.g.*, *Vermont*, 904 F.2d at 801; *Schlitz*, 681 F. Supp. at 333-34.

intrude on a sovereign interest long perceived as falling exclusively within the competence of the state.[44]

In the instant case, the majority concluded that the tenure of state judges is an important attribute of state sovereignty because the Tenth Amendment and principles of federalism mandate states to retain their integrity as separate and independent units within the federal system.[45] Such integrity is implicit within the authority of a state to determine the qualifications of its most important government officials.[46] The authority lies "at the heart of representative government."[47] Thus, federal courts must be certain of Congress' intent when the constitutional balance of federal and state powers is at stake.[48] Because congressional interference with Missouri's decision to establish a qualification for their judges would upset this balance,[49] the majority held that Congress must make its intention to do so "unmistakably clear in the language of the statute."[50]

Moreover, the majority stated that the authority of the people of the states to determine the qualifications of their government officials, in light of the Commerce Clause, may be inviolate.[51] Conceding that *Garcia* limits judicial review of acts and statutes enacted pursuant to Congress' Commerce Clause power,[52] the majority reasoned that application of its new plain statement rule could avoid a potential constitutional problem.[53] In this context, the majority refused to read the ADEA to encompass appointed state judges unless Congress had expressed its intention in "absolutely certain" terms that such judges

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44. *See Massachusetts*, 858 F.2d at 54 ("[T]he tenure of state judges is a question of exceeding importance to each state, and a question traditionally left to be answered by each state. Any federal encroachment on a state's freedom of choice in this area, therefore, strikes very close to the heart of state sovereignty."); *see also Illinois*, 721 F. Supp. at 159 (state's ability to determine the tenure of its own judiciary goes to the heart of state sovereignty); Apkins v. Treasurer & Receiver General, 401 Mass. 427, 431, 517 N.E.2d 141, 143 (1988)(the ADEA "should not be read in derogation of a State's sovereign interest.").

45. Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991).

46. *Id.* at 2402.

47. *Id.*

48. *Id.* at 2401.

49. *Id.*

50. *Id.* at 2401 (quoting Will v. Michigan Dept. of State Police, 491 U.S. 58, 63 (1989)). The *Will* plain statement rule was derived from Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985).

51. *Gregory*, 111 S. Ct. at 2402-03.

52. *Id.* at 2403.

53. *Id.*

were included.[54] Because the "appointees on the policymaking level" language under the ADEA was so broad, it was at least arguable whether Congress indeed had intended appointed state judges to fall within the Act's coverage.[55] Thus, applying the plain statement rule resulted in the majority refusing to extend the Act to reach appointed state judges.[56]

Although Justice White, in his concurring opinion, agreed that the ADEA did not prohibit Missouri's mandatory retirement provision, he strongly disagreed with the majority's plain statement rule.[57] According to Justice White, the rule was contrary to the Court's Tenth Amendment jurisprudence for two reasons.[58] First, the *Garcia* Court had rejected the view that the courts could identify affirmative limitations on the commerce power by relying on different attributes of state sovereignty.[59] Because the courts lacked such ability, any test for state sovereignty that turned on judicial determination of whether a particular state activity was "integral" or "traditional" was deemed "unsound in principle and unworkable in practice."[60] Second, both *Garcia* and *Baker* had concluded that the states must look to the national political process rather than to "judicially defined spheres of unregulable state activity" to protect themselves against undue congressional encroachment.[61] No claim had been made that the political process by which the ADEA was extended to the state was defective in any manner.[62] Thus, Justice White reiterated the Court's stance in *Baker* that the Tenth Amendment is not implicated where the political process operates properly.[63]

The majority in the instant case could have approached the issue of whether appointed state judges fall within the "appointees on the policymaking level" exemption as one of simple statutory interpreta-

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54. *Id.* at 2404.

55. *Id.*

56. *Id.*

57. *Id.* at 2408 (White, J., concurring in part, dissenting in part, and concurring in the judgment).

58. *Id.* Justice White also stated that the majority's announcement of the *Will* plain statement rule was unprecedented and fundamentally unsound. *Id.* (White, J., concurring in part, dissenting in part, and concurring in the judgment).

59. *Id.* at 2410.

60. *Id.* at 2410 (quoting *Garcia*, 469 U.S. at 546-47).

61. *Id.* (White, J., concurring in part, dissenting in part, and concurring in the judgment) (quoting *Baker*, 485 U.S. at 513).

62. *Id.* at 2411.

63. *Id.* at 2410-11 (quoting *Baker*, 485 U.S. at 513).

tion.[64] Yet the majority chose to resolve the issue by crafting an affirmative limitation on federal legislation affecting states under the Commerce Clause. Indeed, the plain statement rule's function as an affirmative limit on Congress' exercise of its Commerce Clause power does contravene the recent Court's Tenth Amendment jurisprudence.[65] Both *Garcia* and *Baker* stand for the proposition that it is not for the courts to define affirmative limits on Congress' Commerce Clause power.[66] Rather, Congress alone should define and enforce any limits on its power to regulate the states under the Commerce Clause.[67] Although the majority pays homage to the "letter" of *Garcia* and *Baker*, it simply ignores the "spirit" of these decisions in order to restrain congressional efforts under the Commerce Clause which would implement federal policies.

Because the majority believes that a state's decision in determining judicial qualification and selection is a power reserved to the states under the Tenth Amendment, the plain statement rule enables the courts to determine if Congress intended to regulate this decisionmaking.[68] Yet application of the rule calls for a judicial determination of which state activities are "integral" or "traditional." The *Garcia* Court, according to Justice White, explicitly held that judicial determinations of this sort were clearly untenable.[69] Applying the rule allows courts to carve out state functions by making choices among favored federal policies.[70] Thus, acts such as the ADEA, which was constitutionally

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64. *See Id.* at 2408 (White, J., concurring in part, dissenting in part, and concurring in the judgment). The Court granted certiorari to decide the following question:

> Whether appointed Missouri state court judges are "appointee[s] on the policymaking level" within the meaning of the Age Discrimination in Employment Act ('ADEA'), 28 U.S.C. Sections 621-634 (1982 & Supp. V 1987), and therefore exempted from the ADEA's general prohibition of mandatory retirement and thus subject to the mandatory retirement provision of Article V, Section 26 of the Missouri Constitution.

Id. (citing Petition for Certiorari). Justice White criticized the majority on the basis that the case represented one of pure statutory interpretation. *Id.*

65. *See id.* (White, J., concurring in part, dissenting in part, and concurring in the judgment); *see also supra* notes 57-62 and accompanying text.

66. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556; *Baker*, 485 U.S. at 512; *see supra* note 37 and accompanying text.

67. *See Garcia*, 469 U.S. at 556; *accord Baker*, 485 U.S. at 513; *see also supra* notes 30 & 37 and accompanying text.

68. *Gregory*, 111 S. Ct. at 2402.

69. *Id.* at 2410 (White, J., concurring in part, dissenting in part, and concurring in the judgment) (quoting *Garcia*, 469 U.S. at 546); *see supra* notes 26-28 and accompanying text.

70. *See Garcia*, 469 U.S. at 546-47; *see also supra* notes 27-28 and accompanying text.

extended by Congress' exercise of its Commerce Clause power to the states[71] to combat age discrimination in the work place,[72] are merely empty shells. Courts will simply apply the plain statement rule whenever there is the slightest hint that state autonomy is threatened or infringed.

Moreover, *National League* assumed that there were limits on Congress' power to interfere with core state functions and that it was the courts' responsibility to enforce those limits.[73] But *Baker* removed any possibility that the federal structure imposes limitations on the Commerce Clause.[74] According to the *Garcia* and *Baker* Court, the remedy for federal intrusion in the states' realm of traditional state functions was political, not judicial.[75] As members of Congress representing their respective state interests participated in the consideration and promulgation of the ADEA, the political process ensured that the Act does not threaten state autonomy.[76] However, the Court's plain statement rule bypasses the national political process approach enunciated by the *Garcia* and *Baker* decisions, and provides state protection from congressional overreaching.

Disturbed that the *Garcia-Baker* standard is a high one to overcome, the majority in the instant case has succeeded in returning notions of state sovereignty to the judicial sphere. Even though the plain statement rule is clearly contrary to the recent Court's Tenth Amendment cases, it may represent the first step towards reestablishing the "Tenth Amendment immunity" balancing test developed after *National League*.[77] Nevertheless, the rule may toll the death knell for policies embodied in federal acts and statutes which effect states' rights

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71. *See Wyoming*, 460 U.S. at 241-42 (pre-*Garcia* case holding that extension of the ADEA to the states was a valid exercise of congressional power under the Commerce Clause, not precluded by external Tenth Amendment constraints).

72. *See supra* note 4.

73. *See supra* notes 20-23 and accompanying text.

74. *See supra* note 33 and accompanying text.

75. *Garcia*, 469 U.S. at 556; *Baker*, 485 U.S. at 513; *see supra* notes 30-31 & 37 and accompanying text.

76. *See Vermont*, 904 F.2d at 802; *accord Schlitz*, 681 F. Supp. at 332.

77. *See Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time command the support of a majority of this Court."); *see also* Payne v. Tennessee, 111 S. Ct. 2597, 2623 n.2 (Marshall, J., dissenting) (citing *Garcia* as an "endangered precedent" that is likely to be overruled).

Since the *Garcia* decision, the composition of the Court has changed such that the *Garcia* dissenters now represent the majority.

to determine the qualifications of their government officials. The rule even may be eventually extended to immunize all types of state governmental functions from Congress' Commerce Clause power.[78] Such extension of the plain statement rule will not only be unwarranted, but counter-productive to societal interests inherent in congressional legislation.

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78. *Gregory*, 111 S. Ct. at 2410 (White, J., concurring in part, dissenting in part, and concurring in the judgment).