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Commerce Clause Reigns Supreme

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NOTES

COMMERCE CLAUSE REIGNS SUPREME

Garcia v. San Antonio Metro Transit Authority[1]

The application of the commerce clause of the United States Constitution to the states has been the subject of two "about face" decisions by the United States Supreme Court in the last twenty years. Beginning in 1968, *Maryland v. Wirtz*[2] held that the Fair Labor Standards Act of 1938 (FLSA)[3] could constitutionally be applied to the states.[4] In 1976, *Wirtz* was overruled by *National League of Cities v. Usery*[5] which held that the FLSA could not constitutionally be applied to the states when it operated "to directly displace the States' freedom to structure integral operations in areas of traditional government functions."[6] In 1985, the Supreme Court overruled *National League of Cities* by holding once again that the FLSA could constitutionally be applied to the states.[7]

Two major constitutional issues are posed by these cases and will be discussed in this Note. First, whether the FLSA is an appropriate use of the commerce power to regulate interstate commerce. Second, whether there is a constitutional limitation on the commerce power in the tenth amendment which precludes application of the FLSA and similar legislation to the states.

While there is no doubt under the current interpretation of the commerce clause that the FLSA is a constitutional use of Congress' power, it is arguable that the tenth amendment imposes a limitation on that power. The tenth amendment issue has not been heard for the last time.

The United States Constitution gives Congress the authority "to regulate commerce with foreign nations, and among the several States, and with indian

1. 469 U.S. 528 (1985).
2. 392 U.S. 183 (1968).
3. 29 U.S.C. §§ 201-219 (1982).
4. *Wirtz*, 392 U.S. at 196-99 (held that FLSA amendments extending coverage to state run schools and hospitals and the "enterprise concept" were constitutional).
5. 426 U.S. 833, 855 (1976).
6. *Id.* at 852. This case did not completely invalidate the FLSA. It held only that its application to certain state functions is unconstitutional. For a discussion of the test for determining which state functions are exempt see *infra* notes 98-120 and accompanying text.
7. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). This case was brought to determine whether operating a transit authority is an exempt function under *National League of Cities*. The Court did not decide that question, instead finding that the *National League of Cities* test was inappropriate. *Id.*

tribes."[8] It is the power to regulate commerce "among the several States" that gave rise to the FLSA. The power to regulate interstate commerce has recently been given a very broad interpretation by the courts. That has not always been the case.

In 1824, the Supreme Court in *Gibbons v. Ogden*,[9] held that the commerce power did not stop at state boundaries, but extended into the states,[10] and that Congress could override state law when necessary to regulate commerce.[11] The *Ogden* court also stated that the only limitations on the commerce power were those prescribed in the Constitution.[12] What those limitations are will be discussed later.

With the decision of *Hammer v. Dagenhart*[13] in 1918, the Supreme Court restricted somewhat the broad scope of the commerce power. That decision struck down the regulation of child labor as an improper regulation of interstate commerce.[14] Congress attempted to regulate child labor by imposing restrictions on interstate transportation of goods made by children working in violation of the regulations. In holding the regulation of child labor invalid, the Court held that Congress was really attempting to regulate labor under the pretense of regulating goods. Since the goods themselves were not harmful, there was no valid reason for regulating the goods.[15] The regulation of labor conditions, on the other hand, was within the regulatory power of the states and was not a proper subject for federal regulation.[16] Congress was trying to do indirectly what it could not do directly.[17]

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8. U.S. CONST. art I, § 8, cl. 3.

9. 22 U.S. (9 Wheat) 1 (1824).

10. *Id.* at 8. This case began the assertion of a broad commerce power. Without this holding federal power over commerce would stop at the state border.

11. *Id.* at 14. This is an assertion of Congress' power to preempt state law where Congress has power to regulate commerce. Congress could not effectively regulate interstate commerce unless it could preempt conflicting state law.

12. *Id.* at 9 (The Court did not, however, discuss what those limitations were.).

13. 247 U.S. 251 (1918) (The Court held that Congress could not regulate child labor standards under the commerce clause.). Child labor standards are incorporated in the FLSA, which was found to be constitutional in United States v. Darby, 312 U.S. 100 (1941). *Hammer* represents a period of restrictive interpetation of the commerce clause.

14. *Hammer*, 247 U.S. at 276. The court recognized that it was proper to regulate noxious goods, but in this case the goods were harmless. The regulation of the goods was an indirect regulation of child labor. At this time Congress could not directly regulate child labor. The Court would not allow Congress to indirectly regulate what it could not regulate directly.

15. *Id.* For cases dealing with regulation of noxious goods, see Hippolite Egg Co. v. United States, 220 U.S. 45 (1911); Lottery Case, 188 U.S. 321 (1903).

16. *Hammer*, 247 U.S. at 273. This is similar to the tenth amendment limitation argument. That is, since the power to regulate labor is not specifically given to Congress it is reserved to the states. For a discussion of the tenth amendment limitation, see text beginning *infra* at note 53.

17. *Hammer*, 247 U.S. at 273; *see also* Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). *Hammer* was specifically overruled by United States v. Darby, 312 U.S. 100, 116-17 (1941).

Under the restrictive interpretation of the commerce power in *Hammer v. Dagenhart*, the FLSA would not be a proper use of Congress' authority. However, that restrictive interpretation of the commerce power did not last long. In *Coronado Coal v. United Mine Workers*,[18] the Court held that Congress had authority under the commerce power to prohibit activities which interfered with the movement of coal into interstate commerce even though the Court found mining to be a purely local activity.[19] Those activities sufficiently affected interstate commerce so as to bring them within the purview of the commerce clause. Likewise, the Court found regulation of a local grain exchange to be within the commerce power in *Board of Trade of City of Chicago v. Olsen*.[20] Even though its operations were local in nature, when combined with other grain exchanges, it had an effect on the interstate commerce of grain.[21]

While giving Congress broad power to regulate local activity, *Coronado Coal* and *Olsen* were still not entirely inconsistent with *Hammer v. Dagenhart*. The goods themselves, or more precisely the flow of the goods, affected interstate commerce directly in *Coronado Coal* and *Olsen* while child labor, dealt with in *Hammer v. Dagenhart*, had only an indirect effect on interstate commerce. However, one could strongly argue that the activities prohibited in *Coronado Coal* were similar to employing child labor and thus indirectly affected commerce.

At any rate, the importance of *Hammer v. Dagenhart* faded quickly in the late 1930s. In *National Labor Relations Board v. Jones & Laughlin Steel*,[22] the Court held that Congress had the authority to regulate the labor practices of a firm engaged in interstate commerce.[23] *Jones and Laughlin Steel* held that even though the plant involved produced steel locally, it was subject to regulation because its product was sent into interstate commerce and therefore affected commerce enough to bring it within the commerce power.[24] The threat to interstate commerce in *Jones & Laughlin Steel* was

18. 268 U.S. 295 (1925).

19. *Id.* at 310.

20. 262 U.S. 1 (1923).

21. *Id.* at 37. This cumulative effect theory brought almost every activity within the commerce power. It would be difficult to think of any activity that would not affect interstate commerce if it were combined with all similar activities in the United States.

22. 301 U.S. 1 (1937). Jones and Laughlin Steel Company produced steel locally, but shipped it to other states. It also obtained raw materials from several states. Because of this contact with other states, the steel production was subject to regulation. This case extended the commerce power to cover employee-employer relations in the plant which produced the steel. *Id.* at 34-43.

23. *Id.* at 31-32. Compare the regulation of labor practices with the regulation of child labor standards, which was found unconstitutional in *Hammer*. *Jones & Laughlin Steel* represents a position inconsistent with *Hammer*.

24. *Id.* at 37. This follows the test set forth in *Coronado Coal* for the regulation of local activities under the commerce clause. That is, if the activity affects interstate commerce, then it is subject to regulation under the commerce clause. *See supra* notes 18-19 and accompanying text.

one of possible labor unrest and a strike, resulting in the reduced flow of steel into the commerce stream.[25]

United States v. Darby[26] extended the power of the commerce clause to "intrastate" activities which "affected" interstate commerce.[27] Congress could also regulate intrastate activities if their regulation was an appropriate means to accomplish a legitimate regulation of interstate commerce.[28] This power to regulate intrastate activities has been extended to allow Congress to prohibit intrastate activities which restrain interstate commerce.[29] Given this broad interpretation of the commerce clause, almost no activity would be exempt from regulation if Congress found the requisite effect on interstate commerce.[30]

In 1938, the Fair Labor Standards Act[31] was passed to regulate labor. It was specifically designed to regulate wages and hours.[32] The FLSA estab-

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25. *Jones & Laughlin Steel*, 301 U.S. at 41-43. Compare this possible threat to commerce with the rationale set out in the FLSA. United States Code section 202(a)-(b) states:

> The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes 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) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.
>
> (b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

29 U.S.C. § 202 (a)-(b) (1982).

26. 312 U.S. 100 (1941) (FLSA held not to be unconstitutional exercise of the commerce power).

27. *Id.* at 119-21. This merely restates the position in *Coronado Coal* and *Jones & Laughlin Steel*. *See supra* notes 19-24 and accompanying text.

28. *Id.* at 121. For cases interpreting the necessary and proper clause see McCulloch v. Maryland, 17 U.S. (4 Wheat) 415 (1819); United States v. Ferger, 250 U.S. 199 (1919).

29. Coronado Coal v. United Mine Workers, 268 U.S. 295, 310 (1925) (prohibited local activities interfering with the movement of coal into interstate commerce); *see also*, Local 167, Int'l Brotherhood of Teamsters v. United States, 291 U.S. 293, 297 (1934).

30. There is language in McCulloch v. Maryland, 17 U.S. (4 Wheat) 415 (1819), indicating that there is no tenth amendment limitation. *Id.* at 421. This would mean even state-run activities may be regulated.

31. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1982)).

32. *Id.* §§ 6-7.

lished broad regulation of hours and wages similar to the legislation regulating labor practices which was upheld in *Jones & Laughlin Steel.*[33]

In order for the FLSA to be valid, Congress had to find the requisite effect on interstate commerce. Congress' theory in passing the FLSA was that every employee necessary for the production of goods for interstate commerce is substantially related to the flow of interstate commerce. Since Congress can regulate even local activities if they have a substantial effect on interstate commerce, Congress can regulate all employees, provided they are necessary to the production of goods which move in interstate commerce.

The Fair Labor Standards Act specifically states that substandard wages burden the flow of goods, permit unfair competition, cause labor disputes which obstruct commerce, and interfere with the orderly marketing of goods, and that channels of interstate commerce are used to perpetuate these conditions.[34] The policy of the FLSA was to eliminate the conditions referred to above.[35] Regulation of child labor was found unconstitutional in *Hammer v. Dagenhart.*[36] In upholding the FLSA as constitutional, *United States v. Darby*[37] specifically overruled *Hammer v. Dagenhart.* The Court in *Darby* stated that the motives and purposes of regulation are for legislative judgment.[38] Courts have no control over those decisions.[39] As long as the Court finds that Congress has a rational basis for finding a regulatory scheme necessary to protect interstate commerce, the regulation is valid.[40] The Court will not substitute its judgement for that of Congress, but it will look to see that there is a rational basis for congressional regulation. The Court in *Darby* found that there was a rational basis for the FLSA.[41]

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33. For a discussion concerning the coverage of the Fair Labor Standards Act of 1938, see Cooper, *"Extra time for Overtime" Now Law*, 37 MICH. L. REV. 28 (1938); Davisson, *Coverage of the Fair Labor Standards Act*, 41 MICH. L. REV. 1060 (1943); Green, *Some Heretical Remarks on the Federal Power over Commerce*, 31 MINN. L. REV. 121 (1947). For a current discussion, see Wood & Wood, *The Fair Labor Standards Act: Recommendations to Improve Compliance*, 1983 UTAH L. REV. 529.

34. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, § 2(a), Stat. 1060 (codified as amended at 29 U.S.C. § 202(a) (1982)).

35. *Id.* § 2(b).

36. 247 U.S. 251 (1918).

37. United States v. Darby, 312 U.S. 100 (1941); *see also* Opp Cotton Mills v. Administrator of the Wages & Hour Div. of the Dept. of Labor, 312 U.S. 126 (1941).

38. *Darby*, 312 U.S. at 115 (Court not concerned with Congress' motive; regulation is valid if Congress has a reasonable basis for believing the regulation is necessary to protect interstate commerce).

39. *Id.* (indicating these are legislative decisions of the type with which the Court will not interfere).

40. *Id.* at 121. Under a rational basis test the Court will not decide the merits. The Court will merely determine if Congress had a rational basis for its decision. Compare this approach with a strict scrutiny test in which the Court substitutes its judgment for that of Congress.

41. *Darby*, 312 U.S. at 111-12 (once rational basis found the regulation is a valid exercise of the commerce power).

As originally enacted, the FLSA covered those employees engaged in the production of goods for interstate commerce.[42] Early cases held that the act covered more than just production personnel. *Kirschbaum Co. v. Walling*[43] held the FLSA applicable to building maintenance personnel such as engineers, firemen, electricians, watchmen, and porters.[44] The employees in *Kirschbaum* worked for the owners of the building, not the tenant companies which actually produced the goods.[45] It follows that employees in these positions hired by the company actually producing the goods would be covered.[46] Thus, any employee necessary for the production of goods for commerce is covered by the 1938 Act.[47]

The constitutionality of the FLSA, at least as applied to the private sector, is well settled.[48] The FLSA was amended in 1961 to cover employees engaged in certain enumerated enterprises rather than employees necessary for the production of goods for interstate commerce.[49] This amendment was upheld in *Wirtz*.[50]

At the present time, no serious argument can be made that the FLSA itself is unconstitutional. It has been upheld by nearly half a century of case law. The major question left concerning the FLSA is whether it can be applied to the states.

The most serious constitutional challenge faced by the FLSA is whether it can be applied to the states or their political subdivisions. This is the question squarely addressed in *Wirtz*, *National League of Cities*, and *Garcia v. SAMTA*.[51] The Supreme Court has changed its mind on this issue twice

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42. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, § 6(a), 52 Stat. 1060, 1062-63 (codified as amended at 29 U.S.C. § 206(a) (1982)) ("Every employer shall pay to each of his employees who in any work week is engaged in commerce, wages at the following rates . . . .").

43. 316 U.S. 517 (1942).

44. *Id.* at 525-26.

45. *Id.* at 524.

46. This is an easy case. If employees employed by the building owner who does not produce goods for interstate commerce are covered, then employees in those same positions employed by a manufacturer of goods for commerce must also be covered.

47. Roland Elec. v. Walling, 326 U.S. 657 (1946).

48. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537 (1985); National League of Cities v. Usery, 426 U.S. 833, 836 (1976); Maryland v. Wirtz, 392 U.S. 183, 189-90 (1968).

49. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65 (codified as amended at 29 U.S.C. § 206 (1982)).

50. *Wirtz*, 392 U.S. 183.

51. *Garcia*, 469 U.S. 528; *National League of Cities*, 426 U.S. 833; *Wirtz*, 392 U.S. 183. The tenth amendment 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." U.S. CONST. amend. X.

in the last twenty years. There is little doubt that the issue will be raised again.

There are no limitations on the commerce power other than those prescribed in the Constitution.[52] The question then, is whether there is a constitutional limitation; specifically, whether there is a tenth amendment limitation which limits the commerce power as applied to states and cities. The early case of *McCulloch v. Maryland*[53] stated that the tenth amendment posed no limitation on federal powers.[54] Where federal power existed that power was complete.[55] Under this line of reasoning, it would not matter whether the power was asserted against the private sector or the states. This came to be the prevailing view before *National League of Cities v. Usery*.[56]

This view prevailed in *Maryland v. Wirtz*,[57] which found the first amendments to apply the FLSA to states and cities. The original Act, passed in 1938, specifically excluded the states and their political subdivisions from coverage.[58] Through a 1961 amendment, Congress changed the basis for coverage of the FLSA from persons necessary to the production of goods for interstate commerce to persons employed in certain enterprises enumerated in the statute.[59] Under this scheme, courts need only to determine if the employee is employed in one of the enumerated enterprises to find the employee covered by the FLSA, rather than determining whether he is necessary for the production of goods for interstate commerce. This amendment did not remove the exemption of the states. That was done by a 1966 amendment which added hospitals, schools, and certain other institutions including those that are public and private.[60] *Wirtz* upheld the switch to the enumerated

52. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 9 (1824).

53. 17 U.S. (4 Wheat.) 415 (1819).

54. *Id.* at 420-22. Obviously this is in direct conflict with the holding in *National League of Cities.*

55. *Id.*

56. 426 U.S. 833 (1976). *See generally*, Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161. *See also* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977).

57. 392 U.S. 183 (1968). The holding at least was faithful to the prevailing view. However, there is language leaving some doubt about the absoluteness of this holding. *See infra* note 76 and accompanying text.

58. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, § 3(d), 52 Stat. 1060, 1060 ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State . . .").

59. 29 U.S.C. § 206(a) (1982) now reads: "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates . . . ." *Id.*

60. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830, 833 (codified as amended at 29 U.S.C. § 203(r) (1982)).

enterprise test as a reasonable regulatory scheme.[61] *Wirtz* also upheld application of the FLSA to state run hospitals and schools.[62]

By upholding these two amendments, *Wirtz* began the encroachment of the FLSA upon the states. The FLSA was attacked in *Wirtz* on the grounds that the Act would interfere with "sovereign state functions."[63] While not specifically couched in tenth amendment terms, this is basically the tenth amendment argument. The majority had two answers to the concern that the act would interfere with "sovereign state functions." First, the amendments in question did not factually interfere with the way the states performed their sovereign functions.[64] Just what "sovereign state functions" are was not clearly addressed in *Wirtz*. This first answer to the tenth amendment challenge did not say there was no limitation on the commerce power. It only said that, even if there is a limitation, it was not exceeded in that case.

To support its first argument, the Court pointed out that the FLSA would have a limited effect on state run institutions because of exemptions in the act for executive, administrative, and professional personnel.[65] Medical personnel and teachers fall under this exemption, so the employees covered would be secretaries, janitors, watchmen, and other similar employees.[66] The Act sets minimum wage and overtime requirements only. "[It] does not otherwise affect the way in which school and hospital duties are performed."[67] The Court stated that it was not factually accurate to say that Congress was telling the states how to perform medical and educational functions in light of the aforementioned limitations.[68]

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61. Maryland v. Wirtz, 392 U.S. 183, 188 (1968) (Court held the "enterprise concept" was covered by the reasoning of United States v. Darby, 312 U.S. 100 (1941)).

62. 392 U.S. at 196-99.

63. *Id.* at 193 (tenth amendment limitation argument).

64. *Id.* at 193-94. Whether the amendments factually interfere with the states' sovereign functions is a question of degree. Although the amendments do not directly tell the states what to do, they do increase costs. This, in itself, intrudes on the states' decision making process. In this case that intrusion is minimal. Perhaps the Court does not feel the intrusion is sufficient to warrant limiting Congress' power. On the other hand, the Court may not feel that increased costs in themselves are an intrusion on the states.

65. *Id.* at 193. Section 213(a)(1) of the United States Code provides that certain employees are exempt. The Act exempts "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) . . . ." 29 U.S.C. § 213(a)(1) (1982).

66. These employees make up a small percentage of the employees of the institutions covered, so the increased costs of providing minimum wages for them is comparatively small, but these are really the only employees of these institutions who are likely to be paid less than the minimum wage in the absence of regulation.

67. *Wirtz*, 392 U.S. at 193. Once again the effect on the states lies in the increased cost. Increased costs undoubtedly affect state decisions.

68. *Id.* at 193-94.

The Court's reasoning is only partially accurate. It is true that Congress is not directly telling the states how to perform medical and educational functions. However, by requiring the state to pay a minimum wage and overtime, the Act will increase the cost of providing these functions. By increasing the cost, Congress is indirectly influencing state decisions. The effect is limited when compared to later extensions of the FLSA, but it does exist.

The Court's second answer to the tenth amendment challenge was that the federal government, through the commerce clause, could override the states' interests.[69] "[It] is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."[70] The Court relied on *United States v. California* which stated that there is no limitation on the power to regulate commerce with respect to traditional government functions.[71] "The state can no more deny the power if its exercise has been authorized by Congress than an individual."[72]

By its second argument, the Court held that there is no tenth amendment limitation on the commerce power. *Wirtz* followed the reasoning of most previous decisions on the tenth amendment limitation.[73] "The Tenth Amendment came to have no restrictive significance. It was considered a mere expression of sentiment whose time had passed with the growth of national power to meet national needs."[74]

It should be noted that the amendment upheld in *Wirtz* did not extend coverage of the FLSA as far as the amendment struck down later.[75] The major impact on the states under the FLSA is increased cost of operation because the FLSA may require the state to pay its employees higher wages. The amendment upheld in *Wirtz* applied the FLSA to very few state employees, and therefore, imposed only a small financial burden when compared to later amendments. *Maryland v. Wirtz* held that the tenth amendment poses no limitation on the commerce power, however, there is language to the effect that the Court has the power to prevent the destruction of state sovereignty.[76] While it is dictum, the statement leaves room to argue that there

69. *Id.* at 195-96 (Court stated that "federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants'") (quoting Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 426 (1925)).

70. *Wirtz*, 392 U.S. at 195.

71. United States v. California, 297 U.S. 175, 185 (1936) (recognizing use of such a test in tax area but not in the commerce clause area).

72. *Id.* at 185.

73. *See* Barber, *supra* note 56.

74. *Id.* at 162.

75. The amendments at issue in *Wirtz* extended coverage to the states only in the areas of schools and hospitals. Later amendments extended coverage to all state activities. *See infra* note 79 and accompanying text.

76. *Wirtz*, 392 U.S. at 196.

is some point at which the Court could limit the commerce power. Whether later amendments extending the FLSA would, in the mind of this Court, reach that point is something we will never know, but the Court in *National League of Cities v. Usery*[77] held that the 1974 amendment went too far.[78]

In 1974, Congress amended the FLSA, entirely removing the previous state exemptions from the Act.[79] Thereafter, states and their political subdivisions were supposed to be subject to the same rules as the private sector. However, that was not to be the case.

The reemergence of the tenth amendment began as a footnote in *Fry v. United States.*[80] *Fry* addressed the constitutionality of applying the Economic Stabilization Act of 1970 to state employees.[81] That statute was a temporary effort to meet what was thought to be a national economic emergency. The Court upheld the Act, stating that the Economic Stabilization Act was not as "drastic an invasion of state sovereignty" as *United States v. Darby.*[82] Footnote seven of the *Fry* opinion stated the tenth "amendment declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[83] This was the stepping stone, albeit a small one, which led to *National League of Cities.*

The effect of the 1974 amendment is to extend coverage to almost all state employees.[84] This is a more considerable burden on the state than the FLSA amendments approved in *Wirtz.* After *Maryland v. Wirtz,* the state only faced increased costs of operating hospitals and schools. Many employees of these institutions were exempt from coverage.[85] After the 1974 amendments, the state faced increased costs of operating all of their agencies because of the minimum wage and overtime pay requirements. *National League of Cities v. Usery* challenged the FLSA on the ground that these increased costs intruded on state sovereignty.[86]

77. 426 U.S. 833 (1976).

78. *Id.* at 840 (established a tenth amendment limitation on Congress' commerce power).

79. 29 U.S.C. §§ 201-219 (1982) (1974 amendments) (extended coverage of the FLSA to nearly all public employees).

80. Fry v. United States, 421 U.S. 542 (1975).

81. *Id.*

82. *Id.* at 547. Because of the temporary nature of the act, the Court felt it was not as intrusive as the FLSA upheld in *Darby.* That Act also addressed a national emergency. *Id.* at 548.

83. *Id.* at 548 n.7. This footnote was used as authority in *National League of Cities* for the premise that there is a limitation on the commerce power. National League of Cities v. Usery, 426 U.S. 833, 852 (1976).

84. By removing the exception of the states from the FLSA, these amendments made the Act apply to the states in the same manner it applies to individuals.

85. *See supra* note 65 concerning exemptions from the FLSA.

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

In *National League of Cities v. Usery*, the Supreme Court held that the 1974 amendments were unconstitutional to the extent that they "operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions . . . ."[87] This holding did not completely overrule the 1974 amendments. The 1976 amendments are overruled only as they apply to traditional government functions. The FLSA is still applicable to activities of the states that are not traditional government functions. Determining what are "traditional government functions" is the major problem with *National League of Cities*, and is discussed later in this Note in connection with *Garcia v. SAMTA*.

National League of Cities was based on a theory of state sovereignty. "We have repeatedly recognized that there are attributes of State sovereignty attaching to every State government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the [C]onstitution prohibits it from exercising the authority in that manner."[88] This is the basic tenth amendment argument. That is, while Congress may have authority to regulate a particular aspect of commerce, it cannot exercise it with respect to the states if it intrudes on the rights or powers reserved to the states in the Constitution. Federal power ends where state power begins if that state power is one of the states' sovereign powers. The Court went on to quote an opinion which stated that the power to set wages to those they employ to carry out their governmental functions was one attribute of state sovereignty.[89]

The power to set wages of state employees carrying out state government functions is an attribute of state sovereignty. The FLSA attempts to regulate this attribute and it intrudes on state sovereignty. Therefore, if one accepts the proposition that federal power ends where it intrudes on state sovereignty, the FLSA is unconstitutional when it attempts to set wages for employees who carry out state governmental functions.

This entire theory hinges on whether there is, in fact, a judicial limitation on Congress' power. As pointed out earlier, there was language in *Wirtz* to the effect that the courts had power to prevent destruction of the states as political entities.[90] This language was pointed out in *National League of Cities* as authority that such a limitation does exist.[91] The Court also used footnote seven from the opinion in *Fry v. United States* as authority for a tenth

87. *Id.* at 852.

88. *Id.* at 845. This is a key link in the Court's reasoning. There must be state functions which Congress cannot reach with the commerce power before any of this is relevant. The opposing view is that there is no affirmative limit on Congress' power to regulate state activities.

89. *Id.* (the Court quoted Coyle v. Oklahoma, 221 U.S. 559, 565 (1911)).

90. *See supra* note 76 and accompanying text.

91. 426 U.S. at 842. This language, however, is contrary to the holding in that case.

amendment limitation. The Court analyzed the tenth amendment limitation with other recognized limitations on commerce power regulations. "Constitutional enactments . . . may nonetheless be invalid because found to offend against the right to trial by jury[92] . . . or the Due Process Clause of the fifth amendment."[93] The fifth and sixth amendments, however, are specifically enumerated rights and are rights of the people, not rights of the states.[94] The Court's analogy is not persuasive.

The Court also used the analogy of tax law where some intergovernmental immunity is recognized.[95] However, the Court recognized early that the power to tax is the power to destroy.[96] That is the basis for tax immunity. Regulating the states is not as intrusive as taxing them. The Court in *United States v. California* recognized that it looks to traditional state activities to mark the boundary for taxation, but stated that there was no such limitation on the commerce power.[97] In all fairness to the Court's position in *National League of Cities*, however, it must be recognized that regulations like the FLSA which require the states to expend additional funds have an effect on the states very similar to taxation. The difference is that taxation is direct while regulation indirectly increases state expenditures. One could argue that regulations which cause increased expenditures by the state should be treated in the same manner as taxation because of their similar effects.

In any event, if there is a tenth amendment limitation which precludes regulation of some state activities, the issue then becomes determining which activities are exempt.

The tenth amendment limitation, even if it exists, does not prevent all coverage of the state by the FLSA. Determing which state activities are exempt is a problem. A four part test arose out of *National League of Cities* to determine which activities are exempt.

The first prong of the test is that the statute in question must regulate the states as states.[98] This means that the statute regulates the state as it exists in the federal system as opposed to the people of the state.[99] If the

92. *Id.*

93. *Id.* The Court's argument based upon the fifth and sixth amendments is not very convincing, however, because these are rights of individuals, not of the states. The argument is useful only by analogy.

94. *See supra* note 93.

95. 426 U.S. at 843.

96. McCulloch v. Maryland, 17 U.S. (4 Wheat) 415, 436 (1819). Taxing a state directly removes revenue from the state. Regulating indirectly does so. The state can offset the effect of regulation to some extent, but it cannot do the same with taxation.

97. United States v. California, 297 U.S. 175, 185 (1936) (held the Safety Appliance Act applicable to state run railroads.)

98. National League of Cities v. Usery, 426 U.S. 833, 854 (1976).

99. *See* Michelman, *supra* note 56.

statute regulates the people of the state it is not invalid under this prong of the test, even if the statute conflicts with state law.[100]

Hodel v. Virginia Surface Mining and Reclamation Association, Inc.[101] dealt with the first prong of the test. *Hodel* held the Surface Mining Act[102] constitutional because it did not regulate the states as states. The Surface Mining Act provided that if the state did not adopt state legislation meeting certain requirements, the federal government would step in and regulate land reclamation. The states were not forced to adopt any regulation.[103] If Congress had attempted to force adoption of state regulation then it would have been regulating the states as states.

The second prong of the test is that the statute must address an attribute of state sovereignty.[104] The state sovereignty argument is based on early cases, certain Federalist papers, and the United States Constitution. The argument starts with the theory that the powers delegated to the federal government are "few and defined."[105] The other powers are retained by the states, including those concerning the affairs and welfare of their citizens.[106] The state governments would generally be considered more important than the federal government.[107]

The states retain sovereignty over all matters not given to the federal government by the Constitution.[108] Under the tenth amendment, Congress may not exercise its power "in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[109] If one of the sovereign powers retained by the states is restricted by a federal regulation in a manner that interferes with the independent existence of the states, the federal regulation is invalid.[110]

The third prong of the test is the regulation must directly impair the states' ability to structure operations "in areas of traditional government

100. *See supra* notes 8-47 and accompanying text.

101. 452 U.S. 264 (1981) (good discussion of the *National League of Cities* test).

102. 30 U.S.C. §§ 1201-1328 (1982).

103. *Hodel*, 452 U.S. at 288.

104. *National League of Cities*, 426 U.S. at 845; *see supra* note 88 and accompanying text.

105. 1 THE FEDERALIST, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, A COLLECTION OF ESSAYS BY A. HAMILTON, J. MADISON & J. JAY, No. 45, at 319 (1917).

106. *Id.*

107. *Id.*

108. These are the powers of the states that Congress supposedly cannot impair. Just exactly what these powers are remains an open question.

109. *National League of Cities*, 426 U.S. at 843 (1976) (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)). It should be noted that this language is found in footnote seven in *Fry*. That does not enhance its value as authority for its proposition.

110. *See National League of Cities*, 426 U.S. at 852.

functions."[111] This is the controversial requirement. What are traditional government functions?

A related issue is how the FLSA impairs the states' ability to structure its operations. Justice Douglass, in his dissent in *Wirtz*, pointed out that the FLSA would force the states and cities to raise taxes, curtail hospital and school services, curtail other services, or refrain from entering new activities to meet changing conditions because of the new financial burdens imposed by the FLSA.[112]

The FLSA required the state to pay a minimum wage and overtime pay. This increases the cost of operating state institutions. Since the state has a limited budget, it must restructure its operations to meet these new costs. The 1976 amendment gave rise to much higher costs than those upheld in *Wirtz*, and therefore required the state to restructure its operations even more. The Court discussed the effect the FLSA had on several states and municipalities.[113] These effects included increased costs of operation and reduced training of highway patrol officers because of the increased costs that would otherwise be required.[114] The Court, in *National League of Cities*, held that the increased costs displaced state policies in structuring and delivering traditional governmental services.[115]

This prong was the main issue in the cases following *National League of Cities*.[116] These cases came up with no clearly defined line between traditional government functions and non-exempt functions.[117] This prong of the test was attacked as being unworkable in *Garcia v. SAMTA* and was one of the reasons for overruling *National League of Cities*.[118] This prong will be discussed further in conjunction with *Garcia v. SAMTA*.

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111. *Id.* at 852.

112. Maryland v. Wirtz, 392 U.S. 183, 203 (1968). Those who support a tenth amendment limitation must believe these increased costs are a sufficient intrusion on the states before such a limitation may be invoked.

113. *National League of Cities*, 426 U.S. at 846-47.

114. *Id.* By this discussion the Court is trying to show how the FLSA affects state decision making. Take the case of the California Highway Patrol officers who were receiving less training because the state could not afford to pay the overtime required by the FLSA. The state then decided to reduce the quality of its patrolmen rather than absorb the increased costs.

115. *Id.* at 849. The Court's holding, in theory at least, makes more sense than the Court's first answer to tenth amendment concerns in *Wirtz*. *See supra* note 64. However, *Wirtz* does not base its holding entirely on this argument. *See supra* note 69.

116. For a summary of some of these, cases see *Garcia*, 469 U.S. at 538-39.

117. *Id.* The Court looked at the cases it summarized and could find no common characteristics differentiating traditional government functions from non-exempt functions.

118. *Id.* at 538-47.

The last prong of the test is that the federal interest must not be such that it justifies state submission.[119] This is a balancing test which would allow regulation if the federal interest was paramount. This fourth prong of the test could arise in a variety of situations. One such situation would be legislation similar to the Economic Recovery Act upheld in *Fry v. United States*, in which Congress responded to a national emergency. Another situation in which the Court recognized a paramount federal interest is the regulation of railroads.[120]

After *National League of Cities*, any state activity which met the four prong test was exempt from FLSA coverage, but the Court struggled with the third prong of the test trying to determine which functions were "traditional government functions."[121] *Garcia v. SAMTA* was litigated to determine whether municipal ownership of a mass transit system was a traditional government function.

The City of San Antonio regulated public transportation until 1959 when it bought the San Antonio Transit Company and created the San Antonio Transit System.[122] In 1978, the facilities and equipment were transferred to a public mass transit authority known as the San Antonio Mass Transit Authority (SAMTA).[123] The suit was brought to enforce the minimum wage and overtime requirements of the FLSA against SAMTA. The federal district court decided that such ownership fell within the concept of traditional government function and was thus exempt from FLSA coverage.[124] In previous decisions, other courts had decided that ownership of a mass transit system was not a traditional government function.[125]

On consideration of the case, the Supreme Court sidestepped the issue of whether operation of SAMTA was a traditional government function and

119. National League of Cities v. Usery, 426 U.S. 833, 852-55 (1976). This prong of the test seems to be drawn from Justice Blackmun's concurring opinion. *Id.* (Blackmun, J., concurring).

120. United Transp. Union v. Long Island R.R., 455 U.S. 678, 687 (1982) (Court discussed the *National League of Cities* test but found it inapplicable because the federal government has a greater interest in regulating railroads than the states).

121. *See supra* notes 116-17 and accompanying text.

122. *Garcia*, 469 U.S. at 531. There is no doubt that if the transit company had remained private it would now be covered by the FLSA.

123. *Id.*

124. *Id.* at 533-35.

125. San Antonio Metro. Transit Auth. v. Donovan, 557 F. Supp 445 (W.D. Tex. 1983), *reh'g denied*, 471 U.S. 1049 (1985). Three Federal courts of appeals and one state appellate court have reached the opposite conclusion on this same issue. *See*, Dove v. Chattanooga Area Regional Transp. Auth., 701 F.2d 50 (6th Cir. 1983); Alewine v. City Council, 699 F.2d 1060 (11th Cir. 1983), *cert. denied sub nom.* City of Macon v. Joiner, 470 U.S. 1027 (1985); Kramer v. New Castle Area Transit Auth., 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983); Francis v. City of Tallahassee, 424 So. 2d 61 (Fla. Dist. Ct. App. 1982).

rejected the traditional government function test as "unsound in principle and unworkable in practice."[126] The Supreme Court overruled *National League of Cities* and its test for state immunity from regulation under the commerce clause.[127] This is the second of the "about face" decisions.

The Court gave several reasons why the traditional government function test was inappropriate. The first is difficulty of application.[128] *National League of Cities* set forth examples of immune functions and those which are not immune, but did not explain how they were identified.[129] Despite many adjectives, identifying immune state functions remains difficult.[130] Various adjectives have been used including traditional, essential, strictly governmental, and historically governmental.[131]

In summarizing cases following *National League of Cities*, the Court listed as functions which are exempt from regulation: regulating ambulance services, licensing automobile drivers, operating a municipal airport, performing solid waste disposal, and operating a highway authority.[132] Listed as non-exempt functions were: issuance of industrial development bonds, regulation of intrastate natural gas sales, regulation of traffic on public roads, regulation of air transportation, operation of a telephone system, leasing and sale of natural gas, operation of a mental health facility, and provision of domestic services for the aged and handicapped.[133]

The Court stated that it found it difficult to identify an organizing principle to differentiate the exempt and non-exempt functions listed above.[134] "Thus far, this Court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*."[135]

The Court pointed to its experience in determining state immunity from federal taxation as further evidence that such a standard is difficult to ap-

126. *Garcia*, 469 U.S. at 546-47.

127. *Id.* at 531 (after deciding to overrule *National League of Cities*, there was no reason for the Court to address the issue brought before them).

128. *Id.* at 538-40.

129. *Id.* at 539 (operation of railroads not exempt); *see* United States v. California, 297 U.S. 175 (1936). Fire prevention, police protection, sanitation, public health, and parks and recreation were also cited as exempt functions. National League of Cities v. Usery, 426 U.S. 833, 851 (1976).

130. San Antonio Metro. Transit Auth. v. Donovan, 557 F. Supp. 445 (W.D. Tex. 1983), *reh'g denied*, 471 U.S. 1049 (1985).

131. *Garcia*, 469 U.S. at 540. While each of these adjectives has slightly different meanings they are all used for the same purpose in this context, to mark the boundary of federal power under the Constitution.

132. *Id.* at 538-39.

133. *Id.*

134. *Id.* at 539 (difficulty in finding an organizing principal used by the Court as evidence that the *National League of Cities* test was unworkable).

135. *Id.*

ply.[136] The governmental versus proprietary test used in the tax area was unstable.[137] The Court illustrated the test's instability with two opinions: one holding that providing a municipal water supply was immune from taxation and the other holding that it was not immune.[138] Because of the instability and uncertainty of the governmental versus proprietary test, it was abandoned in *New York v. United States.*[139]

The Court also stated that the historical test for traditional government functions was too restrictive.[140] An historical test bases immunity on whether a state historically engaged in a particular activity. Such a test prevents courts from accomodating changing circumstances.[141] No new activities of the state could be immune, no matter how important that activity may be, because the activity was not historically engaged in by the state. The Court also pointed out that the uniquely governmental function test was rejected in the area of government tort liability because it was unmanageable.[142] The necessary government function test would also restrict the choices of the states and would require the courts to determine the economic necessity of state activities.[143] State choices would be restricted because activities which the state feels are appropriate for them to engage in may not be "necessary" and therefore not exempt from regulation. The necessity test would be one of a strict necessity as opposed to one comparable to the broad test under the necessary and proper clause.[144] Courts would then have to determine if a particular state activity is strictly necessary to the operation of state government.

The Court stated "[a]ny rule of state immunity that looks to the 'traditional,' or 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which

136. *Id.* at 540. The Court did not cite to any cases specifically stating that the tax area test was difficult to apply, but merely stated the Court never developed a "consistent formulation" of the test for immunity in the tax area. *Id.*

137. *Id.* at 541-42. When the state enters the marketplace seeking customers it is acting in its proprietary capacity and may be taxed. *See* Ohio v. Helvering, 292 U.S. 360 (1934).

138. *Garcia*, 469 U.S. at 542; *see* Flint v. Stone Tracy Co., 220 U.S. 107, 172 (1911). *Cf.*, Brush v. Commissioner, 300 U.S. 352, 370-73 (1937).

139. New York v. United States, 326 U.S. 572 (1946).

140. *Garcia*, 469 U.S. at 543-44.

141. *Id.* The Court is recognizing the fact that, in a modern society, governments may need to expand their operations to meet the needs of their citizens. The Court apparently does not want to restrict any necessary or desireable expansion of a state's operations.

142. *Id.* at 545. The inference is that the test would be unmanageable in the commerce power context also.

143. *Id.* If Courts are to administer this type of test, they must necessarily determine which activities they feel are necessary for the states to survive as separate entities.

144. *See supra* note 28 for case interpreting the necessary and proper clause.

state policies it favors and which ones it dislikes."[145] These are decisions best made by the people and their elected representatives, not the courts.[146] Any such test, the Court said, would not be faithful to the role of federalism in a democratic society.[147]

Garcia held that any limit on Congress' authority under the commerce clause is built into the political process.[148] The Court rejected any rule of state immunity based on integral or traditional governmental functions.[149]

The Court stated that the role of the state in electing federal legislators and executives is a built-in procedural safeguard against abuse of power under the commerce clause.[150] Where the federal government has regulated state activity, it has also provided financial support for those activities.[151] Specifically, the Court pointed out that SAMTA recieved $12 million from the federal government in its first two years alone.[152] This, says the Court, is proof that the procedural safeguards are working.[153] Congress imposed regulations on the states which increased the cost of operating state activities, but Congress also provided financial support to help offset these increased costs. At least in the mind of the Court, this shows that the states have enough influence over Congress to keep Congress from increasing the states' costs of operation without compensation from the federal government to offset costs. The states' influence over Congress is derived from the procedural safeguard mentioned by the Court.

The role of the states in selecting federal officials is not what it was at the time the Constitution was adopted. Senators were once elected by state legislatures, now senators are elected by the people. The influence of the states is not as great as it was when the state legislature elected senators, but apparently the Court feels the states still have enough influence to protect their own interests.

No one can doubt the strong influence states and cities have over Congress. The Court's position on the states' ability sufficiently to limit Congress' power to protect the states' sovereign status is certainly defensible. In modern politics, the states and cities probably exert most of their influence over Congress through lobbying. They also have some influence through the voting

145. *Garcia*, 469 U.S. at 546.

146. *Id.* Either the courts make the decisions or the legislature makes the decisions. The Court feels that the legislature is in a better position to make decisions about which state policies should be favored.

147. *Id.* Presumably, in a democratic society, the people through their elected representatives are to make the decisions which govern their lives, not the courts.

148. *Id.* at 556; *see also* Wickern v. Filburn, 317 U.S. 111 (1942).

149. *Garcia*, 469 U.S. at 546.

150. *Id.* at 552.

151. *Id.* at 552-53.

152. *Id.* at 553.

153. *Id.*

process. Voters who reside in a state or municipality should vote for congressmen who will protect that state or municipality's interests. This is the whole basis of a democratic society. If certain state activities should be exempted from FLSA coverage it would seem that the legislative process is the proper place to make exceptions.

Very little has changed in the years between *National League of Cities* and *Garcia* which would explain the holding in *Garcia*. Justice O'Connor is the only new member of the Court since *National League of Cities* and she voted to sustain that decision. All of the Justices voting to overrule *National League of Cities* voted to sustain its principles in later cases.[154]

Why did the Court change its mind? The only reason that can be drawn from *Garcia* itself is that Justice Stevens and Justice Blackmun changed their minds and decided the *National League of Cities* test was unworkable. Justice Blackmun, it should be noted, qualified his concurrence in *National League of Cities*. His reason was to make it clear that his concurrence was based on his belief that the *National League of Cities* test allowed federal regulation if the national interest outweighed state interests.[155] However, that sheds little light on his position in *Garcia*. *National League of Cities* allowed federal regulation of the states, but only if an important federal interest needed to be protected. *Garcia* allows federal regulation of the states. The two holdings are far apart.

The Constitution is necessarily vague. It was written to stand the test of time and change. Both *National League of Cities* and *Garcia* are plausable interpetations, but there are problems with both interpetations. Under a *National League of Cities* test, courts will have to decide which state activities are so important that they should not be regulated. Courts will also have to decide which state activities are "traditional," and thus exempt from regulation. This is a function best left to the legislature. Such a test is difficult for the courts to apply and results in instability in interpetation. Legislative action would at least have the potential to be more stable.

The *Garcia* test also has problems. Congress is, to some extent, intruding on the decision making process of the states. The FLSA increases the states' cost of operating. This is offset to some extent by appropriations of federal funds, but federal appropriations may not completely offset the increased costs. In light of the current move toward cutting the federal budget, it is questionable whether the states can continue to exercise enough influence to retain these federal funds. It seems that the *Garcia* Court overlooked this possibility. Perhaps the Court believed that states would continue to have enough influence. One must not overlook the possibility that the states could get Congress to amend the FLSA so as to remove certain activities from its coverage. This

154. *Id.* at 558-59 (Powell, J., dissenting).

155. National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring).

is the core of the built-in political limitation on the commerce power.

Congress is intruding on state decisions in other ways as well. By imposing a minimum wage, Congress is limiting the ability of the state to hire less skilled workers who might not be able to find work in the private sector because they are not productive enough to be worth the minimum wage. Minimum wages also restrict the desirability of hiring teenagers during the summer.

It remains to be seen how the political process will work as a limitation on the commerce power. If history is any indication, the political process will work. It should be remembered that, in a historical context, *National League of Cities* is a more aberrational holding than *Garcia*. Writers after *National League of Cities* pointed out that it would be difficult to find a firm constitutional basis for that holding.[156]

The holding of *Garcia*, however, is not yet set in concrete. It was a five to four decision. Two of the majority Justices were on the other side of the fence in *National League of Cities*. It is very likely that they could change their minds again if *Garcia* does not work. Any personnel change on the court would put this holding in jeopardy. In light of the Court's argument that congressional appropriations to the states to offset increased costs is proof that the procedural safeguards are working, perhaps the most important factor in whether *Garcia* stands is the fate of federal balanced budget proposals. If federal funding to the states is cut, the Court may become disillusioned with the political safeguard theory. The constitutional issue is not clear cut. The present decision seems to be between two theories, each of which has its problems. Only time will tell if the reasoning of *Garcia* is sound.

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156. Barber, *supra* note 56, at 164.