JUDICIAL REVIEW IN AMERICAN FEDERALISM: AN UNCERTAIN FUTURE

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INTRODUCTION

The doctrine of federalism has always been considered an integral component in the scheme of American government. Its importance is reflected in both the constitutional guarantees of federal supremacy and state sovereignty. Over the last decade, a surprising trend has emerged at the Supreme Court to reinvigorate the state sovereignty aspect of federalism by breathing new life into the tenth amendment. This debate has been carried on at the Court and in law journals for the last several years. It is now apparent that the Court has abruptly and prematurely withdrawn from the battle of ideas in deference of future congressional decisions in the area.

In Garcia v. San Antonio Metropolitan Transit Authority,1 the Supreme Court, in a five to four decision, formally abandoned any judicial role in resolving constitutional conflicts involving the federal commerce power and the tenth amendment. The Court held that such conflicts are more properly resolved in the houses of Congress, rather than before the judicial branch. More importantly, the Court’s abdication of its review responsibility was predicated on the specific finding that the political safeguards inherent in the political processes were sufficient to guard the state’s interests against federal encroachment.

This essay briefly traces the rise and fall of the doctrine of state sovereignty before the Supreme Court to isolate the predominating elements in the ongoing debate over the Court’s role of review. Further, an argument is presented that the Court is the constitutionally appropriate body to resolve these issues. Finally, the article recommends that the Court should assume a more activist posture of review by changing its emphasis on the two most integral

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elements of the debate — traditional state functions and political accountability.

I. THE RISE AND FALL OF STATE SOVEREIGNTY

A. Limiting the Commerce Clause Through State Sovereignty

In the Garcia case, the Supreme Court explicitly overruled its prior decision in National League of Cities v. Usery\(^2\) which was handed down only nine years earlier. National League of Cities was the most troublesome and enigmatic holding of the Court under the commerce clause in forty years.\(^3\) The essence of that decision is that the tenth amendment stands as an affirmative limitation on the exercise of the congressional commerce power. The undoubted thrust of the opinion was to reverse a post-New Deal trend of judicial decisions that defined the commerce clause as an independent grant of plenary power to Congress, unencumbered by any restrictions based in the tenth amendment.\(^4\)

The National League of Cities case specifically involved a challenge to amendments to the Fair Labor Standards Act\(^5\) that extended its wage and hour provisions to the majority of public employees of the states and their municipalities.\(^6\) In writing for a majority of the Court,\(^7\) Justice Rehnquist reaffirmed the broad expansee of the congressional commerce power,\(^8\) and quickly emphasized that the Court’s decision was not a return to a form of “dual federalism” analysis.\(^9\) In attempting to draw a fine distinction be-

\(^3\) The major analytical shift in commerce clause analysis occurred in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (allowing federal regulation of purely intrastate activities if they had a close and substantial relation to interstate commerce); But see Carter v. Carter Coal Co., 298 U.S. 238 (1936) wherein the Court stated: “Working conditions are obviously local conditions . . . . Such effect as they may have upon commerce . . . . is secondary and indirect.” Id. at 308-09.
\(^4\) 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”).
\(^7\) 426 U.S. at 834. Justice Rehnquist delivered the Court’s opinion and was joined by Chief Justice Burger and Justices Stewart, Powell and Blackmun.
\(^8\) Id. at 840.
\(^9\) Id. The traditional analysis of dual federalism would allow a state to choose an area of state regulation which would be unencumbered by the federal commerce power. See, e.g.,
tween a principle based on the structural requirements of the Constitution and one which signaled a return to "dual federalism," Justice Rehnquist asserted that the federal legislation could not be applied to "[S]tates qua [S]tates" due to the constitutional prohibition inherent in state sovereignty:

We have repeatedly recognized that there are attributes of 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 Constitution prohibits it from exercising the authority in that manner.\(^{11}\)

A fundamental part of the majority's thesis of the direct constitutional barrier of the tenth amendment was the recognition certain "attributes of sovereignty" attach to every state government.\(^{12}\) Once the Court determines that one of these attributes has been infringed by federal legislation, the inquiry proceeds to determine whether such attribute is essential to its "separate and independent existence."\(^{13}\) The application of the above test resulted in finding that the federal wage and hour provisions "directly supplant[] the considered policy choices of the State's elected officials."\(^{14}\) The Court found that this type of interference in "essential decisions"\(^{15}\) in areas concerning "integral operations in areas of traditional governmental functions"\(^{16}\) constituted an impermissible violation of the guarantees of the tenth amendment.\(^{17}\)

\(^{10}\) Hammer v. Dagenhart, 247 U.S. 251 (1918) (federal law held invalid where it attempted to regulate the conditions of "production"); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (federal tax on employers of children held invalid because it constituted a "penalty" and invaded a traditional state area of regulation).

\(^{11}\) Id. at 847.

\(^{12}\) Id. at 845.

\(^{13}\) Id. at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911) (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869))).

\(^{14}\) Id. at 848.

\(^{15}\) Id. at 855.

\(^{16}\) Id. at 852. Justice Rehnquist provided some examples of traditional governmental functions such as fire prevention, police protection, sanitation, public health, and parks and recreation. Id. at 851.

\(^{17}\) Id. at 856. Justice Blackmun specially concurred and chose to view the majority opinion as one balancing the respective federal and state interests. "I may misinterpret the Court's opinion but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance [and] imposed federal standards would be essential." Id. (Blackmun, J., concurring).
While Justice Rehnquist's opinion clearly emphasized that the tenth amendment had been invigorated as an affirmative limitation on congressional power, the opinion was partially incomplete because it did not attempt to provide judicially manageable standards for determining other attributes of sovereignty that warrant similar immunity. This, along with the questionable use of precedent by Justice Rehnquist, provided the stimulus for a virtual torrent of criticism from a wide range of commentators.\(^{18}\)

Some five years later, the Court took the opportunity to refine the opinion of National League of Cities in \textit{Hodel v. Virginia Mining Control and Reclamation Association}.\(^{19}\) The Hodel Court fashioned a three-part test to ascertain whether there exists an unconstitutional encroachment upon state sovereignty:

First, there must be a showing that the challenged statute regulates the “States as States.” Second, the federal regulation must address matters that are indisputably “attribute[s] of state sovereignty.” And third, it must be apparent that the State's compliance with the federal law would directly impair their ability “to structure integral operations in areas of traditional governmental functions.”\(^{20}\)

In writing for the Court, Justice Marshall added what should be

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20. 452 U.S. at 287-88 (citation omitted).
considered a required fourth part of the test. 21 In adopting the concurring opinion of Justice Blackmun in National League of Cities, 22 the Court insisted that satisfaction of the formalized three-pronged test would be insufficient to demonstrate the unconstitutionality of the federal enactment if the "nature of the federal interest advanced may be such that it justifies state submission." 23

In the interim between National League of Cities and Garcia, the Court expanded on the limitations inherent in the concept of state sovereignty on four occasions. Importantly, the Court refused to find any federal law to be in violation of the tenth amendment in these cases and appeared to retrench from the spirit, if not the letter, of National League of Cities. 24

B. The Garcia Decision

In writing for the majority in Garcia v. San Antonio Metropolitan Transit Authority, Justice Blackmun recited a lengthy list of lower federal court decisions that allegedly demonstrated 25 a fatal inconsistency of analysis toward establishing a uniform and coherent approach toward the discovery of protected state governmental enclaves. 26 "Our examination of this 'function' standard . . . now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism . . . ." 27 The majority found that the inquiry for traditional governmental functions must be abandoned because there was no "organizing principle" that consistently separated the decisions in the lower courts. 28 The nature of the abandonment of

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22. 426 U.S. at 856.
23. 452 U.S. at 288 n.29.
25. 469 U.S. at 561 n.4. Justice Powell believed that the cases cited by Justice Blackmun did not truly involve the problem of defining governmental functions. Id. For a revealing critique of Justice Blackmun's questionable use of precedents, see Schwartz, National League of Cities Again — R.I.P. Or a Ghost That Still Walks?, 1985 Fordham L. Rev. 141, 152-54.
27. Id. at 531.
28. Id. at 539.
the National League of Cities standard is underscored by the majority's reliance on the inconsistent results of lower courts. The reconciliation of such inconsistent results is undoubtedly a central function of judicial review by the Court.\textsuperscript{29} The Court's use of such grounds could well reveal an attitude on the part of some justices that reflects a reluctance to follow the precedential value of National League of Cities.\textsuperscript{30}

The majority opinion continued to focus on the third prong of the Hodel standard as it found that a tradition-oriented approach subverts the very federalism principles that it proposes to protect.\textsuperscript{31} The Court rejected an historical approach to determining the traditional functions of a state because the reasonable objectivity thought to be gained by such an approach was only "illusory."\textsuperscript{32} Justice Blackmun asserted that an analysis focusing on history would create a straight jacket of constitutional principles preventing courts from accommodating the inevitable changes in the functions of states over a period of time.\textsuperscript{33} Moreover, such an approach would force the Court or Congress to select an appropriate time period along the historical continuum to fix the date that "tradition" would officially begin for tenth amendment purposes.\textsuperscript{34}

The argument that tradition is an inappropriate guide in determining those governmental functions immune from federal regulation has a superficial appeal. A bit deeper analysis yields the proposition that National League of Cities never attempted to fashion a narrow backward-looking standard. "Tradition," as properly understood, meant only that the Court should use a historical orientation as a means of informing itself of the nature and scope of those functions considered by the framers and states as properly belonging in the governmental sphere of activity. This use of tradition as a touchstone to inform the Court, has been utilized to assist (if not control) decisions rendered on the first,\textsuperscript{35} fourth\textsuperscript{36} and fifth\textsuperscript{37}

\textsuperscript{29} See Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157 (1960).
\textsuperscript{31} 469 U.S. at 546-47.
\textsuperscript{32} Id. at 544.
\textsuperscript{33} Id. at 546.
\textsuperscript{34} Id. at 544.
\textsuperscript{35} See, e.g., Hague v. CIO, 307 U.S. 496 (1939) (reaffirming the use of streets and parks for the communication and discussion of ideas).
amendments. The tenth amendment poses no greater difficulty in interpretation than the aforementioned constitutional provisions.\footnote{36} The real interpretative problem lies in the Court's reluctance to begin its search for the legitimate values implicit in the historical underpinnings of the tenth amendment.

The more controversial portion of the \textit{Garcia} opinion was its reliance on the structural political process to guarantee and protect the states' interests. Justice Blackmun noted that the "principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."\footnote{38} In a quixotic paragraph, the majority of the Court seemed to recognize that there may exist some constitutional limitation on Congress' commerce power, but immediately refocused on the sole remedy of the political process.

\[W]\textit{e} continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce clause must reflect that position. But the principal and basic limit . . . [are] the built-in restraints that our system provides through state participation in federal governmental action.\footnote{40}

While it is difficult to believe that the majority in \textit{Garcia} read the tenth amendment completely out of the Constitution, one can understand the dissenters' concern over the amendment's current force.\footnote{41} At any rate, if Justice Blackmun intended to give assurance of some existing constitutional protection for the states, he failed. There is not the slightest clue as to the existence or proper method of determining the constitutional scope of the tenth amendment as a limit on the commerce power.\footnote{42}

\footnote{36. See, \textit{e.g.}, United States v. Watson, 423 U.S. 411 (1976) (reaffirming the importance of history in permitting warrantless arrests of felons in public places).}

\footnote{37. See, \textit{e.g.}, Blair v. United States, 250 U.S. 273 (1919) (relies on broad expanse of investigatory powers that are historically attributes of modern grand juries).}

\footnote{38. The scope of each amendment would obviously be different, but the foreseeable scope of the tenth amendment surely could not be considered as broad and difficult as the first amendment.}

\footnote{39. 469 U.S. at 550.}

\footnote{40. \textit{Id.} at 556.}

\footnote{41. "[T]he Court's opinion . . . does not identify even a single aspect of state authority that would remain when the Commerce Clause is invoked to justify federal regulation." \textit{Id.} at 579 (Powell, J., dissenting).}

\footnote{42. \textit{But see Comment, Garcia v. San Antonio Metropolitan Transit Authority: The Fall of National League of Cities}, 49 \textit{A.B. L. Rev.} 967, 991-97 (1985) (asserting that the \textit{Garcia} court accepted the proposition that a state had a right to structure its own governing
II. Garcia and the Constitution

The tone of Justice Blackmun's opinion is so unabashedly radical in its perception of the proper role of judicial review that it is appropriate to examine his methodology. His newly discovered exception to the doctrine of judicial review is at once both inappropriate and ill-timed. The Supreme Court has continually served the single most important function in American constitutionalism. While both Congress and the President have rendered important and crucial interpretations of the Constitution,43 the Court is the unqualified final arbiter of the document. To reveal that a fundamental principle of interpretation has somehow sprung to the forefront of the Court's agenda after almost two centuries of tradition of judicial review is unconvincing.

In the case of Marbury v. Madison,44 the Supreme Court found that the Constitution existed as a restraint on the political processes and legislative acts emanating from them. In so doing, the Court declared the Constitution to be a species of law superior to legislative acts. The Supreme Court's role, according to Justice Marshall, was to interpret and give meaning to the Constitution as law.45 Thus, Marshall established the Court as the final arbiter over issues of constitutional interpretation.

The power of judicial review, as set forth in Marbury, extends to all cases arising under the Constitution.46 The modern Court has liberally used the power of judicial review to decide cases on such disparate topics as the scope of executive privilege,47 abortion rights,48 and the House of Representatives' power to exclude a member from its body.49 In each of these cases a facially valid argument could be made that the precise legal issue was a political question and nonjusticiable, or one which was outside the scope of the Court's power of judicial review. Yet, the Court proceeded to hear and decide all of these controversial cases. It is perplexing to

apparatus).

44. 5 U.S. (1 Cranch) 137 (1803).
rationally explain why the Court boldly decides complex separation of powers and substantive due process cases with increasingly regularity, but chooses to remain silent in the face of the tenth amendment structural questions presented.

A clue to the Court's precipitous withdrawal from the area of the tenth amendment jurisprudence may lie in two underlying concerns of the Court. The first consideration reflects on the Court's perception of the checkered and uncertain history of an active judicial posture in the commerce clause area. The second concern must be a lack of respect and appreciation for the benefits of federalism for the citizens of the states as well as the nation at large.

Justice Blackmun explicitly held that the "traditional" function test of National League of Cities was "unworkable" and incapable of producing judicially acceptable distinctions between governmental functions. In the immediate decade after the National League of Cities decision, the Court developed an apparently workable standard under the Hodel criteria and Blackmun balancing approaches. In reality, this four-part test can be seen as developing a standard that proved to be an insurmountable hurdle for states. The seeming impossibility of ever being able to satisfy the fourth balancing prong, requiring an overriding state interest, was a clear indication that the Court was in no mood to overturn congressional enactments under the commerce power. Moreover, and perhaps more revealing, was the apparent attitude of some justices who refused to accord the decision in National League of Cities the respect due under the doctrine of stare decisis.

The second area of concern relates to the discounting of the values of federalism and state autonomy. This failure is in large part measurable by the lack of concentration given to the structural and functional variables in federalism. The benefits to be gained by recognizing these attributes are nowhere found in the Garcia ma-

53. See supra text accompanying notes 20-23.
ajority opinion and apparently have no function in informing the Court of the underlying values at stake. This omission is so blatant that it stands distinctly apart from other areas of constitutional interpretation. Can one seriously imagine the Court deciding a first amendment case without making recourse to the societal values of free and uninhibited speech and debate? Under fourth amendment analysis a clear pattern of balancing the values of privacy against the burdens on law enforcement has emerged over the last fifteen years. The same methodology of considering values under the tenth amendment should be employed by the Court in deciding federalism cases.

The values implicit in American federalism are well known and have been successfully utilized by the Court in past terms.55 The most famous reason for allowing states to structure their sovereign affairs was aptly described by Justice Brandeis as “one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.”56 The Court should not end its recognition of the importance of state sovereignty by adhering to a policy that will ultimately discourage new or novel programs at the state level.

Judicial appreciation of these values can be increased by looking to the intent of the founders of the nation. James Madison wrote in The Federalist No. 4557 that: “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.”58 The purpose of having such a reservation of powers for the states was primarily to establish and maintain a strong political bond between the state and its citizens59 in order to prevent the encroachment of federal power.60 This fundamental structuring of federal-state power relationships also has the advantage of encour-

55. 469 U.S. at 573-74 (Powell, J., dissenting) (listing and discussing cases on point).
57. The Federalist No. 45 (J. Madison).
58. Id. at 303 (J. Madison) (Modern Library ed. 1937).
60. The Federalist No. 46, at 308-09 (J. Madison) (Modern Library ed. 1937).
aging state citizens to participate in their own governance\textsuperscript{61} and hold politically accountable those in office who affect their daily lives.\textsuperscript{62}

These aforementioned values must be understood and utilized by the judiciary if there is to be any meaningful review under the tenth amendment. The core function of the reservation is not a mere "nullity" in its effect, but a guarantee of a dual system of sovereignty that protects political participation and individual rights at the closest and most efficient level of government. Re-establishing a viable tenth amendment jurisprudence would not cause a return to the eighteenth century and a static approach to federal-state issues. There is nothing backward looking in these values that should cause that concern. These values are as rich and vibrant today as they were over two hundred years ago. They should properly by employed by the Court as interpretative tools in future cases for a clearer appreciation of the stakes involved in the federal encroachment power.

III. THE POLITICAL SAFEGUARDS RATIONALE

The theory that there exist political safeguards within the federal political process originated with James Madison. His analysis served as the genesis for any of the modern positions:

The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former.\textsuperscript{63}

A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular States.\textsuperscript{64}

Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures.\textsuperscript{65}

\textsuperscript{61} The Federalist No. 17, at 103 (A. Hamilton) (Modern Library ed. 1937).


\textsuperscript{63} The Federalist No. 45, at 301 (J. Madison) (Modern Library ed. 1937).

\textsuperscript{64} The Federalist No. 46, at 307 (J. Madison) (Modern Library ed. 1937).

\textsuperscript{65} The Federalist No. 45, at 301 (J. Madison) (Modern Library ed. 1937).
These ideas were rejuvenated by Professor Wechsler in 1954, and more recently, by Dean Choper who substantially expanded them to a formula of nonjusticiability. As originally expounded by Wechsler, the political process was trustworthy because of the limited goals of the federal government. According to theory, the tendency of Congress to legislate has been “on an ad hoc basis to accomplish limited objectives, supplanting state-created norms only so far as may be necessary for the purpose.” He viewed federal law as basically an interstitial product, and found that tradition placed the “burden of persuasion on those favoring national intervention.” These propositions were combined with the belief that the primary reason for judicial review in the federalism arena was for “the maintenance of national supremacy against nullification or usurpation by the individual states . . . .”

Dean Choper accepted the logic of Wechsler’s arguments and significantly expanded them by asserting that the “true” interest or position of a state is not always advanced by its elected representatives at the state level. He asserts that, as Madison believed, the “people” created the Constitution, so too, the “people of the states” should be proper focus of a tenth amendment analysis. The elected representatives at the national level are held accountable by the people, and may thus be relied upon to advance the proper interests. In addition to finely tuning the existing political process arguments, Choper’s ultimate position is one of extreme abdication in federalism review for the most pragmatic of reasons. A federalism question concerning an issue of encroachment of federal power over state sovereignty is simply not a constitutional issue. Rather, it “should be treated as nonjusticiable, final resolution being relegated to the political branches . . . .”

68. Wechsler, supra note 66, at 545.
69. Id.
70. Id. at 559.
71. CHOPER, supra note 67, at 183.
72. Id.
73. Id. at 176-90.
74. Id. at 175.
vanced for this position is that the public, at some future point, will refuse to accord the legitimacy due the Court’s rulings. The continued line of decisions that are characterized as ant-majoritarian will lead to popular disregard for them, and may ultimately inspire certain political forces to attack the Court.  

In Garcia, Justice Blackmun relied on the political safeguards rationale advanced by Wechsler and Choper to hold that the Constitution did not protect the sovereign interests of the states. In finding that these interests are more properly protected through the political processes, he cited with satisfaction several instances where the states have been able to acquire federal grants and exempt themselves from a wide variety of federal statutes.

The majority’s reliance on these examples of the states using the political process proves little about the way these processes function. Each particular exemption granted could be based on differentiated political and social forces that would be too complex for judicial understanding. The Court’s additional reliance on the obtaining of federal grants either overlooks or ignores the serious federalism questions involved in the increasing congressional use of “strings-attached” federal funds.

Perhaps more importantly, criticism of the majority position in Garcia need not be based on the proposition that the political processes cannot be trusted to guard the fundamental sovereignty interests of the states. That argument will be developed shortly. The processes of the federal government do indeed work sometimes to protect state interests. That fact is quite beside the point of whether the Court should have abdicated its Marbury responsibility in the first instance. The Court should never have assigned to Congress the duty of judging the scope of its own constitutional powers.

Aside from the Court’s breach of its Marbury duty, the Garcia opinion’s focus on the political safeguards in the federalistic struc-


77. Id. at 553.

78. See generally Note, Taking Federalism Seriously: Limiting State Acceptance of National Grants, 90 YALE L.J. 1694 (1981) (suggesting that the Constitution recognize a zone of state power wherein the states possess the sole right to make policy decisions).
ture of the government, and also display a certain ingenious attitude toward such structure. Initially the states did play an important part in the nature and scope of federal politics. By the same token, the states also controlled the franchise and could legislatively determine the boundaries of congressional districts.

The present reality of the state's influence has drastically changed. The passage of the seventeenth amendment ended the practice of United States Senators being chosen by the state legislatures.\textsuperscript{79} The Congress has been actively engaged in assuming control of the franchise by legislation spurred on by the poor record of civil rights in some areas of the nation.\textsuperscript{80} The Supreme Court has been equally active in utilizing the equal protection clause in reapportionment cases that have restricted the power of the states to fashion their voting districts pursuant to their local needs.\textsuperscript{81}

The protective shield of political safeguards at the federal level has also been decreased by the remarkable change in the type of individual elected to those offices. The pressures of the national media and the influential role of political action committees in campaign contributions have caused the Senators and members of the House of Representatives to be attentive, if not devoted, to interests other than their own state's.\textsuperscript{82}

Justice Blackmun's theory of political safeguards overlooks another important consideration. The adoption of such a position allows one branch of government to be the sole judge of the scope of its own powers. This posture is certainly inconsistent with the judicial powers espoused in \textit{Marbury},\textsuperscript{83} and varies from the traditional principles of the separation of powers doctrine.\textsuperscript{84} This very issue

\textsuperscript{79} "The Senate of the United States shall be . . . elected by the people thereof . . . ." U.S. CONST. amend. XVII, § 1.
\textsuperscript{81} See, e.g., Baker v. Carr, 369 U.S. 186 (1962) (equal protection clause is applicable to state reapportionment cases); Wesberry v. Sanders, 376 U.S. 1 (1964) (congressional districts must be apportioned equally due to command of U.S. CONST. art. I, § 2).
\textsuperscript{83} "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
\textsuperscript{84} "If . . . the legislative body are themselves the constitutional judges of their own powers, and that the construction . . . is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption . . . . The interpretation of the laws
was raised only a few years prior to *Garcia* in *INS v. Chada*\(^8\) wherein the Court noted the “pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . .”\(^8\) Quite clearly, the Court chose to ignore its own warning.

From a deeper perspective, the Court’s preference for a process-oriented treatment of the tenth amendment is more troublesome. The orientation toward protecting the political processes began with the famous footnote in *United States v. Carolene Products.*\(^7\) It was invoked then to provide a stricter scrutiny to keep open “those political processes ordinarily to be relied upon to protect minorities . . . .”\(^8\) Although the issue is entirely different in tenth amendment jurisprudence; the approach of the Court is synonymous in the shared belief that the normal workings of the democratic system will ultimately benefit both discrete and insular minorities and the states.

In both areas, the Court has expressed a reluctance to decide constitutional questions by resorting to issues of substance. These matters are thought to be better left to the democratic or political processes because of their recognized competence in such matters.\(^8\) This position actually reflects the proposition that the Court is more competent to make judgments concerning political processes rather than those dealing with the substantive values of the tenth amendment. If the Court’s position appears to stand judicial review on its head, there exists an every greater dissimilarity in the two approaches to the process theory that demonstrates the futility of following such a scheme in tenth amendment cases.

In the process approach outlined in *Carolene Products*, the Court applies strict scrutiny when it appears that the political

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86. *Id.* at 951.
87. 304 U.S. 144, 152 n.4. (1938) (hinting that greater scrutiny by the Court is applicable when laws infringe on individual rights or when laws curtail access to the political processes for discrete and insular minorities).
88. *Id.*
processes are changed or altered to disadvantage the minorities who would likely benefit from access to them. In other words, the party for whom the political safeguards were expected to protect receives the benefit of a stricter scrutiny by the Court to ensure that the safeguards are open and functioning. By contrast, in Garcia the Court merely assumes that the processes continue to function in the manner necessary to safeguard state interests. This assumption is valid only if one refuses to acknowledge the vast changes that have occurred in the federal political processes over the last thirty years. Therefore, the majority opinion's view of federalism review is not so much a process orientation as it is a "process for the sake of process" position. In the end, "trust the process" neither means nor guarantees any substantive constitutional limits in federalism.

IV. FUTURE JUDICIAL REVIEW IN FEDERALISM

The present state of judicial review in federalism questions appears to be non-existent. Justice Blackmun's opinion positioned the Court in such a differential posture with respect to congressional decisions that there is no plausible analysis available to those deeply concerned with the life and vitality of federalism. It is one thing to roundly criticize the decision for its unprincipled basis, but quite another to supply the correct approach for a future Court to follow.

One may assume that the National League of Cities analysis, as developed in Hodel, has been completely abandoned by the Court. Even a future majority of the Court that wishes to overrule the Garcia decision is unlikely to make recourse to the discarded standards. It is possible that such a return might occur, but if history is any indicator, a sizable number of justices and scholars will always be adamantly opposed to a rigid Hodel-like formulation that resembles a code more than a constitutional norm.

It is highly probable that a new majority of justices will utilize some of the ideas and themes advanced by Justice Rehnquist in his opinion in National League of Cities. As one sorts through the propositions in his opinion and the wealth of debate that it engendered in subsequent law journals, a few strands of the appropriate

calculus begin to appear.

The notion of defining the immunized state activities by referring to some of those functions as "traditional" will be abandoned. Adopting this approach will have no appreciable effect on the ultimate analysis. As pointed out earlier, the present majority of the Court either never understood Justice Rehnquist's thrust or simply used the concept of tradition as a strawman. The arguments mustered against such an approach consistently berated it for being backward looking and disabling the Court from analyzing the problems raised by the modern changes in social demands, environmental priorities and technological innovations.

The focus on tradition will be slightly modified to encompass the broader perspective of activities that states have historically assumed to be the proper functions of government. When this approach is adopted, the arguments against using tradition are dissipated because the revised methodology permits a court to consider those functions assumed by a state in modern times. Importantly, this determination only begins the inquiry needed. When such a function is identified by a court, the question then becomes whether this activity is insulated from federal regulation by virtue of the tenth amendment. Since the state has assumedly made a deliberate political choice under its police power, the only relevant question is whether such activity substantially affects or interferes with interstate commerce. If the activity properly falls under one of the appropriate federal schemes of regulation of commerce, the area is properly regulable under the congressional commerce power.

The remaining seed of analysis that will probably be developed from the progeny of National League of Cities is the theory that political accountability is the central link to a coherent judicial analysis of federalism. In its simplest form, the guarantee of political accountability prevents the Congress from sheltering itself from the electorate when it acts or regulates in an area traditionally occupied by the states. The most prevalent method of accomplishing this is for Congress to require the states to implement federal policy affecting private actors. In this situation, the federal government declines to use its power of preemption, but proceeds to displace the relevant state policy choices in the area by requiring

91. See supra text accompanying notes 31-38.
states to enforce federal guidelines through state agencies. The states probably have greater financial and administrative burdens and Congress has no apparent accountability or attributability for its action. It is this form of federal regulation, recently litigated in Federal Energy Regulatory Commission v. Mississippi, that poses the greatest threat to the doctrine of political accountability.

Assuming that these two strands of analysis are developed in future cases, there remains a formidable task of the Court. The judicial branch must proceed along its chosen analytical path to develop some comprehensible normative principles in the area of federalism. There are certainly more than a sufficient number of them available — at least, judging from the ongoing debate. They vary in range from the present unfettered view of the dominant commerce clause to the position espousing that traditional, integral areas of state governance are immunized from federal regulation.

The principle established must be sufficiently coherent for Congress to understand the applicable limits of its regulatory power. Although the members of Congress have a duty to determine the constitutionality of their own enactments, the standard for that determination should be more than an individual's intuitive hunch or feeling. It is the duty of the Supreme Court to interpret the inherent conflicts arising from the commerce clause and the tenth amendment in justiciable cases arising within its jurisdiction. It is only through the execution of that duty that the Court can provide the political branches with the constitutional guidelines within which they can function. The confidence shown by the Court in the constitutional judgment of Congress is entirely premature in the absence of some development of constitutional principles in the area.

The obvious deficiency of the present status of the Garcia decision is the Court's misconceived notion of its duty of judicial review. The Constitution guarantees that state sovereignty is a "fundamental component of our system of government." The true test for the modern Court is to abandon the interpretative trappings of

92. 456 U.S. 742 (1982) (held constitutional a federal regulation that required states to consider federal standards in order to continue regulating public utilities).
“sovereignty” and “tradition,” and continue to articulate the importance of those values that underlay federalism. By proceeding along this course, the Court will be able regain its essential role as the final interpreter of the Constitution.