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Richard S. Myers

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The Supreme Court has long played an important role in defining the relationship between the federal and state governments. In particular, the Court's commerce clause[1] decisions have had a significant effect on the continuing debate about the appropriate distribution of governmental power. The Court's decisions have, in addition, frequently sparked debate about the Court's role in these fundamental issues of governmental structure.

The Burger Court has been no exception. The Court's decisions—particularly those in the commerce clause area—have figured prominently in the continuing debate about the distribution of power between the federal government and the states. In general, the Burger Court has given far greater emphasis to state sovereignty in deciding cases involving federal/state relations. These decisions have been among the most controversial of the last fifteen years.

In the 1960's, state sovereignty did not play a significant part in the Court's commerce clause jurisprudence. The Warren Court reaffirmed Congress' expansive power under the commerce clause[2] and rejected the view that the tenth amendment[3] limited this congressional power.[4] The Court greatly expanded the scope of federal authority in other areas as well. For example, the expansion of section 1983 actions and of the incorporation doctrine transformed much of state tort and criminal law—previously the virtually exclusive province of the states—into federal constitutional law.[5] By

* Associate, Jones, Day, Reavis & Pogue, Washington, D.C. The author served as co-counsel for the petitioner in South-Central Timber Dev. Inc. v. Wunnicke, 104 S. Ct. 2237 (1984), which is discussed in this article. The author would like to thank Robert H. Lande, Judith A. McMorrow, Mollie A. Murphy, and Joe Sims for reading an earlier draft of this article and offering helpful comments and suggestions.

1 The commerce clause provides: "Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.

2 *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

3 "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.

4 Maryland v. Wirtz, 392 U.S. 183 (1968).

5 *See* Bator, *Some Thoughts on Applied Federalism*, 6 HARV. J. OF L. & PUB. POL'Y 51, 54 (1982).

1970, a noted constitutional authority could state, with little fear of contradiction, that "[f]ederalism is dead."[6]

The Burger Court has, at a minimum, changed the rhetoric substantially. In a variety of areas,[7] the Court has manifested a solicitude for state sovereignty.[8] Perhaps the most controversial of the Burger Court's decisions have been in the commerce clause area. The Court has carved out two related state sovereignty limitations on the scope of the commerce clause: the *National League of Cities*[9] doctrine, which the Court recently abandoned,[10] and the "market participant" doctrine.[11] This article discusses both of these limitations and evaluates the Burger Court's view of state sovereignty. In addition, this article adresses a third, closely related area: the Burger Court's treatment of state action immunity from the antitrust laws.[12]

The article concludes that the Burger Court's effort to revive state sovereignty in the commerce clause area has been a failure, at least on a doctrinal level. In addition, on a practical level, the Court's decisions have little altered "the legal hegemony of the national government."[13] The Court has, however, been successful in furthering the dialogue about the role of the states vis-a-vis the national government. In the long run, this effort to highlight the states' role in our constitutional structure may well have a salutary impact.

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6 P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 96 (1970).

7 Abstention: *See, e.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431-32 (1982) (*Younger* applies to noncriminal state proceedings when "important state interests are involved"); Younger v. Harris, 401 U.S. 37 (1971). Habeas corpus: *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 128-29 (1982); Stone v. Powell, 428 U.S. 465 (1976). Eleventh amendment: *See, e.g.*, Atascadero State Hospital v. Scanlon, 53 U.S.L.W. 4985 (U.S. June 28, 1985); Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984); Quern v. Jordan, 440 U.S. 332 (1979); Edelman v. Jordan, 415 U.S. 651 (1974). Preemption: *See, e.g.*, Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190 (1983); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975); *see* Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 885-89 (1979). *See generally* Ripple & Kenyon, *State Sovereignty—A Polished But Slippery Crown*, 54 NOTRE DAME LAW. 745 (1979).

8 One article justifiably claims that federalism is the organizing principle of Justice Rehnquist's constitutional philosophy. *See* Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982). For a recent example of Justice Rehnquist's willingness to defer to the states, see Supreme Court of N. H. v. Piper, 105 S. Ct. 1272, 1281-85 (1985) (Rehnquist, J., dissenting) (dissenting from the Court's holding that New Hampshire rule limiting bar admission to state residents violates the privileges and immunities clause).

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

10 Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976).

11 *See* Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

12 *See* Parker v. Brown, 317 U.S. 341 (1943).

13 Monaghan, *The Burger Court and "Our Federalism"*, 43 LAW & CONTEMP. PROBS. 39, 39 (Summer 1980).

I. *National League of Cities* and the Temporary Revival of the Tenth Amendment

A. *The Case Law*

1. *Maryland v. Wirtz*

The Warren Court's expansive construction of the commerce clause was not revolutionary. The doctrine of "dual federalism," which restricted the scope of the commerce clause, had long since been abandoned.[14] In *United States v. Darby*,[15] Justice Stone stated that the tenth amendment did not restrict congressional power under the commerce clause:

> Our conclusion [that the Fair Labor Standards Act of 1936 is constitutional] is unaffected by the Tenth Amendment. . . . The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.[16]

Together with an expansive view of congressional power under the commerce clause,[17] the Court's view of the tenth amendment greatly enhanced the national government's power in relation to the states. By and large, these aspects of commerce clause jurisprudence remained settled over the next thirty years.[18]

Thus, the Warren Court's decision in *Maryland v. Wirtz*[19] was well within the mainstream of commerce clause precedent. In *Wirtz*, the Court upheld the constitutionality of Congress' decision to apply the Fair Labor Standards Act to state operated schools and hospitals. Twenty-eight states and one school district argued "that the Act may not be constitutionally applied to state-operated institutions because [the commerce] power must yield to state sovereignty in the performance of governmental functions."[20] The Court bluntly rejected this argument as "simply . . . not ten-

14 *See generally* Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

15 312 U.S. 100 (1941).

16 *Id.* at 123-24.

17 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

18 As Professor Tribe states: "Until 1976, the conventional wisdom was that, since 1937, there have been no judicially-enforceable limits on congressional power which derive from considerations of federalism." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-20, at 300 (1978).

19 392 U.S. 183 (1968).

20 *Id.* at 195.

able."[21] The Court stated that *United States v. California*[22] had settled that "[i]f a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."[23] Writing for the majority, Justice Harlan concluded: "[The Court] will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens."[24] In a dissent joined by Justice Stewart, Justice Douglas asserted that "what is done here is . . . such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism."[25]

2. *National League of Cities*

In 1975, in *Fry v. United States*,[26] the Burger Court reaffirmed *Wirtz*. In *Fry*, the Court upheld the constitutionality of the Economic Stabilization Act of 1970, which authorized the President to limit salary increases of state employees. Although it relied on *Wirtz*, the Court appeared to signal a revival of tenth amendment-based limits on congressional power. The Court said:

> While the Tenth Amendment has been characterized as a "truism", . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the State's integrity or their ability to function effectively in a federal system. Despite the extravagant claims on this score made by some *amici*, we are convinced that the wage restriction regulations constituted no such drastic invasion of state sovereignty.[27]

Emphasizing the limited scope of the statute at issue in *Wirtz*, the Court concluded: "The federal regulation in [*Fry*] is even less intrusive. Congress enacted the Economic Stabilization Act as an emergency measure to counter severe inflation that threatened the national economy."[28] The Court noted that excluding state and local government employees from coverage would have drastically

21 *Id.*
22 297 U.S. 175 (1936).
23 392 U.S. at 197. The Court explicitly rejected the relevance of the governmental/proprietary distinction: "[I]t 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." *Id.* at 195.
24 *Id.* at 198-99 (footnote omitted).
25 *Id.* at 201 (Douglas, J., dissenting).
26 421 U.S. 542 (1975).
27 *Id.* at 547 n.7.
28 *Id.* at 548.

impaired the effectiveness of the federal legislation.[29]

Alone in dissent, Justice Rehnquist quoted Justice Douglas' dissenting statement in *Wirtz*: " 'If all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment.' "[30] Relying on the intergovernmental tax immunity cases[31] and the basic concept of constitutional federalism,[32] Justice Rehnquist stated that Congress should not be permitted to regulate the wages paid by a state to employees of facilities closely allied with traditional state functions.[33] Moreover, Justice Rehnquist also urged the Court to overrule *Wirtz*.[34]

Just one year after *Fry*,[35] Justice Rehnquist's suggestion that the Court reverse *Wirtz* commanded majority support. In *National League of Cities v. Usery*,[36] the Court, in a 5-4 decision, overruled *Wirtz* and held "that insofar as the challenged amendments [to the Fair Labor Standards Act] operate to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3."[37] Now writing for the majority, Justice Rehnquist repeated his argument in *Fry* that congressional regulation of private citizens differs from congressional regulation of the states. Justice Rehnquist stated that "[t]he difference . . . is that a State is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy, . . . but is itself a coordinate element in the system established by the Framers for governing our Federal Union."[38]

The Court found that applying the provisions of the Fair Labor Standards Act to the states and their political subdivisions would

29 *Id.*

30 *Id.* at 550 (Rehnquist, J., dissenting) (quoting *Wirtz*, 392 U.S. at 205 (Douglas, J., dissenting)).

31 *See, e.g.*, New York v. United States, 326 U.S. 572 (1946).

32 421 U.S. at 557 (Rehnquist, J., dissenting). Justice Rehnquist disclaimed reliance on the Tenth Amendment "by its terms." *Id.*

33 *Id.* at 558 (Rehnquist, J., dissenting). Justice Rehnquist acknowledged that this "standard" would prompt difficult line-drawing issues. The Justice suggested that either the governmental/proprietary distinction or a traditional/nontraditional state function distinction might prove useful, but concluded that it was "unnecessary to engage in the business of line drawing [in *Fry*], since the regulation in question sweeps within its ambit virtually all state employees regardless of their tasks." *Id.* at 558 n.2 (Rehnquist, J., dissenting).

34 *Id.* at 559 (Rehnquist, J., dissenting).

35 *Fry* was decided just one month after *National League of Cities* was argued for the first time.

36 426 U.S. 833 (1976).

37 *Id.* at 852 (footnote omitted).

38 *Id.* at 849 (citation omitted) (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

"significantly alter or displace the States' ability to structure employer-employee relationships . . . [in such] integral governmental functions . . . [as] fire prevention, police protection, sanitation, public health, and parks and recreation."[39] The statute therefore did "not comport with the federal system of government embodied in the Constitution."[40] Congress had acted unconstitutionally because it had "sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system.' "[41]

Justice Blackmun, who provided the crucial fifth vote, joined in Justice Rehnquist's opinion and also filed a short concurring opinion. The concurring opinion contained this caveat: "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 with imposed federal standards would be essential."[42]

In a vigorous dissent, Justice Brennan argued that "there is no restraint [on Congress' exercise of the commerce power] based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on the commerce power."[43] Accusing the majority of substituting their judgment for "a congressional judgment with which they disagree,"[44] Justice Brennan declared "[i]t unacceptable that the judicial process should be thought superior to the political process in this area."[45] Extending the thesis of Professor Wechsler's famous article,[46] Justice Brennan maintained that "[j]udicial restraint in this area merely recognizes that the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and that the States are fully able to protect their own interests in the premises."[47]

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39 426 U.S. at 851.

40 *Id.* at 852.

41 *Id.* (quoting *Fry*, 421 U.S. at 547 n.7).

42 426 U.S. at 856 (Blackmun, J., concurring). This position has been criticized. *See, e.g.*, Kaden, *supra* note 7, at 888 ("a balancing test is not the solution here . . . ."). For a more general criticism of balancing tests, see generally Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978).

43 426 U.S. at 858 (Brennan, J., dissenting).

44 *Id.* at 867 (footnote omitted) (Brennan, J., dissenting).

45 *Id.* at 876 (Brennan, J., dissenting).

46 *See generally* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). See J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) for a full elaboration of Justice Brennan's political representation rationale.

47 426 U.S. at 876 (Brennan, J., dissenting).

3. Subsequent Limitations on the Scope of *National League of Cities*

The decision in *National League of Cities* met with almost universal criticism,[48] and the Court subsequently narrowed the doctrine.[49] In fact, despite several opportunities to do so, the Court never struck down a statute under the doctrine.[50]

In *Hodel v. Virginia Surface Mining & Reclamation Association*,[51] the Court upheld the constitutionality of the Surface Mining Control and Reclamation Act of 1977. First the Court concluded that the Act, which regulated the use of private lands within the borders of the states, fell within the scope of Congress' commerce power.[52]

48 *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 224 n.44 (1980); Alfange, *Congressional Regulation of the "States Qua States": From National League of Cities to EEOC v. Wyoming*, 1983 SUP. CT. REV. 215; Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment*, 1976 SUP. CT. REV. 161; Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U.L. REV. 1, 19-25 (1978); Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 UCLA L. REV. 1301, 1322-24 (1978).

49 Even prior to Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985), some commentators concluded that the Court had "narrowed" *National League of Cities* into oblivion. *See, e.g.*, Note, *The Repudiation of National League of Cities: The Supreme Court Abandons the State Sovereignty Doctrine*, 69 CORNELL L. REV. 1048 (1984).

The cases illustrate the Court's narrowing of the doctrine. *See* EEOC v. Wyoming, 460 U.S. 226, 236-39 (1983); FERC v. Mississippi, 456 U.S. 742, 758-71 (1982); United Transp. Union v. Long Island R.R., 455 U.S. 678, 683-90 (1982); and Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277-88 (1981). Prior to *Garcia*, *National League of Cities* applied only to congressional exercises of the commerce power. *National League of Cities* did not limit congressional authority under § 5 of the fourteenth amendment. *See Hodel*, 452 U.S. at 287 n.28; Milliken v. Bradley, 433 U.S. 267, 291 (1977); *cf.* Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976) (principle of state sovereignty embodied in the eleventh amendment limited by § 5 of the fourteenth amendment). The Court had not indicated the extent to which *National League of Cities* applied to congressional authority under the spending power, *see National League of Cities*, 426 U.S. at 852 n.17, or the war power. *See id.* at 855 n.18. Professor Rotunda stated:

> . . . *National League of Cities* has been interpreted as an attempt to limit solely Congress's power under the commerce clause. Many lower courts, subsequently faced with tenth amendment challenges to federal legislaton enacted pursuant to the spending power, war powers, or the enabling clause of the fourteenth amendment, have, therefore, announced that the *National League of Cities* analysis is simply inapplicable.

Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289, 296 (1984) (footnote omitted).

50 Professor Graglia stated that *National League of Cities*, as limited by *Hodel*, "hardly rises to the status of an aberration, applying at most to certain direct national controls of the administration of state government." Graglia, *In Defense of "Federalism"*, 6 HARV. J. OF L. & PUB. POL'Y 23, 27 n.5 (1982).

51 452 U.S. 264 (1981).

52 *Id.* at 275-83. Concurring in the judgment, Justice Rehnquist stated "that one of the greatest 'fictions' of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people." *Id.* at 307 (Rehnquist, J., concurring). After reviewing the Court's expansive interpretations of the scope of the commerce power, including Wickard v. Filburn, 317 U.S. 111 (1942) and Perez

The Court then rejected a challenge to the Act based on the *National League of Cities* doctrine.[53] In so holding, the Court refined the test established in *National League of Cities*:

> [A] claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. 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 states' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."[54]

In addition, the Court stated in a footnote that "[d]emonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission."[55]

The Court followed this basic approach in three other recent cases: *United Transportation Union v. Long Island Rail Road Co.*;[56] *FERC v. Mississippi*;[57] and *EEOC v. Wyoming*.[58] In *United Transportation*, a unanimous Court concluded that the tenth amendment did

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v. United States, 402 U.S. 146 (1971), Justice Rehnquist asserted: "Despite the holdings of these cases, and the broad dicta often contained therein, there *are* constitutional limits on the power of Congress to regulate pursuant to the Commerce Clause." 452 U.S. at 309 (Rehnquist, J., concurring) (emphasis in original). The Justice concluded that "[o]ur cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce," *id.* at 310-11 (emphasis in original), and that "[t]hough there can be no doubt that Congress in regulating surface mining has stretched its authority to the 'nth degree,' our prior precedents compel me to agree with the Court's conclusion." *Id.* at 311 (Rehnquist, J., concurring).

53 *Id.* at 283-93.

54 *Id.* at 287-88 (citations omitted). The Court concluded that the first of the three requirements had not been satisfied; the Act governed only "the activities of coal mine operators who are private individuals and businesses." *Id.* at 288. The Court rejected the assumption that the tenth amendment limits congressional authority to preempt or displace state regulation of private activities having the requisite effect on interstate commerce. *Id.* at 289-90.

55 *Id.* at 288 n.29 (citing *Fry* and Justice Blackmun's concurring opinion in *National League of Cities*).

56 455 U.S. 678 (1982).

57 456 U.S. 742 (1982).

58 460 U.S. 226 (1983). Although it relegated the issue to a footnote, the Court rejected a *National League of Cities* "defense" in Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 460 U.S. 150 (1983). There, the Court held that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies was not exempt from the Robinson-Patman Act. The Court stated: "The retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty. . . . It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities." 460 U.S. at 154 n.6 (citations omitted).

not prohibit applying the Railway Labor Act to a state owned railroad engaged in interstate commerce. The Court stated that the "operation of a railroad engaged in interstate commerce is not an integral part of *traditional* state activities generally immune from federal regulation under *National League of Cities*."[59] Operating a passenger railroad "has traditionally been a function of private industry, not state or local governments."[60] Chief Justice Burger's opinion thus emphasized that the third prong of the *Hodel* test was determinative.

In *FERC v. Mississippi*, the Court upheld certain portions of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Titles I and III of PURPA direct state regulatory commissions and nonregulated utilities to "consider" adopting and implementing certain regulatory standards. These titles also prescribe procedures to be followed in considering the proposed standards and set forth reporting requirements. Section 210 of Title II of PURPA encourages the development of cogeneration and small power production facilities and directs the Federal Energy Regulatory Commission ("FERC"), in consultation with the state regulatory authorities, to promulgate rules to further this goal. Section 210 also requires the state regulatory authorities to implement these rules and authorizes FERC to exempt cogeneration and small power production facilities from certain state and federal regulations.

Justice Blackmun, writing for four other Justices, stated that the issue presented in *FERC v. Mississippi* differed from those addressed in *Fry* and *National League of Cities*, both of which involved claims that the states were immune from generally applicable federal regulations. In *FERC v. Mississippi*, however, Congress tried to "use state regulatory machinery to advance federal goals."[61] Noting similarities to the Surface Mining Act involved in *Hodel*, the Court held "only that Congress may impose conditions on the State's regulation of private conduct in a pre-emptible area."[62]

Justice Powell, concurring in part and dissenting in part, emphasized that PURPA prescribed administrative and judicial procedures that the states were required to follow in considering whether to adopt the proposed regulation. He thus concluded that, "[a]t least to this extent, I think the PURPA violates the Tenth Amend-

59 455 U.S. at 685 (emphasis added).

60 *Id.* at 686 (footnote omitted). Although it did state that it did not mean "to impose a static historical view of state functions generally immune from federal regulation," *id.*, the Court concluded that "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation." *Id.* at 687.

61 456 U.S. at 759.

62 *Id.* at 769 n.32. *See generally* Rotunda, *supra* note 49.

ment."[63] Justice O'Connor, writing for the Chief Justice and Justice Rehnquist, strongly defended state sovereignty, and concluded that "Titles I and III of PURPA conscript state utility commissions into the national bureaucratic army. This result is contrary to the principles of *National League of Cities v. Usery*, . . . antithetical to the values of federalism, and inconsistent with our constitutional history."[64]

In *EEOC v. Wyoming*, another 5-4 decision,[65] the Court upheld the constitutionality of applying the Age Discrimination in Employment Act of 1967 ("ADEA") to state and local governments. Justice Brennan, who had long been a critic of the *National League of Cities* doctrine,[66] explained:

> The principle of immunity articulated in *National League of Cities* is a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the States enjoy a 'separate and independent existence,' . . . not be lost through undue federal interference in certain core state functions.[67]

Justice Brennan concluded that the ADEA's intrusion "is sufficiently less serious than it was in *National League of Cities* so as to make it unnecessary for us to override Congress's express choice to extend its regulatory authority to the States."[68]

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63 456 U.S. at 771 (Powell, J., concurring in part and dissenting in part).

64 *Id.* at 775 (O'Connor, J., concurring in the judgment in part and dissenting in part).

65 460 U.S. 226 (1983). Justices Brennan, White, Marshall, Blackmun, and Stevens formed the majority. Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor were again in dissent. It has often been observed that Justice Blackmun has played the key role in the *National League of Cities* cases:

> The entire scope of federal control of state or local governments remains uncertain, since the difference between the outcome of *National League of Cities v. Usery* and *FERC v. Mississippi* or *EEOC v. Wyoming* is solely the way in which Justice Blackmun strikes a balance between competing federal and state concerns. While Justice Blackmun's balancing of such interests is not the "law" of these cases in a technical sense, it is his vote which at the moment is determinative because the other eight justices are now evenly split between a position advocating judicial deference to the congressional definition of commerce power over state and local governments and active judicial scrutiny of the permissible scope of such power.

J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 181 (2d ed. 1983) (footnote omitted); *see also* Note, National League of Cities v. Usery to EEOC v. Wyoming: *Evolution of a Balancing Approach to Tenth Amendment Analysis*, 1984 DUKE L.J. 601, 619-20. Of course, it was Justice Blackmun who, in *Garcia*, provided the crucial fifth vote to overrule *National League of Cities*.

66 *See, e.g.*, *National League of Cities*, 426 U.S. at 856 (Brennan, J., dissenting); Massachusetts v. United States, 435 U.S. 444, 461-62 (1978).

67 460 U.S. at 236 (quoting *National League of Cities*, 426 U.S. at 841).

68 *Id.* at 239. In a concurring opinion, Justice Stevens, after reviewing some of the history of the commerce clause, argued that the Court should reverse *National League of Cities*:

> Congress may not, of course, transcend specific limitations on its exercise of the commerce power that are imposed by other provisions of the Constitution. But there is no limitation in the text of the Constitution that is even arguably applica-

In dissent, Chief Justice Burger, joined by Justices Powell, Rehnquist, and O'Connor, concluded that the ADEA violated both the three prong *Hodel* test and Justice Blackmun's balancing test.[69] In a separate dissent joined by Justice O'Connor, Justice Powell contested Justice Stevens' view of the history of the commerce clause[70] and declared:

> State sovereignty remains a fundamental component of our system that this Court has recognized time and time again. . . . [A]ll of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, understood the States' reserved powers to be a limitation on the power of Congress—including its power under the Commerce Clause. And the Court has recognized and accepted this fact for almost 200 years.[71]

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ble to this case. The only basis for questioning the federal statute at issue here is the pure judicial fiat found in this Court's opinion in *National League of Cities v. Usery*. Neither the Tenth Amendment, nor any other provision of the Constitution, affords any support for that judicially constructed limitation on the scope of the federal power granted to Congress by the Commerce Clause. In my opinion, that decision must be placed in the same category as [*E.C. Knight, Hammer v. Dagenhart*, and *Carter v. Carter Coal Co.*]—cases whose subsequent rejection is now universally regarded as proper. I think it so plain that *National League of Cities* not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself, that it is not entitled to the deference that the doctrine of *stare decisis* ordinarily commands for this Court's precedents. Notwithstanding my respect for that doctrine, I believe that the law would be well served by a prompt rejection of *National League of Cities*' modern embodiment of the spirit of the Articles of Confederation.

Id. at 248-50 (footnotes omitted) (Stevens, J., concurring).

69 In *FERC*, Justice O'Connor, in discussing the balancing codicil to the three prong *Hodel* test, *see* notes 42 & 55 *supra* and accompanying text, stated: "Neither [*Hodel* nor *United Transportation Union*] . . . involved such an exception to *National League of Cities*, and the Court has not yet explored the circumstances that might justify such an exception." *FERC*, 456 U.S. at 778 n.4 (O'Connor, J., concurring in part and dissenting in part).

70 In his concurring opinion in *FERC*, Justice Stevens stated that the commerce clause "was the Framers' response to the *central problem* that gave rise to the Constitution itself." 460 U.S. at 244 (Stevens, J., concurring) (emphasis added). *See* note 68 *supra*. In his dissent, Justice Powell responded:

> No one would deny that removing trade barriers between the States was *one* of the Constitution's purposes. I suggest, however, that there were other purposes of equal or greater importance motivating the statesmen who assembled in Philadelphia and the delegates who debated the ratification issue in the state conventions. No doubt there were differences of opinion as to the principal shortcomings of the Articles of Confederation. But one can be reasonably sure that few of the Founding Fathers thought that trade barriers among the States were 'the central problem,' or that their elimination was the 'central mission' of the Constitutional Convention. Creating a National Government within a federal system was far more central than any 18th-century concern for interstate commerce.

Id. at 265-66 (Powell, J., dissenting); *see* Alfange, *supra* note 48, at 270-80 (discussing the Stevens/Powell dispute).

71 460 U.S. at 273-75 (footnote omitted) (Powell, J., dissenting).

4. *National League of Cities* Abandoned: *Garcia v. San Antonio Metropolitan Transit Authority*

On February 19, 1985, the Court, in *Garcia v. San Antonio Metropolitan Transit Authority*,[72] adopted Justice Stevens' suggestion[73] and overruled *National League of Cities*. In *Garcia*, the district court had held that municipal ownership and operation of a mass-transit system constituted a traditional governmental function. Thus, the mass-transit system was exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act (the "FLSA") under *National League of Cities*.[74] In a 5-4 decision,[75] the Court reversed the district court's decision and overruled *National League of Cities*.[76]

Justice Blackmun, who had supplied the critical fifth vote in *National League of Cities*, wrote the majority opinion in *Garcia*. Justice Blackmun concluded that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest."[77] The opinion emphasized the Court's failure to define "the scope of governmental functions deemed protected under *National League of Cities*,"[78] the lower courts' struggles with the doctrine,[79] and the Court's abandonment of the governmental/proprietary distinction in the intergovernmental tax immunity cases.[80] In addition, the Court noted that in all likelihood "alternative standards that might

72 105 S. Ct. 1005 (1985).

73 EEOC v. Wyoming, 460 U.S. at 250 (Stevens, J., concurring).

74 San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445 (W.D. Tex. 1983). Garcia intervened as a defendant at the district court level. Garcia and the Secretary of Labor filed separate jurisdictional statements. The two cases—Nos. 82-1913 and 82-1951—were consolidated.

75 Justice Blackmun wrote the majority opinion for Justices Brennan, White, Marshall, and Stevens. Justice Powell wrote a dissent, which was joined by the Chief Justice, and Justices Rehnquist and O'Connor. Justice Rehnquist filed a separate dissent, and Justice O'Connor wrote a dissent, in which Justices Powell and Rehnquist joined. *Garcia* was first argued on Mar. 19, 1984. On July 5, 1984, the Court returned the case to the calendar for reargument and requested the parties to brief and argue the question " '[w]hether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered.' " 104 S. Ct. 3582, 3583 (1984).

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

77 *Id.* at 1007 (quoting *National League of Cities*, 426 U.S. at 852). Justice Blackmun's emphasis on state *regulatory* immunity may be an effort to save market *participant* immunity. *See* notes accompanying Section II *infra*. In 1980, Justice Blackmun stated that, "[t]he basic distinction . . . between States as market participants and States as market regulators makes good sense and sound law." Reeves, Inc. v. State, 447 U.S. 429, 436 (1980).

78 105 S. Ct. at 1011.

79 *Id.*

80 *Id.* at 1014 (discussing New York v. United States, 326 U.S. 572 (1946)).

be employed to distinguish between protected and unprotected governmental functions . . . [would not be] manageable . . . ."[81] The Court therefore "reject[ed], as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' "[82] Such an approach "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[83]

In *Garcia*, the Court also emphasized a structural approach. Justice Blackmun noted that "the sovereignty of the States is limited by the Constitution itself[84] . . . [and that] the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself."[85] Justice Blackmun therefore asserted that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[86] The Court, however, did not reject the possibility that the judiciary might limit certain federal intrusions on state sovereignty,[87] but it emphasized that such limitations should be narrowly drawn.[88] Justice Blackmun concluded that in *Garcia* the national political process had adequately protected state sovereignty.[89]

Justice Powell's dissent contended that the Court had substantially altered the federal system created by the Constitution and had

81 *Id.* at 1014.

82 *Id.* at 1016.

83 *Id.* at 1015.

84 *Id.* at 1017.

85 *Id.* at 1018.

86 *Id.*

87 Thus, Justice Blackmun did not adopt Dean Choper's position that federalism issues should be nonjusticiable. *See generally* J. CHOPER, *supra* note 46. Justice Blackmun mentioned that there "undoubtedly" are limits on the federal government's ability to interfere with state functions, *see* 105 S. Ct. at 1016, but suggested that judicial intervention would be appropriate only if the national political process had not worked as intended. The scope of this limit is unclear. Justice Blackmun stated that "[t]hese cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." 105 S. Ct. at 1020. A citation to Coyle v. Oklahoma, 221 U.S. 559 (1911), however, suggests that Justice Blackmun would be concerned about federal actions that treat a single state or region differently from the way in which other parts of the country are treated.

88 Justice Blackmun declared that: "Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.' " 105 S. Ct. at 1019-20 (quoting EEOC v. Wyoming, 460 U.S. at 236).

89 *Id.* at 1020

reduced the "Tenth Amendment to meaningless rhetoric . . . ."[90] Justice Powell stated that *National League of Cities* adopted a familiar type of balancing test."[91] He also observed that *EEOC v. Wyoming* articulated a "functional" test, which eliminated the speculation that *National League of Cities* created "a sacred province of state autonomy."[92] Questioning whether the national political process affords sufficient protection for state sovereignty,[93] Justice Powell stated that reliance on the political process did not justify evading judicial review. He declared that "[t]he States' role in our system of government is a matter of constitutional law, not of legislative grace."[94] According to Justice Powell, "judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution."[95]

Justice Powell stated that judicial intervention under a balancing test was required on the facts presented because "the state interest is compelling."[96] Although he observed that "municipal operation of an intra-city mass transit system is relatively new in the life of our country," Justice Powell stated that "[i]t nevertheless is a classic example of the type of service traditionally provided by local government. It is *local* by definition."[97] Sustaining application of the FLSA to the city transit system, Justice Powell believed, "makes Justice Douglas's fear [that the Court's commerce clause analysis allows the federal government to violate state sovereignty] once again a realistic one."[98]

Justice O'Connor's dissent in *Garcia* focused on the fundamental changes wrought by "the emergence of an integrated and industrialized national economy. . . ."[99] These changes brought an expansion of congressional power under the commerce clause,[100] an expansion necessary to allow the Congress "sufficient power to address national problems."[101] Justice O'Connor advised that re-

90 *Id.* at 1022 (Powell, J., dissenting).

91 *Id.* at 1024 (Powell, J., dissenting).

92 *Id.* (Powell, J., dissenting) (quoting EEOC v. Wyoming, 460 U.S. at 236).

93 Justice Powell expressed doubts about the "malfunction of the 'political process' " limit identified, but not defined, by Justice Blackmun. *Id.* at 1025 n.7 (Powell, J., dissenting).

94 *Id.* at 1026 (Powell, J., dissenting).

95 *Id.* at 1028 (Powell, J., dissenting).

96 *Id.* at 1032 (Powell, J., dissenting).

97 *Id.* (Powell, J., dissenting) (emphasis in original).

98 *Id.* at 1033 (Powell, J., dissenting) (referring to Justice Douglas' comment in dissent in Maryland v. Wirtz, *see* text accompanying note 25 *supra*).

99 *Id.* at 1034 (O'Connor, J., dissenting).

100 *See, e.g.*, Perez v. United States, 402 U.S. 146 (1972); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

101 *Garcia*, 105 S. Ct. at 1034 (O'Connor, J., dissenting).

cent changes in the workings of Congress, which "may well have lessened the weight Congress gives to the legitimate interests of States as States,"[102] must be considered in the context of the development of Congress' commerce power. Justice O'Connor feared that "[a]s a result [of these recent changes], there is now a real risk that Congress will gradually erase the diffusion of power between state and nation on which the Framers based their faith in the efficiency and vitality of our Republic."[103]

Justice O'Connor therefore concluded that congressional action "must not contravene the spirit of the Constitution."[104] Observing that state autonomy should be relevant in assessing the propriety of the means by which Congress exercises its powers, Justice O'Connor stated: "This principle requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power."[105] The dissent argued that the protections of the political process do not justify judicial reliance on Congress' "underdeveloped capacity for self-restraint."[106] According to Justice O'Connor, "[t]he proper resolution . . . lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States."[107]

Justice Rehnquist, in a short dissent, indicated that the district court's judgment in *Garcia* could be affirmed under any one of several approaches.[108] Justice Rehnquist stated, however, "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."[109] In her dissent, Justice O'Connor also sounded this refrain: "I would not shirk the duty acknowledged by *National League of Cities* and its prog-

102 *Id.* at 1035 (O'Connor, J., dissenting).

103 *Id.* (O'Connor, J., dissenting).

104 *Id.* at 1036 (O'Connor, J., dissenting).

105 *Id.* at 1037 (O'Connor, J., dissenting).

106 *Id.* (O'Connor, J., dissenting). Justice O'Connor's language recalls Justice Stone's famous phrase: "[T]he only check upon our own exercise of power is our own sense of self-restraint." United States v. Butler, 297 U.S. 1, 79 (1936) (Stone, J., dissenting). It is ironic that a judicial conservative should express dismay about reliance on the "restraint" of the politically accountable branches of government.

107 *Garcia*, 105 S. Ct. at 1037 (O'Connor, J., dissenting). Justice O'Connor emphasized the distinction that played such a key role in *National League of Cities*—the difference between federal regulation of a state and federal regulation of a private entity.

108 Justice Rehnquist identified four approaches that would support affirmance: 1) the majority's test in *National League of Cities*; 2) Justice Blackmun's balancing test from *National League of Cities*; 3) Justice Powell's test in *Garcia*; and 4) Justice O'Connor's test in *Garcia*. *Id.* at 1033 (Rehnquist, J., dissenting).

109 *Id.* (Rehnquist, J., dissenting).

eny, and I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility."[110]

B. *Assessment*

The Court's opinion in *National League of Cities* had, of course, received sharp criticism.[111] Although the criticism took a variety of forms, two arguments received the most attention. The first argument posited that the Court in *National League of Cities* departed from the historical understanding about the constitutional basis for a judicially enforceable state sovereignty limitation on the exercise of the commerce power.[112] The second argument was that the Court's intervention to protect state sovereignty was inappropriate because the states are adequately represented in the national political process.[113]

The first argument was based on the Court's earliest commerce clause opinions. Chief Justice Marshall expressed the early understanding that the tenth amendment did not limit the powers of the national government.[114] Under this theory, Congress has plenary power when acting within the scope of an affirmative power.[115] As Marshall explained in *Gibbons v. Ogden*,[116] the Constitution does not sanction judicial interference with congressional action within the scope of the commerce power.[117] Prior to *National League of Cities*,

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

111 *See* commentary collected at note 48 *supra*. The decision does, however, have a few defenders. *See, e.g.*, Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81. Some commentators, without endorsing *National League of Cities*, argue that the Court has some role to play in restricting federal legislation that has significant effects on state and local governments. *See, e.g.*, Kaden, *supra* note 7; Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977); Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism* 89 HARV. L. REV. 1871 (1976).

112 *See, e.g.*, Alfange, *supra* note 48, at 275; Tushnet, *supra* note 48, at 1322.

113 J. CHOPER, *supra* note 46, at 171-259. Some commentators have criticized *National League of Cities* on the ground that there are no judicially manageable standards for implementing a state sovereignty based limitation on the commerce power. *See, e.g.*, Tushnet, *supra* note 48, at 1324-28. In *Garcia*, Justice Blackmun explained that the failure to develop workable standards in this area played an important role in his decision to reverse his position. 105 S. Ct. at 1007. Professor Nagel correctly noted that the "lack of standards" argument can also be made against judicial review of legislation affecting individual rights, and that the judicial restraint argument in the *National League of Cities* context reflects an undervaluing of "structural values." *See* Nagel, *supra* note 111, at 95. "Activism" in the context of individual rights, however, does not necessarily justify "activism" in another context. The proper position should rely on the political process in both areas.

114 M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-07 (1819).

115 *See generally* Barber, *supra* note 48.

116 22 U.S. (9 Wheat.) 1 (1824).

117 Chief Justice Marshall stated:

> [T]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which

this interpretation had been considered settled.[118]

The second argument,[119] which ultimately proved so important in *Garcia*, was that the courts need not exercise their power of judicial review to protect state sovereignty. The national political process allegedly provides adequate protection for the states. As Dean Choper characterizes the argument:

> The point . . . is *not* that any of these exercises of national power (suppositional or real) is in fact constitutional as a matter of abstract principle. . . . [C]ertain federal regulations . . . may transgress the constitutional principle of federalism . . . . Rather, the position is that judicial review is not the steadfast brake to be relied on to prevent the destruction of state sovereignty. . . . [T]he states can and should depend on the national political branches, not the federal judiciary, for the preservation of states' rights.[120]

According to this view, absent a violation of a specific constitutional provision, the courts should only overturn legislative judgments if the interests involved were unable to secure a fair hearing for their views.[121] In the commerce clause context, such intervention is unnecessary because the states are adequately represented in the national political process.[122]

These arguments are substantial—and in *Garcia* they were substantial enough to persuade five Justices to overrule *National League of Cities*. Although this is not the place for a full treatment of the issue, the Court reached the proper result in *Garcia*. And contrary

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> they have relied, to secure them from its abuse. They are the restraints on which people must rely solely, in all representative governments.

Id. at 197; *see* F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 40 (1937). Justice Frankfurter observed:

> Marshall not merely rejected the Tenth Amendment as an active principle of limitation; he countered with his famous characterization of the powers of Congress, and of the commerce power in particular, as the possession of the unqualified authority of a unitary sovereign. He threw the full weight of his authority against the idea that, apart from specific restrictions in the Constitution, the very existence of the states operates as such a limitation.

118 *See, e.g.*, *National League of Cities*, 426 U.S. at 861-63 (Brennan, J., dissenting); L. TRIBE, *supra* note 18, § 5-20, at 300; *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 199 (1983).

119 *National League of Cities*, 426 U.S. at 876-78 (Brennan, J., dissenting); *see also* Massachusetts v. United States, 435 U.S. 444, 456 (1978).

120 J. CHOPER, *supra* note 46, at 220-21 (footnote omitted). Justice Brennan apparently would deny that federal regulations can transgress the constitutional principles of federalism. *National League of Cities*, 426 U.S. at 858 (Brennan, J., dissenting); *see* J. CHOPER, *supra* note 46, at 221 (disagreeing with Justice Brennan on this point).

121 This is, of course, a specific example of Dean Ely's theory of judicial review. *See generally* J. ELY, *supra* note 48.

122 *See* J. CHOPER, *supra* note 46, at 176-90; M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 46-49, 58-59 (1982); Tushnet, *supra* note 48, at 1328-37. Some have disagreed with the view that state representation in the national political process affords sufficient protection for state sovereignty. *See* Kaden, *supra* note 7, at 857-68.

to Justice Powell's concern in *Garcia*,[123] overruling *National League of Cities* does not read the tenth amendment out of the Constitution.[124] Judicial enforcement is not necessary to give meaning to a constitutional provision.[125]

Although the Court does not view the tenth amendment as a judicially enforceable, substantive restraint on congressional authority under the commerce clause, the amendment will still serve an important function.[126] First, as Justice Brennan noted, the tenth amendment and principles of federalism are useful guides in statutory construction. The Court is correctly reluctant to interpret federal legislation in a way that would alter the balance of power between the federal government and the states.[127] Second, the Justices are not the only ones who swear to uphold the Constitution. The tenth amendment and principles of federalism will still serve as constraints on Congress when it considers proposed legislation that would seriously intrude upon state and local governments.[128]

Pennhurst State School & Hospital v. Halderman[129] illustrates the first point.[130] In *Pennhurst*, the Court held that The Developmentally Disabled Assistance and Bill of Rights Act (the "Act") did not create any substantive rights for the mentally retarded to "appropriate treatment" in the "least restrictive" environment. The Act established a federal-state grant program of financial assistance from the federal government to participating states. States could comply with the conditions in the Act or forego federal funding. The Court considered whether 42 U.S.C. § 6010, the Act's "bill of rights" provision, created enforceable rights and obligations. In an opinion by Justice Rehnquist, the Court acknowledged that "Congress may fix the terms on which it shall disburse federal money to the States."[131]

The Court, however, then stated:

123 *Garcia*, 105 S. Ct. at 1022 (Powell, J., dissenting) ("today's decision effectively reduces the Tenth Amendment to meaningless rhetoric").

124 This appears to be of concern. *See National League of Cities*, 426 U.S. at 842-48; *Fry*, 421 U.S. at 547 n.7 ("the Tenth Amendment . . . is not without significance").

125 *See* Tushnet, *supra* note 48, at 1343.

126 Justice Blackmun's opinion did indicate that there are some affirmative limits on congressional power, but these limits inhere in process, not result. The scope of this limit is not yet clear. *See Garcia*, 105 S. Ct. at 1025 n.7 (Powell, J., dissenting).

127 *See National League of Cities*, 426 U.S. at 858 n.2 (Brennan, J., dissenting). *See generally* L. TRIBE, *supra* note 18, § 5-20, at 304-05; Tushnet, *supra* note 48, at 1343. *Cf.* Molina-Estrada v. Puerto-Rico Highway Auth., 680 F.2d 841, 846 (1st Cir. 1982) (applying *National League of Cities* as an aid in statutory construction).

128 Tushnet, *supra* note 48, at 1343.

129 451 U.S. 1 (1981).

130 *See generally* McConnell, *The Politics of Returning Power to the States*, 6 HARV. J. OF L. & PUB. POL'Y 103 (1982).

131 451 U.S. at 17 (citations omitted).

> The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.[132]

In a footnote, the Court stated: "There are limits on the power of Congress to impose conditions on the States pursuant to its spending power . . . see *National League of Cities v. Usery* . . . ."[133] Greatly influenced by the "massive financial obligations"[134] that would have been imposed on the states and by congressional unwillingness to fund these obligations,[135] the Court held that section 6010 was merely precatory. Thus, as *Pennhurst* illustrates, federalism often plays an important role in the interpretation of the scope of federal legislation.[136]

There have also been many recent examples of the second point, that federalism influences members of Congress in their consideration of federal legislation.[137] (The debate over a national products liability law is a recent example.)[138] These debates oc-

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132 *Id.* (citations and footnote omitted).

133 *Id.* at 17 n.13 (citations omitted). Of course, the Court had reserved this precise question in *National League of Cities*. 426 U.S. at 852 n.17.

134 451 U.S. at 17.

135 *Id.* at 22.

136 The same concerns are evident in the "congressional consent" area. The Court has long supported the position that "Congress has undoubted power to redefine the distribution of power over interstate commerce" by "permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible." Southern Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945). When Congress authorizes state action that would otherwise run afoul of the commerce clause, however, "congressional intent must be unmistakably clear." South-Central Timber Dev., Inc. v. Wunnicke, 104 S. Ct. 2237, 2242 (1984). As the Court stated in *South-Central*:

> . . . when Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a state is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

Id. at 2243 (footnote omitted).

137 *See* P. BOBBITT, CONSTITUTIONAL FATE 194, 274 n.21 (1982) (mentioning two examples of federalism concerns contributing to the defeat of federal legislation: (1) an amendment to the Social Security Act that would have extended coverage to state workers; and (2) a plan to use federal funds to induce the states to adopt no-fault auto insurance plans); Anson & Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 98 n.135 (1980); Kaden, *supra* note 7, at 848 n.8, 862, 892.

138 *See, e.g., Hearing on S.44 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 2d Sess. 440 (1984) (opposing federal product

curred prior to *National League of Cities*,[139] and there is no reason to suspect that federalism will not continue to play a role, even after the doctrine's demise.

The use of federalism outlined in the preceding paragraphs is a far better approach than that articulated by the dissenters in *Garcia*. The language employed by the dissenters[140] suggests a return to pre-1937 days. The textual and functional justifications for such judicial intervention are weak. Allowing the politically accountable branches of the government to control the types of decisions in *National League of Cities* and *Garcia* should not be regarded with horror.

This conclusion is not intended as an endorsement of the Fair Labor Standards Act[141] or the vast body of federal legislation enacted pursuant to the commerce clause. As others have persuasively argued,[142] there are numerous reasons to be concerned about the expansion of the federal government's powers vis-a-vis the states. But concern about the desirability of congressional action pursuant to the commerce clause does not necessarily indicate that the Court should regard the tenth amendment or principles of federalism as judicially enforceable limits on congressional authority.

The dissents of Justices Rehnquist and O'Connor in *Garcia* remind us that *Garcia* may not be the last word. The Court may again revive *National League of Cities*. Changes in personnel on the Court in the next few years may well bring another change of direction in this area. For the reasons outlined above, such a course of action would be mistaken.

II. The Market Participant Doctrine: A Return to a Categorical Approach[143] to Commerce Clause Adjudication

A. *The Case Law*

On the same day it decided *National League of Cities*, the Court established another state sovereignty-based exception to traditional

liability legislation in part on the ground that such legislation would be "a blatant usurpation by the Federal Government of an area of law that has always been left to the States"); *see also id.* at 416-20, 439-44.

139 *See, e.g.*, Alfange, *supra* note 48, at 231 n.104. *See generally* Dorsen, *The National No-Fault Motor Vehicle Insurance Act: A Problem in Federalism*, 49 N.Y.U. L. REV. 45 (1974).

140 For example, the dissenters invoked the "spirit of the Constitution." *Garcia*, 105 S. Ct. at 1036 (O'Connor, J., dissenting). This language closely resembles the Court's reliance on "penumbras" and "emanations" in Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

141 *See National League of Cities*, 426 U.S. at 881 (Stevens, J., dissenting) (making the same point).

142 *See generally* Kmiec & Diamond, *New Federalism is Not Enough: The Privatization of Non-Public Goods*, 7 HARV. J. OF L. & PUB. POL'Y 321 (1984).

143 The reference is to the Court's practice (long since abandoned) of trying to

commerce clause principles. In *Hughes v. Alexandria Scrap Corp.*,[144] the Court first enunciated the market participant doctrine. *Alexandria Scrap* involved a Maryland statute designed to remove abandoned automobiles from the state. The statute provided a bounty to licensed scrap dealers who received such "hulks" from the owners of the cars or from licensed wreckers. A 1974 amendment to the state statute imposed more exacting documentation requirements on out-of-state processors than on in-state processors. These requirements placed out-of-state processors at a disadvantage in obtaining "hulks" and thus state bounties.

In response to an out-of-state processor's commerce clause challenge, the Court concluded that the Maryland statute did not involve "the kind of action with which the Commerce Clause is concerned [because] Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price."[145] The Court declined to hold that "the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State."[146] Instead, the Court concluded that "[n]othing in the purposes animating the Commerce Clause prohibits a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[147]

Significantly, the Court in *Alexandria Scrap* suggested that it might have reached a different result if the market affected by the bounty scheme had not been "created" by the state.[148] As Justice Stevens emphasized in his concurring opinion,

> [i]t is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program. Our cases finding that a state regulation constitutes an impermissible burden on interstate com-

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distinguish commerce from mining or manufacturing and direct from indirect effects on commerce. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 65, at 150-61.

144 426 U.S. 794 (1976).

145 *Id.* at 805, 806.

146 *Id.* at 808.

147 *Id.* at 810 (footnote omitted).

148 The Court stated:

> [W]e note that the commerce affected by the 1974 amendment appears to have been created, in whole or in substantial part, by the Maryland bounty scheme. We would hesitate to hold that the Commerce Clause forbids state action reducing or eliminating a flow of commerce dependent for its existence upon state subsidy instead of private market forces. Because the record contains no details of the hulk market prior to the bounty scheme, however, this issue is not clearly presented.

Id. at 809 n.18.

> merce all dealt with restrictions that adversely affected the operation of a free market. This case is unique because the commerce which Maryland has "burdened" is commerce which would not exist if Maryland had not decided to subsidize a portion of the automobile scrap-processing business. By artificially enhancing the value of certain abandoned hulks, Maryland created a market that did not previously exist.[149]

Justice Brennan, in a dissent joined by Justices White and Marshall, noted the conceptual link between *National League of Cities* and *Alexandria Scrap*: "The absence of any articulated principle justifying this summary conclusion leads me to infer that the newly announced 'state sovereignty' doctrine of *National League of Cities* . . . is also the motivating rationale behind this holding."[150] Justice Brennan objected to "the Court's categorical approach . . . which simply carves out an area of state action to which it declares the Commerce Clause has no application."[151] The dissent concluded that the constitutionality of the Maryland statute should have been evaluated under normal commerce clause principles.

Four years later, in *Reeves, Inc. v. Stake*,[152] the Court again upheld a state resident preference program on the ground that the state had simply acted as a market participant. *Reeves* involved a state owned and operated cement plant. Because of a cement shortage, the South Dakota State Cement Commission confined the sale of cement from the plant to state residents. In response to a commerce clause challenge by an out-of-state cement distributor, the Court held that the Commission's action did not violate the commerce clause. The Court found that the state was acting as a market participant rather than as a market regulator. The Court emphasized that:

> Restraint in this area is counseled by considerations of state sovereignty, the role of each State "as guardian and trustee for its people" . . . and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[153]

Moreover, the *Reeves* Court clearly distinguished a manufactured good like cement from natural resources "like coal, timber, wild game, or minerals," explaining that

> [cement] is the end product of a complex process whereby a costly physical plant and human labor act on raw materials.

149 *Id.* at 815 (Stevens, J., concurring).
150 *Id.* at 822 n.4 (Brennan, J., dissenting).
151 *Id.*
152 447 U.S. 429 (1980).
153 *Id.* at 438-39 (citations and footnotes omitted).

> South Dakota has not sought to limit access to the State's limestone or other materials used to make cement. Nor has it restricted the ability of private firms or sister States to set up plants within its borders. . . . Moreover, petitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement. Whatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there, those limits do not apply here.[154]

The Court observed that South Dakota had borne substantial risk in establishing the cement plant.[155] In addition, invalidating the state preference program would "rob South Dakota of the intended benefit of its foresight, risk and industry."[156]

In a dissenting opinion, Justice Powell, joined by Justices Brennan, White, and Stevens, rejected the majority's market regulator/market participant distinction. According to Justice Powell,

> [t]he application of the Commerce Clause to this case should turn on the nature of the governmental activity involved. If a public enterprise undertakes an "integral operatio[n] in areas of traditional governmental functions," *National League of Cities v. Usery* . . . the Commerce Clause is not directly relevant. If, however, the State enters the private market and operates a commercial enterprise for the advantage of its private citizens, it may not evade the constitutional policy against economic Balkanization.[157]

The Court again addressed the "market participant" doctrine in *White v. Massachusetts Council of Construction Employers, Inc.*[158] In *White*, the mayor of Boston issued an executive order "which required that all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, should be performed by a work force consisting of at least half bona fide residents of Boston."[159] In response to the dissent's argument that "regulation" rather than "market participation" was involved,[160] the Court acknowledged that some yet undefined limits

154 *Id.* at 444 (citations and footnote omitted).

155 *Id.* at 446 n.19.

156 *Id.* at 446.

157 *Id.* at 449-50 (Powell, J., dissenting). Justice Powell stated that he thought *Alexandria Scrap* involved a "traditional governmental function," i.e., a subsidy program. *Id.* at 447 n.1 (Powell, J., dissenting).

158 460 U.S. 204 (1983).

159 *Id.* at 205-06 (footnotes omitted).

160 *Id.* at 216-23 (Blackman, J., concurring in part and dissenting in part). The dissent in *White* emphasized that a state imposing residence preference requirements as conditions to its contracts with private parties acts as a market regulator and not as a market participant. The dissent concluded that such a state is thus not entitled to the market participant exemption:

> The simple unilateral refusals to deal that the Court encountered in *Reeves* and

to the market participant doctrine still remained. The Court concluded, however, that "[w]herever the limits of the market participation exception may lie . . . the executive order . . . falls well within the scope of *Alexandria Scrap* and *Reeves*."[161] The municipal activity involved in *White* was "a discrete, identifiable class of economic activity in which the city . . . [was] a major participant [as] [e]veryone affected by the order . . . [was] in a substantial if informal sense, 'working for the city.' "[162]

The Court's most recent discussion of the market participant doctrine appeared in *South-Central Timber Development, Inc. v. Wunnicke*.[163] In *South-Central*, however, only six Justices addressed the issue.[164] Justice White's plurality opinion, joined by Justices Brennan, Blackmun, and Stevens, concluded that Alaska's policy of conditioning the sale of state-owned timber on the purchaser's promise to process the timber in-state prior to export did not fall within the protection of the market participant doctrine. In an effort to limit the scope of the doctrine, Justice White stated:

> The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The

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Alexandria Scrap were relatively pure examples of a seller's or purchaser's simply choosing its bargaining partners, "long recognized" as the right of traders in our free enterprise system. The executive order in this case, in notable contrast, by its terms is a direct attempt to govern private economic relationships. The power to dictate to another those with whom he may deal is viewed with suspicion and closely limited in the context of purely private economic relations. When exercised by government, such a power is the essence of regulation.

Id. at 218-19 (footnote omitted) (Blackmun, J., concurring in part and dissenting in part).

161 *Id.* at 211 n.7.

162 *Id.*

163 104 S. Ct. 2237 (1984).

164 The primary issue in *South-Central* was whether Congress had authorized Alaska's requirement that timber cut from state lands be processed in-state prior to export. The Ninth Circuit held that a similar policy for federal lands indicated implicit congressional approval for Alaska's policy. South-Central Timber Dev., Inc. v. LeResche, 693 F.2d 890 (9th Cir. 1982). The Court stated that, before the courts are entitled to find congressional consent to state actions that would otherwise violate the commerce clause, "congressional intent must be unmistakably clear." 104 S. Ct. at 2242. The Court concluded:

> The fact that the state policy in this case appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent. Congress acted only with respect to federal lands; we cannot infer from that fact that it intended to authorize a similar policy with respect to state lands. Accordingly, we reverse the contrary judgment of the Court of Appeals.

Id. at 2243 (footnote omitted).

Because of its ruling on the consent issue, the Ninth Circuit did not decide the market participant question. Justice Powell and the Chief Justice did not vote on the market participant question. Justice Powell's short opinion stated his view that a remand was appropriate to allow the Ninth Circuit an opportunity to rule on the market participant issue. *Id.* at 2248 (Powell, J., concurring in part and concurring in the judgment). Justice Marshall did not participate in the decision of the case.

> State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market. Unless the "market" is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry.[165]

In *South-Central*, Justice White concluded that Alaska could "not avail itself of the market-participant doctrine to immunize its downstream regulation of the timber-processing market in which it is not a participant."[166]

B. *Assessment*

Although it attracted less attention than the decision in *National League of Cities*, the Court's creation of the "market participant" doctrine has also been vigorously criticized.[167] Justice Brennan stated the basic objection to the doctrine in his dissent in *Alexandria Scrap*:

> Principles of legal analysis heretofore employed in our cases considering claims under the Commerce Clause . . . are ignored, and an area of state action plainly burdening interstate commerce, an area not easily susceptible of principled limitations, is judicially carved out and summarily labeled as not "the kind of action with which the Commerce Clause is

165 *Id.* at 2245-46 (footnote omitted) (White, J., plurality opinion).

166 *Id.* at 2246-47 (White, J., plurality opinion). Justice Brennan filed a short concurring opinion, which included his view that "Justice White's treatment of the market-participant doctrine and the response of Justice Rehnquist point up the inherent weakness of the doctrine." *Id.* at 2247-48 (Brennan, J., concurring).

Justice Rehnquist, in an opinion joined by Justice O'Connor, dissented. Justice Rehnquist stated that "the line of distinction drawn in the plurality opinion between the State as market participant and the State as market regulator is both artificial and unconvincing." *Id.* at 2248 (Rehnquist, J., dissenting). Justice Rehnquist stated:

> Alaska is merely paying the buyer of the timber indirectly, by means of a reduced price, to hire Alaska residents to process the timber. Under existing precedent, the State could accomplish that same result in any number of ways. For example, the State could choose to sell its timber only to those companies that maintain active primary-processing plants in Alaska. Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (other citations omitted). Or the State could directly subsidize the primary-processing industry within the State. Hughes v. Alexandria Scrap, 426 U.S. 794 (1976) (other citations omitted). The State could even pay to have the logs processed and then enter the market only to sell processed logs. *See* 104 S. Ct. at 2246. It seems to me unduly formalistic to conclude that the one path chosen by the State as best suited to promote its concerns is the path forbidden it by the Commerce Clause.

Id. at 2248-49 (Rehnquist, J., dissenting).

167 *See, e.g.*, Blumoff, *The State Proprietary Exception to the Dormant Commerce Clause: A Persistent Nineteenth Century Anomaly*, 1984 S. ILL. U.L.J. 73; Schwartz, *Commerce, the States, and the Burger Court*, 74 NW. U.L. REV. 409 (1979); Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981); Note, *State Purchasing Activity Excluded from Commerce Clause Review*, 18 B.C. IND. & COM. L. REV. 893 (1977).

concerned."[168]

The market participant doctrine thus removes a particular type of state action from the balancing approach typically used in commerce clause adjudication.[169] In dissent, Justice Brennan refused to treat " 'what is essentially a problem of striking a balance between competing interests as an exercise in absolutes.' "[170]

In addition, Justice Powell's suggestion in *Reeves* that the Court should decide commerce clause cases based "on the nature of the governmental activity involved"[171] ignores the distinction between a governmental entity and a private party. As the Court noted in *National League of Cities*, even if acting in a "proprietary" capacity, "a State is not merely a factor in the 'shifting economic arrangement' of the private sector."[172] When acting in a proprietary capacity, "a state cannot be equated with private entrepreneurs" because "the State responds to incentives and maximizes values that no private economic actor would respond to or value."[173] Moreover, parochial state legislation—whether construed as market participation or regulation—may implicate interstate comity concerns not present when a private entity acts.[174] Regardless of their form, parochial state actions threaten fundamental commerce clause values.

All state "proprietary" activity preferring state residents, however, does not necessarily violate the commerce clause. Eliminating the market participant exemption would simply require the courts to subject the challenged state action to normal commerce clause principles.[175] Some of the conduct challenged in the market participant cases might have withstood scrutiny under commerce clause analysis.

In fact, several commentators have approved of the Court's support for efforts to prefer state residents in distributing state

168 *Alexandria Scrap*, 426 U.S. at 817-18 (Brennan, J., dissenting) (citations and footnotes omitted).

169 For an illustration of the balancing exercise, see Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

170 *Alexandria Scrap*, 426 U.S. at 818-19 (quoting H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 564 (1945) (Frankfurter, J., dissenting)).

171 447 U.S. at 449 (Powell, J., dissenting).

172 *National League of Cities*, 426 U.S. at 849.

173 Anson & Schenkkan, *supra* note 137, at 89.

174 The Court's commerce clause cases have long expressed the conviction that protectionist state measures threaten interstate harmony. *See, e.g.*, Pennsylvania v. West Va., 262 U.S. 553, 559 (1923); West v. Kansas Nat'l Gas Co., 221 U.S. 229, 255 (1911). The Court has often remarked that the commerce clause expresses the Framers' "conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979).

175 *See Alexandria Scrap*, 426 U.S. at 830-32 (Brennan, J., dissenting).

funds. The supporting rationales, however, differ from the Court's reasoning. For example, one commentator has stated:

> The states' independent lawmaking authority suggests an even broader range of state power to limit public sector resources to residents. Arguably, at least in the absence of special circumstances, only the members of a group providing a service have a legitimate claim of entitlement to it. Like other groups free to combine their members' efforts to produce collective benefits to be shared among the group, political communities, including states, have a prima facie justification for limiting distribution of their public goods to those who combined to provide them.[176]

In contrast to this more traditional, "political" rationale to justify a state's preference of its own citizens, some commentators have relied on economic theory to support state subsidy programs. One commentator approvingly described why state subsidy programs have received favorable judicial treatment:

> The failure of commerce clause objections to a state's expenditures in favor of its own citizens follows rather neatly from the realization that such payments are positive inducements that stimulate output rather than restrict it to monopoly levels. Thus, the subsidization of both cement production and in-state automobile hulk disposal, and the channeling of state expenditures to in-state contractors, hardly can promote monopolistic exploitation of other states. In all such cases the statutes are likely to yield increased production levels. Although these statutes might well cause overproduction as inefficient as a monopoly's underproduction, the legislating state itself pays for its action rather than profits from it, so that the legislature's judgment may be thought more reliable than parochial.[177]

These commentators recognize that it is inappropriate to label every state action involving a preference for state residents "protectionist" and to presume such action unconstitutional. Such an approach would likely undermine the special relationship between a state and its residents.[178] Although there are doctrinal problems with the market participant exemption, the Court's decisions reflect an appropriate deference to state autonomy.

The subsidy theory which the commentators have emphasized[179] may well be a more appropriate analytical foundation than

176 Varat, *supra* note 167, at 523; *see also* Wells & Hellerstein, *The Governmental—Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1130-35 (1980) (emphasizing state interest in fiscal autonomy).

177 Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 584 (1983); *see also* Anson & Schenkkan, *supra* note 137, at 89.

178 *See* Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 SUP. CT. REV. 51, 77.

179 *See, e.g.*, Varat, *supra* note 167, at 540-48; *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 73-75 (1983); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 61 (1976).

the market participant doctrine. In fact, the subsidy idea has featured prominently in the cases in this area.[180] *White* involved the expenditure of city funds. In *Reeves*, South Dakota favored its residents in the distribution of goods manufactured at a facility built with the residents' tax dollars. In *Alexandria Scrap*, Maryland "created" a market through a subsidy funded by state tax dollars.

The Court has often described market participant cases in "subsidy" terms. In *New England Power Co. v. New Hampshire*,[181] the Court characterized the *Reeves* market participant exemption as allowing a state to confine the sale of state-produced goods to its residents. In *Sporhase v. Nebraska ex rel. Douglas*,[182] the Court noted that *Reeves* involved "a good publicly produced and owned in which a State may favor its own citizens in times of shortage."

The only "market participant" case in which the state did not prevail provides an instructive contrast. In *South-Central Timber Development, Inc. v. Wunnicke*,[183] Alaska set conditions on the export of a natural resource that happened to be located in the state. The federal government, however, had originally purchased all of the state's natural resources, including the timber involved in *South-Central*.[184]

The subsidy rationale provides a useful explanation for the Court's decisions. This approach also has significant normative appeal. The market participant/market regulator distinction presents substantial problems,[185] and a categorical approach to commerce

180 In United Bldg. & Constr. Trades Council v. Mayor of Camden, 104 S. Ct. 1020 (1984), the Court addressed a privileges and immunities clause, U.S. CONST. art. IV, § 2, challenge to a Camden ordinance requiring that at least 40% of the employees of contractors and subcontractors working on city construction projects be Camden residents. The Court held that the "market participant" exemption does not apply to the privileges and immunities clause, 104 S. Ct. at 1028-29, and remanded for application of the normal privileges and immunities clause standard. *Id.* at 1030. The Court, however, spoke approvingly of the challenged ordinance and emphasized the impact of the state "subsidy." The Court stated: "The fact that Camden is expending its own funds or funds it administers in accordance with the terms of a grant is certainly a factor—*perhaps the crucial factor*—to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause." *Id.* at 1029 (emphasis added). The Court also noted that local government entities "should have considerable leeway in analyzing local evils and in prescribing appropriate cures. . . ." *Id.* at 1030 (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)). The Court observed that "[t]his caution is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls." *Id.*

181 455 U.S. 331, 338-39 n.6 (1982).

182 458 U.S. 941, 957 (1982).

183 104 S. Ct. 2237 (1984).

184 *See* Hicklin v. Orbeck, 437 U.S. 518, 528 n.11 (1978). As one commentator has noted, "[i]n any case where the state's wealth does not derive from the contributions of residents acting through the state, there is good reason to adhere strictly to obligations of interstate equality" and "[t]hat is especially true when the national government conveys property to a state without compensation." Varat, *supra* note 167, at 557 n.238.

185 *See, e.g.*, Varat, *supra* note 167, at 501-08.

clause adjudication has provoked a more general objection.[186] In contrast, allowing state "subsidies" under normal dormant commerce clause analysis would afford the states significant freedom without risk to the rest of the states.[187]

The "subsidy" idea, however, could be interpreted too broadly. In *South-Central*, Alaska analogized its requirement that timber purchased from state land be partially processed within Alaska to the state "subsidy" approved in *Alexandria Scrap*.[188] In a recent commerce clause case,[189] Hawaii argued that "foregone revenues" are equivalent to a subsidy and thus not invalid under the commerce clause. If foregone revenues were equated to a subsidy, the states would be able to use their taxing power to eviscerate the protections of the commerce clause. When a state spends funds from the state treasury, we can have some confidence that "the state legislature has considered the burdens and benefits of its action."[190] Simply foregoing revenues, however, should be viewed as state regulatory action, and thus subject to traditional commerce clause restraints. Moreover, a state's expenditure of its own funds is not likely to have significant adverse effects on nonresidents. Therefore, deference to such state action is appropriate under both the political and economic rationales discussed above.

III. State Action Immunity: An Appropriate Accommodation?

A. *The Case Law*

Federal-state conflicts are standard fare in the Court's commerce clause cases. Federalism issues often arise in less traditional contexts as well. For example, the Burger Court has given a great deal of attention to federalism issues in deciding state action cases in the antitrust area.

This section is not designed to present a comprehensive analysis of the Court's decisions in the area.[191] Rather, this section dis-

186 In his dissent in Hughes v. Alexandria Scrap, Justice Brennan stated: "I cannot agree that well-established principles for analyzing claims under the Commerce Clause are inapplicable . . . merely because the Court somehow categorically determines that the instant case involves 'a burden which the Commerce Clause was [not] intended to make suspect.' " 426 U.S. at 818 (quoting majority opinion) (Brennan, J., dissenting); *see The Supreme Court, 1982 Term*, *supra* note 179, at 74.

187 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

188 *South-Central*, 104 S. Ct. at 2244.

189 Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049, 3056 (1984).

190 Levmore, *supra* note 177, at 585.

191 There has been a tremendous volume of commentary in this area. *See generally* Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435 (1981); Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. OF L. & ECON. 23 (1983); Levmore, *supra* note 177; Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975).

cusses the relationship between the state action cases and the constitutionally-based, state sovereignty exemptions discussed in sections I and II.[192]

The landmark case in the state action area is *Parker v. Brown*.[193] In *Parker*, the Court considered whether a raisin marketing program adopted under the California Agricultural Prorate Act violated the Sherman Act, was preempted by the Agricultural Marketing Agreement Act of 1937, or was invalid under the commerce clause. California produced almost all of the raisins consumed in the United States and nearly half the world supply. Ninety to ninety-five percent of the raisins grown in California were shipped in interstate or foreign commerce. The raisin marketing program at issue in *Parker* restricted competition among raisin growers and maintained prices.

In considering the validity of this program under the Sherman Act, the Court assumed that the program would have violated the Sherman Act if it had been entered into solely by private parties. The Court also presupposed that Congress could have prohibited a state from maintaining such a stabilization program.[194] Nevertheless, the Court concluded:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.[195]

The Court also found that the California program was not preempted by the Agricultural Marketing Agreement Act of 1937[196] and that it was not invalid under the commerce clause.[197] In both its preemption and commerce clause discussions, the Court emphasized that the national government had contributed to, and cooper-

192 Other commentators have discussed the constitutional underpinnings of *Parker*. *See generally* Blumstein & Calvani, *State Action as a Shield and a Sword in a Medical Services Antitrust Context:* Parker v. Brown *in Constitutional Perspective*, 1978 DUKE L.J. 389; Davidson & Butters, *Parker and Usery: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action*, 31 VAND. L. REV. 575 (1978); Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L. REV. 1099 (1981).

193 317 U.S. 341 (1943). *See generally* Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976) (explaining historical roots of state action doctrine).

194 317 U.S. at 350.

195 *Id.* at 350-51. In Southern Motor Carriers Rate Conference v. United States, 105 S. Ct. 1721 (1985), the Court stated: "The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Id.* at 1726 (footnote omitted).

196 317 U.S. at 352-59.

197 *Id.* at 359-68.

ated with, California in establishing the marketing program.[198]

Parker did not, of course, answer all questions about the scope of the state action doctrine. For thirty years, however, the Court exhibited little interest in the doctrine.[199] The Burger Court has shown a renewed interest in the area, and the Court has issued a steady flow of state action decisions since 1975.[200]

Although some questions remain, the basic outlines of the state action doctrine have become fairly well established.[201] When the challenged action is that of the state, acting as sovereign, the action is not subject to the Sherman Act.[202] When the challenged activity is not directly that of the state itself, the Court will consider whether the challenged restraint is "one clearly articulated and affirmatively expressed as state policy" and whether the policy is "actively supervised" by the state.[203] A state statute will not afford protection from Sherman Act scrutiny "if the statute on its face irreconcilably conflicts with federal antitrust policy."[204] In addition,

198 *See* notes 196-97 *supra* and accompanying text. The Court's emphasis on federal approval was considered significant in later commerce clause cases. For example, in H. P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949), the Court emphasized that in *Parker* the United States Secretary of Agriculture had affirmatively cooperated in promoting the state program and had supported it with substantial federal loans. In *Hood* the Court clearly indicated that affirmative expressions of federal approval are necessary if state actions otherwise inconsistent with the commerce clause are to withstand scrutiny. *H. P. Hood & Sons*, 336 U.S. at 537.

199 *See* Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1374-75 (1978).

200 *See, e.g.*, Southern Motor Carriers Rate Conference v. United States, 105 S. Ct. 1721 (1985); Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985); Hoover v. Ronwin, 104 S. Ct. 1989 (1984); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

201 The Court recently answered several open questions. In Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985), the Court decided that neither active state supervision nor state compulsion is required to exempt a municipality's conduct from the antitrust laws. In Southern Motor Carriers Rate Conference v. United States, 105 S. Ct. 1721 (1985), the Court decided that a private party may avail itself of state action immunity in the absence of state compulsion as long as the two prong *Midcal* test is satisfied. There are still open questions remaining. *See Town of Hallie*, 105 S. Ct. at 1720 n.10 (leaving open the question of whether active state supervision is required when the actor is a state agency).

202 *See, e.g.*, Hoover v. Ronwin, 104 S. Ct. 1989, 1996-98 (1984); Bates v. State Bar of Ariz., 433 U.S. 350, 359-63 (1977).

203 *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

204 Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982). Whether a state regulatory scheme is preempted by the federal antitrust laws poses a difficult question. *See, e.g.*, Battipaglia v. New York State Liquor Auth., 745 F.2d 166 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1393 (1985). Another difficult question is whether a state statute that would be invalidated under preemption standards can be "saved" by the state action doctrine. *See Battipaglia*, 745 F.2d at 176-77 (discussing, but not resolving, this question); Miller v. Hedlund, 579 F. Supp. 116, 121-24 (D. Or. 1984) (applying state action doctrine to save a statute that would

municipal conduct is protected by the state action doctrine if the municipality acts pursuant to a clearly articulated state policy, the municipality's actions need neither be compelled nor actively supervised by the state.[205] Moreover, since the passage of the Local Goverment Antitrust Act of 1984,[206] local governments are only subject to antitrust suits seeking injunctive relief. Local governments are thus exempt from treble damages actions under the antitrust laws.

The Court has often noted that the state action doctrine rests on principles of federalism and state sovereignty.[207] And as two commentators have suggested:

> [I]t seems that the Court is . . . relying on more general, constitutionally derived principles of federalism to strike a balance between federal and state interests. This suggests that the different interpretations of *Parker* reflect the justices' individual perceptions of the source and scope of constitutional limitations on the reach of the antitrust laws.[208]

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otherwise have been preempted). The federal courts should allow state statutes to stand under the supremacy clause in the absence of clear congressional intent to supersede state law. In Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), Justice Rehnquist stated the proper approach to preemption inquiry:

> Because pre-emption treads on the very sensitive area of federal-state relations, this Court is "reluctant to infer preemption," . . . and the presumption is that pre-emption is not to be found absent the clear and manifest intention of Congress that the federal Act should supersede the police powers of the States.

455 U.S. at 61 (Rehnquist, J., dissenting) (citations omitted). Under such an approach, relatively few state laws would be preempted. This position is probably closest to the intent of Congress. *See* Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287, 1334-35 (1982). The Congress that enacted the Sherman Act in 1890 probably did not intend to override contrary state laws. Congress can always clarify its intent. Thus, most state choices to displace competition should be upheld, subject to normal dormant commerce clause scrutiny.

205 Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985). *See generally* Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach*, 53 FORDHAM L. REV. 23 (1984).

206 The Local Government Antitrust Act of 1984, Pub. L. 98-544, 98 Stat. 2750, was passed on Oct. 10 and signed by President Reagan on Oct. 24, 1984. This Act was prompted by congressional concern about the flood of antitrust suits against municipalities (in particular, the $28.5 million verdict against the Village of Grayslake, Lake County, and three local officials) and the FTC's filing of antitrust complaints against New Orleans and Minneapolis for alleged antitrust violations arising from taxi regulations. *See FTC Suits Spur Congress to Protect Cities from Paying Antitrust Damages*, Nat'l L.J., Aug. 18, 1984, at 1569-72. The Act protects "local governments" from damage suits under the antitrust laws, but allows suits seeking injunctive relief. Congress, therefore, made it clear that the antitrust laws do indeed apply to local governments, but limited the available relief.

207 *Southern Motor Carriers*, 105 S. Ct. at 1729 (stating that "[t]he *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws . . . ."); *Hoover*, 104 S. Ct. at 1995; *Boulder*, 455 U.S. at 53 ("the *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution").

208 Blumstein & Calvani, *supra* note 192, at 414.

Certain Justices have highlighted eleventh amendment concerns, while others have asserted the relevance of tenth amendment principles.

For example, Justice Stevens' majority opinion in *Cantor*, which described the state action doctrine as a principle of sovereign immunity, resembles eleventh amendment analysis. Justice Stevens stated: "[Mr. Chief Justice Stone] carefully selected language which plainly limited the Court's holding [in *Parker*] to official action taken by state officials."[209] As several commentators have noted,[210] this focus on the defendant's *identity* echoes eleventh amendment concerns.[211] The Court has relied on eleventh amendment principles in other state action cases as well.[212]

Other opinions have emphasized tenth amendment values. The Chief Justice's opinion in *Lafayette* explicitly linked the commerce clause concerns of *National League of Cities* to the *Parker* state action doctrine.[213] Justice Stewart's dissent in *Lafayette* also noted a connection between the two cases.[214] Moreover, in his concurring opinion in *Cantor*,[215] Justice Blackmun outlined a balancing test resembling his proposal in *National League of Cities*.[216]

Justice Rehnquist and others contend that *Parker* raises supremacy clause issues.[217] For example, in *Boulder*, Justice Rehnquist declared: "The question addressed in *Parker* and in this case is . . . whether statutes, ordinances, and regulations enacted as an act of government are *pre-empted* by the Sherman Act under the operation of the Supremacy Clause."[218] Such a question "implicates

209 Cantor v. Detroit Edison Co., 428 U.S. 579, 591 (1976) (footnote omitted).

210 Blumstein & Calvani, *supra* note 192, at 414-19; Note, *Crawling Out from Under Boulder*, 34 CASE W. RES. L. REV. 303, 321-24 (1983-84).

211 *See also Boulder*, 455 U.S. at 58-60 (Stevens, J., concurring).

212 *Lafayette*, 435 U.S. at 412 (relying on eleventh amendment cases to support principle that cities are not sovereign entities). The dissent criticized the Court's reliance on eleventh amendment concepts. *Id.* at 430 (Stewart, J., dissenting).

213 *Id.* at 423-24 (Burger, C.J., concurring in part).

214 *Id.* at 430, 439 (Stewart, J., dissenting).

215 428 U.S. at 610-12 (Blackmun, J., concurring).

216 426 U.S. at 856 (Blackmun, J., concurring). Many lower court decisions have, at least implicitly, noted the connection between tenth amendment principles and the state action doctrine. *See, e.g.*, Town of Hallie v. City of Eau Claire, 700 F.2d 376, 384-85, 384 n.18 (7th Cir. 1983), *aff'd*, 105 S. Ct. 1713 (1985); Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1195-97 (6th Cir. 1981), *vacated and remanded*, 455 U.S. 931 (1982); Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956, 967-69 (W.D. Mo. 1982), *aff'd*, 705 F.2d 1005, 1014 n.13 (8th Cir. 1983), *cert. denied*, 53 U.S.L.W. 3702 (U.S. Apr. 1, 1985); *see also* Shenefield, *The Parker v. Brown State Action Doctrine and the New Federalism of Antitrust*, 51 ANTITRUST L.J. 337, 339 (1983) (discussing interplay between *Parker* and *National League of Cities*); *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 273-78 (1982).

217 *Boulder*, 455 U.S. at 60 (Rehnquist, J., dissenting); *Cantor*, 428 U.S. at 637 (Stewart, J., dissenting); Handler, *supra* note 205, at 1330-38; Handler, *supra* note 200, at 1374-88; Handler, *supra* note 194, at 1.

218 455 U.S. at 60 (Rehnquist, J., dissenting) (emphasis in original).

our basic notions of federalism."[219] According to Justice Rehnquist, "[t]he *Parker* doctrine correctly holds that the federal interest in protecting and fostering competition is not infringed so long as the state or local regulation is so structured to ensure that it is truly the government, and not the regulated private entities, which is replacing competition with regulation."[220]

B. *Assessment*

The Court's state action decisions in many ways represent basic constitutional decisions about the role of the states in our federal system. Considering the constitutional nature of the antitrust laws,[221] this characterization of the Court's state action decisions should not be surprising. The problems that surface in the state action area resemble those with which the Burger Court has struggled in other areas involving federal/state conflicts. The governmental/proprietary debate in *Lafayette*[222] exemplifies this type of conflict. This similarity suggests that the analysis proposed in sections I and II of this article should also be applied in the state action context.

The Burger Court's state action decisions have been severely criticized. For example, in discussing a recent decision in the area, one commentator stated: "I believe [*Hoover v. Ronwin*][223] demonstrates the necessity for congressional action, given the inability of the Court to deal with this area in anything but the most regrettably formalistic terms."[224] Another commentator has opined that "the Court's opaque and conflicting opinions in the cases have often defied interpretation."[225]

Although the Burger Court's decisions in this area may lack consistency,[226] the approach enunciated in *Parker* nevertheless is

219 *Id.* at 61 (Rehnquist, J., dissenting).

220 *Id.* at 70 (Rehnquist, J., dissenting).

221 *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933); Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982).

222 City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

223 104 S. Ct. 1989 (1984).

224 Campbell, *Supreme Court Update — State Action Immunity from Antitrust Law*, 53 ANTITRUST L.J. 429, 429 (1984).

225 Page, *supra* note 192, at 1101.

226 Prior to *Town of Hallie* and *Southern Motor Carriers*, the Burger Court had narrowed the scope of the state action doctrine. This result was probably attributable to the recognition that the doctrine assisted the states in sheltering conduct with clear anticompetitive consequences. *See* Easterbrook, *supra* note 191, at 27; Handler, *supra* note 204, at 1331. This "thread" in the cases contradicts the view that the Burger Court has exhibited a solicitude for state sovereignty. This earlier narrowing of the state action doctrine illustrates both the difficulty of the issues involved in areas of federal-state conflict and the sharp split in the Court on these issues. Many of the Court's state action decisions have been decided by close votes, with the dissenters in *Garcia* often dissenting in cases that have restricted the

proper. While the impact of uncertainty in legal rules should not be trivialized, the Court's basic approach is sound. And, more importantly for this article's focus, this approach accords appropriate recognition to the states' role in our federal system.

The Court's state action decisions follow the "rule of statutory construction" approach outlined in section I. Greatly influenced by federalism concerns, the Court has refused to apply federal legislation to certain state actions absent clear congressional intent. This approach avoids the question of whether Congress could constitutionally apply the Sherman Act to challenged state conduct.[227] In addition, Congress is forced to act, if it feels action is necessary.[228]

This approach does not preclude all challenges to allegedly anticompetitive state actions.[229] State action is still subject to normal commerce clause principles. Several commentators have recently supported a similar approach.[230] The primacy of normal commerce clause principles respects state choices in the economic sphere,[231] while preventing state actions that adversely affect nonresidents.[232]

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scope of *Parker*. For example, in *Boulder*, Justice Rehnquist was joined in dissent by the Chief Justice and Justice O'Connor. In its most recent decisions in the state action area, *Town of Hallie* and *Southern Motor Carriers*, which were decided shortly after *Garcia*, the Court greatly expanded the scope of the state action doctrine and gave states and municipalities significantly greater freedom to act in this area. As *Garcia* and the state action cases illustrate, the Burger Court has not always moved in a straight line in these "state sovereignty" cases. This does not, however, undermine the position that the Burger Court has generally been far more active than the Warren Court in highlighting the states' importance in our federal system.

227 After *Garcia*, however, the answer to this constitutional question should be clear in nearly all cases.

228 In *Southern Motors Carriers*, Justice Powell stated: "After over 40 years of Congressional acquiescence, we are unwilling to abandon the *Parker* doctrine." 105 S. Ct. 1726 n.18. As the Local Government Antitrust Act of 1984 illustrates, Congress will act to correct the Court's judgments in this area, if Congress believes it is important to do so.

229 Political recourse is always possible.

230 *See* Levmore, *supra* note 177, at 626-29; Page, *supra* note 192, at 1107. *See generally* Easterbrook, *supra* note 191.

231 Several commentators have correctly concluded that the Court should not dictate the manner in which the state must exercise its economic choices. *See* Easterbrook, *supra* note 191, at 36-40; Page, *supra* note 192, at 1136-38. Others have also correctly concluded that the Court should accord municipalities the same treatment states receive. *See* Easterbrook, *supra* note 191, at 36-38; Lopatka, *supra* note 205, at 52-77.

232 The Court—particularly in recent years—has emphasized that the negative implications of the commerce clause help ensure that those harmed by a governmental act are represented in the political body making the decision. The Court has exercised the "strictest scrutiny" when faced with facially discriminatory legislation, Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 958 (1982); Hughes v. Oklahoma, 441 U.S. 322, 337 (1979), in part because out-of-state parties are not represented in the political body enacting the discriminatory legislation. *See, e.g.*, McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 45 n.2 (1940); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938); O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 OR. L. REV. 395, 400 (1982); Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1705-08

Deference to state economic decisions in the absence of significant out-of-state consequences is consistent with *Parker*'s emphasis on federalism.[233] Moreover, this approach is far superior to the balancing approach advanced in some judicial decisions and by certain commentators.[234] Such a balancing approach would resurrect the judicial attitude of the substantive due process era, when the courts regularly second-guessed state economic choices.[235]

IV. Conclusion: An Overall Assessment

The Burger Court has manifested a solicitude for state sovereignty in a variety of areas. This concern for state sovereignty influenced the Court's creation of two limitations on the scope of the commerce clause—the *National League of Cities* doctrine, which has now been abandoned, and the market participant doctrine, which still remains good law. These state sovereignty-based limitations on the commerce clause must be regarded as failures, at least on a doctrinal level. The standards the Court has struggled to articulate have proved unworkable. And substantial clarification of these standards in the foreseeable future is improbable. Moreover, the Court has failed to justify its role in declaring particular state actions to be beyond the scope of commerce clause scrutiny.

Nevertheless, the Court's opinions in this area have been beneficial. First, the Court has highlighted the importance of state sov-

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(1984); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 124, 128 n.14. This "political representation" rationale dovetails with the economic approach advanced by certain commentators. For example, Professor Levmore has stated that "the state action exemption should be reformulated to exclude circumstances ripe for interstate exploitation. The doctrine, for example, should exempt typical state regulation of a local electric utility but should not protect regulation that 'exports' monopoly burdens to nonresidents." Levmore, *supra* note 177, at 627; *see also* Easterbrook, *supra* note 191, at 45-50. Determining whether a challenged state scheme has significant out-of-state effects will often raise difficult questions. *See, e.g.*, Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 444-46 (1982) (criticizing the Court's decision in Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978)); O'Fallon, *supra* at 418-19 (criticizing the Court's decision in Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981)). Despite these difficulties, the approach outlined in the text does focus on the relevant inquiry.

233 This position is not intended to convey approval of state schemes that restrict competition. Rather, deference is desirable unless Congress has clearly expressed an intent to displace such laws. The adverse impact of anticompetitive regulations will fall principally on those who have a voice in the political process.

234 *See Boulder*, 455 U.S. at 56 n.20; *Cantor*, 428 U.S. at 610-12 (Blackmun, J., concurring); Blumstein & Calvani, *supra* note 192, at 438-41; Campbell, *supra* note 224, at 433; Kennedy, *Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Under the Antitrust Laws*, 74 Nw. U.L. REV. 31 (1979); Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974); Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 Nw. U.L. REV. 71 (1974).

235 *See Boulder*, 455 U.S. at 67 (Rehnquist, J., dissenting); 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 215c (1978); Page, *supra* note 192, at 1122-25. *See generally* Verkuil, *supra* note 191.

ereignty. This effort has fostered the continuing dialogue about the role of the states in our federal system.[236] Second, the Court's decisions have sparked an outpouring of scholarly commentary.[237] This commentary has focused attention on the distribution of power between the national government and the states and has prompted several strong defenses of federalism.[238] Finally, in certain instances, the Court's decisions have caused Congress to reconsider legislation that would have significantly affected state and local governments. These effects must be regarded as beneficial, particularly if one shares the view that a rethinking of the relationship between the federal government and states is necessary.[239]

Despite the potential benefits, the Court should abandon the market participant doctrine, just as it abandoned *National League of Cities*. The practice of carving out "islands of state autonomy" is misguided. In the *National League of Cities* context, as the *Garcia* majority stated, the Court should rely on the national political process. And in the market participant area, the Court should rely on normal dormant commerce clause principles to protect state sovereignty.[240]

Although the Court should not use the tenth amendment or general notions of federalism as judicially enforceable limits on the commerce power, federalism should still play a significant role. The Court should rely on principles of federalism to interpret federal statutes and should require that Congress clearly state its intent to "interfere" with state and local matters. With the reservations previously discussed, the Court's state action doctrine illustrates how this process can and should work. The "subsidy" theory, as an analytical substitute for the market participant doctrine, affords significant freedom to the states, without seriously jeopardizing other states' interests.

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236 This type of dialogue is typical in constitutional adjudication. *See, e.g.*, Wellington, *Book Review*, 97 HARV. L. REV. 326, 335 (1983). Professor Bobbitt describes the Court's decision in *National League of Cities* as the Court's exercise of a "cueing" function: "[W]e may come to think that the case is not a major doctrinal turn but a cue to a fellow constitutional actor, an incitement to Congress to renew its traditional role as protector of the states." P. BOBBITT, *supra* note 137, at 194.

237 Many of the books and articles cited throughout this article were written in response to the Court's decisions in the area, and thus focus primarily on doctrinal matters. Other articles have focused more on historical sources. *See, e.g.*, Diamond, *The Federalist: Neither a National Nor a Federal Constitution, But a Composition of Both*, 86 YALE L.J. 1273 (1977).

238 *See, e.g.*, Kmiec & Diamond, *supra* note 142, at 340-51. *See generally* Nagel, *supra* note 111.

239 *See generally* Kmiec & Diamond, *supra* note 142 (concluding that constitutional federalism is greatly unbalanced and proposing both a decentralization of governmental activity and a privatization of nonpublic goods).

240 The problem facing those who agree that the federal government is too large vis-a-vis the states is that these arguments have typically lost in the political arena. Scalia, *The Two Faces of Federalism*, 6 HARV. J. OF L. & PUB. POL'Y 19, 20 (1982).

The Burger Court's state sovereignty doctrines discussed in this article have largely been failures. The Court has, however, contributed significantly to the continuing debate about an important issue of governmental structure. As this process continues, a more appropriate accommodation of federal and state interests may be reached.