CONGRESSIONAL PREEMPTION OF STATE POLICY: INTERPRETING THE GARCIA DECISION

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It has been more than a decade since the U.S. Supreme Court handed down its decision in National League of Cities (NLC) v. Usery (1976), setting aside the extension of federal regulations concerning wages and hours to employees of state and local governments. Federal intrusion into the organization and structuring of such basic functions, NLC had argued, threatened not only the immediate fiscal viability of state and local budgets but, more fundamentally, seriously eroded the independence of states as political entities. The Court majority ruled that the Tenth Amendment of the U.S. Constitution protected states as sovereign entities against federal intrusions under the Commerce clause, a judgment widely acclaimed by state and local officials as a constitutional declaration of independence from federal regulations that directly affected their basic service functions.

Naturally, its advocates presumed that the NLC ruling would serve as a benchmark in the constitutional definition of state sovereignty in the American federal system, at minimum a statement of fundamental constitutional principle that states enjoy a core level of immunity from federal intrusion into basic state functions. But it never achieved the status of accepted judicial doctrine. It was consistently rejected as a compelling argument in most lower court cases involving issues of state sovereignty, was significantly narrowed in its application by Equal Employment Opportunity Commission (EEOC) v. Wyoming in 1983, and was ultimately overturned altogether in Garcia v. San Antonio Metropolitan Transit Authority in 1985.

The Garcia decision indicated that we have reached an important transition in the constitutional definition of the rights of states in the American federal system. The transition does not, however, necessarily involve a judicial redefinition of the constitutional relationship between states and the federal government, or (as some lamented) an abandonment of traditional judicial responsibility in balancing the sovereign interests of state and federal governments. Rather, it involves a frank reassertion by the Supreme Court of the fundamental and primary responsibility of the Congress in protecting the integrity of the American federalist system. This article outlines the critical elements of the NLC decision and how they failed to provide viable constitutional precedent in subsequent federal court
decisions. In so doing, it attempts to identify the implications for American federalism of the Court’s abandonment of the NLC principle.

THE NLC DECISION AS A CONSTITUTIONAL ANOMALY

The NLC decision was a fundamental challenge to the constitutional power of the federal government to directly regulate the actions of states. The Congress had enacted the Fair Labor Standards Act (FLSA) in 1938 stipulating minimum wages and maximum hours that could be required by employers. In its original language, the FLSA defined "employers" in such a manner as to explicitly exclude states and their political subdivisions from the reach of the federal regulations. Amendments to the Act in 1966 contained language that redefined "employers" to remove the state and political subdivision exemption from several types of previously exempted employers: state hospitals, institutions and schools. The redefinition was challenged as a violation of state sovereignty as protected under the Tenth Amendment but was upheld as a constitutional exercise of Congressional authority in Maryland v. Wirtz. Amendments to the FLSA in 1974 further broadened the definition of "employer" to in effect remove the remainder of the state and political subdivision exemption. That redefinition, causing a direct federal regulation of wages and hours of all employees of state governments and their political subdivisions, was challenged on the same Tenth Amendment grounds in NLC v. Usery.

In a 5-4 decision, the Supreme Court held that the 1974 amendments had the effect of directly displacing the states' freedom to structure integral operations in areas of traditional governmental functions and therefore Congress had exceeded its constitutional authority under the Commerce clause. While the Court did cite the testimony of a number of state and local government officials who estimated that implementation of the amendments would cause dramatic increases in the costs of providing essential services such as police and fire protection, it held that an assessment of actual impact was not crucial to resolution of what it saw as a larger constitutional issue.

The critical issue was viewed as one of basic state sovereignty—the capacity of states to maintain a separate and independent existence in the American federal system. The NLC majority ruled that the 1974 amendments, if upheld, would force states and their political subdivisions to relinquish extensive discretion over the operation and structuring of their "traditional" and "essential" governmental services. If they were to retain existing (needed) levels of basic service provision, they would be forced to absorb the federally mandated increases in the costs of those services. How they absorbed the increases was their own affair. The Court majority found this to be an
unwarranted disruption and displacement of the normal and independent functioning of state governments, ruling that the Constitution contained (in the Tenth Amendment) an express limitation on the power of the Congress to override state sovereignty which "expressly declares . . . that Congress may not exercise power in a fashion that impairs the states' integrity to function effectively in a federal system" (NLC, 1976:852).

The NLC decision drew quite favorable responses from state and local officials, but it was received with considerable skepticism by the federal court system and many (but by no means all) legal scholars. The decision had been based on an interpretation of the Tenth Amendment that had until that time not been upheld in the federal courts. It was a well developed constitutional doctrine that the Tenth Amendment established residual rather than exclusionary authority, and without question allowed Congress under its Article I plenary powers and the Supremacy clause to preempt state action in a regulatory field (Davidson and Butters, 1978:579-582; Lynch, 1978:378-379). It was understood that Congress should not exercise its plenary authority in such a manner as to preempt basic state functions, a constitutional requirement that rested on both the language of the Tenth Amendment and the presumption that the establishment of an explicitly federalist system required the presence of separate and independent states as political entities (Abrams, 1984:735-737). At the same time, the doctrine at least implicitly presumed that significant safeguards existed in the representation of states interest in the Congress to prevent such complete federal preemption of state functions.

There has been fairly widespread agreement in principle that the American federal system requires some fundamental constitutional protection of the legitimate actions of states as sovereign bodies. And yet, attempts to define which functional areas are so essential to the political integrity of states that they must be constitutionally immunized from federal encroachment have met with little success. The federal courts have consistently upheld Congress' authority to preempt state action in instances where federal authority is clearly demarcated under plenary powers and when the federal enactment in question explicitly preempts existing or future state action, even if the state actions preempted are considered to be within an important and/or traditional area of service provision (La Pierre, 1982:818-878; Field, 1978:1275; Tribe, 1976:698-699; Alexander, 1986). Only when the federal intent to preempt was not explicit or the degree of federal preemption was incidental did the question arise of balancing the legitimate interests of federal and state governments. In most of those cases, legitimate and appropriate state interests have been considered compelling because of the broader constitutional imperative sustaining state sovereignty as an integral part of a functioning federalist
system. In no case had the federal courts upheld a state action over preemptory federal enactments because the performance of the particular state service in question was determined to be "essential" or "integral" to the independent political identity of the state.

Against this backdrop, the NLC decision was an anomaly. While it appealed to a constitutional principle to which many subscribed in theory (the sovereignty of states), it contradicted long-established federal court doctrine concerning federal plenary powers and the Supremacy clause. Its interpretation as precedent therefore became immediately problematic. If NLC was seen as establishing an element of state constitutional immunity from federal preemption under the Commerce clause, a complete rethinking of congressional plenary powers and the constitutional mandate of the Supremacy clause was required. If such an immunity is not compelled by the Constitution, what areas of state functioning would be immune from total preemption by the federal government? NLC enunciated a principle that could be supported in constitutional theory, but could not be applied.

The first major interpretation of the NLC decision came in the case of Hodel v. Virginia Surface Mining and Reclamation Association (1981). The Court interpreted NLC as establishing a three-pronged test for federal courts to use in cases of Tenth Amendment challenges to federal preemption of state action: a) does the congressional enactment challenged regulate states directly? b) does the congressional enactment regulate a functional area that is indisputably an attribute of state sovereignty? and c) does the implementation of the enactment impair the state's ability to structure operations in areas of its traditional governmental functions? (Hodel, 1981:287-288). When applied to a federal enactment that effectively preempted state action, affirmative holdings on each of the three questions would presumably signify congressional encroachment on state sovereignty to an extent prohibited by the Tenth Amendment.

However, the Hodel three-pronged test proved to be extremely difficult to apply. The first standard was clear enough when applied to state agencies, but required extensive statutory and constitutional investigation when applied to independent state agencies (Areeda, 1981:445), political subdivisions (Forder, 1983:413-436; Cronin, 1982:51), and private actors implementing state policies (Cantor v. Detroit Edison, 1976). The second standard presumed that a core set of functions or activities could be identified as integral to the sovereign nature of states in the federal system, but NLC had not established a formula by which one might differentiate core functions from ancillary activities. Furthermore, even if core functions could be identified, Court doctrine required that a question of balancing legitimate state and federal interests could only be considered if the federal enactment was not explicit in its intention to preempt state action. In the NLC
case, however, the federal intent to preempt had been explicit in the removal of regulatory immunity from states and their political subdivisions! The third standard appeared to narrow the scope of investigation to "traditional" governmental functions without elaborating on whether traditional state functions must be automatically considered essential to the state's sovereign nature (La Pierre, 1982:842-959; Abrams, 1984:730; Michelman, 1977:1172-1179; Tribe, 1977:1076-1077; Souther, 1980:155-168; Altange, 1983:226-236; Berner, 1984:1068-1071). And even though this third standard appeared to call for evidence of how implementation of preempting federal legislation would affect the normal execution of those functions, the NLC majority had stipulated that such evidence was not critical to resolution of the conflict.

THE EROSION OF NLC AS PRECEDENT

Given the myriad of conflicting signals from the NLC decision, one would have expected that it would provide a relatively weak precedent for subsequent challenges to federal enactments. That proved to be the case. In over two hundred challenges to federal enactments using arguments based on the NLC decision between 1977 and 1983, only a handful succeeded at the federal district court level and none of those survived on appeal (La Pierre, 1982:814-977; Rotunda, 1984:96-318; Berner, 1984:1054-1058; Field, 1985:90-106). Consistent with the previously established judicial doctrine on congressional preemption of state regulatory activities, the federal courts in all of these cases have focused solely on a) whether the federal enactment is within the scope of congressional plenary powers, and b) whether the enactment explicitly intends to preempt state action by directly addressing states as states. None attempted to define that core of traditional state functions held immune to federal preemption.

This trend was most clearly demonstrated in Equal Employment Opportunity Commission (EEOC) v. Wyoming in 1983. The Congress had enacted the Age Discrimination in Employment Act (ADEA) in 1967 making it unlawful for employers to discriminate against any employee on the basis of age. As originally drafted, the Act defined "employer" in such a manner that its regulations did not apply to the federal government, state governments or their political subdivisions, or employers with fewer than 25 employees. In the same 1974 act that amended the FLSA and precipitated the NLC challenge, Congress extended the definition of "employer" under ADEA to include federal and state governments. The EEOC sued on behalf of a state fish and game department supervisor who had been involuntarily retired at the age of 55.

The federal district court dismissed the suit, finding under language similar to that used in NLC, that the 1974 amendments
violated Tenth Amendment restrictions on the powers of Congress in that they regulated employment relations with game wardens and other law enforcement officials. A Supreme Court review of federal court challenges to the 1974 extensions of ADEA revealed however that in the six years prior to the district court dismissal of the EEOC claim (in 1981), every court had found the ADEA amendments a valid constitutional exercise of congressional power under either the Commerce clause or the enforcement powers of the 14th Amendment. A review of court decisions subsequent to the EEOC dismissal (1981-1982) found that while two district courts had overturned the 1974 ADEA amendments, eight other district courts and two courts of appeals had declined to do so (EEOC, 1983:234, note 6).

The Supreme Court utilized the three-pronged test but cautioned that "[d]emonstrating that these three requirements are met does not . . . 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" (EEOC, 1983:241-242). In its application of the NLC standards, the Court found that the ADEA amendments did regulate states directly and did address matters indisputably attributes of state sovereignty, i.e., employment relations between the state and its employees. But the Court rejected the presumption that implementation of the amendments therefore automatically impaired the state's ability to structure its integral operations.

Instead, the Court formulated guidelines for determining whether the degree of impairment of state operations was sufficient to warrant constitutional protection, concluding that federal enactments would be upheld as valid preemption of state sovereign actions unless a) the federal enactment so overrides state policy objectives that it leaves the state no practicable means for discharging a sovereign function; and b) the federal enactment inflicts damage, fiscal or otherwise, on state and local functions not directly involved in the federal regulation. Fiscal damage would be demonstrated if state and local treasuries would be depleted, while non-fiscal damage would be demonstrated if evidence were brought that implementation of the federal enactment frustrates broad and significant state or local objectives. In the determination of the degree of impairment, the burden was placed directly on the state to demonstrate both the significance of its own (thwarted) policy objectives and the nature and degree of damage inflicted by implementation of the federal enactment.

Based on this line of reasoning, the Court upheld the 1974 ADEA amendments as a valid exercise of congressional power. More significantly, it reaffirmed the previously established judicial doctrine with regard to federal preemptive powers:
[t]he principle of immunity articulated in National League of Cities is a functional doctrine, however, whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of the federal system in which the States enjoy a 'separate and independent existence' not be lost through undue federal interference in certain core state functions (EEOC, 1983:235) (emphasis added).

But which state functions? The Court would not be compelled to accept for one state a core function successfully argued by another state in a previous challenge, and it was therefore impossible to establish any standardized list of core state functions that could be immunized. At that point, the effective precedent value of the NLC decision evaporated (Rotunda, 1984:319-320; Alfange, 1983:258-260; Berner, 1984:1058-1063).

THE GARCIA CASE

The Supreme Court indicated its willingness to consider abandoning the NLC decision altogether when it expressly invited rearguments on whether the NLC principle should be reconsidered in Garcia v. San Antonio Metropolitan Transit Authority in 1984. The Garcia case did not in the strictest sense present a direct test of the principle declared in NLC. The case involved a challenge to the failure of the municipal transit authority to incorporate into its operations regulatory provisions under the 1974 amendments to the Fair Labor Standards Act. In late 1979, the U.S. Department of Labor published FLSA guidelines specifically tailored to the strictures of the NLC decision. Those guidelines extended FLSA wage and hour requirements to "nontraditional" state and local functions, including (explicitly) mass transit, and defined "nontraditional functions" as those not protected by the Tenth Amendment.

But the municipal transit authority was not a state agency per se. It was privately owned and operated until the late 1950s when it was taken over and operated by local government. To a significant degree, the transit system had retained most of the attributes of a private business. If the three-pronged test were applied, the state would have had great difficulty demonstrating its direct involvement as the party regulated by the FLSA guidelines, or that the municipal transit authority could be considered a direct state agent carrying out expressed state policy under direct and continuous state supervision (Community Communications Co. v. City of Boulder, 1982). It would have been equally difficult for the state to demonstrate that the transit service should have been considered an attribute of its
sovereignty and/or a traditional state function as would be protected by the Tenth Amendment under NLC (Garcia, 1985:1011-1012; Re: United Transportation Union, 1982).

Under the more precise and stringent EEOC standards, the state would have been compelled to demonstrate that transit was a sovereign state function, that the state had established significant and broad policy objectives in that service area, that these objectives could not be discharged through other means, and that federal regulation inflicted specific damage on the state or its designated executor. Moreover, it would have made little difference whether the transit system was a private, a local governmental, a state-funded or state-regulated, or a totally state-provided enterprise since the 1974 amendments to the FLSA demonstrated an express federal intent to preempt state action in the regulatory field. If a federal enactment expressly intended to preempt state action and was within the Congress' plenary powers under the Constitution, state action would have to yield automatically.

While the Garcia case did present an opportunity to reargue the broader issue of the constitutionality of the 1974 amendments under the Tenth Amendment, the Court could have pursued a narrower scope of inquiry. The Court could have simply reaffirmed the appropriateness of reviewing state challenges to federal preemption on a case-by-case basis as directed by the EEOC decision, a procedure that would have placed the burden on the state (or its claimed agent) to demonstrate established state policy objectives and significant federal obstruction of those objectives. This would have allowed the Court to apply EEOC standards narrowly and find (for example) that the state was not being regulated directly, or that mass transit had not been shown to be a traditional function of that particular state, or that the state had failed to demonstrate sufficient damage. Under any of these options, the Court could have found for Garcia without directly confronting the sovereignty requirement of the Tenth Amendment as declared in NLC.

A direct confrontation of the NLC principle however required a broader scope of consideration. Even if the state had been able to meet the extensive and complicated requirements stipulated by the EEOC decision, the Court would still have had to reconcile the state's claim of sovereignty with the mandates of the Supremacy clause, since federal intent to preempt state action was quite explicit in the 1974 amendments. To force a direct consideration of the NLC principle and Tenth Amendment protections to state sovereignty, the Court would have had to maintain that EEOC-required evidence was not really crucial to resolution of the broader issue and deal directly with the question of whether the Tenth Amendment imposes constitutional limitations on federal preemptive powers. This was essentially the same approach used by the majority in NLC.
The Court chose neither approach. Instead of narrowly applying the more general three-pronged test or the more stringent EEOC standards to the case at hand, the Court majority addressed the broader question of whether a priori definitions of state sovereignty could stand as constitutional limitations on the scope of congressional plenary powers. It concluded that such a priori definitions, as implied in the NLC protection of traditional governmental functions, could not be constitutionally sustained, stating that "a rule of state immunity from Federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional' [is] unsound in principle and unworkable in practice [sic]" (Garcia, 1985:1016). To allow, even to invite, the federal judiciary to make such judgments, Justice Blackmun wrote, is to interfere unacceptably with the state's basic functions, its freedom "to engage in any activity that their citizens choose for the common weal . . . ." (Garcia, 1985:1015). The application of a 'traditional function' standard as prescribed by NLC, he concluded, "is not only unworkable but is inconsistent with established principles of federalism . . . ." (Garcia, 1985:1016). Therefore National League of Cities v. Usery itself had to be overturned.

The remainder of the decision declared that there existed sufficient general constitutional (rather than Tenth Amendment) safeguards of state sovereignty in the face of expanding federal preemption under plenary powers. While admitting that states "do retain a significant measure of sovereign authority," the Court reiterated that state sovereignty is "residuary" and its protection lies in the structure of the federal government itself rather than in a constitutional immunity of particular state functional areas (Garcia, 1985:1017-1018). The fundamental constitutional restriction on federal preemption of state action under plenary powers (such as the Commerce clause) "is one of process rather than one of result" (Garcia, 1985:1019).

**CONSTITUTIONAL FEDERALISM AFTER GARCIA**

Even before the Supreme Court heard Garcia, the NLC decision had, through its ineffectiveness in application in the federal courts over a period of eight years, become totally discounted as a compelling constitutional precedent. The Garcia decision itself was wholly consistent with this trend, sustaining the residual (rather than exclusionary) interpretation of state sovereignty under the Tenth Amendment. Such a conclusion should not however be interpreted as the final demise of the constitutional principle expressed in the NLC decision. The constitutional relationship between states and the federal government is far broader and more complex than the circumstances of absolute federal preemption under the Commerce clause, and even the
Garcia decision itself leaves room for judicial intervention on behalf of state sovereignty (Field, 1985:104-116).

The Garcia decision, however, does serve notice that constitutional protection of the sovereign integrity of states in the American federal system must rely less on Tenth Amendment interventions by the federal courts and rely more on the circumspection of the Congress with regard to the impact its preemptive regulatory activities have upon state interests (ACIR, 1986; Hunter and Oakerson, 1986). This was essentially the same approach the Court used with respect to the antitrust liability of municipalities. The Supreme Court had ruled in Parker v. Brown (1943) that the statutory language of the Sherman Act precluded application of federal antitrust regulation to states as actors (Parker, 1943:350-351). In 1978, however, the Court ruled that such an immunity did not automatically include political subdivisions of a state, unless the state by constitutional provision or statute explicitly authorized and actively supervised those activities of subdivisions claimed to have anticompetitive effect (Lafayette v. Louisiana Power and Light Co., 1978). The Court subsequently ruled that municipalities organized and structured under constitutional or statutory home rule provisions, to the degree that they are authorized to exercise broader local governmental discretion in policy making and implementation, were likewise unable to claim automatic immunity, even if they could demonstrate that they were operating in areas of traditional local governmental service provision, or that the state had purposely delegated such discretion as a conscious state policy (Community Communications, 1982:52-56).

As a result, close to 300 private antitrust actions were filed against cities and counties between 1982 and 1984, mostly in the areas of sewer service, land use decisions, and cable television franchises. Under provisions of the Sherman Act, a successful antitrust claim against a local government could result in the awarding of treble damages, such as the $28.5 million damage award originally granted to a developer denied sewer hookup by the Village of Grayslake, Illinois in 1984. While the political and fiscal implications of the lack of local government immunity from antitrust actions were obvious and foreboding, it was clear that under established judicial doctrine, local government officials could not seek constitutional shelter under the NLC principle unless their activities were explicitly authorized by state statute. Lacking any prospect for judicial relief under NLC alone or significant increase in statutory authorizations from state legislatures, local officials turned directly to Congress in an appeal for legislative immunity from antitrust liability provisions.

Ironically, it was neither the political issue of local self-governance nor the fiscal gravity of local government liability that moved the Congress to action, but rather antitrust suits against
Minneapolis and New Orleans filed by the Federal Trade Commission in May 1984 (Cooper, 1984, for example). These suits, aimed at forcing those cities to stop setting taxicab fares and limiting the number of competitors, precipitated an extensive debate over whether the FTC should be authorized to initiate such suits and produced statutory language in the FY 1985 appropriation bill that effectively blocked the FTC from using any of its 1985 funds to pursue those suits. Shortly thereafter, the Congress passed the Local Government Antitrust Act confining antitrust awards against local governments to injunctive relief.

While local government officials were unable to move the Congress to legislate total immunity for municipalities from antitrust regulations, the appropriations debate did force the Congress to take account of and address the adverse and unanticipated effect that federal preemptive legislation was having on the functioning of local governments in their provision of traditional services. The issue of municipal antitrust liability revealed the more critical constitutional question of whether resolution of such issues should be more appropriately sought through the legislative or judicial processes. Since the Tenth Amendment immunizes neither states nor their municipalities from federal preemptive legislation, the political debate must focus initially on the nature and scope of the preemptive legislation. With respect to the Garcia case, the Congress had, in the 1974 amendments under challenge, intentionally and explicitly moved to bring states and their political subdivisions under the regulations of the Fair Labor Standards Act. The admonition of the Garcia Court is clear: the Congress, not the federal court system, is the political forum in which the U.S. Constitution has provided for the representation of state interests, and only from the Congress can relief be sought from federal preemptive legislation that, if enacted, would effectively threaten the integrity of states as sovereign actors in the American federal system.

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