State Sovereignty in the Federal System: Constitutional Protections Under the Tenth and Eleventh Amendments

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The U.S. Supreme Court has held that state sovereignty is protected by principles of common law rather than explicit constitutional guarantees under the Tenth and Eleventh Amendments. The Court has also cautioned that congressional actions, even under delegated powers, may not threaten the integrity of states as sovereign entities in the federal system. The National League of Cities decision in 1976 appeared to reverse this doctrine by implying the existence of Tenth Amendment protections of state actions in traditional functional areas. However, the federal courts discounted the NLC ruling as a compelling precedent in subsequent federalism cases because of its vagueness and its fundamental inconsistency with established doctrine. In 1985, the Supreme Court overturned the ruling in Garcia v. San Antonio, reaffirming the common law nature of state sovereignty and arguing that constitutional protection of state interests lies primarily in the representative structure of the federal system rather than in specific constitutional guarantees.

State sovereignty has been a major issue in American political history. The founders of the republic designed a federal system that established supremacy for the U.S. government within the realm of its delegated authority while also protecting the sovereign interests of the states. It was difficult, however, to define the exact parameters of state sovereign interests in policy areas involving powers directly delegated to the federal government in Article I of the U.S. Constitution. As the Congress exercised more and more of its powers over the years, the realm of state sovereignty seemed to shrink, leading some observers to fear that the constitutional principle of national supremacy effectively robbed the concept of state sovereignty of all substance.

In this context, the U.S. Supreme Court decision in National League of Cities v. Usery (1976) appeared to herald a dramatic turn against the drift toward the erosion of state sovereignty. By a narrow majority, the Court argued in essence that the U.S. Constitution protects a core of traditional state functions as being integral to the preservation of states as sovereign entities in the federal system. The Court also implied that this core was to be constitutionally protected from all federal encroachments, even those arising from the federal government’s exclusive powers. Application of the National League of Cities decision to specific cases of state claims of sovereign

\[1\] 426 U.S. 883.
rights has proven difficult however, and subsequent Supreme Court decisions appeared to abandon the decision altogether. In 1985 National League of Cities was overturned in Garcia v. San Antonio Metropolitan Transit Authority. 2

THE TENTH AMENDMENT: STATES AS SOVEREIGN ENTITIES

The Tenth Amendment has always been regarded as being at the core of constitutional protection of state sovereignty. It states that: "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." The federal courts, however, have consistently upheld congressional enactments preempting the actions of states in those areas identified under Article I of the U.S. Constitution as exclusive powers of the U.S. government. 3 While it may be obvious that "[t]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution," the prevalent judicial interpretation of the sovereign protections extended to states concludes that the Tenth Amendment embodies a constitutional mandate "that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 4 Consequently, the Tenth Amendment has been interpreted as identifying the sovereign authority of states in both a residual and exclusionary manner.

This pattern of judicial interpretation reveals a fundamental constitutional paradox in American federalism. If the federal government, under clear constitutional authority, enacts legislation that directly or indirectly preempts state authority or actions in a functional area, how can a state claim exclusive sovereign authority (i.e., immunity from federal intervention) over that area under the Tenth Amendment without thwarting federal objectives? If the actions of a state could be considered immune from federal intervention, the Congress would be unable to exercise its constitutional powers. On the other hand, if the Congress preempts state authority in most functional areas, what is left of the state as a sovereign political entity?

If the Tenth Amendment were interpreted broadly and the powers of the U.S. government were interpreted narrowly, we would have to conclude that the task of providing basic social welfare services (e.g., regulation, education) in the American system falls primarily on state and local governments. The ability of these governments to provide such services gives definition not only to their integrity as political entities but also to the distribution of

2105 S. Ct. 1005.
sovereign authority within the federal system as a whole. It can be argued therefore that Congress should not legislate in any manner that impairs the abilities of state and local governments to provide services at levels chosen by their respective representative bodies. If the Congress does legislate in such a manner, the effect may be to compromise the policy choices of those representative bodies and to undermine their sovereign authority.

The critical debate has focused on whether the Congress is checked by a fundamental constitutional requirement that state sovereignty not be violated or whether the Congress simply demurs from preempting state authority for political reasons. Those who argue that a constitutional requirement exists bear the burden of identifying which powers or services must be ascribed to state and local governments in order to fulfill the constitutional prescription of state sovereignty implied in the Tenth Amendment. Initial attempts to identify services "essential" or "integral" to a state's sovereign existence focused on those services that have been traditionally provided by state and local governments, since they represent allocative choices of a state's political actors. These are services that citizens have collectively decided to provide through public means, decisions which require, as acts of self-governance, constitutional protection.⁶

This approach, however, ultimately leads to the conclusion that the process rather than the outcome of political choices forms the core of sovereign authority. What is critical to the protection of state sovereignty, then, is not the provision of any particular set of services selected by a representative body, but rather that process by which public allocative decisions are given effect. To interfere with a state's ability to provide a service which it has traditionally provided, it has been argued, would deny effect to the political choices of the state's representative bodies and "leave a [S]tate formally intact but functionally a gutted shell."³⁷

A more fruitful approach to identifying those dimensions of state sovereignty protected by the Tenth Amendment would be to recognize that the U.S. Constitution preserves the basic political institutions and processes of the states. All federal enactments that intervene in functional areas addressed by legitimate state action in effect compromise the legislative intent of state representative bodies and infringe on a state's basic political sovereignty.⁸ Since the U.S. Constitution established a federal system that purposely demarcated states as sovereign entities, the question becomes one of


⁸Abrams, "On Reading and Using the Tenth Amendment," 735-737, esp. note 79.
whether a particular congressional enactment could in fact threaten the existence of states as so defined. Enactments that could impair the ability of states to function as autonomous political entities (i.e., those that encompass core aspects of a state's legislative process and those appropriate executive activities that give legitimate legislative decisions effect) would be prohibited by the Tenth Amendment.9

THE ELEVENTH AMENDMENT: THE REACH OF FEDERAL JUDICIAL JURISDICTION

The Eleventh Amendment establishes a measure of sovereign immunity of states from private damage judgments in the federal courts, stating specifically that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The courts have broadly interpreted the Eleventh Amendment as a jurisdictional bar against the federal government.10

With respect to a constitutional protection of state sovereignty, the critical question is whether the Eleventh Amendment can be read as an absolute bar against suits brought against sovereign political entities. Legal scholars who have examined the debates on this issue in the constitutional convention, the ratification conventions, and The Federalist (particularly in Nos. 80 and 81 written by Alexander Hamilton) have concluded that no consensus on this issue was reached during the founding period.11 Consequently, the prevailing judicial interpretation holds that the Eleventh Amendment does not establish an independent requirement of state sovereignty but rather leaves the preexisting common law sovereignty of states basically unimpaired.12 In essence, whatever sovereign immunity was enjoyed by states under common law remains intact until diminished by explicitly authorized congressional action.13

With respect to the application of the Eleventh Amendment, the Supreme Court has generally focused more on "the concept of [State] sovereign immunity of which it is a reminder" than on a narrower reading of the amend-

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9Ibid., 735, note 66 and Davidson and Butters, "Parker and Usery," 604, note 135.
13Field, "Part One," 537-545, esp. notes 97 and 98.
ment's language which might allow suits to impair or threaten a state's ability to function as an independent entity. The broader reading of the Eleventh Amendment has forced the Court to consider the circumstances in which the Congress may authorize suits against states and thereby threaten their basic sovereignty. Essentially, the Court has held that the amendment bars suits against states in which the outcome would entail the recovery of monetary damages, an interpretation seen by many legal scholars as a constitutional confirmation of state sovereignty directly attributable to the Eleventh Amendment.

This presents another paradox in the constitutional protection of state sovereignty. Under its delegated powers and the Supremacy Clause, the Congress is clearly capable of authorizing suits against states that raise federal questions. In its application of the Eleventh Amendment, however, the Supreme Court has accepted both state sovereignty as a common law doctrine rather than a constitutional requirement and the precondition that a state must consent to being sued, implying a realm of state sovereignty impervious to congressional intervention. The paradox of the Court's position is obvious: the Congress is unfettered in its capacity to pass enactments that preempt state action, including those which grant federal court jurisdiction to enforce the enactments; yet a state must first consent to a suit brought against it under those enactments.

The Court attempted to establish some guidelines for applying the state consent requirement in Parden v. Terminal Railway (1964) by stipulating that states had voluntarily consented to congressional plenary powers and federal supremacy when they ratified the Constitution and had thereby surrendered a portion of their sovereignty. Furthermore, the Parden Court maintained that a state, in effect, consents to suit in federal courts when it enacts laws and/or engages in activities in functional areas that are under federal

14 Tribe, "Unraveling National League of Cities," 1071. This position was essentially laid out in Hans v. Louisiana 134 U.S. 1 (1890): 15, but has since been interpreted as an over-reading of the language and the intent of those who drafted the Eleventh Amendment. The narrower interpretation saw the amendment as a direct response to the Court's ruling in Chisolm v. Georgia 2 U.S. 419 (1793) and an attempt to restrain the federal courts, standing alone, from creating causes of action against states. Cf. Nowak, "Scope of Congressional Power," 1430-1441, Gibbons, "The Eleventh Amendment and State Sovereign Immunity," 1920-1939, and Engdahl, "Immunity and Accountability." 9.


18 Field, "Congressional Imposition," 1212-1218.

regulatory jurisdiction. As a conscious state choice, enactments or activities in areas of federal jurisdiction are interpreted as an implied state waiver of whatever immunity is afforded by the Eleventh Amendment. In most subsequent cases, however, the Court has sustained implied consent in areas of congressional enactments only when the enactments explicitly authorize suit in its enforcement provisions.

CONSTITUTIONAL PRECONDITIONS FOR FEDERAL PREEMPTION

Based on the ratification debates and subsequent Supreme Court interpretations, it is difficult to argue that either the Tenth or Eleventh Amendment creates an explicit constitutional requirement that state sovereignty be protected beyond the general principle that states must continue as functioning independent political entities in order to preserve the designed character of the federal system. In cases heard under both amendments, the Supreme Court has consistently held that the federal government, acting under its powers, may preempt areas of state action and authorize suit in federal courts to enforce that preemption. In all of these cases, however, the Court has required that congressional enactments be clearly pursuant to plenary powers and explicitly designed to preempt either state action (in the case of federal regulatory enactments) or state immunity (in the case of congressional authorization of suit against states).

The initial burden rests with the Congress to show that it has the constitutional authority to preempt state action and, in the case of a particular piece of federal legislation, that it has expressly done so. If the Congress enacts law within its powers and expresses a clear intent to preempt state action, then the Supremacy Clause invalidates state laws or activities pursuant to state laws that are inconsistent with the federal law. In the presence of a valid congressional enactment, the Court has held that a state law or activity is preempted automatically when: (1) the state law actually conflicts with federal statutes such that compliance with both federal and state statutes is

21Ibid., 192–193. This type of consent is usually termed an implied or “constructive” waiver of sovereignty; see Tribe, “Intergovernmental Immunities,” 688–693.
impossible, or the state law stands as an obstacle to the accomplishment of federal objectives; or (2) when the state, through its law or activity, attempts to act in a field exclusively occupied by federal regulation, as evidenced by the sheer scope of federal regulation in that field and/or the presence of a clearly dominant federal regulatory purpose. At this point, the legitimacy or importance of the state law is not a consideration; when in conflict with a valid federal law, any contrary state law must yield.

In the absence of an express federal intent to preempt state action, the burden shifts to the state to show that it has acted in its sovereign capacity. If the state can show that its law or activity is integral to its functioning as a sovereign entity in the federal system, it is presumed to be protected under the implicit Tenth Amendment mandate that Congress avoid impairing the ability of the state to function as an independent entity. The absence of express federal preemption and the presence of a legitimate state purpose has prompted the Supreme Court to attempt to balance the legitimate sovereign interests of the federal and state governments, a balance that tends to favor a state when it is acting in its sovereign capacity. While Congress can admittedly preempt even the most legitimate or "vital" of state purposes under its powers, the Court has required that such a congressional enactment contain express preemptive language creating an exclusive federal field of regulation.

Over the past hundred years, the regulation of commerce and trade has provoked a continuous confrontation of federal powers and state sovereignty. Specifically, the constitutional battle lines have been drawn between a state's legitimate right to regulate local economic affairs and the federal government's legitimate interest in promoting competition under the Commerce Clause. Since the purpose of the Commerce Clause is to restrict state actions that adversely affect the flow of interstate commerce, federal adjudication of state claims for sovereign immunity from federal interference has generally focused on the impact of a state activity rather than on its purpose or nature. As with other areas of preemption, legitimate state action can be preempted by federal action through a congressional enactment that signifies an explicit federal intent to occupy a regulatory field exclusively. In such a case, the state action is invalidated under the Supremacy Clause. In the

26 Rice v. Santa Fe Elevator Corp. 331 U.S. 218 (1947): 230. While local regulation may conflict with the terms of federal regulation, it has in some cases been upheld as fundamentally consistent with federal objectives; see Huron Portland Cement v. Detroit 362 U.S. 440 (1960): 446 and Ray v. Atlantic Richfield Co., 165-166.
absence of clear congressional intent to preempt state action however, the
Constitution requires the recognition and accommodation of legitimate in-
terests of both the federal and state governments.

In cases involving the Commerce Clause, the federal interest is clear even
in the absence of explicit congressional enactments: the Commerce Clause
stands as a restriction on state actions when those actions have significant
adverse effects on interstate commerce.\textsuperscript{31} As the impact on interstate
commerce is found to be less significant, the federal courts have tended to balance
the severity of impact against the importance of the intended state pur-
pose.\textsuperscript{32} In \textit{Pike v. Bruce Church} (1970), the Supreme Court formulated
guidelines for establishing such a balance, guidelines that focus both on the
nature of the impact and on the importance of the state purpose served by
the allegedly conflicting state action:

Where the [state] statute regulates evenhandedly to effectuate a legitimate local
public interest, and its effects on interstate commerce are only incidental, it
will be upheld unless the burden imposed on such commerce is clearly excessive
in relation to the putative local benefits. If a legitimate local purpose is found,
then the question becomes one of degree. And the extent of the burden that
will be tolerated will of course depend on the nature of the local interest in-
volved, and on whether it could be promoted as well with a lesser impact on
interstate activities.\textsuperscript{33}

Using the \textit{Pike} guidelines, the Supreme Court has frequently upheld the state
exercise of traditional police power when local interests are being served, the
impact on interstate commerce is incidental, and other implementing
mechanisms are not available.\textsuperscript{34} Generally, the Court has extended greater
leniency from the restrictions of the Commerce Clause to proprietary (as op-
posed to governmental) interests because these types of state activities do
not ordinarily have a substantial effect on interstate commerce, and are not
the kinds of state actions targeted by the Commerce Clause.\textsuperscript{35}

**THE BOUNDS OF FEDERAL PREEMPTION: PARKER V. BROWN**

The question of whether states are appropriate respondents to federal regu-
lation under the Commerce Clause was first raised in a challenge to the Sher-
man Antitrust Act (1890) in *Parker v. Brown* in 1943.\(^{26}\) The Sherman Act declares monopolization, conspiracy to monopolize, or contracts in restraint of trade or commerce among the states to be illegal.\(^{37}\) The intentions of the act were clear with respect to states and were based on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.\(^{38}\)

The Congress supplemented the general prohibitions of the Sherman Act with more specific behavior prohibitions and severe (triple) damage awards in the Clayton Antitrust Act (1914).\(^{39}\)

The *Parker* ruling contained the first explicit recognition by the Supreme Court that state sovereignty under the Tenth Amendment poses a limitation on the reach of federal regulation under the Commerce Clause. The nature of the Court's argument, however, created some ambiguity as to whether the Tenth Amendment in fact requires state sovereign immunity from the reach of the Sherman Act. From the outset, the Court admitted that the allegedly anticompetitive activity of a state would have been a clear violation of the Sherman Act had the activity been conducted by a private party, indicating clearly that the Court considered the nature of the actor to be more critical to a determination of immunity from the Sherman Act's provisions than the nature of the activity itself.

But the Court found that, whereas the Congress had the authority under the Commerce Clause to prohibit such state activities, it had not expressly done so in the Sherman Act.\(^{40}\) Searching through the language and legislative history of the act, the Court concluded that the Congress never intended to preempt state-sanctioned anticompetitive activity.\(^{41}\) Although the Sherman Act contains no language explicitly exempting states from its restrictions, legal scholars have concluded that such an exemption is consistent with the expressed goals of the legislation.\(^{42}\) In the absence of a clear congressional intent to preempt such state action, the Court concluded that constitutional principles of federalism protect state policy prerogatives if the state is acting in its sovereign capacity.

The *Parker* decision left unsettled two rather significant issues. First, there has been considerable debate among legal scholars concerning the exact source of the apparent immunity espoused by the Court. The broader interpreta-

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\(^{26}\) As cited in note 29.


\(^{40}\) *Parker v. Brown*, 351.

\(^{41}\) Ibid., 350–351.

tion of the ruling holds that the *Parker* majority recognized that a state has the sovereign (substantive) right to regulate its own economic activities free of federal interference, and that *any* federal interference would be inappropriate under basic principles of federalism.\(^{43}\) The narrower interpretation holds that the *Parker* majority ruled against the inclusion of states under the provisions of the act because federal imposition of Sherman Act liabilities on states would be inappropriate to sustaining the balance of sovereign interests in the federal system.\(^{44}\) That in turn would imply that Sherman restrictions are indeed within the purview of congressional prerogatives, so long as the enforcement provisions do not impair a state’s functional independence.\(^{45}\)

This implication raises a second and perhaps more important issue. The federal courts and legal scholars tend to refer to the *Parker* ruling as mandating a “state action exemption,” a phrase which implies a fundamental constitutional requirement to protect state sovereignty. Yet neither the Constitution nor the Sherman or Clayton Acts stipulates such an “exemption.” The Court later admitted that such a reference was more likened to a “judicial shorthand expression” than an established constitutional principle.\(^{46}\) To be precise, however, an exemption would be a deliberate decision on the part of a legislative body to exclude a particular subgroup of persons or activities from the reach of the legislative enactment. The fact that the Congress has legislated a number of exemptions to federal antitrust laws indicates that an exemption is fundamentally a legislative act rather than a judicial interpretation of legislative intent.\(^{47}\) The *Parker* ruling therefore must be read in the narrower sense, namely, that the Congress in the Sherman Act did not explicitly preempt states from engaging in the types of actions restricted of other actors under its provisions. Congress could have, but did not. In the absence of a clear congressional intent to preempt, the Court simply presumed, consistent with the common law notion of state sovereignty discussed above, that the act did not preempt.\(^{48}\)

The federal courts have generally followed the narrower line in applying

\(^{43}\)Davidson and Butters, “*Parker and Usury,*” 587–588. This interpretation of *Parker* as a right-to-regulation rather than a case of inappropriate damages is in part based on the fact that *Parker* was brought as an equity case seeking injunctive relief only.


\(^{45}\)See notes 59–64 and accompanying text.

\(^{46}\) *Lafayette v. Louisiana Power and Light*, 393, note 8.

\(^{47}\) Berenson, “The Antitrust Liability,” 371–372 and Cronin, “Alternative Approaches to Municipal Antitrust Liability,” 53, note 16. Cronin points out in note 97 (page 64) that exemptions are never presumed by the federal courts with respect to federal statutes that clearly embody dominant national policy objectives (such as the Sherman Act). Moreover, exemptions would be extremely difficult to substantiate from either the legislative history or the implied intent of the Congress.

the *Parker* ruling. Most frequently they have ignored questions of whether states enjoy an exemption and focused instead on whether a state, in its allegedly anticompetitive activities, can be considered to be "acting in its sovereignty capacity." Subsequent rulings developed two basic prerequisites for determining whether a state is acting in its sovereign capacity and is, therefore, qualified for *Parker* immunity in the absence of a clear congressional intent to preempt state action:

1. the presence of a "clearly articulated and affirmatively expressed state policy" to supplant competition, either through expressed policy or through legislative contemplation of the kinds of anticompetitive implementing activities that are likely to result from the state policy; and
2. an active state involvement in the implementation of the state policy, whether implementation is carried out by public or private actors.

The second standard becomes more difficult to apply if a state, in an expressed policy, delegates authority to a private actor (who might well be violating the Sherman Act if engaged in similar activities in a private role) to implement that policy. The Court has ruled, however, that *Parker* immunity can be extended to private actors if their actions are explicitly authorized by a state, compelled by a state policy, and necessary to the achievement of the state objectives outlined in the policy.

**NATIONAL LEAGUE OF CITIES AND ITS LEGACY**

The Supreme Court ruling in *National League of Cities v. Usery* marked a wide deviation from this pattern. Under *Parker*, the overriding question was whether Congress intended to preempt state law or state activities. If congressional intent was not explicit and if the nature of the state law was such that a state could be said to have acted in its sovereign capacity to further a legitimate state interest, then the state law would be upheld under the Tenth Amendment and the broader federalist principles contained in the Constitution. In *National League of Cities*, the Court heard a challenge to the 1974

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amendments to the Fair Labor Standards Act that had extended federal wage regulations to cover almost all employees of states and their political subdivisions.

The Court's ruling contained reasoning and language that clearly implies that the Constitution requires protection of some areas of state functioning from federal encroachment, even if the congressional intent to preempt state action is explicit. The Court majority conceded that Congress may exercise power under the Commerce Clause, but maintained that the Constitution protects attributes of state sovereignty that cannot be ignored by acts of Congress. It concluded that the 1974 amendments constitute a "congressionally imposed displacement of state decisions," amounting to a displacement of a state's "freedom to structure integral operations in the areas of traditional governmental services," a freedom protected from federal encroachment by "the federalist system of government embodied in the Constitution." However, the Court majority did not explain what types of state services, which they had alternatively described as "integral," "essential," "traditional," and "typical," were to be constitutionally protected in this manner. Moreover, in arriving at its decision, the majority discounted the significance of both the explicitness of congressional intent (the key element under Parker) and the actual impact of the federal enactments upon the functioning of state governments.

Because of the lack of specificity as to the source of this protection or the types of state activities so protected, National League of Cities proved in subsequent cases to be a very weak foundation for state sovereignty arguments. With respect to the narrower question of which services are constitutionally protected, efforts to provide substantive (and constitutionally sustainable) definitions of "integral" or "traditional" state services failed to produce workable standards. In the first six years, over 200 challenges were filed against federal legislation under arguments based on National League of Cities, yet only a handful succeeded at the district court level and

52 29 U.S.C. Sect. 203. The effect of the 1974 amendments was to remove exemptions previously afforded states and their political subdivisions under the Fair Labor Standards Act. See note 65 and accompanying text.
53 National League of Cities v. Usery, 845.
54 Ibid., 849-852.
none survived on appeal.\textsuperscript{57} With respect to the broader question of federal preemptory authority under the Constitution, federal courts have continuously recognized that Tenth Amendment protection does not constrain the range of federal enactments under the defense powers (Art. I, Sect. 8, cls. 11–14), spending powers (Art. I, Sect. 8, cl. 1), or enforcement powers under the Thirteenth, Fourteenth, and Fifteenth Amendments.\textsuperscript{58}

A graphic illustration of the weakness of \textit{National League of Cities} as a precedent was presented in the 1983 case of \textit{Equal Employment Opportunity Commission (EEOC) v. Wyoming}.\textsuperscript{59} \textit{National League of Cities} had been uniformly interpreted by the federal courts as establishing a three-pronged test for determining whether a federal enactment violates state sovereignty to such a degree that the Constitution requires that the enactment be set aside:

1. Does the federal enactment regulate states directly?
2. Does the federal enactment address matters that are undisputably attributes of state sovereignty?
3. Does the federal enactment directly impair a state’s ability to structure integral operations in areas of traditional governmental functions?\textsuperscript{60}

The majority in \textit{National League of Cities} concluded that all three conditions were present, implying (but not specifying or documenting) that the impairment produced was fiscal.\textsuperscript{61}

In \textit{EEOC v. Wyoming}, the Court considered a challenge to the extension of the Age Discrimination in Employment Act\textsuperscript{62} to state governments and their political subdivisions. In this case, the Court attempted to clarify the \textit{National League of Cities} ruling by establishing standards for assessing the degree to which a federal enactment impairs state sovereignty. The EEOC majority determined that sufficient impairment to warrant Tenth Amendment protection is present when (1) a federal enactment overrides state policy objectives to such an extent that it leaves the state no practicable means for discharging a sovereign function, and (2) the enactment inflicts damage, fiscal or otherwise, on state and local functions not directly involved in the federal


\textsuperscript{59}460 U.S. 226 (1983).


\textsuperscript{61}\textit{National League of Cities v. Usery}, 846–850.

\textsuperscript{62}29 U.S.C. 621–634. The same law (P.L. 93-259) extended coverage of both the Age Discrimination in Employment Act and the Fair Labor Standards Act to state and local government employees. Amendments related to the latter were challenged in \textit{National League of Cities v. Usery}. 
regulation. If the damage claimed is fiscal, a state bears the burden of documenting that the enactment actually depletes state and local treasuries. If the damage claimed is not fiscal, a state bears the burden of documenting that the enactment frustrates state and local policy objectives of real breadth and importance. The EEOC Court, in requiring that both conditions be present to sustain unconstitutional impairment to state sovereignty, established that a state must bear the burden of demonstrating not only impairment but also a significant degree of "hardship" imposed by the enactment.

In 1984, the Court heard a challenge to the failure of a metropolitan transit authority to implement regulatory provisions under the same 1974 amendments to the Fair Labor Standards Act. In late 1979, the U.S. Department of Labor had published FLSA guidelines that identified mass transit as a nontraditional state and local function and thereby outside Tenth Amendment protection. Instead of deciding the case on its facts alone, and perhaps responding to the case history since 1976, the Court invited rearguments on whether the National League of Cities ruling should be reconsidered. The decision, in Garcia v. San Antonio Metropolitan Transit Authority, was handed down in early 1985.

Garcia overturned National League of Cities altogether. Instead of focusing on the usual application of the three-pronged test, the majority addressed the broader question of whether any core definition of state sovereignty can be sustained constitutionally. It concluded that it could not, stating that a judicial appraisal of whether a particular governmental function is integral to state sovereignty is "unsound in principle and workable in practice." The Court reaffirmed that while states do retain sovereign authority, that authority is constitutionally "residuary" and its protection lies in the structure of the federal government itself rather than in a constitutional immunity extended to particular state functions.

WHITHER STATE SOVEREIGNTY?

The rulings in EEOC and Garcia negating National League of Cities as a precedent in state sovereignty cases are consistent with the pattern of Supreme Court decisions regarding state sovereignty over the past fifty years. State

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65As cited in note 2. The guidelines challenged were formulated to implement the same 1974 amendments to the FLSA as were originally challenged in National League of Cities v. Usery; see note 52 and accompanying text.
66Garcia v. San Antonio Metropolitan Transit Authority, 1016. It has been argued by many legal scholars that such a conclusion had, in fact, been accepted by the Court in cases for the two years prior to Garcia; see Rorunda, "Doctrines of Conditional Preemption," 296-318 and Berner, "The Repudiation of National League of Cities," 1071-1076.
67Garcia v. San Antonio Metropolitan Transit Authority, 1017-1019.
sovereignty is constitutionally protected only to the degree that it does not obstruct explicit congressional enactments under delegated powers. Attempts to identify the provision of specific services as traditional, essential, or integral to the sovereign existence of states have proven fruitless due to the wide variations in services provided by the states. While state and local governments are likely to be more knowledgeable of local needs and conditions and, thereby, more capable of choosing the appropriate means of addressing those needs, their policy choices may not, under the Supremacy Clause, impair implementation of legitimate federal policy decisions.

The accurate measure of constitutional protection afforded to state sovereignty by the Supreme Court was succinctly defined by the Parker ruling over forty years ago when the Court reasoned that, in the absence of explicit federal preemption under delegated powers and acting in its sovereign capacity in areas of legitimate state interests, a state may act free (but not immune in any constitutional sense) from federal encroachment. In this regard, a state has real and significant safeguards: federal enactments must be pursuant to plenary powers and must be explicit in their intent to preempt state action. Moreover, it cannot be ignored that federal enactments must run the gamut of political forces in the Congress in which state interests are explicitly represented under the Constitution.

The role of the federal courts in protecting state sovereignty is, and has always been, rather well defined: to determine whether federal enactments are consistent with the U.S. government's powers under the Constitution and if so, whether those enactments are expressly designed to preempt state action. Such recent cases as EEOC and Garcia raise again the question of whether federal enactments can preempt state action to such a degree that states are no longer able to function as independent sovereign entities in the federal system. By overturning the National League of Cities decision, the U.S. Supreme Court has reaffirmed the common law interpretation of the Tenth Amendment protections. This interpretation finds state sovereignty to be residuary. Since, at the same time, the Court reiterated that state sovereign interests are adequately protected by the representative structure in the Congress, it seems unlikely that the federal courts will again attempt to identify a core of state functions that are constitutionally immune from federal preemption.