"Phoenix Rising" and Federalism Analysis

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Introduction

Within a short time of its issuance, the United States Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority*[1] spawned a debate among legal analysts and national politicians that has grown to significant proportions.[2] Such a reaction to the Supreme

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1. 105 S. Ct. 1005 (1985). The *Garcia* decision established that Congress violated no federal constitutional limit on its Commerce Clause power in affording the employees of San Antonio's public mass-transit system the minimum wage and overtime protections of the Fair Labor Standards Act of 1938, as amended in 1974 (the "FLSA"). 29 U.S.C. §§ 201-219 (1974). The Supreme Court ruled that application of the FLSA requirements to employees of a state governmental agency did not infringe Tenth Amendment principles of state sovereignty and federalism. In its course, the Court overruled National League of Cities v. Usery, 426 U.S. 833 (1976), which had determined that the Tenth Amendment prohibited federal regulation of the wages and hours of state employees. The *National League of Cities* opinion enunciated Tenth Amendment standards forbidding Congressional regulation of interstate commerce that affected the "States as States" and unduly interfered with the states' "integral governmental functions." *Id.* at 845, 851. The Court in *Garcia* reasoned that *National League of Cities* standards had proven unworkable as guidelines for delineating the boundaries of state immunity from congressional commerce regulation. Moreover, the *Garcia* opinion considered judicial efforts to draw such boundaries to be inconsistent with the very principles of federalism upon which *National League of Cities* had rested. *Garcia,* 105 S. Ct. at 1014.

2. Within less than one year after the Supreme Court decided the *Garcia* case, no fewer than seventeen legal analyses of *Garcia*'s tenth amendment doctrine were published in academic and professional journals. *See* Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine,* 99 HARV. L. REV. 84 (1985); Frickey, *A Further Comment on Stare Decisis and the Overruling of* National League of Cities, 2 CONST. COMM. 341 (1985); Horace, *The Changing Landscape of Federalism: The Supreme Court Rejects* National League of Cities *and Affirmative State Rights in* Garcia v. San Antonio Metropolitan Transit Authority, 28 WASH. U.J. URB. & CONTEMP. L. 445 (1985); Kostyack, National League of Cities v. Usery *Overruled: States No Longer Immune From Federal Commerce Clause Power in Area of Traditional Government Functions,* 14 STETSON L. REV. 786 (1985); Van Alstyne, *The Second Death of Federalism,* 83 MICH. L. REV. 1709 (1985); Comment, National League of Cities Overruled—*Supreme Court Rejects Tenth Amendment as an Affirmative Limitation on Congress' Power Under the Commerce Clause,* 13 FLA. ST. U.L. REV. 277 (1985); Comment, Garcia v. San Antonio Metropolitan Transit Authority *and the Manifest Destiny of Congressional Power,* 8 HARV. J.L. & PUB. POL'Y 745 (1985); Comment, Garcia v. San Antonio Metropolitan *Transit Authority: Dismantling a Nation of Many Sovereign States,*

Court's ruling leaves the decided impression that *Garcia* is a case of some importance, a milestone in the evolution of the constitutional doctrine of federalism. Whether *Garcia* will mark a radical shift in the jurisprudence of federalism, with major practical ramifications in the balance of federal and state economic regulatory powers, or whether the case is destined for a quick and unceremonious overruling is a question of some moment. This Article evaluates the probable significance of *Garcia* for the development of the constitutional doctrine of federalism.

There is reason to suggest that *Garcia* represents little more than an ephemeral stage in the development of the doctrine of federalism. Over the past two centuries, the United States Supreme Court's interpretations of the constitutional allocation of federal and state economic and police regulatory powers reveal a striking pattern.[3] Initially, the Court establishes its doctrinal conceptualization of the federalism balance. Then, from the contradictions of the Court's justifications for the doctrine, a

37 MERCER L. REV. 523 (1985); Comment, Garcia v. San Antonio Metropolitan Transit Authority: *Is the Political Process a Sufficient Safeguard to State Autonomy*, 13 W. ST. U.L. REV. 523 (1985); Bottdorff, *High Court Ruling on Overtime Pay Crawls into Action: Contrary Bill Pending*, L.A. Daily J., Nov. 4, 1985, at 1, col. 2; Chapple, *Washington's Labyrinthine Ways*, 8 URB. STATE & LOC. L. NEWSL., Summer 1985, at 3; Connor & Witkowski, *Public Employers Meet the FLSA*, FLA. B.J., July-Aug. 1985, at 33; Cooper, *'Garcia' Could Subject Civil Servants to Wage Law*, 7 Legal Times, Mar. 18, 1985, at 20, col. 1; Heuvel, *Public Employers Subject to Fair Labor Standards Act*, 58 WIS. B. BULL., Oct. 1985, at 17; Howard, *Federalism Under Fire? With Luck, High-Court Justices Will See Error of Overtime Ruling*, L.A. Daily J., Oct. 24, 1985, at 4, col. 3; McCarthy, Garcia v. Metropolitan Transit Authority *and "Our Federalism": Random Thoughts*, 8 URB. STATE & LOC. L. NEWSL., Summer 1985, at 2; Stewart, *Court Flip-Flops on Tenth Amendment*, 71 A.B.A. J. 114 (1985).

Congress recently amended the Fair Labor Standards Act of 1938, Pub. L. No. 99-150, 54 U.S.L.W. 3-4, to relieve part of the potential economic burden that the *Garcia* decision might otherwise have placed on state and local governments. The amendment allows state and local governmental agencies to offer employees additional compensatory time off in lieu of overtime pay, and limits employees to prospective relief only for violations of the Fair Labor Standards Act by states and their political subdivisions.

3. This Article focuses exclusively upon the Supreme Court's doctrine of federalism under the Commerce Clause and the Tenth Amendment. Apart from seminal rulings concerning the federal taxing and spending powers, *see, e.g.*, United States v. Kahriger, 345 U.S. 22 (1953); United States v. Butler, 297 U.S. 1 (1936); intergovernmental tax and regulatory immunities, *see, e.g.*, New York v. United States, 326 U.S. 572 (1946); Johnson v. Maryland, 254 U.S. 51 (1920); and Congressional enforcement of the Civil Rights Amendments, *see, e.g.*, City of Rome v. United States, 446 U.S. 156 (1980); Katzenbach v. Morgan, 384 U.S. 641 (1966); United States v. Guest, 383 U.S. 745 (1966); the major constitutional principles of federalism have been forged with respect to federal and state economic and police regulatory powers under the doctrines of the Commerce Clause and the Tenth Amendment. The Commerce Clause provides, in pertinent part: "The Congress shall have Power . . . [t]o regulate Commerce with foreign nations, and among the several States . . . ." U.S. CONST. art. I, § 8. The Tenth Amendment provides: "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.

different concept emerges, undermining and replacing the former doctrine. Later, this pattern repeats itself: the new doctrinal concept, threatened by an opposition to its underlying justifications, eventually crumbles, and gives birth to an entirely new federalism doctrine.

Surprisingly, this pattern replicates the evolution of the "Phoenix," the self-perpetuating beast of Assyrian and Greek mythology.[4] This observation may appear unorthodox at first, since one seldom seeks frameworks for constitutional analysis in mythology.[5] Nevertheless, the myth of the Phoenix and the stages of federalism doctrine in the area of congressional commerce regulation bear uncanny similarities. The analogy of the evolving eras of the Supreme Court's federalism doctrine to consecutive generations of the Phoenix proves useful in evaluating *Garcia*'s ultimate impact on federalism principles and possible developments in the constitutional design for federal-state relations in the future.

I. The Phoenix Myth and Structures in the Stages of Federalism Doctrine

Consider the Greek historian Ovid's account of the tale of "Phoenix Rising":

> Most beings spring from other individuals, but there is a certain kind which reproduces itself. The Assyrians call it the Phoenix. It does not live on fruit or flowers, but on frankincense and myrrh. When it has lived five hundred years, it builds itself a nest in the branches of an oak, or on the top of a palm tree. In this it collects spices and incense, and of these materials builds a pile on which it lies to die, giving out its last breath among the perfumed odors. From the body of the parent bird, a young Phoenix issues forth, destined to live as long a life as its predecessor. When the youth has gained sufficient strength, it lifts the body of its parent on its back, and flies with it to the Temple of the Sun, where it deposits

4. *See infra* text accompanying note 6, recounting the tale of "Phoenix Rising," as narrated by the Greek historian, Ovid.

5. It should go without saying that I am not promoting Assyrian or Greek mythology as a source of authority or as a methodology for constitutional interpretation. The tale of the "Phoenix" merely presents an interesting and elucidating context in which to examine the constitutional doctrine of federalism. Any apologia should be unnecessary, however, given the tradition of "myth-telling" in constitutional theory. Consider the celebrated fiction of the "social contract," traditionally employed as a justification for the legitimacy of judicial constitutional review. *See, e.g.*, E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 61-89 (1959) (relationship of social contract theory associated with Hobbes and Locke to institutions of constitutional supremacy and federal judicial review); J. STEINBERG, LOCKE, ROUSSEAU, AND THE IDEA OF CONSENT (1978) (role of consent in theory of liberal democracy).

the corpse to be consumed in flames of fragrance.[6]

The myth of the Phoenix is analogous to the evolution of federalism doctrine in at least three respects. First, just as the Phoenix feasts on spices and incense, tokens of worship, the Commerce Clause and Tenth Amendment doctrines feed on lofty constitutional principles that the federal judiciary claims to observe and to venerate.[7]

Second, the Phoenix lives a measured life, and from the body of the dead parent springs a young Phoenix. Similarly, past doctrines of federalism have all expired cyclically, creating the present expectation of impermanence in the *Garcia* doctrine.[8] Moreover, from the decline in every era of Commerce Clause or Tenth Amendment doctrine, the same fundamental principle of federalism is reborn, although cast in a new and different form.[9]

The third similarity is as important as the second. After gaining strength, the young Phoenix carries its parent to the Temple of the Sun, where the corpse burns amidst perfumed odors. When each successive federalism doctrine is well established, the Supreme Court acknowledges the normative rationales and values that the dead doctrine had attempted to serve. By giving credence to the rationales and values of the former generation of doctrine, the Court leads the existing doctrine to its death. The ascendancy of the former rationales and values by way of a new doctrinal rule promotes an alternating pattern of justifications for consec-

6. Paraphrased from T. BULLFINCH, THE AGE OF FABLE 310-11 (Heritage Press ed. 1942).

7. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833, 845 (1976) ("There are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."); United States v. Darby, 312 U.S. 100, 114 (1941) (Congress' power over interstate commerce can "neither be enlarged nor diminished by the exercise or non-exercise of state power. . . . It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."); United States v. E.C. Knight Co., 156 U.S. 1, 13 (1895) ("It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed. . . ."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188-89 (1824) ("[I]f, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.").

8. As this Article will fully explain, the prevailing theories of federalism in the area of Congressional commerce regulation have enjoyed surprisingly brief favor, given the fundamental nature of the issues involved.

9. *See infra* text accompanying notes 10-11, 18 for an articulation of the "central federalism principle."

utive stages of federalism doctrine, a dialectic in doctrinal vindication.[10]

The United States Supreme Court's interpretation of the Constitution has produced four generations of federalism Phoenixes to date: (1) the period of internal restraints on Congress' commerce power, from 1887 to 1937; (2) the period of expansive Commerce Clause rulings; (3) the ascendancy of the Tenth Amendment in *National League of Cities v. Usery*; (4) the ruling in *Garcia*.

As a discrete stage in federalism doctrine, each Phoenix characterizes the Supreme Court's continuing efforts to preserve a single, central principle of federalism. This principle is that the structure, text and history of the United States Constitution understand that state governments possess an identity and capacity that may not be destroyed by the federal government; the federal government, in turn, possesses an identity and capacity that the states may not destroy.

Although embodying the spirit of the central federalism principle, each Phoenix is distinguished by its doctrinal "form." Two other attributes identify each new generation of federalism doctrine. Each Phoenix is characterized by the predominant "justification" given for its doctrinal form, and by the "defect" latent within its form that eventually leads to its demise and to the birth of a new Phoenix.

As this Article examines the birth and death of the four Phoenixes, important theoretical features in the development of Commerce Clause and Tenth Amendment doctrine will become apparent. Analysis of the forms, justifications, and defects of the Phoenixes reveals that the United States Supreme Court has used distinct modes or techniques to construct the successive generations of federalism doctrine. These modes of doctrinal construction illuminate particularly viable avenues of future doctrinal change for a Court aiming to rework the federalism balance after *Garcia*.

10. This Article will demonstrate that the United States Supreme Court has justified rules of federal judicial restraint on congressional economic regulatory power by asserting federal judicial protection of the states' separate and independent existence. In contrast, the Court also has justified expansion of such congressional powers vis-a-vis the states by asserting implied limitations on federal judicial review of congressional legislation under a principle of political representation of states' interests in the Congress. These justifications have alternated with the waxing and waning of congressional powers in the successive stages of Commerce Clause and Tenth Amendment doctrine. *See infra* note 34 and accompanying text ("Phoenix I" use of principle of judicial protection of states' separate and independent existence); *infra* notes 43-45 and accompanying text ("Phoenix II" use of political representation principle); *infra* notes 49-57 and accompanying text ("Phoenix III" use of principle of judicial protection of states' separate and independent existence); *infra* notes 68-75 and accompanying text ("Phoenix IV" use of political representation principle); *infra* notes 79-80, 85-87, 90, 114-115 and accompanying text (probable use of principle of judicial protection of states' separate and independent existence in "Phoenix V").

II. Origins of the Phoenix

Although analysis of Commerce Clause and Tenth Amendment doctrine begins with "Phoenix I," the period of judicial activism from 1887 to 1937,[11] the earlier celebrated Commerce Clause and federalism decisions of Chief Justice Marshall introduced seminal concepts that characterized the first Phoenix and all of its following forms. Justice Marshall's opinions in *McCulloch v. Maryland*[12] and *Gibbons v. Ogden*[13] articulated the central principle of federalism and the two recurrent themes later used as justifications for particular forms of the federalism principle.[14] Moreover, Justice Marshall's definition of the federal commerce power contained the germ for the form of Phoenix I.

McCulloch v. Maryland invalidated Maryland's imposition of a tax on the Second Bank of the United States.[15] Justice Marshall's opinion established that the federal government, although limited in its powers, is supreme within its sphere of action. Supremacy, Marshall reasoned, means the ability to exercise plenary powers within the federal sphere of action.[16] This includes the capacity to remove all unauthorized obstacles to those powers posed by the state governments.[17] Within its appropriate sphere of activity, the federal government cannot be controlled by any state.

Justice Marshall's theory of federal power describes the central principle of federalism:[18] the sovereignty of government, whether it be federal or state, is defined by an inherent sphere of authority and essential functioning within this sphere that cannot be destroyed or coopted by another government. This central federalism principle underlies the distinct forms of the four Phoenixes examined in the following discussion.

Moreover, Justice Marshall's justification for federal supremacy is the germ of an argument that will be called the "political representation

11. The Supreme Court first became seriously involved in review of congressional action under the Commerce Clause only after passage of the Interstate Commerce Act in 1887, 49 U.S.C. § 501 (1982), and the Sherman Antitrust Act in 1890, 15 U.S.C. § 1 (1982).

12. 17 U.S. (4 Wheat.) 316 (1819).

13. 22 U.S. (9 Wheat.) 1 (1824).

14. *See supra* note 10.

15. *McCulloch,* 17 U.S. (4 Wheat.) at 436.

16. [T]he government of the Union, though limited in its powers, is supreme within its sphere of action. . . . It is the government of all; its powers are delegated by all; it represents all, and acts for all. . . . The nation, on those subjects on which it can act, must necessarily bind its component parts.

Id. at 405.

17. "[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.* at 436.

18. *See supra* text accompanying notes 10-11.

principle." This principle is one of the recurrent themes used as a justification for particular forms of federalism doctrine.[19] The political representation principle asserts that the governmental functions and operations created by the people of one sovereignty cannot be trusted to the regulation of another sovereignty unless the people are given political representation there as well. As applied in *McCulloch,* the principle prohibited the people of Maryland from interfering with the operations of a national bank created by the people of all the states to achieve a national objective. The Maryland legislature could not be trusted to represent in any meaningful manner the interests of the entire nation.[20] Within the Phoenixes, however, the political representation principle has been applied to justify congressional regulation touching upon the economic and police regulatory interests of state governments.[21] In such a context, the political representation principle will not encounter the same sovereignty conflict as in *McCulloch*: because the states are represented in the national legislature, the federal judiciary will presume that Congressional exercises of power take the important interests of the states into meaningful consideration.

Gibbons v. Ogden invalidated New York's grant of a steamboat monopoly because it conflicted with a federal licensing statute regulating interstate navigation.[22] Chief Justice Marshall defined Congress' commerce power to include regulation of all commercial transactions concerning or affecting more than one state, even if such transactions are actually conducted wholly within one state.[23] Only commerce that is "completely internal to a state" is outside of the federal government's control. This definition of the Congressional commerce power, based upon a division of separate and limited spheres of plenary regulatory authority, was consistent with Justice Marshall's conception of federalism in *McCulloch.*[24]

19. *See supra* note 10.

20. *McCulloch,* 17 U.S. (4 Wheat.) at 431 ("In the legislature of the Union alone, [we] are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.").

21. *See infra* notes 43-45 and accompanying text ("Phoenix II" use of political representation principle), and notes 68-75 and accompanying text ("Phoenix IV" use of political representation principle).

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

23. *Id.* at 194 (the external boundaries of the various states do not make commercial transactions that affect other states intrastate in nature).

24. *Id.* at 195 (control of the "completely internal commerce of a State" would be "reserved for the State itself" because the power to regulate such commerce had not been delegated to the federal government).

Justice Marshall's definition of the federal commerce power in *Gibbons* planted the seeds for two concepts that are important in the later stages of federalism doctrine. First, *Gibbons* contained the germ for the form of Phoenix I, the theory of "dual sovereignty."[25] Basically, "dual sovereignty" is the notion of "two mutually exclusive, reciprocally limiting fields of power."[26] By excluding from the federal commerce power the control of completely internal commerce of the states, *Gibbons* led to judicial efforts to delineate respective spheres of federal and state economic regulatory powers. Although Justice Marshall never delimited federal commerce powers to specific and proper purposes and objects of federal regulation, as the Court would in Phoenix I, his recognition of separate federal and state spheres of commerce assisted the spawning of the dual sovereignty theory.

Second, although Justice Marshall's opinion in *Gibbons* relied upon the political representation principle,[27] it introduced the other recurrent theme used as a justification for particular forms of federalism doctrine in the Phoenixes.[28] This theme will be called the "principle of judicial protection of the states' separate and independent existence." In Marshall's words, this principle comprehends that "our complex system [presents] the rare and difficult scheme of one general government . . . which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union," and that "the one [cannot exercise], or has [no] right to exercise, the powers of the other."[29] By positing a theoretical limit to federal exercise of the commerce power, the opinion set the groundwork for the principle of judicial protection of the states' separate and independent existence that later would serve as a justification for rejecting forms of federalism doctrine inspired by the political representation principle.

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25. *See infra* notes 30-35 and accompanying text.

26. E. CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS 135 (1936).

27. *Gibbons* made clear that Marshall trusted the political restraints of state representation in Congress to safeguard state interests in federal commerce regulation. Marshall emphasized that

> power over commerce . . . is vested in Congress as absolutely as it would be in a single government . . . [and 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 they have relied, to secure them from its abuse.

Gibbons, 22 U.S. (9 Wheat.) at 197.

28. *See supra* note 10.

29. *Gibbons*, 22 U.S. (9 Wheat.) at 204-05.

III. Phoenix I: Theory of Dual Sovereignty and Judicial Enforcement of Internal Restraints on Commerce Power

In Commerce Clause history, the period from 1887 to 1937 is remembered for the United States Supreme Court decisions striking congressional legislation as unauthorized under its commerce powers, particularly the decisions nullifying several of President Franklin Roosevelt's New Deal measures.[30] The Supreme Court achieved these results by imposing restraints on the scope of Congress' power under the Commerce Clause. The Court defined and enforced limits that it considered to be inherent in the concept of interstate commerce. By specifying the regulatory objectives and types of activities that properly belong to interstate commerce, the doctrine rigidly differentiated federal and state spheres of economic regulation.

The case of *United States v. E.C. Knight, Co.*[31] is representative of the Commerce Clause and federalism doctrines of Phoenix I. *E.C. Knight* established that congressional antitrust legislation could not regulate the manufacturing activities of industrial monopolies. The Court categorized the activities related to transportation of manufactured goods as objects of commerce, therefore within the reach of Congress' power; however, activities related to the manufacture of the goods were classified as objects outside of commerce or prior to commerce, therefore beyond the reach of legislation enacted under the Commerce Clause. The Court explained that its definition of Congress' commerce powers, encompassing only those activities reasonably connected to interstate transportation, protected state governments' traditional economic and police powers to regulate internal matters of productive industries. If the federal commerce power included the regulation of manufacturing monopolies, it would logically include regulation of all productive industries in all their aspects. Congress would then be authorized to control all the

30. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating Bituminous Coal Conservation Act of 1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating National Industry Recovery Act of 1933); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (invalidating Railroad Retirement Act of 1934). The Court's rejection of New Deal measures was not reserved to interpretations of the Commerce Clause. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) (invalidating a state law establishing minimum wages for women as a violation of the Fourteenth Amendment Due Process Clause); United States v. Butler, 297 U.S. 1 (1936) (invalidating Agricultural Adjustment Act of 1933 as an unconstitutional exercise of congressional taxing and spending powers); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (invalidating the petroleum code under NIRA on the ground of excessive delegation of legislative power to the executive).

31. 156 U.S. 1 (1895).

detailed concerns of local business operations.[32]

The example of *E.C. Knight* well illustrates the form in which Phoenix I embodied the central federalism principle. The doctrine of dual sovereignty assumed that Congress' commerce powers and the states' police powers must be mutually exclusive and separate, both as to the classes of activities regulated and as to the objectives of regulation.[33] By defining proper and improper objects of Congress' commerce powers, the dual sovereignty perspective subdivided the world of economic regulation into federal and state spheres, with reciprocally limiting fields of authority.

As *E.C. Knight* demonstrates, Phoenix I justified the federalism doctrine of dual sovereignty by the principle of judicial protection of the states' separate and independent existence. The Court aimed to preserve for state control the realm of contract and property in internal business operations. Were the federal commerce power extended to all contracts and combinations in manufacture, the Court surmised, there would be little left of the traditional state economic regulatory powers.[34]

The doctrine of dual sovereignty, however, contained the seed of its own destruction. To categorize federal and state realms of power, the judiciary was required to characterize a regulatory interest as federal or state in nature. This characterization depended to a great extent upon the level of abstraction at which the interest was evaluated. In part, the breadth of the federal commerce power was a function of the level of abstraction in the judicial definition of the relevant market.

For example, in regard to the definitional problem presented by *E.C. Knight,* the Court was able to characterize corporate mergers and consolidations as matters for state control because it treated manufacturing located wholly in one state as a market distinct and separate from transportation within the same industry.[35] The Court might well have viewed

32. "[A]n inevitable result [would follow] that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management." *Id.* at 15 (citing Kidd v. Pearson, 128 U.S. 1, 21 (1888)).

33. *See* E. CORWIN *supra* note 26, at 135.

34. *E.C. Knight,* 156 U.S. at 16.

35. The power to regulate commerce "may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce." *E.C. Knight,* 156 U.S. at 12. The Supreme Court's conclusion that commerce succeeds to manufacture and is not a part of it was not logically compelled. To the extent that interstate commerce could be defined broadly or narrowly, the choice of level of abstraction demanded some external normative justification in order to fortify the *E.C. Knight* holding. In Phoenix I, the doctrine of dual sovereignty and the principle of the states' separate and independent existence attempted to serve such a purpose.

the relevant regulatory market to be the integrated manufacturing and transportation of a nationwide industry, and might have assumed that monopolization of manufacturing would affect the national distribution of the product. On this higher level of abstraction for defining Commerce Clause interests, the Court easily might have applied its reasoning in *E.C. Knight* to conclude that any one state could not effectively control the relevant national market by exercising its local police powers. In short, the problem of level of abstraction in characterization of federal and state interests, that is, the potential variations of characterization based on different levels of abstraction, was the internal defect in the theory of dual sovereignty that eventually led to the death of Phoenix I.

IV. Phoenix II: Expansive Commerce Clause Doctrine and Cooperative Federalism

By 1937, the Court appreciated the indefensibility of the dual sovereignty doctrine as a theory of Congress' power under the Commerce Clause. The judiciary's categorical distinctions among integrated processes of national industries had denied any effective power to the federal government to control economic problems arising from the manufacture of products distributed on a national scale. Moreover, the prospect of competitive economic disadvantage was likely to deter a state from stringent regulation of productive industries. With the decision of *NLRB v. Jones & Laughlin Steel Corp.*,[36] Phoenix I was laid to rest.

Jones & Laughlin Steel upheld Congress' power to regulate labor relations at a production plant operated by a nationwide mining, manufacturing, and sales corporation. The Court reasoned that labor disputes relating to production could have an immediate and substantial effect on interstate transportation of the product and that control of labor relations would be appropriate to protect commerce from obstructions.[37] Openly attacking the categorical doctrine of Phoenix I, the *Jones & Laughlin Steel* opinion recognized that the intrastate or local nature of an activity would not determine the reach of the Commerce Clause; rather, the Court would look to the effect of an activity upon commerce

36. 301 U.S. 1 (1937).

37. [T]he fact remains that the stoppage of [Jones & Laughlin's] operations by industrial strife would have a most serious effect upon interstate commerce . . . [so] how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?

Id. at 41.

to validate an exercise of the commerce power.[38]

The new form of the central federalism principle in Phoenix II manifested itself most clearly in *Wickard v. Filburn*[39] and *United States v. Darby*.[40] *Wickard* sustained federal farm production controls when applied to wheat grown by an Ohio farmer solely for his family's consumption. The Court established that Congress may regulate an activity, however local its nature or trivial its interstate impact, provided Congress reasonably found that the aggregate class of similar activities would have a substantial economic effect on interstate commerce.[41] Because the home consumption of all farmers like Mr. Wickard might substantially influence the national demand for wheat in the open market, Congress' power under the Commerce Clause properly extended to Mr. Wickard. *United States v. Darby* upheld the original Fair Labor Standards Act, which prescribed minimum wages and maximum hours for employees in the private production of goods for interstate commerce. The *Darby* opinion endorsed Congress' use of the commerce power to affect public health, morals, or welfare transactions that were traditionally subject to state police power regulation.[42]

Together, *Wickard* and *Darby* articulated a doctrine of cooperative federalism premised on the idea that national socio-economic policy is the joint product of federal and state regulation. The doctrine of cooperative federalism acknowledged that the spheres of federal commerce power and of traditional state economic and police regulatory powers overlapped. Accordingly, the federal judiciary abandoned its efforts to differentiate rigidly between the two spheres. Cooperative federalism was characterized, therefore, by extreme judicial deference to congressional exercises of the commerce power to achieve national socio-economic or

38. Although acknowledging the concerns of *E.C. Knight*, *id.* at 34-36, the Court in *Jones & Laughlin Steel* refused to characterize interstate commerce on the lower, narrower level of abstraction used in Phoenix I, and thereby undermined the categorical differentiation in the inherent natures of interstate and intrastate economic activities prevalent in Phoenix I. *Id.* at 36-43.

39. 317 U.S. 111 (1942).

40. 312 U.S. 100 (1941).

41. *Wickard*, 317 U.S. at 128-29.

42. As the Court stated in *Darby:*

> Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. . . . It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.

312 U.S. at 114 (citations omitted).

police power ends.[43]

The Supreme Court justified its deference to congressional police power regulation by way of the political representation principle: because Congress is more institutionally competent to set national socio-economic policy, conflicts between federal and state police power objectives would have to be resolved in political arenas, not in the courts. The Court in *Wickard* cited Chief Justice Marshall's opinion in *Gibbons v. Ogden* for the proposition that effective restraints on the federal commerce power depended upon the national political processes.[44] Phoenix II, the doctrine of cooperative federalism could be counted on to preserve the central federalism principle: state representation in the national legislature would safeguard the interests most essential to the continued existence and meaningful operation of the states as political entities.

Buried in the doctrine of cooperative federalism, however, was the defect that would destroy Phoenix II. After *Wickard* and *Darby,* the Commerce Clause appeared to contain few, if any, internal restraints that could be judicially enforced. Congress might regulate any activity, whether intrastate or interstate in scope, provided Congress reasonably considered the class of all similar activities to have a substantial effect on interstate commerce. Moreover, Congress could regulate such activities even when its motive was a noncommercial, police power purpose, and even though the effect on commerce stemmed from sources not traditionally viewed as economic or commercial.[45] Given such an expansive definition of Congress' commerce power, judicial limitation of federal commerce regulation was virtually impossible by way of internal Commerce Clause restraints.

Unless the federal judiciary were to abdicate review of Congressional commerce legislation, Phoenix II required the Supreme Court to look outside of the Commerce Clause for meaningful restraints to federal

43. *Darby* opened the door for this "hands-off" judicial policy by announcing flatly, "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." *Id.* at 115 (citations omitted).

44. *Wickard*, 317 U.S. at 120 (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-95 (1819)).

45. Even the reasonableness of Congress' judgments were not to be seriously questioned by the judiciary, as the Supreme Court made abundantly clear by its later decisions in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964), which upheld Congress' exercise of the commerce power in enacting Title II of the Civil Rights Act of 1964, prohibiting racial discrimination in places of public accommodation. These decisions established that the federal courts must defer to a congressional finding that an activity affected interstate commerce and to a congressional selection of means to regulate that activity, if there were any conceivable rational basis for Congress' actions, whether or not presented in the legislative history.

commerce power. Federal economic regulation that seriously threatened the identity and capacity of the states could be tempered only by external limitations on Congress' commerce power. In fact, the *Darby* opinion planted the seed of the very restraint that would come to life in Phoenix III: the Tenth Amendment's recognition of the reserved powers of state sovereignty.[46] At its maturity, therefore, Phoenix II pointed to the avenue of doctrinal change that would give birth to a new Phoenix.

V. Phoenix III: *National League of Cities v. Usery* and the Ascendancy of the Tenth Amendment

National League of Cities v. Usery[47] presented circumstances conducive for the Court to assert an external restraint on Congress' commerce powers and to give life to the Tenth Amendment. After the Supreme Court's endorsement of the original Fair Labor Standards Act in *Darby,* Congress amended the FLSA several times.[48] The 1974 amendments extended the minimum wage and maximum hours provisions to almost all employees of state governments and their political subdivisions. *National League of Cities* invalidated the 1974 amendments on the basis of the Tenth Amendment. The Supreme Court reasoned that the Tenth Amendment, like the guarantees of individual rights in the first eight amendments, places external substantive restraints on the otherwise plenary power of Congress to regulate interstate commerce.[49]

46. *Darby* itself found no Tenth Amendment restriction on Congress' authority to regulate the wages and hours of private business employees. The Court in *Darby* dismissed the Tenth Amendment by asserting, "[o]ur conclusion is unaffected by the Tenth Amendment . . . [which] states but a truism that all is retained which has not been surrendered." *Darby*, 312 U.S. at 123-24. Nevertheless, the opinion introduced the germ of an external federalism restraint that might possibly be cultivated under more conducive circumstances.

47. 426 U.S. 833 (1976).

48. The provisions of the Fair Labor Standards Act material to this Article are 29 U.S.C. §§ 203, 206 & 207 (1982); accordingly, only amendments to those sections are noted here. 29 U.S.C. § 203 (definitions) was amended in 1949 (Act of Oct. 26), 1961 (Act of May 5), 1966 (Act of Sept. 23), 1972 (Act of June 23), and 1974 (Act of April 8). 29 U.S.C. § 206 (specifying minimum wage) was amended in 1949 (Act of Oct. 26), 1955 (Act of Aug. 12), 1956 (Act of Aug. 8), 1961 (Act of May 5), 1963 (Act of June 10), 1966 (Act of Sept. 23), and 1974 (Act of April 8). 29 U.S.C. § 207 (specifying maximum hours in a work week) was amended in 1949 (Act of June 20), 1961 (Act of May 5), 1966 (Act of Sept. 23), and 1974 (Act of April 8). Detailed commentary on the substance of these amendments is unnecessary, since only the 1974 amendment to section 203, which defined "employer" to include entities of states and political subdivisions and "employee" to include employees of such entities, is directly relevant to this Article.

49. *National League of Cities*, 426 U.S. at 833. The Tenth Amendment prohibits federal legislation of commerce directed at "States as States" that interferes with the States' authority to make determinations regarding "functions essential to [their] separate and independent existence." *Id.* at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)). Having defined the power to structure employer-employee relations as an "undoubted attribute of state sover-

In Phoenix III, a new form of the central federalism principle issued from the Tenth Amendment doctrine of *National League of Cities*. As the guardian of the reserved powers of the states, the Supreme Court would prevent Congress from exercising its Commerce Clause authority in a manner that impaired the states' integrity as governmental units. The Tenth Amendment would demand that the judiciary inquire whether or not Congress had displaced the freedom of the states to structure their policies and operations in traditional areas of legal regulation and administration of public services.[50]

The principle of judicial protection of the states' separate and independent existence served as the justification for the doctrine of Phoenix III.[51] Just as Phoenix III repeated the justification given for dual sovereignty in Phoenix I, Phoenix III contained an internal defect similar to that of Phoenix I. The standards for application of the Tenth Amendment required the federal judiciary to articulate "essential attributes of state sovereignty," "integral state operations" and "traditional state functions."[52] Like dual sovereignty in Phoenix I, therefore, Tenth Amendment doctrine demanded a categorical, qualitative analysis for restraints on the Commerce Clause. In order to establish what are "essential attributes," "integral operations" or "traditional functions," the Court must have a determinate theory of what a state must be and of how a state must function in the federal system.

Justice Brennan's dissent in *National League of Cities* highlighted the problems presented by the Tenth Amendment qualitative analysis.[53] First, he argued that the standards adopted by the majority presumed that the concept of state sovereignty has some inherent meaning, some definite and unalterable nature.[54] But, is it possible to posit any essential attributes or integral functions of state sovereignty, in the sense of opera-

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eignty," the Court concluded that the 1974 amendments impaired the states' "ability to function effectively in a federal system." *National League of Cities,* 426 U.S. at 852 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

50. The Tenth Amendment would protect the states' power to structure activities "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *National League of Cities,* 426 U.S. at 851.

51. The Court explained in *National League of Cities*:

> Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental . . . decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."

Id.

52. *Id.* at 849, 851, 852.

53. *Id.* at 856-80 (Brennan, J., dissenting).

54. *Id.* at 863-64.

tions without which there could be no state?[55] Arguably, the "state" is not a thing, or even a value, but a dynamic set of more or less exchangeable relations or functions. Second, the standards could not refer to tradition as a measure of essential state operations and functions without fixing the concept of state sovereignty in time and substance.[56] Third, because the doctrine depended upon judicial definition of the essential nature of state sovereignty, the doctrine challenged the political representation principle the Court had embraced in its Commerce Clause cases since 1937.[57]

Within seven years of the *National League of Cities* decision, the difficulties intrinsic to Tenth Amendment categorical qualitative analysis had weakened Phoenix III. The force of *National League of Cities* was rapidly undermined by several methods of doctrinal manipulation. Because *National League of Cities* had not specified which particular state activities were immune from federal commerce regulation, the Tenth Amendment standards permitted ad hoc judicial characterization of state functions as "integral" or "nonintegral," "traditional" or "nontraditional." By categorizing areas of activity as "nonintegral," or by introducing new criteria to label an activity "nontraditional," federal courts exempted whole regulatory fields from the protective umbrella of the Tenth Amendment. For instance, in the Supreme Courts' 1982 decision in *United Transportation Union v. Long Island Railroad Co.*,[58] that subjected a state-owned railroad to the collective bargaining regulations of the Federal Railway Labor Act, the Court held that the operation of a railroad engaged in interstate commerce is not an integral part of traditional state activities. The set of traditional activities, the Court explained, is not determined entirely by historical state practices; rather, state entry into a market already regulated by the federal government

55. Applying the doctrine of *National League of Cities*, federal courts have identified the following activities, among others, as traditional governmental functions: regulating ambulance services, Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956, 967-69 (W.D. Mo. 1982), *aff'd on other grounds*, 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864; operating a municipal airport, Amersbach v. City of Cleveland, 598 F.2d 1033, 1037-38 (6th Cir. 1979); performing solid waste disposal, Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1196 (6th Cir. 1981). Would a state cease to exist or cease to function as a "state" if it were not empowered to regulate, free of substantial federal restraints, ambulance, airport, and waste disposal services?

56. *National League of Cities*, 426 U.S. at 866 (Brennan, J., dissenting).

57. *See supra* note 44 and accompanying text. The Court in United States v. Darby, 312 U.S. 100, 115 (1941), declared its faith in the capacity of the national senators and representatives of the various states to vigorously defend state interests, so that legislative measures emanating from a proper exercise of the democratic process in Congress would never seriously undermine the essence of state sovereignty.

58. 455 U.S. 678 (1982).

will imply knowing state acceptance of the federal controls that condition competition with private businesses.[59]

Another method by which the Supreme Court sapped the force of Tenth Amendment doctrine was the rationale that "the greater power includes the lesser"; that is, where Congress has the constitutional power to preempt an entire regulatory field, Congress may condition state administrative participation upon compliance with federal standards. The Supreme Court employed this rationale to uphold federal electrical utility legislation in *FERC v. Mississippi.*[60] Recognizing that Congress could have preempted the states entirely in the regulation of private utilities, the Court held that Congress can permit the states to continue regulating private utilities on the condition that the state legislatures consider the adoption of federal regulatory standards according to procedures outlined in the legislation. The Tenth Amendment would not bar congressional efforts to use state governmental machinery to advance federal goals by encouraging state promulgation of federal programs.[61] Given the Tenth Amendment constraints of *National League of Cities, FERC* authorized an unprecedented expansion of congressional power to control the content and manner of states' lawmaking processes.

The Supreme Court most severely crippled Tenth Amendment doctrine, however, in the 1983 case of *EEOC v. Wyoming.*[62] The decision held that federal age discrimination regulations did not violate Tenth Amendment principles when applied to the retirement policies of Wyoming state game wardens. The majority's analysis characterized *National League of Cities* as establishing a "functional doctrine" of governmental immunity.[63] With this characterization, the Court trans-

59. *Id.* at 687 ("[T]here 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.").

60. 456 U.S. 742 (1982).

61. The Court did, however, acknowledge that legislative and administrative authority to make fundamental policy decisions is perhaps the quintessential attribute of state sovereignty. "Indeed," the Court stated, "having the power to make decisions and to set policy is what gives the State its sovereign nature." *Id.* at 761. This precise point fueled Justice O'Connor's virulent dissent: by "conscript[ing] state utility commissions into the national bureaucratic army," the federal statute directly regulated "the States as States"; moreover, Congress had impacted "essential attributes of state sovereignty" by specifying the content of federal proposals for consideration by state governments and by dictating how consideration must take place. *Id.* at 775-79 (O'Connor, J., dissenting).

62. 460 U.S. 226 (1983).

63. *Id.* at 236. The purpose of the *National League of Cities* doctrine, according to the *EEOC* Court, was "not to create a sacred province of state autonomy, but to ensure that" the separate and independent existence of the states "not be lost through undue federal interference in certain core state functions." *Id.* at 236.

formed the Tenth Amendment immunity doctrine from a rigid, categorical qualitative analysis to a more flexible, consequentialist, quantitative analysis. The focus of the doctrine shifted from a qualitative determination of the essential attributes of state sovereignty, which could not be burdened by federal commerce regulation, to a quantitative or consequentalist balancing of the severity of federal intrusion in state functions, however essential, traditional, or integral to state sovereignty.[64]

The effect of this transformation was to permit Congress to act directly upon the "States as States" and to regulate "undoubted attributes of state sovereignty," provided that the degree of federal intrusion were judicially approved. Under *EEOC,* Tenth Amendment immunity became the product of a governmental interest comparative impairment analysis, the judicial weighing of incremental costs to state budget and policy objectives against the importance of national regulatory goals. When cast in this balance, the significance of state interests easily could be overcome. Moreover, *EEOC* focused on the same area of state sovereignty in which the *National League of Cities* principles developed: federal regulation of state employment practices. *EEOC* effectively limited *National League of Cities* to its facts and to its characterization of the dramatic, negative impact of federal law upon state fiscal and police power concerns. So limited, *National League of Cities* and Phoenix III were rendered vulnerable.

VI. Phoenix IV: *Garcia* and the Return of Political Safeguards of Federalism

Garcia v. San Antonio Metropolitan Transit Authority[65] served the deathblow to Phoenix III. Overruling *National League of Cities* and repudiating Tenth Amendment doctrine, *Garcia* recognized Congress' power to regulate the wages and hours of state employees under the Fair Labor Standards Act. The Court reasoned that a rule of state immunity from federal regulation that turns upon a judicial evaluation of "integral" or "traditional" state governmental functions was unsound in principle and unworkable in practice.[66]

64. *See* Note, *The Repudiation of* National League of Cities: *The Supreme Court Abandons the State Sovereignty Doctrine,* 69 CORNELL L. REV. 1048, 1072 (1984) (arguing that EEOC v. Wyoming establishes a consequentialist balancing standard permitting federal statutory intrusions in traditional state functions as long as they were deemed "minimal" in their effect on states' ability to function as autonomous units).

65. 105 S. Ct. 1005 (1985).

66. *Id.* at 1016.

Tenth Amendment doctrine was unsound in principle because it emphasized judicial identification of the essentials of state sovereignty to the disservice of democratic self-governance. American federalism guarantees to the states, within the realm of authority left to them under the Constitution, the freedom to engage in any activity chosen by their citizens to promote the common welfare, however unorthodox or untraditional that activity may appear to the federal judiciary. Thus, the Court stated, "[a]ny rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[67]

In the Court's view in *Garcia*, the Tenth Amendment rule of immunity was unworkable in practice because it was incoherent, leading to unpredictable results. First, the identification of certain aspects of political sovereignty as "essential" to state integrity was incoherent because the judiciary lacked manageable and objective standards for establishing the fundamental elements of statehood.[68] Second, reliance on tradition or history as a standard for immunity necessarily led to arbitrary linedrawing. The judiciary was required to decide by fiat how longstanding and serious a pattern of state involvement must be in order to defeat federal regulation.[69] Third, the rule produced a static vision of the core of state sovereignty.[70]

The Court in *Garcia* proposed that the measure of state sovereignty lay not in the Tenth Amendment doctrine, but in the structure of the federal government itself. That structure is designed in part to protect the states from overreaching by Congress. As integral political units in the federalist system, states exert direct influence in the Senate, where they receive equal representation, and indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in presidential elections. Sufficient evidence, the Court argued, attests to the federal political protections of state interests:

67. *Id.* at 1015.

68. *Id.* at 1016 ("We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty. In part, this is because of the elusiveness of objective criteria for 'fundamental' elements of state sovereignty . . . .").

69. *Id.* at 1014 ("Reliance on history as an organizing principle results in linedrawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present . . . .").

70. *Id.* at 1017 ("The power of the Federal Government is a 'power to be respected' as well, and the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies.").

federal grants now account for one-fifth of state and local governmental expenditures; moreover, states "have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause."[71]

By this reasoning, *Garcia* spawned the fourth, and current, Phoenix. Phoenix IV trusts the "political safeguards of federalism" to preserve the identity and capacity of state governments. As the *Garcia* arguments demonstrate, the justification for Phoenix IV is the political representation principle.[72] When operating correctly, the federal political processes will sufficiently account for the fundamental interests of state sovereignty, because of meaningful representation of the states in the federal body politic. Apparently, in Phoenix IV, the only role for judicial review of federal regulation affecting the states is to ensure that the federal political processes have given due consideration to state concerns in deliberations.[73]

The reappearance of the political representation principle in Phoenix IV is likely to entail the same internal defects discovered by the Court in earlier generations of the Phoenix. In fact, the opinions of the four dissenting Justices in *Garcia* voiced the values and rationales that were instrumental in the transition from the doctrine of cooperative federalism in Phoenix II to the ascendancy of the Tenth Amendment in Phoenix III.[74] Moreover, the dissenters asserted that the states ratified the Con-

71. *Id.* at 1019. The historical attempts of states to garner all the benefits of membership in the federal union, but to limit the accompanying burdens, led the *Garcia* Court to conclude:

> In short, 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, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Id. at 1018.

72. *See supra* notes 10, 19 and accompanying text.

73. The five Justices in the *Garcia* majority were

> convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. 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."

Garcia, 105 S. Ct. at 1019-20 (citing *EEOC,* 460 U.S. at 236).

74. The four dissenters, Justice Powell, Chief Justice Burger, Justice Rehnquist and Justice O'Connor, criticized the *Garcia* doctrine for permitting federal political officials to be "the sole judges of the limits of their own power." Such a doctrine, they asserted, is inconsistent with the fundamental precept of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), that it is "emphatically the province and duty of the judicial department to say what the law is." *Garcia,* 105 S. Ct. at 1021 (Powell, J., dissenting). This critique led the dissenters to conclude that the Court must not "[abdicate] responsibility for assessing the constitutionality of [federal

stitution on the condition that they would retain a major role in internal policymaking and administration, a role which could not be preempted by the national government.[75] Justice Powell rejected the view of federalism, which he attributed to the majority, that identifies the states' police and economic regulatory powers as the remainder of those governmental functions that Congress does not subsume under the Commerce Clause.[76] A meaningful concept of federalism, the dissenters would reason, requires constitutional protection of the core of the legitimate interests of "States as States," which the courts must enforce.[77]

The brief dissent of Justice Rehnquist, who authored *National League of Cities,* sounded the death knell of *Garcia* and Phoenix IV. The principle of judicial protection of "essential functions" of state sovereignty, he wrote, "will, I am confident, in time again command the support of a majority of this Court."[78]

VII. Phoenix V: The Future of Supreme Court Federalism Doctrine

If Justice Rehnquist is correct, there is likely to be a fifth Phoenix. In that eventuality the evolution of Commerce Clause and Tenth Amendment doctrines reveals noteworthy bearings by which the development of post-*Garcia* federalism doctrine might be directed. From the foregoing analysis of Phoenixes I through IV, distinct modes or techniques of doctrinal construction emerge. These modes are interesting for at least two reasons. The United States Supreme Court has employed several of these modes with such regularity that they represent virtual patterns in construction of federalism doctrine that may well be repeated in the future. Even more important, however, is the recognition that the modes of doctrinal construction illuminate particularly viable avenues for development of federalism doctrine to undermine *Garcia*. Assuming that these modes are used once again, they point to likely forms for the federalism doctrine of Phoenix V.

The first mode of doctrinal construction is the "transmigration" of the central federalism principle: the manner in which the Supreme Court

regulation] on the ground that affected parties theoretically are able to look out for their own interests through the electoral process." *Id.* at 1026 n.12.

75. *Id.* at 1027-29.

76. The *Garcia* decision, the dissenters charged, "does not identify even a single aspect of state authority that would remain when the Commerce Clause is invoked to justify federal regulation." *Id.* at 1033 (Powell, J., dissenting).

77. *Id.* at 1026 ("The States' role in our system of government is a matter of constitutional law, not of legislative grace.").

78. *Id.* at 1033 (Rehnquist, J., dissenting).

has transplanted the central federalism principle in different constitutional provisions. When internal erosion of existing doctrine threatened the central federalism principle, the Supreme Court has turned for protection of the federalism principle to a different and relatively unshaped constitutional provision. Recall that, faced with the crumbling internal restraints of the Commerce Clause during Phoenix II, the Court turned to the external restraints of the totally unformed and doctrinally fluid Tenth Amendment in Phoenix III. If this mode is repeated, the Tenth Amendment doctrine, severely diluted after *National League of Cities,* likely will not be reaffirmed in Phoenix V, but replaced by a unique doctrine, probably centered in a different constitutional provision.

A second mode, tantamount to a pattern in doctrinal development, is the dialectic exchange in the justifications from one Phoenix to the next. The Supreme Court has protected the central federalism principle either by promoting the judiciary as the guardian of the separate and independent existence of the states to check congressional usurpation of the states' police and economic regulatory powers, or by promoting the national political process as the safeguard of the states' interests with judicial deference to congressional regulatory policies.[79] Because these justifications present two schemes for allocating national decisionmaking authority for federalism issues—schemes that are fundamentally inconsistent—relative preference of one justification over the other is inevitable.[80] At the same time, the emphasis on one justification at the expense of the other is ultimately destabilizing, shifting the Court's concern to the disfavored objective and displacing existing federalism doctrine with rulings appropriate to the Court's shifting focus. Apparently, once the current doctrinal form of the central federalism principle and its justification are well entrenched in the existing Phoenix, judicial recognition of the values and rationales underlying the parent Phoenix brings about a readoption of the former justification and the birth of a new doctrine.

Thus, the principle of judicial protection of the states' separate and independent existence and the political representation principle have replaced each other seriatim as the basic rationales underlying the changing forms of the Phoenixes. In this dialectic, state sovereignty and congressional supremacy, the two major normative values that form the

79. *See supra* notes 10, 19, 28 and accompanying text.

80. Although the political representation principle envisions a different distribution of national governmental decision-making authority than the principle of judicial protection of the states' separate and independent existence, the two are not in conflict in their ultimate objectives; in a sense, they are but different sides of the same coin, that is, how best to preserve the fullest exercise of specifically enumerated national powers while guaranteeing the continued vitality and autonomy of the nation's subparts.

Supreme Court's federalism doctrine, alternatively force the judiciary to activism on the states' behalf or to self-restraint. According to this dialectic, following upon the political representation principle in the *Garcia* doctrine, the principle of judicial protection of the states' separate and independent existence should foster a doctrine in Phoenix V that will reinvest significant socio-economic regulatory power in the state governments which the federal judiciary will enforce.

A third mode, a virtual pattern in doctrinal development, is the introduction of the germ for the succeeding federalism doctrine: the manner in which the Supreme Court decisions that establish the doctrinal form of each Phoenix generally introduce the germ of the form for the following Phoenix. In retrospect, the germ can be identified as a theoretical issue left unresolved in the creation of the existing doctrine. For instance, the germ for the doctrine of dual sovereignty in Phoenix I was planted earlier in Justice Marshall's unsatisfactory accounting of separate federal and state spheres of economic regulatory powers.[81] Similarly, *United States v. Darby,* the pillar of Congress' expansive commerce powers, raised the issue of the Tenth Amendment as an external restraint that was later developed in *National League of Cities.*[82] This mode encourages careful examination of the *Garcia* opinion to detect theoretical weaknesses or inconsistencies with other constitutional doctrines that might lead to the birth of Phoenix V.

Against the background of these modes, several avenues for doctrinal reconstruction after *Garcia* appear particularly well illuminated. Because these routes are already highlighted by unmistakable signals, any or all of them may be propitious avenues for the United States Supreme Court to follow in developing federalism doctrine for the fifth Phoenix. The following analysis explores three such conceptual routes.

A. Route 1: Review of the National Political Process

The *Garcia* decision itself has suggested a first avenue for doctrine in Phoenix V. *Garcia* presumed that national political processes ensure the integrity of state sovereignty: state participation in federal policymaking theoretically prevents excessive congressional overreaching.[83] The Court stressed that judicial limitation of Congress' commerce powers in the interest of the states could only be justified by possible breakdowns in the structural or procedural restraints that protect the states within the na-

81. *See supra* notes 25-26 and accompanying text.

82. United States v. Darby, 312 U.S. 100, 123-24 (1941).

83. *See supra* notes 71-73 and accompanying text.

tional political processes.[84] This emphasis on judicial review of the national political process may be an overture to the birth of the next Phoenix. The federal courts may accept this invitation to develop standards to scrutinize the congressional procedures for enacting commerce legislation that directly burdens the states.

Conceivably, the federal judiciary could adopt review standards to ensure adequate consideration and weighing of state interests implicated in federal interstate commerce regulation. These standards might require a full and fair hearing for state opposition, a deliberate balancing of national and state concerns, and a statement of reasons in the legislative history for accommodating or rejecting the positions of the states in opposition. In fact, current Eleventh Amendment doctrine has evolved such process-oriented review standards for its own purposes.[85] Similar review standards for Commerce Clause and federalism doctrine may appeal to a federal judiciary acting to protect the states' interests in the federal system. The independence and importance of state economic and police regulatory power are reinforced if the courts demand that Congress adopt procedural devices that ensure deliberate consideration of the ramifications for federal-state relations likely to flow from interstate commerce regulation.

In light of *Garcia,* therefore, review of the national political process would represent a reassertion of judicial activism to protect the separate and independent existence of the states.[86] At a minimum, the judiciary would be reluctant to presume casually that "the internal safeguards of the political process have performed as intended."[87]

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84. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of [the] basic limitation [imposed by the constitutional scheme to protect the "States as States"], 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."

Garcia, 105 S. Ct. at 1019-20 (emphasis added).

85. *See infra* notes 101-112 and accompanying text. The Supreme Court has interpreted the Eleventh Amendment as a bar to litigation by private parties against a state in federal court, unless Congress has made a "clear statement" of intent to lift the state's sovereign immunity. *See* Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142 (1985); Employees v. Department of Pub. Health and Welfare of Mo., 411 U.S. 279 (1973). The Eleventh Amendment's "clear statement" rule contemplates that a state's claim of sovereign immunity as a defense to suit in federal court will succeed unless Congress has expressly declared in unmistakable language in the relevant statute that any state that undertakes the regulated conduct has waived its immunity.

86. *See supra* notes 79-80 and accompanying text.

87. *Garcia,* 105 S. Ct. at 1020.

B. Route 2: Dormant Commerce Clause

The Court may choose to reinforce the states' police and economic regulatory powers by abandoning its constitutional doctrine of the Dormant Commerce Clause.[88] In essence, this doctrine asserts that effective federal control of national free trade necessarily implies that states are prohibited from discriminatory or excessive burdens upon interstate and foreign commerce.[89] Under the Dormant Commerce Clause, the federal judiciary has struck state legislation as discriminatory or unduly burdensome to interstate commerce even when Congress had not regulated to the contrary or preempted the field.[90] Such active judicial intervention in economic regulation appears theoretically and practically inconsistent with the doctrine of *Garcia*.

Garcia's judicial deference to Commerce Clause legislation presumes that a proper allocation of federal and state authority in economic regulation derives from a political consensus, from the decisions of politically accountable legislators as to the preferred characteristics and objectives of national free trade. Yet, by invalidating state economic regulation as an interference with the national interest in interstate commerce, the federal judiciary acts in a quasi-legislative capacity. Its pronouncements are not an exercise of binding constitutional review, but may be overridden and corrected by Congressional approval of state economic choices. Moreover, in order to perform competently in this quasi-legislative capacity, the Court must be willing and able to make the type of economic and political policy determinations explicitly disavowed in *Garcia*.

The Dormant Commerce Clause analysis, developed in keynote decisions such as *Kassel v. Consolidated Freightways Corp.*,[91] calls for judicial balancing of the nature and importance of state economic regulatory concerns against the extent of the burden on interstate commerce. Such

88. The Dormant Commerce Clause doctrine recognizes that the affirmative grant of commercial regulatory power to Congress, U.S. CONST. art. I, § 8, negatively implies constitutional limitations upon state interference with interstate commerce. The federal judiciary's enforcement of these limitations, however, is subject to congressional correction. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-2 to 6-12, at 320-42 (1978).

89. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

90. *See, e.g.*, H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 535 (1949) (there exist "great silences of the Constitution" that have allowed the Supreme Court to limit the scope of what the states might do); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522-23 (1935) (the states have forced interstate economic competition to be conducted more through political processes than through the marketplace by being overly responsive to local economic interests). *See also* D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, chs. 6, 7, 10, 12 (1985).

91. 450 U.S. 662 (1981).

balancing is possible only with a preconceived political and economic theory of what national free trade must be and how federal and state regulatory powers should be allocated in realizing the national objectives. Theorizing of this type is, of course, precisely what the Court repudiated in *Garcia* as "unsound in principle and unworkable in practice."[92]

If this theoretical contradiction between *Garcia* and Dormant Commerce Clause analysis escapes judicial attention, a more glaring contradiction faces the Supreme Court at the practical level of applying Dormant Commerce Clause principles. The doctrine has accommodated state economic regulations that establish state-resident preference policies for the distribution of state-owned or state-produced goods and services. Typical is the 1980 Supreme Court decision in *Reeves, Inc. v.*

92. *Garcia,* 105 S. Ct. at 1014-15. The *Garcia* majority rejected a principle of state immunity from federal commercial regulation based upon judicial determination of the constitutionally protected scope of state economic and police regulatory powers. Although the Court was confronted with the issue of congressional encroachment upon state economic and police regulatory powers, a federal court would wrestle with the same theoretical inquiry if faced with the issue of state legislative interference with dormant federal economic regulatory powers. Even if merely sub rosa, the United States Supreme Court similarly is forced to determine the protected scope of state economic and police regulatory powers when it is asked to prevent a state from burdening particular interstate commercial activities under the Dormant Commerce Clause.

Current Dormant Commerce Clause balancing analysis purports to respect state economic regulations directed to achieving traditional police power objectives, such as promotion of local safety and health. The Court in *Kassel* asserted strongly:

> It may be said with confidence, however, that a State's power to regulate commerce is never greater than in matters traditionally of local concern. . . . For example, regulations that touch upon safety—especially highway safety—are those that "the Court has been most reluctant to invalidate." . . . Indeed, "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." . . . Those who would challenge such bona fide safety regulations must overcome a "strong presumption of validity."

Kassel, 450 U.S. at 670 (quoting Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 449 (1978) (Blackmun, J., concurring), and Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959)).

Kassel recognized that the heavy presumption of constitutionality for state economic and police power regulation should be overcome solely on the basis of an excessive burden on interstate commerce. 450 U.S. at 670-71. Under *Garcia,* federal judicial invalidation of state legislation on the avowedly eco-political nature of such an assessment is questionable. Should the federal judiciary not otherwise presume that a burden on interstate commerce, if heavy enough, or on federal economic policy objectives, if weighty enough, will trigger the attention of Congress and an appropriate political response? If Congress had not preempted state economic regulation, should not the federal judiciary presume either that federal interests in national free trade are not threatened or that Congress has silently acquiesced in the states' economic policy choices? *Compare* D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE §§ 11.01 to 11.08, at 260-94 (1974) (impropriety of federal judicial policymaking under Dormant Commerce Clause) *with* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 205-11 (1980) (defending federal judicial role under Dormant Commerce Clause).

Stake,[93] holding that South Dakota, consistent with the Commerce Clause, could confine the sale of cement produced in state-owned plants solely to state customers in a time of market shortage. *Reeves* established that when the state acts as a market participant instead of a market regulator, the state should enjoy the same competitive rights as private industry to favor preferred customers.

This distinction between the proprietary and regulatory functions of state sovereignty is no longer viable after *Garcia*. In arguing that the Tenth Amendment rules were unworkable, the *Garcia* opinion described the Court's experience in the related field of state immunity from federal taxation.[94] The common thread running through the tax immunity cases was the attempt to distinguish taxable state proprietary functions and exempt state governmental functions. When all efforts to evolve a principled test for the distinction failed, the Court finally abandoned the doctrine in the 1946 case of *New York v. United States.*[95] The *Garcia* majority noted simply, "[t]he distinction the Court discarded as unworkable in the field of tax immunity has proved no more fruitful in the field of regulatory immunity under the Commerce Clause."[96]

If the "proprietary/regulatory" characterization is unworkable for state tax immunity and unworkable for Tenth Amendment state immunity from federal commercial regulation, clearly it is unworkable as well for the Dormant Commerce Clause.[97] Without this distinction, of

93. 447 U.S. 429 (1980).

94. *Garcia,* 105 S. Ct. at 1016.

95. 326 U.S. 572, 583 (1946) ("[W]e reject limitations upon the taxing power of Congress derived from such untenable criteria as 'proprietary' against 'governmental' activities of . . . the States . . . .").

96. *Garcia,* 105 S. Ct. at 1014.

97. The rule of constitutional immunity for the proprietary functions of state and local governments has encountered increased resistance in recent decisions of the United States Supreme Court. A four-member plurality of the Court attempted to bolster the intellectual integrity of the "market participant"/"market regulator" distinction for Dormant Commerce Clause doctrine in South-Central Timber Development, Inc. v. Wunnicke, 104 S. Ct. 2237 (1984) (Alaska law requiring that timber taken from state lands be processed within the state prior to export is not exempt from Commerce Clause scrutiny under the "market participant" doctrine). Recognizing that an expansive concept of "market participation" for state immunity from Dormant Commerce Clause restrictions could engulf the rule against excessive state economic burdens on interstate commerce, the plurality reasoned that the "market participant" exception would not permit a state to impose contractual conditions upon its trading partners that have substantial regulatory effects "downstream" in distinct and separate markets in which the state is not an active participant. *Id.* at 2246-47. With surprising candor, the plurality admitted that "the heart of the dispute in this case is disagreement over the definition of the market." *Id.* at 2246. This admission underscores the inherent intellectual insecurity of the "market participant"/"market regulator" distinction. Similar to the distinction between federal and state economic regulatory interests in the "dual sovereignty" doctrine of Phoenix I, *see* text accompanying note 35, this distinction depends upon the level of abstraction in the

course, *all* state resident preference schemes could be subject to invalidation under the Dormant Commerce Clause.[98] The pressure to treat all state economic regulation uniformly under Dormant Commerce Clause standards may give the Supreme Court even greater incentive to abandon the doctrine altogether.

By refusing to act as Congress' watchdog for the interests of national free trade, the Supreme Court would effectively reinvest state and local governments with significant power to control economic markets that have not been regulated directly by Congress. Clearly, in refraining from active intervention in state market regulation, the Court would be paving a doctrinal path in Phoenix V that would be inspired by the principle of judicial protection of the states' separate and independent existence. Since the Dormant Commerce Clause required judicial activism on behalf of federal economic concerns, judicial "passivity" in the abdication of Dormant Commerce Clause review of state legislation would tip the federalism balance in favor of state freedom to exercise economic and police regulatory powers when Congress has not "spoken" to the contrary.

C. Route 3: Eleventh Amendment Sovereign Immunity

A third avenue for Phoenix V is grounded in the Eleventh Amend-

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judicial definition of the relevant market in which the state is a cognizable "participant." The problem of level of abstraction in characterization of "market participation" may be exploited to undermine any differentiation between state involvement in a market and regulation of that market. Certainly, the plurality's disclosure fueled the charge of the dissenting Justices that the line of distinction drawn between the state as "market participant" and as "market regulator" is "both artificial and unconvincing." 104 S. Ct. at 2248 (Rehnquist, O'Connor, JJ., dissenting). *See also id.* at 2247-48 (Brennan, J., concurring) (the plurality's "treatment of the market-participant doctrine and the response of Justice Rehnquist point up the inherent weakness of the doctrine").

Moreover, the Court effectively has confined the rule of constitutional immunity for the proprietary functions of state and local governments to its "market participant" doctrine under the Dormant Commerce Clause. In United Bldg. & Constr. Trades Council of Camden County v. Mayor & Council of Camden, 104 S. Ct. 1020 (1984), the Court held that a municipal ordinance imposing a municipal resident quota for employees of business associations working on city construction contracts violated the Privileges and Immunities Clause. The Court declined to transfer the "market participant"/"market regulator" distinction to the doctrine of the Privileges and Immunities Clause of Article IV. U.S. CONST. art. IV, § 2, cl. 1. The majority reasoned that an analysis fashioned for the Dormant Commerce Clause could not be applied appropriately to a constitutional prohibition imposing a "direct restraint" on state action in the interests of interstate harmony. *Id.* at 1028-29.

98. Under present Dormant Commerce Clause doctrine as represented in *Reeves, see supra* note 93 and accompanying text, the power of a state to establish resident preference policies for the distribution of state-owned or state-produced goods and services depends entirely upon the classification of the state as a "market participant," as opposed to a "market regulator."

ment sovereign immunity doctrine.[99] By overruling *National League of Cities,* the *Garcia* decision has invited a reexamination of Eleventh Amendment theories of state consent to federal court jurisdiction. The federal judiciary might inquire whether states have affirmatively waived their sovereign immunity to federal enforcement of Commerce Clause legislation. Adoption of an Eleventh Amendment waiver doctrine would undermine the presumption in *Garcia* that national political processes safeguard federalism concerns.

Under contemporary Eleventh Amendment doctrine, a state is immune from suits brought against it in federal court without its consent, by citizens of other states or by its own citizens.[100] Congress may require the states to consent to federal court suit under a federal regulatory program as a condition to the operation of state agencies affecting interstate commerce. In *Employees v. Department of Public Health and Welfare of Missouri,* the Supreme Court established that congressional intent to lift Eleventh Amendment immunity was a prerequisite to the loss of that immunity in the federal courts. Congress must articulate its purpose to condition the maintenance of certain state functions upon waiver of Eleventh Amendment immunity by a clear statement on the face of the statute or in undisputed legislative history.[101]

Employees involved a suit by Missouri state health care employees for overtime compensation under the Fair Labor Standards Act Amendments of 1966, that had extended the coverage of the original act to state employees working in hospitals and related institutions. The Supreme Court affirmed a dismissal of the complaint on Eleventh Amendment grounds, holding that, in enacting the 1966 amendments, Congress had not made sufficiently clear its intent to remove the states' constitutional

99. U.S. CONST. amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

100. *See* Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142 (1985); Parden v. Terminal R.R. Co., 337 U.S. 184, 196 (1964); Hans v. Louisiana, 134 U.S. 1, 17-19 (1890).

101. 411 U.S. 279, 284-85 (1973) ("when Congress does act, it may place new or even enormous fiscal burdens on the States. Congress, acting responsibly, would not be presumed to take such action silently.... It would also be surprising ... to infer that Congress deprived Missouri of her constitutional immunity without ... indicating in some way by clear language that the constitutional immunity was swept away."). The Supreme Court's recent decision in Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142 (1985) has clarified and narrowed the "clear statement" rule recognized in *Employees.* The majority opinion established that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion." *Id.* at 3147.

immunity to federal court suit by private citizens.[102]

In their concurrence, Justices Marshall and Stewart argued for a two-pronged test to evaluate the question of Eleventh Amendment waiver: "(1) Did Congress effectively lift the state's veil of sovereign immunity by extending the protections of the FLSA to state employees? [and] (2) Even if Congress did lift the state's immunity, did the state consent explicitly or constructively to congressional removal of its immunity?"[103] Only if both prongs of the test were satisfied would an exercise of federal jurisdiction be permitted under the Eleventh Amendment.

In effect, Justices Marshall and Stewart would have had the Court examine whether Missouri's ongoing health care operations constituted constructive consent by the state to Congress' efforts to remove the state's sovereign immunity. The majority, however, never reached the issue of the state's express or implied consent to federal suit. Because the majority failed to find the necessary congressional intent to lift the state's immunity, it did not need to establish whether a state would have to consent explicitly or constructively to congressional removal of its immunity.

The "clear statement" of congressional purpose found to be missing in *Employees* was furnished by the 1974 amendments to the Fair Labor Standards Act.[104] With the "clear statement" rule satisfied, the time was

102. *Employees,* 411 U.S. at 285. The Court emphasized that the 1966 amendments had not altered the original jurisdictional provision of the FLSA, that generally authorized damages actions "in any court of competent jurisdiction," 29 U.S.C. § 216(b) (1966), so as to provide specifically for federal jurisdiction of damages actions against states brought by their own employees.

103. *Employees,* 411 U.S. at 287 (Marshall, Stewart, JJ., concurring).

104. Section 16(b) of the FLSA was amended in 1974 to provide explicitly for federal and state judicial power to hear FLSA claims brought by private employees against state and local government employers. Prior to the 1974 amendments, section 16(b) read: "[An] action to recover such liability may be maintained in any court of competent jurisdiction . . . ." The provision was amended to read: "[An] action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction . . . ." Act of April 8, 1974, effective May 1, 1984.

Further, the House Committee report accompanying the bill that introduced the language enacted as section 16(b) included a pointed statement that Congress meant to convey its intent to condition operation of state agencies upon consent to federal suit as required by the Supreme Court in *Employees*:

> Section 16(b) of the Act is amended to make it clear that suits by public employees to recover unpaid wages and liquidated damages under such section may be maintained in a Federal or State court of competent jurisdiction. This amendment is intended to overcome that part of the decision of the Supreme Court in *Employees of the Department of Public Health v. Missouri* . . . which stated that Congress had not explicitly provided in enacting the 1966 amendments that newly covered State and local employees could bring an action against their employer in a Federal court under section 16.

H.R. 913, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 2811, 2853.

ripe for the Supreme Court to determine whether Eleventh Amendment waiver depended as well upon the states' express or constructive consent to suit under the FLSA. In 1976, when the 1974 amendments to the FLSA were invalidated as an unconstitutional exercise of Congress' commerce power in *National League of Cities v. Usery,*[105] this question was once again reserved for consideration in a future case.

Now that *National League of Cities* has been overruled by *Garcia,* it is an open question whether the Eleventh Amendment imposes a second condition to suit against a state in federal court under congressional commerce legislation, namely, that a state must have independently consented, either expressly or constructively, to Congress' policy of immunity waiver.[106] This question raises several thorny issues of practical importance to litigation strategy and of normative importance to constitutional federalism doctrine.

First, if the Eleventh Amendment were to require a state's consent to suit in federal court under the Fair Labor Standards Act or similar interstate commerce regulation, how is such consent to be established? Can a state be held to have impliedly waived sovereign immunity by continuing public agency operations after *Garcia* made the 1974 amendments applicable to their activities? In a relevant case, *Parden v. Terminal Railroad Co.,*[107] the Supreme Court held that a state-owned railroad operating in interstate commerce had impliedly consented to suit under the Federal Employers Liability Act.[108] The Court reasoned that, by beginning operation of an interstate railroad twenty years after enactment of the FELA, the state necessarily consented to suits authorized by that Act.[109] Unlike *Parden,* however, the state operations and employ-

105. 426 U.S. 833 (1976).

106. In two recent Eleventh Amendment cases, Edelman v. Jordan, 415 U.S. 615, 672-73 (1974) and Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3149-50 (1985), a majority of the United States Supreme Court refused to find a state waiver of Eleventh Amendment protection on the sole basis of the state's "constructive consent" to federal suit by voluntary participation in a federal program. These rulings should not be understood to take any affirmative stance against a second element in a two-pronged Eleventh Amendment test that would require evidence of a state's independent waiver of immunity by explicit or constructive consent. In neither case would the Court have had reason to consider the Marshall-Stewart proposal in *Employees* for a second prong to the sovereign immunity inquiry, *see supra* text accompanying note 103, since both legislative enactments at issue were held to fall short of an unequivocal expression of congressional intent to abrogate sovereign immunity. *Edelman,* 415 U.S. at 674; *Atascadero,* 105 S. Ct. at 3147-49. Thus, *Edelman* and *Atascadero* reasonably stand only for the proposition that, without a "clear statement" of congressional abrogation, Eleventh Amendment waiver will not be implied under a theory of state "constructive consent" to federal court suit.

107. 377 U.S. 184 (1964).

108. 45 U.S.C. § 51 (1982).

109. *Parden,* 377 U.S. at 184, 196.

ment policies covered by the Fair Labor Standards Act may have been in effect long before *Garcia* confirmed the constitutionality of the 1974 amendments. Despite these differences, should the state be held to constructive consent by failing to cease employment policies in violation of the 1974 amendments?

Second, would a requirement of express or constructive waiver of state immunity bar damages actions in both federal and state courts, or in federal courts only? Justices Marshall and Stewart argued in their concurrence in *Employees* that the Eleventh Amendment provides limitations only upon federal judicial power.[110] In their opinion, Congress could authorize suits against states on federal causes of action brought in state courts.[111] Thus, even if the Eleventh Amendment proved a sufficient defense to a FLSA damages action in federal court, the state courts would be obliged to entertain federal causes of action when Congress so mandated.

In his dissenting opinion, Justice Brennan contested the position of Justices Marshall and Stewart. Justice Brennan characterized their theory as harboring the "paradoxical conclusion" that a state could frustrate enforcement of a federal commerce program in federal court, but would be powerless to prevent enforcement in its own courts.[112] Moreover, the conclusion that Congress may allow suits against states only in state court without express or constructive waiver of immunity to federal suit would be theoretically unwise. Damages actions under the FLSA represent precisely the class of litigation in which federal jurisdiction is preferred because of the conceivable hostility of state judges to federal policy.[113]

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110. While Justices Marshall and Stewart found that "the State has not voluntarily consented to the exercise of federal judicial power over it . . ." in *Employees*, "the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions" against the state. *Employees*, 411 U.S. at 296-98 (Marshall, Stewart, JJ., concurring).

111. *Id.* at 297-98.

112. *Id.* at 316 (Brennan, J., dissenting).

113. As Professor Nowak insightfully has observed, the major drawback in an Eleventh Amendment doctrine that only looks to state courts for the protection of federal programs is that "[s]tates seeking to avoid the impact of the federal regulation could create procedural impediments to the successful pursuit of the remedy in state courts." Nowak, *The Scope of Congressional Power to Create Causes of Action against State Governments*, 75 COLUM. L. REV. 1413, 1443 (1975).

Of course, the issue of the immunity that a state may enjoy in federal or state courts as to damages actions under the FLSA should not frustrate total federal judicial enforcement of the Act. The celebrated *Ex parte Young* fiction should permit federal injunctions running prospectively against state and local governmental agencies to prevent future violations of FLSA standards. *Ex parte* Young, 209 U.S. 123 (1908). Because *Ex parte Young* was based upon the fiction that in such situations the state is not acting through its agent because the agent's unlawful conduct is ultra vires, the doctrine does not permit retroactive compensatory relief

Finally, how would an Eleventh Amendment state waiver doctrine initiate the birth of Phoenix V? Underlying the theory of express or constructive state consent to federal suit is the unavoidable premise that Congress alone cannot subject state governments to federal jurisdiction so as to realize legitimate Commerce Clause objectives. Regardless of the clarity of Congress' purpose to remove state immunity, the doctrine recognizes an independent power of the states to withhold consent to suit, the nature and parameters of which the federal judiciary must define and enforce.[114]

Arguably, the state waiver doctrine would contradict the core rationale of *Garcia*. Under this Eleventh Amendment theory, the measure of state sovereignty is not the self-conscious and purposive determination of the national political processes that weigh the inherent interests of the states against the federal interests in commerce regulation. Rather, the consent requirement creates a rule of state immunity that turns on judicial evaluation of the circumstances in which a state may be found to have waived its privilege of sovereignty. Supreme Court adoption of the Eleventh Amendment state waiver doctrine, therefore, may well undermine the *Garcia* vision of federalism. It may vindicate the dissenters' position that only judicial protection of fundamental aspects of state sovereignty can preserve their separate and independent existence.[115]

Conclusion

"Prognostics do not always prove prophecies—at least the wisest prophets make sure of the event first."[116]—Horace Walpole, Fourth Earl of Oxford

This Article presented the eras of Commerce Clause and Tenth Amendment doctrines as consecutive generations of Phoenixes. As in

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where the state agency will be ultimately responsible for the payment. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

It is likely, nevertheless, that a state or municipal government employee bringing suit for past violation of the FLSA would seek retroactive restitutionary relief. A claim for overtime pay unlawfully withheld by a government employer, for example, would only be effectively satisfied by a damages award. If, as Justice Brennan proposes in *Employees,* the Eleventh Amendment would bar suit in state courts when it applies to federal court actions, the employee of a governmental agency would be prevented from obtaining retroactive monetary relief in any forum. At best, state and local public agencies could, one by one, be drawn into court by aggrieved employees seeking prospective injunctions.

114. *See Employees*, 411 U.S. at 294-95 (Marshall, Stewart, JJ., concurring) ("The issue, then, is whether the State has consented to [a] suit [brought by private citizens pursuant to a federal statute].").

115. *See supra* notes 74-78 and accompanying text.

116. Letters to Thomas Walpole, Feb. 19, 1785.

the Phoenix, one spirit—the central federalism principle—has been preserved over time through a succession of bodies—different doctrinal concepts. Each generation of the Phoenix was characterized by a prevalent doctrinal "form" for federal-state relations, by a "defect" latent in its doctrine that was exploited to create subsequent doctrine, and by a "justification" whose contradictions would drive the existing doctrinal "form" to its death. This examination of the Phoenixes revealed three modes of doctrinal construction that point to several well-dredged channels for future development of federalism doctrine.

There is an unfortunate, and perhaps unavoidable, quality of "prognostication" associated with scholarship that suggests possibilities on the basis of past phenomena. Indeed, the enterprise of legal commentary is subject to this critique insofar as it addresses the theoretical and practical ramifications of governmental decisionmaking, particularly judicial declaration of doctrine. Naturally, in the absence of "constitutional clairvoyance"—an insight that regrettably escapes this author— there is no inevitability or certainty to the theoretical construct of this Article: were a fifth Phoenix to appear in fact, it may be shaped quite differently than prior discussion might suggest. Vindication, if any is required, comes from a twist on Horace Walpole's observation, quoted above: the most interesting and meaningful function of "prognostication" may not be to prove prophecies. There may be intrinsic merit in encouraging legal thinkers to be aware of the theoretical constructs that can reasonably be placed on past judicial doctrine, and of the conceptual paths that are made inviting in light of the intellectual conventions these constructs support. At the very least, if the particular theoretical construct of this Article persuades, the legal thinker who despairs at the emerging directions of the United States Supreme Court federalism doctrine might take some consolation from a conviction that merely one more Phoenix is rising.