

FACTORING IN TRADITION: THE PROPER ROLE OF THE TRADITIONAL GOVERNMENTAL FUNCTION TEST

INTRODUCTION

We all have traditions, a way that things have always been done. But surely nothing has *always* been done a certain way. How long must something have been going on for it to qualify as a “tradition”? Does the fact that something has become “traditional” mean that that is the way that it should continue to be done? The answer to these questions does not matter very much if we are discussing family or holiday “traditions.” However, when this label is applied to the regulatory action of a government body, we should perhaps pause before assuming that those who have “traditionally” regulated in a given area should continue to do so.

In a 2007 Supreme Court opinion by Chief Justice Roberts, the Court upheld a flow control ordinance which forced all trash coming from designated counties to be processed at a certain public facility.¹ The traditionally local nature of waste disposal, the Court held, made it something that was properly regulated by state and local governments.² While the Court primarily pointed to the favored facility’s public nature to support its decision, Chief Justice Roberts also focused on the fact that waste disposal was typically and traditionally a local government function.³ In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court clearly ruled out the traditional governmental function test as a dispositive tool of adjudication for Commerce Clause cases.⁴ While *United Haulers* was a dormant Commerce Clause case, it is unclear whether analyses conducted in these two closely related contexts should warrant different standards.

The discussion is made more interesting by the dissenting opinion authored by the Court’s junior member, Justice Alito.⁵ Justice Alito, who was joined by Justices Stevens and Kennedy, disagreed with the majority’s conclusion on a number of different levels, but he explicitly cited the Court’s opinion in *Garcia* as prohibiting the Court from applying the traditional governmental function

1. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (plurality opinion).

2. *Id.* at 344–45.

3. *Id.*

4. 469 U.S. 528, 543–49 (1985).

5. *United Haulers*, 550 U.S. at 356–71 (Alito, J., dissenting).

test to the case at hand.⁶ In contrast, Chief Justice Roberts's opinion for the plurality failed to mention *Garcia*.⁷

This paper will discuss the traditional governmental function test, including its origins and the path that it has traced through Supreme Court jurisprudence, as well as its current status. The analysis portion of the paper will begin with a discussion of the status that the traditional governmental function test currently occupies in American jurisprudence in light of the diverging views that have arisen since the Court's first foray into this area in *National League of Cities*.⁸ Appeals court decisions will be analyzed to see how they have interpreted the decisions of the Supreme Court regarding this controversial test. This section will conclude with an analysis of where the Court's recent decision in *United Haulers* leaves appeals courts in their quest to institute the interpretations articulated by the Supreme Court. Another line of analysis that will be interwoven into this section will be that of the dormant Commerce Clause and the applicability of Commerce Clause jurisprudence to dormant Commerce Clause questions. The ultimate goal of the paper is to evaluate, in light of the Court's decision in *United Haulers*, the proper role of the traditional governmental function test in judicial decisionmaking.

I. THE TRADITIONAL GOVERNMENTAL FUNCTION TEST

A. *The Rise of the Test*

In the past, the Supreme Court adjudicated issues of federalism by using a test that looked to whether the regulated activity was a traditional or core function of the States. This traditional governmental function test had its genesis in *National League of Cities v. Usery*. In *National League of Cities*, the Court struck down an amendment to the Fair Labor Standards Act which sought to apply federal minimum wage and maximum hour provisions to employees of individual states.⁹ In an opinion by Justice Rehnquist, the Court held that "insofar as the challenged amendments operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they [were] not within the authority granted Congress by [the Commerce Clause]."¹⁰

The Court's rationale in *National League of Cities* stemmed from what it saw as "attributes of sovereignty attaching to every state government which may not be impaired by Congress. . . ."¹¹ The majority focused on the power

6. *Id.* at 368–69.

7. *See id.* at 334–47 (plurality opinion).

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

9. *Id.* at 851.

10. *Id.* at 852.

11. *Id.* at 845.

that the states and the federal government shared as dual sovereigns. The Court put states on a different footing than an individual or a corporation when it came to challenging Congress's exercise of the Commerce power.¹² This distinction, the Court argued, was essential to guard against the threat that the federal government would "devour the essentials of state sovereignty" if its power to regulate commerce went unchecked.¹³

Despite Justice Brennan's dissenting opinion which focused on the plenary power of Congress over the regulation of commerce,¹⁴ as of 1976 a majority of the Court had made it clear that congressional regulation of commerce could not extend to areas traditionally left to the states to regulate as sovereign entities.

It is not difficult to identify the driving force behind the creation and implementation of the traditional governmental function test. Those who embraced a theory of dual federalism were concerned that there would soon be no area of a State's internal affairs which would be out of the reach of federal legislation. The traditional governmental function test was the tool the Court devised to ensure that there would be such a demarcation.

In *National League of Cities*, the Court saw the sort of federal regulation that had recently been applied to individuals being applied to states. In arguing that this was not a natural and constitutional progression, Justice Rehnquist opined that:

It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.¹⁵

While there could be no argument that the dual federalism set up by the Constitution implied that private individuals and enterprises would be subject to the regulation of both federal and state legislation, Rehnquist argued that this kind of double regulation was impermissible when applied to States acting in their sovereign capacity as States.¹⁶ While regulation of this kind may certainly fall within Congress's plenary power to regulate interstate commerce, the Tenth Amendment acted as a restriction on this power, prohibiting Congress from exercising its "power in a fashion that impair[ed] the States' integrity or their ability to function effectively in a federal system."¹⁷

12. *Id.* at 854.

13. *National League of Cities*, 426 U.S. at 855.

14. *Id.* at 858–60 (Brennan, J., dissenting).

15. *Id.* at 845 (majority opinion).

16. *Id.* at 844–45.

17. *Id.* at 843 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).

B. Problems with the Test

While no one denies the constitutional command that government power should be diffused between the federal government and the states, the standards by which to judge the propriety of this diffusion is less certain. In *Garcia*, the Court dealt with the issue of “the extent to which SAMTA [San Antonio Metropolitan Transit Authority] may be subjected to the minimum-wage and overtime requirements of the FLSA [Fair Labor Standards Act].”¹⁸ The petitioner contended that Congress’s extension of the FLSA to cover state and local government employees meant that SAMTA was obligated to pay its employees according to the standards laid out in the FLSA.¹⁹ SAMTA, on the other hand, argued that any extension of the FLSA to the traditional governmental functions of state and local government was unconstitutional in violation of the Court’s decision in *National League of Cities*.²⁰

When it came time for *Garcia* to be decided, the traditional governmental function test had proven to be just as unworkable in practice as any other judicial attempt at line-drawing in this area. This unworkable nature was the driving force behind the *Garcia* decision. The main problem was that the test outlined in *National League of Cities* and clarified in *Hodel v. Virginia Surface Mining and Reclamation Ass’n* did not produce predictable results in lower federal courts.²¹

Traditionally, when the Court adopted any sort of balancing test, it did so with the hope that it would eventually lead to a workable standard. The traditional governmental function test required that regulated activity fall into one of two groups; in one group were those activities that were traditionally governmental in nature, and in the other were those that were not.²² The *Garcia* Court lamented that “it [was] difficult, if not impossible, to identify an organizing principle” that dictated which group a given activity would fall into.²³ In the decisions that sought to apply the test, lower courts found that licensing drivers and operating a highway authority were traditional government functions, while regulating traffic and operating a mental health facility were not entitled to protection against federal regulation.²⁴ Examples

18. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985).

19. *Id.*

20. *Id.* at 534.

21. *Id.* at 538–39.

22. *Id.* at 537.

23. *Garcia*, 469 U.S. at 539.

24. *Id.* Numerous other lower court decisions were cited, including cases dealing with various areas of regulation: e.g., operating a municipal airport, performing solid waste disposal, regulating intrastate natural gas sales, regulating air transportation, and providing in-house domestic services for the aged and handicapped. *Id.* at 538–39. The effect of laying out all of these decisions was to show just how arbitrary the traditional/non-traditional distinction turned out to be in practice. *Id.* at 539.

like these illustrate the difficulties that courts encountered in applying this test in a consistent fashion to real cases. In the process of trying to lay out a bright-line rule, the *National League of Cities* Court seemed to have created, in practice, a multi-factor balancing test.

It would seem that history could be a good indicator of an activity's traditional nature since we generally think of traditions as things which result from the passage of some significant amount of time. Once one got past initial impressions, however, it became clear that this method of categorization was just as arbitrary and meaningless as any other. As the *Garcia* Court observed, "the 'traditional' nature of a particular governmental function can be a matter of historical nearsightedness," with "today's self-evidently 'traditional' function" often being "yesterday's suspect innovation."²⁵ Although history was the most intuitive way to measure the traditionally governmental nature of an activity, its ineffectiveness as a dispositive test made it clear that it might be difficult to fashion any consistent method for making these decisions.

As one might expect, there were voices on the losing side in *National League of Cities* who suggested the problems that could accompany the standard the Court's majority ended up advocating in *Garcia*. Senators Harrison A. Williams, Jr. and Jacob K. Javits jointly filed an amicus curiae brief in support of the respondent's position in *National League of Cities*.²⁶ These men had two reasons for opposing a test which turned on a judicial determination of whether a regulated activity was governmental or private in nature.²⁷ They first argued that this type of test would frustrate the goals of the amendments.²⁸ Secondly, arguing as legislators, they claimed that the distinction that appellants' sought to show only existed in theory, and an interpretation which focused on such theoretical distinctions would prove wholly impractical in terms of real world application.²⁹ The two Senators argued that there was scarcely any activity in which government engaged that did not have a counterpart in the private sector.³⁰

25. *Id.* at 544 n.9.

26. Brief for Senators Harrison A. Williams, Jr. and Jacob K. Javits as Amici Curiae, *National League of Cities v. Usery*, 426 U.S. 833 (1976) (Nos. 74-878, 74-879), 1975 WL 173805 [hereinafter Brief for Senators Williams and Javits].

27. *Id.* at *19.

28. *Id.*

29. *Id.* In making their argument, the Senators, citing a 1955 Supreme Court case, said: [T]he "non-governmental-governmental" quagmire" involve[d] "distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation," and that any attempt to invoke such distinctions would result in the "the inevitable chaos when courts try to apply a rule of law that is inherently unsound."

Id. at *20 (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 65, 68 (1955)).

30. *Id.* at *19-20.

C. The Test Following Garcia

Despite the demise of the traditional governmental function test as a dispositive tool of adjudication, the rationale that lay behind the test has maintained a presence in federalism jurisprudence. In *Gregory v. Ashcroft*, Justice O'Connor, speaking for the Court's majority, used the plain statement rule and various Supreme Court precedents to attempt to restrain Congress's ability to regulate in areas that "go to the heart of representative government."³¹ *Gregory* was concerned with whether a provision in the Missouri Constitution requiring judges to retire at the age of seventy was violative of the Age Discrimination in Employment Act of 1967 (ADEA).³² Justice O'Connor, citing a Supreme Court decision from 1869, held that:

Not only . . . can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.³³

Justice O'Connor's opinion characterized the Constitution generally, and the Tenth Amendment in particular, as placing very strict limitations on how far federal power which purports to be plenary actually extends.³⁴

Justice O'Connor pointed out that when acting within its granted powers, Congress was allowed to regulate in areas traditionally regulated by the States.³⁵ However, she distinguished the instant issue, by arguing that the state constitutional provision at issue went beyond an area of traditional state regulation and was in fact "a decision of the most fundamental sort for a sovereign entity."³⁶ Implicitly, O'Connor seemed to be criticizing judicial decisions that would allow this sort of invasion of fundamental states' rights, but she was restrained by the Court's decision in *Garcia*. In an effort to reconcile her views of federalism with the Court's prohibition of a traditional government function standard, she invoked the clear statement rule.³⁷ In requiring a clear statement of congressional intention to override a state's authority to regulate in this area, Justice O'Connor basically condemned the legislation's application in the case at hand as unconstitutional by laying out a

31. *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

32. *Id.* at 455.

33. *Id.* at 457 (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869)).

34. *Id.* at 457–58.

35. *Id.* at 460.

36. *Gregory*, 501 U.S. at 460.

37. *Id.* at 460–61.

rigid construction requirement that had to be met before the legislation would pass constitutional muster.

After laying out the important role that the Tenth Amendment plays in maintaining the independent sovereignty of states, Justice O'Connor held that "if Congress [was] to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"³⁸ Justice O'Connor cited the seminal treatise on constitutional law by Laurence Tribe, stating that "to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."³⁹ Although O'Connor purported to honor the framework laid out by the *Garcia* Court, the methods she chose for implementing that decision seemed to be more in line with *Garcia*'s dissent than with its majority.

In *Gregory*, Justice White, joined by Justice Stevens, concurred in the majority's decision but questioned the majority's wisdom in "ignor[ing] several areas of well-established precedent and announc[ing] a rule that [was] likely to prove both unwise and infeasible."⁴⁰ Much like Justice Alito's dissent in *United Haulers*, Justice White pointed to the Court's decision in *Garcia* as foreclosing the line of reasoning that the majority was adopting.⁴¹ Given that the traditional governmental function test had proven to be unworkable in practice, White argued, the Court in *Garcia* "made it clear 'that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.'"⁴² In its efforts to carve out areas of state activity that will not be subject to federal regulation, White argued that the Court was contravening the entire rationale behind the Court's decision in *Garcia*.⁴³

The rationale behind the traditional governmental function test was also invoked in Justice Kennedy's concurrence in *United States v. Lopez*. Much like *Gregory*, *Lopez* came out in the favor of those acutely concerned with states' rights; however, the majority in *Lopez* primarily relied on the insufficient commercial nature of the regulated activity to strike down the

38. *Id.* at 460 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)).

39. *Id.* at 464 (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25, at 480 (2d ed. 1988)).

40. *Id.* at 474 (White, J., concurring).

41. *Gregory*, 501 U.S. at 477 (White, J., concurring).

42. *Id.* (quoting *South Carolina v. Baker*, 485 U.S. 505, 512 (1988)). Expanding on his conception of the deference that should be paid to the Court's decision in *Garcia*, Justice White emphasized that "[a]s long as 'the national political *process* did not operate in a defective manner, the Tenth Amendment [was] not implicated.'" *Id.* at 479 (quoting *Baker*, 485 U.S. at 513).

43. *Id.* at 477.

legislation.⁴⁴ In concurrence, Justice Kennedy invoked many of the prior sentiments that Justice O'Connor had expressed in cases like *Gregory* and *New York v. United States*.⁴⁵ Further, Justice Kennedy pointed out the accountability problems that arise when federal legislation is allowed to restrict the way that states do things. Citing various opinions authored by Justice O'Connor, he argued that: "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."⁴⁶

While Justice Kennedy did make mention of the importance of the commercial nature of the regulated activities, it seems that the thrust of his argument turned on the importance of States being allowed to oversee the regulation of those areas of concern that had traditionally been reserved to the States.

Officially, the Court's decision in *Garcia* has made it clear that the traditional governmental function test is not to be used to determine whether Commerce Clause legislation is properly applied to State activities. Decisions like *Gregory*, *New York*, and *Lopez*, as well as the Court's recent decision in *United Haulers*, however, seem to suggest that while this test may not be used in name any longer, its rationale remains a driving force in the way Justices make decisions.

II. DIVERGING APPLICATIONS OF THE TEST

A. Appellate Court Decisions

With the Supreme Court being less than consistent regarding their application of the traditional governmental function test, it is worthwhile to take a look at how courts of appeals have applied the Court's sometimes divergent jurisprudence in light of *Garcia* and the cases that have followed.

44. *United States v. Lopez*, 514 U.S. 549, 567 (1995).

45. *Id.* at 576 (Kennedy, J., concurring). *New York v. United States* was a case in which Justice O'Connor wrote the majority opinion invalidating a provision of federal law that "commandeer[ed] the [States'] legislative processes . . . by directly compelling them to enact and enforce a federal regulatory program." 505 U.S. 144, 176 (1992) (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). Justice O'Connor was careful to make clear that this case had no effect on the holding in *Garcia*, because *New York* was "not a case in which Congress ha[d] subjected a State to the same legislation applicable to private parties." *Id.* at 160. Despite this admonition, Justice White wrote an opinion concurring in part and dissenting in part in which he opined that the majority's "attempt to carve out a doctrinal distinction for statutes that purport solely to regulate state activities is especially unpersuasive after *Garcia*." *Id.* at 188, 205 (White, J., concurring and dissenting).

46. *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

In the 1993 case of *May v. Arkansas Forestry Commission*,⁴⁷ the Eighth Circuit had to address an outright claim that *National League of Cities* had once again become good law. The case before them had facts very similar to those in *Garcia*.⁴⁸ The Arkansas Forestry Commission “vigorously argue[d] that the Tenth Amendment prohibit[ed] any application of the [Fair Labor Standards Act] to state employees.”⁴⁹ Not to be deterred by unfavorable precedent, the Forestry Commission claimed that the Court’s decisions in *Gregory* and *New York* had effectively amounted to an implied reversal of *Garcia*.⁵⁰ The Commission argued that, even if *Garcia* had not been explicitly overruled by these intervening cases, the Eighth Circuit was allowed to ignore it as precedent based on implications contained in those decisions.⁵¹

Ultimately, the court held that it was not at liberty to depart from the binding Supreme Court precedent of *Garcia*.⁵² Further, the court held that the decisions in *Gregory* and *New York* could “be read in harmony with *Garcia*.”⁵³ Despite the Forestry Commission’s arguments, the court pointed out that both of the opinions that they relied upon explicitly refused to reach the Tenth Amendment issue, making it impossible for them to be construed as overruling *Garcia*.⁵⁴

In 1999, the Fourth Circuit dealt with a question concerning the application of the Telecommunications Act of 1996. In *Petersburg Cellular Partnership v. Board of Supervisors*, the Fourth Circuit decided the constitutionality of an Act of Congress.⁵⁵ If the petitioner in *May* directly attacked the precedential value of *Garcia*, the court in *Petersburg* dealt with a more subtle challenge. In

47. 993 F.2d 632 (8th Cir. 1993).

48. *Id.* at 635. Whereas in *Garcia* the controversy was the extent to which the San Antonio Metropolitan Transit Authority could be subjected to the FLSA’s minimum-wage and overtime requirements, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985), here the Eighth Circuit was deciding whether the Forestry Commission’s failure to pay its employees wages for the time spent “subject-to-call” violated the FLSA, *May*, 993 F.2d at 635. Though the two cases dealt with different provisions of the FLSA, the overarching issue of the two cases was virtually identical: Did FLSA provisions apply when the area being regulated was one that was traditionally left to the states to regulate? *Garcia*, 469 U.S. at 530–31; *May*, 993 F.2d at 635.

49. *May*, 993 F.2d at 635.

50. *Id.* at 635–36. The parties in *May* went so far as to “engage in complex calculations in an endeavor to demonstrate that a majority of the sitting Supreme Court Justices either oppose[d] or support[ed] the *Garcia* decision.” *Id.* at 636 n.2.

51. *Id.* at 636.

52. *Id.* The court seemed to imply that it did not necessarily agree with the decision in *Garcia*, but that it was bound to follow it “regardless of what [they] might [have done] if [they] were cutting from whole cloth.” *Id.*

53. *Id.*

54. *May*, 993 F.2d at 636.

55. *Petersburg Cellular P’ship v. Bd. of Supervisors*, 205 F.3d 688, 693–94 (4th Cir. 2000). In actuality, only two of the three judges who heard the case deemed it necessary to reach the constitutional issue of whether the Tenth Amendment had been violated. *Id.* at 691–92.

Petersburg, the Nottoway County Board of Supervisors (Board) was appealing the district court's decision that it failed to fulfill the requirements of the Telecommunications Act of 1996 when it denied Petersburg Cellular Partnership's (Petersburg) permit application.⁵⁶ The Act required that a denial of such a permit be supported by "substantial evidence."⁵⁷ While Petersburg argued that the denial of their permit application was not supported by the requisite evidence, the Board claimed that such evidence was present, and, even if it were not, "the requirement that [Nottoway County] apply a federal standard in making its zoning decisions violate[d] the Tenth Amendment to the . . . Constitution."⁵⁸

The fragmented three-member panel resembled the Supreme Court on this issue, with a two-judge majority agreeing on an outcome but not its reasoning, and one judge in dissent claiming that Supreme Court precedent precluded the reasoning applied by one of the members of the majority.⁵⁹ The two-judge majority upheld the county's denial of the permit application but did so for different reasons. The Act in question required that "state and local governments may not prevent construction of [communications] facilit[ies] unless their decision is 'in writing and supported by substantial evidence contained in a written record.'"⁶⁰ Judge Niemeyer thought that this "substantial evidence" requirement had not been met but that such a requirement was a violation of the Tenth Amendment and therefore a requirement that the county was not bound to meet.⁶¹ Judge Widener, in a concurring opinion, held that the county had indeed met the "substantial evidence" requirement and declined to issue an opinion on the requirement's constitutionality.⁶² Finally, Judge King, who agreed with Judge Niemeyer's characterization of the "substantial evidence" question but disagreed with his evaluation of the Tenth Amendment question, wrote an opinion in dissent.⁶³

Originally, the county planning commission unanimously recommended approval of Petersburg's permit application.⁶⁴ However, after the recommendation, several county residents spoke out regarding their opposition

56. *Id.* at 693–94.

57. *Id.* at 694. The court outlined the long-standing meaning that has been accorded the term "substantial evidence" in federal law. *Id.* The standard requires "more than a mere scintilla of evidence, [but] less than a preponderance;" what is required is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *AT&T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 430 (4th Cir. 1998)).

58. *Id.* at 691.

59. *Id.* at 691–92.

60. *Petersburg*, 205 F.3d at 694.

61. *Id.* at 706.

62. *Id.* at 707 (Widener, J., concurring).

63. *Id.* at 710–11 (King, J., dissenting).

64. *Id.* at 692 (majority opinion).

to the tower's erection.⁶⁵ Citing problems with air traffic and the attractive nuisance to children that the tower might create, the residents voiced their concerns about the proposed tower.⁶⁶ Following this expression of opposition, the commission postponed their final evaluation until after the FAA had conducted its assessment of the proposed tower.⁶⁷ Despite the FAA's subsequent issuance of approval of the proposed tower, the Board voted unanimously to deny Petersburg's application.⁶⁸ Though the Board gave Petersburg no explicit reason for denying its application, at a subsequent meeting some of the Board members offered an explanation as to why they had denied the permit application; these comments indicated that the Board had denied the application because of negative public sentiment and not as a result of the kind of "substantial evidence" that the Act required.⁶⁹

Judge Niemeyer relied on the Supreme Court's language from *Printz*, *New York*, and *Gregory* to limit federal intrusion into areas that were traditionally of state concern.⁷⁰ For Judge Niemeyer, the Act amounted to a federal imposition that compromised state and local sovereignty.⁷¹ He also made the familiar argument that the forced implementation of federal standards at the local level could lead to the electorate holding state and local officials accountable for decisions that were made for them by federal legislators.⁷² Because "land-use decisions are a *core function* of local government," Judge Niemeyer held that federal intrusion into this area was a violation of the Tenth Amendment as well as an affront to the dual-federalist structure of the Constitution.⁷³ He argued that while certain provisions of the Telecommunications Act merely preempted

65. *Petersburg*, 205 F.3d at 692.

66. *Id.*

67. *Id.* at 693.

68. *Id.*

69. *Id.* "One member stated that 'the people in the neighborhood did not want . . . the structure there.' Another said, 'I think this, this [is] close to people that live there and they do object to it. I think there is other land that could be obtained.' And another said, 'I've talked to my people in that area and they, they don't want it.' One member questioned rhetorically, 'are we going to allow our citizens to [take] this crap?'" *Id.*

70. *Petersburg*, 205 F.3d at 700–01. Judge Niemeyer used *Printz v. United States*, 521 U.S. 898, 918–19 (1997), for the proposition that "[t]he Tenth Amendment assures the system of dual sovereignty inherent in the constitutional structure, by reserving to the states or the people the powers not delegated by the Constitution." *Petersburg*, 205 F.3d at 700. He cited *Gregory* for claiming that "[t]he federalist constitutional structure depends on [a] separation and independence of sovereigns." *Id.* Finally, Judge Niemeyer pointed to Justice O'Connor's opinion in *New York v. United States* to show that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.*

71. *Id.* at 700.

72. *Id.*

73. *Id.* at 703 (internal quotation marks omitted) (quoting *Gardner v. City of Baltimore*, 969 F.2d 63, 67 (4th Cir. 1992)).

areas of local government, the portion of the Act at issue here *used* legislative processes of the states to enact federal regulations.⁷⁴ This, Judge Niemeyer argued, constituted a commandeering of state government, which the Supreme Court had previously held to be unconstitutional in *New York*.⁷⁵

In dissent, Judge King voiced agreement with Judge Niemeyer on whether the “substantial evidence” showing had been met.⁷⁶ But that was virtually the only point on which the two jurists agreed. Responding to Judge Niemeyer’s claim that the law in question was an impermissible commandeering of state legislative processes, Judge King argued that what Congress did here amounted to conditional preemption, a completely permissible practice under the Supreme Court’s jurisprudence.⁷⁷ He argued that federal preemption of state law need not be direct and that Congress could “induce states to regulate activities affecting interstate commerce by threatening to preempt contrary state regulation if the state itself fail[ed] to regulate in accordance with federal instruction.”⁷⁸ Judge King argued that the disputed section of the Act did “not become unconstitutional ‘simply because Congress chose to allow the states a regulatory role’ in a preemptible field.”⁷⁹

Judge King claimed that Judge Niemeyer’s insistence on analyzing the case under *New York* could only be justified if the rule of *National League of Cities* was revived.⁸⁰ He argued that a closer look at Judge Niemeyer’s opinion revealed that what he was doing, in effect, was arguing for the position advocated by the Court in *National League of Cities*.⁸¹ Through Judge Niemeyer’s use of phrases like “core powers,” “traditional legislative process,” and “core function of local government,” Judge King argued that his colleague was implicitly relying on a line of reasoning that had been foreclosed by *Garcia*.⁸² Though Judge Niemeyer purported to rely solely on binding Supreme Court precedent, Judge King argued that he was basically resurrecting *National League of Cities*.⁸³ Ultimately, Judge King pointed to the majority’s reasoning in *Garcia* to support his decision, reiterating the problems that arise when the federal judiciary attempts to solve problems that are properly left to the political branches.⁸⁴

74. *Id.* at 703–04.

75. *Petersburg*, 205 F.3d at 704.

76. *Id.* at 710 (King, J., concurring).

77. *Id.* at 712.

78. *Id.* at 713.

79. *Id.* at 715 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 290 (1981)).

80. *Petersburg*, 205 F.3d at 711 (King, J., concurring).

81. *Id.* at 717–18.

82. *Id.*

83. *Id.* at 717.

84. *Id.* at 718–19.

May and *Petersburg* present an interesting illustration of the ways that different courts and jurists can address the traditional governmental function test in practice. Those two cases, taken together with the Court's 2007 decision in *United Haulers*, seem to provide a sort of road map for litigants as well as jurists. At one extreme lies *May*, where a litigant tried to resurrect *National League of Cities* and its famous test by citing decisions that it claimed "amount[ed] to an implied reversal [of *Garcia*]."⁸⁵ The Eighth Circuit was quick to point out that, not only had *Garcia* not been overruled, but it provided directly applicable precedent that demanded a decision in favor of the appellees.⁸⁶ The outcome of *May* seems obvious in hindsight. A party is very unlikely to be successful when it raises an almost identical claim to a losing argument made in a prior Supreme Court case, which is still good law. However, it is not unreasonable that the Forestry Commission saw the Court's decisions in *Gregory* and *New York* as signs that *Garcia*'s strength was diminishing.

The Forestry Commission might have had greater success had it presented a more nuanced argument, similar to those made by the majority in *Gregory*, *New York*, and *United Haulers*. In *Gregory*, Justice O'Connor made an arguably fuzzy distinction between activities that were merely an area of traditional state regulation and those that were "of the most fundamental sort for a sovereign entity."⁸⁷ She was careful, however, to avoid claiming that Congress did not have the ability to regulate in these "fundamental" areas, instead opting for a requirement that when these areas of regulation are implicated, Congress must make its intention "to alter the 'usual constitutional balance between the States and the Federal Government' . . . 'unmistakably clear in the language of the statute.'"⁸⁸

85. *May v. Ark. Forestry Comm'n*, 993 F.2d 632, 635 (8th Cir. 1993).

86. *Id.* Because of the way the Forestry Commission presented its case, the Eighth Circuit Court had little choice but to apply *Garcia* as it raised "precisely the Tenth Amendment question raised by the Commission" in *May*. *Id.*

87. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

88. *Id.* (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). As applied to the facts in *Gregory*, Justice O'Connor was in effect arguing that the ADEA's general rule that it is "unlawful for an 'employer' 'to discharge any individual' who is at least 40 years old 'because of such individual's age'" should not be applied to state judges. *Id.* at 456 (citing 29 U.S.C. §§ 623(a), 631(a)). Because the case "concern[ed] a state constitutional provision through which the people of Missouri establish[ed] a qualification for those who sit as their judges," Justice O'Connor reasoned that any congressional intention to intrude into an area of such fundamental state concern ought to be made explicit by Congress. *Id.* at 460–61. The Eighth Circuit had decided the case against the petitioning judges by labeling them "appointees . . . 'on a policymaking level,'" thereby disqualifying them from protection under the ADEA. *Id.* at 456. Justice O'Connor was unsure of the persuasiveness of this classification argument and instead held that the ADEA did not apply to the judges, because the legislation did not make a clear statement that judges were to be included. *Id.* at 467.

In *New York*, the Court again took an approach which sought to protect the rights of States to regulate themselves from further encroachment by the federal government, while simultaneously leaving the Court's decision in *Garcia* undisturbed. Since the legislation at issue was being applied to states only and not private individuals, Justice O'Connor argued that *Garcia* was not implicated.⁸⁹ This arguably irrelevant distinction can be viewed as another vehicle for retaining for states that which has traditionally been theirs without explicitly overruling *Garcia*.

The prevailing litigants and jurists in *Petersburg* were able to extract the tools necessary for maintaining local control over local issues from cases like *Gregory* and *New York*. The essence of what the court was saying in *Petersburg* was that the federal government should not be able to tell states how to carry out local tasks such as permit application approval. Mindful of the shadow that *Garcia* cast, however, they were forced to frame their arguments in different terms. The court made arguments referencing accountability issues and the problems that attend when states are forced to implement federal policies.⁹⁰ Also, the majority opinion drew comparisons to *New York*, claiming that the instant case dealt with unconstitutional commandeering of state legislative processes.⁹¹ It is also apparent from *Petersburg* that terms like "traditional" are not off-limits, as long as they are mentioned for the purposes of bolstering an argument and not as an iteration of the argument itself.⁹²

The various majority and dissenting opinions in *Gregory*, *New York*, and *Petersburg* can be characterized as examples of judges and Justices supporting arguments that lead to results that correspond with their policy preferences. Those that believe strongly in the doctrine of dual sovereignty have no problem drawing minor distinctions that will make *Garcia* inapplicable. Likewise, those in favor of a strong central government with much more expansive power are willing to group factually distinguishable cases under *Garcia*'s large umbrella, making challenges to federal authority ineffectual. Regardless of the motives underlying the opinions of various judges and Justices, it seems clear that, though the traditional governmental function test may no longer be used in a dispositive manner in Commerce Clause cases, the traditional nature of a regulated activity remains an important factor in the minds of at least some jurists.

89. *New York v. United States*, 505 U.S. 142, 160 (1992).

90. *Petersburg Cellular P'ship v. Bd. of Supervisors*, 205 F.3d 688, 700 (4th Cir. 2000).

91. *Id.* at 703-04.

92. *Id.* at 697, 705.

B. *What the Commerce Clause Cases Mean for DCC Cases*

If *Garcia*'s role in the outcome of Commerce Clause cases can be debated, its presence cannot be denied. Whether and how the traditional governmental function test should apply to dormant Commerce Clause cases is potentially a very different question.

The dormant Commerce Clause is a doctrine that can be viewed as a logical corollary to the Commerce Clause. The Constitution dictates that "the Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁹³ Many have argued that this positive grant of power to Congress suggests, by negative implication, a dormant Commerce Clause, which prohibits the states from "unjustifiably discriminate[ing] against or burden[ing] the interstate flow of articles of commerce," even if Congress has yet to act in the area concerned.⁹⁴ Most of the controversy over the dormant Commerce Clause focuses on the extent to which states should be allowed to regulate in areas that affect commerce.

In *United Haulers*, the Court confronted the question of whether a local flow control ordinance discriminated against interstate commerce and was thus unconstitutional.⁹⁵ Arguably, the most directly applicable precedent was the Court's decision in *C&A Carbone, Inc. v. Clarkstown*.⁹⁶ Writing for a plurality of the Court, Chief Justice Roberts opined that there was an important difference between the instant case and *Carbone*, which dictated that, though the flow control ordinance in *Carbone* was struck down, the one at issue in the

93. U.S. CONST. art. I, § 8, cl.2.

94. *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994). There are some jurists that argue that the negative Commerce Clause should occupy a limited domain in Supreme Court jurisprudence, while others argue that it has no place at all. In *United Haulers*, Justice Scalia reiterated his opinion that "the so-called 'negative' Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007) (Scalia, J. concurring) (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring)). Based on stare decisis grounds, Justice Scalia was "willing to enforce" a dormant Commerce Clause in two situations: "(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by the Court." *Id.* (quoting *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring)). Justice Thomas, who previously shared Justice Scalia's view of the dormant Commerce Clause, reached a turning point in *United Haulers*. He noted that the "negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice." *Id.* at 349 (Thomas, J., concurring). Justice Thomas came to the conclusion that the "application of the negative Commerce Clause turn[ed] solely on policy considerations, not on the Constitution," and, as such, he "would discard the Court's negative Commerce Clause jurisprudence." *Id.*

95. *United Haulers*, 550 U.S. at 334 (plurality opinion).

96. 511 U.S. 383 (1994).

instant case was to be upheld.⁹⁷ Unlike the flow control ordinance in *Carbone*, the one at issue in *United Haulers* favored a state-created public benefit corporation, which the Chief Justice argued, “[did] not discriminate against interstate commerce for purposes of the Commerce Clause.”⁹⁸ For the purposes of this paper, however, the public/private distinction is not the most interesting part of the Chief Justice’s opinion.

The Chief Justice warned the Court to “be particularly hesitant to interfere with the Counties’ efforts [to address waste disposal problems] under the guise of the Commerce Clause because ‘[w]aste disposal is both typically and traditionally a local government function.’”⁹⁹ He also cited another Second Circuit decision, which stated that “[f]or ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States.”¹⁰⁰ Given that the public/private distinction was the primary basis on which the plurality’s decision rested, the Chief Justice’s minor aside regarding the traditional nature of waste collection and disposal could be viewed as benign passage merely intended to bolster his overall argument. Justice Alito, however, viewed these assertions in a very different light.

Justice Alito disagreed with virtually every conclusion reached by the plurality.¹⁰¹ Although the bulk of his opinion was reserved for his dissatisfaction with the public/private distinction, he also voiced disagreement with the plurality’s characterization of waste collection and disposal as a typical and traditional governmental function.¹⁰² Justice Alito cited *Garcia* as precluding the plurality from adopting the traditional governmental function test as a rationale for upholding the ordinances at issue.¹⁰³ Noting that the traditional governmental function test had proved to be unworkable in practice, Justice Alito asserted that “to the extent [that the plurality’s] holding rest[ed] on a distinction between ‘traditional’ governmental functions and their nontraditional counterparts . . . , it [could not] be reconciled with prior precedent.”¹⁰⁴

97. *United Haulers*, 550 U.S. at 334 (plurality opinion).

98. *Id.* The Chief Justice was of the opinion that it was perfectly fine for local legislation to favor the government, “but treat every private business, whether in-state or out-of-state, exactly the same.” *Id.*

99. *Id.* (alteration in original) (citing *United Haulers Assn. v. Oneida-Herkimer Solid Waste Mgmt. Auth.* 261 F.3d 245, 264 (2d Cir. 2001)) (Calabresi, J., concurring)).

100. *Id.* (internal quotation marks omitted) (citing *USA Recycling, Inc. v. Town of Babylon*, N.Y., 66 F.3d 1272, 1275 (2d Cir. 1995)).

101. *See id.* at 356–71 (Alito, J., dissenting).

102. *United Haulers*, 550 U.S. at 368–70 (Alito, J., dissenting).

103. *Id.* at 368–69.

104. *Id.* at 369. Justice Alito also argued that the plurality was empirically wrong in its characterization of waste collection and disposal as a traditional function of local government. *Id.* Citing an amicus brief filed for National Solid Wastes Management Association, Justice Alito

Justice Alito's dissent calls to mind many of the dissenting opinions that have previously been discussed. Justice White's opinions in *Gregory* and *New York*, as well as Judge King's dissent in *Petersburg* represented jurists giving considerable power to Congress when it was legislating under the Commerce Clause. While Justice Alito's dissent tracks along the same conceptual lines as Justice White's and Judge King's earlier opinions, there is one key difference. Justice Alito is using the dormant Commerce Clause to limit the extent to which States are allowed to regulate their own arguably internal affairs. Assuming that the reasoning of *Garcia* is properly applied in the context of Commerce Clause cases, it begs the question whether that reasoning should be extended to cases decided under the dormant Commerce Clause. Obviously, Justice Alito felt that *Garcia* should be given the same force in dormant Commerce Clause cases as it was afforded in cases decided under the Commerce Clause.¹⁰⁵

The difference between a Commerce Clause case and a dormant Commerce Clause case simply turns on the origination of the legislation being challenged. While in Commerce Clause cases, the Court construes an act of Congress to make sure that it has not exceeded the power granted to it by the Commerce Clause, in dormant Commerce Clause cases, the Court looks at state legislation to determine if it has infringed on the proper domain of federal authority.

In *New York*, Justice O'Connor described the two ways in which the Court can approach questions of "whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States."¹⁰⁶ Ultimately, however, she decided that these two inquiries were "mirror images of each other."¹⁰⁷ No matter which inquiry was used, the essential question was whether the power sought to be exercised was properly exercised by Congress or the States.¹⁰⁸ If Justice O'Connor's reasoning is correct, then dormant Commerce Clause cases can be decided by applying the same reasoning employed in Commerce Clause cases. If the contents of a state law fall within the confines of the powers reserved to the States by the Tenth Amendment, then that law should be upheld as a valid exercise of state power. However, if the state law operates in an area that has been delegated to

pointed out that "most of the garbage produced in this country is still managed by the private sector." *Id.*

105. *Id.* at 368–69.

106. *New York v. United States*, 505 U.S. 142, 155 (1992). Justice O'Connor claimed that these kinds of questions could either be addressed by using an inquiry into "whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution," or by determining "whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment" to the States. *Id.* at 155–56.

107. *Id.* at 156.

108. *Id.* at 156–57.

Congress by the Constitution, specifically the Commerce Clause for the purposes of this paper, then that legislation should be deemed invalid and unconstitutional.

III. FUTURE APPLICATION OF THE TEST

Deciding that dormant Commerce Clause cases should be decided using the same inquiries as those utilized in Commerce Clause cases, we must return to Chief Justice Roberts's opinion and ask why he felt comfortable invoking the traditional nature of trash collection as a reason for upholding a state law attempting to regulate in that area. In upholding the state law, the Chief Justice was doing essentially the same thing that Justice O'Connor did by striking down the applicability of federal legislation to States in *Gregory* and *New York*. Justice O'Connor, however, did make an effort to distinguish those cases from *Garcia*.¹⁰⁹ The Chief Justice, on the other hand, failed to even mention *Garcia* anywhere in his opinion, seemingly content to use the traditional governmental function test as merely a factor in his analysis, thereby avoiding *Garcia*'s proscription of using the traditional governmental function test "to draw . . . boundaries of state regulatory immunity."¹¹⁰

Looking at the line of cases to come out since *Garcia* was decided in 1985, those jurists who have chosen to mention the traditional or essential nature of a regulated activity have done so as a factor to bolster a larger argument, rather than as a dispositive test compelling their decision.¹¹¹ This use of the traditional nature of a regulated activity would offer little fodder for discussion if it were not for the various dissenting opinions, which have condemned the use of the traditional governmental function test in any capacity.¹¹² This series of divergent decisions from various distinguished jurists suggests that precedent can be used to support either side of the argument. Such an assertion

109. In *Gregory*, Justice O'Connor invoked the clear statement rule so as not to trample on Congress's ability to regulate in areas that were traditionally of state concern. *Gregory v. Ashcroft*, 501 U.S. 452, 460–62, 464 (1991). In *New York*, Justice O'Connor and the majority struck down a provision in a piece of federal legislation, not for the realm it sought to regulate, but for the method in which it carried out that legislation. She argued that Congress can use any "permissible method of encouraging a State to conform to federal policy choices," *New York*, 505 U.S. at 168, but "Congress may not simply 'commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,'" *Id.* at 161 (alteration in original) (quoting *Hodel v. Va. Surface & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

110. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

111. See, e.g., *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 344–45 (2007); *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring); *Gregory*, 501 U.S. at 460; *Petersburg Cellular P'ship v. Bd. of Supervisors*, 205 F.3d 688, 705–06 (4th Cir. 2000).

112. *United Haulers*, 550 U.S. at 368–69 (Alito, J., dissenting); *Gregory*, 501 U.S. at 477 (White, J., dissenting in part); *Petersburg*, 205 F.3d at 715 (King, J., dissenting).

leaves us with the question of what role the traditional governmental function test ought to play in federal jurisprudence.

Looking at judicial practice, it seems clear that a regulated activity's status as something that has traditionally been handled by the States will affect the reasoning of at least some jurists in determining the proper body to legislate in that area. Justice Ginsburg, who joined Chief Justice Roberts's plurality opinion in *United Haulers*, pointed out during oral arguments that "garbage disposal has for long been considered a municipal responsibility, a municipal function."¹¹³ Though counsel for the petitioners pointed out that such a mode of analysis was prohibited by *Garcia*, Justice Ginsburg's mentioning of trash disposal's traditionally municipal nature suggests that it might have been a factor that she considered in reaching her ultimate decision.¹¹⁴

Despite what the Court has described as the unworkability of the traditional governmental function test in practice, the fact that the Court in *National League of Cities* thought that it was important enough to be given the status of a dispositive test suggests that the test should maintain some level of importance in answering questions of federalism. Just because it is difficult to come up with a definitive test for determining whether or not something has traditionally been considered a function of local government does not necessarily mean that the test should be altogether discarded.¹¹⁵

States have experienced issues very similar to those discussed in this paper when dealing with the question of whether a given activity is properly regulated by the state government, or by a local governmental body. One method that they have devised to determine "the respective authority of the

113. Transcript of Oral Argument at 11, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (No. 05-1345).

114. Mr. Tager, counsel for petitioners, argued that "[t]he Court [had] rejected [the traditional governmental function test] in *Garcia*," because the Court "found that it was unworkable to try to determine what [was] a traditional governmental function in any particular case. The Court found that it was in a total line-drawing morass. And so it said we're throwing that [test] out." *Id.* at 11–12.

115. The Supreme Court decided another case that concerned a "traditional" governmental function of a state in May of 2008. In *Department of Revenue v. Davis*, 128 S. Ct. 1801, 1804 (2008) (plurality opinion), the Court upheld the Commonwealth of Kentucky's income tax structure against a challenge that it violated the dormant Commerce Clause. Citing to the Court's decision in *United Haulers*, Justice Souter's opinion for a plurality of the Court cited the traditionally governmental nature of taxing as a reason for ruling that it did not violate the dormant Commerce Clause. *Id.* at 1810–11. Showing no hesitation to honor the Court's reasoning in *United Haulers*, Justice Souter opined that "[i]t should go without saying that the apprehension in *United Haulers* about 'unprecedented . . . interference' with a traditional government[al] function is just as warranted here." *Id.* at 1811. In line with many of the cases mentioned in this paper, this most recent decision is further proof that the Court will not ignore the traditionally governmental nature of an activity if a state's ability to regulate in that area is challenged.

state legislature and . . . municipalities” has been to “[recognize] three broad categories of regulatory matters: (1) matters of local concern; (2) matters of statewide concern; and (3) matters of mixed state and local concern.”¹¹⁶ Echoing the sentiments of the Court in *Garcia*, the Colorado Supreme Court admitted, however, that it had “not developed a particular test which could resolve in every case the issue of whether a particular matter [was] ‘local,’ ‘state,’ or ‘mixed.’”¹¹⁷ Cognizant of the difficulties that accompany line-drawing exercises in this area, the Colorado Supreme Court admitted to making “these determinations on an ad hoc basis, taking into consideration the facts of each case.”¹¹⁸

Deciding that the area is one that is not easily traversed using bright lines, the Colorado Supreme Court “considered the relative interests of the state and the . . . municipality in regulating the matter at issue in a particular case.”¹¹⁹ In conducting this balancing of interests, the Colorado courts gave some consideration to “whether a particular matter [was] one traditionally governed by state or by local government.”¹²⁰ This analysis of a particular matter’s traditional nature, however, was only one of a number of factors to be considered in determining which governmental body should wield the power to regulate in a given area.¹²¹ The approach adopted by the Colorado Supreme Court could very easily translate to issues of federalism dealt with by federal courts. Federal courts could employ a balancing test to determine whether the federal government or the states have more substantial interests at stake. The Tenth Amendment’s reservation of undelegated power to the states, the expansiveness of the Commerce Clause’s grant of power to Congress, as well as the traditional nature of the activity to be regulated are just a few of the factors that the courts could use to balance these competing interests.

As one might expect, the activity regulated in contentious cases like those already discussed is not likely to fit neatly into either the sphere of federal or state authority. This means most cases courts face will, at least arguably, deal with issues that implicate both federal and state prerogatives. With straight-faced claims capable of being made on both sides of the argument, it would be beneficial to include a presumption element in the analysis of these questions concerning the Commerce Clause or the dormant Commerce Clause.

This presumption element will cut one of two ways, depending on the legislation at issue. As a result of the oath taken by all state and federal

116. *City and County of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990).

117. *Id.*

118. *Id.* at 767–68.

119. *Id.* at 768.

120. *Id.*

121. Other factors include the need for statewide uniformity, extraterritorial impact, other state interests, and other local interests. *Denver*, 788 P.2d at 768–70.

legislators, there will always be a presumption that duly enacted legislation, whether ratified by a state legislature or Congress, is constitutional.¹²² In this way, if the issue is one concerning Congress's right to enact a law pursuant to its commerce power, courts should assume that Congress has respected the limits of this power and enacted legislation that falls within its parameters. Likewise, a state law challenged as violative of the dormant Commerce Clause should be accorded a presumption that the state legislature did not act outside of those powers reserved to it by the Tenth Amendment and structural principles of federalism. Courts should be especially hesitant to validate claims that duly enacted legislation is unconstitutional.¹²³ The presumption of constitutionality should provide the court with the necessary starting point to apply the aforementioned balancing test.

Prior to serving on the United States Supreme Court, Benjamin Cardozo was a judge for the Court of Appeals of New York. He wrote a concurring opinion in *Adler v. Deegan*,¹²⁴ which recognized the difficulties that often attend when trying to categorize government action into local or state concerns. In an attempt to describe how to make decisions when the area sought to be regulated does not clearly fall into either category, then-Judge Cardozo wrote:

There are some affairs intimately connected with the exercise by the city of its corporate functions, which are city affairs only. . . . There are other affairs exclusively those of the state. . . . A zone, however, exists where state and city concerns overlap and intermingle. The Constrution [sic] and the statute will not be read as enjoining an impossible dichotomy. . . . How great must be the infusion of local interest before fetters are imposed? There is concession even by the plaintiff that, if the subject be "predominantly" of state concern, the Legislature may act according to the usual forms. But predominance is not the test. . . . The test is rather this: [t]hat, if the subject be in a substantial degree a matter of state concern, the Legislature may act, though intermingled with it are concerns of the locality.¹²⁵

122. The Constitution dictates that "[t]he Senators and Representatives . . . and the Members of the several State Legislatures . . . shall be bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI, cl. 3.

123. In *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810), Chief Justice Marshall addressed the restraint that should be exercised when adjudicating the constitutionality of a law:

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. . . . [I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

Id.

124. 167 N.E. 705 (N.Y. 1929).

125. *Id.* at 713–14.

Judge Cardozo's description of the proper test to apply when state concerns comes into conflict with local concerns seems to suggest a presumption in favor of state regulation. He requires only that "the subject be in a substantial degree a matter of state concern" for the state legislature to be empowered to act.¹²⁶ Though the legislature's action will be "intermingled with . . . concerns of the locality," Judge Cardozo seems to be implying that it will be up to the state legislature to keep those concerns in mind, rather than bestowing a positive grant of power to act on the local governmental body.¹²⁷

Judge Cardozo's description of the acts of the state legislature being "intermingled with . . . concerns of the locality" can aptly be applied to federalism questions.¹²⁸ Because Congress is comprised of individuals elected by their respective states, it stands to reason that they have the concerns of their various constituencies in mind when they enact legislation. This dual accountability to their electing state, as well as the union as a whole, specially qualifies members of Congress to adjudge which issues are properly regulated at the federal level as distinguished from those that states would be better equipped to handle. While there is an argument to be made that federal legislators will always choose the option that retains for themselves the maximum amount of power, as the *Garcia* Court pointed out, it is the role of the federal political process to ensure that states are not forgotten in the course of enacting federal legislation.¹²⁹ The ever-present problem of reelection will always be a check on members of Congress and their willingness to divest the states of power that is properly theirs.

In searching for a suitable solution to the problem of what to do when it is unclear whether an area is properly regulated by the federal government or the states, one possible resolution could be arrived at by synthesizing the aforementioned state law. Although bright-line rules are often preferable to balancing tests for the predictability and uniformity that they offer, federalism issues like those encountered in *National League of Cities*, *Garcia*, *Gregory*, *New York*, and most recently *United Haulers* have proven elusive problems for air-tight categories to encase.

The federal judiciary could adopt a balancing test similar to that endorsed by the Colorado Supreme Court in *Denver* coupled with a presumption in favor of federal regulation, similar to that which was outlined by Judge Cardozo in *Adler*. Using this framework, the traditional governmental nature of a particular function should be used as a factor that militates in favor of state regulation, but which is by no means dispositive. In this way, the traditional governmental function test could be used by jurists like Chief Justice Roberts

126. *Id.* at 714.

127. *Id.*

128. *Id.*

129. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552-54 (1985).

and Justice O'Connor as an important tool for protecting states' rights, without necessarily being a dispositive test, while those in line with Justices Alito and White could use the test as a less-compelling factor, so as not to clash with the Court's decision in *Garcia*.

CONCLUSION

Judges sitting on lower federal benches are left with a difficult choice given the confusing and inconsistent precedent flowing from *Garcia* and its progeny. Upon synthesizing all of the applicable case law, it seems that the winning side in these cases has been successful in maintaining a place for the traditional governmental function test in adjudicating federalism questions. While there is no doubt that *Garcia* has foreclosed this test's use as a dispositive factor, it has maintained a certain prominence, nonetheless. Until the Court is able to clear up the uncertainties that exist with regard to this controversial test, as illustrated by the opinions of Justices O'Connor, White, Alito, and Chief Justice Roberts, judges on lower federal courts can honor stare decisis by either keeping an activity's traditional nature in mind as a factor when making their decisions, or they may dismiss it as inapplicable as a result of the Court's decision in *Garcia*. The one consensus that can be gleaned from the confusing precedent that followed *National League of Cities* is that application of the traditional governmental function test requires far too much balancing to truly be considered a bright line rule.

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