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THE COURT'S ROLE IN CONGRESSIONAL FEDERALISM: A PLAY WITH (AT LEAST) THREE ACTS

Philip Bobbitt

INTRODUCTION

The constitutional drama that climaxed in the Garcia case can be usefully understood, by a theatrical metaphor, as a play in three acts. In the first act, the principal characters are introduced and the problematic nature of their relationship established; the way the characters understand their problems creates their problems. In the second act an attempt made to overcome the conflict of the first act serves only to intensify the struggle and even threatens values widely shared by the players. In the third act, a futile effort is made to resolve the tensions that now appear almost inevitable among such characters in this situation. The play closes not with a Greek embrace of fate, but with the muttering asides of discontented players who promise, like Fitzgerald’s Charlie Wales, that they’ll be back, oh they’ll be back, and then . . . .

For this is a modern play.

ACT I

THE STATE OF MARYLAND v. WILLARD WIRTZ, SECRETARY OF LABOR

As is often the case in the modern theatre, the perceived background of the action—what the characters thought to be the principles dividing them and guiding their actions—was really only a setting, or to continue the metaphor, a set. Like a stage set, the setting created an illusion that did structure the action. The mistakes made in the first act, as the characters responded to what they erroneously took the situation to be, created the tension that the characters attempted to resolve during the rest of the play.

This setting was the context provided by the historic doctrinal triumph of the Darby case, by which the power of Congress to develop a national economic unit was ratified and the New Deal agenda brought into harmony with the Constitution’s system of enumerated federal powers.

Prior to Darby there had been two separate strands of permissive interpretation of the power of the Congress “to regulate commerce among the several states.” One line of cases held that the Congress could regulate items that were not strictly subject to the interstate commerce power—because they were not being regulated for a commercial purpose—so long as these items were regulated interstate. By this means, Congress was allowed to regulate the sale of lottery tickets, obscene material, white slave traffic, and impure food and drugs.

A second line of cases held that the Congress could regulate items that were not strictly subject to the power to regulate interstate commerce—because these items were limited to intrastate distribution—so long as the regulation was for a commercial purpose, as demonstrated by a showing that such intrastate commerce had a substantial effect on interstate commerce. By means of this case law, Congress regulated the intrastate rates of an interstate carrier. In the famous Shreveport Rate Case, this federal power was upheld because such rates have “such a close and substantial relationship to interstate traffic.”

These two lines of case law met in United States v. Darby decided in 1941. At issue was the Fair Labor Standards Act (FLSA), the centerpiece of the “Sec-
ond'" New Deal. Chief Justice Harlan Stone wrote for the majority upholding complex regulations that governed minimum hourly wages, maximum working hours, and overtime. In Darby the congressional purpose was not strictly commercial and the subject of the regulation was not strictly interstate. The new standard held that activities that affected interstate commerce could be regulated by Congress, regardless of Congress' purpose or the scope of these activities.

The FLSA required every employer "engaged in commerce or in the production of goods for commerce" to pay a certain minimum wage. The original definition of "employer," however, excluded "the United States or any state or political subdivision of a state . . . ." In 1961, the act was amended to cover all employees of any "enterprise" engaged in commerce or production for commerce, provided that the enterprise also fell into certain listed categories. In 1966, Congress added to the list of categories enterprises "engaged in the operation of a hospital . . . or school . . . (regardless of whether or not such hospital . . . or school is public or private . . . )." At the same time, the Congress modified the definition of employer so as to remove the exemption for states.

This, then, is the setting for the "action" which begins when Maryland, joined by 27 other states and one school district, brings suit against the U.S. Secretary of Labor to enjoin enforcement of the act insofar as it applied to schools and hospitals operated by the states or their subdivisions. In 1967 a three-judge court is convened to hear the case. That court clearly sees the issue as one involving the limits of federal power. As the Harvard Law Review comments at the time,

Judge Winter's analysis rests on a metaphysics of constitutional powers. He postulated that all exclusive powers of Congress are "plenary" and that all plenary powers are "necessarily coterminous." Therefore, he analogized the interstate commerce power to the foreign commerce and war powers, and relied in part on cases upholding exercises of those powers against claims of violation of state sovereignty.

The next scene brings the case to the Supreme Court, which renders a decision in Maryland v. Wirtz in 1968. The Supreme Court affirms the district court. The Court considers and rejects the appellants' argument that the expansion of coverage of the statute through the "enterprise concept" is beyond the power of Congress under the Commerce Clause. This question, the Court holds, had been settled by United States v. Darby, which upheld the power of Congress to regulate intrastate activities when they have a substantial effect upon interstate commerce. The Court notes that the Congress had found that substandard wages and excessive hours, when imposed on employees of a company shipping goods into other states, gave the exporting company an advantage over companies in the importing states. Such a situation, notes the Court, constitutes a "rational basis" for the extension of the FLSA to all enterprises.

The appellants had also argued that the statute could not constitutionally be applied to state-operated institutions "because that power must yield to state sovereignty." The Court replies that this argument is untenable—there is no "general doctrine implied in the federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." If a state is engaged in economic activities that are validly regulated by the federal government, the Court goes on, the state may be forced to conform to federal regulation.

By the end of the first act, then, the characters have established themselves in this posture:

The Congress, trying to extend federal protection to workers hitherto denied the benefits possessed by virtually the entire workforce, is vindicated by Darby. It was in Darby, after all, that Stone had made the unfortunate remark, itself a truism, that "the Tenth Amendment is only a truism." This simply meant that the Tenth Amendment expressed the bland view that whatever the extent of federal authority, it must derive from the enumerated powers. With respect to the commerce power, Darby set its limits: there were none to be imposed by courts. Hence a fair reading of state sovereignty, in the commerce context, simply caused it to vanish, should Congress choose to act. For if we apply the statement "a state engaged in activities that are validly regulated by the federal government must conform to federal regulation" to require only that, were the practice subject to regulation done by private hands the federal power could reach it, we have simply removed the relevance of the fact that it is a state that is to be regulated.

The states are in full retreat. Having relied upon their exclusive powers to protect segregation, malapportionment, and criminal laws governing sexual conduct, the states had already seen the first of these fall to an expanded—if degraded—Commerce Clause. By using "federalism" as a code-word for practices that united the Congress against the states, the states had risked losing their greatest protector—the state orientation of congressional delegations. Once this was lost, the Court would not protect them.
The Court has withdrawn—a neutral, impassive actor simply attempting to manage what appeared to be the inevitable triumph of the New Deal over the

Old Constitution. Its last words, as it left the stage, seemed to settle the matter.

**ACT II**

**NATIONAL LEAGUE OF CITIES v. USERY**

In this act, the Supreme Court, for the only time in the 50 years since *Darby*, holds a congressional regulation of commerce to be unconstitutional.

In *National League of Cities*, although it concedes that the regulations at issue are “undoubtedly within the scope of the Commerce Clause,” the Court finds that wage and hour determinations with respect to “functions . . . which are essential to the separate and independent existence” of the states are beyond the reach of congressional power under the Commerce Clause.

The Court was not, therefore, setting new limits on federal power (the regulations were “undoubtedly” within the reach of the commerce power); instead, it was identifying fundamental limitations. This would appear to resolve the problem created by *Wirtz*’s era- sure-by-logic of state sovereignty; it restores to relevance the element of statehood.

A further, more subtle difficulty, however, had been created for the Court by *Maryland v. Wirtz*. It was this: how does a court overrule a decision both “substantively” and “procedurally?” For that was what was required; the Court in the first act had gotten both aspects wrong by misconceiving the issue as a mere *Darby* problem. The Court was wrong to say that there are no limitations on the commerce power imposed by federalism, but it was also wrong to decide this issue, that is, to arrogate to itself the role of policing the Congress regarding the limitations on plenary powers imposed by federalism. Let us make no mistake: to decide that the Congress has not misread a particular constitutional rule is to assume the power to decide that it has.

One sees the conundrum: how could the Court in the second act—in *National League of Cities*—say both (1) that the Court was wrong in the first act, *Maryland v. Wirtz*, not to apply a particular rule and (2) that it was also wrong to apply any rule at all, since the limitations imposed by federalism on the plenary powers of Congress are determined by Congress and not by the Court. The decision creates a kind of Liar’s Paradox: if (2) is true then (1) must be false; but if (1) is false, then (2) must be false.

It is as if a character wishes to retract a speech made in the first act on the grounds that he already has too many lines. If the Court were right and had no business deciding the case in *Maryland v. Wirtz*, then it would have no opportunity now to overrule that case.

A desperate attempt ensues to avoid the conun- drum. *Wirtz* is overruled, but the institutional issue of the Court’s competence vis-a-vis Congress is not addressed. The Court simply hopes that, by the terms of its decision, it can limit its ruling to the facts in *National League of Cities*—that is, to the application of the FLSA to the state practices at issue—and thus not be forced to confront the question of institutional competence.

Such an attempt may be called an exercise of the Court’s “cuing function,” to employ another theatrical term. There are times when the Court, instead of creating doctrine for the lower courts to apply in the context of constitutional review called the “checking” function, wishes to give a clue to another institutional actor. The decision is accordingly limited to its facts, as far as the courts go, but has its real impact if it is picked up and applied by the Congress, for example, or the President or the states, in the discharge of their own constitutional responsibilities.

The difficulty with this rather subtle exercise of Supreme Court power is not, as you might expect, that Congress misses the cue or fails to act accordingly. Not at all. Rather it lies with the lower courts who, in their fixation on doctrinal argument derived from “checking” cases, wish to use the cue meant for someone else as the occasion for making new doctrine.

Recognizing this in a series of lectures in 1979, I predicted that the Supreme Court, after *NLC*, would adopt the following course:

If the Court were exercising a cuing function in *National League of Cities* then we would expect to see the Court not granting *certiorari* in cases which present a development of the doctrine announced in *National League of Cities*. We would expect to see little development of the doctrine in the cases taken on appeal. Indeed, citation of *National League of Cities* would be virtually absent except for dicta. Finally, if we were lucky, we might even encounter a case presenting a substantial *National League of Cities* issue which the Court chose wholly to ignore. When the Court did rely on *National League of Cities* it would
only be in cases in which lower courts, misled by the erroneous checking assumption, had actually struck down legislation on that basis.\(^8\)

This is precisely what happened. In the case of City of LaFayette v. Louisiana Power & Light,\(^9\) which applied the federal antitrust laws to municipalities, there is scarcely a reference to NLC even though it was discussed in both briefs and at oral argument and is clearly germane to the decision which followed.

The difficulty was, however, that the lower courts (and the law reviews) were not listening. Moreover, the Supreme Court could not discipline the lower courts without making further doctrinal pronouncements which, in turn, induced the lower courts to further deciding. When one circuit went so far as to get the substantive doctrine exactly wrong and create a conflict within the circuits, the Supreme Court could no longer maintain its silence. So the high Court decided to take three cases, all meant to underscore the view that NLC was limited to its facts.

Doing this, of course, simply flouted the underlying reason why NLC was limited to its facts. The Court was now making doctrine, taking opportunities to decide cases on the merits, when the fundamental rule it was trying to repair was that it had no right to decide such cases.

The result was an inexorable decline into chaos. As I mentioned, the initial reaction to NLC in the legal community was simply to treat it as a checking-function case—indeed as a partial overruling of Darby, as claimed by Justice William J. Brennan and the dissenters in NLC. The law reviews were unanimous in this misunderstanding. The predictable result was confusion in the lower courts, for NLC had not set out to provide them with a doctrinal test to apply. Let us review this play within the play to see what happened.

Soon after the NLC announcement, the Second circuit holds that the control of a metropolitan transit system can be regulated by the Congress. Friends of the Earth v. Carey\(^10\) involved rather extensive changes in traffic programs, licensing, parking, delivery, and taxi regulations that New York state and New York City were required to make in New York City’s metropolitan transit control plan in order to comply with the Clean Air Act. The state and city argued, among other things, that the federal government could not require these changes because the control of a traffic system was “an integral government function,” the phrase used by the Supreme Court in NLC to characterize, but not define, state activities so crucial to federalism that Congress could not prescribe their operation, and thus were an improper subject for congressional regulation. The Court holds that the control of a traffic system is not such a function since the regulation of traffic on roads and highways “has long been considered to be a cooperative effort between city, state, and federal authorities.”\(^11\)

Then, the first circuit proceeds to hold in Enrique Molina-Estrada v. Puerto Rico Highway Authority\(^12\) that the operation of a state highway authority is a traditional or integral government function. In this case, employees of the Puerto Rico Highway Authority brought an action for wages due under the FLSA. The Puerto Rico Highway Authority built and repaired roads, operated toll roads and parking lots, and planned to build and operate a mass transit system. The Court finds that these are integral government functions because (1) governments have always built roads, making this a traditional function, (2) providing roads and highways is a public service, intended to benefit all, and (3) government is the principal provider of the service.

These are but two examples; there were many others. What finally motivated the Supreme Court to act was that, not despite but because of the high court’s fastidiousness, the lower courts were setting up tests of their own, and conflicting case law began to accrete around the various tests.

Thus, the sixth circuit in Amersbach v. City of Cleveland\(^13\) in the course of deciding that the operation of a municipal airport is an integral government function, announced this test for a reserved state function: (1) the governmental service or activity must benefit the community as a whole and be available to the public at little or no direct expense, (2) the service or activity must have been undertaken for the purpose of public service rather than pecuniary gain, (3) government must be the principal provider of the service or activity, and (4) government must be particularly suited to provide the service or perform the activity because of a communitywide need for the service or activity.\(^14\)

The Amersbach court finds that the operation of a municipal airport meets this test. The operation of an airport is essential to an air transportation system, and “[a]irports are increasingly indispensable in a nation where airplanes are relied upon as a principal mode of passenger transportation.”\(^15\) Moreover, government is usually the provider of airport service to commercial aviation.

The Carey Court had found, a year earlier, however, that the level of federal involvement was the dispositive issue; yet this was not mentioned in Molina-Estrada five years later, even though there was certainly federal involvement in Puerto Rico’s highway system in the form of federal highway grants and federal regulation through the Department of Transportation and the National Highway Traffic Safety Agency.
The operation of airports is heavily regulated by the Federal Aviation Administration, but the *Amersbach* court never mentioned this fact. The traffic control system in *Carey* surely meets the criteria announced in *Molina-Estrada* and *Amersbach*. Traffic control is a government service, available to all. Government is the principal, if not the sole provider of the service—especially in New York City, where traffic problems are especially complicated—and there is a community-wide need for the service. Such disarray was widespread.

Consider the opinions of the district court and the 11th circuit in *Williams v. Eastside Mental Health Center, Inc.* In this case, an employee of a community mental health center brought a suit for wages under the *FLSA*. The mental health center which employed Williams was one of a system of such centers that formed the mental health service of the state. The state retained a certain degree of control over the center, which each court finds determinative, although leading to different results.

The district court holds that the operation of the mental health center satisfied the test enunciated in *Amersbach*, and thus provides "integral" state functions. The court finds that the center is part of the mental health system set up by the state of Alabama to provide mental health care to its citizens. Moreover, government is "particularly suited" to provide these services, and there was a communitywide need. Thus, the *FLSA* does not apply to the employees of the center.

The 11th circuit then reverses on the grounds that the state service provided was not intended for "all" citizens of Alabama. "We think that an integral function is in this context one that a state performs for or in relation to the society at large, the state as a whole . . . . The function involved here addresses a specific problem affecting a limited class of persons within the state." In support of this eccentric view, the court goes on to list some examples of integral functions (taxing power, utilities, water provision) but never gets around to a discussion, much less a refutation, of the analysis used by the district court.

At times even the same circuit appeared to apply different tests. Thus the same court which struck down the federal intervention in *Amersbach*, in 1979, upholds the application of the *Clean Air Act* to the state in *Ohio Department of Highway Safety*, in 1980.

This is too much. The Supreme Court, after five years of self-enforced restraint, breaks its silence. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.* the Court introduces a three-part test which greatly limits the fact situations which might constitute impermissible federal interference with state functions.

In *Hodel*, an association of coal producers challenged the constitutionality of the *Surface Mining Control and Reclamation Act*, that, among other things, prescribed federal performance standards for surface mining on "steep slopes." The association argued that the act was an unconstitutional interference with the states' traditional function of regulating land use. The Court upholds the act because it merely regulates private activities. The Court distinguishes this type of regulation from regulation of "states as states." Only the latter is prohibited by the Tenth Amendment. The Court announces a new test under *National League of Cities*:

First, there must be a showing that the challenged statute regulates the "states as states" . . . . Second, the federal regulation must address matters that are indisputably attributes of state sovereignty . . . . Third, it must be apparent that the states' compliance with the federal law would directly impair their ability to 'structure integral operations in areas or traditional governmental functions'.

In 1982, the Court further limits the application of *NLC* in *United Transportation Union v. Long Island Railroad Co.* In this case, a union of railroad workers brought action seeking a declaratory judgment that the relationship between the union and that the railroad was governed by the federal *Railway Labor Act* (*RLA*), not by New York's Taylor Law. The district court holds that the *RLA* applied, but the circuit court reverses, holding that the operation of a state-owned common carrier was an integral government function, and thus the Tenth Amendment barred application of the federal act. The Supreme Court reverses.

The Court concentrates on the third element of the *Hodel* test: whether the state's compliance with the federal law would directly impair its ability to structure integral operations in areas of traditional government functions. Determining whether a particular function is integral to state government requires more than an inquiry into what is "traditionally" a state function. Instead, "it was meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state's ability to fulfill its role in the Union and endanger its 'separate and independent existence'." The Court concludes that "it can . . . hardly be maintained that application of the Act to the state's operation of the Railroad is likely to impair the state's ability to fulfill its role in the Union.
or to endanger the 'separate and independent existence' referred to in National League of Cities . . . ."26 and accordingly holds that the operation of the Long Island Railroad is not an integral government function.

What kind of federal regulation could possibly fail under this line of cases? A statement by a circuit court judge considering a case in 1982 is illuminating. In Kramer v. New Castle Area Transit Authority,28 commenting on the LIRR test, Judge Leonard I. Garth wrote:

I find it almost impossible to hypothesize very many other circumstances in which federal regulation would endanger the 'separate and independent existence of a state' (other than the National League fact) . . . . In effect, the endangering test announced by the Court, whatever its wisdom, appears to me to have the virtue of being more certain in application than the 'traditional function' test . . . . [It will undoubtedly have the effect of forestalling disputes of the type presented by the instant case.

Finally, the Court’s opinion in EEOC v. Wyoming27 restricts the scope of plausible checking under NLC even further. This opinion applies the balancing test from Hodel to require that federal regulation actually threaten the state’s existence, an addition that, if anything could do so, would seem to restrict NLC to its bare facts.

But the cases continued to come. The Supreme Court was deepening its Faustian pact, using doctrine to cut off the possibility of more doctrine. Still struggling under the paradox created by Maryland v. Wirtz and the need to rectify that decision, it was worsening the situation as it flailed about. Now there were more cases than ever.

**ACT III**

**GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY**

The third act was inevitable.

In Garcia, the San Antonio Metropolitan Transit Authority (SAMTA) sought a declaratory judgment that it was entitled to immunity from the overtime pay provisions of the FLSA. SAMTA did not question that the transit system affected interstate commerce sufficiently to fall within Congress’ power to regulate commerce. Instead, it claimed exemption from federal law as a governmental entity performing a traditional governmental function—the transit system had been publicly owned and operated since 1959. The district court upheld the claim of immunity.

While an appeal to the Supreme Court was pending, the Court decided United Transportation Union v. Long Island Railroad and subsequently vacated the district court’s decision in Garcia, remanding the case for further consideration in light of Long Island Railroad. When the district court again upheld SAMTA’s immunity, it seemed virtually inevitable that the Supreme Court would reverse. This is the situation as the curtain rises on the third act.

Instead of reversing the district court on the narrow ground that SAMTA, like the Long Island Rail Road, was not performing a traditional governmental function, however, the Supreme Court overturns National League of Cities. Thus ends the Court’s decade-long effort to enforce an area of immunity from federal regulation under the Commerce Clause for certain functions of state and local governments. The Court’s language makes clear that Congress’ action in affording SAMTA employees the protections of the wage and hour provisions of the FLSA contravenes no affirmative limit on Congress’ power under the Commerce Clause. The Court also emphasizes that, except for unspecified but extreme threats to the states’ very existence, Congress is the ultimate arbiter of the bounds imposed by federalism. So we have the actors now making the same mistakes that led them to the impasse that appeared to require the re-making of those mistakes; hence, when the Court finally overrules the “procedural” elements that unite Wirtz and National League of Cities, it finds itself trapped into overruling the “substantive” elements of the more recent precedent. It would be irony, but it is too predictable.

Thus the play ends, or in the tradition of the modern theatre, simply stops. There is no satisfying catharsis, no resolution. Some of the players are insisting that the play go on—and it is yet possible that a deus ex machina in the form of new court appointments will revive the action.

**CODA**

What ought to have been done? And what can we learn about our constitutional jurisprudence from these events?
ply erased an important structural element of the Constitution, the way the popularity of abstract art effectively removed figurative drawing from art schools; questions of federalism simply would have become irrelevant. What was needed was some way to overrule Maryland v. Wirtz "substantively" and "procedurally." Here, the Court did not get much help from the commentators or the lawyers. By compromising its position procedurally and then stonewalling, the NLC court virtually ensured the case's demise. It might have found a way out, however, in a venerable "procedural" precedent.

In Marbury v. Madison the Court was at great pains to indicate its views of the constitutional merits arising from the refusal by the Secretary of State of a new administration to deliver the validly issued commissions of its predecessor. "To withhold his commission," Marshall wrote, "is an act deemed by the court not warranted by law, but violative of a vested legal right." Despite this, as we all know, the Court did not grant William Marbury's petition for a writ of mandamus. This dictum is sometimes criticized as an example of the Court rendering an advisory opinion, a criticism of which I am doubtful. In stating the general rule of law applicable to the case, and in determining whether a right existed, Marshall did no more than was logically necessary to bring forward the question of the availability of the remedy. Jurisdiction to hear the case was not at issue. It is the custom nowadays simply to assume the plaintiff's claims and then ask whether a remedy will lie, but to determine their merits does not, by itself, flout the rule against advisory opinions. That rule bars courts from deciding questions "in the air," that is, questions detached from actual legal cases and controversies. There is no judicial power "to give answers to legal questions as such but merely the authority to decide them when a litigant [is] before the Court."28 In Marbury, however, the Court was presented with an actual case involving concrete legal issues. The Court served notice that, if such a case should arise when the Congress had properly provided for an Article III remedy, the Court would order the commission delivered.29 Something of the same lucidity and forbearance was required here.

There is no doubt that the Court in Garcia—or in NLC—could have joined its correct perception that there are limitations on Congress imposed by the federal structure with its equally correct view that these limitations are for enforcement by the Congress, not the Courts. But so long as courts (and commentators) remain transfixed by the image of one sort of argument—doctrinal—in service of one sort of function—the checking function of constitutional common law—we will not avail ourselves of the many flexible tools provided by the Constitution.

ENDNOTES

1 I am indebted to Miss Margaret Burns for able research regarding the lower court opinions that followed National League of Cities; to Professor Sanford Levinson for his customary generosity in reading an initial draft of this paper; and to Mrs. Candace Howard for secretarial grace under pressure.

2 United States v. Darby, 312 U.S. 100 (1941).

3234 U.S. 342 (1914).


7 The declaratory judgment in Powell v. McCormack, 395 U.S. 486 (1969), is an example of the cuing function between the same actors that we have here.


10 552 F.2d 25 (2nd Cir. 1977).

11 Ibid., p. 38.

12 680 F.2d 841 (1st Cir. 1982).

13 598 F.2d 1033 (6th Cir. 1979).

14 Ibid., p. 1037.

15 Ibid.


17 I am inclined to suspect that it was the availability of private actions that caused the NLC solution—which depended on a tacit understanding by the coordinate branches of government—to unravel.

18 509 F. Supp. at 583.

19 669 F.2d at 680.

20 U.S. v. Ohio Department of Highway Safety, 635 F.2d 1195 (6th Cir. 1980).


22 Ibid., pp. 287-88.

25Ibid., pp. 689-90.
2677 F.2d 308 (3rd. Cir. 1982).

28Eisler v. United States, 338 U.S. 189 (1949) per Frankfurter, J.
29I take it there is no doubt regarding Congress’ power to provide the Court with such a role should Congress choose to do so.