JUDICIAL PHILOSOPHIES IN COLLISION: JUSTICE BLACKMUN, *GARCIA*, AND THE TENTH AMENDMENT*

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This essay offers a reflective overview of the Supreme Court's federalism cases from *National League of Cities v. Usery*[1] to that decision's reversal just nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*.[2] These cases illuminate the rise and fall of a constitutional doctrine and the intellectual evolution of the Justice, Harry A. Blackmun, who has cast the crucial deciding vote in this field. Most intriguingly, they illustrate the collision, in an unusual context, of the different philosophies of judicial decisionmaking which have vied for supremacy on the modern Court. The essay begins with an overview of the contradictory ideological labels applied to judicial behavior, moves directly to an analysis of the multi-faceted character of the *Garcia* decision, devotes the bulk of the discussion to tracing how *Garcia* grew out of the theoretical and practical tensions inherent in *National League of Cities* and its progeny, and concludes with a brief reflection on *Garcia*'s philosophical significance and its vindication in the political process to which it paid homage.

I. THE END AND THE BEGINNING

A. Political Labels and Judicial Philosophies

It is colloquial second-nature for judicial commentators to apply a right-left political framework to the decisions of courts and the behavior of judges. For example, Justice Blackmun is widely regarded as having undergone an ideological shift: from being a "conservative" judge in most areas to being a "liberal" judge in many. After his appointment by President Nixon in 1970, he voted frequently with "conservative" Chief Justice Warren E. Burger, and was

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1. 426 U.S. 833 (1976).
2. 469 U.S. 528 (1985).

even called a "Minnesota Twin" of his longtime friend and fellow Nixon appointee.[3] But by the early 1980's he became a reliable ally, in many cases, of the two most "liberal" Justices on the Court at that time, William J. Brennan, Jr. and Thurgood Marshall. It is far from clear, of course, what such political labels mean in the context of constitutional interpretation. They are, at face value, too blunt and imprecise to convey much meaningful information about a judge's constitutional philosophy. Yet we use them anyway, because of their convenience, and because, in the view of many cynics, judicial decisionmaking, like war according to Clausewitz,[4] is simply the continuation of politics by other means.

At the same time, attempts have been made to analyze the choices judges make in interpreting the Constitution through a more refined framework, avoiding crude political terminology. This has been an approach used not only by constitutional scholars seeking a more informative theory of judicial decisionmaking, but also by politicians attempting to define the qualities they seek in a judge in deliberately "apolitical" terms. Thus, one rarely hears a conservative politician openly calling for the appointment of "conservative" judges. Rather, such a politician will call for judges to exercise "judicial restraint" and to avoid "judicial activism." Or, in President Nixon's famous terminology, such a politician will advocate a judicial philosophy of "strict constructionism."[5]

But judicial restraint and strict constructionism turn out to be very different concepts. Judicial restraint is generally taken to mean a reluctance to exercise the power of judicial review and a tendency to show deference to the judgment of the legislature or executive. It also implies respect for the Court's own precedents. By these lights, the 1954 decision in *Brown v. Board of Education*,[6] overturning a fifty-eight-year-old precedent and striking down the segregation laws of numerous states, was a very "activist" ruling. Strict constructionism, however, implies not deference to prior decisions or to coordinate branches of government, but obedience to the plain words of the Constitution itself. According to this philosophy, judges should adhere to the precise language of the Constitution, and only strike down laws which clearly violate a specific constitutional provision. The Constitution itself makes this theory difficult to apply, however, due to the many vague or "open-ended" provisions in that document. Because such provisions — the "due process" and "cruel and unusual punishment" clauses, for example — defy mechanical or literal interpretation, strict constructionists must fall back on a theory of interpretation capable of circumscribing the purely personal opinions or philosophies of the judges.

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3. *See* B. WOODWARD & S. ARMSTRONG, THE BRETHREN 121-22 (1979).

4. *See* K. VON CLAUSEWITZ, ON WAR 16 (O.J.M. Jolles trans. 1943) ("We see, therefore, that war is . . . a continuation of political intercourse, a carrying out of the same by other means.").

5. "Strict constructionism," since Nixon politicized its meaning, has generally been replaced by the term "interpretivism." *See* J. ELY, DEMOCRACY AND DISTRUST 1-9 (1980). Finding "interpretivism" to be rather awkward, however, and being unwilling to consign an apt and useful term to the fate of a political slogan, I will continue to use "strict constructionism" in its classic, pre-Nixonian meaning.

6. 347 U.S. 483 (1954).

Many people, on both the right and the left of the political spectrum, seem to assume that any theory designed to limit the discretion of judges must also narrow the scope of constitutionally guaranteed individual rights. In some cases, this is true. Former Attorney General Meese was a prominent advocate for a variant of strict constructionism that would limit the scope of vague provisions of the Constitution to the specifically discoverable intentions of the Framers.[7] This doctrine of "original intent" would indeed restrict the scope of judicial enforcement of constitutional rights, and has been attacked both for this reason and on broader historical grounds.[8] An alternative approach, however, was used by Justice Hugo L. Black, properly regarded as one of the great strict constructionists in Supreme Court history. Justice Black made the same claim for his approach that Meese made for his: that it would circumscribe judicial discretion and provide clear guideposts for judicial decisionmaking. But Justice Black, while also purporting to follow the intentions of the Framers, demonstrated that *strict* constructionism need not mean *narrow* constructionism. He resolved the ambiguity of vague provisions not by narrowing their scope, but by dramatically broadening it to encompass, in the case of the due process clause of the fourteenth amendment, the entire Bill of Rights. On the issue of whether the fifth amendment's privilege against self-incrimination prohibits compelled testimony when the defendant is given immunity from prosecution, for example, he and Justice William O. Douglas read the clause strictly — at its sweeping face value — to hold that it did.[9] Thus, while strict constructionism can in theory restrict constitutional liberties, it can also serve to expand them.

The fact that Justice Black, the great strict constructionist, was also an ardent liberal and a renowned judicial activist, points up the inherent irony of the fact that political conservatives claim both judicial restraint and strict constructionism as their own. In fact, as Professor John Hart Ely has pointed out, the two philosophies "cut across [each other] . . . virtually at right angles."[10] The reason is really quite simple. Each philosophy emphasizes loyalty to a different standard: judicial restraint to the judgment of the legislature, strict constructionism to the facial meaning of the Constitution. The two loyalties potentially conflict. When the legislature itself declines to stay within the strict

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7. *See* Meese, *Address Before the D.C. Chapter of the Federalist Society Lawyers Division*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 25 (S. Levinson & S. Mailloux eds. 1988) [hereinafter INTERPRETING LAW AND LITERATURE].

8. Justice Brennan, for example, in an unusual public speech, attacked Meese's approach as "arrogance cloaked as humility," concealing a purely political "antipathy to claims of the minority." N.Y. Times, Oct. 13, 1985, at A1. *See also* Brennan, *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING LAW AND LITERATURE, *supra* note 7, at 13. And the distinguished historian Henry Steele Commager criticized Meese for ignoring the very original intentions he purports to follow, noting that the Framers "laid down general principles . . . in language flexible enough to anticipate an ever-changing society. . . . Such flexibility is just what [they] intended." N.Y. Times, Nov. 20, 1985, at A31.

9. "The difficulty I have . . . with the majority of the Court in the present case is that they add an important qualification to the Fifth Amendment. The guarantee is that no person 'shall be compelled in any criminal case to be a witness against himself.' The majority does not enforce that guarantee as written but qualifies it; and the qualification apparently reads, 'but only if criminal conviction might result.' Wisely or not, the Fifth Amendment protects against the compulsory self-accusation of crime without exception or qualification." Ullmann v. United States, 350 U.S. 422, 443 (1956) (Douglas, J., joined by Black, J., dissenting).

10. J. ELY, *supra* note 5, at 1.

bounds of the Constitution, a judicial decision will require choosing between the two philosophies.[11]

B. The Quadruple-Take of Garcia

Garcia v. SAMTA[12] is an illuminating example of how a single decision can reflect the complex interaction of judicial philosophies with political labels. Joe Garcia was a bus driver for the city of San Antonio, Texas. He wanted to be paid for his overtime at the federally-mandated rate. There was no question that were his employer, the San Antonio Metropolitan Transit Authority, a private business, the federal standards would apply. The only issue was whether its status as a public agency entitled it to an exemption from those standards under the "state-sovereignty" doctrine of *National League of Cities v. Usery*.[13] Justice Blackmun's opinion for a five to four majority of the Court held that it did not.

The majority went further, however, than merely deciding in Joe Garcia's favor. Instead of simply limiting or distinguishing *National League of Cities*, they overruled it outright. In so doing, Justice Blackmun reversed his own position in the 1976 case. *National League of Cities* was also decided by a five to four margin, with Justice Blackmun providing the decisive fifth vote in its support. In 1985, seven members of the Court — Chief Justice Burger and Justices Brennan, White, Marshall, Powell, Rehnquist, and Stevens — adhered to their positions of nine years before. An eighth, Justice O'Connor, supported the position her predecessor Justice Stewart had taken. Four — Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor — adamantly supported *National League of Cities*. Four — Justices Brennan, White, Marshall, and Stevens — just as adamantly reaffirmed their original opposition to that decision. Only Justice Blackmun changed his mind, but in so doing he swayed the Court and radically altered its course in an entire field of constitutional law.

Garcia was revealing on a number of levels. It dramatically highlighted Justice Blackmun's increasingly pivotal role on the Court and his gradual shift from a "conservative" pro-federalist stance in 1976 to a "liberal" pro-nationalist attitude nine years later. While *Garcia* was greeted as a major victory for the "liberal" wing of the Court, however, Justice Blackmun's role in that decision was in fact a striking vindication of President Nixon's proclaimed goal of bringing "judicial restraint" and "strict constructionism" to the Court. In fact, *Garcia* can be seen as a prism refracting the different — and contradictory — aspects of judicial behavior described as "liberal" or "conservative." Depending on which angle you view it from, *Garcia* is a liberal decision — and yet a conservative one — and yet again a liberal one — and yet *again* a conservative one.

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11. Seen in this light, judicial activism may actually be more consistent with strict constructionism than is the latter's supposed conservative ally, judicial restraint. A judicial activist can always claim to be following a philosophy of strict constructionism, even when upholding a law, because he can say he does so, not out of deference to the legislature, but simply because they stayed within the bounds. By contrast, an apostle of judicial restraint may often feel compelled to accept legislative judgments that flout the principles of strict constructionism.

12. 469 U.S. 528 (1985).

13. 426 U.S. 833 (1976).

On the first take, *Garcia* was immediately recognizable as a liberal decision. What else could one say about a ruling in which notoriously "liberal" Justices like Brennan, Marshall, Blackmun, and Stevens were in the majority, and "conservatives" like Burger, Powell, Rehnquist, and O'Connor dissented? After all, it upheld federal power against a claim of "states' rights," a cause associated with political conservatives. And it did so in the context of federal minimum wage-maximum hour legislation that was originally championed and passed by political liberals.[14] But on the second take, *Garcia* was clearly a conservative decision because it deferentially upheld an Act of Congress in the comfortable tradition of judicial restraint. Indeed, Justice John Marshall Harlan, a conservative adherent of judicial restraint, had written the Court's opinion in *Maryland v. Wirtz*,[15] the 1968 federalism case overturned by *National League of Cities* and revitalized by *Garcia*.

This leads to the third take of *Garcia*: Because it overruled a Supreme Court precedent only nine years old, it was in that respect a highly activist and therefore liberal ruling. The dissenters in *Garcia* made much of this, going through familiar conservative lamentations over "the precipitous overruling of multiple precedents,"[16] a rather awkward complaint in view of the fact that *National League of Cities* itself overruled a precedent only *eight* years old. The fourth and final take of *Garcia* addresses the essential philosophical nature of the decision: It was, in my view, a profoundly strict-constructionist ruling, and thus, according to the announced standards of conservatives themselves, a profoundly conservative ruling. The dissenters in *Garcia* wanted to overturn the federal law in question because it violated a supposed constitutional guarantee of "state sovereignty." There is, however, no such guarantee spelled out anywhere in the Constitution. The *Garcia* dissenters found such a broad principle implicit in the tenth amendment. The language of that amendment, however, reserves to the states only powers "not delegated"[17] to Congress. Since, as even the *National League of Cities* Court conceded, the Act of Congress at issue in *Garcia* was well within the delegated commerce power,[18] the tenth amendment simply did not apply.

The true essence of the dissenters' position in *Garcia* was that a broad, implicit value ("federalism" or "state sovereignty") could be inferred and extrapolated from the structure of the Constitution as a whole, with only nominal support from any specific provision. This kind of reasoning is remarkably reminiscent of the Court's argument, in the infamously "liberal" 1973 case of *Roe v. Wade*,[19] that the fourteenth amendment and the Bill of Rights, taken together, incorporate a broad, implicit constitutional value ("privacy") encompassing a woman's right to choose abortion. The *Garcia* dissent was, like *Roe v. Wade*, a classic case of extreme loose constructionism. And the *Garcia* majority, using a classic strict-constructionist argument, implicitly accused the

14. The Fair Labor Standards Act of 1938, ch. 676, §1, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219), which was at issue in both *National League of Cities* and *Garcia*, was a major part of President Franklin D. Roosevelt's New Deal program.
15. 392 U.S. 183 (1968).
16. *Garcia*, 469 U.S. at 559.
17. U.S. CONST. amend. X.
18. *National League of Cities*, 426 U.S. at 841.
19. 410 U.S. 113 (1973).

dissenters of trying to inject their own personal political philosophies into the Constitution, admonishing them that "we have no license to employ freestanding conceptions of state sovereignty when measuring Congressional authority under the Commerce Clause."[20] The tensions underlying this curious role reversal, and the circuitous route by which the Court arrived at the quadruple-take of *Garcia*, are discussed in Part II below.

II. THE *NATIONAL LEAGUE OF CITIES* ERA: 1976-1985

A. The National League of Cities *Departure*

Federalism — the apportionment of power between the states and the federal government — has historically been a major concern of the Supreme Court. By 1976, however, it had languished for many years as a source of constitutional controversy. The Court had not struck down an Act of Congress on the ground that it invaded the reserved powers of the states since 1936, in the case of *Carter v. Carter Coal Co.*[21] The tenth amendment, which reserves to the states all powers "not delegated" to the federal government (nor specifically denied the states by the Constitution),[22] seemed to have become irrelevant in constitutional law. All that changed on June 24, 1976, when the Court, by a five to four vote,[23] struck down the 1974 amendments to the federal Fair Labor Standards Act of 1938 (FLSA), which extended the Act's minimum-wage and overtime provisions to almost all employees of state and local governments and agencies.[24]

The route by which the Court curtailed this federal legislation was different from that taken by the conservative majority of the 1930's, however. The *Carter Coal* Court simply held that regulation of the conditions of employment in coal mining was outside the scope of the commerce power of Congress.[25] By 1976, however, it was well established that the power to "regulate commerce" included the power to regulate employment conditions in businesses participating in, or "affecting," commerce. This point was settled in 1941 in *United States v. Darby*[26] and has never since been seriously questioned. Furthermore, there is nothing in the language or logical meaning of the commerce clause itself which draws any distinction between public-sector and private-sector employees. The power of Congress to regulate conditions of employment under the clause depends on the nexus with interstate commerce, not on the identity of the employer, and it is indisputable that conditions in public employment may influence commerce just as much as conditions in private business.

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20. *Garcia*, 469 U.S. at 550.
21. 298 U.S. 238 (1936) (striking down federal regulation of employment conditions in coal mines).
22. *See* U.S. CONST. amend. X.
23. *National League of Cities*, 426 U.S. 833.
24. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(2), 88 Stat. 55, 59 (codified at 29 U.S.C. § 203(e)(2)(C)); *see also supra* note 14 (discussing 1938 Act).
25. *See generally Carter Coal*, 298 U.S. 238. *See also* U.S. CONST. art. I, § 8, cl. 3.
26. 312 U.S. 100 (1941).

It follows that under the commerce clause itself, Congress was constitutionally empowered to enact the legislation at issue in *National League of Cities*. The Court willingly accepted that stipulation, and did not base the invalidation of the FLSA amendments on any doctrine *internal* to the commerce clause. The majority instead argued that "when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other . . . affirmative limitations contained in the Constitution . . . [such as] the right to trial by jury contained in the Sixth Amendment or the Due Process Clause of the Fifth Amendment."[27] The Court identified the tenth amendment as the principal source of this limitation.[28] Thus, the Court concluded, "while undoubtedly within the scope of the Commerce Clause,"[29] the federal legislation at issue transgressed a separate constitutional guarantee — external to the commerce clause — protecting "'the essentials of state sovereignty.'"[30]

Before examining the Court's attempts to define the nature and breadth of the "state sovereignty" guarantee it relied upon in *National League of Cities*, it is appropriate to note the political and institutional aspects of the decision, especially the exceptionally bitter division on the Court which it occasioned. Justice (now Chief Justice) Rehnquist was the intellectual force behind the ruling. He wrote the opinion of the Court in an ambitious attempt to frame a broad new constitutional doctrine limiting federal regulatory power over the states. "States' rights" had long been a concern of political conservatives, and Justice Rehnquist was one of the four Supreme Court appointees with whom Richard Nixon sought to reverse the direction the Court had taken during the liberal era of Chief Justice Earl Warren. Indeed, Rehnquist may be the most conservative Justice to sit on the Court since James C. McReynolds retired in 1941. The majority in *National League of Cities*, sure enough, was composed of the four Nixon appointees and Justice Potter Stewart. And Justice Rehnquist's opinion flatly overruled a Warren Court precedent only eight years old.[31]

Maryland v. Wirtz,[32] decided in 1968 toward the end of the Warren Era, had upheld essentially the same federal power at issue in *National League of Cities*.[33] The Court's opinion in *Wirtz* was written by Justice John Marshall Harlan, himself a conservative with an abiding concern for federalism and the legitimate prerogatives of the states. *Wirtz* held that federal minimum wage and overtime standards constituted only a limited and indirect interference with a state's prerogatives as an employer, and that in any event, "the Federal Government, when acting within a delegated power, may override countervailing state interests."[34] In other words, there simply was no external, overriding state-sovereignty limitation on the commerce power. Justice Harlan

27. *National League of Cities*, 426 U.S. at 841 (citations omitted).
28. *Id.* at 842-43.
29. *Id.* at 841.
30. *Id.* at 855 (quoting Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)).
31. *Wirtz*, 392 U.S. 183.
32. *Id.*
33. While *Wirtz* dealt with state school and hospital employees, 392 U.S. at 186-87, *National League of Cities* concerned police and firefighters, 426 U.S. at 846-47.
34. *Wirtz*, 392 U.S. at 195.

was joined by Chief Justice Warren and Justices Black, Brennan, White, and Fortas. Justice Douglas, joined by Justice Stewart, dissented.[35]

The reversal of *Wirtz* in 1976 was thus made possible by the replacement of Chief Justice Warren and Justices Black, Harlan, and Fortas by the "Nixon Four": Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist. While *National League of Cities* thus marked an important victory for the conservative wing of the Court, and for Justice Rehnquist in particular, it was bitterly attacked by the mostly liberal minority. Justice Brennan's dissenting opinion, joined by Justices White and Marshall, assailed Rehnquist's majority opinion in startlingly harsh terms, calling it an "ill-conceived abstraction,"[36] a "patent usurpation of the role reserved for the political process,"[37] and a "catastrophic judicial body blow at Congress' power under the Commerce Clause."[38] Justice Stevens, while not joining Brennan's opinion,[39] was just as dismissive of Justice Rehnquist's approach. Employing some sarcasm of his own, he noted that "[t]he Court holds that the Federal Government may not interfere with a sovereign State's inherent right to pay a substandard wage to the janitor at the state capitol. The principle on which the holding rests is difficult to perceive."[40]

Justice Brennan made it clear that he regarded the decision as a political attack on the expansive social-welfare powers assumed by Congress under the New Deal of President Franklin D. Roosevelt. Brennan appeared to believe that Justice Rehnquist's theory of state sovereignty signalled the resurrection, in disguised form, of the restrictive approach to federal regulatory power taken by the ultraconservative Justices Van Devanter, Sutherland, Butler, and McReynolds, who dominated the Court until 1937. That quartet, with the frequent support of Justice Owen J. Roberts, succeeded in striking down many of F.D.R.'s New Deal initiatives, ultimately provoking the Court-Packing Crisis of 1937.[41]

It was against this background of bitter disagreement on the Court that Justice Blackmun had to make up his mind which way to vote. According to one account, he was still undecided only a week before the decision was handed

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35. *Id.* at 201. Justice Marshall did not participate.
36. *National League of Cities*, 426 U.S. at 867 (Brennan, J., dissenting).
37. *Id.* at 858 (Brennan, J., dissenting).
38. *Id.* at 880 (Brennan, J., dissenting).
39. This was perhaps because, being new on the Court, he hesitated to endorse such a virulent attack on some of his colleagues. *See* B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 409.
40. *National League of Cities*, 426 U.S. at 880 (Stevens, J., dissenting).
41. *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936) (striking down the Agricultural Adjustment Act of 1933); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down federal regulation of employment conditions in coal mines); Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935) (striking down federal railroad pension plans); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act's "fair competition codes").

President Roosevelt's "Court-Packing Plan," proposed on February 5, 1937, was only defeated after the Court (and Justice Roberts in particular) reversed course, and after the announced retirement of Justice Van Devanter, whom FDR replaced with Justice Black. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding, five to four, a state minimum-wage law against substantive due process attack); National Labor Relations Board v. Jones &

down.[42] He finally joined Justice Rehnquist's opinion, giving it full force as precedent, but added a concurring statement which hedged the impact of the ruling somewhat and illustrated his own doubts. Justice Blackmun's praise for the opinion he was joining was distinctly left-handed. Although "not untroubled" by some of its implications, he did "not read [it] so despairingly as [did Justice] Brennan."[43] While conceding "I may misinterpret the Court's opinion," he characterized *National League of Cities* as adopting a "balancing approach" which would "not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater."[44]

The language of his concurrence suggests that Justice Blackmun was torn by competing instincts. Although he clearly shared the concern of his conservative colleagues for state autonomy, Justice Blackmun's reservations indicated his support for federal regulatory power in areas he regarded as important. His concern for environmental protection, for example, was indicated four years earlier in a case involving the Sierra Club's standing to sue over a proposed wilderness development.[45] And his concern for the federal enforcement of equal rights was suggested by his leadership role in expanding the constitutional protections for permanent resident aliens against discrimination.[46]

Whether the majority opinion in *National League of Cities* actually adopted a "balancing test," as Justice Blackmun thought, is an interesting and ambiguous question. On its face, the formal test laid down by Justice Rehnquist for state immunity from federal regulation was expressed as a *per se* rule carving out a defined zone of state sovereignty rather than as an *ad hoc* balancing approach. The states were to remain free "to structure integral operations in areas of traditional governmental functions."[47] In particular, Congress could not "regulate directly the activities of States as public employers."[48] The clear implication was that the state employer-employee relationship was within the zone of protected "sovereignty." This approach appeared to make no case-by-case allowance for the relative weight of the federal interests involved.

Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding, five to four, the National Labor Relations Act under the commerce power).

42. *See* B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 409-10.

43. *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring).

44. *Id.*

45. *See* Sierra Club v. Morton, 405 U.S. 727, 755 (1972). Justice Blackmun, dissenting from the denial of standing, expressed concern for the impact on national parkland of the proposed amusement park development.

46. In Graham v. Richardson, 403 U.S. 365 (1971), Justice Blackmun wrote the opinion of the Court declaring alienage a "suspect" classification, and thus prohibiting most state discrimination against permanent resident aliens. He again wrote for the Court in Sugarman v. Dougall, 413 U.S. 634 (1973), which expanded this doctrine to cover most public employment. In the late 1970's and early 1980's, however, he moved into dissent as the Court, in his view, failed to follow through on his pioneering opinions, and even appeared to be cutting back on them. *See* Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (upholding a state's exclusion of aliens from serving as probation officers); Ambach v. Norwick, 441 U.S. 68 (1979) (same as to public teaching jobs). *See generally* Koh, *Equality With a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51 (1985).

47. *National League of Cities*, 426 U.S. at 852.

48. *Id.* at 841.

Justice Blackmun's characterization of *National League of Cities* was supported, however, by Justice Rehnquist's treatment of *Fry v. United States.*[49] The *Fry* decision, only one year old when *National League of Cities* was decided, had upheld federal dictation of the wages paid to state employees in the context of an emergency nationwide wage-and-price freeze. The Court did not overrule *Fry,* but purported to find it consistent with the *National League of Cities* doctrine. The weight of Congress' interest in resolving a national economic emergency in *Fry* did not ameliorate the interference with state autonomy, however. By acting pursuant to the commerce clause to "freeze" state salaries, Congress was unquestionably "displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions."[50] Justice Brennan argued in his *National League of Cities* dissent that it was "absurd to suggest that there is a constitutionally significant distinction between curbs against increasing wages and curbs against paying wages lower than the federal minimum."[51] This apparent inconsistency between *Fry* and *National League of Cities* is further accentuated by the fact that Justice Rehnquist himself, the architect of the new doctrine, had dissented in *Fry.*[52]

By nevertheless accepting the validity of *Fry,* Justice Rehnquist struck a compromise designed to hold the support of more moderate Justices like Blackmun. The effect was to incorporate an implicit gloss on the stated *National League of Cities* test, essentially allowing the Court to keep open the option of bowing to overriding federal concerns on a case-by-case basis. While the "balancing" formula explicitly voiced by Justice Blackmun thus seemed to be tacitly accepted by the majority — who had little choice, after all, with Justice Blackmun providing the fifth vote — an undeniable tension remained between the theoretical potential of Justice Rehnquist's state-sovereignty doctrine and the pragmatic instincts of at least one of its nominal supporters.

National League of Cities received a great deal of notice, and unquestionably marked a major new departure for the Burger Court. It was not immediately clear, however, whether it would actually lead the Court to substantially reduce federal power, or remain an isolated, symbolic victory for states' rights advocates. The balancing approach incorporated into the decision provided a way out for the Court — and for Justice Blackmun in particular — when assessing any future clash between federal and state prerogatives. In fact, over time, a majority of the Court quietly abandoned *National League of Cities.* While giving repeated lip service to the formal test it enunciated and to its general concern for "state sovereignty," the Court upheld the prerogatives of the federal government in every single federalism case arising over the next eight years. National interests were always found to outweigh the values of federalism thought to be implicit in the tenth amendment. Thus, when *Garcia* came to pass, the end of the road had been in sight for some time. The story of how this turnabout occurred is a fascinating study in the evolution of constitutional law, which in this case occurred largely in the mind of a single Justice.

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49. 421 U.S. 542 (1975).
50. *National League of Cities,* 426 U.S. at 852.
51. *Id.* at 872 (Brennan, J., dissenting).
52. *Fry,* 421 U.S. at 549 (Rehnquist, J., dissenting).

B. The Road to Garcia

The first federalism cases following *National League of Cities* were *Hodel v. Virginia Surface Mining & Reclamation Assn.*[53] and *Hodel v. Indiana*,[54] decided in June 1981, in which the federal strip mining law[55] was challenged as an invasion of state sovereignty. The law allowed states to maintain regulatory authority over strip mining on nonfederal lands, but only if they agreed to enforce federally-imposed environmental standards, and proved that they had the resources to do so within a specified time. Otherwise, the federal government would pre-empt state authority and assume direct regulatory control. It was claimed that the federally-dictated standards unconstitutionally displaced the states' "traditional" right to regulate land use.

The Court had little apparent difficulty unanimously upholding the law against tenth amendment challenge. Justice Marshall's opinion for the Court in *Virginia Surface Mining* (the lead case) enunciated a "three-part test" (actually in four parts) for evaluating a *National League of Cities*-based challenge. A successful challenge had to make three showings: "First . . . that the challenged statute regulates the 'States as States.' Second, [it] must address matters that are indisputably 'attribute[s] of state sovereignty.' And third, it must . . . impair [the state's] ability 'to structure integral operations in areas of traditional governmental functions.'"[56] Finally, even if these three conditions were met, the challenge would fail if "the nature of the federal interest advanced [were] such that it justif[ied] state submission."[57] This last proviso represented Justice Blackmun's concurring gloss on *National League of Cities*.

The Court found the state's argument to fail on the first prong of the test because the strip mining law regulated private companies and individuals, not the "States as States." *National League of Cities*, the Court held, applied only to direct regulation of the states as such, not to federal regulation of private parties which might displace parallel state regulation of those parties. Justice Rehnquist concurred only in the judgment, but his separate opinion did not mention any concerns with the majority's treatment of *National League of Cities*. Rather, he devoted his brief concurrence to some mild grumbling about the proper judicial standard for assessing Congress' power to regulate commerce in the first place, insisting that Congress must demonstrate a "substantial" nexus between interstate commerce and the regulated activity in question.[58] Although he grudgingly conceded that Congress had acted within its powers in regulating strip mining, Justice Rehnquist complained that "one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress."[59]

Justice Rehnquist's concern that the Court's expansive reading of the commerce power might enable Congress to intrude on the most localized kinds

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53. 452 U.S. 264 (1981).
54. 452 U.S. 314 (1981).
55. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified as amended at 30 U.S.C. §§ 1201-1328 (1988)).
56. *Virginia Surface Mining*, 452 U.S. at 287-88.
57. *Id.* at 288 n.29.
58. *See id.* at 307-13 (Rehnquist, J., concurring).
59. *Id.* at 308 (Rehnquist, J., concurring).

of economic activities was an interesting reflection of the fears of the conservative Justices of the 1930's. Justices Sutherland, Butler, Van Devanter, and McReynolds were motivated by similar concerns to take a remarkably narrow view of the commerce power in judging the validity of the ground-breaking legislation of the New Deal. Rehnquist's views are not so extreme as theirs were, but he clearly embodies a continuation in spirit of the judicial attitude of that earlier, more conservative Court. His isolated position in the strip mining cases, however, was a strong indication — *National League of Cities* notwithstanding — that the Court as a whole was far from sharing his special zeal for limiting federal power.

Some of the problems with the Court's *National League of Cities* criteria for adjudicating federal-state conflicts became apparent nine months later in the otherwise minor case of *United Transportation Union v. Long Island Rail Road Co.*,[60] handed down in March 1982. There the Court held that a state could not claim tenth amendment immunity for a state-owned railroad actually engaged in interstate commerce. The nexus with commerce was palpable, and railroads had been subject to extensive federal regulation for almost a century. The case was thus an easy one, and Chief Justice Burger disposed of it in a brief opinion for a unanimous Court.

Chief Justice Burger had no difficulty determining, under the third part of the *Hodel* test, that operating a railroad in interstate commerce was not a "traditional" state function.[61] But he had more difficulty in explaining just how, as a matter of general theory, a state function could be identified as "traditional." Did not such a term imply a historical straitjacket limiting the states to the services they had usually performed in the past? Aware of this weakness, he awkwardly tried to argue around it:

> This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation. Rather 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 government's ability to fulfill its role in the Union.[62]

But this simply begged the question. To ask whether a regulation impairs a state's "ability to fulfill its role" in the federal system is to ask the very same question *National League of Cities* itself tried to answer. The test offered by *National League of Cities* for deciding whether the state's "role in the Union" is threatened depends in the first place on whether the state function at issue is "traditional." But what is "traditional," Chief Justice Burger seemed to be saying, depends on whether the state's role in the system is threatened. This was circular reasoning at its most opaque. The Court thus remained unable to articulate a principled grounding for a key part of the *National League of Cities* state-immunity doctrine.

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60. 455 U.S. 678 (1982).
61. *Id.* at 684-86.
62. *Id.* at 686-87.

The first clear indication that Justice Blackmun might part company with the pro-*National League of Cities* bloc appeared in *Federal Energy Regulatory Commission v. Mississippi*,[63] decided in June 1982. A five to four majority upheld, against a tenth amendment challenge, the Public Utility Regulatory Policies Act of 1978 (PURPA),[64] a part of President Carter's energy program. The challenged portions of the law required state utility regulatory commissions to consider federally-suggested standards, and to follow federally-imposed procedures in doing so. It thus posed a rather unusual conflict between "state sovereignty" and federal regulatory power. The Justices seemed to agree that Congress could simply pre-empt state regulation of utilities altogether, and directly impose its own standards.[65] The constitutional issue, somewhat curiously, revolved around whether the more limited, indirect means chosen by Congress unacceptably intruded into state governmental operations.

The voting line-up in *FERC v. Mississippi* spoke volumes. Justice Blackmun wrote the opinion for the majority, joined by the four *National League of Cities* dissenters. Justice O'Connor, in her first term on the Court, wrote a dissent, joined by Chief Justice Burger and Justice Rehnquist, which launched a vigorous attack on the majority opinion and strongly defended *National League of Cities*.[66] Justice Powell wrote a separate, more cautious partial dissent expressing sympathy with Justice O'Connor's approach, but disagreeing with the majority on much narrower grounds.[67] The most significant aspect of the decision was not the substance of Justice Blackmun's majority opinion, which did not purport to cut back on *National League of Cities* at all, and in effect did no more than decline to extend the principles of that ruling to an untried and rather anomalous federal-state issue. What made *FERC v. Mississippi* noteworthy was the sharp gulf between Justice Blackmun's cautious and deferential approach to federal power, and the fierce states' rights evangelism of Justice O'Connor's opinion.

Justice O'Connor invoked a sweeping philosophical rationale for protecting state autonomy, citing the role of the states as "laboratories for the development of new social, economic, and political ideas,"[68] and pointedly used the example of Wyoming's 1869 innovation of allowing women to vote. After quoting Alexis de Tocqueville on the virtues of locally representative government,[69] she went on to describe the PURPA's direct regulation of state government as a relic of the Articles of Confederation, obviated by the Constitution's authorization of direct federal legislative authority over individ-

63. 456 U.S. 742 (1982).

64. Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 15, 16 & 42 U.S.C.).

65. *See FERC*, 456 U.S. at 764 (majority opinion), 773 (Powell, J., concurring in part and dissenting in part), 786-87 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment in part and dissenting in part).

66. *Id.* at 775. Actually, Justice O'Connor concurred in the judgment in part and dissented in part, but she limited the concurring part of her opinion to a single footnote at the beginning, agreeing with the Court's upholding of several minor aspects of the PURPA.

67. *Id.* at 771 (Powell, J., concurring in part and dissenting in part).

68. *Id.* at 788 (O'Connor, J., concurring in the judgment in part and dissenting in part).

69. *Id.* at 789-90 (O'Connor, J., concurring in the judgment in part and dissenting in part).

uals.[70] She declared: "The Framers consciously rejected a system in which the National Legislature would employ state legislative power to achieve national ends."[71]

The impression left by the opinions in *FERC* is less one of retreat from *National League of Cities* by the majority, than of a renewed enthusiasm for that precedent on the part of the Burger-Rehnquist-O'Connor bloc. Justice Rehnquist clearly gained an articulate and vociferous ally in his drive to limit federal power with President Reagan's appointment of his erstwhile Stanford Law School classmate.[72] The strident tone of Justice O'Connor's opinion — she assailed the majority's approach as "antithetical to the values of federalism, and inconsistent with our constitutional history"[73] — may in fact reflect nothing more nor less than a determination to cash in *National League of Cities'* formal protection of state sovereignty at its full face value.

Justice Rehnquist had been forced to reconcile the doctrine of that decision with a tacit balancing approach in order to carry a majority. One of the waverers, of course, was Justice Blackmun, but another was apparently Justice Stewart, who was reportedly reluctant to overrule a Warren Court precedent.[74] Stewart's replacement by Rehnquist's soulmate O'Connor may well have emboldened the conservative bloc. With Justice Blackmun voting against their position in *FERC*, there was no need for them to adhere to the balancing test he had imposed on *National League of Cities*. Thus, as one commentator put it, "it was with *[FERC]* that the hidden tensions of *[National League of Cities]* began to emerge."[75]

Particularly notable in *FERC*, as in *National League of Cities* itself, was the unconcealed rancor expressed in the published opinions. Justices Blackmun and O'Connor exchanged some especially pungent volleys. O'Connor called

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70. *Id.* at 791 (O'Connor, J., concurring in the judgment in part and dissenting in part). One of the more curious aspects of the federalism debate has been the competing invocations of the Articles of Confederation, the American constitution from 1781 to 1789, as a sort of constitutional bogeyman. *See infra* notes 88-94 and accompanying text (discussing Justice Stevens's concurring opinion in EEOC v. Wyoming, 460 U.S. 226, 244 (1983)). Justice O'Connor's comparison of the PURPA, which she viewed as a dangerous expansion of federal power, to the Articles of Confederation was ironic. Although it is true that the Articles formally utilized a system of direct federal-to-state, as opposed to federal-to-individual, lines of governance, as a practical matter the Continental Congress had no enforcement powers over the states. Thus, the main flaw of the Articles, and the primary impetus behind the Convention of 1787, was its extraordinarily unwieldy degree of state autonomy.

71. *FERC*, 456 U.S. at 791 (O'Connor, J., concurring in the judgment in part and dissenting in part).

72. Rehnquist and O'Connor both graduated in the Stanford Law School Class of 1952.

73. *FERC*, 456 U.S. at 775 (O'Connor, J., concurring in the judgment in part and dissenting in part).

74. According to a rather intriguing account by Bob Woodward and Scott Armstrong, Justice Stewart was initially determined not to overrule the 1968 *Wirtz* precedent (from which he had dissented), on grounds of *stare decisis*, but was challenged at conference by Justice White for not voting according to his actual view of the merits. Stewart supposedly responded to this challenge by switching his vote in Rehnquist's favor. *See* B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 406-07.

75. Kobylka, *The Court, Justice Blackmun, and Federalism: A Subtle Movement with Potentially Great Ramifications*, 19 CREIGHTON L. REV. 9, 37 (1986).

Blackmun's analysis an "absurdity,"[76] and accused the majority of "conscript[ing] state utility commissions into the national bureaucratic army,"[77] "dismember[ing] state government,"[78] and ("most colorfully,"[79] according to Blackmun) "permit[ting] Congress to kidnap state utility commissions."[80] Justice Blackmun responded: "While these rhetorical devices make for absorbing reading, they unfortunately are substituted for useful constitutional analysis. For while Justice O'Connor articulates a view of state sovereignty that is almost mystical, she entirely fails to address our central point."[81]

The new division on the Court reflected in *FERC* was repeated the next year — and appeared to harden and deepen — in *Equal Employment Opportunity Commission v. Wyoming*,[82] decided in March 1983. This case, like *National League of Cities*, concerned the extent of federal power to regulate the employment conditions of state workers. But instead of wages, *EEOC v. Wyoming* dealt with age discrimination. The federal Age Discrimination in Employment Act of 1967 (ADEA)[83] prohibited employers from discriminating among persons between forty and seventy on the basis of age, except where age was proven to be a "bona fide occupational qualification" (BFOQ). In 1974, the ADEA was extended to state and local governments.[84] In *EEOC*, a game warden challenged Wyoming's age fifty-five retirement policy. The issue posed was strikingly analogous to that of *National League of Cities*. Was Congress intruding on the sovereignty of the states by imposing a federal age discrimination standard on their dealings with their own employees? Did such federal interference with "the activities of States as public employers"[85] "displace the States' freedom to structure integral operations in areas of traditional governmental functions"?[86] The Court's answer, by the same five to four vote as in *FERC v. Mississippi*, was no.

The break between Justice Blackmun and his former colleagues in the *National League of Cities* majority seemed irretrievable. He joined silently in Justice Brennan's majority opinion in *EEOC*. Justices Powell, Rehnquist, and O'Connor united in a solid phalanx behind Chief Justice Burger's dissenting opinion. The majority held the tenth amendment challenge in *EEOC* to fail on the third prong of the "three-part test": It did not "directly impair" the state's sovereign policy-making rights in what the majority conceded was the traditional function of ensuring the competence and vigor of its public-safety offi-

76. *FERC*, 456 U.S. at 781 (O'Connor, J., concurring in the judgment in part and dissenting in part).
77. *Id.* at 775 (O'Connor, J., concurring in the judgment in part and dissenting in part).
78. *Id.* at 782 (O'Connor, J., concurring in the judgment in part and dissenting in part).
79. *Id.* at 767 n.30.
80. *Id.* at 790 (O'Connor, J., concurring in the judgment in part and dissenting in part).
81. *Id.* at 767 n.30.
82. 460 U.S. 226 (1983).
83. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634).
84. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 55, 74 (codified at 29 U.S.C. § 630(b)).
85. *National League of Cities*, 426 U.S. at 841.
86. *Id.* at 852.

cers.[87] Whether the federal regulation at issue in *EEOC* violated the *National League of Cities* test was arguable. What was less arguable, however, was that the Court's answer to that question in *EEOC* seemed inconsistent with the answer it had given in *National League of Cities* seven years before. It is difficult to frame a plausible argument that regulation of age discrimination in employment is less intrusive, or constitutionally distinguishable for federalism purposes, from regulation of wage-and-hour standards. Indeed, while the wage-and-hour standards might cost the state more, one could argue that potentially litigious discrimination standards are more bothersome. The implication of *EEOC*, therefore, was that *National League of Cities* had been effectively limited to its facts.

One member of the *EEOC* majority, Justice Stevens, called openly for overruling *National League of Cities*, declaring in a separate concurrence that the 1976 decision "not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself."[88] Quoting a 1946 lecture by Justice Wiley B. Rutledge, for whom Stevens clerked during the 1947-48 Term, he maintained that the need for centralized regulation of commerce, capable of overriding parochial state barriers to free trade, was the primary impetus behind the calling of the Constitutional Convention in 1787.[89] Noting that the Court had "given a miserly construction to the Commerce Clause"[90] in years past, he argued that the Framers intended "to confer a power on the National Government adequate to discharge its central mission."[91] Asserting that "there is no limitation in the text of the Constitution that is even arguably applicable"[92] to laws like the FLSA and ADEA except "the pure judicial fiat found in *[National League of Cities]*,"[93] he called for the "prompt rejection of [that case's] modern embodiment of the spirit of the Articles of Confederation."[94]

The Stevens concurrence provoked a heated counterattack from Justice Powell, who, joined by Justice O'Connor, wrote a "personal dissent from Justice Stevens' novel view of our Nation's history."[95] Justice Powell insisted that the primary purpose of the Constitutional Convention had been to construct a new government in which the states would continue to play an important role.[96] Furthermore, he relied on not only the words of the tenth amendment,

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87. *EEOC*, 460 U.S. at 238-39. Perhaps instrumental to the majority's reasoning was the ability of the states to vindicate their policy concerns under the ADEA by proving that age was a BFOQ in certain occupations. *See id.* at 240. The dissenters vehemently protested that proving a BFOQ was an unreasonably difficult hurdle. *Id.* at 257-58 (Burger, C.J., joined by Powell, Rehnquist and O'Connor, JJ., dissenting). The imposition of the ADEA on the states, they maintained, represented an intrusive and insensitive obstacle to their ability to ensure the qualifications of their police officers and firefighters. *See id.* at 259.

88. *Id.* at 249 (Stevens, J., concurring).

89. *Id.* at 244-45 (Stevens, J., concurring).

90. *Id.* at 246 (Stevens, J., concurring).

91. *Id.* at 246-47 (Stevens, J., concurring).

92. *Id.* at 248 (Stevens, J., concurring).

93. *Id.*

94. *Id.* at 250 (Stevens, J., concurring). *See also supra* note 70 and accompanying text (discussing Justice O'Connor's different invocation of the specter of the Articles of Confederation). Justice Stevens's rhetorical comparison was clearly more germane given the decentralized weakness of the Articles as a system of government.

95. *EEOC*, 460 U.S. at 265 (Powell, J., dissenting).

96. *Id.* at 266-68 (Powell, J., dissenting).

but on "the inherent federal nature of the system"[97] as derived "from the structure of the National Government itself"[98] to support his view that the Framers intended "the States' reserved powers to be a limitation on the power of Congress — including its power under the Commerce Clause."[99] The principal authority Justice Powell furnished for this argument, however, derived rather startlingly from the Interposition and Nullification Doctrines of Jefferson, Madison, and John C. Calhoun, which he cited at some length.[100] Although he offered assurance in a footnote that he "[did] not suggest that either . . . doctrine was constitutionally sound,"[101] for which one supposes Abraham Lincoln's ghost must be grateful, it is difficult to see these theories as "directly pertinent to the question"[102] of federal power in view of their decisive refutation by the Civil War which Powell himself admitted they led to.[103] Justice Powell's vague assertion that "the Commerce Clause . . . is . . . only one provision of a Constitution that embodies strong principles of federalism"[104] seems hardly a sufficient answer — certainly not from a strict-constructionist perspective — for the lack of any explicit state-sovereignty-related limitation to put up against the unequivocal delegation of the commerce power.

One important aspect of *EEOC v. Wyoming* given short shrift by both the majority and the minority was the possible support for the ADEA to be found in section five of the fourteenth amendment, which authorizes Congress to "enforce, by appropriate legislation, the provisions of this article,"[105] chief among which is the clause guaranteeing "the equal protection of the laws."[106] The majority simply noted that "we need not decide"[107] whether section five supported the ADEA's enactment because the commerce power did. But the issue was unavoidable for the dissenters since even if their tenth amendment objections were valid, this would have no effect on a section five-based enactment. Because the equal protection clause by its very nature regulates the "States as States," Congress' power to enforce that clause cannot logically encounter any "state sovereignty" objections.

Chief Justice Burger therefore went to some pains, in his opinion for the four dissenters, to denigrate the extent of congressional power under section

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97. *Id.* at 270 (Powell, J., dissenting).
98. *Id.*
99. *Id.* at 275 (Powell, J., dissenting).
100. *See id.* at 271-73 (Powell, J., dissenting).
101. *Id.* at 272 n.8 (Powell, J., dissenting).
102. *Id.*
103. *Id.* at 272 (Powell, J., dissenting). Indeed, it is difficult to fathom what Justice Powell hoped to accomplish by tying the *National League of Cities* doctrine to "this early and interesting history," as he called it. *Id.* at 272 n.8 (Powell, J., dissenting). One can speculate that Justice Rehnquist's failure to join Justice Powell's opinion may have been due to a certain sensitivity over making his favorite constitutional theory look like the musty relic Justice Stevens was eager to portray it as. Of course, some of the Founding Fathers were undoubtedly strong states' rights advocates. As Justice Stevens noted in a 1985 speech, "[t]he term 'founding generation' describes a rather broad and diverse class." *See* N.Y. Times, Oct. 26, 1985, at A11. Other founders, such as Chief Justice John Marshall, were articulate opponents of the Interposition and Nullification Doctrines, and supported centralized federal supremacy. We all know which side won the Civil War.
104. *EEOC*, 460 U.S. at 275 n. 13 (Powell, J., dissenting).
105. U.S. CONST. amend. XIV, § 5.
106. U.S. CONST. amend. XIV, § 1.
107. *EEOC*, 460 U.S. at 243.

five, and to deny its applicability to *EEOC*. He noted that the reach of federal powers under section five has "always been uncertain."[108] The controversy dates back more than a hundred years to the *Civil Rights Cases*,[109] when the Court, over the first Justice Harlan's dissent, adopted what many now view as an unduly restrictive interpretation of congressional power to enforce the fourteenth amendment. One reason the issue has not received a full airing in modern times is that Congress has repeatedly chosen, for example with the Civil Rights Act of 1964,[110] to employ an "end run by way of the Commerce Clause"[111] when legislating equal rights, rather than to reassert its long-dormant section five powers and force the Court to reconsider the *Civil Rights Cases*. In any event, Chief Justice Burger maintained that the kind of retirement plan at issue in *EEOC* did not violate the equal protection clause itself,[112] and he therefore found Congress without any remedial enforcement power under section five to enact the ADEA.

Whatever one thinks of Chief Justice Burger's view of the extent of congressional power under section five (and it seems unduly narrow), the significance of all this to understanding the Court's decision in *EEOC*, and in particular Justice Blackmun's decisive vote to uphold the ADEA, lies in the nature of the federal interest at stake. In a sense, this may have been a covert equal protection case, and Justice Blackmun's longstanding and increasingly well-developed concern for equal rights was probably an important factor in his support for federal power in *EEOC*.[113] Just as his remarks in his *National League of Cities* concurrence about the special federal interest in environmental protection reflected his concern for that value,[114] and foreshadowed his support for the strip mining law in 1981, so his vote in *EEOC* seemed to reflect a belief in the necessity and desirability of a strong federal role in guaranteeing equal rights. The problem was that upholding the federal prerogatives he found dear left Justice Blackmun with a string of votes broadly inconsistent with the bold states' rights doctrine he had signed on to in 1976. With *National League of Cities* looking increasingly out of line, it appeared that the case-by-case exceptions might have come to defeat the validity of the rule.

C. Closing the Circle

This supposition was proven correct in *Garcia v. SAMTA*,[115] which after being postponed and reargued was finally handed down on February 19, 1985. Writing for himself and the four *National League of Cities* dissenters, Justice Blackmun briskly declared that "the attempt to draw the boundaries of state

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108. *Id.* at 259 (Burger, C.J., dissenting).
109. 109 U.S. 3 (1883).
110. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended principally at 42 U.S.C. §§ 2000a to 2000h-6).
111. G. GUNTHER, CONSTITUTIONAL LAW 163 (11th ed. 1985) (quoting from his letter to the Justice Department of June 5, 1963, regarding the proposed Civil Rights Act).
112. *EEOC*, 460 U.S. at 260 (Burger, C.J., dissenting). Chief Justice Burger cited two cases from the late 1970's in which the Court had upheld similar mandatory retirement provisions against direct constitutional attack. *See* Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).
113. *See supra* note 46 and accompanying text.
114. *See supra* note 45 and accompanying text.

regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled."[116] The four conservatives were united in dissent behind an opinion by Justice Powell.[117]

Justice Blackmun devoted the heart of the Court's opinion to attacking the "traditional function" test, which was clearly the weak point in the *National League of Cities* doctrine. After listing a bewildering array of state services and functions that the lower courts had placed on one side or the other of the "traditional" boundary, he concluded: "We find it difficult, if not impossible, to identify an organizing principle. . . . The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best."[118]

Justice Blackmun and the majority made their most brilliant point against the "traditional function" test by turning the federalism and states' rights logic of the conservatives onto itself. They pointed out that a test purporting to single out "traditional," "necessary," or "integral" state services and functions simply could not

> be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else — including the judiciary — deems state involvement to be.[119]

Such a test, they said, employing a classically conservative, strict-constructionist form of argument, "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[120] Turning Justice O'Connor's rhetoric in *FERC* about state experimentation back on her,[121] Justice Blackmun pointed out that "the States cannot serve as laboratories for social and economic experiment[ation]"[122] if they are not free to assume "traditionally" private functions when the need arises.

Most fundamentally, Justice Blackmun rejected judicial reliance on "freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."[123] Rather, "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[124] Thus, the majority embraced a political-process theory of state immunity, holding that since the Constitution itself limited state sovereignty in numerous ways, it was impossible to derive

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115. 469 U.S. 528 (1985). *Garcia*, like *National League of Cities*, dealt with an application of the FLSA to municipal employees. *See supra* notes 12-13 and accompanying text.
116. *Garcia*, 469 U.S. at 531.
117. *Id.* at 557 (Powell, J., dissenting).
118. *Id.* at 539.
119. *Id.* at 546.
120. *Id.*
121. *See supra* notes 68-69 and accompanying text.
122. *Garcia*, 469 U.S. at 546.
123. *Id.* at 550.
124. *Id.*

from that document any "*a priori* definitions"[125] of state autonomy. In the absence of any judicially enforceable guarantee of state sovereignty,[126] Justice Blackmun cited the states' political role in choosing senators, representatives, and presidential electors (in Chief Justice John Marshall's words, "the restraints on which the people must often rely solely, in all representative governments"[127]) as the appropriate way to vindicate their interests.

Garcia placed the "liberal" majority in the curious position of advocating judicial restraint and respect for the outcome of the political process against the protests of the "conservative" dissenters that the Court not "shirk the duty"[128] of exercising judicial review, in accordance with the judicial activism of *National League of Cities*. The majority returned to the traditional, strict-constructionist view of the tenth amendment as expressing merely "a truism that all is retained which has not been surrendered."[129] Because that amendment's express language reserves to the states only powers "not delegated"[130] to Congress, and the commerce power *is* "delegated" to Congress, the tenth amendment, by definition, cannot logically be thought to limit the proper exercise of that or any other delegated congressional power. The *National League of Cities* doctrine is best described (as the *Garcia* Court implied) as an attempt to import into the Constitution an externally-conceived notion of what the ideal federal-state balance should be, using the tenth amendment as a convenient vehicle for doing so. The appeal of that doctrine's supporters to amorphous "principles of federalism" implicit in the "constitutional system" betrays the fundamentally loose-constructionist nature of their approach.[131]

Although the majority in *Garcia* clearly got the better of the constitutional argument, one still must ask why Justice Blackmun ended up on the opposite side of the issue from his position of nine years before. The same theoretical objections were levelled at the *National League of Cities* doctrine in 1976, and obviously had left him unmoved. He seemed convinced, in 1976, that federal power had overreached, and that the political process could *not* safely be relied upon to guard the autonomous interests of the states. Was it purely the theoretical deficiencies of *National League of Cities*, as revealed in the fruitless wrestling of the lower courts with the unworkable "traditional function" test, that ultimately disaffected him?[132] This seems to have been a factor, but only in conjunction with the increasing practical irrelevance of the issue for Justice Blackmun.

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125. *Id.* at 548.

126. Of course, as the majority noted, *id.* at 550, the Constitution does contain some limited, highly specific guarantees of state sovereignty, such as the guarantee of state territorial integrity in Article IV, § 3, cl. 1, but none of these is applicable to the *National League of Cities* line of cases.

127. Gibbons v. Ogden, 22 U.S. 1, 197 (1824).

128. *See Garcia*, 469 U.S. at 589 (O'Connor, J., joined by Powell and Rehnquist, JJ., dissenting).

129. United States v. Darby, 312 U.S. 100, 124 (1941).

130. U.S. CONST. amend. X.

131. *See* EEOC v. Wyoming, 460 U.S. 226, 275 (Powell, J., joined by O'Connor, J., dissenting).

132. Professor Kobylka emphasizes the "unworkability" concern in his analysis of Justice Blackmun's motivations for shifting his position. *See* Kobylka, *supra* note 75, at 47-48.

In the cases following the 1976 decision, the federal powers that were challenged tended invariably to be ones which Justice Blackmun found to be of far greater importance than the interest in "state sovereignty" which was repeatedly balanced against them. Justice Blackmun himself had indicated from the beginning, with the balancing test he conceived in his *National League of Cities* concurrence, that the theoretical ideal of state immunity could be overridden by sufficiently weighty federal interests. As it turned out, what Justice Blackmun regarded as a weighty federal interest was very different from the views of his more conservative colleagues in *National League of Cities*. While they and the subsequently-appointed Justice O'Connor showed a willingness, notably in *FERC v. Mississippi* and *EEOC v. Wyoming*, to scale back federal power, Justice Blackmun found himself sympathetic to the asserted federal goals.

By 1985, *National League of Cities* stood alone as the sole case in which Justice Blackmun felt the federal government overstepped its bounds, and the dimensions of that intrusion into state autonomy probably seemed more and more marginal in perspective. In any event, he apparently saw no point in continuing to maintain an awkward, dubiously-founded mechanism for restraining federal power which neither he nor the Court ever again saw fit to use. He summed up his perspective on the *National League of Cities* era in *Garcia* by saying: "[T]he model of democratic decisionmaking the Court there identified underestimated, in our view, the solicitude of the national political process for the continued vitality of the States. . . . In sum, in *National League of Cities* the Court tried to repair what did not need repair."[133]

III. CONCLUSION

The *National League of Cities* era raises complex questions of principle and motivation on the part of the Supreme Court. For Justices on both sides of the issue, the philosophical debate over "judicial restraint" — the division of authority between the judiciary and the two political branches of government — became entangled and confused with the debate over "federalism" — the balance of federal versus state power. Normally, the two debates can be conceptually fused without much loss of coherence because the exercise of the Court's power to override political decisions almost always involves imposing a federal constitutional standard on a state policy. In recent years, there has been a fairly clearcut division on the Court between those Justices favoring state and political prerogatives, and those favoring federal and constitutional interests.

In the bitterly disputed case of *Los Angeles v. Lyons*,[134] for example, the Court ruled five to four that a black victim of a life-threatening police "chokehold" had no standing to get an injunction forcing Los Angeles to halt the practice. The majority was composed of the pro-states' rights quartet — Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor — plus Justice White. Justices Brennan, Marshall, Blackmun, and Stevens — all in the *Garcia* majority — dissented. The majority did not hold that chokeholds were constitutional, but that Lyons had no legal stake in the outcome of the case because it was supposedly too speculative and improbable that he would ever

133. *Garcia*, 469 U.S. at 556-57.

again be subjected to a chokehold.[135] The ruling thus rested on a view of judicial restraint rooted in the separation of powers: that the Court could not go beyond its Article III "judicial power" to hear actual "cases or controversies," and could not intrude on the prerogatives of the political branches by issuing a purely advisory ruling. But the effect of the Court's decision was to allow Los Angeles — and, by extension, states and localities everywhere — some leeway to continue using police chokeholds despite a persuasive claim that they violated a federal constitutional right. The angry dissent of the minority Justices not only advocated a broader view of the judicial power to hear cases, but emphasized the states' duty to conform their police practices to federal constitutional standards.[136] The point is that in cases like *Lyons* there was no conflict between the philosophies of judicial restraint and state autonomy, and neither the "conservative" nor the "liberal" Justices were forced to decide which philosophical principle was most important to them.

The source of the tensions and contradictions apparent in the *National League of Cities* line of cases is that they forced a rare and awkward choice of loyalties between judicial restraint and federalism. Although technically a federal constitutional claim like any other, the state-immunity doctrine of *National League of Cities* was starkly different from most other constitutional rights, in that it involved a "right" of the state against the federal government rather than a right of the individual against the state. To show judicial deference in this case was to uphold federal interests; the only way to preserve state interests was through federal judicial intervention. Thus, having become used to upholding state prerogatives and denouncing judicial activism in the same breath, the conservative Justices were forced to choose. They revealed their overriding loyalty to the "federalist" doctrine of state autonomy by abruptly departing from their nominal philosophies of judicial restraint and strict constructionism. Likewise, the liberal Justices, while showing a quick grasp of the rhetoric of judicial restraint, revealed that judicial activism as such had never been the true lodestar of their philosophy. Rather, it was the primacy of federal rights and interests. For both sides of this debate, then, the contradictions of judicial decisionmaking lie not so much in any inexplicable departure from principles, as in a choice from among competing principles.

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In 1988, the Supreme Court explicitly reaffirmed *Garcia* in *South Carolina v. Baker*,[137] upholding the federal government's authority to tax interest income from state and local government bonds.[138] Justice Brennan, writing for the same five Justices who constituted the *Garcia* majority, clarified the earlier decision by noting that although the Court in *Garcia* held that it had no occasion "to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the

134. 461 U.S. 95 (1983).
135. *Id.* at 105-06.
136. *Id.* at 113-37 (Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ., dissenting).
137. 485 U.S. 505, 511-15 (1988).

Commerce Clause,"[139] judicial intervention to protect state autonomy was only warranted where "some *extraordinary* defect[] in the national political process" had been demonstrated.[140] While *Baker*, like *Garcia*, declined to "attempt any definitive articulation"[141] of such extraordinary defects, the *Baker* Court noted that South Carolina had "not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless."[142] The Court rejected as categorically inadequate South Carolina's contention that the law at issue "was 'imposed by the vote of an uninformed Congress relying upon incomplete information.'"[143] *Baker* thus left little doubt that only a truly bizarre or catastrophic failure of the national political process would even tempt the Justices in the *Garcia* majority to reenter the tenth amendment thicket braved by *National League of Cities*. Justice Brennan's recent retirement, of course, deprives the *Garcia* "nationalists" of their formerly clearcut control of the Court. President Bush's appointment of David H. Souter as Brennan's successor renders *Garcia*'s future uncertain at best, in view of his apparently conservative but still largely unknown judicial philosophy.

Whatever portents *Baker* or the departure of Justice Brennan may contain as to whether *Garcia* will enjoy greater precedential longevity than *National League of Cities*,[144] Congress itself has already provided the most fitting epitaph to the *National League of Cities* era. On November 13, 1985, President Reagan signed into law a bill which partially reversed the impact of *Garcia* by lifting the FLSA's time-and-a-half overtime pay requirement for

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138. *Baker* overruled the Court's contrary holding on that issue in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 585-86 (1895).

139. *Garcia*, 469 U.S. at 556.

140. *Baker*, 485 U.S. at 512 (emphasis added).

141. *Id.*

142. *Id.* at 513.

143. *Id.* (citation omitted).

144. Both Justices Rehnquist and O'Connor issued ill-disguised threats, in their dissents in *Garcia*, to overrule that decision and resurrect *National League of Cities* as soon as they had the votes to do so. *See Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting), 589 (O'Connor, J., joined by Powell and Rehnquist, JJ., dissenting). This would constitute the Court's *third* flip-flop on this issue (surely some kind of record). The other two *Garcia* dissenters, however, Chief Justice Burger and Justice Powell, have since left the Court. Justice Kennedy, who replaced Justice Powell, did not participate in *South Carolina v. Baker* and has not yet had occasion to express his views on the tenth amendment issue. Now-Chief Justice Rehnquist and his replacement, Justice Scalia, both concurred in the result in *Baker*, while explicitly declining to join Justice Brennan's reasoning or his reaffirmation of *Garcia*. *See Baker*, 485 U.S. at 528 (Scalia, J., concurring in part and concurring in the judgment), 528-30 (Rehnquist, C.J., concurring in the judgment). Justice Scalia accused the majority of "misdescrib[ing]" the holding in *Garcia*, *see id.* at 528, but he did not indicate any desire to overrule the 1985 case. Given Justice Scalia's attitude toward constitutional precedent with which he disagrees in another context, however, it seems likely that if he has any difficulty with *Garcia*, *stare decisis* would not deter him from voting to do so. *See* Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3064-67 (1989) (Scalia, J., concurring in part and concurring in the judgment) (urging categorical repudiation of Roe v. Wade, 410 U.S. 113 (1973)). As for Justice O'Connor, she alone dissented from the judgment in *Baker*, *see* 485 U.S. at 530-34, which would seem to mark her, rather than Chief Justice Rehnquist, as the Court's new anchor on the right in the federalism field. Given the recent retirement of Justice Brennan, the advanced age of at least two of the other remaining members of the *Garcia* majority, and the uncertainty regarding the views of Justices Scalia, Kennedy, and Souter, we can only stay tuned and ponder the fiction this line of cases has made of *stare decisis*.

state and local government employees.[145] *Congressional Quarterly Weekly Report* described it as "one of the faster actions on major legislation in recent years."[146] Congress cannot, of course, overturn the constitutional interpretation laid down in *Garcia*. But by acting with such alacrity to respond to state fiscal concerns, and by voluntarily declining to exercise a power the *Garcia* Court declared it had, Congress dramatically vindicated Justice Blackmun's argument about the protection to be found for state autonomy in the national political process. At least in the heyday of the Reagan-Bush era, the concern that Congress might "devour the essentials of state sovereignty"[147] appears less the "realistic fear"[148] voiced by the dissenters in *Garcia* than one of the "'horrible possibilities that never happen in the real world'"[149] cited by Justice Blackmun's opinion of the Court in that case.

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145. *See* Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (codified in scattered sections of 29 U.S.C. §§ 201-219). The main provision of the law replaced the time-and-a-half overtime pay requirement with time-and-a-half compensatory time off for each hour of overtime worked. *Id.* at § 2, 99 Stat. at 787-89 (codified at 29 U.S.C. § 207(o)). This kind of regulation would certainly have been equally invalid under the old *National League of Cities* test, however, and the minimum wage requirement of the FLSA was unaffected. The latter provision has little impact on the states, however, since most government employees already make more than the minimum wage.

146. 43 CONG. Q. WEEKLY REP. 2379 (Nov. 16, 1985).

147. *Wirtz*, 392 U.S. 183, 205 (Douglas, J., dissenting).

148. *Garcia*, 469 U.S. at 579 (Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, JJ., dissenting).

149. *Id.* at 556 (quoting New York v. United States, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J., joined by Rutledge, J.)).