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National League of Cities Overruled -- Supreme Court Rejects Tenth Amendment as an Affirmative Limitation on Congress' Power under the Commerce Clause

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COMMENTS

NATIONAL LEAGUE OF CITIES OVERRULED—SUPREME COURT REJECTS TENTH AMENDMENT AS AN AFFIRMATIVE LIMITATION ON CONGRESS’ POWER UNDER THE COMMERCE CLAUSE

DOROTHY LOWE BOARDMAN

I. INTRODUCTION

It is not easy to find a beginning for Garcia v. San Antonio Metropolitan Transit Authority.1 The case was filed on November 21, 1979, but that date appears relatively late in the history of the issue involved: Whether the minimum wage and overtime provisions of the Fair Labor Standards Act2 may be constitutionally applied

2. 29 U.S.C. §§ 201-219 (1982). Section 203 provides in part:
   (d) “Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . . .
   
   (r) “Enterprise” means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . . For purposes of this subsection, the activities performed by any person or persons—
   
   (2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or
   
   (3) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.
   
   (s) “Enterprise engaged in commerce or in the production of goods for commerce” means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—
   
   (1) . . . is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 . . . .
   
   . . . . The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

Id. § 206(a) provides in part:
to the employees of a publicly owned and operated mass transit system. This question necessarily encompasses consideration of intergovernmental immunity under the tenth amendment and reconsideration of recent Supreme Court decisions setting the parameters of that immunity.

The emergence of this issue can be traced to July 1937, a time when large Democratic majorities in both houses of Congress were successful in passing President Roosevelt's legislation to greatly expand federal power under the commerce clause, only to have those enactments struck down by an immovable, "reactionary" Supreme Court. Still riding high on the crest of his New Deal populism, President Roosevelt took a bold step. He decided to shift the power of the aged jurists on the Court. The President proposed that for every justice over the age of 70 an additional justice be appointed; thus the workload of the Court's superannuated members purportedly would have been eased. Through this "court packing" plan, up to six new justices could have been appointed by President Roosevelt, and the balance of judiciary power would have been tilted in favor of New Deal measures. Congressional opposition to the plan was immediate and intense and the bill was rejected out of hand. However, as a result of the struggle, pending legislation was saved.

The less intransigent among the justices, their robes still singed

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Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates . . . .

Id. § 207(a) provides in part:

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

3. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

4. U.S. Const. art. I, § 8 provides in pertinent part:

The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

from battle, retreated on many issues, among them the Fair Labor Standards Act of 1938 (FLSA). This was to have been the final major New Deal measure. It consolidated much of the early social legislation of the National Recovery Act (NRA) and completed the construction of the welfare state by giving form and substance to amorphous social goals, such as the prohibition of child labor and the implementation of minimum wage and maximum hour standards.

Controversy has surrounded the FLSA since its inception. The original version of the Act excluded states and their political subdivisions from the definition of “employer” as used in the minimum wage and overtime provisions. In 1966, a congressional amendment extended the coverage of the FLSA and redefined “employer” to include the operation of state-operated hospitals, institutions, and schools. The 1966 amendments did not provide overtime pay protection to drivers, operators, and conductors (“operating employees”) employed by transit companies, public or private. Two years after their passage, the Supreme Court sustained the constitutionality of the 1966 amendments in *Maryland v. Wirtz*.

In 1974, the umbrella of the FLSA was extended to cover virtually all public agencies and their employees. The 1974 amendments, as applied to employees of state and municipal governments, were broadly challenged by the states and their political subdivisions in *National League of Cities v. Usery*. In this

7. *Id.*
ground-breaking decision, the Supreme Court overruled Wirtz and invalidated the 1974 amendments "insofar as [they] operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." However, the opinion, couched sweepingly in terms of states-rights federalism, failed to provide guidance for lower federal courts that had to decide precisely when the FLSA was impinging upon essential state functions. To aid the lower courts, the Secretary of Labor proposed regulations that would give notice of the Department's determinations of which activities constituted traditional governmental functions. The regulations were adopted and published as an interpretive rule.

On December 21, 1979, the Secretary of Labor determined that "local mass transit systems" were not included among a state's traditional functions. The inclusion of this category in the promulgation was prompted by a specific inquiry about the applicability of the FLSA to employees of SAMTA dated September 17, 1979. The first suit of the Garcia v. San Antonio Metropolitan Transit Authority litigation was filed shortly thereafter on Novem-
This Comment analyzes tenth amendment doctrine as it has evolved from *National League of Cities*, through *EEOC v. Wyoming*, to the Supreme Court's most recent pronouncement in *Garcia*. It also surveys the various schools of thought among constitutional scholars concerning their interpretations of this doctrine. The Comment concludes that the return to traditional constitutional principles in the area of congressional commerce clause power, as directed by a majority of the Court in *Garcia*, may be brief. Because that majority includes three Justices over the age of seventy-five, who might be expected to choose retirement over continued service, the likelihood of vacancies arising on the Court in the short term is not to be overlooked. The current administration unquestionably backs the minority's position in *Garcia*. Thus, the longevity of this decision may hinge on the future makeup of the Court, which, in turn, hinges on the federalism policies of both the current and succeeding administrations.

II. *National League of Cities v. Usery*

In *National League of Cities v. Usery*, the Supreme Court held that Congress exceeded its power under the commerce clause by enacting legislation that "displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions." At issue was a challenge by several cities and states to the validity of the 1974 amendments to the FLSA. The Court was divided bitterly on this issue. Justice Rehnquist wrote for the Court and was joined by Chief Justice Burger, Justice Stewart, and Justice Powell. Justice Blackmun joined the majority opinion and also wrote a separate concurring opinion. Justice Brennan wrote a stinging dissent, joined by Justices White and Marshall. Justice Stevens wrote a separate dissent. The challenged FLSA amendments extended statutory minimum wage, maximum hour, and

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22. For a debate on the political ramifications of the President's power to appoint Supreme Court Justices, see *Is the Supreme Court the President's Sole Preserve?*, A.B.A. J., Aug. 1985, at 36. Because there are five Supreme Court Justices more than seventy-five years of age, President Reagan has the potential to appoint more Justices than any President since Franklin D. Roosevelt.
24. Id. at 852.
25. See supra note 12 and accompanying text.
26. See supra note 2 and accompanying text.
overtime provisions to virtually all state and municipal employees. The states argued that when Congress applied these provisions across the board to state and municipal employees as well as to private employees, it violated the tenth amendment.\textsuperscript{27}

Although the states conceded that the 1974 amendments to the Act doubtlessly affected commerce and that they would be constitutional as applied to private employers, the states maintained that the tenth amendment stood as an affirmative limitation upon Congress’ power to apply the provisions to the states and their subdivisions as employers.\textsuperscript{28} The states argued that there were other limitations upon Congress’ otherwise plenary powers: An enactment within the authority of the commerce clause would be invalidated if found to offend the sixth amendment’s right to trial by jury\textsuperscript{29} or the due process clause of the fifth amendment.\textsuperscript{30}

Justice Rehnquist agreed that Congress’ enumerated powers could not be exercised to override state sovereignty:\textsuperscript{31}

\begin{quote}
We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.\textsuperscript{32}
\end{quote}

The Court decided that a state’s power to determine wage and hour scales for its employees was an attribute of state sovereignty\textsuperscript{33} and, moreover, a function essential to the state’s separate and independent existence which could not be abrogated by Congress.\textsuperscript{34}

In reaching its conclusion, the Court considered the substantial costs imposed upon the states and their subdivisions.\textsuperscript{35} The result of compliance, the states urged, would be the forced relinquishment of important governmental activities such as affirmative ac-

\begin{itemize}
\item \textsuperscript{27} 426 U.S. at 837.
\item \textsuperscript{28} Id. at 841.
\item \textsuperscript{29} Id. at 841 (citation omitted).
\item \textsuperscript{30} Id. (citation omitted).
\item \textsuperscript{31} Id. at 842.
\item \textsuperscript{32} Id. at 845.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id. at 852.
\item \textsuperscript{35} Id. at 846. There was little agreement about the cost of compliance with the 1974 amendments. The Secretary argued that the states and cities’ cost allegations were exaggerated and were based on misinterpretations of the Act, and that most cities would be unaffected because they were already adhering to the federal minimum wage.
\end{itemize}
tion, on-the-job training, and internship programs which generally offer lower wages to trainees in consideration for vocational education.\textsuperscript{36} In response, the Secretary of Labor argued that the purpose of the amended provisions was to provide a financial disincentive for using employees beyond a work period Congress deemed appropriate and to spread employment by using additional employees to do the overtime work.\textsuperscript{37}

While not dismissing the considerable financial impact the application of the amendments would have on cities and states, the Court stated that such impact was not crucial to its decision.\textsuperscript{38} The crux of the decision was that the imposition of the amendments on the states and their political subdivisions would impermissibly interfere with their integral governmental functions.\textsuperscript{39} Were Congress allowed to alter or displace the state's ability to structure employer-employee relationships in such traditional areas as fire and police protection, sanitation, public health, and parks and recreation, the majority could see little left of the states' separate and independent existence.\textsuperscript{40}

Justice Blackmun heightened the ambiguity of an already confusing opinion by interpreting the Court's decision as "advocating a balancing approach in which the burden a federal regulation imposes upon a state and the extent of interference with state autonomy is weighed ad hoc against the magnitude of the federal interest and the need for state compliance."\textsuperscript{41} Justice Blackmun went on to say that, in his understanding, this approach would not outlaw federal power in areas such as environmental protection where superior federal interest demanded state compliance.\textsuperscript{42}

\textsuperscript{36} Id. at 847-48.
\textsuperscript{37} Id. at 849.
\textsuperscript{38} Id. at 851. Justice Brennan commended the majority's reluctance to rely upon such costs to invalidate the amendments. Id. at 874 n.12 (Brennan, J., dissenting).
\textsuperscript{39} Id. at 851-52.
\textsuperscript{40} Id. at 851 (citation omitted).
\textsuperscript{41} Rotunda, The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions, 132 U. PA. L. Rev. 289, 293 (1984); see 426 U.S. at 856 (Blackmun, J., concurring).
\textsuperscript{42} 426 U.S. at 856 (Blackmun, J., concurring). Justice Blackmun referred to the majority's distinguishing of Fry v. United States, 421 U.S. 524 (1975). In Fry, the Court upheld the Economic Stabilization Act of 1970 (an "emergency" measure) as applied to the states to temporarily freeze wages of state and municipal employees. Justice Rehnquist cited four reasons why the situation in Fry was sufficiently different from that in National League of Cities so as not to warrant overruling the case: (1) the need for the act was brought about by an extremely serious problem that could be forestalled only by collective action by the federal government; (2) the interference would be short-lived; (3) the enactment would not displace state choices of how to structure governmental operations; and (4) the enactment
Justice Brennan strenuously opposed the majority's opinion, urging that it repudiated settled principles governing judicial interpretation of the Constitution. In a federalist system, he reasoned, restraints upon the commerce power lie in the political process, not in the judicial process. The federalist nature of Congress, consisting of representatives from the states, assures that Congress normally considers the effects of federal regulation upon the states before displacing state authority. Justice Brennan stressed that effective restraints on Congress' exercise of its commerce power "'must proceed from political rather than from judicial processes,'" because the Constitution does not provide for any judicially-imposed restraint upon state sovereignty. He considered the majority's opinion a hollow abstraction without constitutional or precedential basis, which merely reflected displeasure with congressional judgment.

Justice Brennan suggested that the logical extension of the majority's reliance on the tenth amendment as an express limitation on Congress' enumerated powers would overrule not only *Maryland v. Wirtz*, but earlier decisions reaching back to *McCulloch v. Maryland*.

Justice Stevens, in a separate dissent, did not question that the federal government's power over the labor market embraced state employees. He was as confounded as Justice Brennan by the majority's "traditional governmental functions" test and confessed he could not identify a limitation on federal power that would not also invalidate an unquestionably permissible federal regulation of state activities. Stating that he did not agree with the wisdom of the 1974 amendments, he nonetheless affirmed that it was a policy issue which had been resolved by the branch having power to de-

43. 426 U.S. at 857 (Brennan, J., dissenting).
44.  Id. at 876-77.
45.  Id. at 858 n.2 (citations omitted).
46.  Id. at 876 (quoting *Wickard v. Filburn*, 317 U.S. 111, 120 (1942)).
47.  426 U.S. at 858 (Brennan, J., dissenting).
48.  Id. at 860, 867-72.
49.  392 U.S. 183 (1968), overruled in 426 U.S. 833, 840 (1976)). In *Wirtz*, the Court upheld the 1966 Amendments to the Fair Labor Standards Act, which had extended the definition of "employer" to include state hospitals, institutions, and schools.
50.  17 U.S. (4 Wheat.) 316 (1819). See 426 U.S. at 859, where Justice Brennan quotes from the opinion of Chief Justice Marshall in *McCulloch*, 17 U.S. at 405-06: "'The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'any thing in the constitution or laws of any State to the contrary notwithstanding.'"
The Court's decision in *National League of Cities* breathed new life into the tenth amendment and transformed it into an affirmative limitation on Congress' power under the commerce clause. Just how this new precedent was to be followed, however, led to confusion in the lower federal courts. Two conflicting approaches to invalidation of suspect federal legislation were presented. The majority's test asked whether the legislation would impinge upon an "essential state function," but gave little guidance for identifying such functions other than a list of traditional areas of state and municipal involvement such as fire and police protection, sanitation and public health services, and maintenance of parks and recreation facilities. A further ambiguity concerned the measure of impingement necessary to compromise the principles of federalism. Justice Rehnquist considered the degree of federal interference with integral governmental functions of the states to be irrelevant; the dispositive question was whether Congress had exercised its commerce clause authority in an area affecting the states as states. The Court, seemingly reluctant to apply such an absolute standard, did not use the tenth amendment to invalidate federal legislation in the eight years following National League of Cities. Lower courts avoided Justice Rehnquist's test and chose to adopt the balancing approach articulated by Justice Blackmun in his concurring opinion.

### III. National League of Cities as Precedent

#### A. Avoiding the Reach of National League of Cities

The *National League of Cities* decision was severely criticized by both the academic and the judicial communities. However, apprehension that *National League of Cities* heralded a new wave of states-right's federalism soon proved unfounded as subsequent judicial interpretations limited the purview of the decision, reducing it to "a very carefully worded opinion on a very narrow issue." In a footnote to *National League of Cities*, Justice Rehnquist

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51. 426 U.S. at 881 (Stevens, J., dissenting).
52. *Id.* at 851.
53. *Id.* at 851-52.
55. *Id.* at 294.
56. *Id.* at 295.
suggested that Congress might be able to regulate essential state functions by exercising its authority granted under the spending power, or under section 5 of the fourteenth amendment.\textsuperscript{58} Within a week of the \textit{National League of Cities} decision, Justice Rehnquist, confirming the implications of that footnote, rendered an opinion which recognized that under the fourteenth amendment Congress was empowered to enforce the anti-discriminatory employment prohibitions of Title VII of the Civil Rights Act of 1964 against the states as employers.\textsuperscript{59} In 1980, the Court decided \textit{City of Rome v. United States}\textsuperscript{60} and \textit{Fullilove v. Klutznick},\textsuperscript{61} reaffirming the notion that when Congress acts under the Civil War Amendments, it may intrude into all areas of state autonomy.\textsuperscript{62} In those cases, \textit{National League of Cities} was considered irrelevant because it dealt solely with Congress' commerce clause powers; federal action under the fourteenth amendment avoided such "complications."\textsuperscript{63}

Justice Rehnquist was equally correct in believing that federal legislation enacted under the spending power could permissibly impinge upon essential state functions. Following \textit{National League of Cities}, lower federal courts continued to uphold such acts of congressional intrusion in situations where the states had a choice whether to participate in federally funded programs.\textsuperscript{64}

In a 1983 decision, the Supreme Court unanimously removed congressional actions under the spending power from the controlling influence of \textit{National League of Cities}. Justice O'Connor authored the opinion and stressed that the states involved had voluntarily committed to the grants-in-aid programs and had provided assurances that they would abide by the federal regulations. Thus, the states were bound to repay any funds not used as agreed. "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding . . . simply does not intrude on their sovereignty."\textsuperscript{65}

\begin{footnotes}
\item 60. 446 U.S. 156 (1980).
\item 61. 448 U.S. 448 (1980).
\item 62. Alfange, \textit{supra} note 58, at 222.
\item 63. \textit{Id.} at 247-48.
\item 64. \textit{See} Rotunda, \textit{supra} note 41, at 296 n.44 (listing cases). Professor Rotunda notes that the state's "'choice' is often illusory because the federal 'bribe' is so large." \textit{Id.} at 296.
\end{footnotes}
In a 1980 criminal case involving bribery and racketeering charges against a state legislator, the Court held that evidence relating to the accused's official legislative activities could permissibly be introduced in a federal trial because the prosecution was of an individual, not a state. One commentator saw this as a regulation of the states as states: "for the states can act only through the official actions of their officials, and the official actions of legislatures... are the sum of the actions of the individual legislators." The Court's unwillingness to extend the "doctrine [of National League of Cities] to analogous cases," he concluded, "is itself evidence that the doctrine is of questionable validity."

The tenth amendment may not preclude application to the states of legislation enacted under Congress' commerce clause power where the states are acting in a proprietary capacity by competing in the private retail market. Justice Powell, writing for the majority in Jefferson County Pharmaceutical Association v. Abbot Laboratories, reasoned:

In one important sense, retail competition from state agencies can be more invidious than that from chain stores. ... [T]o the extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large.

B. Supreme Court Refinements of the National League of Cities Doctrine

One of the most commonly encountered criticisms of the National League of Cities decision centered on the frustration it caused the judicial community: The opinion simply did not prescribe a test for determining whether a state function was pro-

67. Alfange, supra note 58, at 248-49.
68. Id. at 249.
69. Jefferson County Pharm. Ass'n v. Abbot Laboratories, 103 S. Ct. 1011 (1983). Retail pharmacists brought an antitrust action against pharmaceutical manufacturers, a county hospital, and trustees of the University of Alabama, charging price discrimination in violation of the Robinson-Patman Act. The Supreme Court ruled that if state purchases for consumption and traditional governmental functions are to be exempt from the Act under the tenth amendment, those purchases might only be protected on a case-by-case basis. Id. at 1014 n.6.
70. Id. at 1017 n.17.
ected from federal legislation enacted under the commerce clause. Clear guidance was not provided by indistinct phrases such as "the activities of the States as States,"71 "functions essential to [the states'] separate and independent existence,"72 or "integral operations in areas of traditional governmental functions."73

The Court first attempted to clarify this baffling imprecision in terminology in two companion cases decided in the 1981 Term: Hodel v. Virginia Surface Mining & Reclamation Association,74 and Hodel v. Indiana.75 In these cases, associated coal mining interests brought several preenforcement challenges to the Surface Mining Control and Reclamation Act of 1977,76 which created a national system for regulating surface coal mining and reclamation of land following the cessation of mining activity. Federal district courts in Virginia77 and Indiana,78 in addition to finding constitutional transgressions among certain other of the Act's provisions, found the land reclamation provisions to be in contravention of the tenth amendment. Relying on National League of Cities, the court for the Western District of Virginia framed the issue as whether the Act governed the activities of private individuals or instead regulated the governmental decisions of the states.79 While admitting the Act's ultimate effect was on the coal mine operator, the court concluded that the Act impermissibly interfered with the states' "traditional governmental function" of regulating land

71. 426 U.S. at 842.
72. Id. at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559 (1911)).
73. 426 U.S. at 852. See Comment, National League of Cities Crashes on Takeoff: Balancing Under the Commerce Clause, 68 Geo. L.J. 827, 836 n.60 (1980) for the full litany of formless language used by Justice Rehnquist to describe state activities which are immune from federal regulation under the commerce power.
75. 452 U.S. 314 (1981). Hodel v. Indiana and Hodel v. Virginia Surface Mining & Reclamation Ass'n are hereinafter referred to collectively as Hodel.
76. 30 U.S.C. §§ 1201-1328 (1982). According to the Court, the purpose of the Act was to protect society and the environment from the adverse effects of surface coal mining operations. 452 U.S. at 268. Implementation was to be in two stages. Congress mandated that in the initial phases the environmental protection performance standards under the Act were to be immediately promulgated and enforced. The subsequent, permanent phase mandated adoption of a regulatory program for each state. A state wishing to assume permanent regulatory authority over its surface coal mining operations was required to submit its own program (which necessarily incorporated the environmental protection standards of the Act) to the Secretary of the Interior for approval. Otherwise, the federal government would design a program for the state. 452 U.S. at 268-71.
79. 483 F. Supp. at 432.
The Supreme Court rejected this conclusion by relying on the supremacy clause. The reclamation provisions did not regulate the state as states but, instead, regulated the private activities of coal mine operators, an area affecting interstate commerce over which the power of Congress is "supreme and exclusive."

Were it not for National League of Cities, Justice Marshall, writing for a unanimous Court, could have put down his pen at this point. However, being obligated to dispel the cloud of confusion obscuring the tenth amendment issue at the lower federal court level, he stated that the district court's holding rested on an unwarranted extension of the decision in National League of Cities. Justice Marshall announced a three-pronged test to determine when federal legislation under the commerce clause violated the tenth amendment:

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 "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

Even if a statute were to satisfy all three requirements, a tenth amendment challenge might still fail if the situation were such that the federal interest advanced justified state submission. This condition has become known as the "fourth prong" of the Hodel test and is derived from Justice Blackmun's concurrence in National League of Cities. Thus, the balancing approach, which had won instant favor with the lower federal courts following National League of Cities, gained unanimous Supreme Court acceptance.

Examining the Surface Mining Act in light of these requirements, the Court found it unnecessary to go beyond the first prong of the test. The tenth amendment challenge failed because the statute did not regulate the states as states.

80. Id. at 435 (quoting National League of Cities, 426 U.S. at 852).
81. U.S. Const. art. VI.
82. 452 U.S. at 290 (quoting Missouri Pac. R.R. v. Stroud, 267 U.S. 404, 408 (1925)).
83. Id. at 287, 288 (quoting National League of Cities, 426 U.S. at 845, 852, 854).
84. 452 U.S. at 288 n.29; see 426 U.S. at 856 (Blackmun, J., concurring).
85. See Rotunda, supra note 41, at 294 n.30 (listing decisions in which lower courts employed the balancing approach).
86. 452 U.S. at 288.
The following Term, in *Federal Energy Regulatory Commission v. Mississippi*, the Court went a step beyond *Hodel* to uphold federal legislation of a far more invasive nature. The dispute in *Hodel* arose after Congress gave the states the option of creating and adopting plans for the regulation of surface mining or of having the federal government preempt their authority in the area and create one for them. The enactment challenged in *Federal Energy Regulatory Commission*, however, gave the states the choice of either considering the federal government’s proposals or of abandoning regulation of the field altogether. This case involved a tenth amendment challenge to the Public Utilities Regulatory Policies Act of 1978 (PURPA), legislation designed to enlist the aid of the states in conserving energy resources. PURPA requires the states to entertain federal rate and regulatory standards and to follow public notice and hearing procedures if they choose not to adopt the proposals. To encourage the development of alternative energy sources and small power production facilities, Congress promulgated certain rules in PURPA which the states were required to implement. This was the most intrusive provision and the one which the Court found troublesome.

Justice Blackmun, writing for the majority in *Federal Energy Regulatory Commission*, distinguished *National League of Cities*, stating that the Court there considered “the extent to which state sovereignty shields the States from generally applicable federal regulations” while in *Federal Energy Regulatory Commission* the issue concerned the federal government’s attempts to use “state regulatory machinery to advance federal goals.” Therefore, the issue presented was one of first impression for the Court. This could explain the Court’s reluctance to apply the *Hodel* test, despite other similarities between the two cases, and its reluctance to decide the issue on supremacy clause grounds. Because Congress clearly could have preempted the field, at least insofar as private

88. *Id.* at 764.
89. *Id.* at 766, 781.
94. 456 U.S. at 759.
95. *Id.* at 758-59.
activity was concerned, Justice Blackmun reasoned: "PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards." 96

The more troublesome provision of PURPA, which commandeered state administrative agencies to implement federal standards, was not so neatly dispatched by the Court. Justice Blackmun concluded that because acts similar to those required of the state under PURPA were already being carried out by state administrative and judicial bodies it would be no imposition upon the state to handle matters arising under PURPA. 97 The Court declared that the obligation of state officials to enforce federal law rested squarely on the supremacy clause 98 and that, in certain circumstances, the federal government may structure the states' exercise of their sovereign powers. 99

The Court's first opportunity to consider the third prong of the Hodel test arose earlier in the 1982 Term when it reviewed United Transportation Union v. Long Island Rail Road. 100 The case arose when collective bargaining under the Railway Labor Act (RLA) 101 between a state-owned passenger railroad and a railroad employees' union reached impasse. The State of New York had acquired the Long Island Rail Road some thirteen years earlier, after 132 years of private ownership. Following a pleading battle waged in the lower state and federal courts, strike intercession by the President of the United States, and a transmutation of the railroad entity from a private stock company to a public benefit corporation, the case reached the United States Court of Appeals for the Second Circuit. 102

96. Id. at 765 (emphasis in original) (footnote omitted).
97. Id. at 760-61.
98. Id. (citing Testa v. Katt, 330 U.S. 386 (1947)).
99. 456 U.S. at 764 n.28.
100. 455 U.S. 678 (1982).
102. 455 U.S. at 680-82. Following the failure of efforts of the National Mediation Board to settle the dispute, the Board released the case, which triggered a 30-day cooling-off period under the RLA. In anticipation that the state would challenge the applicability of the RLA, the union filed suit one day before the end of the cooling-off period in the United States District Court for the Eastern District of New York seeking a declaratory judgment that the dispute was covered by the RLA and not by the Taylor Law, a state law prohibiting strikes by public employees. The next day, the union commenced a strike. Pursuant to the RLA, the President imposed an additional 60-day cooling-off period. Prior to the expiration
The court of appeals overruled the district court, employing both the definitional and the balancing tests of *National League of Cities*. It held that the operation of the railroad was an integral state governmental function and that the RLA had displaced "essential governmental decisions" involving that function.\(^{103}\) The Court, on balance, held that the state's interest in controlling the operation of its railroad outweighed the federal interest in applying the Act.\(^{104}\) The Supreme Court disagreed.

In a unanimous opinion written by Chief Justice Burger, the Court found that the railroad's claim failed to pass the third prong of the *Hodel* test which examines whether "the State['s] compliance with the federal law would directly impair [its] 'ability to structure integral operations in areas of traditional governmental functions.'"\(^{105}\)

The Court's review of the RLA revealed nearly a century of comprehensive federal regulation of railroads. The Act had fulfilled its purpose of preventing disruptions in rail service by facilitating collective bargaining between railroads and labor organizations representing railroad employees.\(^{106}\) Also, the operation of passenger railroads, as well as freight railroads, has traditionally been a function of private industry, not of state or local governments.\(^{107}\) Recent state acquisition of some passenger railroads was not accepted by the Court as altering the "historical reality" of federal regulation in the field.\(^{108}\)

Even though the Court insisted that its emphasis on tradition was "not meant to impose a static historical view of state functions generally immune from federal regulation," a narrowing of the traditional state function is perceived.\(^{109}\) Dicta in the case presupposes that the Court would not permit the individual states, "by
acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.\textsuperscript{110}

Not only did the state’s interest in regulation of its passenger railroad fail to qualify as a traditional governmental function under the third prong of the \textit{Hodel} test, but also the state’s knowledge and acceptance of the RLA’s regulation of its railway operation during the thirteen years of state ownership estopped the state from claiming that federal regulation impaired its traditional state sovereignty.\textsuperscript{111}

The Court’s most recent attempt to interpret \textit{National League of Cities} prior to \textit{Garcia} was \textit{EEOC v. Wyoming}.\textsuperscript{112} This case arose when a Wyoming state game warden, who had been forced by statute\textsuperscript{113} to retire at age fifty-five, filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging violation of the Age Discrimination in Employment Act (ADEA).\textsuperscript{114} The Commission then filed suit in federal district court seeking a declaratory judgment that Wyoming was engaged in unlawful employment practices. The district court dismissed the complaint. The court first decided that since ADEA had been enacted under the commerce clause, the proper precedent was \textit{National League of Cities}. Moreover, it held that, under the doctrine of tenth amendment immunity as set forth in that case, the Act could not be applied constitutionally to the state.\textsuperscript{115}

The case was appealed directly to the Supreme Court. The Court, with Justice Brennan writing for a five-Justice majority, reversed, holding that Congress was justified under its commerce clause power in applying the ADEA to the states.\textsuperscript{116}

The state’s challenge to the application of the ADEA to it was not based on the theory that Congress had overstepped its powers

\textsuperscript{110} Id. at 687. For a discussion of the history of federal regulation of railroads, see \textit{id.} at 687-89.

\textsuperscript{111} Id. at 690.

\textsuperscript{112} 103 S. Ct. 1054 (1983).

\textsuperscript{113} 103 S. Ct. at 1059. A Wyoming statute provided that certain law enforcement officers could continue working past age 55 only with the approval of the department, and that no one could continue working beyond age 65. \textit{Wyo. Stat.} § 31-3-107 (1977) (current version at \textit{Wyo. Stat.} § 9-3-607 (1985)).


\textsuperscript{115} \textit{EEOC v. Wyoming}, 514 F. Supp. 595, 600 (D. Wyo. 1981), rev’d, 103 S. Ct. 1054 (1983). Additionally, the district court held that the ADEA could not be upheld under the fourteenth amendment since Congress had not expressly acted under this power. \textit{id.} at 600. Had the court ruled otherwise the state would possess no immunity.

\textsuperscript{116} 103 S. Ct. at 1064.
under the commerce clause, but rather, that the tenth amendment acted as an affirmative restraint barring Congress' direct application of the ADEA to the states.\textsuperscript{117} Responding to this argument, Justice Brennan stated that the principle of immunity which emerged in \textit{National League of Cities} was a functional doctrine that allowed the states to effectively perform certain core state functions, but "whose ultimate purpose [was] not to create a sacred province of state autonomy."\textsuperscript{118}

Justice Brennan's analysis focused on the third prong of \textit{Hodel}\.\textsuperscript{119} Accepting from \textit{National League of Cities} that the operation of state parks was a traditional state function,\textsuperscript{120} the Court explained that the impairment of a state's ability to structure integral operations was judged as a matter of degree.\textsuperscript{121} The Court found that the degree of intrusion in EEOC as compared to that in \textit{National League of Cities} was considerably less serious. The state's asserted purpose of assuring that Wyoming game wardens be physically prepared to perform their duties would not be thwarted by the enforcement of the ADEA. The state could assess the job qualification of preparedness through physical examinations. Moreover, if the state could demonstrate that a particular level of physical fitness was a bona fide occupational qualification for the job of game warden, the state could continue to discharge older wardens on the basis that they failed to meet the standard. The Court did not believe that a state's costs would necessarily be increased by implementation of the ADEA.\textsuperscript{122} Although it would cost the state more to keep the older wardens on the payroll because their salary levels would presumably be higher than the level at which the state might employ younger wardens, these costs to the state would be recouped in the pensions not paid while those workers remained employed and the fewer years for payment following retirement.\textsuperscript{123} Consequently, the Court held that the ADEA did not sufficiently intrude on the state's ability to "structure integral operations."\textsuperscript{124}

\textsuperscript{117} Id. at 1060.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 1060-62; see supra note 105 and accompanying text.
\textsuperscript{120} 103 S. Ct. at 1062 (citation omitted).
\textsuperscript{121} 103 S. Ct. at 1062 (citations omitted).
\textsuperscript{122} Id. at 1062-63.
\textsuperscript{123} Id. at 1063.
\textsuperscript{124} Id. at 1062. The Court suggested that even if the state's interest had survived the three prongs of the \textit{Hodel} test, it would have been outweighed by the federal interest in the ADEA. Id. at 1064 n.17.
Justice Stevens cast the swing vote and joined the Court's opinion; he also authored a concurring opinion denouncing the foundation of the majority's decision. He censured the majority for having construed the commerce clause too narrowly. In maintaining that the commerce clause embodies the central purpose of the Constitution, he asserted that the need for centralized regulation of interstate commerce prompted the drafting of the instrument.\textsuperscript{125} Because regulation of the labor market was clearly within the purview of that central purpose, the only question in Justice Stevens' mind was whether that purpose envisioned control over the public as well as over the private sector of employment. He discussed the interdependence of those segments of the economy and the tremendous growth of public employment, concluding that for Congress to achieve any effectiveness in the labor field it must regulate both public and private employment.\textsuperscript{128}

Accordingly, Justice Stevens concluded that tenth amendment limitations upon Congress' commerce clause power could not exist under the Constitution.\textsuperscript{127} He viewed the \textit{National League of Cities} decision as "pure judicial fiat," an exercise in policy-making which properly belonged to Congress and called for its reversal.\textsuperscript{128}

III. \textit{Garcia v. San Antonio Metropolitan Transit Authority}

A. The Decision of the Federal District Court

On November 21, 1979, Joe G. Garcia and fellow employees of the San Antonio Metropolitan Transit Authority (SAMTA) brought an action against their employer for overtime pay under the Fair Labor Standards Act (FLSA).\textsuperscript{129} On that same date, SAMTA filed an action for declaratory judgment against the Secretary of Labor, styled \textit{San Antonio Metropolitan Transit Authority v. Donovan}, seeking a determination that SAMTA was exempt from the provisions of the FLSA.\textsuperscript{130} SAMTA moved for summary

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\textsuperscript{125} Id. at 1064-65 (Stevens, J., concurring).
\textsuperscript{126} Id. at 1068.
\textsuperscript{127} Justice Stevens stated, "I think it so plain that \textit{National League of Cities} not only was incorrectly decided, but also is inconsistent with the central purpose of the Constitution itself, that it is not entitled to the deference that the doctrine of \textit{stare decisis} ordinarily commands for this Court's precedents." Id. at 1067.
\textsuperscript{128} Id.
\textsuperscript{129} Jurisdictional Statement at 4 n.5, \textit{Garcia}, 105 S. Ct. 1005. That suit was stayed pending disposition of the constitutional challenge in SAMTA's suit. Garcia was granted leave to intervene as a defendant, and the American Public Transit Association was allowed to intervene as a plaintiff.
\textsuperscript{130} Id. at 4.
judgment in the Garcia action, asserting that, under National League of Cities the FLSA could not constitutionally be applied to it. In the alternative, it argued that the decision precluded enforcement of the FLSA against any state or local governmental body in the absence of a congressionally enacted and constitutionally valid amendment to that Act.

On November 17, 1981, the United States District Court for the Western District of Texas granted summary judgment for SAMTA, finding that it performed a traditional state function and was thus immune under the tenth amendment of the Constitution from the minimum wage and overtime pay provisions of the FLSA.

The Secretary of Labor and Garcia each filed a direct appeal to the Supreme Court. While those appeals were pending, the Supreme Court decided United Transportation Union v. Long Island Rail Road. Consequently, the Court vacated the district court's decision and remanded San Antonio Metropolitan Transit Authority v. Donovan for reconsideration in light of Long Island Rail Road. On remand, the district court re-entered summary judgment in favor of SAMTA.

The district court in Donovan was not persuaded that Long Island Rail Road compelled a different conclusion in San Antonio Metropolitan Transit Authority v. Donovan. The court relied on National League of Cities, in which the Supreme Court had decided that the tenth amendment prohibited the use of commerce clause power "to force directly upon the states [Congress'] choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." The district court recognized that even after the Long Island Rail Road decision identifying a sovereign state function remained difficult, despite the fact that the Court had indicated that at least three factors need to be considered: historical reality; other factors indicating that a function is presently a basic state prerogative; and, in the case of activities recently converted from the private sector to public ownership

134. 455 U.S. 678 (1982).
135. 557 F. Supp. at 446-47.
136. Id. at 447 (quoting National League of Cities, 426 U.S. at 855).
137. 557 F. Supp. at 447.
and operation, a court must consider the history and scope of federal regulation to determine whether the conversion would impermissibly erode long-standing federal authority.\textsuperscript{138}

Even after evaluating San Antonio's transit system within these parameters, the district court remained unswayed and held fast to its original determination. The court concluded from a record of Texas regulatory activity dating from 1913 that mass transit had traditionally been a state prerogative and responsibility. Texas' election to leave ownership and operation in private hands and to manifest its interest through the regulation of fares, franchising, insurance, and safety requirements "[d]id not negate the inference of sovereignty that arises from history."\textsuperscript{39}

In considering the third prong of the \textit{Long Island Rail Road} test, the court acknowledged that the history of both mass transit in general and of SAMTA in particular\textsuperscript{140} included recent conversions from private to public ownership.\textsuperscript{141} However, unlike \textit{Long Island Rail Road}, where the federal statute in question, the Railway Labor Act (RLA),\textsuperscript{142} was merely a recent sequel to a long line of federal statutes regulating railway labor relations, the FLSA had specifically exempted transit operators from its coverage.\textsuperscript{143} It was only in 1961 that private transit operators were covered under the

\begin{itemize}
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id. at 448.
\item \textsuperscript{140} Publicly owned transit has existed in San Antonio since 1959 when the City of San Antonio acquired the San Antonio Transit Company. The city's purchase was financed by revenue bonds. No federal funds were involved in the acquisition.
\item Since its establishment, SAMTA has received substantial federal financial assistance under the Urban Mass Transportation Act (UMTA), 49 U.S.C. §§ 1601-1618 (1982). During the first two years of operation, Congress provided grants under the UMTA totaling $12.5 million, an amount equal to 30\% of SAMTA's total operating expenses during that two-year period. From December 1970 through February 1980, SAMTA and its predecessors received $51,689,000 in federal grants, the equivalent of 40\% of their total eligible project costs. See Brief for Secretary of Labor at 8-9, Garcia, 105 S. Ct. 1005.
\item \textsuperscript{141} 557 F. Supp. at 448-49.
\item \textsuperscript{142} Railway Labor Act of 1926, 44 Stat. 577 (current version at 45 U.S.C. §§ 151-188 (1982)).
\item \textsuperscript{143} 557 F. Supp. at 449.
\end{itemize}
FLSA, and it was not until 1966 that the Act was applied to public transit operators.\textsuperscript{144} It would be difficult to find a long-standing federal regulatory scheme that would be eroded by a grant of tenth amendment immunity in light of the short time the statutes have been in existence.\textsuperscript{146}

Defendants Garcia and Donovan argued that a grant of tenth amendment immunity to SAMTA from the wage and overtime pay provisions of the FLSA would impair the impact of other federal statutes affecting the transit company. The court examined several federal statutes and was not convinced that any diminution of federal regulatory authority would follow such a grant.

Much of the legislation in question, such as the National Labor Relations Act (NLRA),\textsuperscript{146} which has generally governed labor relations for private transit companies since its enactment in 1935, contains either statutory or judicial exceptions for state and local governments as employers.\textsuperscript{147} Other statutes merely invite rather than mandate state compliance. The Urban Mass Transportation Act of 1964 (UMTA),\textsuperscript{148} for example, is an exercise of the spending power that conditions the imposition of federal regulation upon voluntary compliance by the states. The states must meet the federal government's standards in order to continue to receive federal funding.\textsuperscript{149}

Absent any erosion of federal statutory power, the court found implicit authority in \textit{Long Island Rail Road} for granting tenth amendment immunity to current governmental functions which had been private functions in the past. The court stated that to hold otherwise "would impose precisely the 'static historical view of state functions' that \textit{LIRR} eschews."\textsuperscript{150}

The Donovan court was convinced that the state's prerogatives, when viewed from the perspective of historical reality, constituted decisionmaking in the conduct of an integral state function. First, the court analogized the operation of local mass transit to the traditional functions of states recognized in \textit{National League of Cities}: fire protection, police protection, sanitation, public health,

\begin{itemize}
\item 144. \textit{Id.} (citation omitted).
\item 145. \textit{Id.}
\item 147. 557 F. Supp. at 449.
\item 149. \textit{Id.} § 1609.
\end{itemize}
and parks and recreation. The court stressed that this nonexclusive list was among the "'numerous line and support activities which are well within the area of traditional operations of state and local governments.'"\(^{151}\) The court noted that the only state function specifically taken off the list was the operation of a commuter railroad. By analogy, state-owned transit systems that perform identical services to railway systems should not be exempt from the FLSA. However, according to the court, *Long Island Rail Road* commands that, because of the absence of a history of federal regulation in the field, bus systems must be distinguished from railroad lines.\(^{152}\)

The district court emphasized the difficulty it had in articulating an adequate basis upon which to distinguish public transit from the functions enumerated in *National League of Cities*. The court recognized that in a recent case, *Kramer v. New Castle Area Transit Authority*,\(^ {153}\) the Court of Appeals for the Third Circuit held that public transit was not entitled to tenth amendment immunity on the basis of the large amount of federal funding made available pursuant to UMTA.\(^ {154}\) The *Donovan* court, however, found the level of federal funding to be an unsatisfactory distinction for three reasons. First, it is an exercise of the spending power. Second, federal funding also supports each of the *National League of Cities* functions. Third, federal funding is an unreliable guideline because of the flux in funding to the states based on changing political demands.\(^ {155}\)

The *Donovan* court's final test for tenth amendment immunity was to evaluate SAMTA's operation under the four factors set out in *Amersbach v. City of Cleveland*:\(^ {156}\) (1) whether the function


\(^{152}\) 557 F. Supp. at 451 n.6.

\(^{153}\) 677 F.2d 308 (3d Cir. 1982).

\(^{154}\) 557 F. Supp. at 451.

\(^{155}\) Id. at 452.

\(^{156}\) 598 F.2d 1033, 1037 (6th Cir. 1979). The *Amersbach* court found that the municipal operation of an airport was a traditional function because of the importance of air travel and because public ownership was the most expedient method of providing the service. The court also noted that only two of the country's 475 airports serving municipal areas were privately owned. Id. at 1038 n.7. The court rejected the employees' argument that the operation of a municipal airport is a proprietary rather than a governmental function and should therefore be subject to federal regulation under the commerce clause.

The Supreme Court, in *Massachusetts v. United States*, 435 U.S. 444 (1978), rejected the governmental-proprietary distinction as tenable. One commentator contends that the *Amersbach* test is flawed under the *National League of Cities* balancing approach because it focuses exclusively on the interests of local governments and does not examine the federal
benefits the community as a whole and is made available at little or no direct expense; (2) whether the function is undertaken for public service rather than pecuniary gain; (3) whether government is the principal provider of the function; and (4) whether government is particularly well suited to perform the function because of a community-wide need. The court decided that SAMTA's operation easily qualified as a traditional governmental function under this test. Curiously, the funding considerations, which were ineffectual to establish a federal interest in the field of local mass transit, became determinative in the court's evaluation of state and local government involvement. The court stressed that public transit was heavily subsidized by local tax revenues in order to augment revenues from nominal fares that amounted to about twenty-five percent of operating expenses. Massive federal grants were not weighed in the court's analysis.

The Donovan court concluded that Long Island Rail Road did not command that it overrule its prior decision. Based on historical reality and other factors, the court found that mass transit was clearly a state prerogative and tenth amendment immunity from the challenged FLSA provisions would not erode existing federal powers because authority in the area of transit employment had long rested with the state and local governments.

B. The Decision of the Supreme Court

Contemporaneously, the Courts of Appeals for the Sixth and Eleventh Circuits decided cases with fact patterns parallel to that of Donovan but held that application of the FLSA's overtime pay requirements to local public transit employees did not violate the tenth amendment. The Court of Appeals for the First Circuit

interests involved. Comment, supra note 73, at 827, 828 n.9.
157. 598 F.2d at 1037.
158. 557 F. Supp. at 453-54.
159. 557 F. Supp. at 454.
160. The Sixth Circuit, in Dove v. Chattanooga Area Regional Transp. Auth., 701 F.2d 50 (6th Cir. 1983), noted that federal planning and funding went into the creation of the Authority in 1971, and that the federal government's role had continued to be extensive. While agreeing with the view of the Supreme Court in Long Island R.R. that the notion of what is traditional is not a static concept, the court stated that it would be peculiar to hold that a traditionally private service which became a public service due to federal aid was immune to federal labor regulations. Id. at 53.

The Eleventh Circuit, in Alewine v. City Council of Augusta, 699 F.2d 1060 (11th Cir. 1983), relied upon an analogy of Augusta's bus system to the commuter railway service in Long Island R.R. The court found that bus service historically has been a private enterprise. The court stated further that the "probability that private companies are 'doomed to ex-
recently employed the Amersbach test in a suit by highway construction workers against their employer, the Puerto Rico Highway Authority. The court found that the Authority was engaged in a traditional governmental function because road building and maintenance benefit the community as a whole, and because the public considers government best suited to provide this service due to the community-wide impact of highway systems.\textsuperscript{161} Garcia \textit{v. San Antonio Metropolitan Transit Authority} was selected by the Supreme Court to resolve this discord.

The question originally argued before the Supreme Court in Garcia was "May minimum wage and overtime provisions of FLSA constitutionally be applied to employees of a publicly owned and operated mass transit system?"\textsuperscript{162} The Court, however, set the case for reargument in the October 1984 Term on a question of much broader constitutional significance: "Whether or not the principles of the tenth amendment as set forth in National League of Cities \textit{v. Usery . . . should be reconsidered.}"\textsuperscript{163}

Upon reargument, the Department of Labor claimed that the doctrine underlying National League of Cities was harmonious with the fundamental principles of federalism embodied in the Constitution, but that the district court's ruling should be reversed because public transit is not a "traditional governmental function."\textsuperscript{164} The Department stressed that public ownership of mass transit systems is a recent development spurred by massive federal aid. It further contended that "[t]he power to make policy judgments is probably the quintessential attribute of sovereignty—but no less an essential attribute for Congress."\textsuperscript{165} Were SAMTA's wage and hour decisions left to the "unfettered control" of the city, they would have just the same effect on interstate commerce as the decisions of private transit operators.\textsuperscript{166} The Department supported retention of the traditional function test because it is a means of accommodating the competing interests of the state and federal governments.\textsuperscript{167}

\textsuperscript{161} Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841, 845-46 (1st Cir. 1982).
\textsuperscript{162} 52 U.S.L.W. 3013 (U.S. July 19, 1983).
\textsuperscript{163} 53 U.S.L.W. 3184 (U.S. Sept. 25, 1984).
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
In its argument, SAMTA contended that "constitutional federalism" and the tenth amendment limit Congress' power to regulate state and local governments under the commerce clause. In support of the assertion that public transit is a traditional governmental function under National League of Cities, SAMTA reported that 100 of 106 major urban centers across the country have publicly-owned mass transit systems and that ninety-six percent of commuters nationwide use public transit systems. SAMTA concluded its argument by stating that the principle of constitutional federalism implicit in the Constitution makes it clear that the states must have a separate and independent existence, and that the role of the judiciary is to determine whether the federal government is "devouring" the states' authority.

SAMTA employee Joe Garcia urged the Court to overrule National League of Cities and to affirm Congress' power under the FLSA to regulate the hours and wages of employees of states and their political subdivisions. Garcia argued that the propositions underlying that decision were entirely alien to the system of government envisioned by the framers of the Constitution. He agreed that both the federal and state governments were intended to possess sovereign authority but contended that the propositions advanced by the Supreme Court in National League of Cities to support this premise were misconceived. The Court argued that first, federal sovereignty was intended to be subject to subordination by state sovereignty and second, the judiciary was vested with a commission to invalidate legislation which it viewed as unduly intrusive on state sovereignty.

168. *Id.* at 3256.
169. *Id.*
170. *Id.* This statement was made in reply to a question from Justice Stevens as to which branch the framers intended to assume this responsibility—the federal judiciary or Congress. *Id.* The expression "devour" derives from Justice Douglas' dissent in *Maryland v. Wirtz*, 392 U.S. 183, 204-05 (1968):

> If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are [sic] concerned, could Congress compel the States to build super-highways crisscrossing their territory in order to accommodate interstate vehicles, to provide inns and eating places for interstate travelers, to quadruple their police forces in order to prevent commerce-cripping riots, etc.? Could the Congress virtually draw up each State's budget to avoid "disruptive effect[s]... on commercial intercourse."?

If all this can be done, then the National Government could devour the essentials of state sovereignty.

(Citation omitted.)

172. *Brief of Appellant on Reargument at 4-5, Garcia*, 105 S. Ct. 1005.
In support of his position, Garcia drew upon the text of the Constitution, the debates at and surrounding the constitutional convention, the Federalist Papers, the debates preceding the ratification of the tenth amendment, and Supreme Court precedent dating from McCulloch v. Maryland. He stated that the purpose of the constitutional convention was to create a national government with supremacy over the governments of the several states. Having suffered the “gloomy consequences” of weak federal government under the Articles of Confederation, the framers decided “to draw a line of demarkation (sic) which would give to the General Government every power requisite (sic) for general purposes,” and to establish federal supremacy within those enumerated powers.

Nor, Garcia continued, was there anything in the tenth amendment intended to alter this understanding or to abridge any power granted to Congress. The legislative history of the amendment clearly establishes that its purpose was to quiet the fears of the anti-federalists that rights not expressly reserved to the people would be incidentally relinquished to the central government—not that its purpose was to restrict any powers granted under the Constitution, whether express or implied.

Prior to National League of Cities, the principle that “[t]he sovereignty of Congress, though limited to specified objects, is plenary as to those objects,” had guided the Court throughout its history, with one exception. For a period of approximately twenty years ending in 1941 during which the Court appeared reluctant to sanction pro-labor legislation, the Court construed Congress’ commerce clause power narrowly.

In 1941, the Supreme Court, in United States v. Darby, returned to its earlier expansive reading of the commerce clause power and held as misplaced any reliance upon the tenth amendment as an independent limitation on congressional power over interstate commerce. The tenth amendment was stated to be but a truism that all is retained that has not been surrendered. Where federal authority exists it is supreme, and the safeguard for state sovereignty lies in the political, not the judicial process. These

173. Id. at 4-12 (citations omitted).
174. Reply Brief of Appellant on Reargument at 6, Garcia, 105 S. Ct. 1005 (quoting The Records of the Federal Convention 356, at 132 (J. Madison) (Farrand ed. 1911)).
175. Reply Brief of Appellant on Reargument at 8, 11-12, Garcia, 105 S. Ct. 1005.
176. Id. at 14-15.
177. 312 U.S. 100 (1941).
178. Id. at 124.
principles have prevailed in the Court's decisions concerning the scope of Congress' commerce clause power, maintained Garcia. "National League [of Cities] represented a sharp departure from these precedents."179

Garcia's arguments proved to be persuasive. On February 19, 1985, the Supreme Court held that the tenth amendment does not place an affirmative limitation upon Congress' power under the commerce clause to extend the FLSA's minimum wage and overtime protections to state and local employees and therefore overruled its decision in National League of Cities.

In a 5-4 decision authored by Justice Blackmun and joined by Justices Brennan, White, Marshall, and Stevens, the Court reexamined the standards for establishing state immunity from federal regulation developed in National League of Cities and subsequent cases and held that, in practice, the standards led to conflicting results.180 Justice Blackmun affirmed that undoubtedly there are limits on the federal government's power to interfere with state functions but they do not reside in a priori definitions of state sovereignty.181 He stated that protection for the states' "residuary and inviolable sovereignty" rests in the structural protections of the Constitution itself.182 The majority concluded that the validity of these structural protections was exemplified by congressional treatment of public mass transit. In each instance, as FLSA obligations were imposed upon the states, they were balanced with extensive funding through the UMTA.183

In revisiting National League of Cities and its progeny, the Supreme Court focused upon the seemingly simple but intractable "traditional function" standard. Under this standard, a federal statute transgressed tenth amendment guarantees if state compliance directly impaired the state's ability "to structure integral operations in areas of traditional governmental functions."184 Fur-

179. Brief of Appellant on Reargument at 12, Garcia, 105 S. Ct. 1005.
180. Garcia, 105 S. Ct. 1005, 1007, 1010-12. The Court listed a number of lower federal court decisions wherein courts struggled to distinguish immune state functions from unprotected state functions and concluded: "We find it difficult, if not impossible, to identify, an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side." Id. at 1011.
181. Id. at 1016.
182. Id. at 1017-18 (quoting The Federalist No. 39, at 285 (J. Madison) (B. Wright ed. 1961)).
thermore, the Court found this standard to be "not only unworkable but . . . inconsistent with established principles of federalism."\(^{185}\)

The function standard defied definition. To sound a "cautionary note" against the assumption that continued case-by-case development would lead to a workable standard, the Court related the history of a similar definitional problem in the area of state immunity from federal taxation. Forty years of tax decisions had failed to formulate criteria to identify state governmental functions that were entitled to immunity.\(^{186}\) In the tax area, the judiciary had attempted to draw the line between "governmental" and "proprietary" functions, subjecting the latter to federal tax under the theory that a state divested itself of its sovereignty when it took on the character of a trader and entered the marketplace seeking customers.\(^{187}\) However, this distinction proved impracticable. Attempting to determine the bounds of congressional power by categorically separating "governmental" from "proprietary" state acts resulted in anomalies such as the federal government's taxing the income of an officer of a state-owned transportation system while, at the same time, exempting from taxation the manager of a municipal waterworks.\(^{188}\) Finally, in 1946, a unanimous Supreme Court abandoned the distinction as untenable.\(^{189}\)

In judicial attempts to protect definitionally important state functions from federal reach in the areas of intergovernmental tax immunity and commerce clause regulation, Justice Blackmun saw more than a problem of phraseology. He stated that any distinction that purported to separate out important governmental functions could not be "faithful to the role of federalism in a democratic society."\(^{190}\) States must be free to experiment within the realm of authority left open to them under the Constitution. Any rule of state immunity that looks to the "'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."\(^{191}\)

The Court declared that when congressional authority was being

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186. *Id.* at 1012-13.
187. *Id.* at 1013 n.7.
188. *Id.* at 1013.
189. *Id.* (citing *New York v. United States*, 326 U.S. 572 (1946)).
191. *Id.*
measured under the commerce clause, the states’ protection from federal overreaching did not lie in the judiciary’s evaluation of the nature of a particular state function or in any other freestanding conception of state sovereignty. Insulation of state interests lay in the structure of the federal government itself.192

The Court emphasized that the framers of the Constitution had given the states a role in the selection both of the executive and the legislative branches of the federal government.193 James Madison had placed particular reliance on the states’ equal representation in the Senate, which he stated as being “at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty.”194 This democratic infrastructure, the Court inferred, was proof of the framers’ intent that state autonomy be preserved by procedural safeguards inherent in the federal system rather than by judicially created limitations on federal power.195

To demonstrate the effectiveness of these constitutional safeguards, the Court cited the states’ historic and continuing ability to obtain federal grants while at the same time exempting themselves from federal obligations imposed under the commerce clause. Among the examples given were the Federal Power Act, the National Labor Relations Act, and the Sherman Act.196 The development of public mass transit bears out this claim. Employing their appreciable power to influence legislation, the states have managed to balance impositions of the provisions of the FLSA with corresponding federal funding through the UMTA.197

The Court “perceive[d] nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that [was]

192. Id. at 1018.
193. Id. (citing U.S. Const., art. I, § 2; art. II, § 1).
194. Garcia, 105 S. Ct. at 1018-19 (quoting The Federalist No. 62, at 408 (J. Madison) (B. Wright ed. 1961)). The majority acknowledged that there have been changes in the structure of the federal government since 1789, including the substitution of popular election of senators through the adoption of the seventeenth amendment in 1913. However, it maintained that:

[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the “States as States” is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a “sacred province of state autonomy.”

Id. at 1019-20 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)).
196. Id. at 1018-19.
197. Id. at 1020.
destructive of state sovereignty or violative of any constitutional provision.” 198 It concluded that the majority in National League of Cities had underestimated “the solicitude of the national political process for the continued vitality of the States.” Attempts in that decision to contain Congress’ commerce clause power over state functions through affirmative limits were unnecessary. “In sum, in National League of Cities the Court tried to repair what did not need repair.” 199

Generally reluctant to overrule recent precedent, the Court stated that it did not hesitate to do so “when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause.” National League of Cities represented such a departure. The decision was held to be doctrinally and operably irredeemable and was overruled. 200 Three dissenting opinions were filed in Garcia. Justice Powell wrote a dissenting opinion in which Chief Justice Burger, Justices Rehnquist and O’Connor joined. Justice O’Connor wrote an opinion joined by Justices Powell and Rehnquist. Justice Rehnquist wrote a very short opinion that was not joined by any other member of the Court.

In his dissenting opinion, Justice Powell strongly criticized the Court’s reasons for overruling National League of Cities and its rejection of judicial review of federalism issues in commerce clause legislation. He thought the Court misunderstood the intention of the framers of the Constitution. 201 Justice Powell contended that the majority incorrectly characterized the mode of analysis established in National League of Cities and developed in subsequent cases. 202 In his view, those cases did not engage in or require a precise definition of “traditional governmental functions.” Rather, those decisions followed the balancing approach Justice Blackmun discerned in the National League of Cities opinion and explained in his concurrence to that decision. Under the balancing approach, federal power would not be outlawed where the federal interest was demonstrably greater than that of the state and where state compliance with the challenged legislation was essential. 203

198. Id.
199. Id. at 1021.
200. Id.
201. Id. at 1021-33 (Powell, J., dissenting).
202. Id. at 1023-24.
203. Id. at 1024 (citing National League of Cities, 426 U.S. at 856).
Justice Powell viewed the Court's "precipitous overruling of multiple precedents" as less serious, in the long run, than its alteration of the "federal system embodied in the Constitution." By removing the states' recourse to judicial review of challenged commerce clause legislation, he argued that the states will be left to the mercy of political decisions made by members of the federal government. Thus, the members of Congress, when acting under the commerce clause, would become the sole judges of the limits of their own power. Such a result, according to Justice Powell, ignores the teaching of *Marbury v. Madison* that it is the duty of the federal judiciary to determine the law where a congressional statute is at odds with the Constitution.

Stating that the tenth amendment performs an integral role in our constitutional theory concerning the balance between state and federal powers, Justice Powell asserted that the Court erred in its interpretation of the legislative history surrounding the Constitution. The framers evinced strong concerns that provision be made for the explicit reservation of powers to the states. Had the Federalists not consented to include the tenth amendment in the Bill of Rights, Justice Powell claimed they would not have been able to secure the necessary votes for ratification of the Constitution.

The Court's sweeping holding did more than resolve the issue in the case before it. Justice Powell feared that, "[in] overruling *National League of Cities*, [the] opinion apparently authorizes federal control, under the auspices of the Commerce Clause, over the terms and conditions of employment of all state and local employees." Justice Powell then applied the tests of *National League of Cities* to the facts of *Garcia*. The balancing test could only weigh in favor of the compelling state and local government interests. He maintained that "displacing their control over wages, hours, overtime regulations, pensions, and labor relations with their employees could have serious, as well as unanticipated, effects on state and local planning, budgeting, and the levying of taxes."
In conclusion, Justice Powell employed the test he had earlier criticized the Court for mischaracterizing in the National League of Cities line of cases. He had inferred that the Court’s inability to find an “organizing principle” among decisions designating various functions as traditional governmental functions was due to its erroneous interpretation of such holdings as “blanket pronouncements that particular things inherently qualified . . . or did not.”

By analogy to the provision of such services as street maintenance, public lighting, traffic control, and water and sewage systems, Justice Powell reasoned that the operation of an intracity mass transit system was a classic example of a traditional governmental function. This conclusion appears to have been based upon the just-denounced inherent qualification standard. Since Justice Powell provided no further explanation for this result, it is difficult to divine whether his reliance was misplaced or whether the passage is merely opaque and thus susceptible of misinterpretation. Services protecting citizens’ health and safety are those with which state and local officials are intimately familiar and for which they are accountable to their electorate. It naturally follows that locally-elected representatives would be more responsive to such needs than would federal bureaucrats. Justice Powell stated that this is the nature of state and local control that “the Framers understood would insure the vitality and preservation of the federal system that the Constitution explicitly requires.”

Filing a separate dissenting opinion, Justice O’Connor explained her fundamental disagreement with the majority’s views of federalism and the role of the Court. She asserted that, in overruling National League of Cities, the Court had so narrowed the range of states’ power under the Constitution that the central issue of federalism became whether there remained any area in which a state might act free of federal interference. She also criticized the majority for its retreat from the conflict between the Constitution’s dual concerns for federalism and an effective commerce power.

Justice O’Connor stated that, due to the emergence of an integrated and industrialized national economy, the powers of Con-

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211. Id. at 1011.  
212. Id. at 1023 n.4.  
213. Id. at 1032.  
214. Id. at 1032-33.  
215. Id. at 1033 (O’Connor, J., dissenting).  
216. Id.  
217. Id.
gress have been dramatically expanded beyond the vision of the framers of the Constitution.\textsuperscript{218} Therefore, it becomes important to realize that the framers perceived a narrow commerce power which would be used primarily to remove interstate tariffs and to regulate maritime affairs and large-scale mercantile enterprises. Justice O'Connor did not suggest that the commerce power should be as narrowly construed today, but contended that this historic perception explains why the framers believed "the Constitution assured significant state authority even as it bestowed a range of powers, including the commerce power, on the Congress."\textsuperscript{219} Justice O'Connor continued, stating that, as a national economy emerged, it was necessary for the Court to more broadly interpret the commerce power of Congress to enable the federal government to deal with economic problems that were national in scope. Today, Congress may regulate intrastate activities that affect interstate commerce as well as commerce among the states. In order to regulate an activity, Congress need only demonstrate a rational basis for finding that the activity affects interstate commerce. Even if an individual's activities do not perceptibly affect interstate commerce, those acts may be brought under the reach of the commerce clause through regulation of that class of activity as a whole as long as that class affects interstate commerce.\textsuperscript{220} As a result, Justice O'Connor stressed, virtually every state activity, in addition to every private activity, affects interstate commerce. Combined with changes in the workings of Congress such as the direct election of senators and the advent of national interest groups, the diminution of state authority over commerce represented by the Court's rejection of \textit{National League of Cities} presents "a real risk that Congress will gradually erase the diffusion of power between state and nation on which the Framers based their faith in the efficiency and vitality of our Republic."\textsuperscript{221}

Justice O'Connor, in conclusion, stated that the majority's reasoning was inconsistent with the spirit of the Constitution in that it did not "[weigh] state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States."\textsuperscript{222} Furthermore, "[t]he spirit of the Tenth Amendment . . . is that the States will retain their integrity

\textsuperscript{218} Id. at 1034.
\textsuperscript{219} Id. at 1035.
\textsuperscript{220} Id. at 1035.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 1037.
in a system in which the laws of the United States are nevertheless supreme."\textsuperscript{223}

In a brief dissenting opinion, Justice Rehnquist stated that Justice Powell’s reference to the tests in \textit{National League of Cities} and Justice O’Connor’s balancing solution were not “precisely congruent with Justice Blackmun’s views in 1976, when he spoke of a balancing approach that did not outlaw federal power in areas ‘where the federal interest is demonstrably greater.’”\textsuperscript{224} Nonetheless, any of these approaches, he stated, would affirm the judgment in this case.

Justice Rehnquist concluded that it was not necessary for the dissenters to spell out the fine points of a principle that would “in time again command the support of a majority of [the] Court.”\textsuperscript{225}

\textbf{V. ALTERNATIVE INTERPRETATIONS OF FEDERALISM}

The majority’s narrow victory in \textit{Garcia} and the portent of Justice Rehnquist’s statement make it apparent that questions of federal regulatory power over the states are still very much in dispute and that the philosophies which underlie both \textit{National League of Cities} and \textit{Garcia} are of continuing relevance.

Commentators have found it no easier to reach agreement in this area than have the Justices. Many proposals for protecting federal and state sovereignty interests have been advanced. Although most scholars suggest tests for balancing these powers to achieve a workable joint-sovereignty relationship, some have advocated establishing sanctuaries wherein particular governmental powers may be held inviolate.

Professors Tribe and Michelman, in support of state sovereignty, propose securing a state’s ability to provide social services from the reach of federal regulation. Professors Choper and Alfange support federal supremacy in economic regulation and would allow judicial review only in defense of individual rights. Professor La Pierre would allow judicial intervention to protect state decision-making in extraordinary situations where Congress could not be held politically accountable for its acts but would rely on political safeguards inherent in the constitutional system in ordinary situations. Professor Rotunda advocates withdrawing cases of conditional federal preemption of state sovereign authority from the field for dispute

\footnotesize{\textsuperscript{223} Id. at 1036 (emphasis in original) (citation omitted).  
\textsuperscript{224} Id. at 1033 (Rehnquist, J., dissenting).  
\textsuperscript{225} Id.}
of federalism issues. Professor Nagel argues that proper consideration of federalism issues demands an intellectual ability to appreciate the indeterminate. "Indeterminate" is the watchword in light of the Court's decision in Garcia. A sampling of the range of federalism philosophies follows. Any one or more of these interpretations could influence the Court when it again considers the extent of congressional regulatory authority over the states.

A. In Defense of Abstractness

Professor Nagel, whose work was cited in the dissenting opinion of Justice O'Connor in Garcia, has defended the Court's decision in National League of Cities for its abstractness, although others have denounced the decision for that same reason. He insists that the decision is understandable and admirable when viewed from the proper intellectual perspective. He contends that the decision requires analysis of basic structural principles of federalism. These are abstract concepts, according to Nagel, that the framers intended would maintain a system of power allocation over long periods of time. Nagel reasons that conclusions of law based upon these principles were not easily made operative. Nagel explains: "Many jurists and scholars tend to envision constitutional values mainly in terms of individuals' rights and to undervalue judicial protection of principles that allocate decision-making responsibility among governmental units." This approach leads to an instrumentalist inclination to use law to accomplish tangible changes in the world. "The [National League of Cities'] Court . . . emphasized the abstract concept behind the principle of federalism; it spoke of states as being 'coordinate elements' [needing] 'separate and independent existence.'" Nagel argues that this language does not require a tangible static system of power allocation. This was made clear in National League of Cities by the fact that the Court refused to rest its decision on any specific measure of the burden imposed on the states by the FLSA.

Professor Nagel's concern is that the frame of mind created by protracted concentration on the direct protection of individual rights "does not easily appreciate the less determinate require-

227. Id. at 87.
228. Id. at 94.
229. Id. at 98 (quoting National League of Cities, 426 U.S. at 849, 851).
ments of constitutional structure” and that a body of law developing in such a system will not fairly represent the full range of the framers’ concerns.\footnote{231. Id. at 109.}

B. The Social Justice Argument

Justice Brennan characterized the majority’s holding in \textit{National League of Cities} as a portent “so ominous for our constitutional jurisprudence as to leave one incredulous.”\footnote{232. 426 U.S. at 875 (Brennan, J., dissenting).} Other members of the judiciary and many constitutional law scholars agreed that \textit{National League of Cities} had “precipitated extraordinarily broad and severe criticism and comment.”\footnote{233. Rotunda, \textit{supra} note 41, at 295. For a list of commentators expressing concern that the Court was returning to its earlier unprincipled handling of limitations on federal commerce power, see id. at 291 n.9, 295 n.38. \textit{See also} Comment, \textit{supra} note 15, at 625, 625 n.2 (suggesting that such a torrent of criticism casts doubt upon the validity of the \textit{National League of Cities} holding).} However, \textit{National League of Cities’} has been given a surprisingly generous interpretation by at least two constitutional law scholars, Professors Tribe and Michelman.\footnote{234. Tribe, \textit{Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services}, 90 \textit{Harv. L. Rev.} 1065 (1977); Michelman, \textit{States’ Rights and States’ Roles: Permutations of “Sovereignty” in National League of Cities v. Usery}, 86 \textit{Yale L. J.} 1165 (1977).} Professor Tribe argues that the decision rested not on the tenth amendment but on the Court’s desire to protect individual rights to state-provided services.\footnote{235. Rotunda, \textit{supra} note 41, at 293 n.27 (citation omitted).} Furthermore, he sees in the opinion the beginnings of a doctrine that the states have an affirmative constitutional obligation to provide essential governmental services to their citizens. Professor Michelman admitted that this interpretation of \textit{National League of Cities} seems to lead in directions not intended or anticipated by the Justices.\footnote{236. Michelman, \textit{supra} note 234, at 1166.}

Professor Michelman observes that certain services of state and local governments are raised to “essential” status by the electorate when voters conclude that such services, even if available in the private sector, satisfy community needs and ought to be provided collectively.\footnote{237. Id. at 1177.} Such a theory, he suggested, might explain why \textit{National League of Cities’} protection from congressional interference should be restricted to governmental suppliers of services.\footnote{238. Id.} However, this public sentiment might emanate from motives less wor-
thy than that social justice demands provision of the service. In such cases there could be little argument that congressional interference would merit judicial intervention. But without further investigation, there is no way of discerning the motives of the electorate. Any determination by the Court to intervene would therefore reflect its own belief that such social justice factors are involved.239 Professor Michelman saw the Court in National League of Cities as ascribing to the states a role of "satisfying social justice concerns that the Court ranked ahead of whatever interests were served by allowing Congress to proceed with the FLSA amendments . . . . [The attribution of this role] could only have been a morally creative judicial act implying recognition of inchoate personal rights."240

C. The Balancing Approach

Other commentators, taking a less moral perspective, have been unwilling to accept Justice Rehnquist as a champion of individual rights. They have focused instead on his analysis and have discerned a balancing of federal and state interests in the state employment arena. Notwithstanding Justice Rehnquist’s insistence that the degree of federal imposition upon state operations was not crucial to the resolution of the issue,241 the decision seems to demand weighing the competing interests involved. The definitional approach advanced by Justice Rehnquist failed because no criteria were set out with which to evaluate inclusion or exclusion from the “integral governmental function” category.

The true precedential value of the decision seems to have been derived from the Court’s treatment of Fry v. United States.242 Not prepared to overrule Fry, the Court distinguished away its significance by employing the very balancing of federal regulatory and state autonomy interests it denied espousing.243

One commentator recognizes a “kind of definitional balancing” in the opinion. This would require determining which side most

239. Id. at 1188.
240. Id. at 1189-90 (emphasis in original). National League of Cities, in essence, is “a case in which congressional action that seemed to carry a substantial risk that some persons would be denied certain services is for that reason subjected to special judicial scrutiny—or, in other words, . . . receipt of those services was treated as a right.” Id. at 1190 (emphasis in original).
241. 426 U.S. at 846, 851.
243. 426 U.S. at 852-53.
closely fits the category and should thus prevail. For example, the state would prevail where the definition of "interstate commerce" would be unduly strained were it stretched to include the state activity in question.244

Another commentator argues that, in practice, the Court retreated from Justice Rehnquist's "rigid per se test" in National League of Cities, and implemented the balancing test advanced by Justice Blackmun in his concurring opinion.245 In Justice Blackmun's test, federal and state interests are weighed to determine whether federal legislation should give way to a state's tenth amendment claims.246 The commentator observes that Justice Rehnquist's test would have required the Court in Hodel to consider only whether the state's interest was an essential state function. The Hodel Court instead used the first prong of the three-part test, which required a showing that the congressional enactment regulated the states. This led the commentator to suggest that the Court did not follow Justice Rehnquist's test.247

D. Conditional Preemption

Supreme Court cases following National League of Cities suggest that very few aspects of state sovereign authority are immune from federal control.248 The Court has upheld commerce clause legislation that affects the states' freedom to structure integral operations in areas of traditional government functions despite the National League of Cities decision. In Federal Energy Regulation Commission v. Mississippi249 and EEOC v. Wyoming250 the states contested the imposition of federal programs which enlisted the cooperation of state administrative and judicial agencies to implement federal regulations and which restructured state employer-employee relationships. The Court deemed these permissible exercises of congressional power because the federal laws did not foreclose the states' ability to continue its operations in the federally-regulated areas. Utilities regulation and labor relations are areas that Congress may broadly preempt. Therefore, federal incursion

244. See Comment, supra note 73, at 847.
246. Id. at 606.
247. Id. at 609.
of a lesser nature which permitted continued state involvement conditioned upon consideration of congressional proposals or restructuring of state employee retirement practices was not improper.

A crucial distinction separates the conditional preemption cases from National League of Cities. The 1974 amendments to the FLSA did not provide for the alternative of federal preemption at federal cost. The states were required to uphold the federal wage and hour restrictions and to bear the cost of increased salaries. The federal government imposed a massive burden on the states without actually appropriating any federal funds. The National League of Cities Court, in effect, held that this would endanger the functioning of the state governments through the imposition of severe fiscal and administrative costs.\(^{251}\) Conversely, in the subsequent cases,\(^{252}\) if the states chose not to assume the new burdens imposed by federal law, the federal government would then preempt the area and assume the costs of direct regulation.\(^{253}\)

The Court has conceded that, as a practical matter, the "choice" afforded the states is sometimes illusory, and a state may often be forced to acquiesce to the federal government's infringement of its sovereignty. One commentator has identified a more troubling aspect of the "consent" approach: The Court has not defined the required nexus between the field which may be preempted and the acts which Congress desires the states to perform. He posits that, under a literal interpretation of Federal Energy Regulation Commission v. Mississippi, Congress could have conditioned its non-preemption of the field of public utilities upon a state's enacting a statute to bring its police and fire fighters under the FLSA. "[T]he consent theory, if taken to its logical extreme, would create a substantial gap in the Usery rationale."\(^{254}\)

Professor Rotunda contends that the Court should follow the doctrine of conditional preemption. He believes the doctrine "provides a principled justification for congressional exercises of the commerce power" that might otherwise be interpreted as infringing on the domain of state governments.\(^{255}\)

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251. Rotunda, supra note 41, at 312.
253. Rotunda, supra note 41, at 312.
255. Rotunda, supra note 41, at 324. Professor Rotunda dismisses the balancing approach as being fraught with opportunity to tempt jurists to impermissible activism. He sees
E. Judicial Policy-Making

Among those commentators who view National League of Cities as an "unfortunate and unjustified exercise in judicial review" is Professor Alfange, an authority on American political history. Professor Alfange accepts Justice Blackmun's analysis discerning a balancing approach in National League of Cities. However, he does not see the interests weighed as being the federal government's concern for equalizing labor standards among state and private employees on one side of the scale and the state's concern for maintaining control over its fiscal reality on the other. Rather, he contends that the Court was balancing policy considerations: "[T]he judgment of constitutionality turn[ed] on the Court's assessment of the wisdom, desirability, or necessity of the policy embodied in the challenged law." He adds that had the Court openly acknowledged its engagement in this process, it would have been forced into a discussion of the factors being weighed which would have greatly improved the coherence of the opinion.

Whether it would have improved the constitutional propriety of the opinion is another matter. Justice Stevens has argued that such policy considerations are the province of the legislative branch, not the judiciary. Because no question of individual rights was at stake, Professor Alfange views the National League of Cities dispute as "a proper case for the judicial self-restraint endorsed by the Court since 1937 in the area of economic regulation."

Professor Alfange concedes that the Court might have provided protection for whatever degree of state autonomy was constitution-
ally guaranteed by use of some standard, but not by an *ad hoc* balancing of interests.\(^{260}\) He states, "If such a [constitutional] standard can be articulated and defended, it may be applied in concrete cases without regard to the existence of the presidential veto power or the influence possessed by the states in the national political process."\(^{261}\) In *National League of Cities* situations, where the Court merely expresses a need to protect state autonomy, rather than relying on a general rule, the measure of the states’ influence in the political process is critical. "For if the states can command a serious hearing for their concerns, it is not a proper judicial function to reassess the outcome . . . to see whether it is desirable."\(^{262}\)

**F. The Federalism Proposal**

Professor Choper, whose work was cited by Justice Blackmun in the *Garcia* opinion, embodies his argument for overruling *National League of Cities* in his "federalism proposal." He believes that "[t]he federal judiciary should not decide questions respecting the authority of the national government over the states. Issues concerning whether federal action violates states’ rights should be treated as nonjusticiable and relegated to the political branches of the national government."\(^{263}\)

Professor Choper contends that the primary justification for the Supreme Court’s exercise of judicial review is the protection of individual liberties guaranteed by the Constitution. The framers’ essential countermajoritarian rationale in adopting the Bill of Rights was to safeguard the rights of individuals who could not be expected to prevail through the standard machinery of democratic procedures.\(^{264}\) Judicial review of federalism issues, Choper argues, is not as easily justified because "[n]umerous structural aspects of the national political system serve to assure that states’ rights will

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\(^{260}\) Alfange, *supra* note 58, at 243-44.

\(^{261}\) *Id.* at 243.

\(^{262}\) *Id.* at 244.

\(^{263}\) J. *CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175 (1980).

\(^{264}\) *Id.* at 64. Professor Choper states that the question of whether the framers originally intended to vest the Supreme Court with the power of judicial review is still unresolved by constitutional scholars. There is persuasive evidence in the debates of the First Congress and in the Judiciary Act of 1789 that Congress intended the courts to be able to pass on the constitutionality of federal and state governmental actions. Professor Choper reasons that the reported evidence is inconclusive because during the nation’s formative years the doctrine of judicial review was not an accepted judicial tradition in either the United States or abroad and because few of the framers held matured views on the subject. *Id.* at 62-63.
not be trampled, and . . . they have not been.\textsuperscript{265}

There are various constitutional mechanisms which protect the political interests of the states, including the states’ equal representation in the Senate and the selection of all congressmen through state elections.\textsuperscript{266} Many congressmen have served as governors or in state legislatures prior to seeking federal election and have “long, resolute, and intimate ties with their districts,” which may explain why they frequently choose to vote along regional rather than along party lines.\textsuperscript{267}

The role of the President in the political process is another protection for state concerns. Structurally, “the electoral college places the separate states directly in a nominee’s path to the White House.”\textsuperscript{268} Candidates obligate themselves to local party organizations and state political leaders to obtain their influence in the presidential nomination and election process. More importantly, to remain effective in Congress, a President must remain attentive to the states’ interests.\textsuperscript{269}

Choper asserts that the partiality of those who serve in nationally elected offices leans to the side of localism, and experience demonstrates that localism exists in many aspects of the political process.\textsuperscript{270} Negative mechanisms of the constitutional process such as bicameralism, the committee system, the filibuster, and the presidential veto help ensure that legislation with any meaningful effect upon state concerns is subject to searching scrutiny.\textsuperscript{271}

Historically, Congress and the Chief Executive have been solicitous of the federal system, Choper maintains. He states that the immense growth of national programs over the history of the republic has not created a centralized autocracy. Generally, Congress has “paid fastidious attention to the notion that certain governmental powers are reserved to the states.”\textsuperscript{272} Illustrative of this assertion are the prolonged constitutional debates that delayed passage of the Sherman Act and civil rights legislation, the concern for local control over education accompanying each proposal of federal financial aid, ‘and Congress’ suspension of various Environmental

\textsuperscript{265} \textit{Id.} at 176.
\textsuperscript{266} \textit{Id.}
\textsuperscript{267} \textit{Id.} at 178.
\textsuperscript{268} \textit{Id.} at 179.
\textsuperscript{269} \textit{Id.}
\textsuperscript{270} \textit{Id.} at 188.
\textsuperscript{271} \textit{Id.} at 185.
\textsuperscript{272} \textit{Id.} at 186.
Protection Agency regulations in 1975 because of strong criticism advanced by state and local governments.\textsuperscript{273}

Choper states that since Andrew Jackson's rejection of the Bank of the United States, Presidents have rejected national legislation they believed would intrude upon states' rights. Sensitive to the financial needs of the states, they have directed federal funds to the states through revenue sharing and federal grant-in-aid programs.\textsuperscript{274}

Choper concludes that the Supreme Court should not adjudicate constitutional questions of national power versus states' rights because cases of alleged federal over-reaching are presented to the Court at a time when the legislation has already survived the federal political process; only after a broad consensus has been achieved, despite negative elements which inhere in the system and allow only a few state representatives to thwart the will of the majority, can any proposal reach the status of law.\textsuperscript{275}

\textbf{G. Political Accountability}

Professor La Pierre, whose work was also cited in the opinion of Justice Blackmun in \textit{Garcia}, in his comprehensive study of the political safeguards of federalism, advocates reliance upon the political process to determine the allocation of power between the states and the national government—similar to the position taken by Professor Choper.\textsuperscript{276} However, he challenges Choper's argument that all federalism issues should be nonjusticiable because the states' interests are secured through the structural protections inherent in the national political system. According to La Pierre, Choper's approach would "permit the nation to swallow the states".\textsuperscript{277} "Deference to the political choices of the nation and rejection of the political choices of state political communities is warranted only to the extent that Congress is politically accountable."\textsuperscript{278}

La Pierre's theory makes Congress politically accountable to the national electorate when political decisions are the product of a

\textsuperscript{273} Id.
\textsuperscript{274} Id.
\textsuperscript{275} Id. at 187.
\textsuperscript{277} Id. at 977.
\textsuperscript{278} Id.
national majority.\textsuperscript{279} Congress' accountability turns on political checks built into the national political process. These checks are: (1) the impact of national policy upon private activity, and (2) the imposition of the costs of enforcing national policies upon the national electorate.\textsuperscript{280} When Congress is politically accountable, intrusion upon state political decisionmaking is permissible. Conversely, when Congress is not politically accountable, the courts should intervene to protect state interests in political decisionmaking.\textsuperscript{281}

Problems of federal usurpation of state political decisionmaking arise when national regulations apply exclusively or primarily to the states.\textsuperscript{282} When purely private interests are involved, Congress becomes politically accountable for two reasons: (1) private parties will hold their national representatives responsible for the impact of the regulations, and (2) the cost of enforcing the federal policy will be borne by the national electorate. When federal regulations apply both to state and private interests, the states' interests are vicariously protected by the impact of the regulations upon private activities.

However, La Pierre contends, federal regulations or taxes that apply exclusively or primarily to the states should be held invalid because there would be no political checks.\textsuperscript{283} He argues that there are only two limitations on Congress' broad power to employ the states as agents for the federal government. "Congress cannot supplement state law, and Congress cannot mandate state enforcement of national regulations."\textsuperscript{284}

Employing the theory of political accountability, La Pierre advocated the overruling of \textit{National League of Cities} because the statute at issue, the FLSA, applied both to public and private employers, thus invoking political checks on the national authority and rendering judicial intervention unnecessary.\textsuperscript{285}

\textbf{VI. Conclusion}

The Supreme Court's decision in \textit{Garcia v. San Antonio Metropolitan Transit Authority} effectively returned the tenth amend-

\begin{itemize}
\item \textsuperscript{279} \textit{Id.} at 1052.
\item \textsuperscript{280} \textit{Id.}
\item \textsuperscript{281} \textit{Id.} at 1053.
\item \textsuperscript{282} \textit{Id.} at 1054.
\item \textsuperscript{283} \textit{Id.} at 1055.
\item \textsuperscript{284} \textit{Id.} at 1056.
\item \textsuperscript{285} \textit{Id.} at 1054.
\end{itemize}
ment to the status described in *United States v. Darby*, a truism that all is retained that has not been surrendered. Justice Powell spoke more strongly in his dissenting opinion in *Garcia*, stating that the majority's decision reduced the tenth amendment to "meaningless rhetoric when Congress acts pursuant to the Commerce Clause." 286

In reaching its decision, the *Garcia* Court reexamined the holding in *National League of Cities*. That decision was originally perceived to bar federal regulation of state functions on the constitutional authority of a reinvigorated tenth amendment. However, in the eight succeeding years, a doctrine evolved that so severely constrained the scope of the original decision that the opinion had little import beyond its facts. Following *EEOC v. Wyoming*, the *National League of Cities* test called for a two-step analysis consisting of the application of the three-pronged *Hodel* test followed by a balancing of the federal interest with the degree of a statute's intrusion upon the state's ability to perform certain core functions.

The major stumbling block, and the reason the test was so problematic in application, was that the third prong of the *Hodel* test and the balancing analysis both rested upon the elusive definition of a "traditional governmental function." The *Garcia* Court examined this "function" standard and decided that it was not only unworkable but constitutionally deficient. 287 The Court found the "function" standard "inconsistent with established principles of federalism" in that it drew the judiciary into deciding policy issues which the framers of the Constitution had intended be settled by debate on the floors of the legislative branch of the government. 288

The Court's concern was that a test that could not dictate a reasonably predictable result invited a judgment that might be based not upon constitutional principles but upon an individual jurist's parochial affiliations. The majority therefore concluded that judicial review was inappropriate where Congress invoked its power under the commerce clause to impose regulatory limits upon state decisionmaking.

The federalism issue resolved in favor of the federal government in *Garcia* is one that has sharply divided the Supreme Court for eight years. In her dissent to the majority's opinion in *Garcia*, Jus-

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287. 105 S. Ct. at 1007.
288. Id.
tice O'Connor compared this most recent eruption of the controversy to a battle scene. 289 This may prove an apt analogy.

The battle lines drawn by the members of the Court in 1976 have reappeared in Garcia. The intermittence of apparent conciliatory decisions seems not to have cooled the Justices' ardent defense of their original positions. 290 Justice Rehnquist, in his dissenting opinion in Garcia, expressed his confidence that the principles of National League of Cities would "in time again command the support of a majority of [the] Court." 291 If this prophecy comes true, it may well be due to a change in the composition of the Court rather than any change in the views of its current members. If one or more members of the majority of the Court chooses to retire before President Reagan's term expires, there is little doubt that the sympathies of an appointee will rest with the minority. On the other hand, this certainty does not extend beyond 1988, for there is no guarantee that Reagan's policies of federalism will survive his term, notwithstanding the party alliance of his successor in office.

Nonetheless, there are avenues of change open to government employers short of the Court's overruling Garcia. The fiscal impact of the FLSA's wage payment, record-keeping, and reporting requirements may be lessened by the flexibility inherent in the federal regulatory system. Of course, the Act may in time be modified by congressional amendment, but immediate change will more likely be effected through the Secretary of Labor's broad latitude to promulgate regulations interpreting and directing implementa-

289. Id. at 1033 (O'Connor, J., dissenting).
290. In National League of Cities, 426 U.S. at 833, Chief Justice Burger and Justices Rehnquist and Powell were among the majority. Justice O'Connor sounded her vigorous defense of state sovereignty in a dissenting opinion in Federal Energy Regulation Comm'n v. Mississippi, 456 U.S. 742 (1982). Since Justice Blackmun, who provided the crucial fifth vote in National League of Cities, joined that decision on his own terms by viewing the holding as requiring a balancing of federal and state interests, it was difficult to divine his allegiance.

A unanimous Court in United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982), did not question the correctness of the principles of National League of Cities even though it refused to apply them to a state-owned railroad. In EEOC v. Wyoming, 103 S. Ct. 1054 (1983), the Court supported the federal agency's imposition of employment regulations against the state. The majority in EEOC was composed of Justice Blackmun and the dissenters from National League of Cities: Justices Brennan, White, Marshall, and Stevens. It has been speculated that Justice Brennan, in writing for the Court in EEOC, chose not to overrule National League of Cities, but rather to refine away its import in the hope that a more politic stance would attract the necessary fifth vote of Justice Blackmun. Note, Equal Employment Opportunity Commission v. Wyoming, 22 Duq. L. Rev. 995, 1013-14 (1984).
291. 105 S. Ct. at 1005, 1033 (Rehnquist, J., dissenting).
tion of the Act’s provisions.292

The *Garcia* decision is rendered on two levels, the practical and the theoretical. At this time, the practical ramifications of the decision are not entirely clear, and, although difficulties for governmental employers will no doubt ensue in the short term, they are not insuperable. On the other hand, at the theoretical level, the fundamental issue of federalism remains unsettled. Even though the majority’s opinion clearly states that the structural safeguards within the representative and executive branches are constitutionally sufficient to protect the states’ sovereign interest when Congress acts under its commerce power, four members of the Court remain unconvinced, and would retain the Court’s power of judicial review in this area. Since the votes of only four Justices are required for a grant of certiorari, it is likely that an appropriate vehicle will soon appear to once again bring this question before the Court.