THE CHANGING LANDSCAPE OF FEDERALISM: THE SUPREME COURT REJECTS *NATIONAL LEAGUE OF CITIES* AND AFFIRMATIVE STATE RIGHTS IN *GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY*

I. INTRODUCTION

Federalism[1] remains one of the most troublesome issues for the United States Supreme Court, which has reversed its position several times.[2] The major debate concerns whether the Constitution contains an express or implied affirmative limit on the power of the federal government over the states.[3]

In 1976 the Supreme Court declared in *National League of Cities v. Usery*[4] that the tenth amendment[5] places an affirmative limit on Congress' commerce power[6] as applied to the states. The Court stated that this restraint renders states immune from federal commerce power regulations that displace a state's ability to structure "integral operations" of "traditional governmental functions."[7]

After attempting to apply this test in several subsequent cases,[8] the Court recently overruled *National League of Cities* in *Garcia v. San*

1. Federalism is defined by one source as a "[t]erm which includes interrelationships among the states and the relationship between the states and the federal government." BLACK'S LAW DICTIONARY 551 (5th ed. 1979).

2. *See infra* notes 24-91 and accompanying text.

3. *See infra* notes 24-38 and accompanying text.

4. 426 U.S. 833 (1976) (holding the wage and hour provisions of the Fair Labor Standards Act (FLSA) inapplicable to state and local governments).

5. U.S. CONST. amend. X. "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." *Id.*

6. U.S. CONST. art. I § 8, cl. 3. "Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." *Id.*

7. *See infra* notes 36-46 and accompanying text.

8. *See infra* notes 42-81 and accompanying text.

Antonio Metropolitan Transit Authority.[9]

II. BACKGROUND OF *GARCIA*

In *Garcia*, the San Antonio Metropolitan Transit Authority (SAMTA) sought a declaratory judgment acknowledging that it was exempt from the overtime provisions of the Fair Labor Standards Act (FLSA)[10] because of its status as a public mass transit authority.[11] The district court granted SAMTA's motion for declaratory relief.[12] The Supreme Court subsequently remanded[13] the case to the district court in light of the Court's decision in *United Transportation Union v. Long Island Railroad Co.*[14] In *Long Island Railroad*, the Court held that a state-owned commuter railroad did not qualify for state immunity because it did not undertake a "traditional" governmental function.[15] The district court distinguished *Long Island Railroad* on remand and held SAMTA[16] immune from the FLSA overtime provisions.[17] It cited the long history of state and local regulation of mass transit for the conclusion that mass transit is a "traditional" function and discounted the federal interest in transit wages because Congress did not attempt to regulate such wages until 1966.[18]

On direct appeal,[19] the Supreme Court reversed in a sharply divided decision.[20] Justice Blackmum authored a broad, stinging attack upon the wisdom and viability of the *National League of Cities* doctrine, which he had supported in 1976.[21] The Justice concluded that states are protected adequately by the political process and by the fact that

9. 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985) (upholding FLSA overtime provisions against public mass transit authority).

10. *See infra* note 34 and accompanying text.

11. 53 U.S.L.W. at 4136.

12. *Id.* at 4137.

13. 457 U.S. 1102 (1982).

14. 455 U.S. 678 (1982) (state-owned commuter railroad not immune from federal labor laws because it was not a "traditional" governmental function).

15. *Id.*

16. San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445 (W.D. Tex. 1983).

17. *Id.* at 453.

18. *Id.* at 447-50.

19. *See infra* note 60.

20. 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985).

21. *See infra* note 66 and text accompanying note 39.

the federal government can exercise only those powers enumerated in the Constitution.[22]

III. History of Commerce Power Limitations

To appreciate the impact of this pronouncement on federalism principles, one must examine the convoluted history of the scope of the commerce power[23] as interpreted by the Supreme Court.

In drafting the Constitution, the framers intended the commerce clause to alleviate restrictive trade regulations among the states by vesting a central authority with power to regulate commerce.[24] Other constitutional provisions only limit Congress' power to regulate interstate commerce.[25] The tenth amendment[26] presents one such potential limitation. The Supreme Court, however, has never clearly established the scope of the tenth amendment limitation with any consistency. Initially, the Court interpreted the tenth amendment to protect the exclusive power of states to regulate local activities.[27] This concept gradually eroded[28] until the Court in *United States v. Darby*[29] found no

22. 53 U.S.L.W. at 4140-42.

23. *See supra* note 6 for the text of the commerce clause.

24. *See* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 533-34 (1949) (explaining the origins and purposes of the commerce clause); *see generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW, 113 (1980) (brief summary of commerce clause background, impact, and uses). For the text of the commerce clause, see *supra* note 6.

25. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (establishing the parameters of the commerce power).

26. *See supra* note 5.

27. The early Court asserted that states possessed the exclusive right to regulate local concerns, including activities which occurred before or after interstate commerce. *See* United States v. Knight, 156 U.S. 1 (1895) (manufacturing is not commerce, and thus is beyond reach of the commerce power); Oliver Iron v. Lord, 262 U.S. 172 (1923) (mining is not commerce); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (federal regulation of sales after completion of interstate transportation exceeds commerce power). *But see* Stafford v. Wallace, 258 U.S. 495 (1922) (stockyards are commerce). In some instances, the Court held that the tenth amendment offered no protection for activities which directly affected interstate commerce. *See, e.g.*, Houston E. & W. Tex. Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914) (held that discounted rates for *intra*state, but not *inter*state, railroad routes directly affected interstate commerce). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 128-50 (1978) (detailed analysis of the early development of the commerce power) [hereinafter cited as HANDBOOK].

28. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), where the Court disregarded the distinction between production and commerce in upholding the National Labor Relations Act. Instead, the Court declared that intrastate activities

commerce power limitation whatsoever in the tenth amendment.[30] The *Darby* Court held that even purely intrastate activities fall within the commerce power if they affect interstate commerce.[31]

Congress used its commerce power liberally and enjoyed full support from the judiciary[32] until the Supreme Court's decision in *National League of Cities v. Usery*.[33] In *National League of Cities*, the Court held the wage and hour provisions of the Fair Labor Standard Act unconstitutional as applied to state and local governments.[34] In a four-one-four plurality decision, the Court rediscovered an affirmative limit on the commerce power within the tenth amendment.[35] Justice Rehnquist, writing for the plurality, concluded that when Congress uses the commerce power to regulate states as states, it cannot interfere directly with a state's power to structure "integral operations" in areas of

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which bore a "close and substantial" relation to interstate commerce fell within the reach of the commerce power. *Id.* at 37. Beginning with this case and until *National League of Cities*, the Court stopped defining the commerce power limits in terms of tenth amendment reserved power. HANDBOOK, *supra* note 31, at 151.

29. 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act of 1936).

30. *Id.* at 124. The *Darby* Court dismissed the tenth amendment as a truism. *Id.*

31. *Id.* The affecting commerce rationale first appeared in *Jones & Laughlin*, 301 U.S. 1 (1937).

32. The only additional modification to the commerce power doctrine prior to *National League of Cities* came in Wickard v. Filburn, 317 U.S. 111 (1942). In *Wickard*, the Court held that farm production for private and local consumption was within the purview of the commerce clause because of the aggregate cumulative effects of such activities. *Id. See also* HANDBOOK, *supra* note 31, at 154.

33. 426 U.S. 833 (1976).

34. *Id.* at 852. The Court struck down the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1976) (amending 29 U.S.C. §§ 202-08, 210, 212-14, 216, 255, 260, 630, 634 (1976) [hereinafter cited as 1974 FLSA Amendments]. The 1974 FLSA Amendments extended coverage of the acts they amended to state and local governments. Striking down the 1974 FLSA amendments, the Court expressly overruled Maryland v. Wirtz, 392 U.S. 183 (1968), which upheld a FLSA amendment extending coverage of the Act to state and local government employees in transit, health care, and education. *National League of Cities*, 426 U.S. 833, 855 (1976).

35. *National League of Cities*, 426 U.S. 833, 843 (1976). "The [tenth] amendment declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively a federal system." *Id.* (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)). Some commentators questioned whether the tenth amendment was the source of this state sovereignty limitation because the above passage is the only explicit reference to the tenth amendment in Justice Rehnquist's plurality opinion. *See, e.g.*, Michelman, *States' Rights and States' Role: Permutations of 'Sovereignty' in* National League of Cities v. Usery, 86 YALE. L.J. 1165, 1173-74 (1977).

"traditional government functions."[36] The Court, however, stated that Congress may invade even this area if a compelling federal interest outweighed the intrusion.[37] The plurality reasoned that states must be free to perform those functions which are "essential attributes of state sovereignty," including the power to structure employer-employee relationships.[38]

Justice Blackmun, writing separately, conditioned his concurrence upon an understanding that the plurality adopted a balancing approach which considered the relative federal and state interests.[39] In a dissenting opinion, Justice Brennan argued that the plurality usurped the role of the legislature and ignored an unbroken line of precedent.[40] Justice Stevens, dissenting separately, asserted that a state's governmental ac-

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36. *National League of Cities*, 426 U.S. at 852. As an example of protected integral government functions, the Court cited a state's ability to structure employer-employee relationships. *Id.* at 851. The Court revived a distinction between regulation of state governmental activities (states as states) and regulation of state proprietary activities. Ironically, this distinction was rejected by the Court 30 years earlier as an unworkable test. New York v. United States, 326 U.S. 572, 582-83 (1946).

37. *National League of Cities*, 426 U.S. at 853. The Court harmonized its decision with Fry v. United States, 421 U.S. 542 (1975) (upholding application of a wage freeze to state governments). It noted that the limits of the commerce power do not preclude temporary emergency federal enactments. 426 U.S. at 853.

38. *National League of Cities*, 426 U.S. at 851-52. Commentators criticized the *National League of Cities* Court for its failure to elucidate the test in anything but ambiguous, undefined language. *See, e.g.*, Note, National League of Cities v. Usery, *Its Implications for the Equal Pay Act and the Age Discrimination in Employment Act*, 10 U. MICH. J.L. REF. 239, 248-58 (1977) (discussion of the ambiguities in *National League of Cities*, including the failure of the Court to specify by category rather than by example the protected state functions, the failure to define or distinguish traditional and essential state functions, and the unexplained governmental/proprietary activity distinction); Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's*, 21 B.C.L. REV. 763, 812-15 (1980) (critical of the Court's failure to specify the protected state activities); Note, *The Constitutionality of the ADEA After Usery*, 30 ARK. L. REV. 363, 366-68 (arguing that the Court failed to explain exactly what burdens are permissible, and noting the conflict between the direct interference test of the plurality and the balancing test of the concurrence). These ambiguities led commentators to develop unique theories about the case. *See, e.g.*, Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) (positing that the Court recognized affirmative rights of citizens to basic governmental services traditionally provided by states). *But see* La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779, 961-77 (1982) (criticizing Tribe's theory and evaluating other theories spawned by *National League of Cities*).

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

40. *Id.* at 867 (Brennan, J., dissenting).

tivities are subject to federal regulation and that state interests are protected adequately by the political process.[41]

In *Hodel v. Virginia Surface Mining & Reclamation Association*,[42] the Court restructured the *National League of Cities* criteria into a "three prong plus balancing" test. Under *Hodel*, to violate the tenth amendment, the challenged statute must first regulate states directly.[43] Next, the statute must address subjects that are unquestionably attributes of state sovereignty.[44] The third prong requires that compliance with the federal statute must directly interfere with a state's freedom to structure "integral operations" in areas of "traditional functions."[45] Even if these criteria are satisfied, a challenge succeeds only if a balancing test shows that the federal interest does not justify state submission.[46]

Lower courts subsequently applied this test inconsistently,[47] partially because of the failure of the Court in both *National League of Cities* and *Hodel* to define adequately the terms used in the test.[48] Many lower courts ignored the vague three-prong test and instead concentrated on the balancing approach.[49] The Supreme Court, however, adhered to its criteria until *Federal Energy Regulatory Commission v. Mississippi*.[50] In *Mississippi*, the Court upheld the Public Utility Regu-

41. *Id.* at 880 (Stevens, J., dissenting).

42. 452 U.S. 264 (1981). The *Hodel* Court held valid under the commerce clause the Surface Mining Control and Reclamation Act of 1977. Under the Act, states must comply with federal regulations concerning coal mining standards and land reclamation. Otherwise, the states must allow the federal government to manage and finance such a program. Because the Act did not compel state regulation or expenditures and only regulated private activity, the Court upheld it. *Id.* at 288.

43. 452 U.S. at 287. The sovereignty challenge in *Hodel* broke down at this first step. *See supra* note 42.

44. 426 U.S. at 287-88.

45. *Id.* at 288 (quoting *National League of Cities*).

46. *Id.* at 288 n.29.

47. *Compare* Kenny v. Board of Trustees of Valley County School Dist., 543 F. Supp. 1194, 1197-99 (D. Mont. 1982) (Age Discrimination in Employment Act ADEA sustained using *Hodel* three-prong test) *with* Usery v. Board of Educ. of Salt Lake City, 421 F. Supp. 718, 719-20 (D. Utah 1976) (ADEA sustained using balancing test) *and* EEOC v. Elrod, 674 F.2d 701, 711-12 (1982) (ADEA sustained using direct impact test and balancing test).

48. *See supra* note 38.

49. *See, e.g.*, Peel v. Florida Dep't of Transp., 600 F.2d 1070 (6th Cir. 1979) (upholding Veterans Reemployment Rights Act as applied to states); Usery v. Board of Educ. of Salt Lake City, 421 F. Supp. 718 (D. Utah 1976).

50. 456 U.S. 742 (1982).

latory Policies Act of 1978 against a state sovereignty challenge. Instead of invoking the *Hodel* test, the Court used a rational basis test because it found no appreciable burden on the state or impairment of the state's ability to function as a sovereign.[51] The Court emphasized that the federal enactment merely set standards for state control of the otherwise preemptible field of utility regulation.[52]

One year later, the Court attempted to apply the *National League of Cities* test for the final time in *EEOC v. Wyoming*.[53] *Wyoming* stemmed from the involuntary retirement of a Wyoming Game and Fish Department supervisor at age fifty-five.[54] A state statute made continued employment of game wardens fifty-five years of age or older contingent upon employer approval.[55] The retired supervisor filed a complaint with the Equal Employment Opportunity Commission (EEOC),[56] which brought suit against the State of Wyoming for violation of the Age Discrimination in Employment Act (ADEA).[57] On defendant's motion, the district court dismissed the case and held that

51. *Id.* at 755-60. Under the rational basis test, the Court validates federal legislation when there is a rational basis for Congress' finding that the regulated activity affects interstate commerce. *Id.* at 758.

52. *Id.* at 746-47. The Public Utility Regulatory Policies Act of 1978 requires states to consider six approaches to structuring utility rates. This requirement was the most intrusive portion of the challenged Act. The majority held that electricity is a proper subject for interstate commerce regulation, since no state relies solely upon its own resources for electricity. *Id.* at 756-57. Furthermore, since the challenged regulations did not set standards for state sovereign powers or compel their exercise, the statute did not regulate states directly. Thus, the Court may have implicitly found that the challenge failed the first prong of the *Hodel* test. *Id.* at 765.

53. 460 U.S. 226 (1983).

54. The district court found that the supervisor was a law enforcement officer, not merely an administrative employee. Thus, he fell within the scope of the Wyoming mandatory retirement statute. EEOC v. Wyoming, 514 F. Supp. 595, 597 (D. Wyo. 1981), *rev'd*, 460 U.S. 226 (1983).

55. The Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, Wyo. Stat. § 31-3-107(c) (1977 & Supp. 1984). The Act states that "[a]n employee may continue in service on a year-to-year basis after age . . . fifty-five (55), with the approval of the employer and under conditions as the employer may prescribe." *Id.*

56. Congress created the Equal Employment Opportunity Commission (EEOC) in the Civil Rights Act of 1964 to enforce the provisions of that Act related to unlawful discriminatory employment practices. *See* 43 U.S.C. § 2000-e4 (1982).

57. Pub. L. No. 90-202, 1 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1982)). The ADEA of 1967 was designed both to promote employment of older persons based on ability and to prohibit arbitrary age discrimination in employment. The statute includes provisions that forbid age discrimination in employment compensation, terms, conditions, and privileges. *Id.* § 623. It specifically prohibits refusal to hire an

Congress exceeded the tenth amendment[58] limit on its commerce power by applying the ADEA to state law enforcement personnel.[59] The EEOC appealed directly[60] to the Supreme Court, which reversed the district court decision.[61]

Justice Brennan, writing for the majority in *Wyoming*, first stated that the *National League of Cities* immunity doctrine was designed only to ensure the independence of states in a federal system.[62] He then reiterated the *Hodel* three-prong test for impermissible federal commerce power intrusions.[63] Applying the facts to the test, the majority found that the statute directly regulated states as states, therefore Wyoming satisfied the first inquiry.[64] The Court, however, failed to consider the second prong: whether the ADEA amendment prohibiting state age discrimination in employment addressed an indisputable attribute of state sovereignty. The Court found that determination unnecessary because it concluded that the challenge failed the third prong of the *Hodel* test, in that the amendment did not impair Wyoming's ability to structure integral operations for traditional functions.[65]

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individual because of his age. *Id.* § 623(a). Its provisions, however, apply only to persons 40 to 70 years of age. *Id.* § 631.

Seven years after the ADEA's passage, Congress amended the Act to include state and local government employees. The Fair Labor Standards Act of 1974, Pub. L. No. 93-259, 88 Stat. 74 (codified as amended at 29 U.S.C. § 630(b) (1982)). Congress enlarged the definition of "employer" to include state and local governments. *See id.*

According to one Supreme Court Justice, 29 states had mandatory retirement laws for certain state employees (usually law enforcement personnel and firefighters) as of March 1983. EEOC v. Wyoming, 460 U.S. 226, 253-54 (Burger, C.J., dissenting).

58. *See supra* note 5 for the language of the tenth amendment.

59. EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981), *rev'd*, 460 U.S. 226 (1983).

60. *See* 28 U.S.C. § 2152 (1982) (provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment . . . of any court of the United States . . . holding an Act of Congress unconstitutional in any civil suit . . . to which the United States or any of its agencies . . . is a party").

61. 460 U.S. 226 (1983). Justices White, Marshall, Blackmun, and Stevens joined Justice Brennan's majority opinion, and Justice Stevens added a separate concurrence. Chief Justice Burger wrote a dissenting opinion adopted by Justices Powell, Rehnquist, and O'Connor. Justice Powell added a separate dissent which Justice O'Connor joined.

62. *Id.* at 236. The Court, however, denied that the *National League of Cities* immunity doctrine was intended to create a sacred province of state autonomy. *Id.*

63. *Id.* at 237 (quoting *Hodel*, 452 U.S. at 287-88).

64. *Id.*

65. *Id.* at 238-39. Regarding the second part of the *Hodel* test, the Court conceded that the meaning of an "undoubted attribute of state sovereignty" remained unclear. *Id.* at 238, n.11. The majority found that the challenge failed part three of the test,

Carefully distinguishing *National League of Cities* by the degree of federal intrusion,[66] the Court stressed the bona fide occupational qualification (BFOQ)[67] and individual assessment[68] exceptions to the ADEA. It also found no conclusive evidence that compliance with the statute drains state budgets.[69] In addition, the Court implied that the ADEA amendment could be upheld under either the balancing test[70] or section five of the fourteenth amendment.[71]

In his dissent, Chief Justice Burger asserted that the Constitution does not authorize the federal government to set detailed standards for the selection of state employees, including those charged with law enforcement.[72] He found all the requisite elements of the three-prong

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though it noted that the *National League of Cities* Court mentioned the management of state parks as an example of a "traditional" governmental function. *Id.* at 239.

66. *Id.* at 239-42. The Court concluded that the threat to Wyoming's independence was less serious than the threat to states posed in *National League of Cities*. *Id.*

The Court apparently misapplied the third prong of the *National League of Cities* test, which requires that the federal statute *directly* impair a state's power to structure "integral" operations. The majority in *Wyoming* considered neither the directness of the impairment nor the type of state activity invaded. Instead, the Court compared the *degree* of federal intrusion with the intrusion in *National League of Cities*, and then balanced the intrusion against the federal interests at stake. *Id.*

One likely explanation lies with Justice Blackmun, who sided with the states in *National League of Cities* on the express understanding that the plurality adopted a balancing of interests approach. *See supra* text accompanying note 39. In *Wyoming*, Justice Blackmun switched to the federal government's side and the balancing became evident. Justice Blackmun's defection from the *National League of Cities* state sovereignty doctrine ultimately manifested itself in his majority opinion in *Garcia*. *See infra* notes 82-91 and accompanying text.

67. 29 U.S.C. § 623(f)(1) (1982). This statute provides an ADEA exception when age is an occupational qualification necessary for the normal operation of a business or when the distinction stems from reasonable factors besides age. *Id.*

68. 29 U.S.C. § 623(f)(3) (1982). Congress allows discharges or other actions for good cause to be taken without violating the ADEA. *Id.*

69. 460 U.S. at 241. The Court contended that other factors may outweigh the "largely speculative" cost increases from higher salaries and higher retirement benefits for older workers. These factors include delayed pension benefits, longer contributions into the pension fund, and shorter benefit payments after delayed retirement. *Id.*

70. *Id.* at 242-43 n.17. The Court stated that the "minimal character of the federal intrusion," measured against the "well defined federal interest" addressed in the legislation, might require a finding that the nature of the interest justifies state submission. *Id.*

71. *Id.* at 243-44 n.18. In reaffirming that a proper exercise of the fourteenth amendment enforcement power is immune from tenth amendment constraints, the Court also restated that Congress' power is not restricted by its recitals of authority. *Id.*

72. *Id.* at 251 (Burger, C.J., dissenting).

Hodel test satisfied.[73] First, he agreed with the majority that the statute regulated states as states.[74] Unlike the majority, however, the Chief Justice concluded that the selection of state employees is an attribute of state sovereignty.[75] Finally, he determined that Wyoming met the last prong of the test because compliance with the statute directly impaired the state's freedom to structure integral operations in the traditional area of state park management.[76] States, he argued, must now face higher employment costs because older workers generally earn more than younger workers.[77] In addition, states must cope with the problems of impeded promotion opportunities and limitations on states' ability to hire the most physically fit game wardens.[78] He noted that the exceptions cited by the majority require states to divert resources to prove a BFOQ under a rigorous standard[79] or to make and defend individual assessments of all affected employees.[80] By applying the balancing test, Chief Justice Burger argued that the state's interest in structuring its employment to meet local needs exceeded any federal interest at stake.[81]

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73. *Id.* at 252-56.

74. *Id.* at 252.

75. *Id.* at 253-54.

76. *Id.* at 255-56.

77. *Id.* at 255.

78. *Id.* at 256.

79. *Id.* at 257-58. *See supra* note 67 and accompanying text for the substance of the bona fide occupational qualification exception. Because this exception contains no guidelines, courts developed divergent standards. The stricter test requires that a BFOQ based on age must be reasonably necessary to the essence of the business. In addition, the employer must reasonably believe that all or substantially all of the persons in the class could not safely or efficiently perform the required duties, or that individual assessments would be impractical. Arritt v. Griswell, 567 F.2d 1267, 1271 (4th Cir. 1977) (quoting Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir. 1976)). Courts most frequently adopt this test. *See, e.g.*, Campbell v. Connelie, 542 F. Supp. 275, 279 (N.D. N.Y. 1982) (age not a BFOQ for state troopers); Johnson v. Mayor and City of Baltimore, 515 F. Supp. 1287, 1296 (D. Md. 1981) (age not a BFOQ for firefighters). Other courts accept a BFOQ claim where elimination of the discriminatory hiring practice increases the risk of harm to people. *See* Hodgson v. Greyhound Lines, 499 F.2d 859 (7th Cir. 1974) (upholding age requirement for bus drivers). Yet another standard demands a factual basis for the belief either that substantially all older employees cannot safely and efficiently do the job, or that some of them cannot, because of traits not ascertainable by other standards. *See* EEOC v. City of St. Paul, 671 F.2d 1162, 1166 (8th Cir. 1982) (age as a BFOQ for firefighters).

80. *See supra* note 68.

81. 460 U.S. at 259, 264-65. Like the district court, Chief Justice Burger observed that Congress created large exceptions to the ADEA for certain federal employees still

Wyoming illustrates the ambiguities inherent in the *National League of Cities* standards, ambiguities that persisted throughout the nine year life of the *National League of Cities* doctrine. Thus, the *Garcia* Court confronted a doctrine that was no more refined in 1985 than it had been in 1976.

IV. GARCIA

Justice Blackmun, writing for the five member majority in *Garcia*,[82] stated that the present controversy centers upon whether mass transit qualifies as a traditional function under the *Hodel* test.[83] Citing the lack of consistency in the federal courts' attempts to apply the "traditional function" standard, he noted that the Court has made little progress in defining the scope of the protected activities.[84] Furthermore, Justice Blackmun contended that a nonhistorical standard for selecting protected functions would also tend to be unworkable because any functional standard "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which it dislikes."[85]

Broadly attacking the theoretical underpinnings of *National League of Cities*, Justice Blackmun announced that the case was overruled as "unsound in principle and unworkable in practice."[86] States retain sovereignty only to the extent that the Constitution has not divested them of their powers and transferred such powers to the federal government.[87] According to Justice Blackmun and the majority, the framers intended that the structure of the federal government itself would provide the principal means to ensure the role of the states in the federal system.[88] Justice Blackmun relied heavily on the fact that the states play a significant role in the political process, and suggested that

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subjected to mandatory retirement laws. *Id. See* 10 U.S.C. § 1251 (1982) (Armed Service employees); 22 U.S.C. § 4052 (1982) (Foreign Service employees).

82. 53 U.S.L.W. 4135 (Feb. 19, 1985). Justice Blackmun was joined by Justices Brennan, White, Marshall, and Stevens. Justice Powell submitted a dissenting opinion joined by Chief Justice Burger and Justices Rehnquist and O'Connor. Justice Rehnquist also filed a separate dissent, as did Justice O'Connor, who was joined by Justices Powell and Rehnquist.

83. *Id.* at 4137.

84. *Id.* at 4138.

85. *Id.* at 4139, 4140.

86. *Id.* at 4140.

87. *Id.*

88. *Id.* at 4141.

states can protect themselves adequately in the political arena.[89] The constitutional limits on the commerce power are limits of process, not limits of result.[90]

Nevertheless, the majority left the door open for potential judicial intervention by quoting language from *Wyoming*, stating that substantive restraints on the commerce clause must be justified procedurally and tailored to compensate for possible failings in the political process.[91]

In a bitter dissent joined by three other Justices,[92] Justice Powell charged the majority with undermining the stability of judicial decisionmaking, abdicating the role of the judiciary in the federal system, and reducing the tenth amendment to meaningless rhetoric.[93] Every member of the Court, he stated, joined opinions in which the principles of *National League of Cities* were reiterated consistently.[94] By making federal political officials the sole judges of the limits of their own (commerce) power, the Court violates fundamental constitutional principles. Among these principles is the duty of the judiciary to "say what the law is," which has been recognized since *Marbury v. Madison*.[95] According to Justice Powell, the fact that Congress generally does not exceed its authority to regulate the states does not make judicial review less necessary when Congress does overstep its powers. The Justice stated that the role of the states in our governmental system "is a matter of Constitutional law, not of legislative grace,"[96] and he chastised the "unelected" majority of the Court for rejecting "almost two hundred years of understanding of the constitutional status of federalism."[97]

Justice Powell also questioned the majority's argument that states are protected poltically because the federal legislature is composed of representatives from the states. Once in office, the Justice noted, mem-

89. *Id.* at 4142. "The political process ensures that laws that unduly burden the states will not be promulgated." *Id.*

90. *Id.*

91. *Id.* (quoting *Wyoming*, 460 U.S. at 236).

92. *See supra* note 82.

93. 53 U.S.L.W. at 4143.

94. *Id.*

95. *Id.* at 4145 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

96. *Id.*

97. *Id.* at 4144.

bers of Congress become members of the federal government.[98] He claimed that the majority's analysis is indistinguishable in principle from a statement that individual rights are amply protected by the political process because Congress is composed of individuals.[99] Justice Powell concluded that the majority view was both incorrect and unjustifiably overbroad in resolving the narrow issue before the Court: the applicability of the FSLA overtime provisions to a local public transit authority.[100]

Justice Rehnquist submitted a brief separate dissent in which he claimed the judgment of the district court should be affirmed under any balancing approach. He also expressed confidence that the principles of *National League of Cities* will regain the support of a majority of the Court.[101]

Justice O'Connor added a separate dissent.[102] She accused the majority of irresponsibly retreating from the principles of federalism rather than attempting to reconcile the dual constitutional concerns of federalism and an effective commerce power.[103] The true essence of federalism, she argued, lies in the legitimate interests of states as states, which the national government is bound to respect.[104] Justice O'Connor claimed that the framers envisioned a republic with vitality assured by diffusion of power among the branches of government and between the federal government and the states.[105] As the nation became more interdependent, the commerce power expanded to encompass any activity that affects interstate commerce.[106] Therefore, every state activity is now vulnerable.[107] In addition, the Court consistently has made state autonomy a relevant factor in assessing congressional action.[108] Consequently, the Court must enforce affirmative limits on federal regulation of the states to complement the judicially expanded

98. *Id.* at 4145.

99. *Id.* at 4145 n.8.

100. *Id.* at 4148-49.

101. *Id.* at 4149.

102. *Id.* at 4149-51.

103. *Id.* at 4149, 4151.

104. *Id.* at 4149.

105. *Id.*

106. *See supra* notes 30-31 and accompanying text.

107. 53 U.S.L.W. at 4150.

108. *Id.* at 4150-51.

commerce power.[109]

V. ANALYSIS

Garcia stands as a very important, yet unusual, federalism decision. Its importance lies in the "creation" of an entirely new framework for protection of states' rights. Under this "political process" framework, states must pursue their political remedies to protect their parochial interests.[110] Judicial remedies are not available to the states, unless perhaps a state can show a breakdown of the political process.[111]

Garcia also is important because it demonstrates that the Court is willing to discard its own standards when they prove unmanageable, even if it means overruling recent consistently applied precedent.[112] The case demonstrates that the Court is capable of self-restraint when it becomes evident that the judiciary is unable to formulate proper and predictable standards for invoking a remedy. It also may signify a limit to the Court's unwillingness to find implied rights in the Constitution.

In some respects, the *Garcia* decision is unusual. First, the decision contains both liberal and conservative elements. Although the Court's composition has become more conservative and current conservative thought favors decentralization, the decision favors the centralized federal government. Nevertheless, *Garcia* may convey the positive signal to conservatives that the Court is willing to assume a more passive role and allow the political process to function in an unencumbered manner.

In addition, Justice Blackmun's majority opinion overrules a decision that he previously supported—*National League of Cities*—which in turn overruled another recent precedent—*Maryland v. Wirtz*.[113] The majority opinion discusses neither the tenth amendment nor the precise issue of whether transit authorities should be subjected to the labor standards of the FLSA.

Garcia may enjoy only a short lifespan. The Court remains sharply divided and future appointments to the Court will reveal whether the

109. *Id.* at 4151.

110. *See supra* text accompanying notes 82-91.

111. *See supra* text accompanying note 91.

112. *See supra* text accompanying notes 50, 62-63, 94.

113. 392 U.S. 183 (1968) (upholding extension of FLSA standards to state and local government employees in transit, health care and education).

"affirmative states' rights" faction regains control. Given the likelihood that President Reagan will have an opportunity to appoint conservative Justices, it seems probable that states' rights will not be left entirely in the political arena for very long.

Before the Court overrules *Garcia*, however, it must formulate clear and workable standards that define the scope of state rights. The Court should not revive the *National League of Cities* standard because it is neither predictable nor easily applied.[114] Instead, a new test is in order. This test, above all, must lend itself to easy application and predictable outcomes. Otherwise Congress, the states, and the courts will not understand the rules of the game, and the resulting confusion may inspire yet another precedent-upsetting decision.

Stephen J. Horace

114. *See supra* notes 38, 47-49 and accompanying text.