THE YALE LAW JOURNAL

DAVID SCOTT LOUK

Repairing the Irreparable: Revisiting the Federalism Decisions of the Burger Court

ABSTRACT. The text of a Supreme Court opinion rarely tells the full story of the debates, discussions, and disagreements that resulted in a particular decision. Drawing on previously unexamined archival papers of the Justices of the Burger Court, this Note tells the story of the Burger Court's federalism jurisprudence between 1975 and 1985, famously bookended by a pair of rare and abrupt reversals of Supreme Court precedent. The Note documents the Justices' deliberations for the first time, sheds new light on the institutional workings of the Court, and enriches our understanding of the foundations of modern federalism. In its federalism cases, the Burger Court grappled with the challenge of balancing the states' autonomy against the rise of new national problems and an expanding federal government's solutions to them. The Justices' papers show that they were more attuned to policy outcomes and the real-world consequences of their decisions than may typically be assumed. Above all, the papers reveal the Burger Court's deep struggle to articulate a sustainable federalism jurisprudence given the constraints of judicial craft. As the Note concludes, however, the Burger Court's uneven federalism experiments nonetheless laid the groundwork for the Court's subsequent attempts to fashion more workable doctrines. The Rehnquist and Roberts Courts have adjudicated federalism disputes more effectively by avoiding impracticable doctrines and remaining mindful of the institutional limitations of courts as federalism referees.

AUTHOR. Law clerk to the Honorable James E. Boasberg, United States District Court for the District of Columbia. My sincere gratitude to Alexander Kazam and the editors of the *Yale Law Journal*, who have made this piece markedly better in each iteration and in every respect. I would also like to thank three professors who have motivated my inquiries into this project and into federalism generally. Heather Gerken first opened my eyes to questions of federalism and localism and continues to be a brilliant role model and invaluable mentor. Judith Resnik's indefatigable energy, vast knowledge of all things federalism(s), and sincere belief in being "as useful as possible" equally inspire me. Finally, the project is deeply indebted to Linda Greenhouse, whose comprehensive institutional knowledge of the Supreme Court, passion for historical and archival research—and first-rate ability to read Justice Blackmun's handwriting—were the but-for causes of this piece. I am also grateful to Harold Koh and Mark Rahdert for taking the time to share their war stories from their time clerking for Justice Blackmun, and to Professor Michael Graetz for his generous advocacy and advice in the early stages of this project. Finally, my sincere thanks to Bruce Gibney, whose encouragement and support of this piece, as with all things, are invaluable to me. Any errors—in transcription, interpretation, or thought—are mine alone.

NOTE CONTENTS

INTRODUCTION 684

I. THE TENTH AMENDMENT REANIMATED: *FRY* & *NATIONAL LEAGUE OF CITIES* (1975-76) 689

A. Inheriting the Nationalist Jurisprudence of the Warren Court 689

B. Reviving the Tenth Amendment: *National League of Cities* and the Traditional Governmental Functions Test 694

C. Blackmun as the Tie-Breaker 697

D. A Decision in Search of a Doctrine 699

II. A DOCTRINE IN DISREPAIR: *HODEL, LONG ISLAND RAILROAD, FERC V. MISSISSIPPI* & *EEOC V. WYOMING* (1981-83) 705

A. *Hodel, Long Island Railroad*, and the Dysfunction of the Traditional Governmental Functions Test 705

B. *FERC v. Mississippi*: O'Connor Foreshadows the "New Federalism" 708

C. *EEOC v. Wyoming*: A Federalism Doctrine Impaired 713

III. REPAIRING THE IRREPARABLE: *GARCIA* (1985) 716

A. A Clerk Lobbies Blackmun To Second-Guess Himself 719

B. Reargument 722

EPILOGUE: FROM THE ASHES OF TRADITIONAL GOVERNMENTAL FUNCTIONS RISES THE "NEW FEDERALISM" 724

INTRODUCTION

"The problem is how best to accommodate the commerce clause and federalism when they collide."
– Justice Lewis F. Powell, Jr., 1975.[1]

Drawing on the rich archival materials preserved by the Justices, this Note provides the first detailed account of the story behind the federalism jurisprudence of the Burger Court. It is the first piece of scholarship to examine at length the papers of the members of the Burger Court – Justices Blackmun and Powell in particular – on the major federalism decisions decided by the Court in the late 1970s and early 1980s. These letters, memos, and draft opinions help explain the seemingly incoherent genealogy of the Burger Court's federalism jurisprudence, illuminate the Court's influence on our contemporary federalism doctrines, and enrich our understanding of how the nation's highest court functions as an institution.

The stories this Note tells revolve around two pivotal five-four decisions of the Court: *National League of Cities v. Usery*,[2] decided in 1976, and *Garcia v. San Antonio Metropolitan Transit Authority*,[3] decided nine years later in 1985. *Cities* signaled the beginning of the Court's modern federalism jurisprudence: in striking down a federal statute that regulated state and local employees' salaries, it became the first case in decades to overturn a federal law on federalism grounds. *Cities* resurrected the Tenth Amendment as something more than the mere "truism" the Court had declared it three decades earlier in *United States v. Darby*.[4] Widely seen as a landmark ruling at the time it came down, *Cities* held that the Tenth Amendment protected the states' "traditional governmental functions" from undue intrusion by the federal government.[5] Despite *Cities*'s potentially far-reaching implications, it was surprisingly hard to implement; in subsequent cases, the Court would repeatedly avoid application of its holding before finally abandoning the project altogether in *Garcia*.

Understanding this turn of events remains relevant to present-day federalism debates. The Burger Court's federalism decisions – some of which

1. Memorandum from Justice Lewis F. Powell, Jr. for Conference in Nat'l League of Cities v. Dunlop 1 (Apr. 17, 1975) (on file with Lewis F. Powell, Jr. Papers, Folder 74-878).

2. 426 U.S. 833 (1976).

3. 469 U.S. 528 (1985).

4. 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered.").

5. *Cities*, 426 U.S. at 852.

were, according to Justice Powell, among "the most important" cases to come before him[6]—set in motion the doctrine that continues to govern the balance between Congress's Commerce Clause powers and the Tenth Amendment's protection of state prerogatives. The Supreme Court's federalism cases are among its most impactful in recent decades, as federalism has become a battleground for an increasing number of policy clashes.[7] Revisiting the origins of modern federalism helps us appreciate how the doctrine developed into its current form.

In telling the story of the Burger Court's federalism decisions, I focus on three periods. The first is marked by the dramatic revival of the Tenth Amendment in the mid-1970s with *Fry v. United States*[8] and *Cities*. Drawing on previously unexamined archives, this Note reveals how behind-the-scenes maneuvers in *Fry* set the stage for the Court's landmark decision in *Cities*. On the surface, *Fry*'s seven-one decision *against* the States—relying on Warren Court precedents—seems hard to square with *Cities*'s five-four decision *for* the States only a year later. After all, *Cities* overturned those same Warren Court precedents. As my research reveals, however, an insurgent rebellion by three Justices in *Fry* resulted in a muted compromise opinion that said little but deliberately left open the possibility for the Court's resuscitation of the Tenth Amendment a year later in *Cities*.

The second period, from roughly 1981 to 1983, finds the Court struggling to apply the "traditional governmental functions" doctrine that it had articulated in *Cities*. The archival materials reveal that the Justices were closely attuned to the practical consequences of deciding for or against the States, and were more open-minded about both sides of the debate than is commonly thought. The Justices' focus on real-world effects also helps explain *Cities*'s gradual desuetude: as the activities of states and private actors increasingly converged, merged, or blurred, the theory of traditional governmental functions first announced in *Cities* was thwarted by the practical challenges of applying it in case after case.

---

6. *See infra* notes 110-111 and accompanying text.

7. *See, e.g.*, Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (arguing that partisan commitments—not abstract attachments to federalism per se—motivate much of the federalism debates in the United States); Judith Resnik, *Federalism(s)'s Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, *in* NOMOS LV: FEDERALISM AND SUBSIDIARITY 363, 365 (James E. Fleming & Jacob T. Levy eds., 2014) ("[F]ederalism's plural legal sources . . . enable[] norm entrepreneurs to shop systems to persuade [others] about the wisdom or the legality of particular points of view—for or against, for example, openness toward new immigrants, state mandates for health care, or environmental regulations.").

8. 421 U.S. 542 (1975).

The third and pivotal period, beginning in 1984, finds the Court in upheaval over Justice Blackmun's about-face in *Garcia*. Mere weeks before his majority opinion was scheduled for publication, he would switch sides and join the dissenters in overturning *Cities*. The opinion he ultimately wrote in *Garcia* appears deeply indebted to one of his clerks, who urged Justice Blackmun to reverse himself—and take the Court with him.

This original historical account enhances our understanding of modern American federalism by illuminating the context in which the Supreme Court issued its opinions.[9] I argue that the Burger Court's struggles reflect two ongoing tensions in the Court's federalism jurisprudence. The first is the tension between purity and pragmatism. The Burger Court's behind-the-scenes deliberations reveal the Justices struggling mightily to apply and refine the conceptually neat "traditional governmental functions" doctrine laid down in *Cities*. Simple enough in theory, the *Cities* test proved difficult to apply in practice. Close examination of the papers reveals that several Justices—not only Justice Blackmun—struggled to find a practicable way to identify protected functions. As Justice Blackmun ultimately concluded when he overturned *Cities*, "Attempts by other courts . . . to draw guidance from this model have proved it both impracticable and doctrinally barren."[10]

The Burger Court's federalism jurisprudence also raised a second tension—one which I do not believe has been discussed elsewhere, and which was especially relevant to members of the Court more inclined to favor state sovereignty. Although Chief Justice Burger and Justice Powell appeared at times to be ardent defenders of state prerogatives, they were not always so confident behind the scenes. I argue that this was in part because the conservative Justices became prisoners of their own doctrine. *Cities*'s traditional governmental functions test led to a catch-22: the only way to protect the states was to essentialize certain services—which might otherwise be privately provided—as quintessentially *governmental*.[11] Expanding the judicially endorsed reach of the state would have been an unfamiliar position for conservative jurists like Justice Powell, who were inclined to favor free enterprise over an expansive, socializing government.[12] Thus, the Burger Court's federalism

9. For a discussion of the importance of understanding the context in which a court encounters a decision, see Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221 (1990). Judith Resnik calls on readers, in interpreting judicial texts and the thinking of judges, to "speak of what judges say not only when they sit on the bench but also when they wheel and deal in settlement conferences, [and] when they speak ex parte, on and off 'the record' . . . ." *Id.* at 229.

10. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985).

11. *See infra* notes 139-145 and accompanying text.

12. *See infra* notes 191-192 and accompanying text.

doctrine contained a second tension: probusiness conservatives were forced to choose between essentializing services as governmental at the *local* level or expanding the government's reach at the *federal* level.

To fully understand the federalism doctrines of the Rehnquist and Roberts Courts, then, we must situate them in the context of the Burger Court's jurisprudence. The Burger Court's federalism cases illustrate pitfalls inherent in policing the boundary between functions of the states and the federal government that later Courts have sought to avoid. While the tensions the Burger Court encountered are not unique to that era—adjudicating federal-state disputes has been among the Court's most controversial functions since *Martin v. Hunter's Lessee*[13]—the focus of the debate has shifted in recent years. In response to the struggles of the Burger Court, I argue, the federalism jurisprudence of the Rehnquist and Roberts Courts has homed in on more clearly definable aspects of states, such as the commandeering (in *Printz v. United States*)[14] or coercion (in *New York v. United States*[15] and *National Federation of Independent Business v. Sebelius*)[16] of state actors. These categories are more readily identifiable, if no less hotly contested.[17] Moreover, they free conservative-minded jurists from choosing between state sovereignty and free enterprise.

The Justices' papers—especially the remarkably thorough and carefully preserved conference notes of Justices Blackmun and Powell—also provide insight into the workings of the Supreme Court as an institution. In part, the archival materials confirm what legal realists have long suspected about the craft of judicial decision making: the Court was focused more on policy, outcomes, and real-world consequences than its sometimes abstract-sounding opinions might suggest. The Justices' papers show that they often concentrated on the practical challenges and problems each individual case raised, debating at conference the anticipated effects of their proposed decisions. In the frequent

---

13. 14 U.S. (1 Wheat.) 304 (1816).

14. 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

15. 505 U.S. 144, 169 (1992) ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

16. 132 S. Ct. 2566, 2603 (2012) (describing the "danger" that Congress's spending clause powers might pose in imposing pressure on the states to accept federal funding to implement federal prerogatives).

17. For recent criticism of the anti-commandeering and anti-coercion principles, see Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 13-18 (2015).

absence of straightforward constitutional resolution, the members of the Burger Court were left to weigh the costs and benefits of each challenged law.

From their papers, the members of the Burger Court also appear more open-minded and less rigidly ideological than might be assumed.[18] Correspondence among the Justices and their clerks produced substantial changes of opinion. The Justices' notes and internal memoranda show that they sometimes changed their votes even after circulation of majority and dissenting drafts, revealing a Court whose members were very responsive to their colleagues' efforts at persuasion. Nor were the Justices afraid to second-guess themselves. Justice Blackmun, for example, was a member of the *Cities* majority and was originally assigned to write the opinion in *Garcia* reaffirming *Cities*. Yet he changed his mind and ultimately wrote the decision that overruled *Cities*. In another case, both the Chief Justice and Justice Powell changed positions after the Conference vote.[19] Especially in light of criticism that the modern Court is predictably partisan,[20] the Justices' willingness to consider both sides of important issues (and even change their minds) indicates that the Court's members were more freethinking than their published opinions might suggest or than their critics might assume.

The Justices of the Burger Court were receptive not only to their colleagues' views, but also to the input of their law clerks. Justice Blackmun's clerks appear to have been especially successful in shaping his ideas. The Justice's papers strongly suggest that his reversal in *Garcia* was influenced by one clerk's dogged insistence that *Cities*'s traditional governmental functions test was unworkable. Even Blackmun's concurrence in *Cities* seems partly in debt to a clerk's conviction that the Justice should write separately to temper the majority's holding. While this Note is not the first effort to assess the role of clerks in Justice Blackmun's jurisprudence,[21] it is the first to do so in the specific context of his federalism decisions and to tell the story of how one

18. *See, e.g.*, Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 187 (1983) (arguing that the Burger Court exhibited a distinct ideological approach to criminal procedure); Timothy M. Hagle & Harold J. Spaeth, *The Emergence of a New Ideology: The Business Decisions of the Burger Court*, 54 J. POL. 120 (1992) (arguing that the Burger Court's business decisions evince an ideology of "instrumental libertarianism").

19. *See infra* notes 179-181 and accompanying text.

20. *E.g.*, Garrett Epps, *The Extreme Partisanship of John Roberts's Supreme Court*, ATLANTIC (Aug. 27, 2014), http://www.theatlantic.com/politics/archive/2014/08/john-robertss-dream-of-a-unifying-court-has-dissolved/379220 [http://perma.cc/6G8R-V2LG].

21. *See* David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFF. (May/June 2005), http://www.legalaffairs.org/issues/May-June-2005/feature_garrow_mayjun05.msp [http://perma.cc/VS83-A942].

clerk's advocacy appears to have helped persuade Justice Blackmun to reverse course in *Garcia*.

In short, the stories contained in the Justices' archival papers—told here for the first time—contribute to our understanding of the Supreme Court as an institution, the operations of the Burger Court in particular, and the Burger Court's federalism doctrine, which continues to shape debates on American federalism to this day.

I. THE TENTH AMENDMENT REANIMATED: *FRY* & *NATIONAL LEAGUE OF CITIES* (1975-76)

A. Inheriting the Nationalist Jurisprudence of the Warren Court

In the Burger Court's first period of major federalism decisions, between 1975 and 1976, the Court began to break free of the nationalist precedents it inherited from the Warren Court. While the Burger Court's first big Commerce Clause federalism case, *Fry v. United States*,[22] appeared to maintain the status quo, behind the scenes the new Justices of the Burger Court were sowing seeds that would bear fruit in *National League of Cities v. Usery* the following year. The Tenth Amendment, long dormant, would see new life.

The Supreme Court had generally endorsed the expansion of federal power in the years between the New Deal and the resignation of Chief Justice Warren in 1969. This was especially true in the context of antidiscrimination law. In *Heart of Atlanta Motel v. United States*[23] and *Katzenbach v. McClung*,[24] the Warren Court unanimously upheld the application of the Civil Rights Act's prohibition on discrimination to privately owned and operated businesses, as well as to the states. The Court found that Congress could regulate such businesses under the Commerce Clause because collectively, the economic activities of these privately owned businesses "directly or indirectly burden[ed] or obstruct[ed] interstate commerce."[25]

The Warren Court also endorsed an expansive vision of the federal government's power over the states in voting-rights cases such as *South Carolina v. Katzenbach*[26] and *Katzenbach v. Morgan*.[27] This expansion of federal

22. 421 U.S. 542 (1975).
23. 379 U.S. 241 (1964).
24. 379 U.S. 294 (1964).
25. *Id.* at 302.
26. 383 U.S. 301 (1966).
27. 384 U.S. 641 (1966).

power was facilitated in part by the desuetude of the Tenth Amendment, which was not discussed in these cases.[28] Twenty-five years earlier, in *United States v. Darby*, the Court had unanimously declared that the Tenth Amendment stated a mere "truism" and stood for nothing more than the uncontroversial proposition that the federal government could not exercise powers not granted to it by the Constitution.[29] After *Darby*, as one scholar explained, "the Tenth Amendment came to have no restrictive significance" in protecting the states from interference by the federal government.[30]

The Burger Court reshaped the constitutional landscape by resurrecting the Tenth Amendment as an independent source of constitutional protection for the states. The Warren Court's last major federalism case, *Maryland v. Wirtz*,[31] exemplified the nation's evolving federalism battlegrounds. Decided in 1968, a year before Burger was appointed Chief Justice, *Wirtz* involved a challenge to the Fair Labor Standards Act (FLSA). The statute applied minimum-wage and overtime requirements to employees of state-operated schools and hospitals.[32] The States argued that the law impermissibly impaired their sovereign prerogatives to manage the covered institutions by interfering with states' employment arrangements. A seven-member majority of the Court disagreed, refusing to limit Congress's power to regulate economic enterprises "simply because those enterprises happen to be run by the states."[33]

Other members of the Court, however, were more troubled by the FLSA's application to state employees. In his dissent, Justice Douglas, joined by Justice

---

28. In contrast to the lack of engagement with the Tenth Amendment in the pair of Warren Court *Katzenbach* Voting Rights Act cases, Chief Justice Roberts drew broadly on the Tenth Amendment in his opinion in *Shelby County v. Holder*, which overturned provisions of the Voting Rights Act. 133 S. Ct. 2612, 2623 (2013) ("But the federal balance is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power . . . . More specifically, the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.").

29. United States v. Darby, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.").

30. Sotirios A. Barber, National League of Cities v. Usery*: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161, 162.

31. 392 U.S. 183 (1968).

32. *Id.* at 185-87.

33. *Id.* at 198-99.

Stewart, sought to exhume the Tenth Amendment, characterizing the FLSA provisions as "such a serious invasion of state sovereignty protected by the Tenth Amendment" that they were inconsistent with "our constitutional federalism."[34] This argument—that the Tenth Amendment placed concrete limits on Congress's Commerce Clause powers—was not addressed by the majority, consistent with the Court's dismissive treatment of the Tenth Amendment in the years before the Burger Court.

After *Wirtz*, seven years passed before the Supreme Court again heard a federalism challenge to Congress's Commerce Clause power. By the time the Court was rendering its decision in *Fry*, its composition had changed dramatically. Burger had become the Chief Justice, and President Nixon had appointed three other Justices to the Court—Justices Blackmun, Rehnquist, and Powell. Despite the addition of these new, more conservative members, the Court's decision in *Fry* suggested that not much had changed—at least from the text of the opinion. Justice Marshall, writing for a seven-member majority, upheld Congress's emergency wage controls over the states in a short, straightforward opinion that barely spanned five columns of the Supreme Court Reporter.[35]

The Justices' papers, however, tell a different story. In fact, there had been considerable acrimony over the decision among the new Nixon appointees, and they worked behind the scenes in *Fry* to plant the seeds of rebellion against *Wirtz*. *Fry*'s laconic holding was the direct result of compromises made after the three new Nixon appointees threatened to jump ship and write their own concurrence. The holding in Marshall's original draft in *Fry* was much broader than the final result, expressly rejecting the idea that the FLSA impinged on state sovereignty and emphasizing that the law "did not purport to impose substantive restrictions on the functions the States could perform."[36]

By the time Marshall had circulated that draft, however, the Court was considering another federalism challenge in the case that would become *Cities*.[37] Powell wrote in the margins of his copy of the draft opinion that, with *Cities* making its way to the Court, the Court should either "hold [*Fry*] for that

34. *Id.* at 201 (Douglas, J., dissenting).

35. 95 S. Ct. 1792 (1975). Only Justice Rehnquist dissented. *Id.* at 1796 (Rehnquist, J., dissenting). Justice Douglas wrote a short concurrence arguing that the case should have been dismissed as improvidently granted. *Id.* (Douglas, J., concurring).

36. Justice Harry A. Blackmun, Draft Opinion in Fry v. United States 6 (Jan. 9, 1975) (on file with Harry A. Blackmun Papers, Box 196, Folder 73-822).

37. The Court noted probable jurisdiction in the combined cases that became *Cities* on January 27, 1975, several weeks after Marshall circulated his first draft. *See* 420 U.S. 906 (1975).

or write this more narrowly."[38] Powell circulated a memo to Marshall and the rest of the Justices expressing concern that Marshall's language would "strengthen the force of *Wirtz* as a precedent and possibly be viewed as extending *Wirtz*."[39] The language would "g[o] a long way to pre-judge *National League of Cities*."[40] He requested that Marshall scale back the discussion of *Wirtz* and instead emphasize the emergency nature of the temporary wage ceilings.[41] The seeds of an insurrection planted, Justice Blackmun responded in a memorandum to Marshall and the conference that there was "much to be said" for Powell's point of view.[42] Then-Justice Rehnquist agreed,[43] despite originally voting at conference to dismiss the case as improvidently granted.[44]

Marshall, senior to all three of the newer Justices, was indignant and refused to alter course, stating that his proposed holding in *Fry* was "carefully cut to the bone and about as narrow a holding as I can imagine."[45] Rehnquist responded that he would write a dissent,[46] and Powell proposed a short, one-page concurrence, emphasizing the emergency nature of the Act and reiterating that "principles of federalism impose some limits on direct congressional regulation of state government."[47] Blackmun joined this concurrence,[48] "withdrawing [his] joinder" from Marshall's opinion.[49]

---

38. Justice Lewis F. Powell, Jr., Notes on Justice Marshall Draft Opinion in Fry v. United States (Jan. 3, 1975) (on file with Lewis F. Powell, Jr. Papers, Folder 73-822).

39. Memorandum from Justice Lewis F. Powell, Jr. to Justice Thurgood Marshall 1 (Jan. 14, 1975) (on file with Harry A. Blackmun Papers, Box 196, Folder 73-822).

40. *Id.* at 2.

41. *Id.*

42. Memorandum from Justice Harry A. Blackmun to Justice Thurgood Marshall (Jan. 15, 1975) (on file with Harry A. Blackmun Papers, Box 196, Folder 73-822).

43. Memorandum from Justice William H. Rehnquist to Justice Thurgood Marshall (Jan. 14, 1975) (on file with Harry A. Blackmun Papers, Box 196, Folder 73-822).

44. *See* Justice Lewis F. Powell, Jr., Conference Notes in Fry v. United States 3 (Nov. 11, 1974) (on file with Lewis F. Powell, Jr. Papers, Folder 73-822).

45. Memorandum from Justice Thurgood Marshall to Justice Lewis F. Powell, Jr. (Jan. 16, 1975) (on file with Lewis F. Powell, Jr. Papers, Folder 73-822).

46. Memorandum from Justice William H. Rehnquist to Justice Thurgood Marshall (Jan. 17, 1975) (on file with Lewis F. Powell, Jr. Papers, Folder 73-822).

47. Justice Lewis F. Powell, Jr., Second Draft Concurrence Opinion in Fry v. United States (Mar. 20, 1975) (on file with Harry A. Blackmun Papers, Box 196, Folder 73-822).

48. Memorandum from Justice Harry A. Blackmun to Justice Lewis F. Powell, Jr. (Mar. 20, 1975) (on file with Harry A. Blackmun Papers, Box 196, Folder 73-822) ("Please join me in your separate concurring opinion.").

49. Memorandum from Justice Harry A. Blackmun to Justice Thurgood Marshall (Mar. 20, 1975) (on file with Harry A. Blackmun Papers, Box 196, Folder 73-822).

When Burger too agreed to join the concurrence,[50] Marshall—sensing a rebellion—stood down. He circulated a new draft that omitted the expansive language upholding *Wirtz* and focused on both the temporary nature of the statute in question and the emergency conditions that required it.[51] Powell, in turn, agreed to drop his concurrence, writing on his hard copy of the draft, "As J[ustice] Marshall incorporated most of this in his opinion for the Court, I withdrew this."[52] He, Blackmun, and the Chief Justice rejoined Marshall's majority.[53] In a note that Blackmun wrote to himself for his files, Blackmun reported that Marshall was "furious at the loss of a [C]ourt" and accused Blackmun and Powell of "conspiring to effect this result."[54] Blackmun had encouraged Marshall to incorporate Powell's contributions to stave off such a feud, but Marshall had "peremptorily refused."[55] Justice Blackmun later wrote that he "voted with the majority in *Fry* basically on the ground of a narrow opinion, the precedent in *Wirtz*, and the emergency nature of the wage controls at issue there."[56]

In the end, Justice Rehnquist was the lone dissenter. He invoked the Tenth Amendment to argue that, even if any individual federal law created a trivial imposition on the states, collectively permitting such laws would gravely undermine the states' role in the federal system.[57] His dissent in *Fry* thus foreshadowed the arguments that would take center stage in *Cities*, a position that had more appeal to Justices in the seven-member *Fry* majority than contemporary readers might have surmised on the basis of the majority opinion.

---

50. Memorandum from Chief Justice Warren E. Burger to Justice Lewis F. Powell, Jr. (Mar. 27, 1975) (on file with Harry A. Blackmun Papers, Box 196, Folder 73-822).

51. Justice Thurgood Marshall, Third Draft Opinion in Fry v. United States 5-6 (Mar. 27, 1975) (on file with Harry A. Blackmun Papers, Box 196, Folder 73-822).

52. Justice Lewis F. Powell, Jr., Notes on Justice Powell Draft Concurrence Opinion in Fry v. United States (Mar. 20, 1975) (on file with Lewis F. Powell, Jr. Papers, Folder 73-822).

53. Justice Harry A. Blackmun, Note for the File in Fry v. United States (Apr. 8, 1975) (on file with Harry A. Blackmun Papers, Box 196, Folder 73-822).

54. *Id.*

55. *Id.*

56. Memorandum from Justice Harry A. Blackmun for Nat'l League of Cities v. Usery 8 (Apr. 15, 1975) (on file with Harry A. Blackmun Papers, Box 217, Folder 74-879).

57. Fry v. United States, 421 U.S. 542, 550 (1975) (Rehnquist, J., dissenting).

B. *Reviving the Tenth Amendment:* National League of Cities *and the Traditional Governmental Functions Test*

Understanding *Fry*'s genesis helps explain why Justice Rehnquist's Tenth Amendment arguments received such an enthusiastic response only a year after they were seemingly repudiated, seven-one, in *Fry*. In the wake of *Wirtz*, Congress expanded the FLSA's wage and hour requirements to cover nearly all state and local employees, effectively extending the same rules to both public and private employers.[58] In response, the plaintiffs in *Cities* argued both that Congress had overstepped its Commerce Clause powers and, picking up Justice Rehnquist's cue, that Congress had violated the Tenth Amendment.[59]

During the conference for *Cities*,[60] each of the Nixon appointees sought to overturn the FLSA amendments, but not necessarily *Wirtz*. This was hardly surprising given the threatened rebellion of the Chief Justice and Justices Powell and Blackmun in *Fry*.[61] While all four voted at conference to reverse the lower court and hold the amendments unconstitutional, none was certain of the precise legal rationale. Justice Powell perhaps put it best in a memo he circulated before conference: "The problem is how best to accommodate the commerce clause and federalism when they collide."[62] Powell thought Congress had gotten carried away in the most recent FLSA expansion.[63] His

58. Act of Apr. 8, 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 58-62.

59. Brief for Appellants at 98, Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (No. 74-878).

60. One of the most remarkable and important parts of Justice Blackmun's papers is his meticulous notes on the Court's conferences after oral arguments. Justice Powell, too, retained his detailed conference notes. Both sets of material shed light on this closed-door setting. Conference debates might be the best opportunity to understand what each individual Justice thought about a given case, but because the Justices are tight-lipped about their discussions, any recordings have become available only posthumously. When the Justices meet after oral arguments, they traditionally present their positions in order of seniority, with the Chief Justice speaking first. Unless uncertain of a position, each Justice will also render a preliminary vote, and thus by the end of the conference a majority will often emerge. The process, particularly in these federalism cases, is revealing. *See, e.g.*, LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 57-59 (2005).

61. The discussion of the conference for *Cities* is drawn from Justice Blackmun's meticulous, but sometimes illegible conference notes, as well as Justice Powell's less copious notes. Any errors in transcription are mine, although I have strived to present only those portions of the notes I can confidently transcribe. *See* Justice Harry A. Blackmun, Conference Notes in Nat'l League of Cities v. Dunlop (Apr. 18, 1975) (on file with Harry A. Blackmun Papers, Box 217, Folder 74-878); Justice Lewis F. Powell, Jr., Conference Notes in Nat'l League of Cities v. Dunlop (Apr. 18, 1975) (on file with Lewis F. Powell, Jr. Papers, Folder 74-878).

62. Powell, *supra* note 1, at 1.

63. *Id.*

memo displayed far more certainty about the desired outcome than about the means to achieve it. His comments at conference were representative of the new Nixon appointees: he was convinced that the Court would need to draw some sort of clear line—after all, if the Court did not, who would?[64] He stated that he "would prefer to limit *Wirtz* to its facts . . . but would consider overruling if necessary."[65]

The other Nixon appointees agreed that the amendments were problematic, but they too were uncertain whether to overturn *Wirtz* or to try to distinguish *Cities* from *Wirtz* on the facts. The Chief Justice and Blackmun shared Powell's inclination to limit *Wirtz* to its facts, and while Rehnquist—the sole dissenter in *Fry*—was open to overturning *Wirtz*, he wondered whether that was necessary given the Court's latitude to react to different situations.[66]

The Court's older members were more steadfast. Brennan, White, and Marshall supplied three reliable votes to affirm the district court and uphold the law.[67] Brennan and White both remarked that *Cities* was essentially *Wirtz* redux.[68] That left the two *Wirtz* dissenters. Justice Douglas, recovering from a debilitating stroke he had suffered over the Court's Christmas holiday,[69] was absent from the conference.[70] Evincing his respect for stare decisis, Justice Stewart stated that he would vote to overrule *Wirtz* if he could "join five"—a majority in its own right—in doing so.[71]

With Douglas absent, no clear majority view on how to deal with *Wirtz*, and the term rapidly closing, the Justices held the case over for reargument. By the time the case was reargued in March 1976, Justice Douglas had stepped down from the Court and Justice Stevens, President Ford's sole nominee, had been elevated.[72]

Although the intervening eleven months provided the Justices with the opportunity to solidify their views, some members of the Court—especially Chief Justice Burger—remained unsure how to articulate a clear doctrinal

---

64. Blackmun, *supra* note 61.

65. Powell, *supra* note 61.

66. *Id.*

67. *Id.*

68. *Id.*

69. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 235 (Kermit L. Hall et al. eds., 1992).

70. Blackmun, *supra* note 61.

71. Powell, *supra* note 61.

72. Lesley Oelsner, *Senate Confirms Stevens, 98 to 0*, N.Y. TIMES (Dec. 18, 1975), http://timesmachine.nytimes.com/timesmachine/1975/12/18/145973042.html [http://perma.cc/Z63P-FV3B].

holding.[73] The Chief Justice, speaking first, stated that the law was "the antithesis of what [he] regard[ed] as [a] fed[eral] sys[tem]," because he thought there ought to be variance between the states within a federal system.[74] Nevertheless, Burger was still uncertain whether—and how—to overturn *Wirtz*, and so voted to overturn the district court but not *Wirtz* itself. White, presumably sensing that *Wirtz* could end up on the chopping block, noted that even the appellants in the case had not asked the Court to overturn *Wirtz* or reconsider whether *Wirtz* was decided correctly.[75] He would vote to affirm, as would Brennan and Marshall, who noted that the Court was not starting from a "clean slate"—perhaps a reminder to the newer Justices of the importance of stare decisis given the rebellion Marshall had faced in *Fry*.[76]

Brennan, who wanted to uphold the law, may have been influenced by the law's effect on individual employees, many of whom had reached out to him in correspondence. The files of Justices Brennan and Blackmun reveal that they kept many letters they received from ordinary citizens. Brennan, for example, retained a moving handwritten letter from a Virginia firefighter who had worked as many as eighty-four hours in a week without a cent of overtime pay. The firefighter wrote that neither he nor his family ever "begrudged the fact that I am only home half the time that other men are home with their families" or that he had "to work on Sundays, [the] 4th of July, Christmas Day, etc.," but that it was unfair that he was not eligible for overtime when other employees might be.[77] The firefighter beseeched Brennan to uphold the FLSA, telling him "my future is definitely in your hands."[78]

Justices Powell and Rehnquist also resumed their postures from the earlier conference. Powell felt it was the Court's role to preserve the federal system, and that strict scrutiny should apply because, in Powell's view, Congress could regulate the states' internal affairs only when necessary to protect federal interests. He concluded that there was no principled way to preserve both the federal system and the FLSA amendments. Overturning the amendments was "a matter of survival" for the federal system, and so he voted to

---

73. The discussion of the conference is drawn from the notes of Justices Blackmun and Powell. *See* Justice Harry A. Blackmun, Conference Notes in Nat'l League of Cities v. Usery (Mar. 5, 1976) (on file with Harry A. Blackmun Papers, Box 217, Folders 74-878, 74-879); Justice Lewis F. Powell, Jr., Conference Notes in Nat'l League of Cities v. Usery (Mar. 5, 1976) (on file with Lewis F. Powell, Jr. Papers, Folder 74-878).

74. Blackmun, *supra* note 73.

75. *Id.*

76. *Id.*

77. Letter from Carl B. Helton to Justice William J. Brennan (Feb. 24, 1976) (on file with William J. Brennan Papers, Box I:381, Folder 74-878-1).

78. *Id.*

overturn *Wirtz*.[79] Rehnquist, the lone dissenter in *Fry*, was quite willing to do so.[80] Stevens – the newest Justice – then stated that he was "not persuaded by the parade of horribles" that the cities and states threatened would ensue should the Court uphold the federal law.[81] He joined Justices Brennan, Marshall, and White in voting to affirm.

The only remaining dissenter from *Wirtz* on the Court, Stewart, held fast to his earlier position that the Court could not hold that the Commerce Clause denied Congress such extensive powers yet simultaneously maintain that *Wirtz* was good law. In essence, he believed that there was no room to distinguish *Wirtz* on its facts. But this time, rather than agreeing only to "join five," Stewart stated that he would overrule *Wirtz* if just *four* others joined him.[82] This brought the tally to an even four-four. It then fell to Justice Blackmun to cast the decisive vote.

C. Blackmun as the Tie-Breaker

This was not an unfamiliar position for Justice Blackmun. In his early years on the Court, he often found himself to be the deciding vote.[83] As many scholars have observed, Blackmun appeared to drift over time from the Burger Court's conservative wing (anchored by the Chief Justice and Justice Rehnquist) to its liberal wing (anchored by Justices Brennan and Marshall).[84] Blackmun often said that he did not change – the Court did.[85] But Blackmun's views on federalism were not so simple. Blackmun was never as hardened a champion of states' rights as Chief Justice Burger or Justices Rehnquist and O'Connor. Blackmun came of age during the Great Depression, an experience

---

79. Blackmun, *supra* note 73.

80. *Id.*

81. *Id.*

82. Powell, *supra* note 73.

83. For example, as Linda Greenhouse has documented, when Justice Blackmun assumed his position on the Supreme Court in 1970, he was immediately put in the position of casting the deciding vote on most of the twenty-two pending certiorari petitions before the Court. *See* GREENHOUSE, *supra* note 60, at 53-54.

84. *See, e.g.*, Dan T. Coenen, *Justice Blackmun, Federalism and Separation of Powers*, 97 DICK. L. REV. 541, 571 (1993) (noting the possibility that Blackmun purposefully moved left to keep the Court balanced once O'Connor's appointment in place of the retiring Justice Stewart caused the Court to move right); Joseph F. Kobylka, *The Court, Justice Blackmun, and Federalism: A Subtle Movement with Potentially Great Ramifications*, 19 CREIGHTON L. REV. 9, 13 (1985) (noting that Blackmun had drifted away from voting with the Chief Justice and increasingly voted with his "ideological and intellectual adversary," Justice Brennan).

85. *See* Nina Totenberg, *Harry A. Blackmun: The Conscientious Conscience*, 43 AM. U. L. REV. 745, 745 (1994).

that, according to former clerk Mark Rahdert, now a professor at Temple University's Beasley School of Law, had a lasting impact on him.[86] Blackmun saw New Deal legislation lift the country from the Great Depression and felt strongly that the federal government must be able to solve national problems.[87] This gave him a correspondingly expansive view of Congress's power under the Commerce Clause.[88]

On the other hand, Blackmun recognized the need for limits on the reach of the federal government's power over the states. Blackmun was not the Tenth Amendment adherent Rehnquist was, but he nonetheless acknowledged that "[w]e have emasculated state operations exceedingly in the past . . . . Does the Tenth Amendment have any meaning at all? If we affirm here it has comparatively little meaning."[89] Blackmun was also not especially persuaded by the government's argument for the necessity of the FLSA amendments. His clerk's bench memo noted that several states supported the FLSA out of a "race-to-the-bottom" concern that interstate rivalry and competition could prevent individual states from adequately protecting their own employees. Blackmun skeptically wrote in the margins: "How?"[90] As he wrote in a memorandum to the Conference shortly before oral arguments, "[I]t would not disturb me too much to have State employees' wages on a slightly lower level than those in private enterprise."[91] Justice Powell put it even more clearly in his memo to the Court before conference: "[M]ore than a third of a century has passed since FLSA was enacted . . . . I know of no finding that this regulation is necessary—at this late date—to effectuate the basic objectives of the Act."[92] Blackmun was also concerned about the practical consequences of the Court's decisions. In preparing for oral argument, Blackmun sought to understand the fiscal impact of *Wirtz* on state and local governments, and whether this impact "really interfered with the states' sovereignty."[93]

Ultimately, Blackmun determined that the only way for the Court to maintain the proper balance between the federal government and the states was to overrule *Wirtz*. Nevertheless, Blackmun stated at conference that he

---

86. Telephone Interview with Mark Rahdert, October Term 1982 Clerk to Justice Harry A. Blackmun, U.S. Supreme Court (Nov. 18, 2014).

87. *Id.*

88. *Id.*

89. *See* Blackmun, *supra* note 56.

90. Memorandum from Karen Nelson Moore, Clerk, U.S. Supreme Court, to Justice Harry A. Blackmun 2 (Apr. 11, 1975) (on file with Harry A. Blackmun Papers, Box 217, Folder 74-879).

91. *See* Blackmun, *supra* note 56, at 7.

92. Powell, *supra* note 1, at 4.

93. Memorandum from Karen Nelson Moore to Justice Harry A. Blackmun, *supra* note 90, at 7.

would not want to write the decision,[94] suggesting that he, like the Chief Justice, could not precisely articulate his legal theory. With four votes to overrule *Wirtz*, the members of the emergent majority – the Chief Justice and Justices Powell, Rehnquist, and Blackmun – picked up Justice Stewart, who was willing to join them in overturning both the FLSA amendments and the *Wirtz* precedent upon which the government had relied.[95] The Tenth Amendment would live again, and – for the first time since the famous federalism confrontations of the New Deal – the Court would strike down a federal law enacted under Congress's Commerce Clause powers.

D. A Decision in Search of a Doctrine

Although Justice Blackmun was confident in his preferred outcome, he remained unsure how to articulate the rationale. A close examination of Blackmun's papers suggests that his unusual concurrence in *Cities* was influenced by his clerk, who insisted that Justice Rehnquist's majority opinion had troubling implications. Blackmun vacillated between his disagreement with Rehnquist's reasoning and his desire to support Rehnquist's outcome. Despite Blackmun's willingness to join the majority in overruling *Wirtz*, his skepticism grew as the case came closer to a decision, especially when Rehnquist circulated an early draft.

Although Rehnquist devoted much of his opinion to the real-world costs the FLSA might impose on state services – concerns that motivated Blackmun to join the majority in the first place – Rehnquist's opinion also went much further. Rehnquist categorically rejected Congress's ability to "displace the States' freedom to structure integral operations in areas of traditional governmental functions."[96] Far from carefully balancing federal and state interests, Rehnquist seemed to articulate a per se rule that would reject nearly any federal displacement of the states in areas that were traditionally state-government functions. Although Rehnquist recognized "attributes of sovereignty attaching to every state government which may not be impaired by Congress," he made little effort to explain what these attributes might be, or how one might identify them.[97] This would ultimately prove fatal to the long-term viability of *Cities*.

---

94. *See* Blackmun, *supra* note 73.

95. *Id.*

96. Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976).

97. *Id.* at 845. Apart from the setting of salaries and overtime policies of state employees, Rehnquist provided only one other example of such an attribute of sovereignty: the power to seat a state's capital. *Id.*

Blackmun agreed with Rehnquist that Congress went too far with the FLSA, but his reasons were narrower, focusing on the difference between "Congress telling the states you *must* [as in *Cities*], versus telling the states you *must not* [as in *Fry*]."[98] Justice Blackmun's clerk on the case, William H. Block, prepared a bench memo for the Justice arguing that Rehnquist's opinion was "legally wrong and [would] create serious problems for the Court in future cases."[99] Block argued that Rehnquist's traditional governmental functions approach would effectively reinstate the governmental/proprietary distinction that had fared poorly in several federal tax immunity cases before being discarded in *New York v. United States* in 1946.[100] According to Rehnquist's reasoning, Block argued, even if a hospital were discharging harmful waste into interstate waters, the federal government could not regulate it on account of the state hospital's "governmental" function.[101] Block noted the problems that would arise in attempting to identify whether the provision of mass transit was clearly a government function,[102] foreshadowing the issues in *United Transportation Union v. Long Island Railroad Co.* and *Garcia v. San Antonio Metropolitan Transit Authority* that would ultimately cause the Court—led by Blackmun—to overturn *Cities*.

Blackmun was uneasy with aspects of Rehnquist's majority opinion, but found Brennan's strident dissent even less appetizing. Observing this, Block urged Blackmun to write a special concurrence.[103] Blackmun was interested, but initially wondered how to distinguish his position. Block pushed Blackmun to repudiate Rehnquist's governmental/proprietary distinction, which the Court had rejected in *New York* and in another case, *United States v.*

98. Justice Harry A. Blackmun, Handwritten Notes in Nat'l League of Cities v. Usery (on file with Harry A. Blackmun Papers, Box 217, Folder 74-879).

99. Memorandum from William H. Block, Clerk, U.S. Supreme Court, to Justice Harry A. Blackmun 1 (May 11, 1976) (on file with Harry A. Blackmun Papers, Box 217, Folder 74-879).

100. *Id.* at 7 ("I note that Justice Stone, in *Gerhardt*, declared that there were two circumstances under which there would be no tax immunity: 1) where the state is engaged in a 'proprietary' as opposed to a 'governmental' function . . . . The 'governmental/proprietary' distinction was rejected by seven justices (including Justice Stone) in *New York v. United States*, 326 U.S. 572 (1946)."). Block noted that the Court in *New York* had concluded that the distinction was "too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion." *Id.* at 8-9 (quoting New York v. United States, 326 U.S. 572, 580 (1946)).

101. *Id.* at 16.

102. *Id.*

103. *Id.* at 20-22.

California.[104] These cases, Block argued, supported a balancing approach in assessing whether the federal government's interests outweighed the impact of the law on the states.[105]

Nevertheless, while Rehnquist's per se rule was perhaps too sweeping, it at least supported the decision to overturn *Wirtz*. As Block told Blackmun, relying on a balancing test to *reject* the application of the FLSA to the states would be more difficult here, since "the interference with the state is not very drastic . . . . [T]he 'intrusion' comes down simply to increased costs."[106] Knowing that Blackmun was firmly wedded to preserving a broad role for the federal government in environmental regulation,[107] Block was careful to note that it would be difficult to "write such an opinion [relying on a balancing test approach] and still preserve federal options such as environmental regulation of state facilities."[108]

Justice Blackmun's papers include several discarded drafts of his concurrence in *Cities*. Blackmun's original draft attempted to explain more fully how the balance in this case favored the states.[109] Yet he eventually cut much of it, and with each draft, Blackmun's concurrence became shorter and vaguer. His original draft echoed Justice Powell's statement at conference[110]: "I regard this as one of the most important constitutional cases that have come to the Court in recent years."[111] Perhaps because Blackmun was concerned that this would extend the reach of Rehnquist's opinion, he dropped this language. Another draft ended with an attempt to speculate as to a limiting principle: "Perhaps, although I am not now certain, the distinction is that between federal legislation that says to the states 'thou shalt' and federal legislation that

---

104. *Id.*; *see also New York*, 326 U.S. at 583 ("[W]e decide enough when we reject limitations upon the taxing power of Congress derived from such untenable criteria as 'proprietary' against 'governmental' activities of the States . . . ."); United States v. California, 297 U.S. 175, 183 (1936) ("[W]e think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity.").

105. *See* Memorandum from William H. Block to Justice Harry A. Blackmun, *supra* note 99, at 7-10.

106. *Id.* at 19.

107. *See* Telephone Interview with Mark Rahdert, *supra* note 86.

108. Memorandum from William H. Block to Justice Harry A. Blackmun, *supra* note 99, at 20.

109. Justice Harry A. Blackmun, First Draft Concurrence in Nat'l League of Cities v. Usery 1 (on file with Harry A. Blackmun Papers, Box 217, Folder 74-878).

110. *See* Justice Harry A. Blackmun, Conference Notes in Nat'l League of Cities v. Dunlop (Mar. 5, 1976) (on file with Harry A. Blackmun Papers, Box 217, Folder 74-878).

111. *See* Blackmun, *supra* note 109.

says 'thou shalt not.'"[112] This too was omitted in the final version. An even later draft stated that Blackmun could not agree with the reasoning of the majority opinion "insofar as it treats the federal interest as irrelevant . . . . I can read the opinion as a whole only as announcing an absolute ban on federal interference with aspects of 'state sovereignty'; and I must disagree."[113] For whatever reason, Blackmun cut this too, perhaps because it would be difficult to retain this language yet nevertheless join the majority.

Ultimately, Blackmun declined to elaborate on his views and provided a terse, one-paragraph concurrence stating simply that, on the basis of a balancing test, in this particular case, he agreed with the majority:

> The Court's opinion and the dissents indicate the importance and significance of this litigation as it bears upon the relationship between the Federal Government and our States. Although I am not untroubled by certain possible implications of the Court's opinion – some of them suggested by the dissents – I do not read the opinion so despairingly as does my Brother Brennan. In my view, the result with respect to the statute under challenge here is necessarily correct. I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential. With this understanding on my part of the Court's opinion, I join it.[114]

In response to Blackmun's invocation of the balancing test rationale, Brennan chose to amend his dissent, adding a paragraph criticizing the balancing-test approach as "a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to the Congress."[115] Brennan appeared to be invoking the process federalism arguments of Herbert Wechsler, the renowned Columbia Law School professor whose federal courts textbook remains – more than sixty years after its

---

112. Justice Harry A. Blackmun, Draft Concurrence in Nat'l League of Cities v. Usery 1-2 (on file with Harry A. Blackmun Papers, Box 217, Folder 74-878). The quoted material has been crossed out in pencil, likely indicating Blackmun's decision to eliminate this phrasing. *Id.*

113. Justice Harry A. Blackmun, June 1976 Draft Concurrence in Nat'l League of Cities v. Usery 1 (on file with Harry A. Blackmun Papers, Box 217, Folder 74-878).

114. Nat'l League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring) (internal citation omitted).

115. Memorandum from Justice William J. Brennan, Jr. for Conference in Nat'l League of Cities v. Usery (June 22, 1976) (on file with William J. Brennan Papers, Box I:381, Folder 74-878).

publication—among the most influential casebooks in American legal education.[116] Wechsler believed that Congress, not the courts, was best situated to calibrate the balance between the states and the federal government. In his classic article *The Political Safeguards of Federalism*, Wechsler concluded that since Congress was composed of representatives from individual states, "Congress rather than the Court . . . on the whole is vested with the ultimate authority for managing our federalism."[117] While Wechsler's "process federalism"[118] argument did not prevail in *Cities*, it would later carry the day in *Garcia*, with Blackmun as its reformed flag bearer.[119]

Cities created an immediate uproar among constitutional-law scholars. Many law review articles fretted over *Cities*'s meaning, its immediate consequences, and its potential impact on future federal laws.[120] Scholars were quick to note that *Cities* "upse[t] previous notions of the federal-state relationship" by articulating, for the first time, a state sovereignty limitation on Congress's Commerce Clause power.[121] As one law professor put it at the time, "Without a doubt the decision will be roundly condemned by constitutional scholars."[122] Another professor similarly criticized the decision, calling state

---

116. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953). The casebook is now in its seventh edition. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th ed. 2015).

117. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 560 (1954).

118. *See* William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 147-48 (1998).

119. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 (1985) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power. The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation.").

120. *See, e.g.*, Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1194 (1977) ("Analyzed to the bottom, the *NLC* decision proves insupportable except as it depends on a perception that 'states as states' under the Constitution are imbued with affirmative duties towards their citizens."); Billups P. Percy, National League of Cities v. Usery*: The Tenth Amendment Is Alive and Doing Well*, 51 TUL. L. REV. 95, 106-07 (1976) (describing *Cities* as a "momentous" decision that recognized significant autonomy for states as "indispensable to the genius of our federal system"); Laurence H. Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1076 (1977) (arguing that in *Cities*, the Court provided the states with leeway to afford their citizens basic government services guaranteed by the Constitution).

121. William J. Kilberg & Linda Batchelder Fort, National League of Cities v. Usery*: Its Meaning and Impact*, 45 GEO. WASH. L. REV. 613, 617 (1977).

122. Barber, *supra* note 30, at 164.

sovereignty, "[l]ike Hamlet's father, . . . a ghost that refuses to remain in repose. . . . The evil that may be done by raising the ghost of state sovereignty may . . . outlive the immediate decision of the Court."[123] The decision also received considerable attention in the popular press, and a number of the Justices paid attention, as their files show. Several, including Justice Brennan, kept newspaper articles on *Cities* in their files.[124]

The doctrinal furor prompted leading constitutional law scholars Frank Michelman and Laurence Tribe to pen twin essays in the *Yale Law Journal* and *Harvard Law Review*, respectively. Both sought to use *Cities* for their own ends. Tribe admitted he made "no claims about what the Justices intended or 'really had in mind'" and "doubt[ed] that the conclusion of this Article" was what the Justices sought to achieve.[125] Nevertheless, both his article and Michelman's were attempts to "enlist that logic [of *Cities*]"[126] for purposes of their own, arguing that *Cities* could be used to support a claim for enhanced personal rights under the Constitution.

Both provided creative interpretations of *Cities*. Since *Darby* had permitted the FLSA's application to private employers in the states, Michelman argued that the only way to square *Darby* and *Cities* was to recognize the crucial difference between private employers and states and municipalities; the latter provide essential public services to citizens that Congress may not impair through federal laws.[127] If so, then "states as states" under the Constitution may have affirmative duties toward their citizens.[128] Tribe followed a similar logic to conclude that if the Court was protecting the states because they provide basic government services to citizens, then by that constitutional logic, Congress could intervene to provide such services directly if and when the states fell short.[129] The fact that Tribe and Michelman could seize on *Cities* and use it to promote what Tribe called "a just constitutional order" suggests both the degree of uncertainty created in the wake of the Court's decision and the muddiness of its reasoning.

---

123. Bernard Schwartz, National League of Cities v. Usery—*the Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115, 1115, 1134 (1978).

124. *See, e.g.*, Editorial, *The Revival of States Rights*, WASH. POST, July 2, 1976, at A22 (on file with William J. Brennan Papers, Box I:381, Folder 74-878-1); Lesley Oelsner, *The Diminishing Right To Fight City Hall in Court*, N.Y. TIMES, Apr. 11, 1976 (on file with William J. Brennan Papers, Box I:381, Folder 74-878-1).

125. Tribe, *supra* note 120, at 1066.

126. *Id.*

127. Michelman, *supra* note 120, at 1194.

128. *Id.*

129. Tribe, *supra* note 120, at 1076, 1103.

Today, with the benefit of forty years' hindsight and the release of some of the Justices' papers, we have a far better understanding of what "the Justices intended or 'really had in mind.'"[130] While one set of commentators at the time concluded that "[u]nfortunately, the Court fails to articulate clearly the new balance between federal and state powers,"[131] we now know this was because members of the Court were as uncertain about this balance as the scholars trying to divine it from *Cities*.

II. A DOCTRINE IN DISREPAIR: *HODEL, LONG ISLAND RAILROAD, FERC V. MISSISSIPPI & EEOC V. WYOMING* (1981-83)

Looking back on *Cities*, Susan Bloch and Vicki Jackson recently concluded that *Cities*'s "divided opinions foreshadowed almost a decade of disagreement about how to apply [it]."[132] This Note in part challenges that account. For all of *Cities*'s supposed significance, the Court never once relied on *Cities* to overturn a federal law, seemingly beating a near-constant retreat from it. Far from disagreeing on how to apply *Cities*, the Court's decisions during this period appear to be a concerted exercise in *avoiding* its application altogether.

While most scholars focus on *Garcia*'s explicit repudiation of *Cities* nine years later, Justice Rehnquist's pro-states coalition never really gained traction in the first place. Justice Blackmun's papers and notes show the Court scaling back *Cities* at every turn as it struggled to apply the "traditional governmental functions" analysis to real-world cases. Curiously, in the first two cases in which the Burger Court had the opportunity to apply its *Cities* holding, even the conservative, pro-states members of the Court endorsed the expansion of federal law. This was in part, I argue, because *Cities*'s traditional governmental functions test presented probusiness, pro-states conservatives with a catch-22: either deny the viability of private alternatives to public programs by deeming them "traditional governmental functions," or stand by and permit the expansive reach of the federal government.

A. Hodel, Long Island Railroad, *and the Dysfunction of the Traditional Governmental Functions Test*

The pattern of retreat began in the very first major federalism case to come before the Court after *Cities*: *Hodel v. Virginia Surface Mining & Reclamation*

130. *Id.* at 1066.

131. Kilberg & Fort, *supra* note 121, at 617.

132. SUSAN LOW BLOCH & VICKI C. JACKSON, FEDERALISM: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 183 (2013).

Ass'n.[133] The 1981 case concerned the reach of the federal government to regulate coal mining. In *Hodel*, the Court avoided applying *Cities* by recharacterizing its holding as establishing a three-part test. To invalidate Congress's actions as a violation of the Tenth Amendment, the Court stated that challenged legislation must (1) regulate the "States as States"; (2) "address matters that are indisputably 'attribute[s] of state sovereignty'"; and (3) directly impair the states' ability "to structure integral operations in areas of traditional governmental functions."[134] Even then, the Court noted, a Tenth Amendment challenge would not succeed if "the nature of the federal interest advanced may be such that it justifies state submission."[135]

This proviso effectively articulated the balancing test to which Blackmun had alluded so vaguely in his *Cities* concurrence, but which no other member of the Court seemed to support at the time.[136] Like his concurrence, the proviso provided no explanation as to how a court might weigh such competing factors. Strikingly, the Court voted unanimously to uphold the federal law in *Hodel*. Even Justice Rehnquist, the author of *Cities*, joined. In subsequent federalism cases, the Court would read *Hodel* as essentially superseding *Cities* and elevating the standard states had to satisfy to prove a Tenth Amendment violation—a standard the states would not once meet before the Court explicitly overturned *Cities* in *Garcia*.

The year after *Hodel*, the Court once again unanimously upheld a federal law challenged on federalism grounds in *United Transportation Union v. Long Island Railroad Co.*[137] This case involved employees of a state-owned railroad who sought to strike under the federal Railway Labor Act. The Court concluded that the operation of a railroad engaged in interstate commerce was not a traditional governmental function in part because the railroad in question had been acquired by the state only sixteen years prior to the litigation. The Court therefore held that the federal law did not impair the states' ability to structure integral operations in areas of traditional governmental functions under the third prong of the *Cities-Hodel* three-part test.[138]

Justice Blackmun's clerks remember the Court struggling to agree on even a basic definition of a "traditional governmental function." Harold Koh, former Dean and Sterling Professor of Law at Yale Law School and a clerk to Justice Blackmun during October Term 1981, recalled an amusing debate over

133. 452 U.S. 264 (1981).

134. *Id.* at 287-88 (quoting Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)).

135. *Id.* at 288 n.29.

136. *Cities*, 426 U.S. at 856 (Blackmun, J., concurring).

137. 455 U.S. 678 (1982).

138. *Id.* at 684-86.

"traditional governmental functions" during oral argument in *Long Island Railroad*. The State tried to convince the Court that local transportation, including subways, was a critical government function.[139] A geographic divide emerged, with Justices from the West reacting skeptically to the claim that a city should be expected to provide subway and light rail services, let alone ones that crossed state borders. To them this was a foreign concept, whereas to the Justices and clerks from the East Coast, the idea of New York City *not* providing a subway system seemed equally absurd.[140]

Long Island Railroad revealed another tension in the traditional governmental functions test: it created an analytic wedge between conservatives favoring private enterprise and those favoring limits on the federal government. To protect the states, the *Cities* test required sanctifying as "governmental" activities that could, at least in theory, have viable private-sector alternatives such as railroads, hospitals, and schools. At oral argument, counsel for the railroad tried to put forward a test of "public dependen[cy]"[141] under which "the economy and the social well-being of the City of New York . . . collapses if we don't have public transit."[142] For a libertarian, the *Cities* test created a dilemma: to protect federalism, one had to sacrifice small government positions and disavow the viability of free-market alternatives. It also required arguments implausible on their face: federalism proponents in *Long Island Railroad* were forced to argue that the railroad was an essential *governmental* function even though it had been operated by a private corporation until 1966, a mere sixteen years earlier. That argument, in turn, led to an uncomfortable reality: the more it could be shown that the market could provide effective alternatives, the fewer "traditional governmental functions" would remain to be protected by *Cities* and keep federal regulators at bay.

It is perhaps not surprising, then, that Chief Justice Burger eagerly dispensed with the idea that railroads were a "traditional" governmental function in *Long Island Railroad*. Nor is it especially surprising that Justice Powell would join him, given Powell's commitment to free enterprise and his experience as an advocate on behalf of private businesses resisting the expanding reach of the state.[143] The Chief Justice, writing for the Court,

---

139. Oral Argument at 55:00, United Transp. Union v. Long Island R.R. Co., 455 U.S. 678 (1982) (No. 80-1925), http://www.oyez.org/cases/1980-1989/1981/1981_80_1925#transcript-text55239 [http://perma.cc/QXD2-PETW].

140. Interview with Harold Hongju Koh, October Term 1981 Clerk to Justice Harry A. Blackmun, U.S. Supreme Court, in New Haven, Conn. (Nov. 21, 2014).

141. Oral Argument, *supra* note 139, at 53:23.

142. *Id.* at 54:42.

143. *See* A.C. Pritchard, *Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws*, 52 DUKE L.J. 841, 853 (2003); *see also infra* note 192 and accompanying text.

dispatched with the problem by rejecting "a static historical view of state functions,"[144] essentially denying that *Cities*'s central inquiry was the vintage of the state activity. Instead, he wrote, the proper test was whether the federal regulation affected "basic state prerogatives."[145] The problem, however, was that since railroads had been operated privately for over a century, a "basic state prerogative" could be disproven simply by pointing to the ready availability of privately operated alternatives. While Chief Justice Burger's explanation resolved the immediate issue in *Long Island Railroad*, it presaged *Cities*'s troubled nonapplication in other Burger Court federalism cases to come.

B. FERC v. Mississippi*: O'Connor Foreshadows the "New Federalism"*

The difficulty of applying *Cities* became even more apparent in subsequent terms, when the Court was confronted with additional federalism challenges in *Federal Energy Regulatory Commission v. Mississippi* (*FERC*)[146] in 1982 and *Equal Employment Opportunity Commission v. Wyoming* (*EEOC*)[147] in 1983. The Justices consistently wrestled with their positions and the practical consequences of their decisions. Moreover, archival materials from *FERC* reveal how open-minded many of the Justices were—even after oral argument—while the papers for *EEOC* evince the Justices' concern with the real-world outcomes of these often-abstract legal disputes.

FERC was a particularly complex case involving provisions of the Public Utility Regulatory Policies Act (PURPA). The provisions in question permitted the Federal Energy Regulatory Commission to exempt certain power facilities from state laws and regulations, mandated that state commissions procedurally consider certain federal regulations, and required state commissions to implement the Federal Energy Regulatory Commission's procedural rules when settling disputes arising under the statute.[148]

The majority coalition in *FERC* shifted substantially in the months before the decision was handed down. What began as a seemingly solid seven-two majority turned into a narrow five-four decision. In hindsight, *FERC* stands out as an example of a case in which seemingly resolute majority and

144. *Long Island R.R.*, 455 U.S. at 686.

145. *Id.* at 686-87.

146. 456 U.S. 742 (1982).

147. 460 U.S. 226 (1983).

148. *FERC*, 456 U.S. at 747 ("PURPA requires each state regulatory authority and nonregulated utility to *consider* the adoption of a second set of standards . . . ." (emphasis added) (citation omitted)).

dissenting coalitions were, at least at first, far more ambivalent behind the scenes than their published opinions suggested. The certainty evinced by the opinions was the result of debate, dueling drafts, and shifting alliances. Even as *Cities*'s traditional governmental functions doctrine fell into disrepair, new arguments in favor of the states were being developed by the newest Justice on the Court – and President Reagan's first nominee – Sandra Day O'Connor.

In dissent, Justice O'Connor would ultimately throw down the gauntlet on behalf of the states. Her opinion would presage the Rehnquist Court's "new federalism" decisions of the 1990s, including the anticommandeering and anticoercion principles she would later articulate in *New York v. United States*.[149] O'Connor's opinion was also noteworthy because *FERC* was the first federalism case since Justice O'Connor replaced Stewart on the Court. Stewart had been a reliable vote for the states in federalism cases like *Wirtz* and *Cities*. But O'Connor, a former Arizona state representative and elected state appellate court judge, was an even more unabashed champion of state sovereignty and skeptic of federal intervention in state affairs.[150] Koh, who clerked the year *FERC* was decided, speculated that O'Connor may have chosen *FERC* as a means to establish herself in her first term on the Court.[151]

At conference, even those members of the Court more sympathetic to the states, such as the Chief Justice and Justice Powell, were unsure what to make of the challenge.[152] Initially, the Chief Justice "tentatively" said he would find the procedural requirements unconstitutional but the substantive ones within Congress's permissible powers[153]: he "would give Congress a wide scope in problems of this kind,"[154] but was "less sure about the imposed procedural requirements."[155] Over the course of the discussion, however, he seemed to come around to reversing across the board, finding all provisions constitutional.[156]

---

149. 505 U.S. 144 (1992).

150. For more on Justice O'Connor's views on federalism and state sovereignty, see Erwin Chemerinsky, *Justice O'Connor and Federalism*, 32 MCGEORGE L. REV. 877 (2001).

151. *See* Interview with Harold Hongju Koh, *supra* note 140.

152. The discussion of the conference is drawn from the notes of Justices Blackmun and Powell. *See* Justice Harry A. Blackmun, Conference Notes in FERC v. Mississippi (Jan. 22, 1982) (on file with Harry A. Blackmun Papers, Box 352, Folder 80-1749); Justice Lewis F. Powell, Jr., Conference Notes in FERC v. Mississippi (Jan. 22, 1982) (on file with Lewis F. Powell, Jr., Papers, Folder 80-1749).

153. Powell, *supra* note 152.

154. Blackmun, *supra* note 152.

155. *Id.*

156. Powell, *supra* note 152.

One question was how to deal with the fact that Congress could have easily preempted state regulation in this area. Justice Brennan voted to uphold on the basis that Congress could have preempted the states entirely—and so mandating mere consideration of certain federal prerogatives was less intrusive by comparison.[157] Yet Congress had never preempted the states in this area, Justice Powell noted, and he wondered whether this omission was telling.[158] Powell was hesitant to overturn the law: "Do I have the nerve to say Congress doesn't have this power?"[159] He decided to uphold the substantive requirements of PURPA but sustain the district court's rejection of its procedural requirements. While Justice White was more hesitant than Brennan, noting that the procedural requirements were new territory for the Court, he nonetheless voted to uphold the law, as did Justice Marshall.[160] Justice Stevens would vote to uphold all of PURPA, also pointing to Congress's uncontested ability to preempt the states' laws entirely.[161]

Justice Blackmun, like Justice Burger and Justice Powell, was ambivalent about the constitutionality of PURPA's procedural requirements, stating that he could reverse "across the board, I guess."[162] Nevertheless there seemed to be a growing consensus that the substantive requirements were a permissible exercise of Congress's power. According to former Blackmun clerk Rahdert, Blackmun had always been more amenable to state power in the regulation of energy and environmental concerns (the concerns raised in *FERC*) than in employment law (the issue in *Cities*).[163] Even Rehnquist, the ardent defender of states in *Cities*, concluded that Congress could preempt the states in energy matters since the law was of national necessity; he would sustain it on that basis, citing *Fry*. But he, too, was skeptical of the procedural requirements.[164]

Last was the Court's newest member, Justice O'Connor. She agreed that the Commerce Clause supported PURPA, but thought it raised "extremely serious questions" under the Tenth Amendment.[165] Justice O'Connor described at length how legislation might "impair state functions," prompting Justice Blackmun to write that "the State Legislator is speaking" in his conference

157. Blackmun, *supra* note 152.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *See* Telephone Interview with Mark Rahdert, *supra* note 86.

164. Blackmun, *supra* note 152.

165. *See id.*

notes.[166] She concluded that the procedural requirements of PURPA were unconstitutional because they directly commanded state commissioners—who acted in both legislative as well as judicial capacities—and "Congress should have no power to determine priorities and procedures of state legislative power."[167] This was an early articulation of what she would ultimately develop as the anti-commandeering doctrine a decade later in *New York*.[168] She accordingly voted to permit the substantive requirements but find PURPA's procedural portions unconstitutional.

Thus, the Court appeared to agree unanimously that the substantive portions of PURPA should be upheld, but the vote on the procedural portions remained unsettled. The Chief Justice assigned the opinion to Blackmun. Blackmun's majority opinion would uphold the procedural provisions, but it was not yet clear who would comprise this majority. O'Connor and Powell were dead set against the procedural provisions, but several others, including Burger and Rehnquist, were hesitant—as the papers reveal, both would eventually flip, persuaded by Justice O'Connor's fervent dissent.

Blackmun's papers in the case at times provide evidence of discarded arguments. As Blackmun drafted the majority opinion in *FERC*, his papers suggest that he wanted to draw on Wechsler's political safeguards of federalism argument. Blackmun had asked one of the Supreme Court's librarians, Penny Hazelton, to research the voting history of PURPA, especially how members of the Mississippi delegation had voted.[169] Hazelton reported that both of Mississippi's senators and two of its five House members had voted against the Act.[170] Given the Mississippi delegation's apparent lack of enthusiasm for PURPA, Blackmun seems to have thought better of this process-federalism point, as he did not mention the delegation's position, nor Wechsler's political-safeguards argument, in his final opinion.[171] Nevertheless, Blackmun would not abandon the argument indefinitely, and it emerged as a central reason for his decision to overturn *Cities* in *Garcia*.

---

166. *Id.*

167. Powell, *supra* note 152.

168. New York v. United States, 505 U.S. 144 (1992).

169. *See* Memorandum from Penny Hazelton, Librarian, U.S. Supreme Court, to Justice Harry A. Blackmun (on file with Harry A. Blackmun Papers, Box 352, Folder 80-1749).

170. *Id.*

171. I contacted Hazelton to inquire as to whether Justice Blackmun had explained his reasons for requesting the votes of the Mississippi congressional delegation. Hazelton responded that he had provided no explanation. This reasoning is educated guesswork on my part. *See* E-mail from Penny A. Hazelton, Professor & Senior Assoc. Dean for Library and Tech. Servs., Univ. of Wash. Sch. of Law, to author (Dec. 22, 2014, 11:21 AM PST) (on file with author).

The Justices' papers also provide a fuller picture of what each member of the Court thought about a decision, including changes of both opinion and position. Unless a Justice drafts a separate concurrence, the Court's official documents will never reveal the exact reasons each Justice found most persuasive. In *FERC*, however, both Blackmun's majority opinion and O'Connor's dissent evolved through back and forth with their colleagues, a dialogue revealed in the files. When O'Connor told the other Justices that she intended to circulate a dissent,[172] Powell and Rehnquist said that they would read it before committing their votes either way.[173] Her opinion – concurring in part (over the substantive provisions) and dissenting in part (over the procedural requirements) – famously began with a bang: "State legislative and administrative bodies are not field offices of the national bureaucracy."[174] O'Connor criticized Blackmun's reasoning in an opinion that would presage the federalism holdings of the Court in subsequent cases like *New York*. She drew heavily on her own background in state politics, which showed in her emphasis on the complex and nuanced roles played by state commissioners. For Justice O'Connor, the PURPA provisions in *FERC* impaired state sovereignty more than the FLSA amendments in *Cities*. As O'Connor noted, the PURPA provisions "regulate[d] the States as States," not as employers similarly situated to private employers as in *Cities*.[175] O'Connor pushed further: the federal government setting state agency agendas was equivalent in its injury to state sovereignty as mandating that state legislatures debate bills drafted by congressional committees.[176] Such a "dismemberment of state government" simply could not be permitted under the Tenth Amendment.[177]

Blackmun fired back, revising his opinion to add that O'Connor's account included "apocalyptic observations" that were "overstated and patently inaccurate."[178] Other members of the Court were more receptive to O'Connor's

172. Letter from Justice Sandra Day O'Connor to Justice Harry A. Blackmun (Feb. 16, 1982) (on file with Harry A. Blackmun Papers, Box 351, Folder 80-1749).

173. Letter from Justice Lewis F. Powell, Jr. to Justice Harry A. Blackmun (Feb. 16, 1982) (on file with Harry A. Blackmun Papers, Box 351, Folder 80-1749); Letter from Justice William H. Rehnquist to Justice Harry A. Blackmun (Feb. 17, 1982) (on file with Harry A. Blackmun Papers, Box 351, Folder 80-1749).

174. *FERC*, 456 U.S. 742, 777 (1982) (O'Connor, J., concurring in part and dissenting in part). O'Connor's opening line has been widely quoted and even inspired the title of a frequently cited law review article on federalism. *See* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993).

175. *FERC*, 456 U.S. at 779-80.

176. *Id.* at 781.

177. *Id.* at 782.

178. *Id.* at 769 n.32 (majority opinion).

opinion, however, including the Chief Justice. He wrote that O'Connor had "persuade[d]" him that "the Court goes too far."[179] Burger had originally joined the majority in *FERC* and assigned the opinion to Blackmun; the irony of Burger's switch did not escape Blackmun, who wrote on the margins of Burger's memorandum announcing his switch, "[y]et he assigned the case."[180] Powell was more restrained in his enthusiasm, concluding that while he agreed "with much" of what O'Connor had written, he was "not entirely at rest" and would write separately too.[181] Rehnquist also joined O'Connor's dissent and thus the newest Justice had whittled Blackmun's majority upholding the constitutionality of the procedural provisions to the minimally necessary five.[182]

Although a single Justice is selected to write for the majority coalition, as Justice Blackmun learned in *FERC*, there is no guarantee the author's ultimate conclusions will satisfy every member of the majority—or retain them. *FERC* also reflects the fact that today's dissent can become tomorrow's majority: as I discuss below, Justice O'Connor's position in *FERC* would ultimately prevail before the Rehnquist and Roberts Courts.

C. EEOC v. Wyoming: *A Federalism Doctrine Impaired*

Thrice in two years, the Court faced Tenth Amendment challenges to Congress's Commerce Clause powers, and thrice it upheld the federal law. Although *Garcia* is often perceived as a dramatic breaking point from *Cities*, the cases that came before it—and the Justices' refinements in applying *Cities*—show that it never really had much significance.[183] This is perhaps most clearly

179. Memorandum from Chief Justice Warren E. Burger for Conference in FERC v. Mississippi (Apr. 13, 1982) (on file with Harry A. Blackmun Papers, Box 351, Folder 80-1749).

180. *Id.*

181. *See* Letter from Justice Lewis F. Powell, Jr. to Justice Sandra Day O'Connor (Apr. 12, 1982) (on file with Harry A. Blackmun Papers, Box 351, Folder 80-1749). For Powell, the importance of state control over state judicial procedure extended to the other organs of state government, and PURPA's requirements simply intruded too far into the core of the states' administrative and judicial procedures. *FERC*, 456 U.S. at 772-75 (Powell, J., concurring in part and dissenting in part).

182. Letter from Justice William H. Rehnquist to Justice Sandra Day O'Connor (Apr. 13, 1982) (on file with Harry A. Blackmun Papers, Box 351, Folder 80-1749).

183. Not everyone overlooked this decision, however. For example, Greenhouse, writing in the *New York Times*, presciently noted that the majority in *EEOC* had "effectively overruled, albeit not in so many words," *Cities*. Linda Greenhouse, *Age Bias Held Binding on State Governments*, N.Y. TIMES (Mar. 3, 1983), http://www.nytimes.com/1983/03/03/us/age-bias-law-held-binding-on-state-governments.html [http://perma.cc/X87P-EU6G].

illustrated in *EEOC*,[184] where the Court, led by *Cities* dissenter Justice Brennan, amicably applied *Cities* and yet once more upheld the federal law against the States.

The legal challenge in *EEOC* was much closer to the core question raised in *Cities* than the challenges in *Hodel*, *Long Island Railroad*, and *FERC*. As with *Cities*, *EEOC* concerned a federal law that applied to employees and employers regardless of whether they were public or private. Bill Crump, a Wyoming State fish and game warden, had reached the age of fifty-five and was forced to retire due to Wyoming's mandatory retirement policy for fish and game wardens. Crump contacted the EEOC, which sued on his behalf, alleging violation of the Age Discrimination in Employment Act (ADEA).[185] The district court ruled against him, holding that the Tenth Amendment limited Congress's reach over the states' hiring practices for game wardens. Ignoring the Court's momentum away from *Cities* in *Hodel*, *Long Island Railroad*, and *FERC*, the district court determined that *Cities* was "not narrowly limited": "[a] thoughtful reading of the case as well as the furor in academic circles created by the decision discloses that."[186]

Blackmun's papers on *EEOC* provide a stark contrast with this understanding of *Cities*. One of Blackmun's clerks wrote to him, "Your concurring opinion in *National League of Cities* flagged your view from the start that the case should not have been considered 'the battle standard of the "new federalism,"' but instead announced a very limited doctrine."[187] At conference, talk focused on the possible real-world effects of the law. Brennan and Powell were particularly concerned with this question.[188] Brennan felt that the effects of the ADEA's application to the states' hiring practices were overblown.[189] After all, Brennan argued, the state's interest in competence would be preserved by the carveout for "bona fide occupational qualifications" (BFOQ) and the right of the state to appeal individual cases in which game wardens were not fit to serve after retirement age.[190]

184. 460 U.S. 226 (1983).

185. EEOC v. Wyoming, 514 F. Supp. 595, 596 (D. Wyo. 1981), *rev'd*, 460 U.S. 226 (1983).

186. *Id.* at 598.

187. Letter from David Ogden, Clerk, U.S. Supreme Court, to Justice Harry A. Blackmun 1-2 (Mar. 15, 1983) (on file with Harry A. Blackmun Papers, Box 368, Folder 81-554-2).

188. The discussion of the conference is drawn from Justice Blackmun's conference notes. *See* Justice Harry A. Blackmun, Conference Notes in EEOC v. Wyoming (Oct. 8, 1982) (on file with Harry A. Blackmun Papers, Box 368, Folder 81-554-2).

189. *Id.*

190. *Id.*

Powell was more inclined to view the case from the perspective of employers.[191] He had been a corporate lawyer prior to taking the bench, and had authored what became known as the "Powell Memorandum," which encouraged corporations to take a more active role in lobbying, litigation, and policy formation.[192] Powell argued that the ADEA's financial and hiring impact would be substantial.[193] He rejected Brennan's suggestion that the BFOQ process provided an effective carveout, and he predicted that the net effect of the law would be more litigation under Title VII, such that it would take roughly three to five years to fire any employee – even for legitimate reasons.[194] This, Powell anticipated, could become a major cause of unemployment,[195] given the increased costs to employers of hiring and firing employees. On the basis of these practical concerns, Powell voted to hold the ADEA unconstitutional as applied to the states.[196]

Brennan, the senior member of the majority, was not persuaded. He kept the opinion for himself, and in it he emphasized that the Act did not "directly impair" the states' ability to "structure integral operations in areas of traditional governmental functions."[197] As Brennan saw it, under the ADEA, the states could "continue to do *precisely what they are doing now*, if they can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden."[198] Brennan's decision was striking in that while he nominally upheld *Cities*, his application of what he called its "functional doctrine" effectively narrowed its holding even further[199] – something that did not escape Blackmun's notice.[200] It was striking that Brennan, a *Cities* dissenter, was now espousing the application of *Cities* as a balancing-test doctrine, effectively using the third step of the *Cities* test – the direct-impairment question – to assess (and minimize) the real-world effects of federal laws. Powell, O'Connor, and

---

191. *See* Pritchard, *supra* note 143, at 853.

192. *See* Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf [http://perma.cc/2QN9-5UGC].

193. *See* Blackmun, *supra* note 188.

194. *Id.*

195. *Id.*

196. *Id.*

197. *EEOC*, 460 U.S. 226, 237 (1983) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-88 (1981)).

198. *Id.* at 240.

199. *Id.* at 236.

200. Next to this statement in Brennan's draft, Blackmun wrote "WJB dissented." *See* Justice William J. Brennan, Draft Opinion in EEOC v. Wyoming 8 (Dec. 17, 1982) (on file with Harry A. Blackmun Papers, Box 368, Folder 81-554-1).

Rehnquist joined the Chief Justice's dissent, which heavily emphasized the direct impairment of the ADEA's application to the states.[201] Stevens separately concurred, emphasizing the process-federalism argument that Congress had the power to act under the Commerce Clause and that it was an improper exercise of judicial power to second-guess Congress.[202] This, in turn, elicited a stern dissent from Powell, joined by O'Connor, rebutting "Justice Stevens' novel view of our Nation's history."[203]

By 1984, *Cities* was eight years old and yet still in its doctrinal infancy. Although hailed as groundbreaking, its immediate effect on American federalism was far more modest than scholars had predicted. Each subsequent federalism challenge—*Hodel*, *Long Island Railroad*, *FERC*, and *EEOC*—had ostensibly treated *Cities* as if it were still good law. But *Cities* proved impotent, as the Court failed to apply it to overturn a single federal law. Marshall's limited application of *Cities* in his three-part *Hodel* test, Burger's narrowing of the traditional governmental functions test in *Long Island Railroad*, and Brennan's restricted understanding of "impermissible effects" on state governments in *EEOC* left *Cities* largely a hollow shell. *Cities*'s focus on traditional governmental functions seems to have meshed poorly with the jurisprudential approaches of many Justices of the Burger Court, whose papers reveal that they were more attuned to policy concerns and real-world effects than *Cities*'s demand for categorical line drawing would permit. *Cities* required a binary labeling of each government function as either traditional or proprietary. But as the Justices' struggles showed, the real world was more complicated.

III. REPAIRING THE IRREPARABLE: *GARCIA* (1985)

Cities would meet its end two years later, in 1985, doomed only after Blackmun's legendary flip-flop in *Garcia v. San Antonio Metropolitan Transit Authority*.[204] Blackmun was originally assigned to write an opinion *upholding Cities*. His papers strongly suggest that he reconsidered on the insistence of his law clerk and, in an abrupt about-face, voted to overturn it.

Garcia, the nail in *Cities*'s coffin, involved a challenge to Department of Labor (DOL) regulations that applied minimum wage and overtime requirements under the FLSA to the San Antonio Metropolitan Transit

201. *EEOC*, 460 U.S. at 251-64 (Burger, C.J., dissenting).

202. *Id.* at 244-51 (Stevens, J., concurring).

203. *Id.* at 265-74 (Powell, J., dissenting).

204. 469 U.S. 528 (1985).

Authority (SAMTA).[205] At conference after oral argument, the Justices once again struggled to apply conceptual categories to real-world situations. The debate centered on whether municipal transit could be considered a "traditional governmental function" under *Cities*.[206] Chief Justice Burger wanted to overturn the extension of the FLSA but had to find a way to distinguish the case from *Long Island Railroad*, which had unanimously held that the railroad in question was *not* a traditional governmental function. The Chief tried to argue that *Long Island Railroad* was "different" because that case concerned a "*real* railroad," in contrast to metro transit.[207] Because traditional governmental functions were not "static" concepts, he argued, these municipal railroads were traditional governmental functions even if "real" railroads somehow were not.[208]

Four of the Chief Justice's colleagues also appeared ready to strike down the statute. Powell was more hesitant than Burger, but agreed that the activities constituting "traditional governmental functions" of states and cities could change with time, including in the case of metropolitan transportation.[209] For Powell, SAMTA was distinguishable from the Long Island Railroad because SAMTA was more local and more intrinsic to the functioning of the municipality.[210] Powell would vote to roll back the FLSA. O'Connor, too, argued for overturning the statute.[211] Reaching the same result by different means, she construed the third prong of the *Cities* test as "whether [the] federal act interferes with local public service," which, she argued, the DOL's regulations did.[212] Rehnquist agreed.[213] Blackmun said he could go either way, but felt he had to draw a line somewhere and joined the four in a vote to overturn the regulations.[214]

---

205. *Id.* at 534.

206. The discussion of the conference is drawn from the notes of Justices Blackmun and Powell. *See* Justice Harry A. Blackmun, Conference Notes in Garcia v. San Antonio Metro. Transit Auth. (Mar. 21, 1984) (on file with Harry A. Blackmun Papers, Box 412, Folder 82-1913-3); Justice Lewis F. Powell, Jr., Conference Notes in Garcia v. San Antonio Metro. Transit Auth. (March 1984) (on file with Lewis F. Powell, Jr. Papers, Folder 82-1913, 18).

207. Blackmun, *supra* note 206.

208. *Id.*

209. *See* Powell, *supra* note 206.

210. *See* Blackmun, *supra* note 206.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

Brennan would have none of this. He did not think SAMTA could be considered a traditional *state* governmental function: it was effectively a "joint venture" between the federal government and San Antonio, since eighty percent of the systems had become public since 1956.[215] Further, SAMTA was heavily supported by federal funding.[216] Justices White and Marshall agreed.[217] Stevens, too, would uphold the regulations, repeating the argument he had made in his *EEOC* concurrence that it was not the Court's place to second-guess the wisdom of Congress.[218]

Thus, there appeared to be five clear votes to overturn the FLSA as a violation of the Tenth Amendment. Burger assigned the opinion to Blackmun, which Blackmun later speculated was "on [Burger's] frequently stated" preference to give opinions to the "least persuaded."[219] As he began to draft the opinion, Blackmun's clerk assigned to the case, Scott McIntosh, sought to develop a "workable set of standards by which courts can sort out one governmental function from another for purposes of state immunity from federal regulation."[220] Blackmun noted that lower courts had struggled to identify traditional governmental functions. If he was forced to uphold *Cities*, he wanted to provide a workable standard for them.

---

215. *Id.*

216. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 532 (1985) (noting that SAMTA had received over fifty-one million dollars in federal grants).

217. Blackmun, *supra* note 206.

218. *Id.*; *see EEOC*, 460 U.S. 226, 250 (1983) (Stevens, J., concurring) ("My conviction that Congress had ample power to enact this statute . . . is unrelated to my views about the merits of either piece of legislation. . . . I also believe, contrary to the popular view, that the burdens imposed on the national economy by legislative prohibitions against mandatory retirement on account of age exceed the potential benefits. My personal views on such matters are, however, totally irrelevant to the judicial task I am obligated to perform.").

219. *See* Memorandum from Justice Harry A. Blackmun for Conference in Garcia v. San Antonio Metro. Transit Auth. (June 11, 1984) (on file with Harry A. Blackmun Papers, Box 412, Folder 82-1913-1). Justice Powell would later question the Chief Justice's judgment. When Justice Blackmun circulated a memo to the conference announcing his switch in positions, Powell wrote at the bottom: "Wow! Case should have been reassigned." Memorandum from Justice Harry A. Blackmun for Conference in Garcia v. San Antonio Metro. Transit Auth. (June 11, 1984) (on file with Lewis F. Powell, Jr. Papers, Folder 82-1913 1984 June-July).

220. *See* Memorandum from Scott McIntosh, Clerk, U.S. Supreme Court, to Justice Harry A. Blackmun 1 (May 8, 1984) (on file with Harry A. Blackmun Papers, Box 412, Folder 82-1913-3).

A. A Clerk Lobbies Blackmun To Second-Guess Himself

Justice Blackmun's papers in *Garcia* provide striking evidence of the influential role that judicial clerks can play in shaping their bosses' jurisprudence.[221] Blackmun's clerk, McIntosh, helped set Blackmun on course to change his mind about *Cities* and, with it, the fate of the Tenth Amendment.

As McIntosh examined the case law, he began "to worry whether the distinction on which the Court is relying is either sound in theory or workable in practice."[222] There were serious problems, McIntosh realized, with "trying to provide a constitutional safe harbor for some governmental functions and not for others."[223] He noted that the governmental-functions test had been discarded as unworkable in the tax immunity case *New York v. United States* in 1946,[224] and concluded that "[t]here is no reason to believe that a distinction which the Court discarded as unworkable in the tax immunity field will be any more productive in the field of regulatory immunity."[225] McIntosh noted similar instability in the lower courts' handling of *Cities*,[226] including the problem of what role history should play in determining whether a governmental function is "traditional."[227] When *Long Island Railroad* rejected "a static historical view of state functions generally immune from federal regulation,"[228] McIntosh concluded that it had rendered the "traditional" requirement impotent.[229]

McIntosh diagnosed another problem with trying to identify "integral" or "necessary" governmental functions: it would not be faithful to the role of federalism in a democratic society.[230] If the purpose of federalism was to allow the states and their citizens to determine the nature and extent of state involvement, then it should be left to the citizens of the states "rather than to

---

221. For an extensive discussion of the role of Supreme Court clerks and debates about their influence, see TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006).

222. Memorandum from Scott McIntosh to Justice Harry A. Blackmun, *supra* note 220, at 1-2.

223. *Id.* at 2.

224. *Id.* at 6-7; *see* New York v. United States, 326 U.S. 572, 583 (1946) (plurality opinion).

225. *See* Memorandum from Scott McIntosh to Justice Harry A. Blackmun, *supra* note 220, at 8.

226. *Id.* at 8-9.

227. *Id.* at 10-11.

228. United Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 686 (1982).

229. *See* Memorandum from Scott McIntosh to Justice Harry A. Blackmun, *supra* note 220, at 10-11.

230. *Id.* at 13.

federal judges" to decide what policies the states should pursue and how.[231] This argument drew not on the inherent limitations of the judicial craft, but instead on a view about which federal institution should resolve federal-state disputes. McIntosh, seemingly drawing on the process-federalism arguments of Wechsler, argued that the states could better pursue their own ends elsewhere than the courts. He argued that judicial intervention risked "an open invitation for the judiciary to make *Lochner*-esque decisions about which state policies they favor and which ones they dislike."[232] Instead, McIntosh encouraged Blackmun to pursue "a different result in this case from the one that [he] chose at Conference."[233] McIntosh suggested that Blackmun change sides and overturn *Cities*.

As Blackmun wrestled with his draft majority opinion, he came to realize that there was no principled way to reject the application of the FLSA amendments to state-operated mass transit systems in light of *Long Island Railroad*. Given the confusion within the lower courts, and Blackmun's inability to construct a principled argument against the application of the FLSA, Blackmun concluded that he must switch positions—flipping the outcome of the entire case. Just weeks before the term's end, Blackmun circulated a memo saying he could "find no principled way in which to affirm. It seems to me that our customary reliance on the 'historical' and the 'traditional' is misplaced and that something more fundamental is required to eliminate the widespread confusion in this area."[234]

As the Justices' papers reveal, even after his switch Blackmun had not intended to overturn *Cities*. Accompanying his memo was a draft opinion that ostensibly sought a middle ground: it was critical of *Cities* but stopped short of expressly overruling it.[235] Nevertheless, it so thoroughly rejected the reasoning of *Cities* that readers were left wondering how *Cities* could remain good law. The early draft Blackmun circulated included an extended discussion of a nondiscrimination principle as the key limit on Congress's regulation of the states, in a sense rewriting the test from *Cities* yet again.[236] According to this

231. *Id.* at 13-14.

232. *Id.* at 14.

233. *Id.* at 2.

234. Memorandum from Justice Harry A. Blackmun for Conference in Garcia v. San Antonio Metro. Transit Auth. (June 11, 1984) (on file with Harry A. Blackmun Papers, Box 412, Folder 82-1913-1).

235. *See* Justice Harry A. Blackmun, Draft Opinion in Garcia v. San Antonio Metro. Transit Auth. (June 11, 1984) (on file with Byron R. White Papers, Box II:13, Folder 82-1913-1).

236. His draft opinion read, in part, "The constitutional mechanisms for safeguarding the role of the States are unlikely to be at risk when Congress proceeds by uniform legislation that places burdens evenhandedly on States and private parties alike, for the outcome will reflect

principle, Congress would not exceed its Commerce Clause powers under the Tenth Amendment unless it singled out the states alone as the subject of its regulations; as long as the regulations applied evenly to both private and public actions, Blackmun trusted that the political system would ensure the states would not be unduly burdened. His early draft closed by only nominally reaffirming *Cities*:

> Today we reaffirm the fundamental premise of *National League of Cities* that Congress' authority under the Commerce Clause must accommodate the special role of the States in the federal system. We hold, however, that the necessary accommodation between federal power and state autonomy is realized when Congress places no burden on the States that it has not placed on private parties as well.[237]

This language would ultimately fall by the wayside, just like *Cities*.

Members of the now-former majority were surprised, to say the least. They felt, in light of the lateness in the term and the change in the majority, that the case should be held over for reargument.[238] Justices Powell and O'Connor thought the Court should ask the parties to brief *Cities*'s continued viability—a matter that had not been raised in the original briefings and oral arguments.[239] Powell may have gambled that Blackmun would ultimately blink and change his mind again if asked to overrule *Cities* expressly. To that end, Powell circulated a memo on behalf of himself and O'Connor suggesting that "it was desirable to focus the attention of the parties broadly on the principles followed by the Court in that case."[240]

---

not only the States' own interests but the interests of all those who are similarly situated. In those circumstances, the structural features of the Constitution designed to protect the States can be trusted to have served their purpose." *Id.* at 25.

237. *Id.* at 29.

238. *See* Memorandum from Chief Justice Warren E. Burger to Justice Harry A. Blackmun (June 11, 1984) (on file with Lewis F. Powell, Jr. Papers, Folder 82-1913 1984 June-July); Memorandum from Justice Sandra Day O'Connor for Conference in Garcia v. San Antonio Metro. Transit Auth. (June 11, 1984) (on file with Lewis F. Powell, Jr. Papers, Folder 82-1913 1984 June-July); Memorandum from Justice William H. Rehnquist to Justice Harry A. Blackmun (June 11, 1984) (on file with Lewis F. Powell, Jr. Papers, Folder 82-1913 1984 June-July).

239. *See* Memorandum from Justice Lewis F. Powell, Jr. to Justice Harry A. Blackmun (July 3, 1984) (on file with Thurgood Marshall Papers, Box 359, Folder 82-1913); Memorandum from Justice Lewis F. Powell, Jr. for Conference in Garcia v. San Antonio Metro. Transit Auth. (July 3, 1984) (on file with Thurgood Marshall Papers, Box 359, Folder 82-1913).

240. Memorandum from Justice Lewis F. Powell, Jr. to Justice Harry A. Blackmun, *supra* note 239.

Blackmun had not intended to overturn *Cities*, as his original draft made plain, but he was highly critical of *Cities*'s reasoning. Blackmun responded to Powell with a warning: "I venture to say . . . that if the question is to be presented, *National League of Cities* just might end up being overruled."[241] Blackmun was not alone in his thinking; Brennan informed the Court that he would not only join Blackmun's new majority opinion but would also "join in such a disposition [of *Cities*] without hesitation."[242] Brennan further explained that "[s]uch an outcome may, in fact, be required by Harry's analysis."[243]

B. Reargument

At reargument, the Justices trained their questions on whether *Cities*'s traditional governmental functions test remained a workable precedent and, more specifically,[244] whether it was the judiciary's place to intervene and protect the states in the name of federalism.[245] With Blackmun ready to join a new majority to overturn *Cities*, Brennan assigned this new majority opinion to Blackmun. Blackmun largely followed the reasoning of the opinion his clerk had drafted the prior term. With *Cities* now on the chopping block, he abandoned his assertion of a nondiscrimination principle to protect the states and focused instead on the longstanding and substantial federal involvement in the provision of municipal transit.

Blackmun, as always, was focused on real-world effects. He found it difficult to see how federal intervention could impair the states' sovereignty when considerable federal support was necessary for metropolitan transit to operate and remain solvent in the first place.[246] He also drew on Wechsler's argument about the political safeguards of federalism,[247] noting that state interests are protected through their representation in Congress. Blackmun then declared *Cities* overruled, noting that it had "departed from a proper

241. Memorandum from Justice Harry A. Blackmun to Justice Lewis F. Powell, Jr. (July 3, 1984) (on file with Lewis F. Powell, Jr. Papers, Folder 82-1913 1984 June-July).

242. Memorandum from Justice William J. Brennan, Jr. for Garcia v. San Antonio Metro. Transit Auth. (on file with William J. Brennan Papers, Box I:667, Folder 82-1913).

243. *Id.*

244. Oral Reargument at 8:22, 46:55, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (No. 82-1913), http://www.oyez.org/cases/1980-1989/1983/1983_82_1913#transcript-text81685 [http://perma.cc/W5U3-FN35].

245. *Id.* at 50:43.

246. *Garcia*, 469 U.S. at 555 ("Congress' treatment of public mass transit reinforces our conviction that the national political process systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation.").

247. *See supra* notes 115-119 and accompanying text.

understanding of congressional power under the Commerce Clause."[248] Given the experiences of the lower courts, *Cities* was "both impracticable and doctrinally barren."[249] In *Cities*, Blackmun concluded, "the Court tried to repair what did not need repair."[250]

Powell, Rehnquist, and O'Connor each dissented vociferously, with Powell blasting Blackmun for flipping and "substantially alter[ing] the federal system embodied in the Constitution."[251] Powell objected in particular to Blackmun's characterization of *Cities* as imposing a "traditional governmental functions" test when – Powell claimed – *Cities* really stood for "a familiar type of balancing test."[252] Of course, this was so only because the majorities in *Hodel*, *Long Island Railroad*, *FERC*, and *EEOC* had undercut *Cities* by employing a balancing test to find no substantial impairment of state activities, however "traditional" they might be.[253] After all, Blackmun's concurrence in *Cities*, in which he advocated a "balancing approach," was not joined by any other member of the majority and would have been superfluous if the majority's opinion had also announced it was undertaking a "balancing approach." *Cities*, long beleaguered, had finally been laid to rest.

Lost in much of the analysis of the Burger Court's federalism doctrines was the very central role that considerations of policy and real-world consequences played. The swing Justices on the Court – Blackmun among them – have been described as "pragmatists who considered cases on their individual facts."[254] Examination of the archives confirms that the Justices were no mere ivory-tower abstractionists; they took seriously the law's effects on ordinary people. After the Court handed down its decision in *Garcia*, Justice Blackmun retained several letters sent by state and local employees which informed him that *Garcia* had eliminated their option to choose "comp time" – the option to take time away from work without drawing on sick leave or vacation time – in lieu of overtime pay. One such letter, signed by dozens of employees of the City of

---

248. *Garcia*, 469 U.S. at 557; *see also* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1312 (1997) ("*Garcia* explicitly adopted [Wechsler's] academic theory concerning the nature of the Constitution and the political process in order to justify its finding of nonjusticiability.").

249. *Garcia*, 469 U.S. at 557.

250. *Id.*

251. *Id.* (Powell, J., dissenting).

252. *Id.* at 562.

253. Justice Rehnquist, in a short, separate dissent, noted as much: "Justice Powell's reference to the 'balancing test' approved in *National League of Cities* is not identical with the language in that case." *Id.* at 579 (Rehnquist, J., dissenting).

254. *See* BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION 400-01 (1990).

Perrysburg, Ohio, asked that they be allowed the choice of taking "comp time" in order to enjoy activities such as "an afternoon with out of town guests, or . . . attend[ing] a child's school program."[255] They beseeched the Justices to revise their ruling to permit the flexibility to choose "comp time" instead of overtime.

Although Blackmun obviously could not effect such an outcome himself, he followed Congress's response diligently. His files on *Garcia* reveal that he kept up with congressional efforts to amend the FLSA to permit "comp time" for employees of state and local governments in lieu of overtime.[256] Sure enough, Congress would amend the FLSA later that year, granting just such an option.[257] In this sense, Blackmun was vindicated in his belief that the responsibility to calibrate the balance between federal and state policies should rest primarily with Congress.

EPILOGUE: FROM THE ASHES OF TRADITIONAL GOVERNMENTAL FUNCTIONS RISES THE "NEW FEDERALISM"

Justice Blackmun closed his opinion in *Garcia* with the observation that, in retrospect, *Cities* sought to repair a federal-state balance that never needed repairing. Yet if the Burger Court failed to repair American federalism, the Court did refine it. The archival sources suggest that striking the appropriate balance between the states and the federal government was more a process of trial and error than of simple deduction from constitutional logic. In the case of the Burger Court's "traditional governmental functions" test, the trials led mostly to error. The Court's many contentious five-four decisions show as much, as do the internal struggles of the Justices revealed in their papers. They also confirm an observation articulated most clearly by Heather Gerken: that the Supreme Court has struggled at times to limit federal power without violating the rules of craft—of articulating well-formulated doctrines that not only enjoy the force of law, but also the respect of a profession that prizes technical merit, sophistication, and deftness.[258]

---

255. *See* Letter from Betty C. Barbe, Emp., City of Perrysburg, Ohio, to Justice Harry A. Blackmun (July 17, 1985) (on file with Harry A. Blackmun Papers, Box 412, Folder 82-1913-5).

256. *See* S. REP. No. 99-159 (1985) (on file with Harry A. Blackmun Papers, Box 412, Folder 82-1913-5).

257. *See* Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (codified as amended at 29 U.S.C. §§ 201-219); Wage & Hour Div., *Fact Sheet #7: State and Local Governments Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T LAB. (2011), http://www.dol.gov/whd/regs/compliance/whdfs7.pdf [http://perma.cc/4ULP-AYZ4].

258. Heather K. Gerken, *Slipping the* Bonds *of Federalism*, 128 HARV. L. REV. 85, 85-86 (2014).

Shortly after *Garcia* came down, as if writing *Cities*'s eulogy, Martha A. Field described *Garcia* as finally recognizing that "the Constitution is too sharp a sword to be unsheathed, save as a last resort in the most extreme of situations."[259] But although the Court has struggled, it has not ceased trying. Field spoke too soon in predicting that the Tenth Amendment sword would go back in the stone: it has struck again, and repeatedly. Like *Cities* itself, *Garcia* was merely a temporary triumph for one set of views on American federalism.[260] Dissenting in *Garcia*, soon-to-be Chief Justice Rehnquist correctly foresaw the Court's trajectory in this area. He was "confident" that the principle espoused in *Cities* would "in time again command the support of a majority of this Court."[261] O'Connor similarly predicted that "this Court will in time again assume its constitutional responsibility" to define the scope of state autonomy under the Constitution.[262]

Sure enough, a mere seven years later, Justice O'Connor again invoked the Tenth Amendment in *New York v. United States*, articulating what has since become known as the "anti-commandeering" doctrine.[263] *New York* concerned Congress's ability to require states to accept ownership of radioactive waste or regulate according to the instructions of Congress.[264] While Justice O'Connor's anticommandeering holding was new, the term "anti-commandeering" was borrowed from a familiar source. O'Connor cleverly seized on a passing observation in the Burger Court's *Hodel* opinion—a unanimous decision *upholding* federal action—and wrote that Congress lacked the ability to "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[265] Neither her language nor her approach was made from whole cloth; as one of Blackmun's clerks observed, O'Connor's dissent in *FERC* was very much a trial run for her opinion in *New York*.[266]

---

259. Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority*: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 118 (1985).

260. Indeed, only a decade later, John C. Yoo argued in 1997 that *Garcia* was already "no longer the controlling theory concerning judicial review of federalism questions." *See* Yoo, *supra* note 248, at 1312.

261. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting).

262. *Id.* at 589 (O'Connor, J., dissenting).

263. 505 U.S. 144 (1992).

264. *Id.* at 175.

265. *Id.* at 176 (alteration in original) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).

266. *See* Telephone Interview with Mark Rahdert, *supra* note 86.

As it turns out, Justice O'Connor's approach has proven far more enduring than the Burger Court's *Cities* doctrine. Expanding on Justice O'Connor's anticommandeering doctrine, the Rehnquist Court also struck down a federal statute on Tenth Amendment grounds in *Printz v. United States* in 1997.[267] In *Printz*, the Court rejected a federal law that obliged local law enforcement officers to conduct background checks on handgun applicants and take certain actions depending on the result.[268] While joining the majority, Justice O'Connor also observed in a short concurrence that such a program, "which directly compel[s] state officials to administer a federal regulatory program, utterly fail[s] to adhere to the design and structure of our constitutional scheme," reiterating once more the objections she first raised in *FERC*.[269]

More recently, the Court has relied on Justice O'Connor's partial dissent in *FERC* and the decisions in *New York* and *Printz* to reject Congress's Medicaid expansion in the Affordable Care Act in *National Federation of Independent Business v. Sebelius*.[270] As discussed earlier, the Court has also drawn on the Tenth Amendment to overturn provisions of the Voting Rights Act in *Shelby County v. Holder*.[271] Arguably, the Burger Court's federalism decisions have even influenced the Court in Commerce Clause challenges not implicating the Tenth Amendment. In *United States v. Morrison*—the challenge to Congress's Commerce Clause power to enact the Violence Against Women Act—Justice Souter in dissent accused the majority of "reviving [the] traditional state spheres of action" doctrine of *Cities*.[272] The *Morrison* majority, Souter argued, ignored *Garcia*'s "rejection of 'judicially created limitations'" and "*a priori* definitions of state sovereignty"[273] in finding Congress could not regulate in "family law and other areas of traditional state regulation."[274]

In addition to refining the Court's federalism doctrine, Justice O'Connor also led the Court in crafting an ingenious escape hatch that has allowed the Court to protect the states without having to draw the Tenth Amendment sword from its sheath at all. In *Gregory v. Ashcroft*, writing for the majority, Justice O'Connor articulated a new rule of statutory interpretation. Drawing on the Court's state sovereign immunity doctrine, the Court held that if Congress

---

267. 521 U.S. 898 (1997).

268. *Id.* at 903-04.

269. *Id.* at 936 (O'Connor, J., concurring).

270. 132 S. Ct. 2566 (2012).

271. 133 S. Ct. 2612 (2013). The invocation of the Tenth Amendment is striking given its absence in earlier Voting Rights cases. *See supra* note 28 and accompanying text.

272. United States v. Morrison, 529 U.S. 598, 647 (2000) (Souter, J., dissenting).

273. *Id.* at 649.

274. *Id.* at 650.

"intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear."[275] Otherwise, the Court will interpret an ambiguous federal statute so as to "avoid a potential constitutional problem."[276] As Gerken has observed, the Court relied on this clever form of constitutional avoidance federalism in *Bond v. United States*.[277] In so doing, the Court sidestepped a determination as to whether Congress's implementation of an international chemical weapons treaty ran afoul of the Tenth Amendment – a deeply tangled inquiry.[278]

The lesson from the Burger Court's troubled federalism jurisprudence, then, is not that the Tenth Amendment cannot protect the states from the federal government – it has, and surely will continue to do so. Rather, the lesson is that courts can more easily referee certain federalism boundary disputes than others. Although a simplistic reading of the Tenth Amendment might suggest that it primarily protects "traditional governmental functions" from congressional overreach, the story of the Burger Court federalism cases illustrates just how difficult it is to identify such functions in practice. No doubt learning from the challenges faced by the Burger Court, the Rehnquist and Roberts Courts have focused less on state functions than on state officials and the direct coercion of states by the federal government. These categories are identified more readily and protected more easily by courts. The Rehnquist and Roberts Courts have also developed a federalism jurisprudence that avoids the dilemma *Cities* created for libertarian-minded jurists. Judges no longer need to sanctify a public program with the label "traditional governmental function" to save it from federal interference.

Nevertheless, modern federalism decisions are far from unanimous. Disagreements about the relationship between the federal and state governments are certain to remain highly contentious for the foreseeable future.[279] Perhaps this is inevitable to some degree. As Resnik has observed, while "many discussions of federations presume . . . that the power over a given domain or kind of right belongs either to subunits or to the federal government . . . the identities of both the subunits and the federated

---

275. Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991).

276. *Id.* at 464.

277. 134 S. Ct. 2077, 2090 (2014) ("We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States.").

278. *See* Gerken, *supra* note 258, at 89.

279. *See, e.g.*, Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561 (2015) (arguing that the next judicial battlefield in American federalism may be the procedures through which the federal government requires states to consent to implementation of federal programs).

government do not remain fixed."[280] Just as federalism proponents have emphasized Justice Brandeis's famous depiction of the states as laboratories of democracy and experimentation,[281] so too has the Court experimented. Its federalism doctrine has, over the years, tested different articulations of essential state functions in an attempt to demarcate federal-state boundary disputes.

This Note told the story of the difficulty that the nation's highest court faced in trying to preserve the proper balance between the independence of the states and the interests of the Nation, between identifying those functions of government reserved to the states and those meriting nationwide regulation. The story of the Burger Court's federalism cases reveals a Court capable of learning from its own mistakes, abandoning unworkable tests, and developing doctrines that pursue traditional ends by new means. In this sense, the Burger Court's federalism jurisprudence illustrates the enduring insight of Justice Oliver Wendell Holmes Jr.'s famous aphorism: "The life of the law has not been logic: it has been experience."[282]

---

280. *See* Resnik, *supra* note 7, at 366.

281. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

282. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Paulo J.S. Pereira & Diego M. Beltran eds., Univ. of Toronto Law Sch. Typographical Soc'y 2011) (1881), http://www.general-intelligence.com/library/commonlaw.pdf [http://perma.cc/8GNF-S4RQ].