

## *STARE DECISIS* IN CONSTITUTIONAL CASES: RECONSIDERING *NATIONAL LEAGUE OF CITIES*

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Institutional dialogues contribute at least as much to constitutional law as their more celebrated colleague, logic. Principles of judicial restraint sometimes lead courts to initiate a dialogue with the legislature designed to alter public policy through institutional cooperation rather than judicial fiat.<sup>1</sup> Principles of *stare decisis* promote a different, internalized dialogue. This dialogue is two-sided, at least figuratively, when judges in effect engage in an imaginary argument about the validity of a precedent with their predecessors. When the precedent in question is recent, however, the dialogue of *stare decisis* can become a soliloquy by judges who may wish to overrule their own previous decision.

Considerations of *stare decisis* differ depending upon whether this dialogue is historical or soliloquial—that is, depending upon whether the precedent in question was born of a different court from that considering overruling it. These differences are highlighted by the Supreme Court's current deliberation into whether to overrule a rather recent and highly questionable decision.

On the last day of the 1983 Term, the Court ordered reargument in two cases raising the issue whether the Fair Labor Standards Act<sup>2</sup> (FLSA) may constitutionally apply to San Antonio's municipal transportation employees in light of *National League of Cities v. Usery*.<sup>3</sup> The Court *sua sponte* requested the parties to discuss “[w]hether or not the principles of the Tenth Amendment as set forth in [*National League of Cities*] should be reconsidered.”<sup>4</sup> In answering this question, the Court must consider the role of

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1. *E.g.*, Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

2. 29 U.S.C. § 201 *et seq.*

3. 426 U.S. 833 (1976).

4. 52 U.S.L.W. 3937 (1984). The pending cases are *Garcia v. San Antonio Metropolitan Transit Authority*, No. 82-1913, and *Donovan v. San Antonio Metropolitan Transit Authority*, No. 82-1951.

*stare decisis* in constitutional litigation in general and in the context of *National League of Cities* in particular. Because *National League of Cities* is a rather recent precedent and could be overruled by the change of only one vote, overruling it seemingly would involve gross disrespect for *stare decisis*—indeed, might reveal the Court to be the unprincipled, political entity envisioned by some critics. The burden of this essay is to demonstrate the contrary. Overruling *National League of Cities* would be principled and consistent with *stare decisis*. This is so in part because the dialogue of *stare decisis* involved in this situation is soliloquial rather than historical.

## I

In 1974 Congress extended the minimum-wage and overtime-pay protections of the FLSA to most employees of state or local governments.<sup>5</sup> This enactment surely must have seemed beyond constitutional objection. Since 1937,<sup>6</sup> the Court had consistently upheld federal legislation regulating the most local affairs of the private sector. The Court had subordinated concerns about federal intrusion into the affairs of state or local governments, stressed the “plenary” nature of congressional power under the commerce clause, and called the tenth amendment a mere “truism” devoid of any protection of state sovereignty.<sup>7</sup> The Court had expressly approved federal regulation affecting state employees in 1936 in *United States v. California*,<sup>8</sup> when it sustained a fed-

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5. Pub. L. 93-259, 88 Stat. 55. The act provided exemptions from coverage for executive, administrative, or professional employees and for elected public officials and their aides. See *National League of Cities v. Usery*, 426 U.S. at 838-39.

6. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), held that the National Labor Relations Act was within Congress's authority under the commerce clause, and *United States v. Darby*, 312 U.S. 100 (1941), upheld the constitutionality of the Fair Labor Standards Act.

7. In *Darby*, *supra*, 312 U.S. at 123-24, the Court stated:

Our conclusion is unaffected by the Tenth Amendment which provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” 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.

8. 297 U.S. 175 (1936). In response to California's argument that “it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal act,” *id.* at 183, the Court unanimously stated (*id.* at 184-85):

The sovereign power of the states is necessarily diminished to the extent of the

eral safety statute that applied to a state-operated railroad. Indeed, as recently as 1968, the Court in *Maryland v. Wirtz*<sup>9</sup> had upheld an earlier amendment extending the FLSA to employees of state hospitals, institutions, and schools. Justice Harlan, a firm believer in federalism, wrote for the Court in *Wirtz*:

[W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.<sup>10</sup>

Yet the seeds for the invalidation of the 1974 extension of the FLSA had been planted even prior to enactment of those amendments. By 1974, only five members of the *Wirtz* Court remained, and two of them—Douglas and Stewart—had dissented. In this new environment the validity of the 1974 amendments promptly came into question. In 1975 the Court agreed to hear *National League of Cities*<sup>11</sup> rather than simply affirming the lower court, which had upheld the amendments on the authority of *Maryland v. Wirtz*. Later in the same Term, in *Fry v. United States*,<sup>12</sup> the Court upheld the application of federal emergency wage controls to state and local employees, while simultaneously slipping away from the broad language of *Wirtz*. The majority opinion in *Fry* contained a footnote apparently recognizing that the tenth amendment afforded some constitutional protection of state sovereignty.<sup>13</sup> Even so, Justice Rehnquist lodged a powerful dissent

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grants of power to the federal government in the Constitution. . . . [We] look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

9. 392 U.S. 183 (1968).

10. *Id.* at 196-97.

11. 420 U.S. 906 (1975), *noting probable jurisdiction of National League of Cities v. Brennan*, 406 F. Supp. 826 (D.D.C. 1974) (three-judge court). The district court had stated that in its view the contentions that the amendments impermissibly intruded upon state sovereignty were "substantial and . . . it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of [*Maryland v. Wirtz*]; but that is a decision that only the Supreme Court can make . . . ." 406 F. Supp. at 828.

12. 421 U.S. 542 (1975).

13. The Court stated (*id.* at 547 n.7):

While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," *United States v. Darby*, 312 U.S. 100 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. Despite the extravagant claims on this score made by some *amici*, we are convinced that the wage restriction regulations constituted no such drastic invasion of state sovereignty.

urging the overruling of *Maryland v. Wirtz*. He contended that wages paid to state employees engaged in "traditional state functions" are beyond Congress's commerce authority.<sup>14</sup>

In *National League of Cities*, Rehnquist's *Fry* dissent became the law. Justice Rehnquist's opinion for a five-judge majority, while not questioning the plenary federal power to regulate the private sector, overruled *Maryland v. Wirtz* and purported to render the states immune from federal regulation that "directly displace[s] the States' freedom to structure integral operations in areas of traditional government functions."<sup>15</sup> The critical fifth vote came from Justice Blackmun, however, whose concurring opinion substantially limited the sweep of Rehnquist's absolutist language. Blackmun construed the majority opinion as adopting a balancing approach, allowing federal regulation 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."<sup>16</sup> The four dissenters argued that the states have no immunity from federal regulation.

The vagueness of the standard announced by Justice Rehnquist, along with the uncertainty arising from Justice Blackmun's attempt to tack a balancing test onto the analysis, have required the Court to decide several more cases involving federal regulation of state operations. In each instance the Court has upheld the federal regulation by distinguishing *National League of Cities*, sometimes in dubious ways. These decisions suggest that *National League of Cities* may have been a "sport" to which the Court will not adhere strictly. Most recently, the Court's order in the San Antonio cases suggests that at least five justices may now be interested in expressly overruling that precedent rather than continuing to narrow it.

The first step in the Court's analysis in the San Antonio cases will have to be a critical assessment of *National League of Cities* and the cases following it. The work of several commentators should be helpful in this regard.<sup>17</sup> But the Court must also consider whether overruling *National League of Cities* would comport with the Supreme Court's approach to *stare decisis* in constitu-

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14. *Id.* at 557-58 (Rehnquist, J., dissenting).

15. 426 U.S. at 852. The Court's recognition of the scope of the federal commerce power over the private sector is found in *id.* at 840-41.

16. *Id.* at 856 (Blackmun, J., concurring).

17. See, e.g., Alfange, *Congressional Regulation of the "States Qua States": From National League of Cities to EEOC v. Wyoming*, 1983 SUP. CT. REV. 215, and materials cited in *id.* at 216 n.14.

tional cases. Below is an attempt to provide some guidance regarding this latter inquiry.

## II

The legitimacy of judicial review in a democracy is, of course, an issue at the heart of constitutional law. One traditional answer has been that judicial review is tolerable only to the extent that the Supreme Court operates as a disinterested decisionmaker, insulated as far as humanly possible from the personal predilections of the justices. An important factor tending to impersonalize, and therefore legitimate, judicial review is *stare decisis*, as Justice Jackson recognized:

I cannot believe that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would abandon or substantially impair the rule of *stare decisis*. Unless the assumption is substantially true that cases will be disposed of by application of known principles and previously disclosed courses of reasoning, our common-law process would become the most intolerable kind of *ex post facto* judicial lawmaking. Moderation in change is all that makes judicial participation in the evolution of the law tolerable. Either judges must be fettered to mere application of a legislative code with a minimum of discretion, as in continental systems, or they must formulate and adhere to some voluntary principles that will impart stability and predictability to judicial discretion.<sup>18</sup>

The Supreme Court has not, however, adhered rigidly to *stare decisis*. It is well established that, both because constitutional law is thought to be a living instrument of public policy adaptable to changing circumstances and because no practical method other than judicial overruling exists to modify erroneous or obsolete constitutional decisions, *stare decisis* is not a strict command in constitutional cases.<sup>19</sup> When this flexible precept is

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18. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334, 334 (1944). Several other useful discussions of *stare decisis* in constitutional law have also come from those who have had a hand in applying that doctrine. See W. DOUGLAS, *STARE DECISIS* (1949); A. GOLDBERG, *EQUAL JUSTICE* 65-97 (1971); Reed, *Stare Decisis and Constitutional Law*, 35 PA. B.A.Q. 131 (1938) (written when he was Solicitor General); Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983). The Douglas, Goldberg, and Reed writings are interesting "period pieces" reflecting the impetus to change constitutional law in the eras of the Warren Court and the Second New Deal. The Jackson remarks represent a more restrained attempt to assess why *stare decisis* appeared to be waning. The Stevens lecture is a good, short, contemporary overview of *stare decisis*. For other recent commentaries, see Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 811-32 (1982); Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467.

19. Justice Brandeis penned what is probably the most frequently cited passage supporting this conclusion:

*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious

considered along with the limited force of the principle of *stare decisis* in general,<sup>20</sup> the Court's freedom to reconsider a constitutional precedent seems great indeed. In fact, the Court is well on its way to issuing its two-hundredth opinion in which a precedent is overruled.<sup>21</sup> To be sure, many of these opinions have provoked little controversy, but every overruling opinion demonstrates the subjective elements of judicial review to some extent. Obviously, the problem of subjectivity is enhanced when a recent precedent is overruled after a change in the Court's membership.

Skilled use of the judicial craft is the only method available to mitigate the strain on the Court's impersonal institutional image caused by overruling. There is an "art of overruling" consisting of the use of techniques "in overruling opinions that, as a general pattern, tend to preserve the impersonal qualities of the judicial process by emphasizing factors other than the vicissitudes of changing personnel."<sup>22</sup> These techniques include reliance upon changed conditions that have undermined the basis for the overruled decision, reliance upon the difficulties the Court has experienced in attempting to apply the overruled decision, and reliance upon the inconsistency between that decision and subsequent precedent.<sup>23</sup> These techniques are easy to apply to *National League*

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concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

*Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (dissenting opinion). Early recognition of the flexibility of the principle of *stare decisis* in constitutional cases can be found in *The Genesee Chief*, 53 U.S. (12 How.) 443, 456 (1851), and *The Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting).

20. Justice Frankfurter for the Court in *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), in the course of overruling a recent decision on an issue of statutory construction, stated:

We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

21. See CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1789-97* (1973), and *id.* at S332-33 (1980 Supp.), which presents a list of cases in which the Supreme Court has overruled precedent. According to this source the Court has issued 171 overruling opinions through the 1980 Term.

22. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 219.

23. *Id.* at 219-29. Israel cited only six cases in which the overruled case was rejected simply because it was thought to be wrong. *Id.* at 223 n.60. In addition to *National League of Cities*, cases decided after Israel's study that seem to fall into this category include *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Perez v. Campbell*, 402 U.S. 637 (1971); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Harris v.*

of *Cities*. The case was both wrong and precedentially weak from the start, has been stretched to the breaking point in later decisions, and can be overruled without creating undue hardship on innocent parties.

## A

*National League of Cities* has little claim to the protection of *stare decisis*, having itself given little respect to precedent. The bulk of Justice Rehnquist's opinion ignored *Maryland v. Wirtz* and discerned theretofore unknown principles of state sovereignty lurking in the federal system. Almost as an aside, near the end of the opinion, Justice Rehnquist stated that "in view of the conclusions expressed earlier in this opinion we do not believe the reasoning of *Wirtz* may any longer be regarded as authoritative."<sup>24</sup> Similarly, *National League of Cities* denounced as "simply wrong" the language in *United States v. California* that had led to the result in *Wirtz*. Rehnquist essentially limited *California* to its facts by reinterpreting it as standing for the proposition that the state's operation of a railroad in interstate commerce is not an integral state activity.<sup>25</sup> Neither the words *stare decisis* nor their import was as much as mentioned in *National League of Cities*.

If the Court in the pending San Antonio cases gives *National League of Cities* the same respect that *National League of Cities* itself accorded to *Maryland v. Wirtz* and *United States v. California*, then *National League of Cities* will die a quick and certain death. For apart from *stare decisis*, the case has little claim to survival. As has been explored in detail elsewhere, Justice Stevens is correct in labeling *National League of Cities* a "pure judicial fiat."<sup>26</sup> The commerce clause grants Congress unqualified power over interstate commerce, and nowhere in the text of the Constitution can an exemption for states or cities be found. As Justice Stevens has explained,

[t]he question . . . is purely one of constitutional power. In exercising its power to regulate the national market for the services of individuals—either by prescribing the minimum price for such services or by prohibiting employment discrimination on account of age—may Congress regulate both the public sector and the private sector of that market, or must it confine its regulation to the pri-

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United States, 382 U.S. 162 (1965). All of these cases overruled precedent less than ten years old.

24. 426 U.S. at 854.

25. *Id.* at 854-55 and n.18. See *supra* note 8.

26. *EEOC v. Wyoming*, 103 S. Ct. 1054, 1067 (1983) (Stevens, J., concurring). The recent article of Alfange, *supra* note 17, presents a thorough critique of *National League of Cities*. In addition, see materials cited by Alfange, at 216 n.14.

vate sector? If the power is to be adequate to enable the national government to perform its central mission, that question can have only one answer.<sup>27</sup>

Whether the Constitution was designed for *the* central purpose of ensuring plenary federal power to regulate commerce, as Justice Stevens maintains, or whether that was simply one of several major purposes, he seems surely correct in concluding that the Constitution grants Congress plenary authority to regulate all forms of employment in today's integrated economy and that it contains no specified limitations on the exercise of that power.

If there were some practical justification for *National League of Cities*, an argument might be available that it should survive despite its baseless beginning,<sup>28</sup> but no such justification is apparent. The states are well protected in Congress by the more or less direct representation provided them by their senators and representatives. At least with respect to general regulation of employers such as that of the FLSA, they also benefit from virtual representation "by senators and representatives responsive to the wishes of the myriad other enterprises . . . covered."<sup>29</sup> The states survived intact in the years before Justice Rehnquist conferred this novel immunity on them, and they are not likely to wither away if that immunity is abolished. In short, *National League of Cities* receives no support from present social needs.<sup>30</sup>

27. EEOC v. Wyoming, 103 S. Ct. at 1068 (Stevens, J., concurring).

28. Cf. Runyon v. McCrary, 427 U.S. 160, 189-92 (1976) (Stevens, J., concurring) (though *Jones v. Alfred H. Mayer Co.* wrongly interpreted Congress's intent in enacting the Civil Rights Act of 1866, it should not be overruled because its interpretation "surely accords with the prevailing sense of justice today" and because overruling it "would be a significant step backwards, with effects that would not have arisen from a correct decision in the first instance"). See also *Florida Dept. of Health & Rehabilitative Services v. Florida Nursing Home Assoc.*, 450 U.S. 147, 151-55 (1981) (Stevens, J., concurring). Justice Stevens's interest in *stare decisis* is also exemplified by Stevens, *supra* note 18.

29. J. ELY, DEMOCRACY AND DISTRUST 224 n.44 (1980). See J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-259 (1980); La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779, 977-1056 (1982); 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 (1954). Justice Brennan's dissent in *National League of Cities* made a similar argument. 426 U.S. at 876-77.

30. See generally Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1072 (1981) ("[H]owever useful an understanding of the past may be in clarifying . . . choices [in constitutional decisionmaking], it cannot determine our response to them. That prerogative—and burden—belongs to the present.") Cf. *Jones, An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1025 (1974) ("the durability of a legal principle, its reliability as a source of guidance for the future, is determined far more by the principle's social utility, or lack of it, than by its verbal elegance or formal consistency with other legal precepts").

Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMM. 93 (1985), with whom I share the pages of this issue, presents an interesting effort to carve out a measure of state immunity that is more persuasive than Justice Rehnquist's effort in *National League*



Even apart from its weak reasoning and its disrespect of precedent, the precedential force of *National League of Cities* was weak from the outset. It was born of a deeply divided Court and announces no clear standards.<sup>31</sup> Overruling opinions often recognize this vulnerability in cases being overruled.<sup>32</sup> Justice Rehnquist's opinion for the five-member majority, which eschewed reliance upon the tenth amendment or any other specific constitutional provision in favor of general principles of federalism,<sup>33</sup> used conclusory labels to demark the limits of state immunity. The resulting confusion is well reflected in the opinion of the district court in the San Antonio cases:

The distinguishing characteristic entitling a state function to Tenth Amendment protection from federal regulations has been described variously as "integral", "essential", "basic", and "traditional". Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult.<sup>34</sup>

Justice Blackmun's concurring opinion undercut the majority's absolutist language by interpreting it as embodying a balancing approach, the quintessential form of jurisprudential uncertainty.<sup>35</sup> The confusion is only compounded if the balancing approach is taken seriously. The FLSA amendments at issue in *National League of Cities* did not require the states to abandon

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*of Cities*, but nonetheless seems to me both to lack textual support in the Constitution and to be unnecessary.

31. As Justice Jackson once explained:

The first essential of a lasting precedent is that the court or the majority that promulgates it be fully committed to its principle. That means such individual study of its background and antecedents, its draftsmanship and effects that at least when it is announced it represents not a mere acquiescence but a conviction of those who support it. When that thoroughness and conviction are lacking, a new case, presenting a different aspect or throwing new light, results in overruling or in some other escape from it that is equally unsettling to the law.

Jackson, *supra* note 18, at 335.

32. Israel, *supra* note 22, at 226.

33. See 426 U.S. at 852. Justice Rehnquist's dissent in *Fry* recognized that the tenth amendment does not "by its terms" constrain the federal commerce power. 421 U.S. at 557. And yet the decisions following *National League of Cities* have all referred to the tenth amendment as its source of authority. See *EEOC v. Wyoming*, 103 S. Ct. 1054, 1060 (1983); *FERC v. Mississippi*, 456 U.S. 742, 758-71 (1982); *United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 684 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-88 (1981). Moreover, in posing the question for reargument in the San Antonio cases the Court spoke of "the principles of the Tenth Amendment as set forth in [*National League of Cities*]". See text at note 4 *supra*.

34. *San Antonio Metropolitan Transit Authority v. Donovan*, 557 F. Supp. 445, 447 (W.D. Tex. 1983). See also Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 420 (1981).

35. See generally T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 53-56 (1966); Tushnet, *supra* note 34, at 425; Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

any policy, but rather simply regulated the means of achieving those ends. It is difficult to understand why the amendments should not have been upheld under a balancing test concerned with protecting only essential state policymaking sovereignty.<sup>36</sup> At the very most, a remand might have been in order to allow the district court to consider evidence of the effect of the FLSA upon the operations of state and local governments.

## B

These ambiguities and weaknesses of *National League of Cities* have been magnified in the Court's subsequent efforts to apply the case. The "lessons of experience" and the "requirements of later precedent" are both factors that influence overruling,<sup>37</sup> and they coalesce in the cases subsequent to *National League of Cities* in a way that compels overruling. Even though *National League of Cities* is only eight years old, the Court's experience with it as a precedent has been demonstrably unsatisfactory.<sup>38</sup>

A unanimous Court in *Hodel v. Virginia Surface Mining & Reclamation Association* concluded that the majority opinion in *National League of Cities* embodied a three-part test for judging whether a state was immune from regulatory legislation adopted under the federal commerce clause:

First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."<sup>39</sup>

Then, in homage to Justice Blackmun's concurring opinion in *National League of Cities*, the Court in *Hodel* added a major qualification:

Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest ad-

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36. The argument of the federal government in *National League of Cities* stressed that, since the federal commerce power had been upheld even where it had displaced the ultimate ends of state policy, see *supra* note 6, that power surely reached regulation of a means by which state ends could be achieved. See *National League of Cities*, 426 U.S. at 844-45; Brief for Appellee at 39-40, and Supplemental Brief for Appellee on Reargument at 2-6, *National League of Cities*; Transcript of Reargument at 38-41, *National League of Cities* (remarks of Solicitor General Bork).

37. Israel, *supra* note 22, at 221-26.

38. See Alfange, *supra* note 17, at 247-81.

39. 452 U.S. 264, 287-88 (1981) (quoting *National League of Cities*, 426 U.S. at 854, 845, 852).

vanced may be such that it justifies state submission.<sup>40</sup>

*Hodel's* adoption of a balancing test makes plain that Justice Rehnquist's opinion in *National League of Cities* is a "majority" one in name only. Of course, it stands to reason that the inquiry in subsequent cases would be governed by Justice Blackmun's balancing test, since the other eight justices are in two diametrically opposed camps of four each, and each camp prefers a balancing approach to the method favored by the other. The important point for purposes of *stare decisis* is that in *Hodel* a unanimous Court as much as admitted that Justice Rehnquist's opinion in *National League of Cities* has only the precedential force of a plurality opinion.

To be sure, *Hodel* and the cases following it have not explicitly recognized the diminished stature of Justice Rehnquist's opinion in *National League of Cities*. Indeed, in each case the Court has purported to rely upon the three-pronged test of *Hodel* that supposedly is a mere summation of the Rehnquist approach. Moreover, *Hodel* itself seems compatible with that approach.<sup>41</sup> But the applications of the three-pronged test in two more recent cases are at odds with Justice Rehnquist's opinion in *National League of Cities* and appear to rest solely on balancing.

The first was *United Transportation Union v. Long Island Rail Road Co.*<sup>42</sup> The Court in that case unanimously upheld the application of the Railway Labor Act, which regulates collective bargaining in the railroad industry, to a state-owned passenger railroad. The Court concluded that the third prong of the *Hodel* test was not satisfied. It first relied upon the reinterpretation of *United States v. California* in *National League of Cities* as holding simply that operating a railroad in interstate commerce was not an integral state function.<sup>43</sup> Second, the Court stressed that, although "some passenger railroads have come under state control in recent years, . . . that does not alter the historical reality that the opera-

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40. *Id.* at 288 n.29 (citing Blackmun, J., concurring in *National League of Cities*).

41. In *Hodel* the Court upheld the Surface Mining Control and Reclamation Act of 1977 on the ground that the statute, rather than regulating the "States as States," imposed requirements upon private mining enterprises. This result is compatible with the distinction drawn in Justice Rehnquist's opinion in *National League of Cities* between the impermissible regulation of the wages of state employees and the permissible displacement of state policies concerning private enterprise present in the statutes upheld in prior cases. See text at note 15 *supra*. Essentially the same can be said of *FERC v. Mississippi*, 456 U.S. 742 (1982), a 5-4 decision that rejected the argument that the Public Utility Regulatory Policies Act of 1978 violated the principles of Justice Rehnquist's opinion in *National League of Cities*.

42. 455 U.S. 678 (1982).

43. See text at note 25 *supra*.

tion of railroads is not among the functions *traditionally* performed by state and local governments.”<sup>44</sup> The Court seemed to be saying that only state activities with deep historical roots qualified for immunity from the federal commerce power. If the notion of state sovereignty found in *National League of Cities* is taken seriously, however, there is no logical or practical reason why innovative state responses to new problems should be unprotected simply because they lack historical precedent.

The Court in *Long Island Rail Road* tacitly acknowledged the tenuousness of its rationale. It asserted:

[W]e are not merely following dicta of [*National League of Cities*] or looking only to the past to determine what is “traditional.” . . . This Court’s emphasis [in *National League of Cities*] on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation. Rather it was meant to require an inquiry into whether the federal regulation affects basic State prerogatives in such a way as would be likely to hamper the state government’s ability to fulfill its role in the Union and endanger its “separate and independent existence.”<sup>45</sup>

Thus, the third prong of the *Hodel* test—whether state compliance would directly impair its ability “to structure integral operations in areas of traditional governmental functions”—appears to have been rewritten to apply only to functions deemed essential to state sovereignty. But which of the myriad operations of state and local governments are at the core of “sovereignty” and which are mere surplusage amenable to federal regulation? A state-operated railroad may sound less “essential” than police or fire protection, but the commuters on the Long Island Railroad might well disagree, especially considering that New York State took over the railroad only to ensure continued service after the private sector had been unable to operate it profitably.

The Court in *Long Island Rail Road* not only provided no guidance out of this morass, it created even more confusion (if that is possible). Following the language quoted above, the Court added that “[j]ust as the Federal Government cannot usurp traditional state functions, there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.”<sup>46</sup> The Court’s immediate point was only that the railroad industry has long been comprehensively regulated by the federal government.

44. 455 U.S. at 686 (emphasis in original).

45. *Id.* at 686-87 (quoting *National League of Cities*, 426 U.S. at 851).

46. *Id.* at 687.

But the quoted language becomes paradoxical when it is recalled that *National League of Cities* acknowledged plenary federal commerce power to regulate essentially all of the private sector. The quoted language suggests that long-standing exercises of the federal commerce power to regulate activities in the private sector render those activities amenable to continued federal regulation even if they are later assumed by the states. By implication, private activities that Congress has failed to subject to federal regulation—whether due to benign neglect or to inattention—may qualify for *National League of Cities* immunity if eventually undertaken by the states. This “use it or lose it”<sup>47</sup> approach to the federal commerce power is not only nonsensical, but perverse in light of the obvious need for innovative federal regulation of the national economy as the future unfolds. In seemingly replacing a focus on “traditional state functions” with one centered on “traditional federal regulation,” this approach appears to turn *National League of Cities* on its head.

The confusion in *Long Island Rail Road* may have resulted in part from a tacit application of a balancing approach. Although the Court in *Long Island Rail Road* purported to apply only the third prong of the *Hodel* test, it stressed the federal government’s determination that uniform national regulation was necessary to the operation of the nation’s railroad system.<sup>48</sup> But how courts can balance this federal interest against New York’s interest in providing commuter rail service is not clear—both are obviously legitimate concerns of the respective sovereigns. Resolution of the issue by the superior sovereign in a democratic fashion in which the affected inferior sovereigns are well represented—i.e., by Congress—seems obviously superior to judicial balancing.

At bottom, *Long Island Rail Road* exemplifies the tension between two competing approaches to *National League of Cities*. One, a historical test, could be applied by courts in a principled manner, but only if it were limited to a “static historical view” that was purportedly rejected in *Long Island Rail Road* and that would seem to give short shrift to modern state innovations. Moreover, under this frozen historical approach it would not be clear that presumably prototypic traditional state functions would be immune—after all, education became a universal state concern only relatively recently in American history. Judicial balancing of

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47. This catchy phrase was coined by Assistant Attorney General Theodore B. Olson during his oral argument in the San Antonio cases. See Transcript of Argument at 16, *Garcia v. San Antonio Metropolitan Transit Authority*, No. 82-1913 (Mar. 19, 1984).

48. See 455 U.S. at 687-90.

the federal and state interests, the second approach lurking in *Long Island Rail Road*, is exceedingly vulnerable to unprincipled judicial decision making. All of this suggests that, even if state immunity from federal regulation had a plausible basis in the Constitution, the immense difficulty in crafting a manageable judicial standard for defining that immunity should lead the Court to reject it altogether.<sup>49</sup>

The second case purporting to apply the three-pronged *Hodel* test was *EEOC v. Wyoming*.<sup>50</sup> In a perhaps portentous decision, Justice Blackmun joined the four justices who dissented in *National League of Cities* to uphold the application to the states of the Age Discrimination in Employment Act (ADEA). Justice Brennan, who scathingly dissented in *National League of Cities*, wrote the opinion for the Court in *Wyoming*. That opinion did not by its terms challenge the precedential vitality of *National League of Cities*, but its reasoning is difficult to reconcile with the prior case.

A Wyoming statute required that state game and fish wardens could continue to work after the age of 55 only with state approval and then only on a year-by-year basis. Under the ADEA, workers between the ages of 40 and 70 are protected against such discrimination on the basis of age unless "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or . . . the differentiation is based on reasonable factors other than age."<sup>51</sup> The Court upheld the preemption of the Wyoming statute by the ADEA. Although game wardens do perform traditional state functions, the Court concluded that the ADEA did "not 'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions.'"<sup>52</sup> Thus, the federal statute was saved by the third prong of the *Hodel* test.

The Court in *Wyoming* found three reasons why "the degree

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49. The Supreme Court has much more readily recognized the existence of a constitutional right where that right can be defined in a clear manner that channels subsequent judicial inquiry. Compare, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964), in which the Court adopted the rather mechanical one-person, one-vote approach to remedy vote dilution arising out of population inequality among districts, with *Mobile v. Bolden*, 446 U.S. 55 (1980), in which the Court declined Justice Marshall's invitation, in dissent, to undertake the difficult task of determining how much disproportionate impact upon the voting strength of the minority community was enough to invalidate a multimember districting scheme. See Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 *YALE L.J.* 635, 665-73 (1982).

50. 103 S. Ct. 1054 (1983). *FERC v. Mississippi* was decided between *Long Island Rail Road* and *EEOC v. Wyoming*, but the Court in that case eschewed reliance upon the *Hodel* test. See *supra* note 41.

51. 29 U.S.C. 623 (f)(1).

52. 103 S. Ct. at 1062.

of federal intrusion in this case is sufficiently less serious than it was in *National League of Cities*.” First, while the FLSA imposed flat requirements concerning wages and overtime pay, the ADEA required only that the state retirement-age policy be tested “against a reasonable federal standard,” with several escape values. Second, the ADEA would have a smaller financial effect upon the states. Third, the Court in *National League of Cities* was concerned that the FLSA could interfere with state policies “beyond immediate managerial goals,” such as “offering jobs at below the minimum wage to persons who do not possess ‘minimum employment requirements.’” In contrast, Wyoming made no claim that its retirement-age statute promoted any such broader goals, and the Court could not imagine any such goal that would involve “either the breadth or the importance of the state policies identified in *National League of Cities*.”<sup>53</sup>

All of this may show that the financial effect of the ADEA on the states will not be drastic. But *Hodel* does not require a drastic effect, only a “direct impairment.” Given the difficulty of using the ADEA’s escape values,<sup>54</sup> the states may be left with the burden of routinely making individualized assessments of the performance of workers between the ages of forty and seventy. Surely this burden, as applied to workers carrying out traditional governmental functions, “directly impairs” the states’ ability to structure their employment relationships within the intent of *National League of Cities* and the meaning of the third prong of the *Hodel* test. The only counterargument is that the “majority” opinion in *National League of Cities* is so opaque that it is impossible to conclude conclusively that *Wyoming* is inconsistent with it.<sup>55</sup>

The cases applying *National League of Cities* aptly illustrate the need for judicial candor and courage to overrule precedent where advisable. Less forthright judicial methods are illegitimate, as Robert Keeton has explained in language applicable to the progeny of *National League of Cities*:

Courts refusing to overrule precedents outright are virtually forced to accomplish reform by devising a labyrinth of rules with dubious and unpredictable implications. Thus overpowering demands of justice encourage such courts to make casuistic distinctions that produce doubt rather than certainty, irregularity rather than evenhandedness, and vacillation rather than constancy. Rigorous judicial abstention from overruling precedents defeats the very stability that those who

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53. *Id.* at 1062-64.

54. *See id.* at 1071-72 (Burger, C.J., dissenting).

55. For a more complete analysis and critique of *Wyoming*, see Alfange, *supra* note 17, at 258-80.

embrace it are trying to preserve.<sup>56</sup>

## C

The last desperate argument for any legal rule is that, despite its manifest idiocy, the rule must be maintained to protect innocent individuals who have relied on it. In the context of the pending San Antonio cases, the question of reliance first requires an analysis of the effect of *National League of Cities* upon the FLSA. That decision held the FLSA to be unconstitutional only as applied to employees performing "traditional state functions." Because of the vagueness of this approach, and because the cases following *National League of Cities* have not followed it faithfully, a state could be said to have reasonably relied upon that precedent only with respect to employees who clearly fell within the sweep of *National League of Cities*—police, fire fighters, and the like.<sup>57</sup> In this light, the San Antonio cases do not pose a difficult question of reliance. The transportation workers in those cases do not fall within any category specifically identified in *National League of Cities*. Moreover, when *Long Island Rail Road* is considered, the claim that they perform traditional state functions is made even more questionable because the transit system in San Antonio had been operated by a private company until it was purchased by the municipality in 1959.<sup>58</sup>

Thus, if *National League of Cities* is overruled in the context of the San Antonio cases, the Court need not address whether *National League of Cities* should be fully retroactively overruled and the FLSA should apply even with respect to state employees engaged in traditional state functions. Since the statute of limitations for nonwillful violations of the FLSA is only two years,<sup>59</sup> this question of retroactivity would be mooted rather quickly.

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56. R. KEETON, *VENTURING TO DO JUSTICE* 15 (1969).

57. *National League of Cities* mentions "fire prevention, police protection, sanitation, public health, and parks and recreation" as prototypic traditional state functions. 426 U.S. at 851.

58. See *San Antonio Metropolitan Transit Authority v. Donovan*, 557 F. Supp. at 448 n.4. The conclusion in the text seems correct to me even though the district court in the San Antonio cases held that *National League of Cities* barred application of the FLSA to these workers. The district court's holding concerning the applicability of *National League of Cities* to transportation workers is inconsistent with *Alewine v. City Council*, 699 F.2d 1060 (11th Cir. 1983); *Dove v. Chattanooga Area Regional Transit Authority*, 701 F.2d 50 (6th Cir. 1983); *Kramer v. New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), cert. denied, 103 S. Ct. 786 (1983); *Francis v. City of Tallahassee*, 424 So.2d 61 (Fla. App. 1982). The Supreme Court has not hesitated to apply a decision retroactively to a losing party when that party had relied upon an interpretation of prior law that was not settled. See *infra* note 62.

59. 29 U.S.C. § 255.



This being so, it might well behoove the Court to leave this issue to the lower courts.

Regardless of which courts end up deciding the issue of retroactivity, it seems clear that there are two alternatives: either all employees, or all employees except those clearly performing traditional state functions, should be covered by the FLSA retroactively. *National League of Cities* plainly did not wipe the FLSA off the books even with respect to employees performing traditional state functions. Although it was once thought that a statute held to be unconstitutional was a nullity for all past or future purposes, it is now recognized that such a holding simply creates a defense to enforcement of the statute, does not automatically void it retroactively,<sup>60</sup> and does not prevent its prospective revival.<sup>61</sup> The more difficult question is whether a statute first held unconstitutional and later revived may have any retroactive impact. To my knowledge, the Supreme Court has never addressed this issue. In an analogous area of statutory construction, the Court has overruled prior constructions of the federal tax laws retroactively despite the reliance interests of the taxpayers involved, but recently it has indicated a willingness to apply such rulings prospectively in cases involving justifiable reliance by taxpayers.<sup>62</sup> In any

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60. Compare *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940), with *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). A recent example of the modern approach is the second decision in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), in which the Court affirmed the holding of a lower court that allowed Pennsylvania, pursuant to state statute, to reimburse nonpublic sectarian schools for secular educational services performed prior to the invalidation of that statute in *Lemon I*, 403 U.S. 602 (1971). Chief Justice Burger's plurality opinion in *Lemon II* stated that "the remote possibility of constitutional harm from allowing the state to keep its bargain" was outweighed by the fact that the schools had reasonably incurred expenses in reliance upon the state statute. 411 U.S. at 203-09. Even more recently, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court refused to give retroactive effect to its holding that the Bankruptcy Act of 1978 unconstitutionally conferred Article III authority upon judges who lacked life tenure and protection against salary diminution.

For a venerable consideration of such issues, see generally O. FIELD, *THE EFFECT OF AN UNCONSTITUTIONAL STATUTE* (1935).

61. See *Jawish v. Morlet*, 86 A.2d 96 (D.C. 1952); 39 Op. Atty. Gen. 22 (1937); Capelletti, *Judicial Review in Comparative Perspective*, 58 CALIF. L. REV. 1017, 1042 n.98 (1970); Nimmer, *A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875*, 65 COLUM. L. REV. 1394 (1965).

62. Decisions such as *Helvering v. Hallock*, 309 U.S. 106 (1940), which overruled a Supreme Court decision's interpretation of a federal revenue act, and *Helvering v. Gerhardt*, 304 U.S. 405 (1938), which overruled longstanding Supreme Court precedent holding that wages of state employees were constitutionally immune from federal taxation, were applied retroactively despite the harshness of those results. See Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437 (1947). More recent cases have indicated a willingness to consider prospective application of an interpretation of the federal tax laws that conflicts with a theretofore settled understanding of those laws. See *Diedrich v. Commissioner*, 457 U.S. 191, 200 n.10 (1982); *United States v. Estate v. Donnelly*, 397 U.S. 286, 294-95 (1970).

event, the states should prevail when their reliance interests are balanced against the federal interest in full enforcement of the FLSA and the interests of the affected employees in receiving the protections of the act retroactively. The states should not be subjected to retroactive monetary liability simply because they took the Court seriously in structuring their relations with their employees. Avoiding this hardship upon the states should make it easier for the Court to overrule *National League of Cities*.

### III

Although *National League of Cities* is ripe for an artful overruling, two potentially thorny problems of symbolism might seem to suggest that the Court should stay its hand. The first is the recent vintage of *National League of Cities*. At this writing that precedent is only eight years old. Overruling such a recent precedent might make the Court appear particularly arbitrary. One obvious response—that *National League of Cities* had itself overruled an eight-year-old precedent—is inadequate, if for no other reason than that two wrongs don't make a right. Second, *National League of Cities* was a five-to-four decision, and its overruling could be accomplished by the change of one vote. Justice Blackmun is, of course, the likely candidate considering both his hesitant concurrence in *National League of Cities* and his membership in the *Wyoming* majority. It might appear that *stare decisis* should have a firmer foundation than the vacillations of one justice.

These two considerations are obviously related. The usual concern about overruling a recent precedent is that it may have fallen victim simply to a change in personnel rather than reasoned reconsideration.<sup>63</sup> This concern is not applicable to *National League of Cities*, since Justice O'Connor—the only justice appointed after *National League of Cities*—agrees with her predecessor, Justice Stewart, that it was correctly decided.<sup>64</sup> Thus the

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63. Israel cited sources showing that “[a]pproximately three-quarters of all overruling cases have reversed cases decided within the previous twenty-five years . . . and have occurred within a five-year period after significant changes (3 to 6 Justices) in the Court’s composition.” Israel, *supra* note 22, at 218 n.31 (citing Bernhardt, *Supreme Court Reversals on Constitutional Issues*, 34 CORNELL L.Q. 55 (1948); and Ulmer, *An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court*, 8 J. PUB. L. 414 (1959)). These conclusions are dated, but an examination of overruling cases since these studies were completed would, I suspect, show that these statistics are still close to the mark. One obvious example is *Hudgens v. NLRB*, 424 U.S. 507 (1976), overruling *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), which had already been eviscerated in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

64. Justice O'Connor’s opinion concurring in the judgment in part and dissenting in

situation under consideration is one in which—to return to the metaphor developed at the outset of this essay—the present Court is engaging in a soliloquy concerning the viability of one of its own decisions rather than in a dialogue about a decision of an earlier Court. Such a soliloquy might reveal a Court vacillating Hamlet-like before a sea of troubles, perhaps a Court without intellectual leadership or vision. But such an overruling opinion would be the fruit of principled decisionmaking and constructive self-doubt as well. The opinion might be a slightly embarrassing admission of human fallibility, but it would not be raw judicial fiat.

When justices have become convinced that they themselves made a recent mistake, they have sometimes decided to overrule the prior case to avoid the problem of “the unsatisfactory ruling . . . becom[ing] more firmly riveted . . . with each repetition” without overruling.<sup>65</sup> The Court recently did just that in *United States v. Scott*,<sup>66</sup> a double jeopardy case in which Justice Rehnquist’s opinion for the Court overruled a decision only three years old that he had written for the Court.<sup>67</sup> The Court in *Scott* stated that “our vastly increased exposure to the various facets of the Double Jeopardy Clause has now convinced us that [the earlier decision] was wrongly decided.”<sup>68</sup> This “vastly increased exposure” was the result of several intervening decisions.<sup>69</sup> These “lessons of experience,” the Court stated, quoting Justice Brandeis’s classic analysis of *stare decisis*,<sup>70</sup> were sufficient to support the overruling of the recent precedent.<sup>71</sup> In light of *Long Island Rail*

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part in *FERC v. Mississippi*, 456 U.S. at 775-97, and her joining in the dissenting opinions of Chief Justice Burger and Justice Powell in *Wyoming*, 103 S. Ct. at 1068-75, 1075-81, demonstrate that she is an avid believer in *National League of Cities*.

65. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 14 (1966).

66. 437 U.S. 82 (1978).

67. *United States v. Jenkins*, 420 U.S. 358 (1975). All five members of the majority of the Court in *Scott* had been in the majority in *Jenkins*.

68. 437 U.S. at 86-87.

69. The Court in *Scott* wrote that “our growing experience with Government appeals convinces us that we must re-examine the rationale of *Jenkins* in light of *Lee* [v. *United States*, 432 U.S. 23 (1977)], *Martin Linen* [*United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)], and other recent expositions of the Double Jeopardy Clause.” 437 U.S. at 95.

70. 437 U.S. at 101 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting)). Justice Brandeis’s statement is quoted in large part in note 19 *supra*.

71. See also *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), in which a six-member majority overruled *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), a 7-1 decision, and the famous flag salute case, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), in which a six-member majority overruled *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), which had a seven-member majority with one justice concurring in the result and one justice dissenting.

*Road* and *Wyoming*, essentially the same could be said of *National League of Cities*.

But even if recent precedents are not sacrosanct, that does not mean that one justice's vote should be allowed to eviscerate them. Here, again, it is necessary to note that Justice Blackmun, the focus of this inquiry, was a member of the Court that decided *National League of Cities*. At the outset, he reduced its precedential value by only haltingly joining that opinion. His vote to overrule *National League of Cities* would seem to be a change of heart based on thoughtful reconsideration. It would not be subject to the criticism, as would be such a vote by a new appointee, that it was simply the reflection of personal judicial politics. That the soliloquy of *stare decisis* is reduced in this case to one justice talking to himself does not render the process illegitimate. Indeed, considering the obvious personal and institutional incentives against changing a vote in these circumstances, the mere fact that a justice has changed his vote implies that he felt compelled to do so by principle, not personal politics.

Such a change of vote by Justice Blackmun would not be unprecedented. The most famous incident in which a judicial change of vote resulted in the overruling of recent precedent is undoubtedly "the switch in time that saved nine," Justice Roberts's decision in *West Coast Hotel v. Parrish* to abandon the conservative bloc and join four others to uphold a state minimum-wage law. A more recent example is *Boys Markets, Inc. v. Retail Clerks Union*,<sup>72</sup> a five-to-two decision that overruled an eight-year-old precedent, *Sinclair Refining Co. v. Atkinson*,<sup>73</sup> itself a five-to-three decision, on an issue of statutory construction, where *stare decisis* supposedly has greater force.<sup>74</sup> Justice Stewart, who had joined *Sinclair*, provided the fifth vote for the decision in *Boys Markets*. He wrote a short concurring opinion noting that "[a]n aphorism of Mr. Justice Frankfurter provides me refuge: 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.'"<sup>75</sup>

72. 398 U.S. 235 (1970).

73. 370 U.S. 195 (1962).

74. See *supra* note 19.

75. 398 U.S. at 255 (Stewart, J., concurring) (quoting *Henslee v. Union Planters Bank*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)). See also *Perez v. Campbell*, 402 U.S. 637 (1971), overruling *Kesler v. Dept. of Pub. Safety*, 369 U.S. 153 (1962), where Justice Brennan's change of vote was critical.

In *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), the Court overruled another aspect of *Kesler*, *supra*, involving three-judge court jurisdiction. Justices Harlan and Brennan switched to provide the necessary votes in *Swift*. Justice Harlan's opinion for the Court in *Swift* announced respect for *stare decisis* by stating that "[t]he overruling of a six-to-two

The possibility that Justice Blackmun's votes will have first created and then destroyed a major constitutional doctrine obviously raises troubling concerns about the judicial process. The Legal Realists taught us that judges make law rather than find it. Today the Critical Legal Scholars tell us that "[j]udges [should] not delude themselves into thinking that what they do has significance different from, and broader than, what every other political actor does."<sup>76</sup> Occasionally, even a justice has recognized the potential force of such a criticism, as "when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court."<sup>77</sup> If the Court is only a political institution, the art of overruling is merely a cosmetic craft for law clerks, who must put the best face they can on the judges' capricious decisions.

This is not the place for a full-blown essay on the "dilemmas of liberal constitutionalism," to borrow Mark Tushnet's phrase.<sup>78</sup> My tentative view is that the problems of the arbitrariness of values and the gap between the Supreme Court's impersonal image and its subjective reality ought to be forthrightly recognized. At the same time the institutional factors that might constrain judicial decision making must be examined without cynicism.<sup>79</sup> The reconsideration of *National League of Cities* sheds some light on these issues. In this small corner of constitutional law, at least, the sprawl and muddle of hopeless subjectivity are absent. The factors involved in the art of overruling *do* provide some guidance. Overruling *National League of Cities* would make clear that doctrine can be important. Indeed, the fact that the probable catalyst

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decision of such recent vintage, which was concurred in by two members of the majority in the present case, and the opinion in support of which was written by an acknowledged expert in the field of federal jurisdiction [Justice Frankfurter], demands full explication of our reasons." *Id.* at 116. Justice Douglas in dissent said: "My objection is not that the Court has not given *Kesler* 'a more respectful burial,' *Gideon v. Wainwright*, 372 U.S. 335, 349 [Harlan, J., concurring], but that the Court has engaged in unwarranted infanticide." *Id.* at 133 (dissenting opinion).

76. Tushnet, *supra* note 34, at 425-26.

77. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 487 (1939) (Frankfurter, J., concurring). In addition, see *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government."); *United States v. Rabinowitz*, 339 U.S. 56, 86 (1950) (Frankfurter, J., dissenting) ("Especially ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors.")

78. See Tushnet, *supra* note 34.

79. A recent essay by Cass Sunstein seems to me to be a step in the right direction. Sunstein, *Politics and Adjudication*, 94 *ETHICS* 126 (1983).

of such an overruling is Justice Blackmun bolsters the conclusion that doctrine can dominate constitutional decision making. For whatever else might be said about Justice Blackmun,<sup>80</sup> it is clear that he cares deeply about doctrine and agonizes over doing the "right"—i.e., institutionally legitimate—thing.

The reconsideration of *National League of Cities* suggests that the relevant question is not whether doctrine and precedent matter, but rather how much they matter. This observation is by no means new, of course. For example, Frederick Schauer recently noted that the performance of the Burger Court suggests that "doctrine, precedent, and related institutional considerations have exerted a considerable restraining influence on what might otherwise have been the more extreme political predilections of the Court's personnel."<sup>81</sup> The fact that *National League of Cities* does not fit this description is not cause for despair or cynicism so much as cause for hope that it will be overruled.

#### IV

Far from being a threat to the image of principled decision making, overruling *National League of Cities* would be an important step toward maintaining the substance of the rule of law. If the alternatives before the Court in the San Antonio cases are either to overrule *National League of Cities* or to continue to pay lip service to that precedent while minimizing its impact by drawing dubious distinctions between it and later cases, then plainly the Court should opt for the former. Even though a fair reading of the cases following *National League of Cities* shows that they have hardly riveted armor around that precedent, a new opinion could give them a revisionist reading stressing their purported adherence to *National League of Cities*. Without an express overruling, "the threat will always be present that the *National League of Cities* doctrine will be revived"<sup>82</sup> with full vigor in some future case.

In *Continental T.V., Inc., v. GTE Sylvania, Inc.*, the Court justified overruling a ten-year-old precedent because it had been "an abrupt and largely unexplained departure" from recent precedent

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80. He would make an interesting subject for a biography. The limited descriptions of him to date range from the character assassination of *The Brethren* to not-so-subtle efforts to reinforce his exercises of judicial activism, see, e.g., Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983), and they seem to me to be far off the mark.

81. Schauer, Book Review, 82 MICH. L. REV. 655, 656 (1984) (reviewing THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983)).

82. Alfange, *supra* note 17, at 281.

and "the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts," and because "[t]he great weight of scholarly opinion has been critical of the decision, and a number of the federal courts confronted with analogous [facts] have sought to limit its reach."<sup>83</sup> In a similar vein, Justice Rehnquist once urged the overruling of a nine-year-old precedent because it was decided " 'by a closely divided court, unsupported by the confirmation of time,' and, as a result of its weak precedential and doctrinal foundation, it cannot be viewed as a check on 'the living process of striking a wise balance between liberty and order as new cases come here for adjudication.' "<sup>84</sup> These quotations are as good a place as any for the Court to begin its decision of the pending San Antonio cases.

In considering whether to overrule *National League of Cities*, the Court might do well to recall the oral argument in that case. Solicitor General Bork presented a strong defense of the FLSA amendments. In response to questioning, however, he conceded that federal regulation of salaries of certain state policy-making officials (who were not covered by these amendments) might be beyond Congress's authority under the commerce clause. When Bork stated in response to another question that federal regulation of the salaries of state judges might be subject to the same objection, a remarkable colloquy ensued between Bork and Justice Rehnquist:

Q: But judges [do] not make policy generally.

MR. BORK: There is a school of thought centered in the Yale Law School, Mr. Justice Rehnquist, that suggest[s] that they do occasionally. But I was trying to prevent it in this case. [Laughter].

Q: Touche.<sup>85</sup>

Bork's effort to limit judicial policy making ended in failure, of course, as Justice Rehnquist had what appeared to be the last laugh. But *stare decisis*, properly understood, in no way immunizes *National League of Cities* from overruling. The San Antonio cases provide the Court with the opportunity to render *National League of Cities* a mere detour from the path of constitutional principle.

83. 433 U.S. 36, 47-48 (1977).

84. *Carlson v. Green*, 446 U.S. 14, 32 (1980) (dissenting opinion), arguing for the overruling of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

85. Transcript of Reargument at 63, *National League of Cities* (Mar. 2, 1976).