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A FURTHER COMMENT ON STARE DECISIS  
AND THE OVERRULING OF *NATIONAL  
LEAGUE OF CITIES*

*Philip P. Frickey\**

*Phases and stages, circles and cycles,  
scenes that we've all seen before,  
let me tell you some more . . . .*

Willie Nelson

Willie Nelson's refrain was written with the human cycle of courtship and separation in mind, but it applies equally well to the Supreme Court's stormy romance with state sovereignty. As I noted in the last issue of this journal,<sup>1</sup> in 1968 the Supreme Court upheld federal regulation of the wages of state employees, rejecting the argument that the Constitution provides states with immunity from federal regulation adopted pursuant to Congress's power to regulate commerce.<sup>2</sup> Eight years later, in *National League of Cities v. Usery*, a Supreme Court with four new members overruled the 1968 decision by a five-to-four vote and held that states are constitutionally immune from federal regulation that "directly displace[s] the States' freedom to structure integral operations in areas of traditional governmental functions."<sup>3</sup> Another eight years later, the Court set *Garcia v. San Antonio Metropolitan Transit Authority* for reargument and sua sponte requested the parties to discuss whether *National League of Cities* should be reconsidered.<sup>4</sup>

It was the burden of my last essay to demonstrate that princi-

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1. Frickey, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 CONST. COMM. 123 (1985).

2. *Maryland v. Wirtz*, 392 U.S. 183 (1968). The Court stated:

[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.

*Id.* at 196-97.

3. 426 U.S. 833, 852 (1976).

4. 52 U.S.L.W. 3937 (1984).

ples of stare decisis, when properly understood, did not counsel against overruling *National League of Cities*. In its decision in *Garcia*,<sup>5</sup> the Court apparently agreed. In an opinion by Justice Blackmun, it expressly overruled that precedent. The majority in *Garcia* consisted of the four dissenters in *National League of Cities* and Justice Blackmun, who had only haltingly joined that precedent and had since appeared largely to recant that position. My earlier essay attempted to justify such a change of heart by Justice Blackmun,<sup>6</sup> and I do not believe any further extended discussion of his role with respect to stare decisis is necessary. The discussions of stare decisis given in the majority and dissenting opinions in *Garcia* are worth noting, however, as are the differing measures of protection of state sovereignty that divided the Justices. It is to these subjects that these comments are addressed.

## I

My earlier essay suggested that opinions overruling precedents have often stressed certain factors to indicate that the overruling of precedent is based on principle, not judicial politics. These factors include whether the overruled decision was wrong from the start, whether its basis has eroded over time, whether the Court has had difficulty in applying the decision, and whether later decisions are in tension with it. *National League of Cities* seemed particularly vulnerable in light of these factors, since in my view “[it] 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.”<sup>7</sup> Justice Blackmun’s majority opinion in *Garcia* stressed all but the last of these factors.

First, the opinion stated that *National League of Cities* was wrongly decided. The basic flaw in that precedent, the Court concluded, was that it gave the Court the primary responsibility for protecting state sovereignty. Instead, “[a]part from the limitation on federal authority inherent in the delegated nature of Congress’ Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”<sup>8</sup> Thus, the Court adopted the argument of various commentators that state sovereignty is “more properly protected” by the federal political process—in which the states are represented by their Senators and Representatives, con-

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5. *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985).

6. See Frickey, *supra* note 1, at 142-44.

7. *Id.* at 129.

8. 105 S.Ct. at 1018.

trol the qualifications of voters in federal elections, and participate in the electoral college—"than by judicially created limitations on federal power."<sup>9</sup>

The Court did not, however, absolutely foreclose judicial review of federal legislation intruding upon state sovereignty. As the above quotations suggest, in a rare case such legislation may be beyond Congress's delegated powers under article I. Moreover, the Court acknowledged the possibility that federal legislation intruding upon state sovereignty could result from a manifest malfunction of the procedural protections available to the states. It stressed that "[a]ny substantive restraint on the exercise of the Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'"<sup>10</sup> The Court concluded that "[i]n the factual setting of these cases the internal safeguards of the political process have performed as intended." Thus, the Court was not required "to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause."<sup>11</sup>

Second, the *Garcia* Court noted that *National League of Cities* was decided "by a sharply divided vote,"<sup>12</sup> and that "the separate concurrence providing the fifth vote in *National League of Cities* was 'not untroubled by certain possible implications' of the decision."<sup>13</sup> The Court in *Garcia* did not make much of the precedential weakness of *National League of Cities* itself, presumably because Justice Blackmun, the author of *Garcia*, was that "not untroubled" critical fifth vote in *National League of Cities*. A more forthcoming *mea culpa* might seem appropriate to some observers, but a majority opinion does not seem to be an appropriate forum for a personal apology. Had another Justice written *Garcia*, a separate opinion by Justice Blackmun explaining his change of view might well have been in order.

Third, the *Garcia* Court stressed the problems it and the lower courts had encountered in attempting to apply *National League of*

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9. *Id.* at n.11. The Court cited approvingly J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-184 (1980); 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); and La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779 (1982).

10. *Id.* at 1019-20.

11. *Id.* at 1020.

12. *Id.* at 1007.

13. *Id.* at 1021.

*Cities*. It found the lower courts in hopeless, yet understandable disarray in their attempts to define “traditional governmental functions” immune from federal regulation under that precedent.<sup>14</sup> Moreover, it concluded that “this Court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*.”<sup>15</sup> As a result, *National League of Cities* was “unsound in principle,” as well as “unworkable in practice,” because it “inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.”<sup>16</sup>

The Court in *Garcia* did not address one issue relating to stare decisis: whether overruling *National League of Cities* retroactively would cause undue hardship upon state or local governments that had reasonably relied upon that precedent. The retroactivity issue will presumably come before the district court on remand in *Garcia*. The Court’s refusal to address the issue of retroactivity is by no means unique, and, as I suggested in the earlier essay, may have been the best approach to take in *Garcia*.<sup>17</sup>

Although the majority opinion in *Garcia* did discuss the relevant factors concerning whether to overrule *National League of Cities*, it did not systematically address considerations of stare decisis. Indeed, read in isolation, the Court’s only overt reference to stare decisis, which appears at the end of the opinion, might seem disappointingly brief and superficial:

We do not lightly overrule recent precedent. We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause. See *United States v. Darby*, 312 U.S. 100, 116-117 (1941). Due respect for the reach of congressional power within the federal system mandates that we do so now.<sup>18</sup>

Yet it would exalt form over substance to make much of a failure to address stare decisis directly, when the opinion contains all that need be said to justify overruling precedent. A concluding section to *Garcia* addressing stare decisis would have been a nice touch,<sup>19</sup> but in the context of this opinion the omission of such a discussion

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14. *Id.* at 1011.

15. *Id.*

16. *Id.* at 1015-16.

17. See Frickey, *supra* note 1, at 138-40.

18. 105 S. Ct. at 1021. At the end of the first sentence of this quotation, the Court dropped a footnote with a “but see” cite to *United States v. Scott*, 437 U.S. 82, 83, 86-87 (1978), which overruled *United States v. Jenkins*, 420 U.S. 358 (1975), and used language that would justify the overruling of *National League of Cities* in *Garcia*. See Frickey, *supra* note 1, at 141-42.

19. See, e.g., *Monell v. Department of Social Services*, 436 U.S. 658, 695-701 (1978); *Moragne v. State Marine Lines*, 398 U.S. 375, 403-05 (1970).

does not demonstrate disrespect for the principles underlying that doctrine.

## II

Stare decisis often seems to be the dissenter's last desperate rallying cry. So it was in *Garcia*, in which the major dissenting opinion, written by Justice Powell and joined by the Chief Justice and Justices Rehnquist and O'Connor, argued that "[t]here have been few cases . . . in which the principle of *stare decisis* and the rationale of recent decisions were ignored as abruptly as we now witness."<sup>20</sup> Justice Powell's assertion is long on hyperbole and short on hypothesis. I see no need to explain further why, in contrast to Justice Powell, I believe overruling *National League of Cities* was a principled result. What I do wish to challenge briefly is Powell's implicit contention that the Supreme Court rarely overrules recent precedent. The statistics are squarely to the contrary.<sup>21</sup> Moreover, contrary to Justice Powell's suggestion,<sup>22</sup> the fact that the Court's decisions attempting to apply *National League of Cities* consistently "reiterated" the reasoning of that decision in no way immunized it from overruling. A common pattern in the overruling of precedent involves initial attempts to apply the decision properly, followed by a frank recognition that the precedent is unworkable or inconsistent with the decisions that have followed it. Indeed, the dissenters in *Garcia* have used precisely this analysis in overruling important precedents concerning the constitutional rights of criminal defendants.<sup>23</sup> Thus, Justice Powell's comment that "[t]he stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitous overruling of *multiple* precedents that we witness in this case"<sup>24</sup> is misleading at best. Moreover, it is difficult to conceive of this overruling as "precipitous," since several decisions since *National League of Cities* have been in tension with the basic rationale of that precedent.<sup>25</sup> When Justice Powell's reliance on stare decisis is analyzed in this light, it becomes apparent that *Garcia* was less an affront to stare decisis than was the overruling of *Maryland v. Wirtz* in *National League of Cities*—an overrul-

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20. 105 S.Ct. at 1021 (Powell, J., dissenting).

21. See Frickey, *supra* note 1, at 140 n.63.

22. 105 S. Ct. at 1021.

23. See *Illinois v. Gates*, 103 S. Ct. 2317 (1983) (overruling *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964)); *United States v. Salvucci*, 448 U.S. 83 (1980) (overruling *Jones v. United States*, 362 U.S. 257 (1960)); *United States v. Scott*, 437 U.S. 82 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358 (1975)).

24. 105 S. Ct. at 1022 (emphasis added).

25. See, e.g., Frickey, *supra* note 1, at 132-37.

ing that, unlike *Garcia*, was caused by major changes in the composition of the Court and was not nearly so predictable based on prior decisions.<sup>26</sup>

Justice Powell read *National League of Cities* as adopting a balancing approach—which came as some surprise to its author, Justice Rehnquist<sup>27</sup>—that supposedly protected state sovereignty far better than does the federal political process relied upon by the majority. At least three elements of his discussion concerning this balancing test deserve comment.

First, Powell charged that the majority in *Garcia* rejected “almost 200 years of the understanding of the constitutional status of federalism.”<sup>28</sup> His assessment of the history of federalism is in part a return to an earlier debate between Justice Stevens and himself.<sup>29</sup> One can easily agree with Powell’s premise that the framers considered federalism a fundamental value and yet disagree with his conclusions. As the Court in *Garcia* said, “to say that the Constitution assumes the continued role of the States is to say little about the nature of that role.”<sup>30</sup> There is simply no textual basis for immunizing the states from federal regulation adopted pursuant to the commerce clause. Indeed, as the majority concluded, the only protections for state interests clearly provided by the language and the structure of the Constitution are procedural in nature. Moreover, Powell’s assertion that the majority opinion was inconsistent with 200 years of history ignores not only *Maryland v. Wirtz*, but also other precedent dating back at least to 1936.<sup>31</sup>

Second, Powell’s discussion of the nature and importance of the procedural protections available to the states is astounding. He asserted that “[t]his Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process.”<sup>32</sup> This conclusion is simply false. Much of modern equal protection jurisprudence since that famous footnote in *Carolene Products* depends upon a model of judicial restraint based upon the presumptive fair-

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26. See *id.* at 125-26, 129, 140-44.

27. See 105 S. Ct. at 1033 (Rehnquist, J., dissenting): “Justice Powell’s reference to the ‘balancing test’ approved in *National League of Cities* is not identical with the language in that case . . . .”

28. 105 S. Ct. at 1023 (Powell, J., dissenting).

29. Compare *id.* at 1027-32 with Justice Stevens’s concurring opinion and Justice Powell’s dissenting opinion in *EEOC v. Wyoming*, 460 U.S. 226 (1983).

30. 105 S.Ct. at 1017.

31. See Frickey, *supra* note 1, at 124-25.

32. 105 S. Ct. at 1026 n.12. In addition, see *id.* at 1035 (O’Connor, J., joined by Powell and Rehnquist, JJ., dissenting).

ness of the political process.<sup>33</sup> For example, in holding that a facially neutral statute that has a racially or sexually disproportionate impact violates equal protection only when plaintiffs can bear the difficult burden of proving that the legislation was the result of discriminatory motivations, the Court has stated:

The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility . . . . When some other independent right is not at stake, . . . and when there is no "reason to infer antipathy," . . . it is presumed that "even improvident decisions will eventually be rectified by the democratic process . . . ."<sup>34</sup>

Indeed, the approach of the majority in *Garcia* mirrors equal protection jurisprudence, allowing the states to prove that the political process malfunctioned in producing federal legislation that intrudes upon core state functions.

Powell's lamentations about the supposed insensitivity of the federal political process to the interests of the states<sup>35</sup> seem oddly out of place not only when compared to the Court's presumption that the political process adequately protects minorities from discriminatory legislation, but also when contrasted with the Court's refusal to consider imbalances in the political system caused by the unequal distribution of resources available for political lobbying and expenditures.<sup>36</sup> Powell himself wrote *Arlington Heights v. Metropolitan Housing Development Corp.*, which presumed that the political process generally protects minorities, and *First National Bank of Boston v. Bellotti*, which refused to consider the distorting effects of money in the political process. In contrast, he has this to say about heightened scrutiny of federal regulation of the states:

[W]e have witnessed in recent years the rise of numerous special interest groups that engage in sophisticated lobbying, and make substantial campaign contributions to some members of the Congress. These groups are thought to have significant influence in the shaping and enactment of certain types of legislation. Contrary to the Court's view, a "political process" that functions in this way is unlikely to safeguard the sovereign rights of States and localities.<sup>37</sup>

33. My colleague Suzanna Sherry called my attention to Justice Powell's own abandonment of the *Carolene Products* theory. See Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982).

34. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). See also *Mobile v. Bolden*, 446 U.S. 55, 133-34 (1980) (Marshall, J., dissenting).

35. See 105 S.Ct. at 1025 n.9: "The adoption of the Seventeenth Amendment (providing for direct election of senators), the weakening of political parties on the local level, and the rise of national media, among other things, have made Congress increasingly less representative of State and local interests, and more likely to be responsive to the demands of various national constituencies."

36. See *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976).

37. 105 S.Ct. at 1031 n.18.

It is no answer to say that the structure of the Constitution presupposes a vital role for the states, since the equal protection clause surely presupposes a meaningful role in America for minorities and counsels against ignoring inequality of political power caused by wealth. In short, what's sauce for the goose ought to be sauce for the gander, or, to use another fowl metaphor, perhaps what most irked Powell is that the chickens have come home to roost.<sup>38</sup>

Third, Powell's application of the balancing approach to the facts of *Garcia* demonstrates the soundness of the majority's denial of any "license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."<sup>39</sup> For Powell, the municipal operation of mass transit at issue in *Garcia*, though "relatively new in the life of our country," should be immune from federal regulation for the following reasons:

[It] is a classic example of the type of service traditionally provided by local government. It is *local* by definition. It is indistinguishable in principle from the traditional services of providing and maintaining streets, public lighting, traffic control, water, and sewerage systems. Services of this kind are precisely those "with which citizens are more 'familiarly and minutely conversant.'" The Federalist, No. 46, p. 316. State and local officials of course must be intimately familiar with those services and sensitive to their quality as well as cost. Such officials also know that their constituents and the press respond to the adequacy, fair distribution, and cost of these services. It is this kind of state and local control and accountability that the Framers understood would insure the vitality and preservation of the federal system that the Constitution explicitly requires.<sup>40</sup>

This approach reveals no standard that can be applied in a principled fashion and depends largely, if not solely, upon the judge's own policy preferences. Powell as much as admitted the latter point when he chided the majority for looking "myopically only to persons elected to positions in the federal government" and disregarding "entirely *the far more effective role of democratic self-*

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38. Had Powell's refusal to trust the political process prevailed in *Garcia*, some commentators would have pounced on the inconsistency between his approach and the Court's decisions involving discrimination and involving money in politics. The more optimistic might have suggested that Powell's analysis was the harbinger of a new jurisprudence—one that must strike down legislation with demonstrable discriminatory effects regardless of whether the legislation was impermissibly motivated and that must uphold limitations on political expenditures. Those predictions would have been about as accurate, of course, as the suggestion that *National League of Cities* established a constitutional right to welfare. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 313 (1978); Michelman, *States' Rights and States' Roles: The Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 *YALE L.J.* 1165 (1977); Tribe, *Unravelling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 *HARV. L. REV.* 1065 (1977).

39. 105 S.Ct. at 1017.

40. *Id.* at 1032.

government at the state and local levels.”<sup>41</sup> The framers—or at least the antifederalists—may well have shared this Jeffersonian vision, but modern developments, not the least of which being the integrated national economy, have rendered it romantic and outdated. More important, the framers inserted no language in the Constitution attempting to compel later generations to live according to that vision of democratic federalism, and modern circumstances have forced Congress to deal with many matters that may seem “local” in and of themselves. Since there is no single, identifiable vision of federalism imbedded in the Constitution from which judges can discern and apply neutral principles of state immunity, the majority in

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41. *Id.* at 1031 (emphasis added). Justice Powell continued:

One must compare realistically the operation of the state and local governments with that of the federal government. Federal legislation is drafted primarily by the staffs of the congressional committees. In view of the hundreds of bills introduced at each session of Congress and the complexity of many of them, it is virtually impossible for even the most conscientious legislators to be truly familiar with many of the statutes enacted. Federal departments and agencies customarily are authorized to write regulations. Often these are more important than the text of the statutes. As is true of the original legislation, these are drafted largely by staff personnel. The administration and enforcement of federal laws and regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they hardly are as accessible and responsive as those who occupy analogous positions in State and local governments.

In drawing this contrast, I imply no criticism of these federal employees or the officials who are ultimately in charge. The great majority are conscientious and faithful to their duties. My point is simply that members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies. It is at these state and local levels—not in Washington as the Court so mistakenly thinks—that “democratic self-government” is best exemplified.

*Id.* at 1031-32. The many empirical assumptions in this excerpt are troubling. Indeed, the overall tenor of Powell’s dissent is inconsistent with the vision of a federal government designed to protect minorities against local prejudices—a vision at least as old as the Constitution itself. See, e.g., THE FEDERALIST No. 10 (J. Madison). Cf. Powell’s comment quoted in the text at note 37. One rather obvious example demonstrating the inconsistency between Powell’s vision of federalism and the facts involves minority vote dilution. Empirical studies have demonstrated that minority citizens have been fenced out of the political process in communities where racial bloc voting occurs and certain “reform” political structures, such as multi-member districts in which officials are elected at large, are present. See, e.g., *Mobile v. Bolden*, 446 U.S. 55, 105 n.3 (1980) (Marshall, J., dissenting) (citing studies); Davidson & Korbel, *At-Large Elections and Minority Group Representation: A Reexamination of Historical and Contemporary Evidence*, 43 J. POL. 982 (1981). Finding no relief in these localities, minorities were forced to seek legislation from the Congress, which eventually amended the Voting Rights Act to outlaw certain types of electoral structures that result in dilution of the minority vote. See The Voting Rights Act Amendments of 1982, § 3, Pub. L. No. 97-205, 96 Stat. 131, 134, amending 42 U.S.C. § 1973, discussed in Frickey, *Majority Rule, Minority Rights, and the Right to Vote: Reflections Upon a Reading of Minority Vote Dilution*, 3 J. L. & INEQUALITY — (1985) (forthcoming). My simple point is that local democracy is not always what it is cracked up to be.

*Garcia* quite rightly concluded that the states, like the rest of us, are subject to the national political process.

### III

The dissents of Justices Rehnquist and O'Connor in *Garcia* did not directly attack the majority opinion as an affront to *stare decisis*. What these Justices did say, however, was more ominous. Both asserted that the approach of the majority is likely to be short-lived, and that *National League of Cities* will be resurrected.<sup>42</sup> This view may be nothing more than sour grapes, or wishful thinking, or unobjectionable prognosticating. But considering that three of the five Justices in the majority are over seventy-five years of age, the comments of Rehnquist and O'Connor have the effect, if not the intent, of shrouding *Garcia* with a pall that is funereal in both senses of that word.

The Court should be exceedingly reluctant to overturn *Garcia*. The most obvious reason is that any overruling of precedent exposes the Court's subjective side, and further flip-flopping on state sovereignty will appear ridiculous. The dissenters in *Garcia* can complain that the decision is wrong and pernicious, and of course there is no neutral way to rebut these assertions conclusively. But the overruling of *National League of Cities* in *Garcia* was based on the standard stuff of overruling: a decision that was weak precedentially from the start had proved unworkable in practice and, at least to one key Justice, weak in principle. In contrast, application of *Garcia* in future cases should be straightforward.

Moreover, *Garcia* is unlikely to be overruled unless there is a change in the Court's membership. New Justices ought to think long and hard before voting to overrule a decision handed down before their time, if durability of law and *stare decisis* are to mean anything.<sup>43</sup> In contrast, a Justice who, like Blackmun, only haltingly provided the fifth vote to a precedent and has participated in subsequent decisions in tension with it is in a much more principled position to vote to overrule it.<sup>44</sup>

It is interesting to speculate what might occur if Robert Bork,

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42. 105 S. Ct. at 1033 (Rehnquist, J., dissenting): "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court"; *id.* at 1038 (O'Connor, J., dissenting): "I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility."

43. See, e.g., *Florida Dept. of Health & Rehabilitative Serv. v. Florida Nursing Home Assoc.*, 450 U.S. 147, 151-55 (1981) (Stevens, J., concurring); *Runyon v. McCrary*, 427 U.S. 160, 189-92 (1976) (Stevens, J., concurring).

44. See Frickey, *supra* note 1, at 142-44.

who is apparently the current odds-on favorite, is appointed to fill the next vacancy on the Court. As Solicitor General, Bork argued *National League of Cities* on behalf of the federal government. Advocacy being what it is, perhaps he did not personally believe the argument that he made, but my reading of the transcript suggests that he forcefully advocated the federal position.<sup>45</sup> In addition, Bork is a strident opponent of judicial balancing tests,<sup>46</sup> and that is what the cases following *National League of Cities* utilized,<sup>47</sup> as Justice Powell's dissent in *Garcia* recognized. The only other way to define "state sovereignty," at least if modern economic realities are considered, would seem to be a static historical test measuring what the states have traditionally done. That approach would draw a nonsensical distinction between traditional activities, which would be protected even if trivial, and modern innovations, which would not be protected regardless of their merit. For all these reasons, it seems questionable whether Bork—or, for that matter, any other principled new Justice—would vote to overrule *Garcia*.

Furthermore, Bork himself has already answered the fundamental complaint of the dissenting Justices in *Garcia*. Justice O'Connor summed up their position when she stated that, "[w]ith the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint."<sup>48</sup> Compare a passage from Bork's famous article on constitutional law:

In *Lochner*, Justice Peckham, defending liberty from what he conceived as a mere meddling interference, asked, "[A]re we all . . . at the mercy of legislative majorities?" The correct answer, where the Constitution does not speak, must be "yes."<sup>49</sup>

#### IV

In the final analysis, stare decisis is probably often only a minor factor in each Justice's voting calculus. But any reconsideration of *Garcia* ought not forget a valuable lesson, as old as *Marbury* itself—that there are instances in which the Court can greatly enhance its overall authority and image by rejecting the power to engage in a less important function. A renewed attempt to identify a sanctum of state sovereignty not only would waste the Court's

45. See *id.* at 145 (quoting a colloquy between Bork and Justice Rehnquist).

46. See *Dronenburg v. Zech*, 741 F.2d 1388, 1392-97 (D.C. Cir. 1984) (Bork, J.), *reh'g en banc denied*, 746 F.2d 1579 (1984); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

47. See Frickey, *supra* note 1, at 132-37.

48. 105 S.Ct. at 1037 (O'Connor, J., dissenting).

49. Bork, *supra* note 46, at 11 (footnote omitted).

scarce judicial resources, but would expose the Court to ridicule as a wholly unprincipled institution driven largely by the personal whims of its members. It is time to close the door upon state sovereignty and move on to other issues.