Introduction

This section is basically your rider on stare decisis.

I. Federalism

The majority attempts to rationalize its result by claiming that any attempt to define traditional governmental functions is inconsistent with federalism. But--

(1) HAB's opinion is inconsistent with any usual understanding of federalism & indeed never describes what the majority thinks federalism entails.

(2) Majority plays lip service to state sovereignty, but mentions the Tenth Amendment only once.

(3) Federalism is a dual system of government; states play a major role. The Federalist outlines the founders' view of the importance of the states, as do cases of this Court. A detailed discussion of federalism goes here.

(4) Majority's unprecedented view means that Congress is free to usurp state power whenever and however it can agree to do so; this view realizes the worst fears of the opponents of the Constitution. It ignores the fact that the Constitution would not have been ratified without the promise of the Tenth Amendment.
II. Majority's Approach

The majority opinion argues that no standard for defining traditional governmental functions can be "faithful to federalism," because any such standard (somehow) interferes with the freedom of states to experiment. More fundamentally, HAB contends that "state sovereignty is limited by the Constitution itself."

(1) As for faithfulness to federalism, it is hard to see how giving Congress unlimited, unreviewable authority to treat States just as it does any private individual or entity is faithful to the role of the States in our federal system; it is also unclear how the majority's approach preserves the States ability to experiment, since Congress can now impose its will without a constitutional check from the courts.

(2) Re: HAB's claim that the traditional government function standard "invites an unelected fed. judiciary to make decisions about which state policies it favors and which ones it dislikes." Of course it isn't the Court's job to judge the wisdom of particular policies. But the majority provides no basis for its assertion that the courts "inevitably" must do so when ruling in this area. The Tenth Amendment provides a substantive check on what Congress may do with respect to the States.

(3) Re: the argument that the fundamental limitation on Congress' power under the Commerce Cl. is one of process. The Court expressly rejected this argument in National League of Cities, and for good reasons: the view is illogical and inconsistent with fundamental constitutional principles.
(a) The majority offers no explanation of how the electoral role of the States guarantees that Congress will not exceed its authority. Congress is part of the federal government.

(b) The fact that the States are politically successful in obtaining funds and exemptions from some federal laws does not show that political processes are the proper means of enforcing constitutional limitations. Moreover, what exemptions Congress gives today it can take away tomorrow. Surely the States are entitled to more protection than whatever the current political situation allows.

(c) The majority effectively makes federal officials the judges of their own power. This is inimical to the fundamental principles of constitutional government. It is the settled province of the courts "to say what the law is." Judicial review needs no different justification in the context of the Commerce Clause from that which it always has.

(d) The Court has never before abdicated responsibility for deciding constitutional questions on the ground that the affected parties can take care of themselves. JUSTICE REHNQUIST responded to the "inherent structural protections" argument in National League of Cities; the majority does not address his argument at all.

(e) For all the majority's talk about "democracy," it does not acknowledge that the State governments are also democratic institutions, and in many ways provide more, and more effective, opportunities for citizen participation. Contrast the
"audience" of the Congress with that of State legislatures and local governments.

III. Defining Traditional Governmental Functions

(1) HAB says that the test of traditional governmental functions has proved unworkable. The cases he cites do not support that claim.

(2) HAB says that the Court's experience in the tax field shows that it is impossible to devise a satisfactory test of traditional functions. But in the tax area, the Court has not retreated to the position here adopted by the majority. Discussion of tax cases goes here.

(3) HAB does not even discuss the possibility of a balancing test, which is, after all, what his concurrence in National League of Cities adopted. This is unfortunate, because a rearticulation of the factors which the Court's decisions have balanced (implicitly, at least) helps to clarify the test and shows that the "unworkability" problem is a red-herring.

-- In deciding whether an enactment under the Commerce Clause violates the States' sovereignty, we should balance how closely the challenged action implicates the core concerns of the Commerce Clause, i.e., the promotion of a national economy and free trade among the States, against the impact on the States if forced to comply with particular federal policies.

(4) Applying the balancing test as described above, it is clear that the application of the FLSA to SAMTA violates State sovereignty.
MEMORANDUM

TO: Annmarie
FROM: Lewis F. Powell, Jr.

DATE: November 13, 1984

Garcia

I comment on the outline of our opinion. It is thorough and identifies the principal points very well.

On further reflection, I am not sure that it is best to put the federalism argument as Part I. It certainly will be the most important part of our opinion. Yet, it seems more logical to follow generally the order of discussion in HAB's opinion. After the introductory portions (that I have dictated as Part I and want you to feel free to revise and edit), we would have a Part II that responds to HAB's rejection of League of Cities. Our
purpose is to demonstrate that the Court reads it far too narrowly, either to justify its attack on federalism or simply because of a misconception of the *League of Cities'* basic approach.

The "traditional governmental functions" test cannot fairly be read as narrowly as the Court does today. The test actually contemplates a balancing or weighing of the respective interests of the two components of our federal system - the states and the federal government. HAB himself viewed the *League of Cities* test in precisely this light in his concurring opinion in that case. Our dissent could identify the weaknesses in HAB's denigration of *League of Cities*, and conclude this part of our dissent with a summary exposition of the proper balancing test.
It is important, Annmarie, to keep this portion of our dissent reasonably concise, ignoring or relegating to summary footnotes some of our possible criticisms. For example, I would dispose of HAB's tax case analogies in a brief footnote.

The second major part of the dissent, Part III, of course, would be the discussion of federalism - the most distinctive feature of our dual system of government. Again, there will be a temptation perhaps to overwrite as there is a great deal that can be said. So long as it is written well, this will not concern me. The Court opinion is 29 pages, and we are free to equal it.

L.F.P., Jr.

ss

Annmarie - we can talk about this
The Court today, in its 5-4 decision overrules National League of Cities v. Usery, 426 U.S. 833 (1976), a case in which we held that Congress lacked authority to impose the requirements of the Fair Labor Standards Act on state and local governments.

I

There are, of course, numerous examples over the history of this Court in which prior decisions have been reconsidered and overruled. I can recall, however, no case in which the principle of stare decisis was ingored as flagrantly as we now witness. The reasoning of the Court in National League of Cities, and the principle applied there, have been repeatedly reiterated over the past eight years. National League of Cities itself has been cited and quoted, since its decision in 1974, in opinions joined by every member of the present Court.

\[1\] National League of Cities, following some changes in the composition of the Court, overruled Maryland v. Wetzel, 392 U.S. 183 (1968), a decision that had not been approved repeatedly.

"The key prong of the National League of Cities test applicable to this case is the third one [repeated and reformulated in Hodel], which examines whether 'the states' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional governmental functions.'" Id., at 684.

The Court in that case recognized that the test "may at times be a difficult one", id., but its application was considered in that unanimous decision as settled constitutional doctrine.

Justice Blackmun, the author of today's reversal of National League of Cities, wrote the opinion of the Court in FERC v. Mississippi, supra, decided June 1, 1982. It is of interest that the four Justices who join Justice Blackmun today were the four who joined his opinion in its
entirety in *FERC v. Mississippi*. In that case, the Court then said:

"In *National League of Cities v. Usery*, *supra*, for example, the Court made clear that the State's regulation of its relationship with its employees is an 'undoubted attribute of state sovereignty.' *Id.*, at 845. Yet, by holding 'unimpaired' *California v. Taylor*, 353 U.S. 553 (1957), which upheld a federal labor regulation as applied to state railroad employees, 426 U.S., at 854. n. 18, *National League of Cities* acknowledged that not all aspects of a State's sovereign authority are immune from federal control." *Id.*, n. 28, p. 764.

The footnote in *FERC* quoted above did say that even where the requirements of the *National League of Cities* standard are met, "there are situations in which the nature of the federal interest advanced may be such that it justifies state submission". The joint federal/state system of regulation in *FERC* was such a "situation", but there was no hint in Justice Blackmun's opinion that *National League of Cities* - or its basic standard that he reiterated - was subject to the infirmities discovered today.

It is true that the doctrine of *stare decisis* does not apply with the same force in a constitutional case as it does where the meaning of the Constitution is not at issue [Annmarie, cite authority]. This distinction usually has been recognized where a new Justice comes to
the Court, bound by his oath faithfully to construe the Constitution, and views a constitutional issue differently from one or more predecessors. In the present case, however, the five Justices who compose the majority today participated in *National League of Cities* and the cases reaffirming it.\(^2\) The stability of judicial decision, and with it respect for the authority of this Court, are not served by the abrupt overruling of precedents we witness in this case. [Annmarie, perhaps you can find some authority for supporting *stare decisis* and its importance that could be included in a footnote].

Whatever effect the Court's decision may have in weakening the application of *stare decisis*, this is likely to be less important than what the Court has done to the Constitution itself. The unique feature of the United States is its federal system guaranteed by the Constitution and implicit in the name of our country itself. Despite some genuflecting in language to the concept of federalism, today's decision can be viewed as

\(^2\)Justice O'Connor succeeded Justice Stewart in September 1981, and participated in *Long Island RR.* and *FERC.*
reading the Tenth Amendment out of the Constitution. The holding is that the Fair Labor Standards Act (FLSA) "contravened no affirmative limit on Congress' power under the Commerce Clause" to determine the wage rates and hours of employment of all state and local employees. Ante, at 27. In rejecting the traditional view of our federal system, the Court states:

"Apart 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." Ante, at 21, 22 (emphasis added).

The "structure" relied upon is the fact that the states have "a role in the selection of both the Executive and Legislative Branches of the federal government". Id. No mention is made of the Tenth Amendment, no other "means" are identified as "ensur[ing]" the role of the states, and no authority is cited for the view that the role of states in the federal system is not rooted in the Constitution itself. Rather, the extent to which the states may exercise their authority is to be determined from time to time by political decisions of the Congress and the President. Id.
Not the least remarkable aspect of the Court's opinion is the criticism of National League of Cities that it "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes". Ante, at 17. It does not seem to occur to the Court that it - an "unelected" majority of five Justices - today rejects almost 200 years of the understanding of the constitutional status of federalism.

I will return later to federalism. First, following the Court's order of discussion, I will address the Court's reasons for overruling National League of Cities, reasons not previously advanced in the several decisions that have accepted the rationale of that case.

Annmarie: Take a careful look at the foregoing language and you might have Lynda also look at it. I don't want to seem strident or to overstate the Court's decision. On the other hand, I think it important at the outset to make explicitly clear the far reaching effect of the Court's decision - a decision without precedent.
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JUSTICE POWELL, dissenting.

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\footnote{National League of Cities following some changes in the composition of the Court, had overruled Maryland v. Wirtz, 392 U.S. 183 (1968). Unlike National League of Cities, Wirtz had not been repeatedly accepted by subsequent decisions. (Annmarie: check this).}

"The key prong of the National League of Cities test applicable to this case is the third one [repeated and reformulated in Hodel], which examines whether 'the states' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional governmental functions.'" Id., at 684.

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Congress and the President decisions the Court says will not be subject to judicial review. Id. Indeed, not the least remarkable aspect of the Court's opinion is its criticism of National League of Cities because it "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes". Ante, at 17. It does not seem to occur to the Court that it - an "unelected" majority of five Justices - today rejects almost 200 years of the understanding of the constitutional status of federalism.

I will return later to what the Court does to federalism. First, following the Court's order of discussion, I will address its criticism of the general standard of League of Cities.

* * *

Annmarie: Take a careful look at the foregoing language and you might have Lynda also look at it. I don't want to seem strident or to overstate the Court's decision. On the other hand, I think it important at the outset to make explicitly clear the far reaching effect of the Court's decision - a decision without precedent. Feel free, of course, to edit and suggest substantive changes.
After a paragraph along the foregoing lines (written more elegantly by you), the dissent could then move - as your outline proposes - to address the doctrine of federalism. This could follow after an opening sentence or two to the effect that although the Court's opinion repeatedly pays lip service to state sovereignty, it nowhere defines it or cites the case that have repeatedly emphasized its basic part of the structure of our government. Nor does the opinion of the Court identify what is left of a separate constitutional role of the states.

As a general observation, Annmarie, your outline of 11/9 is comprehensive. Indeed, it may - if followed too literally - obscure what we agree should be the central emphasis of the dissent: That the Court's opinion is
unprecedented and far reaching because it authorizes a fundamental change in the federal system prescribed by the Constitution and intended by the Framers.

I therefore think we should devote a minimum of space to some of the marginal issues and arguments: e.g., HAB's reliance on the tax analogy, the fact that many of his citations do not support his conclusions, and the like.

* * *

Your suggested outline, after the introductory portions, would have three main parts:

II. Majority's approach.

In this you would address HAB's attack on the "traditional governmental functions" analysis.
III. Defining Traditional Governmental Functions.

Here you would make the important argument that the "traditional governmental functions" test—as stated in League of Cities—is misconceived by the Court's opinion as HAB himself viewed it, in joining League of Cities, the test actually contemplates a balancing or weighing of the respective interests of the two components of our federal system—the states and the federal government.

An alternative outline or structure for our dissent could involve only two major parts after the introductory portions. We could start, as HAB does with the League of Cities standard and demonstrate that the
Court reads it far too narrowly, either to justify its attack on federalism itself or simply because of a miconception of the League of Cities basis approach. HAB recognizes this himself in his concurring opinion.

Part II then would contain our federalism argument. After all, this should be the heart of our opinion and possibly it would be more effective to address Harry's highly vulnerable federalism arguments after a Part I in which we show that the proper understanding of the traditional governmental functions language used in prior decisions is viewed far too narrowly by the Court's opinion.

This alternative outline of our dissent would follow more closely HAB's Court opinion. This would not weigh heavily with me if a different outline seemed more
logical. If Lynda is familiar enough with the case, I would be interested in your joint thinking as to how to organize our dissent. We have all of the material and some wonderfully strong arguments. The structure of the opinion, however, is important and also it is essential not to make it unduly long.