The case of Garcia vs. San Antonio Metropolitan Transit Authority, decided by the Supreme Court Tuesday, rated front-page headlines for good reason. First—and taxpayers beware—it restores sweeping powers that Congress had before 1976 to impose costs on state and local governments. Second, the justices split sharply over whether courts must consistently define the separate prerogatives of federal and state governments. The court majority, in effect, washed its hands of this constitutional responsibility and told the politicians to fight it out.

Garcia is a sharp and untoward reversal of court policy. In 1976, in National League of Cities vs. Usery, the court ruled that even the wide-ranging Commerce Clause of the Constitution does not empower Congress to impose minimum-wage and overtime requirements on state governments performing certain of their "traditional" functions. Since then, the courts have been applying this principle to other cases. In the process they have complained about the difficulty of figuring out what constitutes a "traditional" local government function, and what does not. Garcia solved these difficulties by overruling Usery completely.

Justice Harry Blackmun, writing for the five-man liberal majority, explained why it was necessary and safe to give up trying to hem in the federal government. First, he noted, the courts have found no coherent way to separate the local functions they want to defend against federal intrusion from those they do not. They are not likely to find the magic principle in the future, either, he thought.

More important, he argued, making fixed lists of federal functions vs. local functions is no way to run a changing democracy. Our founders recognized this, for they chose to protect the states not by putting the various levels of government into rigid boxes but by giving the states power within the national government itself—organizing the Senate on state lines, for instance, or making the states the basic units for choosing a president.

This argument is a wonderfully clever way to shift the federalism debate away from arguments about constitutionally allotted government functions to vague and sweeping pronouncements about the nature of the whole American process. Justice Lewis Powell, writing for the minority, was unimpressed with his colleague's intellectual feat.

Justice Powell first maintained that the particular decisions required of the courts by the Usery ruling were no more difficult than the balancing acts they had to perform in countless other policy areas. More central, he thought it scandalous to maintain va­ilerly that the rights of the states in the American regime will be protected automatically. It is dangerous, he asserted, to say that the all-important principle of governments close to the people does not require the protection of explicit laws and rules and court opinions.

When you finish reading this worried criticism of the majority opinion, it is hard to escape the thought that Justice Blackmun's cheery description of a self-regulating federalism is more than a trifle glib. It is particularly so at a time of so much public concern over the enormous accretion of power in Congress, with public esteeem for that body at such a low ebb.

It is indeed true that Usery was difficult to put into practice. After a long period of centralization, many ideas about what naturally constituted a local or state function had been eroded or altogether lost. Liberal justices had made the Commerce Clause an eight-lane highway for federal lawmakers seeking new areas of regulation and control. But the difficulty represented scant cause for abdication.

In fact, the Blackmun decision is not really abdication, but a distinct and affirmative award of power to the federal government. It ignores, along with all the other arguments for de­centralized power, the truth that competition among the states in the delivery of wanted public services at low rates to the taxpayers is a vital control over government excess. Congress faces far less restraint and is correspondingly more guilty of such excess. We hope Justice William Rehnquist is correct in saying that it is only a matter of time before the Blackmun decision is itself reversed.
Governors and Mayors Expect Crowding by Congress in Areas Other Than Pay

By JOHN HERBERS Special in The New York Times

WASHINGTON, Feb. 20 — A furor erupted today among governors, mayors and other local officials over the Supreme Court ruling that 13 million state and local government employees are subject to Federal wage and hour standards.

Some said Tuesday's 5-to-4 decision would raise costs and increase bureaucratic red tape. But beyond that, there was a consensus that the ruling struck at the heart of efforts by state and local governments to win broader authority through the courts to operate their jurisdictions with less interference from Washington.

"I always viewed the Supreme Court in the role of referee, standing on the field in a striped shirt, mediating the contest between the state and Federal governments," said Gov. Bruce Babbitt of Arizona, a Democrat who is a leading advocate of restoration of state powers. "What this decision does is have the referees leaving the field and heading for the shower."

"Aura of Totality" Wears thin

He said he was particularly concerned about "the aura of totality" of the decision, which leaves the Congress and the states contenting on political rather than constitutional grounds.

Governor Babbitt and other governors said that because the Court had "taken a walk" there was fear that Congress would be free to preempt state power in areas far beyond wage and hour standards, in education, crime control, consumer protection and other functions where the states have traditionally held authority.

They also noted that the decision ran counter to President Reagan's philosophy. The Administration, which had welcomed the broad scope of the decision, has held that the states should be given more authority in various areas in return for having their Federal funds reduced. Mr. Reagan's 1986 budget calls for deep cuts in aid to states, cities and other local governments, and the governors said they were now in a position of possibly having to give up both the funds and authority.

The most immediate effect of the decision, according to state and local officials, was that it would cost their governments millions of dollars in overtime pay for police officers, fire fighters, transit workers and others who work split or unusual shifts, and that the paperwork involved would add a burden.

Paying the minimum wage as required under Federal standards was not considered a factor because all but the very smallest jurisdictions have wage standards that equal or exceed the Federal minimum, $3.35 an hour.

Randy Arndt, spokesman for the National League of Cities, said an additional factor was that the governments involved were now in the middle of the fiscal year, with budgets already decided, "and now they are faced with deciding what they are going to do if they don't have enough money to pay policemen and firemen."

Impact on Pay Is Murky

It was unclear, however, what the first impact would be. Congress, in enacting the 1974 legislation bringing state and local employees under Federal standards, wrote in some provisos for unusual shifts so as to restrain the costs. Much of the cost factor would depend on how the Labor Department decided to enforce the regulations.

The Supreme Court's decision was welcomed by labor unions, workers and others who said the legislation was needed to give public employees the same protection as the private sector, which is covered under the Fair Labor Standards Act, and the Federal Government.

However, the decision was unusual in that the court, in ruling that public transit workers had to be brought under Federal standards, also overruled its own decision of 1976 holding that the Constitution did not permit Congress to "directly replace the states' freedom to structure integral operations in areas of traditional governmental functions."

Blackmun Sees State Strength

Associate Justice Harry A. Blackmun, writing the opinion, said efforts by Federal courts to impose limits on the power of Congress under the 10th Amendment had proven "impracticable and doctrinally barren" and the states are now in a position to defend themselves against Congress in "the political process."

S. Kenneth Howard, executive director of the Advisory Commission on Intergovernmental Relations, a nonprofit research organization created by Congress, said he did not understand how the Court came to that conclusion when the commission for some months has been conducting a study on why the states and their subordinate governments had so little power in Congress.

"Where is the political restraint?" he said. "We don't see it that way."

Mr. Howard said one of the preliminary findings of the study was that political parties weakened in recent years Congress had become an assembly of operators little influenced by party officials or elected officials in respective states. "We see pre-emptive legislation by Congress as a real threat to a balanced Federal system," he said.

Richard B. Geltman, general counsel of the National Governors' Association, said, "This decision can only lead to a greater exercise of Federal authority and unitary, centralized government."

States and local governments, he said, are in need of the constitutional protection afforded the Federal legislative and judicial branches, are to be treated as if they were just "a few more special interest groups coming to Washington for help."

Matthew S. Coffey, executive of the National Association of Counties, maintaining that "the Court has taken a walk," said the burden was on state and local governments to assume a "more diligent watchdog role" to make sure Congress no longer passes legislation that asserted "a broad general principle" and then left it up to the courts to decide what harm it might do to the state and local governments. Continued From Page A1
JOINTS ENHANCE FEDERAL POWERS OVER THE STATES

UPSET OWN '76 PRECEDENT

Imposition of U.S. Standards for Transit Workers' Pay
Sets New Framework

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Feb. 19 — Taking the rare step of overturning one of its own recent precedents, the Supreme Court today significantly enhanced the power of the Federal Government to regulate state activities that had been considered immune from Federal control.

The decision, one of the Court's most important rulings on the subject of federalism, created a new framework for analyzing the constitutional balance between Federal and state authority.

The Court ruled, 5 to 4, that Federal minimum wage and hour standards cover employees of publicly owned mass transit systems. In immediate practical terms, the decision is likely to lead to higher wages for transit workers. While nearly all these employees receive more than the minimum wage, they typically work split shifts, with long breaks between the morning and evening rush hours, and would receive increased overtime pay.

Effect on Other State Employees

By extension, the decision also restructures most other state employees to protected status under the Fair Labor Standards Act. The 1976 decision, which the Court overruled today, held that the Constitution did not permit Congress to extend wage and hour coverage to state employees because to do so would "directly displace the states' freedom to structure integral operations in areas of traditional governmental functions."

As important as the decision is for state and local employees, the Court went further: It swept away the theoretical understandings of what has been known as the "new federalism." This was the belief, for which the 1976 decision served as the rallying cry, that the Constitution gives the states special protections and sets affirmative limits on the Federal Government's power to interfere in state affairs.

Relying on Political Precedent

With "rare exceptions," Associate Justice Harry A. Blackmun wrote for the majority today, the Constitution imposes no such limits. Rather, he said, the states are protected against Federal intrusions into their sovereignty only to the degree that they can use the "political process" to protect themselves.

It is "the structure of the Federal Government itself" that protects the states, Justice Blackmun continued, and not any "judicially created limitations on Federal power." He said efforts by the Supreme Court and the lower courts to impose other limits on the power of Congress had proved "both impracticable and doctrinally barren." Citing the presence of state delegations in Congress and the states' role in the Electoral College, Justice Blackmun said: "The political process insures that laws that unduly burden the states will not be promulgated."

Justice Blackmun appeared to be implying that once the states have lost a battle in Congress, the judiciary should interfere only with extreme reluctance, if at all.

In a bitter dissenting opinion, Associate Justice Lewis F. Powell Jr. accused the majority of abandoning the Court's age-old principle of judicial review and of establishing in its place the doctrine that Federal political officials are "the sole judges of the limits of their own power."

"The states' role in our system of Government is a matter of constitutional law, out of legislative grace," Justice Powell said.

The decision, Garcia v. San Antonio Metropolitan Transit Authority, No. 85-1813, was the latest episode in an unusual chapter of constitutional history. Two other dissenting, Associate Justice William H. Rehnquist and Sandra Day O'Connor, each suggested in their own dissenting opinions that the chapter may not be closed, and that today's decision itself may soon be a target for overturning.

Chief Justice Warren E. Burger also dissented. Justice Blackmun's me-
Jority opinion was joined by Associate Justices William J. Brennan, Byron White, Thurgood Marshall and John Paul Stevens.

Blackmun's Pivotal Role

The key role was that of Justice Blackmun. He had been a reluctant member of the 5-to-4 majority in the 1978 decision, which was written by Justice Rehnquist. That decision, National League of Cities v. Usery, struck down Congress's extension of the Fair Labor Standards Act to state employees by resurrecting one of the most obscure provisions of the Bill of Rights, the 10th Amendment.

The 10th Amendment provides that powers not granted by the Constitution to the Federal Government "are reserved to the states." The National League of Cities decision found in that amendment an affirmative check on the ability of Congress to exercise its power over interstate commerce in ways that affected the "states as states." It was the first time in 40 years that the Court had invalidated an action taken by Congress under the Commerce Clause power, and the decision appeared to herald a major shift in the Federal-state balance of power.

That promise did not materialize, however, as the Court seemed to pull back from the full implications of the 1978 decision. In 1972, for example, the Court ruled that employees of the state-owned Long Island Rail Road had a federally guaranteed right to strike, cities as a "fundamental constitutional insight." He said today that he was "surprised and grieving" over the outcome.

Reaction to Ruling

The National League of Cities issued a statement saying the Court had "clearly upset any semblance of balance between the interests of Federal policy and our once-proud traditions of local self-government."

Gerald W. McEntee, president of the American Federation of State, County and Municipal Employees, said the decision ended a period of "second-class citizenship" for employees of state and local government.

Justice Blackmun's 28-page opinion did not discuss the 10th Amendment. Rather, he discussed the extent to which the National League of Cities approach had proved "unsound in principle and unworkable in practice."

"We have no license to enucleate exceptions to state sovereignty when measuring Congressional authority under the Commerce Clause," Justice Blackmun said. "State sovereign interests are more properly protected by procedural safeguards inherent in the structure of the Federal system than by judicially created limitations on Federal power."

REMEMBER THE NEEDIESTI
From the Opinion

By Justice Blackmun

We revisit in these cases an issue raised in National League of Cities v. Usery (1976). In that litigation, this Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (F.L.S.A.) against the states "in areas of traditional governmental functions.

Although National League of Cities supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. Since then, Federal and state courts have struggled with the task thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause.

In the present cases, a Federal District Court concluded that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under National League of Cities, is exempt from the obligations imposed by the F.L.S.A. Faced with the identical question with respect to states, one state appellate court has reached the opposite conclusion.

Lack of Consistency Seen

Our "congressional and overruling action" standard now persuades us that the attempt to draw the boundaries of state immunity under the Commerce Clause in terms of "traditional governmental functions" is not only unworkable but is inconsistent with the obligations imposed by the F.L.S.A. Faced with the identical question with respect to the states, the same court has concluded that the state immunity of the states is to be determined by the Commerce Clause itself, and that its "traditional governmental functions" standard is not to be used to distinguish between state and Federal immunity.

The prerequisites for governmental immunity under National League of Cities as summarized by this Court in Hodel v. Virginia Surface Mining and Reclamation Ass'n (1981), Under that summary, four conditions must be satisfied. First, it is said that the Federal statute at issue must regulate "the states as states." Second, the statute must "address matters that are indispensably "attributes of state sovereignty." Third, state compliance with the Federal obligation must "directly impair [the states'] ability to structure inte-
The states unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.

When we look for the states’ residuary and inviolable sovereignty,” (The Federalist No. 39 J. Madison) in the shape of the constitutional scheme rather than in predetermined notions of sovereign power, a different measure of state sovereignty emerges. Apart from the limitations on Federal authority inherent in the delegated nature of Congress’ Article I powers, the principal means chosen by the Framers to assure the role of the states lies in the structure of the Federal Government itself.

It is, in no way, to object that the composition of the Federal Government was designed in large part to protect the states from overreach by Congress. The Framers thus gave the states a role in the selection both of the executive and the legislative branches of the Federal Government. The states were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications.

From Dissents

By Justice Powell

Because I believe this decision substantially alters the Federal system embedded in the Constitution, I dissent.

The 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. A unique feature of the United States is that the Federal system of government guaranteed by the Constitution and implicit in the very name of our country, despite some misgivings in Justice Powell’s opinion to the concept of federalism, today’s decision effectually reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.

To leave no doubt about its intention, the Court renounces its decision in National League of Cities because it “inevitably invites an unelected Federal judiciary to make decisions about which state policies its favors and which ones it dislikes.” In other words, the extent to which the states may exercise their authority, when Congress portends to act under the Commerce Clause, hinges upon whether Congress has arrived at the case to be determined from time to time by political decisions made by members of the Federal government. As the Court says, will not be subject to judicial review. I note that it does not seem to have occurred to the Court that it, an unelected majority of five, today rejects almost 200 years of the understanding of the constitutional status of Federalism.

Defect in Opinion Is Seen

Today’s opinion does not explain how the states’ role in the electoral process guarantees that particular via the Commerce Clause power will not infringe on residual state sovereignty. Members of Congress are elected from the various states, but in office they are members of the Federal Government.

The Court apparently thinks that the states’ success of obtaining Federal funds for various projects and exemptions from the obligations of some Federal statutes is indicative of the “effectiveness of the Federal political process in preserving the states’ interests.” But such political success is not relevant to the question whether the political processes are the proper means of enforcing constitutional limitations. The fact that Congress generally does not transgress constitutional limits on its legislative reach also does not make judicial review any less necessary to rectify the cases in which it does occur.

The states’ role in our system of government is a matter of constitutional law, not of legislative grace. More troubling than the logical inconsistencies in the Court’s reasoning is the result of its holding, i.e., that Federal public officials, invoking the Commerce Clause, are the sole judges of the limits of their own power. This result is inconsistent with the fundamental principles of the constitutional system. At least since Marbury v. Madison it has been the settled province of the Federal judiciary “to say what the law is” with respect to the constitutionality of acts of Congress. In rejecting the role of the judiciary in protecting the states from Federal overreach, the Court’s opinion offers no explanation for ignoring the teaching of the most famous case in our history.

The question presented in this case is whether the extension of the F.L.S.A. to the wages and hours of employees of a city-owned transit system unconstitutionally impinged on fundamental state sovereignty. The Court’s sweeping holding does far more than simply answer this question in the negative. Today’s opinion apparently authorizes Federal control, under the auspices of the Commerce Clause, over the terms and conditions of employment of all state and local employees. The Court’s action reflects a serious misapprehension. If it is not an outright rejection, of the history of our country and the intention of the Framers of the Constitution.

By Justice Rehnquist

I join both Justice Powell’s and Justice O’Connor’s thoughtful dissents. 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.

By Justice O’Connor

The Court today surveys the battle scene of federalism and sounds a retreat. Like Justice Powell, I would prefer to hold the field and, at the very least, render a little aid to the wounded.

In my view, federalism cannot be reduced to the weak “essence” distilled by the majority today. Due to the emergence of an integrated and industrialized national economy, this Court has been required to examine and review a breathtaking expansion of the powers of Congress. In doing so the Court correctly perceived that the Framers of the Constitution intended Congress to have sufficient power to address national problems. They also envisioned a republic whose majority was assured by the diffusion of power not only among the branches of the Federal Government, but also among the Federal Government and the states.

In the 18th century these intentions did not conflict because technology had not yet converted every local problem into a national question. A conflict has now emerged, and the Court today retreats rather than reconcile the Constitution’s dual concerns.
THE SECOND DEATH OF FEDERALISM

By William W. Van Alstyne

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Overtime-Pay Ruling Burdens
State and Local Governments

By JoAnn S. Lublin
Staff Reporter of THE WALL STREET JOURNAL

The full blow of the Supreme Court's Garcia decision last February has just begun to hit state and local governments where it hurts—in their pocketbooks. Generally, the ruling—which affects about half the nation's 14 million state and local workers—bars the popular practice of granting compensatory time off for overtime work.

Instead, governments are required to pay overtime wages and revamp their payroll systems. They say it will initially cost them $3 billion or more, although everyone won't suffer the same. The Labor Department starts enforcing the ruling on Oct. 15, policing police and firefighter groups seeking back pay already have sued the court's mandate.

State officials, undoubtedly will warn of layoffs, reduced services and higher taxes. For state and local governments, the high court's mandate "probably is the single biggest burden they will be facing this year and maybe next year," says Gregg Jackson, research director of the International City Management Association. At Senate Labor Committee hearings this Thursday, three governors, along with a host of other distressed municipal and state officials, undoubtedly will warn of layoffs, reduced services and higher taxes.

Four Bills have been introduced in Congress to overturn portions of the decision by amending the federal minimum-wage and overtime-pay law. The chances for quick congressional action look slim, however, partly because the court's action hurts certain states and localities more than others. A hardest-hit list would include: California, Florida and smaller, less-unionized communities, largely in the South and the West. Big Northeast cities may be affected relatively less.

The impact is likely to be felt most among firefighters, who consume a big chunk of local budgets. Firefighting also is expensive for states with extensive fire-prone areas, such as California and Florida. While the regular workweek for a majority of U.S. firefighters lasts 56 hours, Labor Department guidelines will require state and local governments to give firefighters premium overtime pay if they work more than 53 hours. One reason that heavily unionized big cities will be less affected is that many already have shorter workweeks than the national norm.

In addition, some states and localities previously chose to comply with the federal Fair Labor Standards Act or have local statutes that closely follow it. Among them: Maryland, Michigan and Massachusetts. "They don't see much need to get on the bandwagon" clamoring for a congressional remedy, says James Valin, a top Labor Department official.

It isn't surprising, then, that five of 21 cosponsors for one House bill modifying the Garcia decision all hail from California—as does Sen. Pete Wilson, the author of a Senate measure. The decision could cost the state and its local governments more than $350 million.

By contrast, the Garcia ruling's economic effect on Massachusetts is "in the millions," says Michael Sloman, an assistant attorney general. "That entered in our thinking" when state leaders

For More Hikers Only the Air Remains Free

By David Sherberman
Staff Reporter of THE WALL STREET JOURNAL

Turnstiles where New Hampshire's Winnipesaukee Falls Trail crosses the Ellis River? A tollbooth on the switchbacks along the Daniel Webster Trail on the northeast slope of Mount Madison?

Not yet. But the hikers who are climbing into the Presidential and Franconia Ranges this summer are talking about more than the waterfalls along the Ammonoosuc Ravine Trail and the steepness of the Six Husbands Trail. They are also talking about user fees.

The term, once confined to the back rooms of Capitol Hill, is increasingly being heard in the back country of the White Mountains. And though nobody's ready to set up turnstiles or tollbooths, the notion is creating a stir along the 50 miles of trails within 50 miles of Pinkham Notch.

Many hikers, like Donna Polhamus of Somerville, Mass., say that "there's something unappealing" about paying a fee to walk the trails. But in the past dozen years, New Hampshire officials, wilderness groups and others have mounted operations to rescue about 100 hikers from remote peaks and ravines—and there is growing sentiment that the cost of such operations and the maintenance of public trails and shelters ought to be underwritten by hikers themselves.

Hiker Obligations

"You get services just by taking a hike in the woods," says Stephen Rice, director of north country operations for the Appalachian Mountain Club, a major wilderness group that maintains eight huts and 17

Give It a Try

Seventy-eight percent of surveyed women food shoppers said they had bought a new product within the past month. Their reasons:

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<th>Reason</th>
<th>Percentage</th>
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<tr>
<td>Like trying new products</td>
<td>43%</td>
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<tr>
<td>Had a coupon</td>
<td>40%</td>
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<tr>
<td>A good price</td>
<td>38%</td>
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<tr>
<td>Interested in product</td>
<td>32%</td>
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<tr>
<td>New advertised</td>
<td>27%</td>
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Source: Better Homes & Gardens
This week a Senate subcommittee will begin hearings on the application of the Fair Labor Standards Act to state and local governments, a subject that usually glazes the eyes of all but the most devoted. This year, though, it is not just a matter of a million dollars here, a million there. Real money is at stake. And state and local political leaders actually may be coming forward to say so.

Early this year the Supreme Court, in the Garcia decision, extended the reach of the FLSA to cover state and local government activities that were once exempt. Among other changes, local employees will not be permitted to work overtime and take compensatory time off later on. From now on, the workers will have to be paid for their overtime at time-and-a-half rates. Local government trainees, from firefighting recruits to youth employment program workers, will also fall under the time-and-a-half rule.

The price tag will vary by locality and region. Big cities in the Northeast will suffer least, since their labor practices are already the most expensive and most favorable to public employee unions. But even these cities will pay more than their spokesmen currently admit. And for the country as a whole, the Garcia decision may cost about $3 billion.

Lest you think this figure is a right-wing scare tactic, be advised that it does not include the cost of renegotiating contracts, administering the changes or going to court in disputes over retroactive pay. Nothing in the current Reagan budget will even approach this decision in added burden to local governments.

As the Journal's Joann S. Lublin pointed out in a story yesterday, even local government workers are not ecstatic about the Garcia decision. The rule requiring time-and-a-half for overtime will often mean no overtime at all, and hence less total wages than in the bad old days. Senior citizens who now do government jobs at relatively low wages in order to stay below their Social Security ceilings may well find the jobs eliminated. Paramedics who work in town and volunteer their after-hours services in their rural home communities will not be able to do so anymore. Though the public-employee unions have an institutional interest in uniform national labor standards, labor organizations are divided on this issue.

Until very recently, local governments were urging the Reagan administration to press for corrective legislation but somehow not yelling quite loud enough for their voices to reach the general media or the Democrats in the House of Representatives. With state and local support slow in coming, the administration faced its own dilemma: Should it step forward and take the political heat alone, or should it let the costs run up and start to entrench themselves until the localities got up the gumption to join vigorously in the debate? In the past few days there have been signs of more action. The hearings will give us the first public indication of how all the calculations have come out. If a thundering silence emerges from the hearing room, do not assume that the Garcia problem is trivial; what you hear will simply be local leaders whose ties to an old ideology make them afraid to acknowledge the depth of the trouble. And if you hear a bit of healthy yelling, you will know that economic realities are at last forcing some necessary reconsiderations in American urban politics.
Implications of Garcia for Federalism

A.E. Dick Howard

Editor's Note: Last year when Professor Howard delivered the Richard Russell Lectures at the University of Georgia, he posed the thesis that the Supreme Court has an important role to play in deciding federalism issues. Since those lectures, the Supreme Court has handed down its decision in Garcia v. San Antonio Metropolitan Transit Authority. In that decision, a five-men majority (there were four dissenters) ruled that where Federal actions are attacked on the grounds that they invade rights reserved to the states under the Tenth Amendment, the states must look, for all practical purposes, to Congress not the courts for protection. In so ruling, the Court overruled one of its own modern decisions, its 1976 decision in National League of Cities v. Usery. The Garcia decision is certainly the most important federalism decision in years and it is being widely debated.

Two centuries ago, the framers who met at Philadelphia labored to produce a Constitution crafted to the needs of a free people living in a republic of extended territory. Drawing on the lessons of history, they sought to give the central government sufficient authority to deal with such national concerns as commerce among the states, while dispersing power in such a way as to protect individual liberty and local self-government—two of the ends for which the war of independence had been waged.

Federalism is a linchpin of that constitutional order. The text of the Constitution—which refers to the states at least fifty times—makes clear how central the concept of federalism was to the framers' thinking. Indeed, it was a concern about the potential power of the new federal government that led to the adoption of the Bill of Rights.

In the nineteenth century, that perceptive French traveler, Tocqueville, lavished praise on the Constitution's bicentennial, the Supreme Court appears to have forgotten both the framers' intent and the teachings of the nation's history. In February the Court decided Garcia v. San Antonio Metropolitan Transit Authority. Five justices joined in a majority opinion concluding, in effect, that if the states want protection within the constitutional system they must look to Congress, not the courts. The principal means, Justice Blackmun wrote, by which the role of the states in the federal system is to be ensured "lies in the structure of the Federal Government itself."

The states and localities, to be sure, will survive the impact of Garcia's immediate holding, which involves the application of the Fair Labor Standards Act to a municipally owned mass-transit system. The holding is bound to be both burdensome and expensive, but most local governments will find ways to adjust.

Far more is at stake, however, than bus drivers' pay. Garcia raises fundamental questions about the role of the Supreme Court as the balance wheel of the federal system. History, principle, and an understanding of the political process argue strongly that the federal judiciary should undertake the very function Garcia abdicates. For those who care about the health of American constitutionalism, Garcia should be an unsettling decision.

Although the ultimate reach of Garcia is unclear, the decision adopts a variation on a theme asking the Court to hold its hand when a litigant claims that a federal action is beyond the authority of the Federal Government in that the action encroaches upon some protected right of the states. Final resolution of such claims, this thesis runs, should be left to the political branches of the government.

Such a position reads an important part of the founders' assumptions out of the constitutional order. One may debate—though the point has long since been academic—whether the founders intended the Supreme Court to have the power of judicial review. But assuming the legitimacy of that doctrine, it is hard to escape the conclusion that the founders assumed that limiting national power in order to protect the states would be a judicial function.

James Madison, in Federalist No. 39, was explicit: "there must be a tribunal empowered to decide controversies relating to the boundaries between the two jurisdictions." The nature of the ratification contest—especially the Federalist's need to reply to anti-Federalist charges—supports this conclusion: the proponents of the Constitution saw federalism as among the institutional arrangements to be protected in the constitutional system.

The principle of the rule of law adds force to what this history teaches. Anglo-American constitutionalism asserts that no branch of government should be the ultimate judge of its own powers. The principle that one cannot be a judge in one's own
cause is of centuries' standing. This principle is stated by Sir Edward Coke in Dr. Bonham's Case (1610) and, in our own time, has been reinforced by United States v. Nixon (1974). The principle is especially important in a system which, in addition to being federal, looks to checks and balances and the separation of powers to restrain arbitrary government.

Moreover, Garcia disregards the ways in which the nation's political process actually works. Essential to any argument that the Court should abdicate from adjudicating limits on rational power vis-a-vis the states is the notion that the states have ample protection in the processes of politics.

This assumption has two dimensions. One is institutional—that the states have a major part in structuring the national government. The other is political—that the ways in which the process actually works (such as in the political parties and in Congress) focus on the states. In fact, neither branch of the argument reflects current realities.

There was a time when the states had considerable influence over the shape of federal politics. Under the original Constitution, U.S. senators were elected by state legislatures. The Constitution did not set federal standards for congressional elections; the states controlled the franchise. And it was up to the state legislatures as to how to draw the boundaries of congressional districts.

All this has changed. The Seventeenth Amendment (adopted in 1913) brought direct election of senators. Judicial decisions (such as that striking down the poll tax) and acts of Congress (notably the Voting Rights Act of 1965) have federalized much of the law respecting the franchise. The 1965 statute, for example, requires preclearance (by the Attorney General or the District Court for the District of Columbia) of voting changes in areas covered by the act. State power to apportion congressional seats has been circumscribed by decisions such as the Supreme Court's 1964 opinion in Wesberry v. Sanders, requiring that congressional districts be based on population.

Accompanying these institutional changes comes a palpable decline in the "political" safeguards. Political parties, especially at the state level, no longer are the force they once were. Increased use of primaries and the impact of "reforms" have encouraged the growth of alternative institutions. Most striking has been the rise of PACs, which now number in the thousands.

The "nationalization" of campaign finance weakens the federal lawmakers' loyalties to constituents. Special interest politics tends to replace consensus politics. Moreover, the explosive growth of the Federal Government in modern times has brought the emergence of the "iron triangle"—the convergence of bureaucrats, interested legislators (often powerful committee chairmen), and lobbyists to determine the shape of federal programs.

In defense of having the Court abdicate Tenth Amendment questions, as it did in Garcia, one sometimes hears the argument that the Court cannot resolve empirical questions. Thus, it is argued, to "balance" competing state and federal interests requires the Court to undertake a mode of inquiry that more properly belongs to legislators. Yet in other areas of constitutional litigation the Court resolves empirical questions as a matter of course. Every case involving claims that a state act burdens commerce requires the resolution of economic and other such data, but the Court does not shirk this task.

Another objection to the Court's having a role in Tenth Amendment cases is that the justices cannot draw workable distinctions, such as deciding what is and what is not a "traditional governmental function" (the distinction that provided state protection against federal intrusion before Garcia). Such line-drawing is, of course, difficult. But its being difficult does not mean that it should not be undertaken, any more than the difficulty of deciding what constitutes "speech" or "religion"—the thorniest of problems—are grounds for not deciding First Amendment cases.

Whatever the tangles confronting the Court, there are even graver reasons to question Congress' competence or willingness to make considered judgments on constitutional questions—especially when the question is that of the limits of Congress' own power. The judicial process may have its flaws, but it aspires to a degree of rationality, including analytical reasoning, that one does not associate with the legislative process. The limits of time, the pressures of lobbyists, the temptations of expediency, undue reliance on staff, and other distractions often have more to do with the final shape of legislation than any thinking about constitutional issues. Martin Shapiro makes the point well: "The nature of the legislative process, combined with the nature of constitutional issues, makes it virtually impossible for Congress to make independent, unified, or responsible judgments on the constitutionality of its own statutes."

Still another argument for the Court's leaving the states and localities to the tender mercies of
Congress is that the Court needs to husband its scarce political capital. This argument raises the specter of a return to “dual federalism”—the ancien régime, before 1937, when the Supreme Court often derailed federal, social and economic legislation in the name of states’ rights.

Such a risk is chimerical. For the Court to play a role in protecting the states as states under the Tenth Amendment, as the majority set out to do in the Court’s 1976 decision in National League of Cities v. Usery (overruled in Garcia), raises no question about Congress’ power over the private sector.

Garcia betrays a glaring disregard of a basic truth about American constitutionalism: that institutional rights are a form of individual rights.

As to keeping the Court out of unnecessary controversies, most of the debate over “judicial activism” in recent decades has involved such issues as school prayer, criminal justice, and abortion. It is individual rights decisions that, by and large, stir passions. One doubts that the partisans of Garcia would be content to see individual rights matters, because they may be controversial, left likewise to the political process.

Garcia betrays a glaring disregard of a basic truth about American constitutionalism: that institutional rights are a form of individual rights. Even such basic guarantees as those in the Bill of Rights and the Fourteenth Amendment do not secure absolute personal rights. They protect against governmental (that is, institutional) actions, not against infringements by private parties. Thus, securing individual rights requires assurances as to the Constitution’s institutional safeguards.

The individual American—as the heir to those who brought the Constitution into being and agreed to its adoption—has a fundamental entitlement to living under the form of government spelled out in the Constitution. The separation of powers is not to be abandoned simply because it may be inconvenient. Likewise, one of the predicates of the constitutional order is that the Supreme Court adhere to the values of federalism as manifestly implicit in the Constitution.

Federalism may be an elusive idea, but it is no mere abstraction. And, while it was essential to the adoption of the original Constitution, it is more than simply a political compromise adopted to get the Constitution underway. Federalism is linked with individual liberty and with the health of the body politic.

By participating in government at the local level, the citizen is educated in the value of civic participation. A robust federalism encourages state and local governments as schools for citizenship. Moreover, federalism both reflects and encourages pluralism, allowing individual idiosyncrasies to flourish. One often hears Justice Brandeis quoted on the states’ serving as “laboratories” for social and economic experiments. The states are more than mere laboratories; to the extent they encourage pluralism the states are handmaidens of the open society.

Ultimately, the case for federalism rests on the right of choice—the essence of political freedom. States and local governments have, of course, often trampled this very right, as when they have denied the vote because of race. The remedies for such abuses lie in vigorous judicial enforcement of constitutional guarantees and in Congress’ power to protect civil rights. But the need to guard against trespasses by states or localities on individual liberties does not undermine the conclusion that federalism as such can operate as part of the very matrix of protection for individual liberties.

In refusing to enforce the Tenth Amendment—to play the role they regularly undertake in respect to other provisions of the Bill of Rights—the Garcia majority leaves an important constitutional sentry post unmanned. What recourse have those who care about the health of federalism?

Early and outright reversal of Garcia should not lightly be predicted, even assuming new justices are appointed to the Court. Reversals typically come only after a precedent has been robed of vitality.

There are other opportunities for courts to vindicate the underlying values. Federal statutes may be interpreted in light of their impact on state and local governments. For example, the Court’s 1981 Pennhurst decision laid down the salutary rule that federal grant conditions, to be binding on state and local governments, must be clearly identified as such when grant funds are accepted. Notions of comity can come into play when reviewing lower courts’ use of their equity powers to reform state institutions (such as prisons) or when deciding how
for a federal court may go in intervening in state court proceedings (as in the Court's 1971 decision in Younger v. Harris).

Ultimately, one may hope for the undermining or demise of Garcia. The majority decision stops short of saying that under no circumstances could the constitutional structure impose affirmative limits on federal actions affecting the states. A more favorable fact situation than that in Garcia, one entailing a more serious intrusion on the states and a more marginal federal interest, might furnish the occasion to begin the movement away from that unfortunate decision.

Early and outright reversal of Garcia should not lightly be predicted, even assuming new justices are appointed to the Court. Reversals typically come only after a precedent has been robbed of vitality. The Court decided Gideon v. Wainwright (1963), requiring states to appoint counsel for felony defendants unable to afford a lawyer, only after twenty years of experience under Betts v. Brady proved that an ad hoc approach would not do. Likewise, it was easier for Justice Blackmun to rationalize the result in Garcia by pointing to the Court's difficulties in post-National League of Cities decisions such as EEOC v. Wyoming and FERC v. Mississippi.

Still, one can hope that eventually a majority of the justices will come to realize the mistake made in Garcia. Because federalism is an intrinsic component of the constitutional system—indeed, bolsters other constitutional values—safeguarding it cannot be left to the unrestrained discretion of the political branches. It may be that the authority pronounced in National League of Cities (and renounced in Garcia) ought to be sparsely used. But it is salutary that the political branches know that the Court has power to step in when the facts point to intervention.

It is no less legitimate and proper for the Supreme Court to concern itself with assuring the health of federalism as it is for the Court to uphold individual liberties as such. In neither case is abdication of the Court's proper role consistent with the principles inhering in the Constitution.

A. E. Dick Howard, White Burkett Miller Professor of Law and Public Affairs, is an expert in constitutional law, jurisprudence and the Supreme Court. He is presently Counselor to Governor Robb of Virginia and Chairman of the Virginia Commission on the Bicentennial of the United States Constitution.