One Man, Two Votes: Harry Blackmun's Federalism Shift

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Introduction

> In an opinion filed with the clerk today, we reverse the judgment of the District Court. We hold that the protective provisions of the Fair Labor Standards Act cover the employees of the Authority, and that, in affording this protection to those employees, Congress contravened no affirmative limit under the Commerce Clause. To draw the boundaries of state regulatory immunity in terms of "traditional governmental functions," we have concluded, is not only unworkable but is inconsistent with established principles of federalism. There is nothing in the regulations of the Act that is destructive of state sovereignty or violative of any constitutional provisions. The continued role of the States in the federal system is primarily guaranteed not by externally imposed limits on the commerce power, but by the structure of the Federal Government itself. We have concluded that *National League of Cities* is out of line with these principles. That case accordingly is overruled.[1]

With this one paragraph from a case summary combined with the opinion that accompanied it, Justice Harry Blackmun effectively undid nine years of legal precedent on the Supreme Court. Indeed, Justice Blackmun's federalism adventure between 1976 and 1985 is certainly a noteworthy one: in *National League of Cities v. Usery*[2] he provided the crucial fifth vote in a majority that effectively created an entirely new legal doctrine of state sovereignty, and a short few years later in *Garcia v. San Antonio Metropolitan Transit Authority*[3] he wrote the majority opinion overruling it.

These two cases and the subsequent federalism cases in between them prove worthy of study, but not so much because of the precedents they helped create. After all, *Garcia*'s decision was handed down over 25 years ago, and the case really only represented a retreat

back to a standard that the Court followed before *National League of Cities* in the first place. Rather, what this set of cases can inform us the most about is the judicial decision-making process itself. Though it might be easy to postulate that the Court's shift here is a purely political one caused by a Court that had formerly learned to the right now leaning further left, when we look at the voting breakdown between *National League of Cities* and *Garcia*, we see that all of the justices' votes remained constant (except for Potter Stewart, who was replaced by Sandra Day O'Connor for *Garcia*'s decision. Even so, O'Connor still voted the same way as Stewart) save for Blackmun. It was his own shift and not any changes in the Court's personnel that ultimately doomed the *National League of Cities* doctrine. Why exactly did Blackmun's shift take place? And might this tell us something more about the wider concept of the "swing justice?"

That Blackmun changed his vote in such a short amount of time proves significant, and there is certainly no dearth of scholarship and literature about the subject that seeks to provide an answer to this question. However, much of the scholarly work surrounding this question was undertaken immediately after the decision in *Garcia* while Blackmun was still on the Court. Now that a significant amount of time has passed since *Garcia*, Blackmun's own papers (as well as the papers of many of the other justices on the Court at the same time) are available to the public for research, and we can study this question through an entirely new lens.

There are several plausible answers to the question as to why Blackmun changed his vote. One is a more legal explanation: he was reluctant to go along with the *National League of Cities* majority in the first place as evidenced by his reluctant concurring opinion in the case, and that he later saw the standard created in that case to prove unworkable.[4] Another explanation is more personnel-based: other members of the Court might have influenced him strategically, and his own clerks who helped him review these cases could have added their own sway. Finally, there's the explanation of the Court itself and/or Blackmun shifting. While the Court's personnel between 1976 and 1985 remained largely constant, Blackmun might have feared the direction that the Court was heading with the *National League of Cities* doctrine and switched his vote to prevent the Court from being able to extend it. While my research lends credence in some way to each of these explanations, after studying this question intently I've concluded the most likely explanation has to do with Blackmun being influenced by

his own brethren on the Court as well as his clerks. I plan to prove this thesis in the following manner: first, by reviewing secondary literature about the subject, and then diving into primary data from Blackmun's papers, analyzing the evolution of his votes in these federalism cases that culminates in his vote in *Garcia*.

Review of Secondary Literature

Several scholars have written about Justice Blackmun's jurisprudence as a whole. Harold Hongju Koh, for instance, discusses Blackmun's views on federalism, separation of powers, and the death penalty. He contends that in each of these areas Blackmun changed, but "in each, his 'second look' was more probing and revealing. In none was his turnabout abrupt or capricious. In each, he changed only after studying the doctrine's impact on society and realizing that he could no longer pretend 'that the desired level of fairness has been achieved.'"[5] Moreover, Dan Coenen highlights two developments between Blackmun's votes in *National League of Cities* and *Garcia*: the "evidenced inability of lower courts to generate satisfactory results in applying the *National League of Cities* test" and "the revelation that four members of the Court were eager to take the principle of *National League of Cities* to lengths Justice Blackmun did not foresee at the time *National League of Cities* came down.[6] Indeed, Coenen postulates that Blackmun's alternatives "were to facilitate a continued assault on congressional power or to pull the plug entirely on the *National League of Cities* principle."[7] Both of these articles seem to lend more credibility to the idea of the legal shift on Blackmun's part: his change was the result of an effort to clarify and improve a legal doctrine.

Joseph Kobylka treats the issue more in depth in a Creighton Law Review article released soon after *Garcia*. He emphasizes how "Blackmun's *National League of Cities* opinion is brief and difficult to understand in light of the opinion in which he was concurring" because "nowhere in Rehnquist's opinion did Rehnquist weight any interests" like Blackmun suggests in the concurrence.[8] In his analysis of Blackmun's role in *National League of Cities*, *Garcia*, and several relevant federalism cases in between, he offers a multitude of explanations for what caused Blackmun to abandon *National League of Cities*. His arguments, however, rely more so on court dynamics. First, "it is possible that in 1976 Blackmun was still feeling something of a "freshman effect"-still somewhat hesitant about charting an independent course

of his own."[9] His equivocation on *National League of Cities* may have been the product of a Justice torn between what seemed to be a comfortable bloc and what seemed to be clearly established legal principles."[10] In addition, O'Connor's appointment to the Court following Stewart's retirement may have made Blackmun "more aware of the possibilities of a rightward shift by the Court in its constitutional interpretation" since "her general orientation is clearly further to the right than was his."[11] Specifically, her joinder in Burger's dissent in *EEOC v. Wyoming* (a case prior to *Garcia* where Blackmun was in the majority that found in the federal government's favor as opposed to the states) that suggested that the *National League of Cities* doctrine "should extend beyond the commerce power to the enforcement sections of the Civil War amendments and other constitutional grants of power" might have "crystallized his fears in this area of constitutional law."[12] Finally, there's the possibility that Brennan helped prod Blackmun over to his side since he would have assigned Blackmun the opinion in *FERC v. Mississippi* (another case that found in the federal government's favor) and he "used something remarkably similar to the Blackmun balancing approach" in his opinion in *EEOC v. Wyoming*.[13]

Biographies written about Blackmun also prove useful in identifying the elements behind his shift, especially in regards to the role that his clerks played in influencing his decisions. In her biography of Justice Blackmun, Linda Greenhouse cites how O'Connor and Blackmun's "battle of footnotes" in the *FERC* case revealed Blackmun's reluctance to keep the *National League of Cities* doctrine alive.[14] Greenhouse also points out how Blackmun originally planned on voting with O'Connor, Rehnquist, and the rest of the *National League of Cities* majority in *Garcia* but his clerk Scott McIntosh convinced him he was on the wrong side because "basing state immunity on whether a particular service is a traditional governmental function was neither 'sound in theory or workable in practice.'"[15] McIntosh offered to produce a draft opinion that would have contravened the majority's rationale but which did not outwardly overrule *National League of Cities*, which Blackmun proceeded to circulate to the conference.[16] Since the majority was so surprised at Blackmun's sudden shift, the justices decided to hold the case over for reargument for the following term.

Another biographer, Tinsley Yarbrough, further emphasizes the importance of Blackmun's clerks in influencing his shift. He reiterates how McIntosh expressed his worry to Blackmun in originally deciding *Garcia* that "any rule of state immunity that looks to the 'traditional,'

'integral,' or 'necessary' nature of governmental functions is an open invitation for the judiciary to make Lochner-era decisions about which state policies they favor and which they dislike."[17] In addition though, Yarbrough underscores the importance of Blackmun's clerk in the following term, Mark Schneider, in shaping the final form of the opinion. Schneider "recommended that the nondiscrimination restriction on congressional power that Scott McIntosh had proposed be discarded and that the Court commit the resolution of federal-state regulatory conflicts once again to the political arena."[18] This rationale was eventually implemented in Blackmun's final draft of the opinion, and both of these biographies amply demonstrate that Blackmun's clerks played a significant role in affecting his switch in *Garcia*.

Review of Evidence

Perhaps some of the most valuable evidence that can be found relating to Blackmun's shift comes not from *National League of Cities* or *Garcia* but a federalism case that actually came before both of them. *Fry v. United States* was a case dealing with the application of the *Economic Stabilization Act of 1970* that "authorized the President to stabilize wages and salaries at certain levels."[19] The petitioners argued that "Congress did not intend to include state employees within the reach of the *Economic Stabilization Act* and that the Pay Board therefore did not have the authority to regulate the compensation due state employees."[20] The Court, however, disagreed, and in a 7-1 decision found in favor of the federal government.

Before the case was even decided, Blackmun himself wrote in his notes that "the case, for me [is] basically not a difficult one."[21] Because the act in question had expired the same year that the case finally reached the Court, Blackmun among other justices was inclined to dismiss the case as improperly granted, but since the case had already been briefed and argued he stated he was "somewhat hesitant to DIG the case."[22] When he began his discussion of the federalism issue, Blackmun noted that

> existing authority is flat and dead against the petitioners. *Maryland v. Wirtz* is surely significant precedent for the breadth of congressional power under the Commerce Clause. There the distinction between governmental and proprietary was rejected and the breadth of the commerce power was recognized. All

> that was necessary is that the enactment have a rational basis. Surely that was so here.[23]

Blackmun went on to say that "unless the case is peremptorily decided, I am in favor strongly of an affirmance."[24] He would later go on to join the majority opinion on January 14, 1975 in a letter to Justice Marshall.[25]

Most of the evidence suggests that Blackmun was particularly comfortable with finding in favor of the federal government and that he didn't feel like federalism was a strong issue in this case. At first, he didn't seem to have much problem with Marshall's original opinion: a note from one of his clerks, David Becker, recommended that Blackmun join the opinion because it "hits the mark precisely...I am glad that he relies on the facts of this case to note that this particular law poses no problems of intrusion with state sovereignty."[26] However, an earlier outline of that case by the same clerk suggests a slight bit of discomfort: "Although I see some value in a signed opinion that cuts back a bit on the expansive language of *Maryland v. Wirtz*, it would not change the result in this case and is hardly one of the most pressing claimants to this Court's time."[27] In a hand-written marginal annotation, Blackmun only wrote the word "agree" next to this paragraph. Blackmun's reluctance becomes all the more visible after Justice Powell wrote a letter to Thurgood Marshall criticizing the original draft of the opinion.

Justice Powell in a January 14, 1975 letter told Justice Marshall that he "refrained from joining you in *Fry* because of concern as to its effect on *National League of Cities v. Brennan* and *California v. Brennan*."[28] These were actually the cases that would later become *National League of Cities*, which would come up in the Court's following term. He believed that "*Fry* (as now written) will strengthen the force of *Wirtz* as a precedent and possibly be viewed as extending *Wirtz*," something that Justice Powell was not inclined to do.[29] Powell was uncomfortable joining Marshall's opinion in its original form and was especially critical of the original penultimate paragraph:

> Petitioners seek to distinguish *Maryland v. Wirtz* on the ground that the employees in that case performed primarily "proprietary" functions, while those subject to the wage regulations in this case performed both "proprietary" and "governmental" functions. But this Court rejected a similar attempted distinc-

> tion as early as *United States v. California*, 297 U.S., at 183, where the Federal Safety Appliance Act was held applicable to an intrastate railroad owned by the State of California. Indeed, we reiterated the same view in *Wirtz* itself. See 392 U.S., at 195.[30]

However, Powell suggested that if Marshall was "disposed to write *Fry* somewhat more narrowly, emphasizing the national emergency and its temporary nature, and eliminating or modifying the next to the last paragraph with respect to proprietary functions, I will happily join you now." Marshall, however, was not inclined at first to change the opinion, stating in a letter to Powell his "regret that I cannot agree with [Powell]" and emphasizing how he felt the opinion was fine as it was.[31] No doubt since Marshall already had a sizable majority he was relatively unafraid of losing one member of his coalition.

Blackmun, however, seemed to be growing more and more skeptical. He never outright criticized Marshall's opinion like Powell, but after reading Powell's note he did circulate a letter arguing that "there is much to be said...for Lewis' point of view, set forth in his letter to you of January 14. This note is just to state that it is all right with me if you wish to accommodate him."[32] Once again, Marshall remained unfazed. If Blackmun genuinely did disagree with how this case would affect the federalism question, he certainly wasn't being particularly aggressive about it. It was only after Powell circulated a separate opinion concurring in the judgment that Blackmun's views became clear:

> Dear Thurgood: I expressed to you some time ago my discomfort with the implications of the opinion, and in my note of January 15 I indicated my sympathy with Lewis' points of view as set forth in his letter of the preceding day. I have now determined that my views coincide with those of Lewis. I am therefore joining his separate concurrence and am withdrawing my joinder in your opinion.[33]

Faced with a significantly weaker majority (and the possibility of its dissolution altogether), Marshall decided to accommodate Powell and Blackmun by removing the original offending paragraph, inevitably limiting the scope of both *Fry* and *Wirtz*. Blackmun's switch from a "strong affirmance" to a separate concurrence in the judg-

ment offers us more insight into his own decision-making process on this issue. On one hand, he did express a slight bit of doubt about the decision because he agreed with his clerk about wanting to limit the expansive nature of *Wirtz*, highlighting his sympathies for the state sovereignty side of the question. However, he was also unwilling to join Rehnquist's dissent. In Blackmun's annotated copy of Rehnquist's first circulation of his dissent, Blackmun makes several notes expressing concern about how "he would OR [overrule] *Wirtz*."[34] It seems that *Fry* wasn't enough to convince Blackmun to overturn *Wirtz* yet, even though this is exactly what *National League of Cities* ended up doing. Indeed, he was still prepared to accept the opinion until Powell expressed his discontent. Perhaps Blackmun himself wasn't sure about how to go convincing Marshall to change the opinion to his liking and he saw Powell's separate concurrence as an opportunity to get what he wanted. Regardless, Blackmun's papers offer us important insight into his views on the federalism question: in spite of voting with the Marshall majority on this case, he seemed relatively unsure about the federalism question itself, and this doubt would become even more manifest one year later with the Court's decision in *National League of Cities*.

With this evidence we see more credibility for the personnel-based hypotheses. Powell's reluctance as well as Rehnquist's determined opposition seem to have had great influence on Blackmun's decision in this case. Moreover, his clerk David Becker offered many insights that Blackmun eventually took into consideration (such as wanting to limit the expansive nature of *Wirtz*). In this context, Blackmun's vote in *National League of Cities* the following year makes more sense, and we can see these same themes manifest themselves even more in Blackmun's papers. Before *National League of Cities* was heard before the Court in the 1974 term, Blackmun wrote a supplemental memorandum expressing his thoughts about the case. Since *Fry* was still being decided in the same term, Blackmun felt that "on balance we ought to hold up *Fry* until we know where we are going in the present case. *Fry* certainly regards *Wirtz* as still good law."[35] Blackmun's memorandum reveals that this was certainly a difficult case for him:

> Ultimately, what this gets down to, I suppose, is one's philosophy of governmental structure in this Country. Surely this is not the kind of thing contemplated by the founders. I doubt if the nation

> will fall apart if we either overrule *Wirtz* or distinguish it...On the other hand, I suppose also that the nation will not fall apart if *Wirtz* is affirmed and if the appellants here do not prevail.[36]

Blackmun goes on to confess that he "voted with the majority in *Fry* basically on the ground of a narrow opinion, the precedent in *Wirtz*, and the emergency nature of the wage controls at issue there" and that the trend of decision in cases like *Wirtz* is "contrary to my initial reaction."[37] Finally, his clerk Karen Moore "suggests that the Court must consider the continuing effectiveness of *Wirtz*. If *Wirtz* is not good law today, the present legislation cannot be upheld."[38]

However, in spite of Blackmun's own personal tendency to strike down the *FLSA*, he was still uncomfortable going along with Rehnquist's opinion, underscored by his decision to write separately on the matter. Indeed, his clerks might largely have influenced that decision as well. A note from his clerk William Block doesn't have kind things to say about the majority opinion:

> Frankly, I think that Justice Rehnquist's proposed opinion is the weakest opinion I have seen this year. It either misuses or ignores the prior doctrines in its effort to reach a per se rule...I think that a separate concurrence is both necessary and appropriate. As a sort of "fall back" recommendation, you might have a one-line concurrence, stating that you understand the case not to reach the situations, such as environmental protection, where the federal interest is greater. In light, however, of Justice Rehnquist's per se rule, I do not think that a one-line concurrence, without explanation of the balancing test that lies behind it, would be very satisfactory.[39]

The *National League of Cities* papers go far to outline how Blackmun's "balancing approach" to complement Rehnquist's opinion came about.[40] He repeatedly brings up the distinction between "proprietary" and "governmental functions," and to him, "on balance, I feel that when a state engages in proprietary functions it clearly should be subject to federal controls."[41] This is a distinction that both he and his clerks seemed to agree upon. Blackmun didn't want to go touting a new constitutional rule because he did feel there were cases where federal intervention was necessary. As his supplemental memos illustrate, Blackmun believed that this was a case where "the Court is

called upon to balance this national concern with a primary state and city concern...*Fry* is consistent with this balancing."[42] In a case like *Fry*, "the national act saved money for the States," but in *National League of Cities* "all the Act does is increase the cost to taxpayers and thereby to reduce government employees and services."[43] Blackmun's decision- making process here also illustrates personnel influence: his clerks went a long way to affect his decision to concur in the result and it's obvious Rehnquist's more absolutist stance made him uncomfortable.

Blackmun's shift in *Garcia* seems far less haphazard when one sees how uncomfortable he was with Rehnquist's opinion in the first place, but to explain the change fully we must analyze more fully some of the subsequent cases the court decided between 1976 and 1985. *Hodel v. Virginia Surface mining and Reclamation Association*[44] and United Transportation Union v. *Long Island Railroad* Co[45] were two unanimously decided cases concerning the rule created in *National League of Cities*, and in both cases the Court found in favor the federal government. *Hodel*, another opinion written by Marshall, was perhaps most notable for helping to create a more fleshed-out three-prong test to apply the rule Rehnquist espoused in *National League of Cities*: in order for a challenged federal statute to be deemed unconstitutional, it must "regulate the states as states," address matters that are "indisputably attributes of state sovereignty," and it must be obvious that the State's compliance with the law would "impair their ability to structure integral operations in areas of traditional governmental fields."[46] Marshall, in spite of being in the dissent in *National League of Cities*, was able to craft an opinion that maintained the ruling in that case without further extending it, and as a result he was able to maintain a unanimous Court. Blackmun, however, didn't seem to have much trouble going along with Marshall's majority rationale from the beginning though: in his notes from conference, he expresses how in a case like this, "C Cl [Commerce Clause] prevails" and he would have no problem reversing the lower court's decision.[47] Additionally, in his clerk's recommendation to join Marshall's opinion, the clerk makes it clear the Marshall's discussion of *National League of Cities* shouldn't "cause you any problems" because the rationale from *National League of Cities* "is inapplicable to Congressional attempts to regulate private parties, even if the regulations conflict with state regulations of those same parties."[48]

Long Island Railroad in the following term dealt with the ap-

plication of the third prong of the *Hodel* test and whether or not the *Railway Labor Act* oversteps the federal government's power when applied against a state-owned railroad.[49] Once again, the Court unanimously found in favor the federal government, and once again Blackmun didn't have much trouble siding with the majority. In his notes from conference Blackmun writes how the third prong of the *Hodel* test is the one he had the hardest time defining in *National League of Cities* and that this was exactly why he concurred separately.[50] His clerk Charles Rothfield was also quick to point out the somewhat random nature of what exactly is an "integral state function" and what isn't: "Virtually everything the state does is designed to benefit the public in some way; whether it is 'essential,' and whether it can be provided only by the government, are likely to be subjective and factually complex inquiries. It is difficult to believe that the *Tenth Amendment* was designed to embody such fine-spun distinctions."[51] In addition, Rothfield was critical of Burger's final opinion because "while the opinion disavows a blind reliance on history in determining the nature of those traditional state functions that are immune from federal regulation, it never states precisely how one goes about identifying such functions."[52] Rothfield was quick to point out the muddled nature of Burger's opinion: managing railroads, after all, certainly wasn't a "traditional state function," and although the Court might have agreed in this case that the federal government ought to prevail the case also shed light on how the "traditional state functions" approach was proving unworkable. Finally, in a supplemental memorandum to the case Rothfield expressed fear that "if lower courts are permitted to balance the value of particular federal programs, I think that the test becomes too individualized and unmanageable."[53] Both Blackmun's and his clerks' uncertainty about the *National League of Cities* rule become more apparent with each case, and this uncertainty only escalates as the Court's unanimity in its decisions over these cases breaks down.

FERC v. Mississippi[54] and *EEOC v. Wyoming*[55] are two more cases centered on questions similar to *National League of Cities*, but unlike the previous two cases, these cases split 5-4. *FERC*, in fact, was handed down in the same term as *Long Island Railroad* and the opinion was written by none other than Blackmun himself. Blackmun wrote that "this case is only one step beyond *Hodel*" and that the regulations that the federal government was imposing upon the states "do not threaten the States' 'separate and independent existence' and do not impair the ability of the states 'to function effectively in a federal

system.'"[56] This was a rationale that other members of the Court had a more difficult time buying, and an ideological divide was certainly becoming more clear. In another one of Rothfield's memos, the clerk expressed his own troubles with coming to a conclusion on this case:

> I must admit that I find the idea of using a balancing approach in this area to be an extremely troubling one...I also have some doubts as to whether the federal courts are well-suited to serve as referees in what will inevitably be extremely delicate disagreements between the federal and state governments...I think that the decision of this case must be affected by the more basic debate about the nature of state and federal sovereignty--and that it is difficult to decide this case without leaning towards one or the other of the fundamental approaches outlined above.[57]

Moreover, Rothfield was astute in pointing out after the Court handed down its opinion that "both the *FERC* majority and SOC's [Sandra Day O'Connor] dissent disclaimed any sort of balancing analysis."[58] No doubt Blackmun was becoming more aware that the balancing test he had promulgated in *National League of Cities* wasn't actually being employed by the justices when deciding similar cases, including himself. Interestingly enough, Blackmun's notes here damage the credibility of the idea that Brennan was a large influence on Blackmun's shift. While we might assume that Brennan would have assigned the opinion since he was the most senior justice in the majority, Blackmun's correspondence with his clerks in his *EEOC v. Wyoming* papers reveals that Burger actually assigned the opinion to Blackmun and subsequently changed his vote after Blackmun circulated the opinion.[59] Finally, there's also evidence that Blackmun was growing perturbed by the dissenting justices, especially O'Connor. A memo from Rothfiel after O'Connor circulated her opinion highlighted how "the language is occasionally harsh, her dissent is highly rhetorical, and it seemed to me that a response in kind might be appropriate."[60]

Decided the following year, *EEOC v. Wyoming* split along the same lines that *FERC* did. Blackmun in his notes expressed a desire to decide this case under the 14th Amendment rather than under Congress's commerce power, which would have circumvented a discussion of *National League of Cities* entirely.[61] However, as his clerk David Ogden pointed out, Justice Brennan ultimately avoided the 14th

Amendment approach in his opinion because Justice Stevens indicated he wouldn't have joined such an opinion.[62] Regardless, Ogden indicated that Brennan's rationale-the third prong of the *National League of Cities*/*Hodel* test-was "the soundest ground in my opinion" and that the Age Discrimination of Employment Act was "less intrusive than the law at issue in *National League of Cities*, permitting the States to achieve the legitimate objectives it advances through more careful means than those it originally chose."[63] Chief Justice Burger and the other dissenters, however, saw the law as "very intrusive, and that Congress cannot require the state legislatures to enact more careful laws."[64] That Brennan's rationale ultimately relies on the same reasoning Blackmun used in *FERC* might have been a strategic move on his part to move Blackmun further from his vote in *National League of Cities*.

Of course, Blackmun's shift culminates in none other than *Garcia* itself. The *Garcia* papers unfortunately don't offer much that the Yarbrough and Greenhouse biographies didn't already mention. Those two sources already amply demonstrate the effect that clerks Scott McIntosh and Mark Schneider had on crafting the final *Garcia* opinion. However, the response that Blackmun's opinion evoked among the other members of the Court is noteworthy. Schneider wrote to Blackmun after Powell and O'Connor circulated their opinions that he found O'Connor's dissent "quite remarkable...it is peculiar for what it is not. It is absolutely silent as to why the judgments below should not be reversed...Nor is there any attempt to rebut the central arguments made in your majority opinion concerning the traditional governmental functions test."[65] Blackmun only responded to Schneider's claim with an emphatic "Yes!" in the margin. The response that Blackmun's opinion evinced might have validated his fear that the Rehnquist bloc was planning on extending *National League of Cities* to a degree that Blackmun was uncomfortable with. Schneider reminds Blackmun that "none of the dissents is willing to defend the 'traditional governmental functions' test, and that none propose any other substantive standard to replace it with,"[66] and this might be exactly why Blackmun felt he needed to kill the *National League of Cities* doctrine in the first place.

Conclusion

Unfortunately, it might be just about impossible for us to get a definite idea of exactly why Blackmun changed his vote between

National League of Cities and *Garcia* without being able to ask him directly. However, the data provided by the papers he left behind is still telling and gives us a reasonably definite answer to the question. Blackmun's papers remind us that his clerks as well as the other members of the Court played an especially important role in his decision-making. It's important to remember that decision-making certainly does not occur in a vacuum. As Justice Felix Frankfurter once said, "A member of the Supreme Court is at once a soloist and a part of an orchestra."[67] Regardless of Blackmun's own personal misgivings surrounding the *National League of Cities* opinion, it's highly likely he wouldn't have reached the same conclusions without the influence of his clerks in helping him form opinions or the fear that justices like O'Connor and Rehnquist wouldn't extend the *National League of Cities* doctrine to an extent that he viewed as irresponsible.

Though this research might help to answer this one specific question, it certainly does a lot to raise other significant questions. First of all, this is only one policy area in which Blackmun shifted. Iss Blackmun's shift here representative of a wider "left-shift" in his jurisprudence, or is the reasoning behind Blackmun's switch here more limited to the cases at hand? It would be interesting to compare the results of Blackmun's shift here to his shift on other issues over his tenure on the Court like criminal law and discern if this shift is something anomalous. Additionally, it would be interesting to conduct other studies on similar "swing justices" on the Court. Blackmun is certainly not the only justice to have switched preferences in the Court's history, and it would be worth studying whether or not the process by which he changed is limited only to him or if there is a pattern among other "swing justices" that end up changing their votes. As the papers of other justices become available in the coming years, it will become easier to conduct such studies and reach more conclusions about the judicial decision- making process.tory, and it would be worth studying whether or not the process by which he changed is limited only to him or if there is a pattern among other "swing justices" that end up changing their votes. As the papers of other justices become available in the coming years, it will become easier to conduct such studies and reach more conclusions about the judicial decision-making process.

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50. Papers of Justice Harry Blackmun, Box 353
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