OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1913 & 82-1951

TITLE JOE G. GARCIA, Appellant v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.; and RAYMOND J. DONOVAN, SECRETARY OF LABOR, Appellant v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

PLACE Washington, D. C.

DATE October 1, 1984

PAGES 1 thru 45

IN THE SUPREME COURT OF THE UNITED STATES

JOE G. GARCIA, Appellant	:	
v.	:	No. 82-1913
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.; and	:	
RAYMOND J. DONOVAN, SECRETARY OF LABOR, Appellant	:	
v.	:	No. 82-1951
SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.	:	

Washington, D.C.

Monday, October 1, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

REX E. LEE, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C.; on behalf of Appellant Donovan.

LAURENCE GOLD, ESQ., Washington, D.C.; on behalf of Appellant Garcia

WILLIAM T. COLEMAN, JR., ESQ., Washington, D.C.; on behalf of the Appellees.

- - -

C O N T E N T S

ORAL ARGUMENT OF	PAGE
REX E. LEE, ESQ., on behalf of Appellant Donovan	3
LAURENCE GOLD, ESQ., on behalf of Appellant Garcia	16
WILLIAM T. GOLDMAN, JR., ESQ., on behalf of the Appellees	24
REX E. LEE, ESQ., on behalf of Appellant Donovan -- rebuttal	44

- - -

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Garcia against San Antonio Metropolitan Transit Authority and the related case.

Mr. Solicitor General, you may proceed whenever you're ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF APPELLANT DONOVAN

MR. LEE: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether Congress can constitutionally prescribe wage and hour limitations for the employees of San Antonio Metropolitan Transit Authority, which is a public entity under Texas law.

It is undisputed but for SAMTA's public status, Congress would clearly have this authority pursuant to its Commerce Clause powers. In setting the case for reargument, the Court has asked that the parties address the question whether or not the principles of the Tenth Amendment as set forth in National League of Cities v. Usery should be reconsidered.

Our answer to that question is that those principles must be preserved. The difference between the power of the federal government to regulate private

businesses and to regulate the states as states is rooted solidly not only in the Tenth Amendment, but also in the broader principle of federalism. That is both historically and also structurally a mainstay of the Constitution itself.

It is a principle which this Court has consistently and unequivocally reaffirmed on four separate occasions subsequent to National League, and whose doctrinal foundations in the precedents of this Court reach back more than a century prior to National League.

This does not mean, however, that the appellees should win this case. The key issue is the requirement that the local government show that the federal law impairs its ability to structure integral operations in areas of traditional governmental functions.

I'll discuss in just a moment our view that the supports -- that this test, this traditional governmental functions test, imports an historical standard. But under no conceivable meaning of that term have the appellees in this case satisfied that third of the Virginia Surface Mining test requirements.

The district court acknowledged that the historical record is not one of predominant public

ownership and operation of transit services, and the American Public Transit Asscciation itself has recognized in its official public literature, and I quote: "Public ownership of transit is a recent development."

A House report issued in 1964 observed that as late as 1960, 95 percent of local transit service were privately owned and operated. And it was not until the late 1970s that the majority of this country's transit systems were publicly owned.

Indeed, it is quite apparent, as explained on pages 26 through 34 of our first brief, that the change from private to public dominance in the mass transit field is directly attributable to federal funding. Sought by local governments in the early 1960s on the basis of pleas by them that without massive federal aid the change from private to public ownership would not be possible and service might cease.

Typical of the representations that were made to Congress was the statement by San Antonio itself, and I'm quoting: "If we do not receive substantial help from the federal government, San Antonio may join the growing ranks of cities that have inferior transportation or may end up with no transportation at all.

QUESTION: General Lee, may I ask whether the Federal Fair Labor Standards Act requirements apply to all federal employees? Do you know?

MR. LEE: I would --

QUESTION: Do you know which ones might be exempted, if any are?

MR. LEE: I would -- I'm just going to have to check on that. I would assume that they do, but I'm not certain.

The Sixth Circuit, we submit, was quite correct when it stated in the Kramer case that "Tradition for these purposes must be gauged in light of what actually happened, and what happened is a federal program of local transit services in which the states participate as latecomer junior partners. There is, therefore, no tradition" -- and I'm still quoting from the Sixth Circuit -- "of the states qua states providing mass transportation."

There is a related point. Congress did not have to accomplish its mass transit spending objectives the way the states requested. Congress could have given the subsidy direct to the private carriers instead of to state and local governments. And in this respect the case is very much like FERC v. Mississippi.

Central to the Court's holding in FERC, as I

read that opinion, is the common sense proposition that by acceding to an alternative preferred by the states, Congress should not be taken to have forfeited Commerce Clause powers that it otherwise clearly has and that would be unassailable if Congress had accomplished its objective other than the way the states requested. We submit that the same principles applies here.

Probably the dominant theme of the briefs filed by the appellees and their amici is that the ability of state and local governments to make certain policy choices otherwise available to them may be impaired in the event the federal government has the authority to set wage rates for their employees. And as a starting point that is a relevant argument, because we agree that as this Court said in FERC v. Mississippi and has repeated several times since, the authority to make policy choices, to make policy decisions is probably the quintessential attribute of sovereignty.

But we find it ironic that the appellees' petition in this respect purports to be based on federalism; because the authority to make fundamental policy decisions is no less an essential attribute of sovereignty for Congress than it is for the states, and both are affected by this case.

Because while it is true that SAMTA's ability

to make some mass transit policy choices could be affected -- the federal government regulates its wages and hours -- it is equally true that SAMTA's wage and hour decisions, if left to their unfettered control, can also limit Congress' ability to regulate Congress. And the reason is that wage and hour decisions by a publicly-owned mass transit employer have just as much effect on interstate commerce as the same decisions, the same wage and hour decisions by a non-governmental mass transit employer.

And if there is one thing that is clear concerning Congress' Commerce Clause prerogatives, it is that the authority to decide, the power to decide concerning the effects on interstate commerce, the comparative effects of different kinds of practices, lies solidly within Congress' stewardship.

And this brings us to the crucial issue of what should be the governing constitutional standard. The reason that there is a constitutional issue in this case is that a central structural feature of our Constitution is the side-by-side existence of two sets of governments. And in any case like this one where you have federal regulation under the Commerce Clause of the states qua states, then the complete and uninhibited exercise of sovereign power by either of these sets of

governments creates a potential conflict with the sovereign powers of the other. That is the constitutional problem, and if the governing constitutional standard is to be adequate, it must take that fact into account.

QUESTION: Do you think -- do you think Maryland v. Wirtz was wrong?

MR. LEE: We accept the overruling of Maryland v. Wirtz that was accomplished in National League of Cities, and we're not --

QUESTION: So you would have -- you would have -- you have been on the other side of National League of Cities, then. I mean you would have -- you would have -- you wouldn't have been making the argument the Government made in National League of Cities.

MR. LEE: Had I been the Solicitor General at the time of Maryland v. Wirtz, I --

QUESTION: I mean -- no -- National League of Cities.

MR. LEE: Had I been the Solicitor General at the time of National League of Cities, I would have taken the same position the Solicitor General took in that case.

But in the interim since that time, National League of Cities has been decided. There is a rather

comprehensive body of law that has developed, including this three-part test plus the balancing safety valve which we think gets it just right, so long as there is an understanding as to what is meant by traditional. There has been some reliance by the states on that test, and there is a significant interest in preserving the existing precedents of -- of this -- of this Court. And for that reason --

QUESTION: Well, General Lee, how does a focus on the historical services provided by a state serve to protect the more fundamental ability of the state to make and carry out its policy choices as a sovereign? I'm not sure that I understand how that serves us well in protecting sovereign rights of states.

MR. LEE: It serves to protect sovereign rights of states and the sovereign rights of Congress, Justice O'Connor, and this is absolutely fundamental to our case, the answer to that question.

We start from the premise, as I've just developed, that the basic constitutional problem is that ours is a federal system, and that if you concentrate only as my opponents do on the fact, with which we have no dispute, that the unfettered exercise by Congress of its powers can erode some state prerogatives, then that leads you in one direction.

Mr. Garcia, on the other hand, focuses in his brief on an equally correct proposition, which is that the unfettered exercise by the states of their prerogatives to make wage and hour decisions, if there are no limitations, can also limit Congress' authority, which it otherwise clearly has, to make decisions concerning effects on Congress.

Our point of view is that this Court really did get it right when in Hodel v. Virginia Surface Mining and three subsequent occasions it said that it's to be -- that the -- that the test is to be three parts plus a balancing safety valve, which permits us to take into account the fact that there is -- there is this equipoise, there is this -- that there are these -- the need to accommodate the competing interests of both state and federal.

Now, as to the -- as to the basis for the historical test, we think that the historical test is also sensitive to the competing needs of both sets of governments; because on the one hand, once again, you can say that regardless of when the states come into the field, that their problems do relate to legitimate police power objectives.

QUESTION: Mr. Solicitor General, are we not talking really in the broadest sense of the power of

Congress to regulate compensation of state and city and county employees? In other words, we're not talking just about a transit system. We're talking about sewage and water and street lights.

MR. LEE: Well, all we are talking about in this case itself, of course, is the applicability --

QUESTION: Yes, yes.

MR. LEE: -- Of the Fair Labor Standards Act to San Antonio --

QUESTION: But we're -- we're also talking about broad constitutional principles and the division of or allocation of power between state and federal government.

MR. LEE: That is correct. There are those issues in the background. But I would urge that the only issue that needs to be decided at this time is the narrow issue of -- of wages. Now --

QUESTION: Issue -- issue really is who pays -- which entity pays the compensation of -- of state and city employees. And if the federal government starts down this road, where does one stop it.

MR. LEE: Well, that is an issue, and that is the perspective from what -- that -- that is the question as placed in the perspective from the appellees' standpoint. But I can also say that there is

a question concerning the prerogative of the Congress to set -- to regulate commerce.

The appellees have very properly raised the question -- probably the dominant theme in the appellees' briefs is a concern that if they lose this case, there will be an adverse impact on their -- particularly if -- if -- if our historical test is -- is adopted, that this will freeze their prerogatives to enter new fields.

My answer to that, and to further answer to your question, Justice Powell, is that there is nothing in this historical test which freezes in any way or adopts any kind of a static view which prevents the states from entering new fields. All it says is that when they do enter new fields, if it is a field that is already subject to regulation by Congress, then they may have to enter it subject to the same -- to some reasonable Commerce Clause regulations of the same type that their private competitors are already facing. And that is a principle that has been established by this Court at least as early as 60 years ago in Helvering v. Powers and has been reiterated numerous occasions since then, in California v. -- United States v. California, Harden v. Terminal Railway.

QUESTION: What is the -- what, Mr. Solicitor

General, is the competitor of a private mass transit system in today's terms? What competitors are there?

MR. LEE: Well, there -- of course, at the time -- at the present time, it is dominantly a field that is dominated -- it is a field that is dominated by public transit systems, though I would add quickly and parenthetically that came about because of this mass -- this massive federal aid.

But at the time -- the issue really must be gauged as of the time the states first entered the field. And you have to ask in answering this question, has there been a law -- is this a traditional governmental function?

QUESTION: Mr. Solicitor General, this time point troubles me. Are you talking about a majority of the states or state by state? And before you answer that question, my next question would be are you talking about city by city or county by county, or what is the limit of the standards you advocate?

MR. LEE: No. I think you have to look at it as a national problem. And I think --

QUESTION: A majority of the states?

MR. LEE: I don't think that you -- I don't think that it would be profitable to look at. I don't think it would be that helpful to look at in terms of a

majority. Indeed, I would urge that that issue not be reached in this particular case, but that the only decision that be reached in this particular case is that where you have the circumstance that you had here where prior to the massive federal aid, and indeed, where you had federal regulation in the employment relations field reaching back to 1935 and at least as early as 1961 that you had federal regulation applying to -- to -- to transit employees, and a circumstance in which as of 19 -- there simply was not a well established -- there simply were not well-established patterns of state ownership already in the field at the time that the federal government entered.

Now, I grant --

QUESTION: Mr. Lee, I take it these questions, for me anyway, raise a secondary question, and that is whether the traditional governmental function test is a correct one. I take it you feel it is.

MR. LEE: Indeed I do, Justice Blackmun. We think the entire approach is sound, and an integral part of that approach is the third test which is the traditional governmental functions test.

QUESTION: But this is why you're getting these questions from the bench.

MR. LEE: That is correct. That is correct.

And I wish to emphasize that we do believe that that test is a sound one, and it's sound for three reasons. One is it has the force of precedent behind it. The second is that it is responsive to the basic underlying constitutional problem. You cannot focus simply on the problems under federalism that the states have or the problems under federalism that the Congress has. You have to accommodate in some way both of them, and we believe that this historical test accomplishes that.

Mr. Chief Justice, I'd like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF APPELLANT GARCIA

MR. GOLD: Mr. Chief Justice, and may it please the Court:

It is our position that there are several and different and distinct arguments, each of which leads to the conclusion that the application of the Fair Labor Standards Act to publicly-owned mass transit systems is constitutional.

There are certain broader arguments than those made by the Solicitor General for that proposition which I wish to begin with. I also agree for the individual appellants here that the arguments -- the basic argument

that he has made concerning the situation in which the states and localities move into an area which was pioneered primarily by the private sector, and do so under conditions in which the federal government is a major cause of the states' and localities' entrance into that field, is not a situation in which the states thereafter can claim that the exercise of that authority free and clear of federal authority is essential to federalism.

In this system that we have of both a federal and state government, to say that such an example of cooperative federalism where the federal government no less than the states and localities is part and parcel of creating the regime in which the states and localities are providing a goods and -- is -- are providing a good or service is one which expands state authority and narrows federal authority, seems to us to be impermissible.

There are at least two arguments which have broader ramifications than the argument I've just outlined and on which we agree with the Solicitor General. The first, which I -- I think I ought to begin by saying would require the overruling of National League and Cities -- National League of Cities is that the system of federalism, which we all agree the

Constitution creates, is a system in which the national government has enumerated powers but is supreme within those enumerated powers, and where the distinctive feature is that the national government does not have plenary powers.

We believe that the argument for that proposition has three basic components. The first is the language of the Supremacy Clause and of the Tenth Amendments themselves. The Supremacy Clause says this Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, anything in the Constitution or laws of any states to the contrary notwithstanding. And the Tenth Amendment says simply that powers "not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people." And all this against the background, as I have said, of a Constitution which does not say that the national government shall have plenary power, but rather enumerate certain powers, including the power to regulate commerce, and which includes also those powers necessary and proper to carry out that basic authority -- an authority which was indeed the very foundation of the process which led to the formation of this nation and the rejection of the

Articles of Confederation.

We set out in our brief on reargument at pages 5 to 12 and then in our reply brief on reargument at pages 2 to 10 the understandings that underlie the bare words and the structure that I have just stated.

We take Madison as the embodiment of the consensus on these major questions of structure and relationship, and we trace what he said in particular in the Federalist Papers and thereafter. That is not a submission that lends itself to oral presentation, but I wish to note two brief snippets. They can be judged in the context or by the totality of our presentation.

While serving in Congress, Madison stated during the debates over the creation of the Bank of the United States, interference with the power of the states was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it. If given, they might exercise it, although it should interfere with the laws or even the constitution of the states.

And the Constitutional Convention, I would note, considered and rejected a proposal which would have precluded Congress from, and I quote: "Interfering with the government of the individual states in any matter of internal policy with -- which respects the

government of such state only, and wherein the general welfare of the United States is not concerned.

QUESTION: Mr. Gold, do you think the framers of the Constitution would have envisioned that they were authorizing the federal government to tell the states how much they could pay their own employees to carry out their necessary sovereign functions?

MR. GOLD: I -- I think, Justice O'Connor, that the -- the answer to that question is the following -- is what follows. The states and localities at the time of the adoption of the Constitution had very small establishments indeed. And the basic question of the extent to which the commerce power would eventually expand seems to us to be cancelled out by the fact that there was also a belief at the time that the wide variety of services that the government provides today would not be provided by the states and localities at all.

I am quick to add that the essential animating concern in the two National League of Cities argument and this argument is the one that you have stated. I can only say two things about that argument that concern insofar as it applies to those activities that are truly and uniquely governmental.

One, as Justice Harlan said in Maryland v.

Wirtz, any activity of the federal government under the commerce power has to be shown to be an activity which -- an action based on an effect on commerce. I am not clear that an attempt to regulate the governor or the legislatures or their staffs could pass that test. I don't want to argue the point one way or the other, because the interesting fact of 200 years of history is that it has never occurred.

The Founding Fathers, insofar as they were concerned about the states and state sovereignties, put -- state sovereignty, put their faith in a political system rather than in a system which would provide that the federal government has enumerated powers, with an exception that the Court shall judge whether those enumerated powers unduly interfere with state sovereignty, and the trust has not yet been abused.

What was said in the tax immunity cases by Justice Frankfurter with regard to creating doctrine on worst case fears ought to be remembered in this context as well.

The beginning of my answer to your question also gets me to the second distinct argument we would make, and that is that the production of goods and services is not an essential of state sovereignty.

In preparing for this argument I was reading

through a book called "American Public Works Association History of Public Works in the United States, 1776-1976," cited in the Solicitor General's opening brief. There was little or nothing in the way of the production of goods and services --

QUESTION: Mr. Gold, forgive me for interrupting you.

MR. GOLD: Yes.

QUESTION: But when you use the term "services," a state does very little beyond providing services for the public; so is there any limitation to your use of the word "services?"

MR. GOLD: Yes, Justice Powell. It is our view that there are certain activities of the states which we just do not regard as a good and service that is rendered in common with the private sector, or that has historically been rendered in common; and that is the making and enforcement of public law. And --

QUESTION: But -- but the typical category of services that the public is interested in primarily and that have thought to have been subject to local democratic control, basically you start with police, and fire, and streets, and light. All of those, I take it from your brief, you would say are subject to the Commerce Clause.

MR. GOLD: No. The -- the police seems to --

QUESTION: Did you say --

MR. GOLD: Oh, I apologize, Your Honor.

QUESTION: Well, you said they are or are not subject to the Commerce Clause?

MR. GOLD: I --

QUESTION: Are all of those services subject or not subject to the Commerce Clause regulation?

MR. GOLD: I started answering. I apologize for breaking in.

The -- it is our view that the police function is properly seen as part and parcel of the lawmaking and law enforcement function, and that that -- and we are now talking about how to delimit a National League of Cities test rather than a test -- rather than whether the test should be over -- overruled entirely. It is our sense that that's part of the law enforcement function.

On the other items which we have grown used to seeing as part of a widely expanded state, locality and federal role, we say this: in almost every instance in the 18th century, the activity was performed either in whole or in part in the private sector, and that that was true well into the 19th century as well.

What has been the determinant factor so far as

we can tell in looking at this history is the availability of capital in the state and locality, the capital needs, the interest of individual entrepreneurs entering --

CHIEF JUSTICE BURGER: I think you've concluded your answer now to Justice Powell, and your time has expired.

MR. GOLD: Thank you.

CHIEF JUSTICE BURGER: Mr. Coleman.

ORAL ARGUMENT OF WILLIAM T. COLEMAN, JR., ESQ.,
ON BEHALF OF THE APPELLEES

MR. COLEMAN: Good morning, Mr. Chief Justice, and may it please the Court:

On reargument this case involves two basic questions: first, whether constitutional federalism provides any limitation on Congress' exercise of its commerce powers directly against the state to supplant core state functions such as the establishment of wages, hours and overtime policies for state and local governments. The second question is whether local public mass transit, constituting 94 percent of all transit services today, is a traditional governmental function.

I think since the Solicitor General agrees with so much of our position, we ought to get to the one

thing on which we have the disagreement.

Today, 100 out of 106 major urban communities have publicly-owned local mass transit, as do all communities with transit in Texas. Ninety-four percent of all transit riders nationwide ride on public mass transit.

San Antonio started to supply public mass transit service in 1959, which is well before there was any attempt of federal regulation of transit or wages and hours.

Now, General Lee explains his modified historical test for traditional functions as follows. The state activity must be well established prior to the development of the federal regulatory presence in the field. Public transit, we submit, clearly meets this test and is not distinguishable from the traditional activities the Solicitor General concedes were correctly protected in National League of City.

I'd ask you to turn to page 2 of SAMTA's original brief to show you the legislative history. Enacted in 1938, the Fair Labor Standards Act expressly exempted all states and their political subdivisions, and all transit systems, public or private, from the minimum wage and overtime provisions. Furthermore, the National Labor Relations Act, enacted in 1935, exempts

all public agencies, including transit systems -- an exemption that continues until today.

The first attempt to extend any Fair Labor Standard provisions to any private transit provisions was in 1961 when minimum wage coverage only was extended only to a few private systems -- those which had revenues in excess of a million dollars. Now, that doesn't sound like much today, but project yourself back to 1961, and you will realize that that meant that very few private systems were covered. Then, all public systems remained completely exempt according to the express language of the -- of the statute.

The city of Philadelphia -- the city of San Antonio, as I said, began to furnish the service in 1959. Thus, we have a picture where Congress expressly exempted public transit service from FISA and NRL -- NLRA requirements during the period in which such transit became well established as a common local governmental service.

By 1965, before there was any attempt by Congress to cover any public transit system, the majority of transit employees worked for public transit companies -- some 56 percent. In 1966, Congress extended the minimum wage requirements to public hospitals, schools, and only those public systems whose

rates and services were regulated by a state or local public utility commission. Transit operators, private and public, continued to be exempt from all overtime provision.

Now, you recall it was in 1965 when the UMPTA statute was passed, and there's not a word in that statute, as you recognized, Mr. Justice Blackmun, in Jackson Transit Company, which said that if the cities took the money, that there would be any condition of federal regulation with respect to wages and hours. In fact, you said, Your Honor, in that case that that statute specifically says that wages and hours and other labor conditions were to be left to local law.

QUESTION: Mr. Coleman --

MR. COLEMAN: It was not until 1970 --

QUESTION: Mr. Coleman, could I just ask this question? In your historical development I suppose it would be perfectly clear under your argument that Congress would not have the power to apply Title VII of the Civil Rights Act to your client either.

MR. COLEMAN: Oh, no, sir. That -- one thing's clear: the Fourteenth Amendment was a dramatic passage of saying that that was one thing in which the federal government had the power to interfere with respect to states.

QUESTION: But if they had just relied on the commerce power, they could not have done it.

MR. COLEMAN: They could not have -- they could not have done it. And that's what they clearly relied upon here.

QUESTION: But you say that this limit applies to exercise of the commerce power but does not apply to exercises of power under the Fourteenth Amendment.

MR. COLEMAN: Well, I would say that I'd have to look at the members on the Court. Some of you have indicated, as you did, Mr. Justice Brennan, in -- in the EEOC v. Wyoming, that when you get around to exercise power under Section 5 of the Fourteenth Amendment that the Tenth Amendment, or federalism, has no restriction whatsoever.

The Chief Justice, and there were three that joined you, said that even there, there was a restriction, although the restriction obviously was a different nature. But I would say that there ought to be some restriction even when you're proceeding under Section 5, because I believe there's one thing in this country that is very important: that we do preserve the independent and separate existence of the state. And I don't think that under Section 5 of the Fourteenth Amendment that Congress can do something which destroys

that independent existence and separate existence of the state.

As I was saying, we have a picture here that: one, you have no regulation of public transit specifically, no regulation of private transit, and it was only in 1974 that Congress attempted to extend minimum wage and hour and overtime provisions to all public transit systems. Prior to the time that Congress attempted to do that, the state practice had become entrenched, because prior to the Congress that enacted, 90 percent of all transit services were provided by public transit agencies. Thus, publicly-owned local mass transit meets even the Solicitor General's own ill-founded and unprecedented historic test for traditional governmental activity.

For 30 years as the states assumed this vital service, Congress told the states that they would be exempt from the Fair Labor Standards Act. Even when Congress provided in UMTA for assistance to local transit, they did not intend to disrupt the settled practices of labor relations governed solely by state law, and that's what was held in Jackson Transit.

In fact, the Government's unsupported historical test bears no relation to the purpose of federalism: restraints on Commerce Clause regulation of

the states as states. Federalism ensures that state and local governments can fulfill their role in the Union by providing those governmental services which their citizens require. Whether an activity has been historically public has nothing to do with the present day realities of state involvement in providing the modern requirement of a state citizenry.

Clearly, the word "traditional" does necessarily mean historical. For example, for decades the tradition in this Court when I stood before this Court was to address the Justices as Mr. Justice. In the last three or four years the tradition has become instructed to address them as Justice.

In any event, this Court decisions rejects the equation of traditional with the passage of many decades. The decisions do not support the suggestion that even if the service is now supplied by most state and local government, it is not traditional merely because the current public sector pervasiveness does not have ancient historic roots; that, in fact, in National League of City, the services protected were defined sometime as integral, other times as important, and also at other times as traditional.

Long Island Railroad clearly states that traditional -- that traditional does not give rise to an

historic test. The Court held the same in New York v. The United States.

I think in this case, Your Honors, these systems had become public and were traditional even before Congress gave any money to the systems. In addition, when Congress gave the money to the systems, it did not say that the systems had to abide by the Fair Labor Standards Act. And your cases make it clear -- Jackson Transit and the Pennhurst -- that unless Congress says that if you want the money, you have to abide by this condition, that you do not read conditions, impose them on the local governments.

The other argument the Solicitor General makes is that somehow you will have unfair competition between the private and the public systems if you don't apply the Fair Labor Standards Act.

The language that he quotes in his brief was describing the situation in 19 -- which led to the passage of the 1966 act, which covered hospitals, schools and some transit companies. And this Court rejected that argument in -- in National League of Cities.

In addition, I would just ask you to see whether when, for example, in San Antonio it costs you 60 cents per passenger to give the service, and the

passenger pays only 18 cents, or 10 cents if a school child, or the elderly, or the handicapped, or if they ride downtown in order to eliminate traffic congestion, to promote unemployment -- to promote employment and to serve the people, it's for free -- I would just ask you how one can come in and compete with that type of system? So it is clear that the competition argument certainly has no relevancy here.

Now, the next argument that the Solicitor General makes, but he hasn't made it at the bar of this Court today, but when you read his brief, you're not quite sure what he's talking about when he says it's the state core function which is to be protected.

We think it is clear that the cases say that the state core function is its ability to fix wages and hours and overtime policies. That's what was said in National League of Cities; that's what was said in EEOC; that's what was said in the FERC case.

It is not that we also have to show, as the Government at certain places suggests, that the -- that the functioning or providing of transit service will -- if you end that that you will end the existence of the city. And in Long Island Railroad, the Chief Justice made it quite clear that when he held that the railroads were not -- were subject to federal regulation, he said

that we're dealing with the third prong of the test which is solely whether the railroads is a traditional government function. The fact that there were only two of them, the fact that there had been a long history of government regulation made the difference.

I'd now like for a moment to turn to the question of the federal constitutionalism which really answers the argument made by the union.

It is clear that when the Constitution was set up that states were to remain and they were to have separate and independent existence. If that's so, then if you don't have a constitutional federal limitation, Congress could presumably even tax a percentage of all revenues collected by state taxes.

I think Justice Blackmun in dissent in Nevada v. Hall made it clear, however, that there is an implicit federalism restriction on Congress and the states. He says, "I would find that source for Nevada sovereign immunity not in expression of the Constitution but in a guarantee that is implied as an essential component of federalism. The Court has had no difficulty in implying the guarantee of freedom of association or implying a right of interstate travel. I have no difficulty in accepting the same argument for the existence of a constitutional doctrine of interstate

sovereign immunity. The only reason why this immunity did not receive specific mention in the Constitution -- that it was too obvious to deserve mention -- is for me significantly fundamental to our federal structure to have implicit constitutional dimension."

Now, we have collected on page 17, footnote 17 of appellees' supplemental brief other cases where constitutional limitations were found implicit from the structure and language of the Constitution. In fact, I stand before you and say that few such principles are more often reiterated than this; that the framers' notion of the continued separate and independent existence of the states places a limitation on Congress' exercise of its plenary powers against state and local government.

QUESTION: Mr. Coleman, if you were -- if you were arguing this for the first time or if the issue had just come up for the first time, would you be more likely to have made kind of a federalism argument than -- than to try to pose it under the Tenth Amendment?

MR. COLEMAN: Well, I -- it's also the Tenth Amendment, but --

QUESTION: Well --

MR. COLEMAN: And you get to the Tenth Amendment in one of two ways. One -- and I think --

QUESTION: Well, if you can get to it the other way, there's no need to, is there?

MR. COLEMAN: Well, no, no. I'll tell -- I'd like to give you the problem, Your Honor.

One, if you follow --

QUESTION: We have it, all right.

(Laughter.)

MR. COLEMAN: -- The approach of -- of Justice Brennan, he would say that within the Commerce Clause if what you're trying to do is to destroy the separate and independent existence of the state, that he would read the Commerce Clause as not going that far; and so, therefore, he would say the power wasn't delegated.

Within the other approach -- and I think the cases tend to support this -- is that, one, you assume that under the Commerce Clause that the federal government has plenary powers, and if it's commerce and any person today after Wickert and Philburn and the Kassenbach case can spell out how anything affects interstate commerce. But there are other provisions of the Constitutiona also. And it's clear, for example, that even though you exercise the plenary power under the Commerce Clause, you could not say and on the trains people can't speak or read the newspaper. Why? Not because there's any -- that's not a regulation of

Congress, but because of the First Amendment.

By the same token, you say that as you look at the Constitution, and if you say that there should be separate and independent positions of the state, there's certain things that the state -- that the federal government can't do because that would seriously affect and destroy the existence of the state.

QUESTION: Even though the power was otherwise there.

MR. COLEMAN: That -- that the power was there, but the same way, if the power was there, then you'd go to the First Amendment or you go to the Fifth Amendment to limit it, here you go to the structure of the Constitution, and you say that --

QUESTION: That was the -- well, that was the basis of the tax immunity cases, wasn't it?

MR. COLEMAN: Well, that's the basis of the tax immunity cases. It's the basis of the Ashton case dealing with the bankruptcy case as to whether you can force a city to go into reorganization.

Now, with respect to the Commerce Clause, for example, Mr. Justice Marshall for the Court in Fry, footnote 7, says it. In Hodel v. Virginia Surface Mining, again for the Court, he says it, as well as he says it in -- in concurring opinion in Employees v.

Missouri Department of Public Health and Welfare.

Mr. Justice Brennan for the Court in EEOC v. Wyoming at footnote 18 says it. The dissenting opinion of the Chief Justice in EEOC and his opinion for the Court in Long Island Railroad says it, in which, incidentally, it was a unanimous opinion.

The dissenting opinion of Justice Powell in EECC says it. The principle has also been asserted by Justice Blackmun in his concurring opinion in National League and his opinion for the Court in FERC v. Mississippi.

QUESTION: Mr. Coleman, I have to confess, what do they all say?

MR. COLEMAN: They all say that --

(Laughter.)

MR. COLEMAN: They all say that when you exercise plenary power under the Commerce Clause that, there's a limitation which is based in constitutional federalism that you have to recognize that the -- that the state -- that the federal government -- I mean that the -- that the Convention intended to keep the states separate and distinct, and therefore, this limitation --

QUESTION: But do they all say that the organ of the government that was going to keep them from going too far was necessarily the judiciary rather than the

Congress, because after all, the states are rather well represented in Congress.

MR. COLEMAN: Well, they -- that -- that's -- that's -- well, in that -- I'd first like to say -- to answer twofold. One, there's no presumption of constitutionality here, because the one thing that's clear, that Congress enacted the 1974 amendment only because this Court in Maryland v. Wirtz said that there was no such principle of constitutional federalism, and the federal government had absolute power. And so now since when in National League you -- you reversed that, it's hard to say that there's still a presumption, normal presumption.

Secondly, the one thing that's clear, that when there was a dispute between the various organs of government, the -- the --

QUESTION: Mr. Coleman, my question was directed to what the framers probably thought would be the correct protection against having the federal government devour the states. Would it be the judiciary or the Congress itself in which the states are represented?

MR. COLEMAN: Ultimately -- ultimately it would be the judiciary. I think that Mr. Ellsworth, who I think was the second Chief Justice of the United

States, he says it, and we quote where he says it. It's also said by the other people that where there is a dispute between the federal government and the state as to whether this type of action was appropriate within the Constitution, that the federal judiciary was to make the determination.

It also suggests in the Chadda case where there the dispute is between the Congress and the President of the United States, and each one felt that what they were doing was right and correct, and each one was equally familiar with federalism and everything else and separation of power, but there this Court made the determination.

Also in the Nixon tape case you had the same problem where you had --

QUESTION: Yes, but in this case you have a peculiar situation, because the issue is one that vitally affects the states, and they are the ones who, in turn, have the primary control over Congress through their own representatives.

MR. COLEMAN: Well, I -- I --

QUESTION: Which is not true in the Chadda situation or the Nixon tapes.

MR. COLEMAN: Well, I would suggest if you call up any -- any governor in any one of the 50 states

and -- and ask him whether he thinks that his state is protected in everything that the state wants to do because there's two Senators down here from that particular state or that members of the House are down here, I -- I just don't think that you can say that the -- that the -- that the states, because they have members in the Congress, are nevertheless -- don't have a separate, independent interest which sometime is not reflected.

And once again I say that even though in other cases you can say this, here you have to recognize that the reason why Congress did what it did was because you decided Maryland v. Wirtz, and now you've overruled Maryland v. Wirtz. So at least you ought to uphold the court below and send -- and say that the statute is unconstitutional; and then if Congress wants to take another look at it in light of the fact that they don't have all the power that they thought they had, then at that point the -- the presumption -- the presumption argument might make some sense. But even though there's a presumption, I still think ultimately the Congress -- I mean this Court is the one that has to make the decision whenever there's a conflict between the -- the federal government and the state.

QUESTION: Mr. Coleman -- Mr. Coleman, after

all, regardless of how members of Congress are elected, the Congress of the United States is a part of the federal government, isn't it?

MR. COLEMAN: Yes, sir, that's true.

Now, the -- the other point I'd like to turn to is the -- what impact of the -- does the Fair Labor Standard Act have on public transit service.

First, we all know that both National League of Cities and EEOC says that an assessment of actual impact is not necessary to resolve -- to resolution of the states' immunity. The federal government concurs in its brief in the lower court on this point. It is not the millions of dollars of extra compensation that is at issue here. It is the displacement of state policy choices that creates the impermissible intrusion. That interferes with an attribute of sovereignty, and therefore threatens the separate and independent existence of the state.

The state here, unlike in FEPC, have no choice between providing the service consistent with federal law or opting not to provide it. State and local governments do not have the budgetary resources to adopt costly federal requirements whenever imposed. Most state -- most state constitutions require a balanced budget or set a limit on debt.

Since labor costs are about 65 to 73 percent of the operating cost of transit, the Fair Labor Standards Act costs may be tremendous. State and local governments with public transit services will be forced by the FLSA to choose between raising fares or curtailing services. The person most hurt by this will be the poor, the elderly and the disadvantaged who depend on public transit to get to school or work or to their other basic -- or for their other basic needs. SAMTA, for example, at rush hour 60 percent -- 66 percent of all riders are Hispanic, 14 percent are black, 84 percent have incomes of under $15,000.

Bus drivers, like policemen and firemen, must meet the public need for essential services. Schedules and working conditions are designed to respond to these needs. They cannot be tailored to eight-hour days. Furthermore, compensation is geared to the unique conditions in the transit sector and do not mesh with the requirements of the Fair Labor Standards Act.

Through the years, special premiums have evolved to compensate transit operators for split shifts, early sign-in and travel time to locations other than principal bus depot and other unique scheduling requirements. Under the Fair Labor Standards Act, these special treatments may be included in the regular rate,

and therefore would greatly increase the amount of overtime cost for transit.

The Solicitor General's only answer is that cities and states should renegotiate their labor contract. And I just ask you to look at all the problems when you ask any union for give-ups, and it seems to me that the one thing that National League of Cities made clear is that you ought not to impose that type of disruption the state. And it does not lessen the undeniable fact that the states' ability to make policy choices now and in the future would be displaced by federal regulations.

Also, in certain of these cities when the transit system is acquired, the people get slotted into the general civil service ledger for other city employees. Now, can you imagine a mayor faced with the problem where he's negotiating with the -- with -- with policemen and firemen, and you say the Fair Labor Standards Act doesn't apply, but the people performing the same type of work on a transit company, you say oh, gee, the Fair Labor Standards Act does apply here.

To be accountable and responsive to all the citizens of the local community in the provisions of important public service and to be able to experiment, as Justice Brandeis thought so important, state and

local governments must have the capacity to make the political judgments about fares, general and special tax increases, services and the costs of providing local public transit.

To subject one essential element of this local political equation to remote proxy control in Washington undermines the state's political capacity to be responsive to the community it serves in providing these governmental functions that uniquely must be provided at the local level.

We urge you, Your Honor, to affirm the decision of the court below.

CHIEF JUSTICE BURGER: Do you have anything you can cover in thirty seconds, Mr. Solicitor General?

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF APPELLANT DONOVAN -- REBUTTAL

MR. LEE: Just this point, Mr. Chief Justice. Unless tradition does refer to what's happened in the past, then some opinions of this Court are going to have to be written -- rewritten as well as some dictionaries.

Unless it is an historical test, then there is to be no effective vouchsafer for the principle unanimously announced by this Court in Long Island that states are not to have the power to erode federal authority. Just as much -- just as there must be some

-- my time is up.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

We'll hear arguments next in Alexander v. Choate.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#82-1913-JOE G. GARCIA, Appellant v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL: and #82-1951-RAYMOND J. DONOVAN, SECRETARY OF LABOR, Appellant v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

---

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Sharon Connelly

(REPORTER)