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U.S. Department of Labor

Solicitor of Labor
Washington, D.C. 20210

JUL 25 1984

MEMORANDUM FOR T. KENNETH CRIBB
Assistant Counsellor to the President

MICHAEL J. HOROWITZ
Counsel to the Director, OMB

JOHN G. ROBERTS
Associate Counsel to the President

FROM : FRANCIS X. LILLY

SUBJECT: San Antonio Metropolitan Transit Authority

Attached is a copy that we received today of the first complete draft of the Solicitor General's proposed brief in the San Antonio Metropolitan Transit Authority case. We are reviewing and analyzing it on an expedited basis. I would very much appreciate your immediate review. After that is complete, we will then have to decide whether a meeting is necessary.

Attachment

Nos. 82-1913 and 82-1951

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOE G. GARCIA, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF LABOR

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This supplemental brief is filed in response to the Court's request that the parties address the question "[w]hether or not the principles of the Tenth Amendment as set forth in National League of Cities v. Usery, 426 U.S. 833 (1976), should be reconsidered." We believe that some clarification of the test for intergovernmental immunity established in National League of Cities and subsequent cases is desirable, so as to lay to rest prevalent misconceptions about the rule established. But the key principle articulated in National League of Cities is sound and enduring constitutional doctrine. That is, we agree that the federal commerce power may not be exercised to directly regulate state activity in a manner that would "hamper the state

government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" United Transportation Union v. Long Island R.R., 455 U.S. 678, 687 (1982) (quoting National League of Cities, 426 U.S. at 851).

I

1. Ours is a federal constitution and a federal system. The federal principle of division of authority between the national government and the states is imbued in both the constitutional text, which recognizes the states as enduring units of government, and in the overall structure of the national charter. The Tenth Amendment, which declares that the "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," announces the principle directly. The national government, although supreme within its constitutional domain under the Supremacy Clause, is one of delegated (albeit broad and far-reaching) powers. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). The states, by contrast, are the presumptive holders of powers not otherwise allocated in the constitutional regime. The vitality of the states as functioning members of this partnership of governments is thus an essential feature of the scheme.

[Although it has been said that the Tenth Amendment is a mere "truism," stating only that "all is retained which has not been surrendered," United States v. Darby, 312 U.S. 100, 124 (1941), we believe it is significant for present purposes.] The Court said in Fry v. United States, 421 U.S. 542, 547 n.7 (1975), that "[t]he Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Our argument, in any event, is not to locate within the confines of the Tenth Amendment any independent "limit * * * on the exercise of [Congress's] delegated powers" (National

League of Cities v. Usery, 426 U.S. at 861 n.4 (Brennan, J., dissenting)). Rather, we take the Tenth Amendment to be a mirror of our constitutional structure, a succinct reminder that "our Federal government is one of delegated powers" (ibid.) and that the states must remain vital organs of general government. The principle of intergovernmental immunity, stripped to its essentials, is simply a means of preservation of that structure of federal-state coexistence. Thus, we do not suggest that the Tenth Amendment by itself establishes any judicially enforceable doctrine of state immunity, and we do not assign such surpassing significance to any of the other constitutional language that we discuss below. Our point is that the Constitution, read as a whole, necessarily presupposes the existence of, and thus requires the protection of, some sphere of autonomy for the states in the conduct of their own core operations.

But the Tenth Amendment is only the most obvious textual manifestation of the federal principle and of the enduring role assigned to the states in our system of government. Others abound. As the Court said in Collector v. Day, 78 U.S. (11 Wall.) 113, 125 (1870), "in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized." The Eleventh Amendment, for instance, confirms a limitation upon the judicial power of the United States, exemplifying a broader principle of state sovereign immunity located in the Constitution. See Pennhurst State School & Hosp. v. Halderman, No. 81-2101 (Jan. 23, 1984), slip op. 7-8 & n.8. Article VII, prescribing the procedure for placing the new Constitution in operation, and Article V, governing ratification of subsequent amendments, reflect the states' role as delegator of authority under our constitutional system. Article IV, Section 3, establishes the territorial inviolability and indivisibility of the states, precluding their fragmentation

or consolidation by Congress without the consent of the states concerned. __/

The intended role of the states as repositories of legitimate authority in the federal scheme is also demonstrated by the many roles assigned to the states in the establishment of the legislative and executive branches of the federal government. See Collector v. Day, 78 U.S. (11 Wall.) at 125. Representatives to the House of Representatives are "apportioned among the several States which may be included within this Union" (Art. I, Sec. 2, Cl. 3; see also Amend. XIV, Sec. 2). Senators were apportioned, two to each state (Art. I, Sec. 3, Cl. 1). Of course, the Seventeenth Amendment substituted direct election for selection of senators by state legislatures. But a more fundamental recognition of the political permanence of the states, the legacy of the "Great Compromise" that made possible the success of the Constitutional Convention, remains: "no State, without its Consent [may] be deprived of its equal Suffrage in the Senate" (Article V).

States were also assigned a key role in the mechanism for selection of the President. Both the composition of the electoral college, in which electors are allocated to the states in proportion to their overall representation in the House and Senate, and the method of selection of electors, which is left to the discretion of the individual States (Art. II, Sec. 1, Cl. 2), reaffirm that the national government was meant to draw its authority from the states. And this point is underscored by the constitutional provision for selection of a President when no candidate garners a majority of the electoral college: a poll of the House of Representatives, the delegation of each state collectively exercising one vote, with "a majority of all of the states * * * necessary to a choice" (Amend. XII).

__/ Cf. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) (equal footing doctrine).

2. The decisions of this Court in a number of contexts that may otherwise seem unrelated reflect the protection afforded by the Constitution to core aspects of state sovereignty. More than a century ago, in Collector v. Day, supra, the Court recognized "[t]hat the existence of the States implies some restriction on the national taxing power" as applied to state instrumentalities. Massachusetts v. United States, 435 U.S. 444, 454 (1978) (opinion of Brennan, J.). __/ The partial immunity of state instrumentalities from federal taxation is "implied from the nature of our federal system and the relationship within it of state and national governments." United States v. California, 297 U.S. 175, 184 (1936). And that immunity is not limited to federal taxation that discriminates against States, but generally extends to taxation that "unduly interferes with the State's function of government." New York v. United States, 326 U.S. 572, 588 (1946) (Stone, C.J., concurring). See also Massachusetts v. United States, 435 U.S. at 456-460 (opinion of Brennan, J.).

This Court has also employed the federalism principle as a pole star in discerning the jurisdiction of the federal courts and delineating the proper exercise thereof. For example, the Court has discerned a sovereign immunity limitation upon the judicial power conferred on the United States by Article III, see Pennhurst State School & Hospital, slip op. 7-8, explaining that the Eleventh Amendment is "but an exemplification" of a more "fundamental rule." Ex parte New York No. 1, 256 U.S. 490, 497 (1921). Indeed, the Court has relied on notions on federalism to restrict the power of the federal courts even in cases properly within their jurisdiction. In Younger v. Harris, 401

__/ While the rule applied in Collector v. Day, -- i.e., that a state's intergovernmental immunity from federal taxation extends to its officers -- has since been overruled, see Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939), the doctrine of immunity survives as to state instrumentalities themselves.

U.S. 36 (1971), the Court held that, absent extraordinary circumstances, federal courts should not enjoin an ongoing state criminal proceeding, explaining that the ruling reflected (id. at 44)

> a proper respect of state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

The Court added (id. at 44-45) that the doctrine of "Our Federalism"

> does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Goverment and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

See also Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 431-432 (1982) (Younger applies to noncriminal state proceedings when "important state interests are involved"). Similar policies are reflected in the Burford abstention doctrine, which limits the role of federal courts where assumption of jurisdiction would disrupt establishment of coherent state policy in matters subject to state law (Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943); Colorado River Water Conservation District v. United States, 424 U.S. 800, 814-815 (1976)), and in the limitations upon the exercise of federal habeas corpus power to review state convictions, see Reed v. Ross, No. 83-218 (June 27, 1984), slip op. 8-9; Engle v. Isaac,

456 U.S. 107, 128-129 (1982). See also Rizzo v. Goode, 423 U.S. 362, 378-380 (1976).

3. The basic teaching of National League of Cities -- that "under most circumstances federal power to regulate commerce [may] not be exercised in such a manner as to undermine the role of the states in our federal system" (United Transportation Union v. Long Island R.R., 455 U.S. at 686) -- is in harmony with the fundamental principle of federalism embodied in the Constitution and recognized in this Court's decisions in other contexts. Although the Court described the Tenth Amendment as "an express declaration" of the federalism limitation it recognized (426 U.S. at 842), the decision in National League of Cities manifests the "essential role of the States in our federal system of government" (id. at 844). The Court's holding, in the end, rests upon the conclusion that in the enactment before it "Congress ha[d] sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system'" (426 U.S. at 852, quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)), and would "allow 'the National Government [to] devour the essentials of state sovereignty'" (426 U.S. at 855, quoting Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)). While it is fair to argue -- as we do in this case -- that particular federal enactments that directly affect state activities nonetheless lack the drastic impact on the continuing vitality of state government that was branded as impermissible in National League of Cities, we have no quarrel with the underlying core principle. We accordingly turn our attention to the test that has been abstracted from National League of Cities to assess claims of state immunity from federal Commerce Clause legislation.

II

In National League of Cities, 426 U.S. at 852, the Court held that 1974 amendments to the Fair Labor Standards Act that

extended minimum wage and overtime protection to virtually all public employees are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral governmental operations in areas of traditional governmental functions." In Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 287-288 (1981), the Court summarized the rule of National League of Cities, stating it in the form of a test:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." Id. at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." Id. at 852.

Even where these three requirements are met, a claim that commerce power legislation enacted by Congress impermissibly infringes state sovereignty may still fail, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." 452 U.S. at 288 n.29. Subsequent decisions of this Court have generally adhered to and applied this formulation of the test for intergovernmental immunity. See Long Island R.R., 455 U.S. at 684 & n.9; EEOC v. Wyoming, No. 81-554 (Mar. 2, 1983), slip op. 9-10. __/

We believe that some clarification of the Virginia Surface Mining test is appropriate and that clarification would reduce

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__/ Unlike other "Tenth Amendment" cases that followed National League of Cities, FERC v. Mississippi, 456 U.S. 742 (1982), addressed the constitutionality of federal legislation designed to foster use of state regulatory processes to advance federal policy goals, rather than the immunity of state instrumentalities from non-discriminatory, generally applicable, federal regulation. FERC accordingly does not, for the most part, rest upon application of the Virginia Surface Mining formulation. See 456 U.S. at 759. The Court recognized the validity of that test, however. Id. at 764 n.28.

the volume of litigation in this area, which is attributable, at least in part, to uncertainty as to the contours of the doctrine involved. But we do not favor any substantial alteration of the test, which, as we understand it, appears faithful to the fundamental constitutional insight that links National League of Cities to the broad mainstream of this Court's federalism jurisprudence.

1. Representatives of the States have periodically sought to dispense with the first requirement of the prevailing test for intergovernmental immunity -- i.e., the requirement that challenged federal commerce power legislation be shown directly to regulate the "States as States." See, e.g., Brief of Council of State Governments Connecticut v. United States, No. 83-870 (October Term 1983). But this requirement, which sharply distinguishes federal commerce power legislation directly regulating private commerce from federal legislation that regulates state government itself, is firmly rooted in the "dual sovereignty of the government of the Nation and of the State[s]" (National League of Cities v. Usery, 426 U.S. at 845) and is required by this Court's countless decisions "attest[ing] to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with Federal law." Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. at 290. See also Oklahoma v. Atkinson Co., 313 U.S. 508, 534-535 (1941).

"It is elementary and well-settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive." Missouri Pacific Ry. Co. v. Stroud, 267 U.S. 404, 408 (1925). This rule of undivided authority is unequivocally stated in the Supremacy Clause (Art. VI, Cl. 2). Any other rule would impermissibly "impair a prime purpose of the Federal Government's establishment" (Case v. Bowles, 327 U.S. 92, 102 (1946)). Thus, stare

decisis, fidelity to the unambiguous command of the Supremacy Clause, and sensitivity to the very demands of constitutional structure that induced the Court in National League of Cities to recognize a protected realm of state sovereignty in the face of Congress's plenary Commerce Clause authority, combine to compel the conclusion that the doctrine of intergovernmental immunity can only apply when Congress legislates to directly regulate state government activity. See EEOC v. Wyoming, slip op. 10 n.10; Virginia Surface Mining, 452 U.S. at 286-290. See also Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 84 n.27 (1978).

2. The second prong of the Virginia Surface Mining formulation of the test for National League of Cities immunity -- that the federal statute address matters that indisputably attributes of state sovereignty -- "poses significantly more difficulties," as the Court has remarked (EEOC v. Wyoming, slip op. 10). Cases subsequent to National League of Cities have not turned on this element of the test, and the Court has had "little occasion to amplify on * * * the concept" (EEOC v. Wyoming, slip op. 10 n.11). We believe, however, that this limitation upon the doctrine of intergovernmental immunity can play a distinct and significant role in delineating the proper scope of that doctrine and the function of the courts in enforcing it.

Because the doctrine of intergovernmental immunity is derived primarily from the structure of our constitutional system of dual sovereignties, it does not readily yield up clear rules for judicial application. Indeed, the Court has frankly acknowledged that the "determination of whether a federal law [impermissibly] impairs a state's authority * * * may at times be a difficult one" (United Transportation Union v. Long Island R.R., 455 U.S. at 684). This problem has attracted considerable attention from the commentators. It has been argued that, because of its source in the structure of the federal constitu-

tional system, the doctrine of intergovernmental immunity is one that, by its nature, should be enforced exclusively by the national political process. See Choper, The Scope of National Political Power Vis-a-Vis the States: The Dispensability of Judicial Review, 86 Yale L.J. 1552 (1977). Professor Wechsler has also emphasized the role of the political process (albeit without excluding entirely a role for the courts in enforcing federalism limitations upon Congress). See The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the Federal Government 54 Colum. L. Rev. 543, (1954). On the other, hand it has been forcefully argued that protection of the structure of federalism is a task of surpassing importance for the courts. Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 Sup. Ct. Rev. 81. And Professor Tribe has observed that the mode of "structural inference" underlying National League of Cities is not, in principle at least, distinguishable from that employed by the Court in defense of federal authority in McCulloch v. Maryland, and that, "[i]f states are to have any real meaning, Congress must * * * be prevented from acting in ways that would leave a state formally intact but functionally a gutted shell." Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services, 90 Harv. L. Rev. 1065, 1068 n.17, 1071 (1977).

Of course, National League of Cities itself rejects the argument that enforcement of any federalism restraints upon Congress's Commerce Clause authority is extra-judicial in nature. 426 U.S. at 841-842 n.12. We do not propose that that conclusion be reconsidered. At the same time, we think it correct to acknowledge that the States play an influential part in the national legislative process (see pages - , supra) and thereby minimize the likelihood that federal commerce power

will be employed in a manner that truly eviscerates state sovereignty. These political "checks" should be considered in assessing the scope of state immunity from federal regulation is considered. See Massachusetts v. United States, 435 U.S. at 456-457 n.13 (opinion of Brennan, J.).

Thus, even in this context, as in ones more frequently confronted by the courts, Acts of Congress come before the Court cloaked with a strong presumption of constitutionality. See Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1, 15 (1976). The standard by which claims of intergovernmental immunity are measured should accordingly make clear that judicial intervention should be the exception rather than the rule. It is only when Congress appears plainly to have forgotten or forsaken the "unique benefits of a federal system in which the States enjoy a 'separate and independent existence'" (EEOC v. Wyoming, slip op. 9 (quoting National League of Cities, 426 U.S. at 845)) that the judicial power should be exercised to override a congressional enactment. By requiring States that claim immunity from federal commerce power legislation to show that the challenged statute "indisputably" undercuts their sovereignty, the Virginia Surface Mining formulation properly emphasizes that neither marginal nor merely arguable impacts are judicially cognizable.

A second, related, reason for adopting this posture of judicial restraint is the "institutional limitations" that restrict courts' "ability to gather information about 'legislative facts'" (United States v. Leon, No. 82-1771 (July 5, 1984), slip op. 2 (Blackmun, J., concurring); see also Akron v. Akron Center for Reproductive Health, No. 81-746 (June 15, 1983), slip op. 5 n.4 (O'Connor, J., dissenting)). Yet as National League of Cities itself makes clear, intergovernmental immunity claims frequently present complex factual questions of impact. Compare 426 U.S. at 846-851 with id. at 873-874 & n.12, 878 (Brennan, J., dissenting). The Court's response has been that,

in applying the intergovernmental immunity doctrine, "particularized assessments of actual impact" are neither necessary nor controlling. 426 U.S. at 851. In EEOC v. Wyoming, slip op. 13, the Court explained that the pertinent inquiry is "more generalized * * *, essentially legal rather than factual," focusing upon "the direct and obvious effect of the federal legislation on the * * * States * * *." When a claim of intergovernmental immunity cannot be established by reference to the "direct and obvious" effect of the challenged federal legislation upon the viability of the federal system, judicial intervention is inappropriate [cites]. In such cases, the courts should defer to the political process as the arbiter of the competing claims of the States' and the Nation. See Cox, The Role of Congress in Constitutional Determinations, 40 U. Cinn. L. Rev. 187, 229-230 (1971). __/

3. The third prong of the prevailing test for state immunity from federal commerce power regulation requires that a complaining state demonstrate that the challenged federal statute "directly impair[s] [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. at 288 (quoting National League of Cities, 426 U.S. at 852). A recurring problem in the application of this standard is to define "traditional governmental functions." It is our view that this standard for assessing immunity of state and local govern-

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__/ We do not agree that this consideration has no bearing simply because an adjudication involves a clash between federal authority and state or local prerogatives. Compare EEOC v. Wyoming, slip op. 13 n.8 (Burger, C.J., dissenting). We note, for instance, that in determining whether a state statute denies due process of law -- a federal standard imposed the States by the Fourteenth Amendment -- the Court has looked to the political judgments of the states generally that are embodied in their laws. Statutes that follow an approach adopted by many states are more readily held to meet the federal standard of due process than idiosyncratic ones. Compare Schall v. Martin, No. 82-1248 (June 4, 1984), slip op. 13 n.16, with Addington v. Texas, 441 U.S. 418 (1979); see also Jones v. United States, No. 82-5195 (June 29, 1983), slip op. 15-16 & note 20.

ment functions should be essentially, if not exclusively, a historical one. This approach is most faithful to the clear intent of National League of Cities, most consistent with the analogous intergovernmental tax immunity doctrine, and truest to the federalism principle that underlies both doctrines.

In its opinion in National League of Cities, the Court pointedly characterized as "traditional" the governmental services that were held to be exempt from enforcement of the Fair Labor Standards Act. The Court stated that the impact of the challenged Fair Labor Standards Act amendments upon States' control of employment relations affecting "fire prevention, police protection, sanitation, public health, and parks and recreation" services was impermissible because "it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens" (426 U.S. at 851; emphasis added). The Court added that its listing of exempt services was not "exhaustive," intimating that other services "well within the area of traditional operations of state and local governments" might qualify for similar treatment. 426 U.S. at 851 n.16 (emphasis added). And in overruling Maryland v. Wirtz, supra, the Court emphasized that the public schools and hospitals that were covered by the 1966 FLSA amendments and that had been upheld in that case represent "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (426 U.S. at 855; emphasis added).

"Traditionally" simply is not synonymous with "generally" or "typically." If the repeated use of the qualifiers "traditional" and "traditionally" does not import a historical standard, it is difficult to assign any meaning at all to these key terms. Our reading of National League of Cities is corroborated, moreover, by the Court's explanation that the holding of United States v.

California, supra, remained good law because states historically have not regarded operation of a railroad as a governmental activity. 426 U.S. at 854 n.18.

Tracing National League of Cities to its doctrinal and precedential roots makes clear both that the Court intended to establish an essentially historical test, and that such a test is a sound one. The analysis employed in National League of Cities is largely derived from Justice Rehnquist's dissent in Fry v. United States, supra. Justice Rehnquist's opinion employs an essentially historical standard in delineating exempt state functions, distinguishing United States v. California from Maryland v. Wirtz (421 U.S. at 557-558; emphasis added):

> I would hold the activity of the State of California in operating a railroad was so unlike the traditional governmental activities of a State that Congress could subject it to the Federal Safety Appliance Act. But the operation of schools, hospitals, and like facilities involved in Maryland v. Wirtz is an activity sufficiently closely allied with traditional state functions that the wages paid by the state to employees of such facilities should be beyond Congress' commerce authority.

Justice Rehnquist acknowledged that "[s]uch a distinction would undoubtedly present gray areas to be marked out on a case-by-case basis," and remarked that "[t]he distinction suggested in New York v. United States, 326 U.S. 572 (1946), between activities traditionally undertaken by the State and other activities" would be useful in resolving such cases (421 U.S. at 558 & n.2).

Both National League of Cities and Justice Rehnquist's dissent in Fry rely heavily upon the doctrine of partial state immunity from federal taxation. See 426 U.S. at 842-843, 854; 421 U.S. 552-556. As noted above (page), that doctrine, like the National League of Cities doctrine, rests ultimately upon the federal structure of our constitutional system. But the tax immunity of the states has not been extended to "revenue-generating activities of the States that are of the same nature as those traditionally engaged in by private persons."

Massachusetts v. United States, 435 U.S. at 457 (opinion of Brennan, J.). See, e.g., New York v. United States, supra; Allen v. Regents, 304 U.S. 439 (1938); Helvering v. Powers, 293 U.S. 214 (1934); Ohio v. Helvering, 292 U.S. 360 (1934); South Carolina v. United States, 199 U.S. 437 (1905). __/ In New York v. United States, Chief Justice Stone espoused a historical standard that would prevent the states from acquiring expanded tax immunity, and thus eroding the federal taxing power and tax base, by taking over activities formerly performed by the private sector (326 U.S. at 588-589; citations omitted):

> [I]mmunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax * * * merely gives an accustomed and reasonable scope to the federal taxing power. * * * The nature of the tax immunity requires that it be so construed so as to allow to each government reasonable scope for its taxing power[.]. The national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it. [__/]

An interpretation of the States' partial immunity from federal commerce power regulation that precludes the States from expanding that immunity and curtailing the effective reach of federal authority by assuming functions previously performed by the private sector is accordingly consistent with both the tax immunity doctrine and the principle of balanced federalism that

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__/ As Justice Brennan observed in Massachusetts v. United States, 435 U.S. at 457 & nn.14-15, cases prior to New York v. United States relied, at least in part, upon a distinction between governmental and proprietary functions, but that distinction was rejected by all factions of the Court in New York v. United States, whereas the historical standard appeared to represent the consensus of the Court.

__/ Although Chief Justice Stone wrote for only four Members of the Court, the separate opinion of Justice Frankfurter, joined by Justice Rutledge, took a more restrictive view of state tax immunity. Only Justices Douglas and Black, in dissent, espoused a more expansive view of that immunity. See Massachusetts v. United States, 435 U.S. at 457-458 n.15.

links it to the National League of Cities doctrine. This Court's opinion in Long Island R.R. makes our point (455 U.S. at 687):

> [T]here is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.

As explained in our opening brief (at 41-42), because the Constitution does not treat the States and the Nation as co-equal sovereigns as to matters within federal authority, see FERC v. Mississippi, 456 U.S. at 761; Sanitary District v. United States, 266 U.S. 405, 425 (1925), this principle properly extends to all cases where the state activity was not well-established as a common governmental function prior to the initial enactment of federal regulatory legislation in the area. Where state activities and patterns of operation are not entrenched prior to the enactment of federal legislation, federal requirements cannot be said to displace state decisions or disrupt settled patterns of organization, and do not imperil the vitality of the states.

We recognize that, in Long Island R.R., 455 U.S. at 686, the Court stated that its emphasis on "traditional governmental functions and traditional aspects of state sovereignty" was not intended to "impose a static historical view of state functions generally immune from federal regulation." At the same time, the Court's holding that "federal regulation of a state-owned railroad simply does not impair a state's ability to function as a state" was predicated directly upon "the historical reality that the operation of railroads is not among the functions traditionally performed by state and local governments" (455 U.S. at 686; emphasis added)). Thus we take the message of Long Island R.R. to be that a focus on the historic scope of state activity is ordinarily proper, not because of a mechanical preoccupation with the past, but because such an inquiry is best calculated to discover "whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state

government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" (455 U.S. at 686-687; citation omitted).

We note that the standard we have proposed does not, in fact, adopt a "static historical view of state functions" or freeze the states in time so that only those activities performed when the Nation was founded qualify for protection under the intergovernmental immunity doctrine. Nor does it adopt any rigid across-the-board cutoff date for activities that are to be considered "traditional." Rather, the standard we espouse entails a more sensitive inquiry, one that turns upon whether the states had, prior to the initial enactment of federal regulatory legislation applicable to a particular field of service or activity, generally established themselves, with settled patterns of organization, as providers of the service. This standard allows the states ample latitude for experimentation with, and expansion of, their services, while it precludes erosion of federal authority. It thus strikes a balance essential for the preservation of our system of constitutional federalism.

This standard also accords proper deference to Congress which, in enacting legislation, must be presumed to be sensitive to the prerogatives of state and local government and to the federal structure of our constitutional system. As explained above (pages), although we do not suggest that "Tenth Amendment" claims are nonjusticiable, we believe that the operation of the national political process affords substantial protection for state interests, and that judicial restraint accordingly is appropriate in this area. As indicated in our initial brief (pages 49-51) respect for Congress militates especially strongly against adoption of a rule that would permit shifting patterns of state activity to undermine the constitutionality of federal enactments that were valid when enacted. In other words, the constitutionality of federal Commerce Clause

legislation must be adjudged in terms of the state activities that were traditional at the time when the legislation was enacted. This rule enables Congress, which is best equipped to engage in the necessary kind of factfinding concerning patterns of political, social and economic organization, as they bear upon the provision of services, to discharge its constitutional responsibility at the time it enacts legislation, free of the threat that its legislative product will, for reasons beyond its control, drift into a status of unconstitutionality. Moreover, such a rule would entrust to Congress the task of periodically reviewing the corpus of enacted law to ascertain whether shifting patterns of state activity warrant any statutory change. Congress, unlike the courts, possesses not only the requisite fact-finding capabilities for the task, but, by its nature, the political sensitivity to "'accomodat[e] the competing demands in this area" (United States v. New Mexico, 455 U.S. 720, 737-738 (1982), quoting Massachusetts v. United States, 435 U.S. at 456 (opinion of Brennan, J.)).

Judicial deference is particularly appropriate in a case like this, where the fundamental constitution principle has been declared by this Court, and the remaining task is to separate those cases and circumstances that fit within the general constitutional rule from those that do not. National League of Cities accomplished two things. First, building upon earlier precedent, it announced the general principle "that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce" (426 U.S. at 842). Second, the Court identified certain core functions of state and local government that the federal government may not invade by Commerce Clause regulation.

Neither of these holdings need (be) or should be disturbed. The first is central to our constitutional structure, and the second

represents a precedent of this Court that has sound underpinnings and has provided useful guidance for courts and legislative bodies. The task of identifying other state activities that fall within or without the protected area will likewise be constitutional questions that must ultimately be resolved by the courts. With the constitutional framework already established however, the application of these principles to additional areas of state governmental activities will turn principally on historic considerations, factual assessments and, ultimately, on the final, safety valve balancing of federal versus state governmental objectives. In sum, these determinations will likely involve the kinds of finer-tuning, balancing decisions concerning which the judgments of Congress -- composed of representatives of the state -- are particularly weighty and should be entitled to special respect by the courts.

4. The final element of the Virginia Surface Mining formulation for assessing claims of Tenth Amendment immunity is, of course, the "balancing test," which recognizes that, notwithstanding any intrusion upon state prerogatives, the nature of the federal interest underlying an Act of Congress that applies to state activities may override the states' sovereignty claim. We believe that the "safety valve" built into the intergovernmental immunity doctrine by the "balancing test" is essential to its validity. As Justice Blackmun observed in his concurring opinion in National League of Cities, 426 U.S. at 856, a balancing approach preserves paramount federal authority vis-a-vis the states "in areas such as environmental protection where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." In other words, where attainment of a statutory goal within the reach of Congress's commerce power requires a uniform legislative scheme, applicable to all who enter the regulated field of activity, vindication of Congress's plenary power to

effectively regulate commerce dictates that states, like others who enter the field, be bound by the federal enactment. The balancing test thus ensures that the intergovernmental immunity doctrine does not serve to "impair a prime purpose of the Federal Government's establishment" (Case v. Bowles, 327 U.S. at 102).

Moreover, in assessing the weight of the federal interest, substantial deference is due to Congress's judgment that a uniform legislative scheme is necessary to secure the statutory objective. The railroad cases illustrate the principle. In Long Island R.R. the Court observed that "the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system" (455 U.S. at 688). The Court concluded that, "[t]o allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system" (id. at 689; emphasis added). See also California v. Taylor, 353 U.S. 553, 567 & n.15 (1957). The Court has properly declined to second-guess these congressional determinations.

III

In our opening and reply briefs filed last Term we have explained why neither the doctrine nor the holding of National League of Cities controls this case; we do not undertake to repeat that discussion here. We think it useful, however, to highlight briefly the relevance of the foregoing general discussion to the relatively narrow question that must be decided in this case.

As we have previously detailed (Gov't Opening Br. 16-18), operation of transit services is not, by any measure, an established municipal service of long standing. Rather, it is the product of a dramatic shift within the last 20 years from

provision of transit services almost exclusively by private enterprise to a mixed industry. That shift occurred only in the wake of establishment of a federal program providing massive financial assistance to localities that took over private transit operations. That program was established by Congress in response to the urgent appeals of state and local officials who claimed that, without substantial federal aid, they would simply be unable to operate transit services. Congress agreed, finding that "[m]ass transportation needs have outstripped the present resources of the cities and the States; * * * that a nationwide program can substantially assist in solving transportation problems" (H.R. Rep. 204, 88th Cong., 1st Sess. 4 (1963)), and that without significant federal aid adequate mass transportation could not or would not be provided by the states and municipalities on their own (S. Rep. 82, 88th Cong., 1st Sess. 4-5 (1963)). See Gov't Opening Br. 26-32. In light of the traditional dominance of the local transit industry by the private sector, the recent entry of local governments into the industry, and the critical role played by federal aid in establishing and maintaining the public sector, it seems beyond question that mass transit is not a traditional governmental function that must be exempted from non-discriminatory federal Commerce Clause legislation lest we jeopardize the vitality of the states.

It can scarcely be claimed, moreover, that the states generally had undertaken to provide mass transit services and had established settled patterns of organization in the field at the time the federal government first began to regulate employment relations in the transit industry. As we have explained (Gov't Opening Br. 39-41) that development commenced in 1935 with the enactment of the National Labor Relations Act, and was progressively extended thereafter. The Fair Labor Standards Act was applied to the local transit industry in 1961, and to public

transit systems by 1966. Appellees have -- understandably -- never even suggested that the Fair Labor Standards Amendments that extended coverage to public transit employees were unconstitutional under the standards applied in National League of Cities when they were enacted in 1966. Thus, their argument depends entirely upon recognition of a rule of creeping unconstitutionality -- i.e., that political and economic developments subsequent to enactment of the challenged provisions rendered them no longer constitutional as of some unspecified date.

Appellees' argument highlights the unworkability of an ahistorical approach to claims of intergovernmental immunity. The rule proposed allows for no settled determinations by the courts, and permits no confidence on Congress's part that action within the "accustomed and reasonable scope [of] federal * * * power" (New York v. United States, 326 U.S. at 589 (Stone, C.J. concurring)) will be upheld as proper. Rather, questions of constitutionality of federal legislation affecting the states would be open to continual judicial reexamination, and the doctrine of intergovernmental immunity would function as a crude form of constitutional "sunset" legislation. We urge rejection of a constitutional rule founded on such shifting sands, with its attendant burdens upon the legislative and judicial branches.

For reasons discussed above, this is precisely the kind of case where deference to Congress's judgment is appropriate. Congress determined that the minimum wage and overtime provisions of the FLSA should be extended to public transit systems to prevent unfair competition. H.R. Rep. 1366, 89th Cong., 2d Sess. 16-17 (1966); S. Rep. 1487, 89th Cong., 2d Sess. 8 (1966). Appellees now claim that that determination is outmoded because

of changed conditions in the transit industry. __/ Absent the most unusual circumstances, such arguments should be addressed to Congress. And deference to Congress's judgment is particularly appropriate here, because, by all accounts, programs established by Congress played a vital role in making feasible widespread public sector participation in the local transit industry. Congress also carefully assessed the claims -- advanced here by appellees -- that the overtime requirements of the FLSA create special hardships for transit operators. Congress concluded, based upon review of collective bargaining agreements in the transit industry, which almost uniformly required payment of overtime after 40 hours in a work week, that "the 'problems of the 40-hour workweek pointed to by some segments of the industry are being met and resolved by a substantial majority of the industry" (H.R. Rep. 93-313, 93d Cong., 2d Sess. 31 (1974)). __/ No

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__/ We note with interest the plans of the British government to reestablish local bus service as a private sector function. The Freedom Road, The Economist, July 14, 1984, at 58.

__/ Appellees note that premium rates are frequently paid in the transit industry because of its scheduling practices (APTA Br. 21; NLC Br. 9-10). But contrary to the perhaps deliberately vague predictions of appellees (APTA Br. 21, NLC Br. 10), the requirements of the FLSA would not simply be superimposed upon any existing premium pay arrangements. To the extent that such premium pay reaches the level of 1-1/2 times the normal rate of pay (compare NLC Br. 9 n.6) it would satisfy the requirements of the FLSA for overtime pay. See 29 U.S.C. 207(a)(1). Any technical differences between existing arrangements and the requirements of federal law in the manner of accounting for hours as to which premium pay is due scarcely rise to the level of an unconstitutional disruption of state sovereignty.

Even if such premium pay arrangements are not in themselves sufficient to meet the overtime requirements of the FLSA, they would not appear to be part of an employee's "regular rate" of remuneration. See 29 U.S.C. 207(a)(1), (e). The FLSA expressly provides for excluding various forms of "extra compensation" in establishing an employee's regular rate of pay. See, e.g., 29 U.S.C. 207(e)(5), (7), and such extra compensation is creditable towards the overtime pay required by the Act. 29 U.S.C. 207(h). Contrary to appellees' implication, it has never been determined in this case, or in any other forum, that existing premium pay arrangements must be treated as part of the "regular rate" to which overtime is applied. See Advisory Commission on Intergovernmental Relations, Mass Transit and the Tenth Amendment, Intergovernmental Perspective Fall 1983, at 17, 23. Indeed, it is safe to assume that appellees would resist any such ruling.
(Continued)

reason for overriding Congress's determination has been demonstrated.

For the foregoing reasons, and the reasons set forth in our opening and reply briefs, the judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

JULY 1984

In any event, even if it were determined that existing premium pay arrangements in some cities are structured so as to be considered part of the "regular rate," the FLSA does not, as a practical matter, require that overtime be paid on the basis of such premium rates. Because of the relatively high wage standards that are said to prevail in the transit industry generally (see NLC Br. 8) -- well in excess of the statutory minimum wage (see Gov't Opening Br. 8 n.12) -- it remains open to management and labor to renegotiate existing premium pay arrangements in light of the requirements of the FLSA to assure that aggregate compensation is not increased. Thus, the FLSA does not require transit operators to pay overtime in any different manner or amount than other employers are required to pay.