SG for Appellant

Gold

Coleman
NRA exempt transit systems
FLSA extended in 1961

(985 suggested as did HRB)

SG Reply
Games at issue: Power of Congress to regulate the compensation of State & local employees.

SC is test: whether at time Fed. Govt. "entered the field" the States "generally" were providing the service?

Which - Govt - in its Fed. system - gets these "first"?

How many States?
Neither Govt, States.

Broad Ask: Balancing Test (25 States)
Weight: Strength of interest vs seriousness of infringement.
Garcia
82-1913

SG's Brief: "principle of Nat. League is sound" but needs "clarification."

1. The "Test" -- which Government "best" entered the field with regulation in the test.

   a. State by State?
   b. How many States before the activity
   c. "traditional" or "fixed pattern"
   d. How many years before "fixed?"

2. Brief by 25 States
   "Balancing test":
   (i) Weigh the strength of "Fed. interest" vs. seriousness of intrusion on state sovereignty.
   (ii) "Core concern" of Commerce Clause not at issue. Fed. commerce "burdened.

   (iii) "Commute burden" on commerce with intrusion of state's interest.

   (iv) If transit workers are exempt from FLSA, how will commerce be burdened. (MPCA)

   (v) Local transit not subject to Fed. regulation (Cr. Long Island)

   (vi) Local interest strong -- school children.
82-1913 Garcia (HAB opinion last term)

HAB's view:

A. Only limitation on exercise of Commerce Clause upon 5 States inhere in the structure of the Fed. Govt. p. 23

Congress, elected from the States, protects the States from unconst. intrusion on their power.

Under this scheme, Congress
- The Fed. Govt. - becomes the judge
of the limits of its power.

Only exception: Congress may not "discriminate" vs. States

Then, role of judiciary w're
- to exercise of Commerce Clause.
- By Congress would be limited to discriminatory regulation

Ask: Under HAB's view that structure of Fed. Govt. is only limitation on its power, would not States be treated exactly as private parties?
The Chief Justice

Affirm

As East Tenn.

Justice Brennan

Rev.

As East Tenn.
Could reverse League of Cities

Justice White

Rev.
Rev. League of Cities
Justice Marshall

Rev

Owens

Justice Blackmun

Rev

Rule as to traditional function
does not apply

Justice Powell

Affirm (See my notes)
Justice Rehnquist

Affirm
(no comment)

Justice Stevens

Reverse
As last year.
Balancing test in OK but
Leave to Congress to do balancing.
Judiciary should not intrude.

Justice O'Connor

Affirm
A water shed case.
Employment relationship bet.
State & employee in a case.
2 state functions.
50% has long memory?
like her view.
October 5, 1984

Re: No. 82-1913 - Garcia v. San Antonio Metropolitan Transit Authority
     82-1951 - Donovan v. San Antonio Metropolitan Transit Authority

Dear Bill,

Since it is "your ox" that is being "gored," will you take on a dissent?

If, for any reason you'd prefer not, let me know.

Regards,

[Signature]

cc: Justice Powell
    Justice O'Connor
October 8, 1984

83-1913 Garcia v. San Antonio
83-1951 Donovan v. San Antonio

Dear Chief:

Bill and I have talked and he agrees I should write the dissent if agreeable to you and Sandra.

I will, of course, try to demonstrate that the "goring" was not of Bill's "ox", but of the Constitution.

Sincerely,

The Chief Justice

lfp/ss

cc: Justice Rehnquist
Justice O'Connor
October 9, 1984

No. 83-1913 Garcia v. San Antonio
No. 83-1951 Donovan v. San Antonio

Dear Lewis,

It is certainly agreeable with me if you take on the dissent in this case. As I indicated at Conference, I may want to add a few thoughts of my own on the subject.

Sincerely,

[Signature]

Justice Powell

cc: The Chief Justice
Justice Rehnquist
MEMORANDUM

TO: Annmarie  DATE: October 18, 1984
FROM: Lewis F. Powell, Jr.
82-1913 Garcia

I have now had an opportunity to read your first
draft of a dissent in this case. I appreciate your
undertaking this in advance of our seeing the Court
opinion. Necessarily, we have assumed that HAB will
adhere essentially to the reasoning of the draft he
circulated last Term. There certainly will be changes,
perhaps substantial ones.¹

I now record random thoughts in this memorandum
both for you and me as reminders to myself. I identify
possible points to be made in our opinion. I state them
in no particular order, and suggest no particular
priority. In the end, some may merit including in a draft
and others perhaps not.

1. We should be careful not to undercut WHR's
opinion in National League of Cities. I recognize,

¹I am dictating this without having reread
HAB's draft of last Term.
Annmarie, that I am retreating somewhat from the view previously expressed that we should speak in terms of redefining the basic standard. Let's find some more felicitous way of accomplishing this. As the standard has been reiterated repeatedly (Hodel, Long Island R.R., and FERC), we should not join HAB now in condemning it. The standard is a sound generalization, but in applying it a court must address and weigh the federal and state interests that are at issue. Your draft does this.

2. We will, of course, emphasize that the Court's opinion rejects long accepted principles of federalism. There is an excellent quote in Younger v. Harris, 401 U.S. 37 (I believe at 44-45) that we should use - with other authorities - to demonstrate the ongoing vitality of federalism. See Pennhurst last Term.

3. In explaining the application of the standard under the balancing approach, we can use the quote from Long Island R.R. - at page 686-as to the application of the standard, and the fact that it is not a static one.

4. It may be helpful to demonstrate by examples that the test is not static. HAB's opinion last Term did this but for a different reason. For decades the
providing of public schools was not a traditional state function in the sense that it had ancient roots. Indeed, we could argue that local transportation - purely in terms of tradition - fits more neatly into the standard than other functions such as schools, public health, garbage collection, etc. Transportation depends on roads and streets. State and local governments always have provided these essentials of "transit": i.e., to facilitate the movement of people so essential to any form of civilized life. Roads and streets are still state and local services. They have been improved, and the means of transportation have changed from horse-drawn carriages to streetcars, buses and now subways. To be sure, most of these early methods of moving people about were privately operated, but this could be left in private hands only so long as they were economically viable. The function was providing an essential public service, and one long regulated only by the states.

Annemarie, I don't want to carry the foregoing too far or to overemphasize it. It may be worth only a footnote, but I'd like your thinking as to its merit.

5. The AFL-CIO's brief argues, as its first point, that the providing of all "goods and services" may
be subjected to federal regulation regardless of whether the goods and services are viewed as traditional or not. HAB's opinion goes beyond this and would hold that the only limit on the Commerce Cause is the "structure" of the federal system.

6. You have commented on federal funding simply in a sentence. After we see HAB's new opinion, it should be pointed out - perhaps in a footnote - that federal funding has now become pervasive - and perhaps necessarily so in view of the extent to which state and local revenues have been drained off primarily by federal income and excise taxes. If "funding" determined the scope of federal constitutional authority the states could be abolished.

* * *

This memorandum implies no criticism of your draft. I think the essence of your draft is sound and well written. No doubt the draft will have to be rewritten - and probably expanded - when HAB's opinion is circulated.

L.F.P., Jr.

ss
Comments on HAB's Opinion of Last Term:

Since 1913 Texas has authorized localities to regulate "carriage for hire". Since 1915 San Antonio has provided for franchising, insurance, safety requirements and other regulations of passenger vehicles operated for hire. P. 2, 3.

Not until 1961 did Congress extend the FLSA to employees of private mass transit systems. P. 4.

In 1966, for the first time, the Act was extended to state and local government employees. The application of the Act to public schools and hospitals was sustained in Maryland v. Wirtz, 392 U.S 183 (1968), but Wirtz overruled in National League of Cities. P. 4, 5.

Not until 1974 was the Act made fully applicable - even with respect to overtime limitations - to mass transit employees. P. 5. This history makes clear that Congress was half-a-century behind Texas in regulating any aspect of local transit systems.

The DC in this case relied heavily on this history of local regulation. P. 7.
HAB recognized the distinction between the authority of Congress to regulate private activity and its authority to impose federal regulation of a state governmental entity. HAB makes the point - perhaps with some reason - that if mass transit is exempt it must be because it is owned and operated by the city rather than because the operations are "local". P. 8.

HAB devotes almost a full page of "string cites" he says illustrates the difficulty of determining what is a "traditional governmental function". P. 9, 10. Annmarie can distinguish a good many of these cases.

Perhaps the centerpiece of HAB's argument last Term was the "difficulty" in "identifying an organizing principle" that places cases on one side of the line or the other. He says that "this Court has made little headway in defining the scope of governmental functions protected under National League of Cities". P. 10.

On the same page that HAB finds no "organizing principle", he speaks of the Court's difficulty in Long Island in developing a "workable standard for traditional governmental functions".

HAB does recognize that many "constitutional standards involve 'undoubted gray areas'", citing Fry v.
United States, 421 U.S. 542, 558, and that we decide on a "case-by-case" basis the applicability of the particular constitutional provision. P. 11.

As Annmarie has noted, HAB devotes several pages to the argument that the Court's difficulty "in the field of tax immunity" is illustrative of the problem involved in the application of the League of Cities standard. Annmarie meets this argument very well. We may think it desirable to expand her response after we see Harry's new opinion.

HAB states that in Long Island we "rejected the possibility of making immunity [from federal regulation] turn on a purely historical standard of 'tradition'". P. 15. He then goes on to say that the defect in the historical approach is that:

   It prevents courts from accommodating changes in the historic function of states, changes that have resulted in a number of once private functions like education being assumed by the states and their subdivisions." [see also footnote 9] P. 15.

HAB concludes that "reliance on history as an organizing principle results in line drawing of the most arbitrary sort". P. 15.
Then, HAB rejects "non-historical standards" as being "just as unworkable as a historical standard". P. 16.

HAB finds "a more fundamental problem" in applying the League of Cities standard - the same problem that explains why the Court was never able to develop a basis for the governmental/proprietary distinction in the inter-governmental tax immunity cases. P. 16, 17. This fundamental problem is that:

"Neither the governmental/proprietary distinction nor any other that purports to separate important governmental functions from other ones can be faithful to the role of federalism in a democratic society". P. 17

But HAB's explanation of his theory of unfaithfulness to the role of federalism is not easy to follow. Indeed, he devotes less than a page to an opaque explanation of this "more fundamental problem" before he comes to his conclusion on p. 18:

"We therefore reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'". P. 18
After finding a "more fundamental problem" for rejecting the League of Cities standard (p. 16), HAB moves forward a few pages to another "more fundamental reason" for this rejection, namely: "the sovereignty of the states is limited by the Constitution itself". P. 19, 20.

It is recognized that the states "retain ... a significant measure of sovereign authority" (citing my dissent in Wyoming), but HAB says they do so "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the federal government". P. 20.

He goes on to say the Court has "no license to employ free standing conceptions of state sovereignty when measuring congressional authority under the Commerce Clause". P. 21. In other words, the Commerce Clause permits the federal government to eliminate all state sovereignty except where explicitly granted the states. This view simply reads the Tenth Amendment out of the Constitution.

Having disposed of the Tenth Amendment, HAB then moves to his novel thesis that the Framers perceived that state sovereignty would be protected by "the structure of the federal government itself". P. 22. He finds that the
states are protected from "overreaching by Congress" because the states were "vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in presidential elections", and they were "given more direct influence in the Senate". P. 22.

As illustrative of how protective the federal government is to the states, HAB cites the lavishness with which federal funds are made available to the states — including the funding of "such services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation". P. 23, 24. This lavishness is more accurately explained by the political benefit seen by members of Congress in making money available to their home districts or states.

HAB cites a number of statutes that expressly exempt states and their subdivisions, including NLRA, OSHA, the Sherman Act and several others. P. 24. HAB cites these as evidence of generosity. Under his view Congress any time could make all of these statutes applicable to the states just as it has done with FLSA.
HAB says "the fundamental limitation [another example of something being 'fundamental')] that the constitutional scheme imposes on the Commerce Clause to protect the states as states is one of process rather than one of result." P. 25.

Finally, HAB identifies the "only substantive restraint" on federal authority is "a requirement that Congress not attempt to single out the states for special burdens or otherwise discriminate against them". P. 25. HAB cites no case authority for this expansive view of the Constitution. It will be interesting to see whether he retains this extreme view when he writes for the Court. He does cite M'Cullough v. Maryland, as resting in part on concerns about discrimination.

***

My rereading of HAB's opinion again shocks me. He rejects, in effect, the existence of any state sovereignty protected by the Constitution except where explicitly stated. He construes the Commerce Clause as preempting the Tenth Amendment even though several states would not have ratified the Constitution without the adoption of that Amendment. [Annmarie: Ask the library -
perhaps Penny - to give us the record evidence of why the 10th Amendment was added.]

As I now read HAB's opinion, it goes beyond the AFL-CIO brief's view that "all goods and services" provided by the states are subject to complete regulation by the federal government.

L.F.P., Jr.
October 23, 1984

Re: Nos. 82-1913 and 82-1951 - Garcia v. San Antonio Metropolitan Transit Authority

Dear Harry:

Please join me.

Respectfully,

Justice Blackmun

Copies to the Conference
October 23, 1984

Re: No. 82-1913 and 1951-Garcia v. San Antonio Metropolitan Transit and Donovan v. San Antonio Metropolitan Transit

Dear Harry:

Please join me.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference
October 23, 1984

No. 82-1913 Garcia v. San Antonio Metropolitan Transit Authority
No. 82-1951 Donovan, Secretary of Labor v. San Antonio Metropolitan Transit Authority

Dear Harry,

I will await the dissent and may have something to say in separate dissent as well.

Sincerely,

[Signature]

Justice Blackmun

Copies to the Conference
October 25, 1984

No. 82-1913) Garcia v. San Antonio Metropolitan Transit Authority

No. 82-1951) Donovan v. San Antonio Metropolitan Transit Authority

Dear Harry,

Please join me.

Sincerely,

Justice Blackmun

Copies to the Conference
October 23, 1984

82-1913 Garcia v. San Antonio Metropolitan

Dear Harry:

In due time I will prepare and circulate a dissenting opinion.

Sincerely,

Justice Blackmun

lfg/ss

cc: The Conference
October 29, 1984

82-1913 - Garcia v. San Antonio Metropolitan Transit Authority

82-1951 - Donovan v. San Antonio Metropolitan Transit Authority

Dear Harry,

Please join me.

Sincerely yours,

Justice Blackmun

Copies to the Conference
October 30, 1984

GAR GINA-POW

To: Annmarie

From: LFP, JR.

Re: 82-1913 and 82-1951 - Garcia v. San Antonio

Over the weekend I read BAB's opinion of October 23 with some care. I did not have with me at home his opinion of last June. As I recall, a large part the present opinion is simply incorporated, but there are significant additions. You mentioned the omission of his "discrimination" point.

In any event, perhaps as a memory refresher for myself, I note points that we may consider - some quite general and others specific.

1. A major curiosity of his opinion is that it proports to support "federalism". For example, he states that League of Cities is "inconsistent with principles of federalism" - p. 2. Again, no "distinction" that "proports to separate our important governmental functions can be faithful to the role of federalism in a democratic society." p. 17.

Federalism - if it means anything - refers to the duel federal and state system of our country. It
necessarily recognizes that the state's have a major role that cannot be voided by the federal government. HAB concedes that "some sovereign authority is retained" by the state (p. 19), but never identifies it. P. 20. At another point, HAB states that the "states unquestionably do 'retain a significant measure of state authority'" (quoting my dissent in Wyoming). P. 20. But he limits that in the next few sentences of his opinion.

[Annmarie: It is important for us to address what federalism means. Some of the decisions of this Court will be quite helpful. [Secondary authority also should be examined.]]

2. HAB concedes that a "case by case" approach might "develop a workable standard". P. 11. But the first 18 pages of his opinion are devoted to rejecting the "traditional function" standard of National Cities. He then concludes that no other standard is workable. There is no mention of a "balancing" analysis that is so familiar in constitutional cases.

[Did not HAB mention balancing his concurring opinion in League of Cities? Do you know of any decisions of this Court that apply a balancing analysis in a Commerce Clause case? We might ask Lynda or the Library for help on this.]
3. You have a good answer to HAB's reliance on the "governmental/proprietary" function distinction in taxation. Were the earlier cases ever expressly overruled or merely reinterpreted?

4. In n. 10, p. 15, HAB refers to the "state interest in being free from federal regulations" - a meaningless genuflecting as he subordinates the state interest to the Commerce Clause.

5. After rejecting "traditional functions" as a standard, HAB considers and rejects "history"; "non-historical"; "uniquely governmental function"; and "necessary governmental services", (P. 15-16). But again HAB does not mention "balancing" or weighing the respective interests of governments in the federal system.

6. Harry has again identified two "more fundamental problems" with League of Cities. The first is that no standard can be found that is "faithful to the role of federalism". P. 16-17. On page 17, after this statement, the opinion curiously seems to wonder off and talk about the opportunity of states to "experiment", and about a non-elected federal judiciary not being competent to interfere with action of "elected legislative representatives". P. 16, 17.
Annmarie, we may take a jab at HAB for this sort of talk. He is not concerned about the competency of an unelected federal judiciary to read the Tenth Amendment out of the Constitution. Nor is it self-evident how conveying virtually unlimited power on the federal government enhances the ability of the various states to "experiment". HAB's "logic" simply eludes me.

7. Repeating the argument he made last Term, HAB finds, as a second "more fundamental reason" for holding that Congress has power to regulate wages and hours of all state and local employees is that "state sovereignty is limited by the Constitution itself". P. 19.

After conceding that "some sovereign authority is retained", he does not identify it except the provision of the Constitution that protects "state territorial integrity". P. 21.

8. The opinion relies on a quote from Justice Field. P. 20. The quotation, though quite general, supports the purpose and substant of the Tenth Amendment. Justice Field, dissenting in B&O Railroad Co. v. Baugh, 149 U.S. 368, 401, said that the Constitution "recognizes and preserves the autonomy and independence of the states...", and that federal "supervision over either the legislative or judicial action of the states is in no case permissible
Rather than supporting HAB's argument that the structure protects the states, the rationale and decision of the Court in this case make perfectly clear that the "protection" that exists at present is a matter of "grace", that can be withdrawn at any time. Federalism must mean more than this. Can there be a genuine federal system if the state components of the system have authority only as a matter of grace by the federal component?

11. Of course, HAB's argument is we can trust the Congress - and perhaps to a less extent the President - not to denigrate the role of the states because the people of all of the states elect the legislative branch and the head of the executive branch. As we have discussed, HAB cites no authority for this and we know of none with the possible exception of some secondary writing. HAB's opinion reflects a unrealistic - if not singularly naive - view of how the political system works in our country today.

In the early years of our country, Congress met only briefly in the course of a year. Its members were drawn, in large part, from citizens of some prominence in various careers - citizens who spent most of each year in their
home districts or states. Now, Congress is composed of professional politicians who - I believe - are restricted by law against holding private employment. They are a branch of the national government. They have no state responsibilities. Moreover, as we have discussed, the relatively new phenomena in national politics is the "special interests group". For years there have been some of these: e.g., veterans groups (but I was never willing to join), and organized labor. Today, the range of groups and PACs that lobby regularly is legion.

12. A major flaw in HAB's "structure" reasoning is that his reliance on "democracy" focuses only on the federal government itself. His opinion overlooks the fact that the most effective democracy is at the local level where the people are close to the local problems, and know and have access to the people who are elected to city councils and county board of supervisors. The people at these levels also have family members who are in the various services performed by the local governments. The state legislatures, none of which meet the year around, are drawn from the various professions and employments within the state. A state legislature therefore is far more responsive to the state electorate than the Congress.
is to any particular state interest. There must be a good deal of writing – perhaps in some of our cases – to the effect that the public participation in democratic processes is greater, better informed, and more influential at the state and local levels than in the Congress or the federal bureaucracy.

13. If HAB mentions the Tenth Amendment, it escaped my reading of his opinion. I hope that Penny has provided us with some history of the adoption of the Tenth Amendment and its purpose. This Court also must have written about it a number of times.

LFP, Jr.
except as to matters by the Constitution specifically authorized or delegated to the United States." There is nothing in the Commerce Clause that "specifically" authorizes Congress to regulate the wages and hours of state employees. The Commerce Clause is no more specific than the Tenth Amendment in the language used.

9. In purporting to illustrate the "effectiveness of political power" (P. 23, 24), HAB emphasizes federal grants to state and local services such as police, fire, schools, sanitation, etc. In commenting on this, we could note that by virtue of the "spending power" Congress has exercised substantial control over state and local affairs, but I know of no decision that holds or implies that the mere granting of federal funds - without a positive reservation of regulating authority - establishes a Commerce Clause right to control the activities that benefit from the grants. See Pennhurst I that may be relevant.

10. HAB cites a number of federal statutes that have not been extended to cover state employees or activities: NLRB, LMRA, OSHA, ERISA, the Sherman Act, the Federal Power Act. - P. 24.