Nos. 82-1913 and 82-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

---

REPLY BRIEF OF APPELLANT JOE G. GARCIA ON REARGUMENT

Of Counsel:

ROBERT CHANIN
1201 16th Street, N.W.
Washington, D.C. 20036

DAVID M. SILBERMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

EARLE PUTNAM
5025 Wisconsin Ave., N.W.
Washington, D.C. 20016

LINDA R. HIRSHMAN
Suite 1900
201 N. Wells Street
Chicago, Illinois 60606

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTE

TABLE OF AUTHORITIES—Continued

REPLY BRIEF OF APPELLANT JOE G. GARCIA ON REARGUMENT

ARGUMENT

I

A. The Secretary of Labor, the appellees, and various of the *amici curiae* elaborate on the truth that "[o]urs is a federal constitution and a federal system," Sec'y. Supp. Br. at 3, a system in which the states are "repositories of legitimate authority," *id.* at 5. *See also, e.g.*, SAMTA Supp. Br. at 4-9; APTA Supp. Br. at 25-30. This we readily concede. *See* Garcia Supp. Br. at 4. But the undisputable fact that the Framers established a federal system, in which both the national government and the several states would possess "sovereignty" poses, rather than resolves, the question of how power is allocated between the nation and the states in that federal system.

In answer to that question we say that ours is a federal system in the sense that the national government is not granted plenary powers but only expressly enumerated powers, and not in the sense that otherwise valid exercises of those enumerated powers (which include the power "to regulate commerce * * * among the several States") are to be subordinated to considerations of state "sovereignty." We submit that the text of the Constitution, specifically the Supremacy Clause in Article VI and the Tenth Amendment, requires this answer, and that this construction alone is consistent with the intent of the framers of the original Constitution and of that Amendment. Garcia Supp. Br. 5-12.

With respect to the actual language of these two constitutional provisions our adversaries uniformly maintain a discreet silence. And insofar as they seek to defend the limitation on the commerce power adopted in *National League of Cities v. Usery*, 426 U.S. 833 (*"National League"*) by evidence of the original understanding their

effort fails; the constitutional thesis set forth in our prior brief is supported in the very materials they invoke.

B. We begin with Madison's *Federalist* No. 39, which is cited at APTA Supp. Br. 27 for the proposition that " 'local or municipal authorities' are not subject within their respective spheres to the general authority." APTA's selective quotation utterly distorts what Madison wrote. In *Federalist* No. 39, Madison in examining the "extent of [the] powers" of the proposed "general authority" explained:

> The idea of a national government involves in it . . . an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority *then the general authority is subject to them, within its own sphere.* In this relation, then the proposed government cannot be deemed a *national* one, *since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.*[1]

Madison thus observed that neither "the local or municipal authorities" nor the proposed "general authority" would be subject to the authority of the other "within its own sphere," and that the "general authority" would be confined to "certain enumerated objects only" and in that sense would not be wholly "national", while as to

---

[1] *The Federalist Papers* 245 (C. Rossiter ed.) (only "national" emphasized in original). All our references to the *Federalist Papers* will be to the Rossiter edition and will be referred to as "*Fed. Pap.*"

"*other*" objects the states would enjoy a "residuary and inviolable sovereignty." APTA's quotation omits Madison's statement that the federal government would be supreme within its own sphere—that of the enumerated powers—the very proposition for which we contend.[2]

Madison made the same point in *Federalist* No. 40, on which SAMTA relies. SAMTA Supp. Br. at 5. Madison there stated, as SAMTA notes, that the "States should be regarded as distinct and independent sovereigns." *Fed. Pap.* 249-250. But Madison elaborated on the statement as follows, in words SAMTA omits entirely:

> We have seen that in the new government, as in the old, the general powers are limited; and that the States, *in all unenumerated cases*, are left in the enjoyment of their sovereign and independent jurisdiction. [*Fed. Pap.* 251, emphasis added.]

Appellees also rely on *Federalist* No. 45 (APTA Supp. Br. 27 and SAMTA Supp. Br. 4, 6), quoting Madison's descriptions of the federal government's powers. Again, he made no suggestion that any of these powers—which, as SAMTA notes but APTA does not, include the power to regulate commerce—is in any way limited by the authority of the states.[3] It is also highly significant that in

---

[2] SAMTA Supp. Br. 5 does quote that sentence in its entirety, but without appreciation of its true import. The sentence quoted at APTA Supp. Br. 27, n.42 from Hamilton's *Federalist* No. 32 is in accord: ("all authorities of which the States are *not explicitly divested in favor of the Union* remain with them in full vigor") (emphasis added).

[3] APTA also quotes a passage from *Federalist* No. 45 that "the component parts of the State Governments, *will in no instance* be indebted for their appointment to the direct agency of the federal government." APTA Supp. Br. 37, quoting *Fed. Pap.* 291, APTA's emphasis. APTA thereby attempts to convey the impression that Congress may not, in the exercise of one of the enumerated powers, regulate the wages and hours of state employees. *See* APTA Supp. Br. 36-37. APTA's leap from what Madison wrote to its own needs in this case again wrests what Madison said wholly out of

Federalist No. 45, which addressed the question whether "the powers transferred to the federal government . . . will be dangerous to the portion of authority left in the several States," *Fed. Pap.* at 288, Madison began by insisting that this was "a secondary inquiry," *id.*—that if

> the Union be essential to the happiness of the people of America, is it not preposterous to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual states. Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty? [*Id.* at 288-289] [4]

In sum, the materials appellees cite from the *Federalist Papers* provide no support for their claim that the Framers intended to subordinate Congress' enumerated powers to considerations of state sovereignty.

---

its context. Madison was illustrating the importance of the states under the Constitution by the states' role in appointing the President and the members of the Senate and House of Representatives. The sentence from which APTA quotes contrasts the absence of a like authority in the federal government. Madison was thus using the word "appointment" in the specific sense of choosing particular individuals to hold an office.

[4] In *Federalist* No. 46, Madison added that if "the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proof of a better administration as will overcome all their antecedent propensities. *And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due. . . .*" *Fed. Pap.* at 295, emphasis added. *See also id.* at 294, *quoted* at Garcia Supp. Br. 8-9.

C. The same is true with respect to the materials appellees cite from the constitutional convention. We agree with APTA that these materials indeed show that one reason the Framers decided to "limit[] congressional power to expressly delegated authority was to prevent federal interference with the States." APTA Supp. Br. at 26 and sources cited *id.* n.41. But the constitutional debates also show that having "limit[ed] congressional power to expressly delegated authority," and having established a democratic process for the exercise of such authority, the framers believed that there would be "no danger to the States from the General Government." [5] Thus it is not surprising that appellees are unable to cite any evidence that the Framers saw a need to subordinate the delegated authority of the federal government to considerations of state sovereignty.

Indeed, the debates at the constitutional convention clearly reveal that the notion of subordinating federal authority to state sovereignty is the very antithesis of what the Framers intended. This is perhaps best evidenced by the fact that the convention *defeated* a proposal to preclude Congress from "interfer[ing] with the government of the individual states in any matter of internal policy." *See* Garcia Supp. Br. 6. Gouverneur Morris, leading the opposition, explained that "[t]he internal policy, as it would be called and understood by the States, ought to be infringed in many cases." 2 Farrand 26.

The Framers' great concern, voiced throughout the constitutional convention, was that "the General Government would be in perpetual danger of encroachment from the State Governments," 1 Farrand 356 (Wilson) (*see also*, 1 *id.* 137, 164, 166-67, 363, 552; 2 *id.* 27), and that the states "could not be too carefully guarded against," 1 *id.* 358-59 (Hamilton). Having experienced, during the period of the Articles of Confederation, the "gloomy con-

---

[5] The Records of the Federal Convention 356 (Farrand ed. 1911) (hereinafter "Farrand").

sequences," 1 *id.* 358 (Madison), of a national government that was too weak and believing that a weak national government would be "fatal to the internal liberty of all," 1 *id.* 464 (Madison), the Framers decided to "run every risk," 1 *id.* 467 (Madison), to avoid that result. Their plan was "to draw a line of demarkation which would give to the General Government every power requesite for general purposes," 3 *id.* 132 (Madison), and to establish federal supremacy within the area marked out for the federal government.

That this federal system would impair state sovereignty to the extent of the powers delegated to Congress was well recognized. In transmitting the proposed constitution to Congress, George Washington, as president of the constitutional convention, wrote as follows:

> It is obviously impracticable in the federal government of these States, to secure all right of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstances, as on the object to be obtained.
>
> * * *
>
> In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. [2 Farrand 667]

D. Appellees likewise derive no support from the fact that "[u]ltimately, the responsibility for mediating the boundaries of federalism devolved, during the course of the Framers' debates, to the federal judiciary." APTA Supp. Br. at 27. The Framers adopted the scheme of judicial review in lieu of a proposal to empower Congress to "negative" laws enacted by the states. *See*

Garcia Supp. Br. at 6 n.3.[6] Thus, the Framers looked to the courts principally to assure that the states would not "encroach upon the national government" which the federalists viewed as a far greater danger than encroachment upon the states by the federal government. See pp. 5-6 *supra*.[7] To the extent the Framers envisioned a role for the judiciary in scrutinizing federal legislation, that role was to assure that the federal government stayed within its enumerated powers.

According to the federalists, if "a question arises with respect to the legality of any power exercised or assessed by Congress," the judiciary would ask a single question: "Is it enumerated in the Constitution. *If it be, it is legal and just.*"[8] At no point did the federalists in arguing

---

[6] Appellee APTA accuses us of "distort[ing] the records of the Federal Convention" with respect to the consideration given to authorizing a congressional "negative" or veto. APTA Supp. Br. at 28 n.46. We did not do so. A proposal to empower Congress "to negative all laws passed by the several States contravening, in the opinion of the national legislature, the articles of the union, or any treaties subsisting under the authority of the union," was "agreed" to by the constitutional convention on May 31, 1787. 1 Farrand 54, 61. On June 7 and again on June 8, a proposal "for extending the negative power to all cases" was defeated, thus leaving the negativing power in its original form as passed. 1 *id.* at 162-63, 164-68. On July 17, the convention for the first time voted to delete the negativing clause and substituted instead the Supremacy Clause. 2 *id.* at 21-22, 27-28. On August 23, a motion to reconsider the deletion of the negativing power was made and failed by only one vote, with the opposition principally arguing that a negativing power was "unnecessary." 2 *id.* at 390-91. Thus when Madison wrote to Jefferson at the end of the convention to report on its deliberations, he stated that negativing was "finally rejected by a bare majority." 3 *id.* at 134.

[7] *Federalist* No. 17 at 119 (Hamilton). *See also* 1 Farrand at 131-36 (letter from Madison to Jefferson); *Federalist* No. 45 at 289 (Madison).

[8] 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* at 186 (Virginia) (J. Elliot ed.) (hereafter "Elliot"). *See also e.g.*, 3 *id.* 553 (John Marshall) ("If

for adoption of the Constitution suggest that, "in mediating the boundaries of federalism," the judicial role would be to balance the federal interest in the challenged legislation against considerations of state sovereignty. Rather, the Framers intended *that* balance to be struck through the federal government's political processes and once set to be maintained by the Supremacy Clause.

E. Appellees attribute to the Tenth Amendment a fundamental change in the theory of the Constitution that limits Congress' enumerated powers in the interests of state sovereignty. There is no basis for that claim. The Tenth Amendment was framed by the federalists to respond to a specific and narrow objection voiced by the anti-federalists: that the federal government would not be limited to the enumerated powers because it is universally true "that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers." 3 Elliot at 445 (Patrick Henry).[9]

[Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard"); 2 *id.* 489 (Wilson); 2 *Annals of Cong.* 1897 (Madison) ("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"). *See also* Garcia Supp. Br. 7-8 and n.6.

[9] This, of course, was not the anti-federalists' only objection to the proposed constitution; they also—indeed principally—argued, as APTA states, that the powers delegated to the federal government were so broad "as to destroy the[] [states'] capacity to function as governmental entities." APTA Supp. Br. at 30. *See, e.g.*, J. Main, *The Antifederalists* 120-21 (1961); R. Kenyon (ed.), *The Antifederalists* xlvi (1966). But, contrary to APTA's assertion, the Tenth Amendment was not framed to meet this latter objection; to do so would have required rewriting the very heart of the Constitution, so as to remove or modify the powers to raise arms, create a federal judiciary, make treaties, control federal elections, and govern a national capital, all of which the anti-federalists found objectionable. *See* J. Main, *supra*, at 122-23; R. Kenyon, *supra*, at

The purpose of the Tenth Amendment was thus to "remove[] a doubt which many have entertained respecting the matter and give[] assurances that, if any law be extended beyond the power granted by the proposed Constitution . . . it will be an error." 2 Elliot at 131 (John Adams). That is precisely what Madison said in proposing the Amendment to the first Congress. *See* Garcia Supp. Br. 11.[10] And that is precisely what the Tenth Amendment itself says: "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." It is not possible to read these words to impose limitations on those powers which *are* "dele-

---

xliii-lxix; Rather, insofar as the anti-federalists argued that the delegated powers of the federal government were too broad, the federalists joined the issue and ultimately prevailed.

The materials APTA cites from the North Carolina ratification debates—all from the anti-federalist Samuel Spencer, *see* R. Kenyon, *supra*, at 407—prove the point. (It is noteworthy that APTA relies heavily on North Carolina's consideration of the Constitution. For North Carolina was the one (and only) state in which anti-federalist sentiment was predominant, R. Kenyon, *supra*, at 407, and North Carolina was the one state which initially failed to ratify the Constitution and which was not at first, part of the union, *see* 1 Elliot at 333.) One argument Spencer made against ratification was that the states "may be swallowed up by the great mass of powers given to Congress," 4 *id.* at 51; Spencer objected specifically to a variety of Congress' enumerated powers, 4 *id.* at 52, 75, 136. A second and discrete point made by Spencer was that the federal government could not even be counted upon to stay within its enumerated powers because, although "it ought to be so and should be so understood . . . it is not *declared* to be so." 4 *id.* at 137 (emphasis in original). The Tenth Amendment supplied the declaration Spencer thought missing; that amendment did not alter the powers Spencer found objectionable.

[10] Madison was concerned that absent the Tenth Amendment an "implication" might have arisen from the Bill of Rights "that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure"; Madison viewed this as "one of the most plausible arguments I have ever heard urged against the admission of the bill of rights," and he concluded that it would be useful to meet this argument in some way. 1 *Annals of Cong.* 439.

gated to the United States by the Constitution." And appellees offer no evidence that any of the framers of that Amendment intended any such result.[11]

F. Lacking any other support in the original materials for their attempt to subordinate federal power to state sovereignty, appellees are reduced to arguing that because our economy has developed "from a purely local, to a regional, and ultimately to a national economy," *EEOC v. Wyoming*, 460 U.S. 226, 247 (Stevens, J., concurring), it is necessary to read into the Constitution limitations that the Framers did not intend, and indeed, that are contrary to the scheme of government the Framers established. *See* APTA Supp. Br. at 17-25; SAMTA Supp. Br. at 25-29.[12] This is a call for constitutional revision, *not* constitutional interpretation.

---

[11] The question whether Congress may, in the exercise of one of its delegated powers, regulate or otherwise interfere with the exercise by the states of one of the powers (such as their role in the choice of electors for the President (see n.3 pp. 3-4, *supra*)) assigned to the states under the Constitution is therefore a wholly distinct question from the one posed here. In such an instance there would arise a conflict between two provisions of the Constitution, one granting a power to Congress and another granting a power to the states, which it would be the responsibility of this Court to resolve. The problem would be of the same nature as when an Act of Congress in the exercise of one of its enumerated powers is challenged as being contrary to one of the prohibitions in the Constitution such as the First or Fifth Amendment. The latter class of cases is inapposite here because the Tenth Amendment does not in terms limit any of the delegated power of the federal government. And a law which regulates state powers which are not set forth in the Constitution gives rise to no conflict among constitutional provisions, and is therefore subject to the Supremacy Clause which gives priority to the laws enacted pursuant to the Constitution, *viz.*, within Congress' enumerated powers.

[12] Appellee SAMTA attempts to buttress its argument by disparaging the importance of the Commerce Clause. *See* SAMTA Supp. Br. at 6-8. But the entire process of framing the Constitution was set in motion by the Virginia General Assembly which appointed "commissioners" to meet with representatives from other states for the sole purpose of "consider[ing] how far a uni-

As authority for this result SAMTA relies most heavily on two decisions that are now discredited,[13] and one decision that rejects the proposition for which SAMTA contends. In *Missouri v. Holland*, 252 U.S. 416, Justice Holmes wrote not only what is quoted at SAMTA Supp. Br. 28 but the following elided sentences:

> The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. [252 U.S. at 434.]

And the point of the opinion—which, of course, upheld the treaty Congress had negotiated—was to exorcise the "invisible radiation" which Missouri had called forth. The entire magnificent passage, with its partial echo of *Federalist* No. 45 (see p. 4, *supra*) conveys Justice Holmes' abiding conviction that the national government is supreme when acting within one of its delegated powers and that those powers must be construed generously "in the light of our whole experience" and "what

---

form system in their commercial regulations may be necessary to their common interest and their permanent harmony." 1 Elliot at 114-15. Out of this action came the Annapolis Convention which in turn called for a constitutional convention because the Annapolis delegates concluded that

> the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the federal government, that, to give it efficacy and to obviate doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the federal system. [1 *id.* at 116-18]

Thus, as Justice Stevens has observed, "the intent of the Framers," in developing the Commerce Clause, was nothing less than "to confer a power on the National Government adequate to discharge its central mission." *EEOC v. Wyoming*, 460 U.S. at 246-47 (concurring opinion).

[13] *United States v. Butler*, 297 U.S. 1 and *Employers' Liability Cases*, 207 U.S. 463, quoted at SAMTA Supp. Br. 26-27.

this country has become." 252 U.S. at 433-435.[14] It was this appreciation of what the Framers had accomplished that led Justice Holmes to dissent from *Hammer v. Dagenhart*, 247 U.S. 251,[15] and to announce in *Sanitary District v. United States*, 266 U.S. 405, 425: "This is not a controversy between equals."

II

In *National League* all the Justices agreed on two points: that the Commerce Clause and the Supremacy Clause mean that congressional regulation of the private sector pursuant to the commerce power preempts state regulation; and that there are areas of state activity that are similarly subject to the overriding force of federal law. In light of these points of agreement, we have argued that if the basic principle of *National League* is reaffirmed, the immunity for state activity should be confined as follows: "Given the range of choices for providing goods and services recognized in this society it simply

---

[14] SAMTA misreads *Federalist* No. 34 in the same way (SAMTA Supp. Br. 28): referring to the powers of the national government, Hamilton there wrote, "There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity." *Fed. Pap.* at 207, emphasis in original.

[15] The brief for California *et al.* as *amici curiae* contends, in disagreement with *Maryland v. Wirtz*, 392 U.S. 183, 195-197, that "continued state autonomy cannot confidently be made to depend on the Court's authority to identify intrinsic limits on the commerce power." Cal. Br. 23. The single item cited to evidence the perceived danger is Congress' prohibition against child labor:

> Congress *has* used its power under the Commerce Clause to destroy; and so used, the power has been strongly defended. *See Hammer v. Dagenhart*, 247 U.S. 251, 277-81 (1918) (Holmes, J., dissenting). [Cal. Br. 24, emphasis in original.]

Hammer and *National League* are as one in their apocalyptic rhetoric. "Our system of government [was not] practically destroyed," *Hammer, supra*, 247 U.S. at 276, when that case was overruled; nor would "the National Government . . . devour the essentials of state sovereignty," *National League, supra*, 426 U.S. at 855, if *National League* is overruled in this case.

cannot be said as a general matter that providing goods and services is an 'essential' of state sovereignty. The fact that, as to any given good or service, some entities that are *not* sovereign provide the service while some entities that *are* sovereign do not, demonstrates that such activity is not an essential attribute of state sovereignty." Garcia Supp. Br. 43; *see also id.* at 34-42. Where the states make a pragmatic judgment to engage in the production of goods and services in common with the private sector rather than to avail themselves of the options of regulating, subsidizing or otherwise stimulating that sector, the resulting state activity is, we submit, so closely akin to economic activity in the private sector—and to the state lawmaking activity relating to such activity—as not to warrant a special immunity as an "essential[] of *state* sovereignty" (*National League*, 426 U.S. at 855, emphasis added) in the federal system created by the Constitution. The countersuggestions as to how to delimit the activities that are "essentials of state sovereignty" are nothing less than an effort to remove that limitation and to make the *National League* immunity apply across the board.

The National League of Cities, *et al.* brief as *amici curiae* does not state a theory of state sovereignty as such, but rather argues that "the ability of the states to govern effectively" is worthy of protection and that if a federal action impairs that ability "it must fall unless it carries out a federal interest that overrides the state power, and is tailored to further such interest in the manner least harmful to state authority." NLC Supp. Br. 8. That brief, indeed, expressly calls for the rejection of the "States as States" limitation. *Id.* 28-29. On a similar tack, the California, *et al.* brief rejects any attempt to "define precisely the contours of state sovereignty." Cal. Br. 37. Indeed, the argument is that an "inquiry whether an exercise of state power is 'really' an exercise of sovereignty fails to respect state democratic choices" and "should be abandoned" in favor of

the rule that "a rational exercise of admitted power", even in a proprietary capacity, is immune from federal authority. *Id.* 38-40.

The appellees' briefs, while cast in more modest terms, seek in practical terms, an equally far-reaching state sovereignty immunity. APTA's premise is that "When Congress attempts to regulate directly the internal decision-making process of state government" Congress "endangers the State's authority over its actions." APTA Supp. Br. 34. This is the predicate for the claim that "state authority to determine the wages and overtime compensation of its employees is . . . a core state function." *Id.* 36. On that theory, any federal regulation of public employee wages would be invalid, subject only to a balancing test to weigh the federal interest. While recognizing that the three-pronged test of *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, mandates an inquiry into whether the federal law impairs "integral operations in areas of traditional governmental functions," APTA would eviscerate that requirement by a five-factor test that in substance brings all generally-provided state functions within the *National League* immunity. *Id.* 45-46. *See also* to the same effect SAMTA Supp. Br. 30-31.

III

Within the framework of *National League* the controversy between the parties has centered on whether mass transit is "a traditional governmental function." We agree with the Secretary of Labor that if (contrary to our basic position) the states are to retain the current form of commerce power immunity, the immunity should be confined to the functions the states have historically performed.

In disagreeing with the Secretary's historical test to define which are "traditional functions" APTA asserts

that it is "newly created out of whole cloth; it cannot be woven out of precedent." APTA Supp. Br. 44. APTA is plainly mistaken. The Secretary's brief quotes *in extenso* from Chief Justice Stone's concurring opinion in *New York v. United States*, 326 U.S. 572, 588-589, which applies just such a historical test. *See* Sec'y. Supp. Br. 20. The same analysis was even more fully developed in Justice Stone's opinion for the Court in *Helvering v. Gerhardt*, 304 U.S. 405, 416-417.[16] The *National League* opinion in turn quotes approvingly from Chief Justice Stone's opinion in *New York* (426 U.S. at 843) and the tax immunity doctrine provided the closest analogy for the commerce power immunity declared in *National League*. Although, in agreement with Justice Stone, we believe that the analogy is unsound

---

[16] Justice Stone wrote:

> With the steady expansion of the activity of state governments into new fields they have undertaken the performance of functions not known to the states when the Constitution was adopted, and have taken over the management of business enterprises once conducted exclusively by private individuals subject to the national taxing power. In a complex economic society tax burdens laid upon those who directly or indirectly have dealings with the states, tend, to some extent not capable of precise measurement, to be passed on economically and thus to burden the state government itself. But if every federal tax which is laid on some new form of state activity, or whose economic burden reaches in some measure the state or those who serve it, were to be set aside as an infringement of state sovereignty, it is evident that a restriction upon national power, devised only as a shield to protect the states from curtailment of the essential operations of government which they have exercised from the beginning, would become a ready means for striking down the taxing power of the nation. See *South Carolina v. United States*, 199 U.S. 437, 454-455. [304 U.S. at 416-417, footnote omitted. *See* also *id.* at 416 quoted at Garcia Supp. Br. 26-27.]

As an example of activities which are not immune, Justice Stone referred to "a street railway business taken over and operated by state officers as a means of effecting a local public policy. *Helvering v. Powers*, 293 U.S. 214." 304 U.S. at 418.

(see Garcia Supp. Br. 22-23, quoting *United States v. California*, 297 U.S. 175, 185), the grounds stated by him for a historical definition of the scope of the tax immunity doctrine are at least equally valid if the commerce power immunity is to be retained. To paraphrase Justice Stone, "the national [commerce] power would be unduly curtailed if the state, by extending its activities, could withdraw from it subjects of [regulation] traditionally within it." *Cf.* 326 U.S. at 589. The opposite view is inconsistent with the constitutional value embodied in the grant to Congress of the power to regulate commerce.[17]

For its part, APTA, though not acknowledging any important alteration in *National League*, would throw the "traditional governmental functions" test overboard. First, APTA objects that any historical standard "will not allow state and local governments to perform their traditional function of serving the needs of their commu-

---

[17] APTA, ignoring Justice Stone's opinions, quotes that of Justice Frankfurter in *New York*, and that of Justice Black in *Gerhardt*. APTA Supp. Br. 44, 45, n.78. The former citation is truly remarkable, for if Justice Frankfurter's non-discrimination standard were carried over to the present subject, appellees would lose this case; the FLSA does not discriminate against the states. Indeed, if the states' immunity from commerce power regulation were confined to a protection from congressional discrimination, the immunity would rarely, if ever, come into play.

Justice Black's concurrence in *Gerhardt* is contrary to the Court's opinion on the very point for which APTA quotes it and is therefore not authoritative. His disagreement with Justice Stone on that issue continued in the 1945 Term when Justice Black cast a dissenting vote in *New York*. But the two Justices were in agreement later at that term in *Case v. Bowles*, 327 U.S. 92, that the tax immunity doctrine does not provide a valid analogy with respect to the other enumerated powers. *See* Garcia Supp. Br. 18-19. As his opinion in *Case*, and his vote in *Wirtz* make clear, "Our Federalism", as Justice Black viewed it, does not incorporate the doctrine that "the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the power of the other." 327 U.S. at 101, quoted at 392 U.S. 194.

nity in changing times." APTA Supp. Br. 45. Under this formulation—accomplished by shifting the key word, "traditional"—each and every governmental service would qualify for the *National League* immunity, thereby nullifying this important limitation on the doctrine. Alternatively, APTA proposes to determine "whether a particular activity of state and local government is a 'traditional governmental function,' " APTA Supp. Br. 45, by pointing to five "indicators." We need not stop to examine these individually, for they have two fatal defects in common: 1) none has anything to do with whether an activity is *"traditional"*, even giving the most generous meaning to that term; 2) none takes into account the constitutional value, discussed above, of preventing the erosion of the federal government's authority in the area of its delegated powers.

As three Courts of Appeals have recognized, the latter consideration has especial force in the case of mass transit because the dramatic shift from private to public operation in the last twenty years is due to "inexorable forces put into motion" by Congress' enactment of UMTA and the consequent enormous federal financial contribution of capital and operating grants. *See Kramer v. New Castle Transit Authority*, 677 F.2d 308, 309-310 (C.A. 3), *cert. denied*, 459 U.S. 1146. Appellees' contention that the federal government thereby forfeited its previous power to regulate mass transit is not only diametrically opposed to the theory of the tax immunity precedents, but would expand *National League* far beyond its expressed purpose to protect "the States' 'separate and independent existence.' " 426 U.S. at 851, *quoting Coyle v. Oklahoma*, 221 U.S. 559, 580. See also pp. 20-21 of our Brief and 6-10 of our Reply Brief on the original argument.[18]

---

[18] Appellees and *amici curiae* also distort the balance of the federal and state interests at stake in this case. They say that the states' interest is the power to exercise the "sovereign" function of providing services and of determining the wages and hours of

IV

In defending the application of the *National League* doctrine to the political subdivisions of states, SAMTA Supp. Br. 46-47 points to decisions in which the employees and obligations of such subdivisions were pro-

---

their employees. *E.g.*, SAMTA Supp. Br. 31-34; NLC Supp. Br. 24. Even granting arguendo that these are truly sovereign functions, the balance cannot be kept true without stating the federal interest at the same high level of generality. The FLSA is an exercise of the federal government's unquestionably sovereign power to regulate interstate commerce; governing the national economy through laws such as the FLSA is at least as "fundamental a duty" of the federal government as "providing services" is for the states.

SAMTA diminishes the federal interest in enforcing the FLSA against state and local governments to the two reasons supporting the FLSA's "enterprise" concept as explained in *Wirtz*. SAMTA Supp. Br. 35-37. But while these are entirely sufficient for holding, as the Court did, that Congress acted within its commerce power when it adopted the "enterprise" concept in 1961 (392 U.S. at 188-193, a holding undisturbed by *National League*), they by no means exhaust the reasons for adopting the FLSA, or for including the states and their subdivisions within its purview. Other purposes of the minimum wage requirement are, in briefest summary, to improve the earning power of the covered employees and benefit the economy generally by putting a floor on wages and increasing purchasing power. The purposes of the maximum hour provisions are to "discourage overtime work and to spread employment" (426 U.S. at 899, quoting the appellees' brief in *National League*), and also "to compensate those who labored in excess of the statutory hours for the wear and tear of extra work . . ." *Bay Ridge Co. v. Aaron*, 334 U.S. 446, 460. (H. Rep. No. 93-913 reprinted in [1974] U.S. Code Cong. & Adm. News, 2811, 2817.) As Congress reaffirmed when it extended the FLSA to public employees generally, the FLSA also vindicates a "call upon [the] Nation's conscience"; it assures that the conditions under which members in this society labor are, and are perceived to be, "fair." Congress there also quoted with approval Justice Burton's observation in *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516: "The Act declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality . . . " *Id.* By holding that most public employees must be excluded, *National League* overturned the congressional judgment, and overrode the federal interest in "[b]readth of coverage".

tected by the tax immunity doctrine. The point is a fair one if one begins with the premise that the tax immunity doctrine affords a proper analogy for an implied limitation on the commerce power as we do not, *see* Garcia Supp. Br. 16-17. (SAMTA and the other defenders of *National League* are, however, necessarily selective in their adherence to this analogy, see pp. 14-17, *supra.*) Moreover, although assuredly in point under appellees' constitutional theory the decisions cited by SAMTA ought not to be followed because those decisions represent another manifestation of the absolutism of the tax immunity doctrine as enunciated in *Collector v. Day*, 11 Wall. (78 U.S.) 113 (1871) (shortly followed by *United States v. Railroad Company*, 17 Wall. (84 U.S.) 322 (1873) cited in SAMTA Supp. Br. 46), but disapproved in *Gerhardt, supra*, and *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466.

A critical examination of this aspect of the *National League* doctrine similar to that undertaken in those cases with respect to the tax immunity doctrine should for the reasons stated at Garcia Supp. Br. 44-46 likewise lead to bringing the Tenth Amendment decisions in line with those under the Eleventh Amendment which immunizes only the states and not their subdivisions.[19]

---

[19] SAMTA Supp. Br. 48 asserts too that the Tenth Amendment is more protective of the states against the federal government than is the Eleventh. No explanation of the basis for that supposed difference is given. (Indeed, in another context SAMTA analogizes these amendments. SAMTA Supp. Br. 44.) The appellees' reliance in responding to our argument in this regard on constitutional provisions which impose prohibitions on the states is equally unsound. SAMTA Supp. Br. 47, APTA Supp. Br. 35. Plainly a state may not escape such restrictions by subdelegating its powers. Conversely, the functions which the Constitution expressly assigns to the states may be performed only by the states themselves, and not by their subdivisions.

V

Appellees' contention that *National League's* restrictions on the Commerce Power should be retained by adherence to *stare decisis* (APTA Supp. Br. 7-15; SAMTA Supp. Br. 22-24) fails to acknowledge that *National League* overruled by the narrowest of margins, the Court's six-to-two decision in *Maryland v. Wirtz, supra,* a carefully reasoned opinion, then 8 years old, written by Justice Harlan whose sensitivity to the concerns of the states in a wide range of federal-state controversies is too well known to require documentation. In overruling *Wirtz* at the close of the *National League* opinion ("One final matter requires our attention," 426 U.S. 852) the Court confronted only that portion of Justice Harlan's opinion which relied on *United States v. California, supra,* and the critical portion of *California* was characterized as "dicta" and disapproved, carrying *Wirtz* along. 426 U.S. at 854-855. The other precedents followed in *Wirtz,* and the Court's independent analysis in that case were ignored.

Of course we do not propose that because *National League* gave *Wirtz* considerably less than its due as precedent, this Court should casually overrule *National League.* But we do submit that the doctrinal importance of the constitutional issue is so great that, as *National League* appears to recognize, considerations of *stare decisis* are entitled to relatively slight weight, and that in reexamining whether *National League's* limitation on the commerce power should survive, the Court should give to *Wirtz* and its antecedents the full weight which the force of their reasoning merits.

CONCLUSION

For the foregoing reasons, and those stated in our earlier briefs, the judgment of the district court should be reversed.

Respectfully submitted,

Of Counsel:

ROBERT CHANIN
1201 16th Street, N.W.
Washington, D.C. 20036

DAVID M. SILBERMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

EARLE PUTNAM
5025 Wisconsin Ave., N.W.
Washington, D.C. 20016

LINDA R. HIRSHMAN
Suite 1900
201 N. Wells Street
Chicago, Illinois 60606

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

Attorneys for Appellant