Dictated but not read - probably in memory

lfp/ss 09/07/84

82-1913 and 82-1951 Garcia v. San Antonio Transit
Donovan, Secretary of Labor v. San Antonio Transit

As of the date of this memo, the following briefs have been filed in addition to those we had before us last Term: Principally two briefs supporting reversal, one by the SG and the other by Larry Gold (and others) on behalf of Garcia. At least three briefs have been filed supporting affirmance, two that are rather persuasive: brief on behalf of National League of Cities and various other state organizations (League of Cities brief), and one - curiously enough - by the Colorado Public Employees Retirement Association. I have not seen a supplemental brief on behalf of San Antonio Transit Authority.

The additional question that we asked to be reargued was:

> "Whether or not the principles of the 10th Amendment as set forth in National League of Cities v. Usery, 426 U.S. 833, should be reconsidered?"

Arguments for Reversal

The SG has filed a curious brief. He says that "some clarification of the test for intergovernmental

immunity established in National League of Cities is desirable . . . but the key principle articulated in that case is sound and enduring constitutional doctrine." Exactly what "clarification" the SG thinks is appropriate is not entirely clear. Whatever it is, he would have us reverse the DC. Throughout his brief, the SG "carries water on both shoulders", arguing that federalism and the 10th Amendment are vital and that League of Cities is basically sound. Nevertheless, League of Cities should be clarified in accordance with the SG's proposed test as follows:

> ". . . the test must be whether at the time the federal goverment first entered the field with regulatory legislation, the states had generally established themselves with fixed patterns of organization as providers of the particular service. Absent such a long-standing tradition of state activity in a field, federal regulation simply cannot be said impermissibly to trench upon state prerogatives."

State must have had a "fixed pattern" of "providing" the particular service"

In applying this test, the SG makes the familiar argument: transit service is not "an established municipal service of long standing". It was a private enterprise until only about 20 years ago, and was feasible only because of "massive financial assistance" from the federal government. When the Fair Labor Standards Act was

amended in 1966 by the addition of language that would include employees of public transit companies, no one would have suggested that the Act as amended was unconstitutional. Thus, the SG says that appellee's "argument depends entirely upon recognition of a rule of creeping unconstitutionality, i.e., that political and economic developments subsequent to enactment" resulted in unconstitutionality. Br., p. 27, 28.

* * *

My Comments on SG''s Brief

The argument of "creeping unconstitutionality" is a clever debating point. It is consistent with the SG's proposed "test" which would focus on which government "first entered the field with regulatory legislation - the state or federal government". Thus, the SG prefers a rule that would establish constitutionality by "who gets there first". On their face, neither of these formulations seems appealing. There is, however, a significant difference.

As the amicus brief of National League of Cities argues rather persuasively, the legitimate powers of a state are not static. They were not frozen when the Constitution was adopted:

> "Just as state powers are not a closed catalogue, so too they are not static. Rather, they grow and change over time, as necessitated by new economic technological and demographic facts. Thus, over time, states and local governments have often begun to provide new services needed by citizens; such services have included public schools, hospitals, fire departments, sanitation facilities, airports and, as in this case, mass transit."

Counsel quotes from a publication by Woodrow Wilson to the effect that: "The question of the relation of the states to federal government . . . cannot . . . be settled by the opinion of any one generation. It is a question of growth, and every successive state of our political and economic development gives it a new aspect, makes it a new question . . ." P. 13.

The relevant provisions of the Constitution have not changed since its adoption and the first ten amendments were added in 1790. Yet, as of that date, neither the federal nor state governments provided any substantial number of the services that are now commonplace: schools, hospitals, clinics, garbage collection, public sewerage, street lights, airports, etc. Under the SG's argument whichever one of these services was first undertaken, or subjected to legislation,

determined which government constitutionally could regulate it.

Apart from other problems, the SG's test would result in different constitutional rules in different states. It may well be that some cities owned and operated their own mass transit before the FLSA purported to cover municipal employees. E.g. - Boston since 1920 (See States' brief)

Brief on Behalf of Garcia (Larry Gold)

This brief reflects the position of organized labor. It is straightforward and drastic. It makes two arguments: first, that National League of Cities should be overruled. Second, even if it were correct in holding that state sovereignty places a limit on the Commerce Clause power, that limit is inapplicable for two reasons (i) "the provision of goods and services is not an essential part of state sovereignty", and (ii) "federal regulation of political subdivisions of a state does not infringe state sovereignty".

One can make a reasoned argument for overruling League of Cities depending upon one's basic perception of our federal form of government. The other arguments made in this brief are so extreme that I cannot believe a majority of this Court would accept them. If "goods and

services" are not a part of state sovereignty, the federal government could preempt virtually all state laws and regulations - including police and fire services, medical services, etc.

* * *

Arguments of the Amici Briefs Urging Affirmance

I have noted above National League of Cities' rebuttal of the SG's arguments. Its brief argues affirmatively that applying the principles of federalism to harmonize the roles of federal and state governments must be a "balancing" process. The brief notes that Justice Blackmun, in his League of Cities concurring opinion, argued for a "balancing approach. The brief also says that Justice O'Connor made a similar argument in FERC v. Mississippi, 456 U.S. 742. This brief, as well as others favoring affirmance, rely on Younger v. Harris which states that federalism means:

> "a system in which there is sensitivity ~~of~~ to the legitimate interests of both State and National Goverments, 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 of the early struggling days of our Union of States, occupies a highly

important place in our Nation's history and its future." p. 7,8.

The brief also relies on Fry v. United States, 421 U.S. 542, 547, n. 7 - a case that I should review.

The amicus brief filed on behalf of Colorado Public Employees Retirement Association, makes an argument that has considerable appeal. It urges reaffirmance of the "fundamental principles of the 10th Amendment articulated in National League of Cities". The decision in that case is "sensitive to the balance of interests that must be struck between the sovereign in our federal system. It then states:

> "When stripped of tis broad constitutional overtones, National League of Cities holds only that Congress may not exercise its Commerce power to legislate the compensation paid to employees of states and their political subdivisions. Congressional intrusion into the amount of revenues that a state may allocate to its employees is a direct assault upon a state's ability to maintain its 'separate and independent existence.' Indeed, a state only may act through its employees. The instant case accordingly should not be used as a vehicle for reconsidering either the Constitutional foundations of National League of Cities or the test that has been developed for assessing claims of state immunity from federal Commerce Clause legislation. Regardless of the ultimate limits of Tenth Amendment immunity, this case may be decided narrowly by following the rule

"payment of compensation" could be a test but it doesn't appeal to me as much as a "balancing" approach

> formulated in National League of Cities and EEOC v. Wyoming that the compensation paid to state employees, including public transit workers, may not be prescribed by Congress." p. 4.

The foregoing makes a lot of sense, primarily because it would be easy to apply. It would actually extend National League of Cities since the greater part of a state budget - both for the state government and its subdivisions - is devoted to employment of people to provide the goods and services that the public now demands. This probably would be viewed as a broadening rather than a limiting of National League of Cities.

The brief also makes a good point in the following language:

> "If there is to be consistent application of constitutional doctrine, Congress' Commerce Clause powers cannot be dependent upon judicial resolution of the thorny historical question of whether some or all states were the first providers of a particular function or service. In this case, the proision of transit services, or more narrowly, the payment of compensation to public transit eymployees, is the sort of integral state function that should not be regulated by Congress." p. 5.

Prudent observation.

* * *

Miscallaneous Points

The SG argues that courts should be reluctant to make judgments such as National League of Cities. The question as to which of the sovereigns should perform services to the public should be left to the "national political process". See pp. 13, 16 of the SG's brief.

I would inquire whether it would not be more democratic to leave this question, if it is to be left to the political process, to that process as it operates in the respective states. The state governments are far closer to the people, and more familiar with their needs, than the government in Washington. Moreover, they are less likely to be dominated by the special interest groups that more often than not control federal legislation and regulations.

Reviewed 9/25 - Well reasoned & exceptionally well written.

aml 09/22/84 There would be the basis for a scholarly dissent if, as I expect, I'll be on the "losing" end.

BENCH MEMORANDUM

To: Justice Powell September 22, 1984

From: Annmarie

Nos. 82-1913 and 82-1951

Garcia v. San Antonio Metropolitan Transit Authority et al

Donovan v. San Antonio Metropolitan Transit Authority et al

Background

JUSTICE BLACKMUN'S proposed majority opinion makes three general claims: first, that National League of Cities v. Usery, 426 U.S. 833 (1976) correctly held that the federal commerce power is limited by the role of the states in the federal system; second, that the standard which has evolved for determining these limits, i.e., whether the exercise of federal power reaches "traditional governmental functions," is both unworkable and

inconsistent with the principles of federalism on which National League of Cities rests; finally, that the states' role in the federal system is amply protected by the legislative process and thus that the only substantive protection necessary is that federal legislation not discriminate against states. I think there are a number of problems with these claims that should be addressed in dissent.

Discussion

I have organized this discussion into two major sections. In Part I, I discuss problems with JUSTICE BLACKMUN's proposed alternative to the test of state immunity from Commerce Clause enactments. In Part II, I address his criticisms of the test that the Court has developed in National League of Cities and its progeny.

I.

A. Procedural Protection for States as States

Although JUSTICE BLACKMUN states that he accepts the holding of National League of Cities that the role of the states in the federal system limits the federal commerce clause power, he explicitly eschews any attempt to define those limits. Following JUSTICE BRENNAN's dissent in National League of Cities, JUSTICE BLACKMUN argues that the limitations the constitution imposes on the exercise of the commerce power with respect to the states inhere in the structure of the federal government. Draft at 23. Thus, he concludes that the "fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect

the 'States as States' is one of process rather than one of result." Id. at 25.

JUSTICE BLACKMUN is surely correct that the Framers intended the structure of the federal government to protect the interests of the states. Nevertheless, I think it is a long step from that proposition to the view that the fundamental protection of state sovereignty under the constitution is one of process and not of substance. JUSTICE BLACKMUN's opinion, like JUSTICE BRENNAN's earlier dissent, does not explain why the states' roles in selecting the President and members of Congress protects the states as states from federal overreaching under the Commerce Clause. While senators may be elected from the various states, once in office they are members of the federal government. Under JUSTICE BLACKMUN's approach, these federal officials are the judges of the limits of their own power. It is not intuitively clear how the constitutional provisions providing for state input in the electoral process guarantee that particular exercises of the Commerce Clause power do not infringe on residual state sovereignty. JUSTICE BLACKMUN's opinion does not explain his reasoning on this point.

Moreover, as far as I can tell, the Court has never abdicated responsibility for assessing the constitutionality of challenged action solely because affected parties theoretically are able to look out for their own interests. As JUSTICE REHNQUIST noted in National League of Cities, a much stronger argument about structural protections could have been made in Buckley v. Valeo, 424 U.S. 1 (1976) and Myers v. United States, 272 U.S. 52 (1926),

than can be made with respect to limitations on the Commerce Clause. In these cases, the President signed legislation which limited his authority with respect to certain appointments and thus arguably "it was no concern of this Court that the law violated the Constitution." Nevertheless, the Court held the laws unconstitutional because they entrenched on presidential authority, the President's consent notwithstanding. JUSTICE BLACKMUN's opinion does not address this point; nor does it cite any authority for its contrary view.

B. Nondiscrimination as a Substantive Standard

JUSTICE BLACKMUN's opinion recognizes only one substantive restraint on the exercise of the Commerce Clause power, that is "that Congress not attempt to single out the States for special burdens or otherwise discriminate against them." The opinion argues that this restraint finds its justification "in the procedural nature of th[e] basic limitation" and is "tailored to compensate for failings in the national political process rather than to dictate a 'sacred province of state autonomy. . . .'" Draft at 25. I believe that this argument is basically incoherent and illuminates the fundamental tension in JUSTICE BLACKMUN's opinion as a whole.

In the first place, the nondiscrimination standard is inconsistent with the basic premise of state sovereignty as a limitation on the commerce power. JUSTICE BLACKMUN's opinion states: "The central principle of National League of Cities is that the States occupy a special position in our constitutional system . . . ." Draft at 18. But the nondiscrimination standard

proposed by JUSTICE BLACKMUN requires only that Congress treat the states exactly as it treats private parties. Far from "reflecting" the states special role in the federal system, this standard seems to me to be incompatible with its existence.

In the second place, adoption of JUSTICE BLACKMUN's "nondiscrimination standard" does not mean that the federal courts will be free from having to define integral governmental functions or some equivalent realm of protected state functions. The opinion notes in a footnote that not "every statute that does single out the States for special obligations is unconstitutional ipso facto." Draft at 27 n.20. It is does not say, however, how the Court is to decide which discriminatory statutes are constitutional and which are not. Given that the Court's purpose in any such inquiry would be exactly the same as it is now under National League of Cities and its progeny (i.e., whether the Commerce Clause is limited with respect to certain state activities), I think the Court is likely to end up engaging in precisely the same kind of analysis that JUSTICE BLACKMUN finds objectionable. Thus, the one substantive limitation that the opinion finds necessary leads the Court to precisely the place JUSTICE BLACKMUN found objectionable in the first place.

II.

A. The Unworkability of "Traditional Governmental Functions"

Section II of JUSTICE BLACKMUN's opinion argues that the test of state immunity under National League of Cities is unworkable. He focuses particularly on the third part of the test as

explained in Hodel v. Virginia Surface Mining & Recl. Assn., 452 U.S. 264 (1981), that state compliance with the federal obligation must "directly impair [the State's] ability 'to structure integral operations in areas of traditional governmental functions.'" 452 U.S. at 287-88 (quoting National League of Cities). To make this argument, JUSTICE BLACKMUN cites a long string of cases involving the question of state immunity under National League of Cities. In his view there is no "organizing principle" distinguishing the cases that have found state immunity from those which have not. In addition, JUSTICE BLACKMUN relies heavily on the Court's experience in "the related field of state immunity from federal taxation." He argues that the Court abandoned the governmental/proprietary distinction in this field both because the Court was unable to "give principled content" to the distinction and because it was unworkable.

It is, of course, difficult to define "traditional governmental functions." But it seems to me that the opinion's recitation of a "laundry list" of functions thought to be protected or unprotected by courts interpreting National League of Cities is somewhat disingenous. In each of the cited cases, the courts considered the issue on the specific facts before it; they did not make blanket pronouncements that particular things inherently qualified as traditional governmental functions or did not. Taken out of context, it is not surprising that JUSTICE BLACKMUN could find no "organizing principle" among the various functions.

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~~view~~ view that "trad. function" test of Hodel is unworkable

Moreover, I do not think the case law cited by JUSTICE BLACKMUN demonstrates his claim that the treatment of this issue in the courts shows that the standard is unworkable. His opinion cites five decisions by the courts of appeals finding "protected functions under National League of Cities." Two of these cases, Amersbach v. City of Cleveland, 598 F.2d 1033 (CA6 1979) and Molina-Estrada v. Puerto Rico Highway Authority, 680 F.2d 841 (CA1 1982), involve the scope of coverage of the Fair Labor Standards Act, the same statute at issue in National League of Cities. In two others, United States v. Best, 573 F.2d 1095 (CA9 1978) and Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (CA6 1981), the courts discussed whether particular activities were integral governmental functions, but the question of immunity under National League of Cities was not properly before the courts. [1] The fifth case, Gold Cross Ambulance v. City of

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[1] In Best, an individual pleaded guilty to drunk driving on a federal enclave. A United States magistrate sentenced him to a jail term and a fine, and ordered that his sentence be suspended pursuant to a California statute. Best moved to correct his sentence on the ground that the magistrate had no power to suspend his license. The DC denied the motion, and CA9 reversed and remanded. Although CA9 spoke of the issuance of drivers' licenses as an integral governmental function citing National League of Cities, the issue in the case was not state immunity from federal activity under the commerce power. Rather, the question presented was whether a federal court could order a state agency to suspend a state created privilege, in a case where the state was not even represented in the relevant proceedings. Thus, while this case involved federalism concerns, they were not those implicated by the holding of National League of Cities.

Similarly, in Hybud Equipment Corp. v. City of Akron, the question was whether a city ordinance, which prohibited the establishment of alternative waste disposal sites and required that all "acceptable" garbage be deposited at a new recycling

Footnote continued on next page.

Kansas City, 538 F. Supp. 956 (W.D. Mo. 1982) held in the alternative that federal antitrust laws could not prevent the city and state from regulating ambulance services, citing National League of Cities. On appeal, however, the case was affirmed not on the National League of Cities ground, but under the state action exemption to the antitrust laws. 705 F.2d 1005 (CA8 1983), cert pending, No. 83-183.

Thus, I think it is a bit misleading to argue that these cases have no "organizing principle." Two of them are not properly analyzed under National League of Cities principles in the first place, one did not reach the National League of Cities question at the CA level, and the other two came to precisely the same conclusion about the Fair Labor Standards Act as National League of Cities did.

excellent

Similarly, I do not think the eight cases which JUSTICE BLACKMUN cites as examples of those where no state immunity has been found show that the courts have found it impossible to discern traditional governmental functions. Two of the cases simply do not involve the question whether certain activity is a traditional governmental function. Williams v. Eastside Mental Health Center, Inc., 669 F.2d 671 (CA11), cert. denied, 459 U.S.

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plant, violated the Constitution or federal law. CA6 noted that waste disposal was a "customary area of local concern long reserved to state and local governments." 654 F.2d at 1196 (citing National League of Cities). The case, however, did not involve the authority of Congress to legislate against a claim of state immunity, but rather the inverse question, whether state law interferred with interstate commerce.

976 (1982), turned on whether the application of the Fair Labor Standards Act to employees of a halfway house would reach the State as State. The CA held that it would not, since the halfway house was not a state institution with state employees. In Friends of the Earth v. Carey, 552 F.2d 25 (CA2), cert. denied, 434 U.S. 902 (1977), CA2 rejected New York City's claim that the DC's order that it enforce a plan under the Clean Air Act violated National League of Cities on the ground that the plan in question was developed by the State and City. Although the other cases cited by JUSTICE BLACKMUN address the problem of identifying traditional governmental functions, when viewed on their facts, I do not think they show that the test is "unworkable."

I think the HABS opinion is on strong ground, however, in citing the Court's difficulties in the analogous tax immunity field. But although the Court has abandoned the "governmental/proprietary" distinction in this field, see New York v. United States, 326 U.S. 572 (1946), it has not taken the drastic approach of defining the states' tax immunity solely in "procedural terms." For example, in Massachusetts v. United States, 435 U.S. 444 (1978), JUSTICE BRENNAN wrote for the Court that the states could have no constitutional objection to federal taxes that satisfied a three prong test: (1) that the tax not discriminate against the states; (2) that the tax be based on a fair approximation of use; (3) that the tax be structured to produce revenues not in excess of the total cost to the federal government of providing the relevant benefits. Thus, while the

Court has abandoned the governmental/ proprietary distinction, it nevertheless subjects revenue measures to some substantive restraints.

B. Traditional Governmental Functions and Federalism

JUSTICE BLACKMUN's opinion also maintains that efforts to define traditional governmental functions are "unsound in principle" because no distinction "that purports to separate important governmental functions from other ones can be faithful to the role of federalism in a democratic society." The opinion argues that the states must be free "to engage in any activity that their citizens choose for the common weal," and that any rule of state immunity which relies on distinguishing "traditional," "integral," or "necessary" state functions "invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."

This is a clever attempt to turn National League of Cities against itself. It seems to me, however, that this argument can fare no better than JUSTICE BLACKMUN's argument for structural protection of the states and the use of a nondiscrimination standard. To the extent that the structure of the federal government cannot be shown to provide adequate protection for the states, then the federal judiciary, whose clear province it is "to say what the law is," must review legislation to determine if Congress has overstepped its authority with respect to the states. Judicial review in this context needs no different justification from that which it always has. In addition, given that JUSTICE BLACKMUN's concession that not all legislation which

discriminates against the states is necessarily unconstitutional, the federal judiciary is likely to play the same role under his approach as it does under the National League of Cities approach.

Conclusion

Despite JUSTICE BLACKMUN's assertions to the contrary, neither his structural approach to the protection of state sovreignity, nor his substantive nondiscrimination standard, is rooted uniquely in the value of federalism. In addition, neither of them protects the states as states. To this extent, the opinion is inconsistent with the central premise of National League of Cities, a premise which the opinion purports to embrace.

JUSTICE BLACKMUN is, of course, correct that National League of Cities is difficult to apply. I think he is wrong, however, to argue that the basic approach of the case is unsound. Neither the cases decided under National League of Cities, nor the Court's experience in the tax immunity field, suggest that a case by case approach to a substantive definition of state immunity from Commerce Clause enactments is unworkable.

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 82-1951

Submitted ....., *19*... *Announced* ....., *19*...

DONOVAN

vs.

SAN ANTIONI MTA

Note

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.								Same vote as 82-1913					
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

lfp/ss 09/29/84 SAN SALLY-POW

MEMORANDUM

TO: Annmarie DATE: Sept. 29, 1984

FROM: Lewis F. Powell, Jr.

82-1913 and 82-1951 San Antonio Transit Authority Case

The brief amicus filed on behalf of 25 states, and apparently written by the Attorney General of Massachusetts, is particularly interesting. It strongly supports reaffirmance of the basic principle (federalism) of National League of Cities, and urges us to affirm the DC's decision. But the brief argues for a different analytical approach. It rejects analysis based upon whether the function at issue is "traditional", and is particularly critical of the "rigid and myopic historical approach" urged by the SG - an approach that looks to whether the municipal function was a traditional one at the time the FLSA was adopted.

The states' brief argues for a "balancing test" - one that would require a court exercising judicial review to weigh the strength of the federal interest in regulating the states as states against the seriousness of the intrusion on state sovereignty". The specific congressional action (here the FLSA) should be analyzed

"in light of the functions served by the states in the constitutional scheme". P. 42.

One factor to be assessed is "the proximity of the federal action to the core concerns of the Commerce Clause". The Founding Fathers wished to assure "an integrated national economy" that can exist only in the absence of state-imposed barriers. The impact of the state activity on interstate commerce must be assessed to determine whether the state must submit to federal regulation. This "does not focus on whether the state is engaged in commercial activity, but instead inquires into the degree which that activity affects the core concerns of the Commerce Clause". The question, therefore, is not whether the regulation of wages and hours of transit workers is within the scope of the Commerce Clause . . . rather, the relevant inquiry is an assessment of degree i.e. how much of a burder on interstate commerce is created by exempting publicly employed transit workers from the FLSA?" P. 42-45.

The states' brief goes on to say that:

> "Once the strength of the federal interest and the impact of the state activity have been ascertained, they may be balanced against the injury to state sovereignty posed the federal regulation."

Finally, as I understand the brief by the states, there must be recognition that the Constitution established "a frame of government within which democratic choice is guaranteed. For this reason, injury to state sovereignty should not be assessed in terms of the substantive merit of a particular state policy, but rather in terms of the effect upon self government." P. 51- 52.

The brief concludes, not surprisingly, that the "balance tips" against the extension of FLSA to public mass transit. These transit systems relate to "local rather than national concerns". Moreover, they have never been regulated by the federal government, but have remained subject to "local political decision-making processes" and regulation. P. 61, 62.

Finally, the point is made that the "assured provision of public transportation is an essential feature of the daily lives of many people - commuters, school children, the elderly, etc." The point also is made that the "intrusion of the national government into this local political process [and local service] not only limits the range of choice, but demonstrates to state and local citizens that the local government is not theirs". P. 64.

Brief of American Public Transit Association (Bill Coleman)

This wordy supplemental brief on behalf of this party (one of the appellees) argues that the "principles" of League of Cities are sound and should be reaffirmed. It is emphasized that four subsequent cases (Hodel, Long Island Railroad, FERC v. Mississippi (opinion by Blackmun), and EEOC v. Wyoming) have reaffirmed League of Cities and its "principles". P. 7-15.

I should have said that on p. 2 of this brief, the two "constraints on Congress' exercise of Commerce Clause power in direct regulation of the states and their political subdivisions, are "the principles of federalism" and the Tenth Amendment.

Commencing at p. 32 of the brief, it is said that "the three part test in Hodel, and applied in subsequent cases, is a fully workable doctrine that insures thorough consideration of all legitimate state and constitutional interests. The result of such judicial scrutiny is in effect a balancing of the importance of each sovereign's interests - a balancing for which the Court's tests and precedents provide objective and understandable criteria". P. 33.

I note that this "balancing test" is similar to that which is the centerpiece in the brief on behalf of 25 states that I discuss above.

Reply Briefs on ~ehalf of Appellants

The SG's reply brief is weak and adds little to the SG's original flawed effort. Indeed, for me the arguments by the SG's office in this case are about the weakest I have ever seen emerge from that quality group of lawyers. For my comments on the SG's brief, see my memo of September 7.

The reply brief of appellant Garcia is scholarly, well written - and will be well argued by Larry Gold - but it reiterates the extreme position advanced in prior briefs. Following elaborate quotations from The Federalist (that could be matched easily with quotations emphasizing federalism), the brief presents an absolutist view of the Commerce Clause: it is supreme over state law whether exercised with respect to private persons or directly as a regulation or restriction on the action of state and local governments. Under this view, all local "goods and services" would be subject to federal regulation. The brief supports this view by the facile observation:

> "The fact that, as to any given good or service, some entities [private corporations] that are not sovereign provide the service while some entities [cities] that are sovereign do not, demonstrates that such activity is not an essential attribute of state sovereignty".

This observation undercuts the SG's argument, and it also identifies the logical weakness of reliance upon whether a service is "traditional", "essential" or "core".

These observations implicitly suggest the merit of the "balancing test" urged by the brief on behalf of 25 states.

The Garcia brief, as an alternative to its "basic position", agrees with the "Secretary of Labor (the SG) that if 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 ". P. 14.

* * *

In light of my examination of these and other briefs, and in view of problems identified in the analysis of League of Cities, I am inclined to agree generally with a balancing test in which a reviewing court would weigh

the factors identified in the states' brief. I will want to discuss with Annmarie who has thought about the case more intensively than I have recently.

L.F.P., Jr.

ss