GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY: AN ALTERNATE OPINION

*Joseph M. Lynch**

Warm partisans of the cause of Federal power have had reason to rejoice: *National League of Cities v. Usery*[1] has been overruled.[2] In their view, that dreadful Rehnquist-wrong excrescence on the written Constitution, that impudent imputation of pseudo-tenth amendment jurisprudence has been properly set aside.[3] The cause of state sovereignty, whatever that may mean, has been left to the political process—to the people and the representatives they choose to send to Congress. *Garcia v. San Antonio Metropolitan Transit Authority*[4] has so determined. Whether Congress in its power to regulate commerce among the states can so affect state activity as "to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence' "[5] is a matter to be left to the political process, not a question to be decided by the judiciary.[6] Foreclosed by the courts, the states, in accordance with the advice in *Garcia*, petitioned Congress for and received appropriate legislative relief.[7] The Fair Labor Standards Act has been amended in their favor.[8]

In the meantime, with relief in the courts foreclosed, those

* Professor of Law, Seton Hall University School of Law. A.B., St. Peters College 1948; LL.B., Harvard Law School 1951. I would like to thank my research assistant, David Skomba, for his unwearying help in preparing this article for publication and Marie-Laurence Mancini for her very helpful editorial suggestions in emendation of the text.

1 426 U.S. 833 (1976).

2 Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1007, 1021 (1985).

3 For a compilation of critical commentary, see Nagel, *Federalism As a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 82 nn.4-8.

4 105 S. Ct. 1005 (1985).

5 United Transportation Union v. Long Island R.R., 455 U.S. 678, 687 (1982) (quoting *National League of Cities*, 426 U.S. at 851).

6 *See Garcia*, 105 S. Ct. at 1016-20. Justice Blackmun's opinion in *Garcia* essentially adopted the position advocated by Justice Brennan in his dissent in *National League of Cities*, 426 U.S. at 856-80 (Brennan, J., dissenting).

7 *See* Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 1985 U.S. CODE CONG. & AD. NEWS (99 Stat.) 787.

8 For a discussion of the Fair Labor Standards Amendments, see *infra* notes 178-185 and accompanying text.

in favor of a committed Federal presence in a broad array of subjects are elated.[9] The elation, however, may be temporary. While *National League of Cities* is overruled, it may not be dead and buried. As Justice Rehnquist observed in his dissent in *Garcia*, there may be a third round.[10] States and local governmental units, dissatisfied with the terms of the recent amendment to the Fair Labor Standards Act, or disaffected by some other provision of that or another statute, may some day raise a new challenge. The principle of *National League of Cities* may then, as Justice Rehnquist prophesied, "again command the support of a majority of this Court."[11] Justice O'Connor, in a separate dissent, shared his expectation.[12] Although not articulated, the reason for Justice Rehnquist's assurance lies in the advanced age of the Court's membership and the present state of the political process. Justice Blackmun, who wrote the majority opinion in *Garcia*, is seventy-seven.[13] Justices Brennan and Marshall, who supported it, are seventy-nine and seventy-seven, respectively.[14] On the other side, Justice Powell, who wrote the longest and most vigorous dissenting opinion, is seventy-eight, as is Chief Justice Burger, who supported him.[15] Significant change in the personnel of the Court before the end of the decade is therefore most likely.

Any vacancies that may occur during President Reagan's tenure are likely to be filled with appointees disposed toward the revival of *National League of Cities*, for the cause of states' rights is popular in those regions of the country from which the President received his main support—the South and the West.[16] Moreover, since those regions have been gaining in population at the ex-

---

9 *See* Nagel, *supra* note 3, at 81-83.

10 *See Garcia*, 105 S. Ct. at 1033 (Rehnquist, J., dissenting).

11 *Id.*

12 *Id.* at 1038 (O'Connor, J., dissenting).

13 Justice Blackmun's date of birth is November 12, 1908. BICENTENNIAL COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, JUDGES OF THE UNITED STATES 29 (1978) [hereinafter cited as JUDGES].

14 Justice Brennan was born on April 25, 1906. *Id.* at 41. Justice Marshall was born on July 2, 1908. *Id.* at 254.

15 Justice Powell was born on September 19, 1907. *Id.* at 321. Chief Justice Burger was born on September 17, 1907. *Id.* at 53.

16 *Portrait of the Electorate*, N.Y. Times, Nov. 8, 1984, at A19, col. 4. A New York Times/CBS News Poll survey, published the Thursday after the 1984 Presidential election, is indicative of the President's strong support in these regions. *See id.* This poll compared the 1980 and 1984 election results. *Id.* In 1980, President Reagan received 52% of the vote in the South and 53% in the West. *Id.* By comparison, he received only 47% of the vote in the East. *Id.* In the 1984 election, which was an electoral landslide for the President, while Mr. Reagan received 52%

pense of the Midwest and the Northeast,[17] the next president will more likely than not be one who shares and advances their cause. If, therefore, present political trends continue, Justice Rehnquist, who is only sixty-one, and Justice O'Connor, who is a young fifty-five, both from Arizona,[18] are likely to be joined by congenial reinforcements from other states reflecting the now prevailing values of the South and the West. *Garcia* will be challenged. The revival of *National League of Cities* will be advocated, and another round of litigation will commence.

It is against that day that this article is written. If *National League of Cities* is to be revived, it is the argument here advanced that its rationale should be revised so that its "traditional governmental function" test be abandoned in favor of a broader balancing of the competing local and Federal interests involved both in that case and in future cases.[19] It is further argued that the application of this balancing test to *Garcia* demonstrates that its result was proper: The Federal interests outweighed those of the local system, and the applicability of the Fair Labor Standards Act to the operation of the San Antonio Metropolitan Transit Authority was correctly sustained.[20] Therefore, if *National League of Cities* is revived, *Garcia* should not be overruled. Rather, its holding should be explained, distinguished, and followed.

A. Background to *Garcia*

The present flourishing state of the national economy is in large part due to the operation of the Constitution's commerce clause, liberally construed by the Court to effect a national economy. On the one hand, state discriminations against interstate commerce, or in favor of local commerce, have been systematically invalidated in a succession of judicial decisions holding that states cannot, by regulation or taxation, promote local industry at the expense of out-of-state industry.[21] On the other hand, the

---

of the vote in the East, he tallied an impressive 63% and 59% in the South and West, respectively. *Id.*

17 *See Census Confirms a Massive Shift to South, West*, Wash. Post, Jan. 1, 1981, at A1, col. 1.

18 Justice Rehnquist was born in Milwaukee, Wisconsin on October 1, 1924, but he is now from Phoenix, Arizona. JUDGES, *supra* note 13, at 332. Justice O'Connor also hales from Phoenix, though she was born in El Paso, Texas. Her date of birth is March 26, 1930. 2 WHO'S WHO IN AMERICA 2452 (43d ed. 1984).

19 *See infra* notes 149-171 and accompanying text (applying balancing test to *Garcia*).

20 *See id.*.

21 For examples on the issue of impermisible state regulation of commerce, see

Court has upheld Federal regulation of such incidents of commerce that would, no matter how trivial in themselves, collectively burden interstate commerce if left unregulated. The commercial farmer's personal consumption of his own grain[22] and the local restaurant owner's operation[23] have been considered integral parts of interstate commerce and therefore subject to Federal regulation. Through such regulation, the Federal Government has policed the pricing of commodities in the national market and has required local businesses to assume certain burdens.

The Fair Labor Standards Act (FLSA),[24] the Federal statute involved in both *National League of Cities* and *Garcia*, requires covered employers to pay their employees a minimum hourly wage[25] as well as no less than one and one-half times their regular rate of pay for hours worked in excess of forty during a work week.[26] The constitutionality of that statute, as applied to employees engaged in manufacture, was upheld in the landmark case of *United States v. Darby*,[27] the Court holding that Congress could prohibit the shipment in interstate commerce of goods manufactured by employees whose wages were less than the minimum prescribed by the statute, or whose weekly hours of labor at that wage were greater than the prescribed maximum.[28] It also held that Congress could in effect prohibit the employment of workers in the production of goods for interstate commerce at other than the

---

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (Iowa statute retricting maximum length of vehicles allowed on highways invalid); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) (Florida statute prohibiting out-of-state bank holding companies from owning or controlling businesses within state invalid); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (Wisconsin regulation prohibiting trucks longer than 55 feet from operating within state invalid); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964) (Florida statutes and regulations reserving market for local producers of milk invalid); Leisy v. Hardin, 135 U.S. 100 (1890) (state without power to interfere with sale implicitly sanctioned by Congress until goods mingled with property of receiving state).

For examples on the issue of impermissible state taxation of commerce, see Bacchus Imports, Ltd. v. Dias, 104 S. Ct. 3049 (1984) (Hawaii excise tax invalid as discriminating against interstate commerce); Maryland v. Louisiana, 451 U.S. 725 (1981) (Louisiana first-use tax invalid as interference with interstate commerce); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977) (New York transfer tax invalid as interference with interstate commerce).

22 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

23 *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964).

24 29 U.S.C. §§ 201-219 (1982).

25 *Id.* § 206(a).

26 *Id.* § 207(a)(1).

27 312 U.S. 100 (1941).

28 *See id.* at 113.

prescribed wages and hours.[29] In so holding, the Court overruled *Hammer v. Dagenhart*,[30] which had invalidated a Federal statute prohibiting the shipment in interstate commerce of goods manufactured by child labor on the ground that since the goods themselves were not harmful or dangerous, the statute was not a regulation of commerce, but rather a condition of production.[31] The latter had been deemed to be beyond the power of the Federal Government and therefore reserved to the states under the tenth amendment.[32]

It is difficult for us today to comprehend the mind-set of seventy years ago, when the concept of interstate commerce was confined to the act of transportation of goods across state lines and held not to include the production of those goods before shipment or their distribution thereafter. While for commercial purposes the entire process—production, shipment, and distribution—was integral, for purposes of governmental control and regulation, commerce was chopped up into separate and isolated components according to the Court's then prevailing construction of the Constitution.[33] No one governmental entity was thus capable of regulating the successive commercial components. As a consequence, government foundered and, ironically, commerce foundered as well. The decision in *Darby* marked the beginning of the end of that compartmentalization.

As originally written, the FLSA excluded states and their political subdivisions from its definition of "employer" for the purposes of the minimum wage and overtime coverage.[34] In 1966, however, Congress amended the Act to cover virtually all employees of hospitals, institutions, and schools operated by the states and their subdivisions, whether or not operated for profit, so long as they were deemed to be "enterprise[s] engaged in commerce or in the production of goods for commerce."[35] In addition, the 1966 amendments extended coverage to employees of all transit companies "engaged in commerce," whether pub-

---

29 *See id.* at 125-26.

30 247 U.S. 251 (1918).

31 *See id.* at 271-72.

32 *See id.* at 273-75.

33 *See supra* notes 31-32 and accompanying text.

34 Fair Labor Standards Act of 1938, ch. 676, § 3(d), 52 Stat. 1060, 1060 (current version at 29 U.S.C. § 203(d) (1982)). The 1938 statute stated: " 'Employer' includes any person . . . but shall not include the United States or any State or political subdivision of a State." *Id.*

35 Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(c), 80 Stat. 830, 831 (current version at 29 U.S.C. § 203(s) (1982)).

licly or privately owned and whether or not subject to state or local regulation, although they did not provide for overtime pay protection to drivers, operaters, and conductors of such companies.[36] In 1974, Congress again broadened the FLSA coverage by phasing out the special exclusion from overtime coverage for transit employees[37] and, more importantly, generally including almost all public agencies and their employees.[38]

The constitutionality of these various inclusions was challenged. In *Maryland v. Wirtz*,[39] the Court sustained the coverage of employees engaged in state and municipal hospital and educational institutions.[40] The Court reasoned that such employees were engaged in enterprises affecting interstate commerce and that Congress could regulate them so as to prevent strikes, thereby forestalling a potentially destructive effect on interstate commerce.[41] But when, in 1976, the Court in *National League of Cities* upheld a challenge to the provision of the FLSA extending coverage generally to all state and municipal employees, it also overruled *Wirtz*.[42] The Court reasoned that "the challenged amendments operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[43] Inasmuch as the challenged amendments did so, the Court concluded that the "constitutional doctrine of intergovernmental immunity"[44] implicit in the tenth amendment barred their application.[45]

B. *GARCIA*: STATEMENT OF THE CASE

Garcia involved the FLSA coverage of employees of the San Antonio Metropolitan Transit Authority (SAMTA).[46] SAMTA is a regional transit authority created by the City of San Antonio pursuant to the law of Texas[47] to serve the San Antonio metro-

---

36 *See id.* § 206(c), 80 Stat. at 836 (repealed 1974).

37 *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 21(b), 88 Stat. 55, 68.

38 *See id.* § 6(a)(1), (6), 88 Stat. at 58, 60 (current version at 29 U.S.C. § 203(d), (x) (1982)).

39 392 U.S. 183 (1968).

40 *Id.* at 201.

41 *See id.* at 188-93.

42 *National League of Cities*, 426 U.S. at 855.

43 *Id.* at 852.

44 *Id.* at 837.

45 *See id.* at 851-52.

46 *Garcia*, 105 S. Ct. at 1008.

47 *See* TEX. REV. CIV. STAT. ANN. art. 1118x (Vernon Supp. 1985).

politan area. It began operations in March of 1978, taking over the facilities and equipment of the City of San Antonio's transit system.[48] Thereafter, in 1979, a specific inquiry was made by the Wage and Hour Administration of the Department of Labor regarding the applicability of the FLSA to its operations.[49] Upon being advised that the Federal Government did not consider it immune from coverage, SAMTA filed a complaint in a Federal district court in Texas against the Secretary of Labor seeking a judgment declaring that because of its asserted constitutional immunity, it was not covered by the FLSA.[50] Joe Garcia, one of SAMTA's employees interested in overtime coverage, was granted leave to intervene as a defendant.[51] The American Public Transit Association was permitted to intervene as a plaintiff.[52]

The critical inquiry in the case was whether the operation of a local mass transit system was an "integral [operation] in [an area] of [a] traditional governmental [function],"[53] under the test set forth in *National League of Cities*,[54] as later reaffirmed and redefined in *Hodel v. Virginia Surface Mining & Reclamation Association*.[55] In *Hodel*, the Supreme Court summarized the prerequisites for governmental immunity under *National League of Cities* as requiring the satisfaction of three conditions before a state activity could be considered immune.[56] First, the regulation must affect "the 'States as States.' "[57] Second, the statute "must address matters that are indisputably 'attribute[s] of state sovereignty.' "[58] Third, the states' compliance must "directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' "[59] The district court in *Garcia* held that the operation of a local mass transit system was an "integral operation in an area of a traditional governmental function" and thus granted summary judgment for the plaintiffs.[60] The defendants

---

48 *Garcia*, 105 S. Ct. at 1007.

49 *See* Brief of Appellant Joe G. Garcia at 4, Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

50 *See Garcia*, 105 S. Ct. at 1009.

51 *Id.*

52 *See* Brief for the American Public Transit Association at 6, Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

53 *National League of Cities*, 426 U.S. at 852.

54 *Garcia*, 105 S. Ct. at 1007.

55 452 U.S. 264 (1981).

56 *Id.* at 287.

57 *Id.* (quoting *National League of Cities*, 426 U.S. at 854).

58 *Id.* at 287-88 (quoting *National League of Cities*, 426 U.S. at 845).

59 *Id.* at 288 (quoting *National League of Cities*, 426 U.S. at 852).

60 San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 446

appealed to the United States Supreme Court.[61] While the appeal was pending, the Court decided the case of *United Transportation Union v. Long Island Rail Road*,[62] in which it held that the tenth amendment did not preclude the application of the Federal Railway Labor Act to the operations of a state-owned, commuter-passenger and freight-carrying railroad engaged in interstate commerce, albeit almost wholly within the State of New York.[63] In a unanimous opinion, Chief Justice Burger, writing for the Court, relied on its prior holding in *United States v. California*[64] sustaining Federal regulation of a state-owned freight railroad, and on its specific reaffirmation of that holding in *National League of Cities*.[65] The fact that the Long Island Rail Road was primarily a passenger railroad made no difference.[66] In the Court's view, the "[o]peration of passenger railroads, no less than [the] operation of freight railroads, has traditionally been a function of private industry, not state or local governments."[67] The opinion noted that at the time of the suit, only two of seventeen commuter railroads in the country were state-owned and operated,[68] and concluded that "the historical reality" was "that the operation of [such] railroads is not among the functions *traditionally* performed by state and local governments."[69]

Although the *Long Island Rail Road* opinion purported to apply the "traditional governmental function" test of *National League of Cities*, it laid the groundwork for a fundamental shift. Explaining the key phrase of *National League of Cities*, Chief Justice Burger observed that the Court was not "looking only to the past to determine what is 'traditional.' "[70] He explained that the emphasis on tradition in that case

> was not meant to impose a static historical view of state functions generally immune from federal regulations. Rather it was meant to require an inquiry into whether the federal regulation affects basic state prerogatives in such a way as would be

(W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

61 *Id.*

62 455 U.S. 678 (1982).

63 *Id.* at 685.

64 297 U.S. 175 (1936).

65 *Long Island R.R.*, 455 U.S. at 685.

66 *Id.* at 686.

67 *Id.* (footnote omitted).

68 *Id.* at 686 n.12.

69 *Id.* at 686.

70 *Id.*

> likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'[71]

The Chief Justice's observation is unclear, however. Despite the recent corruption of the word, "traditional" has meant something coming down to the present from a more distant past. In that traditional sense of the meaning of "traditional," "the historical reality" under consideration necessarily had to be "static." If the more recent history of the last ten years, or even the last five months, is to be considered, then it would seem that starting with *Long Island Rail Road*, the Court was not so much interested in history as such, but in an examination of the particular functions that a state had undertaken in the light of its "ability to fulfill its role in the Union."[72]

In undertaking this examination in *Long Island Rail Road*, the Court apparently focused on the fact that only two out of seventeen commuter railroads in the country were then run under state auspices. It was this present fact, not the traditional or long past fact that most railroads were privately run, that led the Court to decide against a state immunity.[73] In any event, the weight of tradition went the other way. The Chief Justice pointed out: "Railroads ha[d] been subject to comprehensive federal regulation for nearly a century,"[74] the Railway Labor Act[75] having been in effect for fifty-six years.[76]

The Court also introduced another and different type of factor that looked to the purpose of the Federal legislation, rather than to the functions, traditional or not, it had regulated. The Court noted that Congress had enacted the statute as the most effective means of preventing a disruption of vital rail service, which could be ruinous to the national economy.[77] Rather than absolutely prohibiting a railroad strike, the Court stated that Congress had decided upon a complex scheme of mediation and cooling-off periods, thereby "creating an almost interminable collective bargaining process."[78] The Court therefore held that allowing states to acquire an individual

---

71 *Id.* at 686-87 (quoting *National League of Cities*, 426 U.S. at 851).

72 *Id.* at 687.

73 *Id.* at 686 & n.12.

74 *Id.* at 687 (footnote omitted).

75 Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (codified as amended at 45 U.S.C. §§ 151-164 (1982)).

76 *Long Island R.R.*, 455 U.S. at 688.

77 *Id.* at 688 n.20.

78 *Id.* at 689 (quoting Detroit & T.S.L. R.R. v. United Transp. Union, 396 U.S. 142, 149 (1969)).

railroad that was an integral part of the national railroad system and to circumvent the Federal system of collective railroad bargaining would destroy the uniformity mandated by Congress and would endanger the efficient operations of the system.[79] The Court further noted that the State of New York had taken over the railroad subject to this regulatory scheme and had operated under it for thirteen years.[80]

Without saying so, the Court in *Long Island Rail Road* effectively expanded the three-pronged test of *National League of Cities* as summarized in *Hodel*[81] by adding a balancing test whereunder the Court weighed the competing state and Federal interests. In *Long Island Rail Road*, it found the Federal regulatory interest to be the more important.[82] This approach was not unprecedented, however. In effect, the Court had done the same in *National League of Cities* by following its prior holding in *Fry v. United States*,[83] where it had sustained the temporary freezing of "the wages of state and local governmental employees."[84] The Court in *National League of Cities* characterized the statute in *Fry* as an emergency measure "occasioned by an extremely serious problem" of inflation endangering the national economy, which only the national government could regulate.[85] Since the statute temporarily froze, but did not increase, state and local salaries, the Court concluded that the intrusion on the states was not severe.[86] Furthermore, Justice Blackmun's concurring opinion in *National League of Cities*, perhaps with the Court's approval of *Fry* in mind, described the majority's opinion as "adopt[ing] a balancing approach . . . [which] does not outlaw federal power in areas . . . where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[87] Balancing, with its consideration

---

79 *Id.*

80 *Id.* at 689-90.

81 *See supra* notes 56-59 and accompanying text.

82 *See Long Island R.R.*, 455 U.S. at 688-90.

83 421 U.S. 542 (1975).

84 *National League of Cities*, 426 U.S. at 852-53.

85 *Id.* at 853.

86 *See id.*

87 *Id.* at 856 (Blackmun, J., concurring). Later, in EEOC v. Wyoming, 460 U.S. 226 (1983), both Justice Brennan for the majority and Chief Justice Burger for the minority applied what was in effect a balancing test to the question of whether the application of the Federal Age Discrimination in Employment Act of 1967 directly impaired the states' ability to structure integral operations in areas of traditional governmental functions. *Compare id.* at 228-44 (Justice Brennan's majority opinion) *with id.* at 251-65 (Burger, C.J., dissenting). The majority held that it did not. *Id.* at 243-44.

of the competing Federal interests, was therefore an indispensable, though unarticulated, ingredient in the Court's original vindication of a state claim of constitutional immunity.[88] Since, however, the *Long Island Rail Road* opinion did not explicitly mention balancing, but rather continued to refer to the simple three-pronged test of *National League of Cities*, lower courts likewise continued to employ the latter test with a particular focus on the factor of "traditional governmental function."[89]

A few months after its decision in *Long Island Rail Road*, the Supreme Court vacated the district court's judgment in *Garcia* and remanded it for further consideration in light of *Long Island Rail Road*.[90] On remand, the district court again entered judgment for SAMTA, finding that nothing in *Long Island Rail Road* changed its previous conclusion that the operation of a public mass transit system is a traditional governmental function protected by the tenth amendment.[91] Seizing on the words of Chief Justice Burger in *Long Island Rail Road*, that the requirements of a traditional governmental function were "not meant to impose a static historical view of state functions,"[92] the district court relied on a four-pronged test[93] developed by the Sixth Circuit in *Amersbach v. City of Cleveland*.[94] In that case, the court determined that the municipal ownership and operation of an airport constituted a traditional governmental function for the following reasons:

> (1) [T]he government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a communitywide

---

88 In *Hodel*, the court, in a footnote qualifying its summary of *National League of Cities'* requirements, recognized the importance of balancing. *See Hodel*, 452 U.S. at 288 n.29.

89 *See, e.g.*, Alewine v. City Counsel, 699 F.2d 1060 (11th Cir. 1983), *cert. denied*, 105 S. Ct. 1391 (1985); Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841 (1st Cir. 1982); Kramer v. New Castle Area Transit Auth., 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

90 Donovan v. San Antonio Metropolitan Transit Auth., 457 U.S. 1102 (1982).

91 San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 446-47 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

92 *Long Island R.R.*, 455 U.S. at 686.

93 San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 453 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

94 598 F.2d 1033 (6th Cir. 1979).

need for the service or activity.[95]

These criteria represent a substantial revision of the historically focused test implicit in the word "tradition"[96] in favor of a purely functional local governmental test. In some show of deference to *National League of Cities*, the Sixth Circuit in *Amersbach* and the lower court in *Garcia* continued to use the word "traditional," but its meaning had been essentially changed. Applying the *Amersbach* test, it was not difficult for the district court in *Garcia* to conclude that public mass transit constituted a traditional governmental function.[97] The court reasoned as follows: First, by eliminating air pollution, alleviating traffic congestion, conserving energy, and stimulating economic development, public mass transit benefited the community as a whole.[98] Second, the economics of urban mass transit were such that they could not be provided at a profit, and the function, when undertaken by state or local authorities, was provided as a public service rather than for pecuniary gain.[99] Third, since private industry would not undertake the operation, government was peculiarly well-suited to provide it.[100] Fourth, since by 1978, the date the case began, public transit accounted for approximately ninety per cent of mass transit operation in the country, government was the primary provider of those services.[101]

The trial court in *Garcia* also argued from analogy. *National League of Cities* had stated that the provision of police, fire, public health, sanitation, educational, and hospital services, as well as park and recreational facilities, were among the numerous traditional operations of state and local governments.[102] The provision for public mass transit, the court reasoned, was just as essential and must therefore also be considered traditional.[103] The court noted that the states have regarded it as essential.[104] Indeed, Congress, in the debates leading to the adoption of the Urban Mass Transportation

---

95 *Id.* at 1037.

96 *See supra* notes 70-72 and accompanying text.

97 San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 453-54 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.* at 453-54.

102 *National League of Cities*, 426 U.S. at 851, 855.

103 *See* San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 451 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

104 *Id.*

Act of 1964 (UMTA),[105] had also recognized it as essential.[106] The court further reasoned that the origins of mass transit in the private sector were just as irrevelant as the private origins of hospitals.[107] Although state-owned commuter railroads were not functionally different from publicly owned local mass transit systems, they were to be treated differently because of the long-standing Federal regulation of their operations.[108] That, in the court's view, was the true reading of *Long Island Rail Road*.[109] The trial court concluded with an irreverent sally, one probably fatal to its position—"If transit is to be distinguished from the exempt [*National League of Cities*] functions it will have to be by identifying a traditional state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it."[110] It was a sally the Supreme Court did not overlook, Justice Blackmun quoting it verbatim in his majority opinion.[111] The trial court's sense of humor plus its audacious use of the revisionist *Amersbach* test probably did not sit well with the majority.

The trial court's decision was complicated by an additional factor. Prior to its decision, the Third Circuit, in *Kramer v. New Castle Area Transit Authority*,[112] had decided that the Court's decision in *Long Island Rail Road* required the opposite holding—"that the state involvement in local transit systems, increasing with more systems coming under state control in recent years, does not alter the 'historical reality' that the operation of mass transit systems 'is not among the functions *traditionally* performed by state and local gov-

---

105 Pub. L. No. 88-365, 78 Stat. 302 (codified as amended at 49 U.S.C. §§ 1601-1618 (1982)).

106 San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 451 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

107 *Id.* at 453.

108 *See id.* at 448-49.

109 *See id.* at 450.

110 *Id.* at 453. The irreverence of the sally, of course, lay in the play on Justice Stewart's famous and oft-derided test of pornography:

> I have reached the conclusion . . . that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that.

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (emphasis added) (footnotes omitted).

111 *Garcia*, 105 S. Ct. at 1010.

112 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

ernments.' "[113] Accordingly, *Kramer* held that the operation of a local bus system was subject to the overtime pay requirements of the FLSA, the issue before the Court in *Garcia*.[114] Moreover, the Supreme Court had denied certiorari in *Kramer*.[115]

The opinion by Judge Gibbons in *Kramer* relied in part on the fact that the immunization of state operations would erode Federal authority in the area of mass transit.[116] Its principal reliance, however, was placed on both the governmental and economic reality that the assumption of widespread local governmental ownership and operation of public mass transit systems had occurred only after the adoption of the UMTA, and the subsequent heavy Federal financing of state and local ownership and operation.[117] As Judge Gibbons noted, the Federal Government had been and continued to be actively involved in local mass transportation. He stated that "[i]t provides [the following]: (1) capital grants, funded on a '80% federal/20% local' matching basis; (2) operating grants, on a '50% federal/50% local' matching basis; and (3) technical assistance to state and local planning agencies on an '80% federal/20% local' matching basis."[118] Judge Gibbons concluded that the tradition that had evolved, if it could be called a tradition, was one of Federal-state cooperation, whereby the Federal Government had taken the lead and, as the contributor of the larger share of funding, had acted as the senior partner.[119]

The trial court in *Garcia* attempted to meet this argument with the reply that since expenditures under the UMTA constituted an exercise of Congress's spending power and not of its commerce power, the reasoning in *Kramer* proved too much.[120] In 1979, it noted, Congress had spent billions of dollars in support of the state and local governments' provisions for health and education and mil-

---

113 *Id.* at 310 (quoting *Long Island R.R.*, 455 U.S. at 686).

114 *Id.*

115 New Castle Area Transit Auth. v. Kramer, 459 U.S. 1146 (1983). Strictly speaking, denial of certiorari does not necessarily constitute an approval of the lower court's decision or opinion. The denial of certiorari in *Kramer*, however, should have alerted the lower court in *Garcia* to the Supreme Court's preliminary disposition toward the case because *Kramer* involved similar facts and legal issues and followed in time the Supreme Court's remand for further consideration in light of *Long Island Rail Road*.

116 *See Kramer*, 677 F.2d at 310.

117 *Id.* at 309-10.

118 *Id.* at 310.

119 *Id.*

120 *See* San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 451-52 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth. 105 S. Ct. 1005 (1985).

lions in support of law enforcement.[121] Yet these had been immunized from the purview of the commerce clause under *National League of Cities*.[122]

Following the entry of judgment, the Secretary of Labor and Garcia again appealed directly to the Supreme Court, which noted probable jurisdiction.[123] In the meantime, the Sixth Circuit, in *Dove v. Chattanooga Area Regional Transportation Authority*,[124] also held that a publicly owned regional mass transit system was not immunized from compliance with the overtime provisions of the FLSA.[125] In the light of *Long Island Rail Road*, the court declined to apply the purely functional test it had itself proffered in *Amersbach*.[126] Taking note of the reasons advanced in *Kramer*, it stated: "It would indeed be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations."[127]

C. Proposed Disposition of *Garcia*

The proper disposition of *Garcia* lies in the reconciliation of the two basic constitutional principles at issue in *National League of Cities* and *Long Island Rail Road*. Rephrased in the light of the foregoing discussions, they are, first, the preservation of the states' autonomy so that they and their local governmental units may retain their ability to perform necessary and appropriate governmental functions for their people, and second, the preservation of the power of the Federal Government to regulate problems incident to a complicated and integrated national economy.[128]

The preservation of both these principles in cases involving Federal regulation of state and local governmental activity requires a balancing of the relative importance of the competing state and Federal interests. In the reconciliation of these principles, a liberal measure of realism is in order. Federal regulation of state activity under the commerce clause has been justified by application of the well-established principle that commercial ac-

---

121 *Id.* at 452.

122 *Id.*; *see National League of Cities*, 426 U.S. at 851, 855.

123 Garcia v. San Antonio Metropolitan Transit Auth., 464 U.S. 812 (1983).

124 701 F.2d 50 (6th Cir. 1983).

125 *Id.* at 52.

126 *See id.* For a discussion of the *Amersbach* test, see *supra* notes 94-97 and accompanying text.

127 *Dove*, 701 F.2d at 53.

128 *See supra* text accompanying notes 55-127.

tivity, though trivial in itself, may, when "taken together with that of many others similarly situated," cumulatively affect interstate commerce.[129] The Federal Government is responsible for the appropriate regulation of the national economy, and through such regulation, the entire country benefits. Federal interest in the regulation of activity that is not in itself commercial, but merely affects commerce, however, is not as strong as its interest in the regulation of purely commercial activity. This consideration does not bear on the validity of the power as such. It does bear, however, on the vindication of a tangential exercise of the commerce power in the presence of a countervailing constitutional interest. Thus, a private person or corporation cannot complain of a Federal regulation affecting the commercial aspects of a purely noncommercial activity, such as the application of the National Labor Relations Act[130] to a nonprofit private charity.[131] When such an application would affect the guarantees of the religious clauses of the first amendment, however, the Supreme Court has held that the statute should be construed to deny the jurisdiction of the National Labor Relations Board over church-related high schools in order to avoid a constitutional conflict.[132] A second such countervailing constitutional interest

---

129 Wickard v. Filburn, 317 U.S. 111, 128 (1942). In that case, Filburn, a dairy and poultry farmer, maintained the side practice of raising a small acreage of wheat, customarily setting aside a part of his harvest for personal consumption, another part as feed for his poultry and livestock, and finally, a part for sale on the market. *Id.* at 114. The Court held that consumption of wheat grown on the premises constituted the most variable factor in the total amount of the nation's wheat crop, thereby coming within the ambit of the Government's power to regulate the price of wheat. *Id.* at 127-28. The Court concluded "[t]hat appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.; see also* NLRB v. Fainblatt, 306 U.S. 601 (1939).

130 29 U.S.C. §§ 141-187 (1982).

131 In 1974, Congress amended the National Labor Relations Act to bring nonprofit hospitals within the jurisdiction of the National Labor Relations Board. *See* Act of July 26, 1974, Pub. L. No. 93-360, § 1(a), 88 Stat. 395, 395 (current version at 29 U.S.C. § 152(14) (1982)); *see also* Bay Medical Center, Inc. v. NLRB, 588 F.2d 1174 (6th Cir. 1978), *cert. denied*, 444 U.S. 827 (1979).

132 NLRB v. Catholic Bishop, 440 U.S. 490 (1979); *see* Wisconsin v. Yoder, 406 U.S. 205 (1972); Lemon v. Kurtzman, 403 U.S. 602 (1971). In *Catholic Bishop*, the Court stated:

> [A]lthough the respondents press their claims under the Religion Clauses, the question we consider first is whether Congress intended the Board to have jurisdiction over teachers in church-operated schools. In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), by holding that an Act of Congress ought not be construed to

is that of the states in the preservation of their autonomy whereby they may serve the people in their respective states. In cases of Federal regulation, the benefit supposedly accruing from the regulation should be more closely examined, and the consequent harm to those served by the state or local governmental unit should be fairly appraised.

The Federal regulation in *National League of Cities* involved the requirement under the FLSA of minimum wages, maximum hours, and overtime pay for almost all state and local employees.[133] It thus affected a commercial aspect of almost all the noncommercial activities of state and local units. Police and fire personnel, town clerks, state registry workers, road repairmen, and school teachers are all involved in noncommercial activity. An appraisal of the supposed benefits accruing to the national interest and the resultant harm to the state's interest should be made. While the Federal regulation in *National League of Cities* affected the wage structures of state and local governmental units specifically and wage structures generally, its benefit to the national economy was problematic. The ensuing increase in purchasing power due to the raise in pay would be offset by either the reduction in governmental expenditures, or the additional and local taxes necessary to pay the raise. On the other hand, the harm to those served by the states and local governmental units was, as Justice Rehnquist pointed out, obvious—either the ensuing reduction in services or the additional taxes.[134] The beneficiaries of the amendment to the FLSA were not the residents of the various states or of the United States, but rather the unions of state and local governmental employees. In reality, Congress seemed to be representing this special constituency rather than the people of the states or the United States.

Long Island Rail Road stood on different grounds, however. The Federal regulation in that case covered only one class of employees, those working on passenger and freight-carrying rail-

---

> violate the Constitution if any other possible construction remains available. Moreover, the Court has followed this policy in the interpretation of the Act now before us and related statutes.

Catholic Bishop, 440 U.S. at 500.

The Court, in the same case, also referred to the problem inherent in an assertion of NLRB jurisdiction over employees of religious hospitals, pointing out the special provisions made in the National Labor Relations Act for such institutions. *Id.* at 506.

133 *National League of Cities*, 426 U.S. at 835-36; *see also supra* notes 24-26 and accompanying text (discussing the FLSA).

134 *See National League of Cities*, 426 U.S. at 848.

roads,[135] almost all of whom were employed in private industry both at the time of the original enactment and at the commencement of the case.[136] The statute was therefore one directly regulating a commercial activity. Its aim, moreover, was not to benefit labor or, for that matter, industry, but rather the general public by ensuring stable labor relations in an industry crucial to the operation of the national economy.[137] As Chief Justice Burger emphasized, both the national interest and the interest of the Federal Government in the continued operation of the statute were therefore strong, continuing, and long-standing.[138] While it was true that by the time the case began, the state operation of the commuter railroad did not constitute a commercial venture, most commuter railroads were still largely operated as such, and the Long Island Rail Road was nonetheless part of a national railroad system requiring uniform national regulation. But more importantly, the state interest in the substitution of its own strike legislation was not crucial; the freedom of their railroad employees to strike, though prohibited by state law, was nevertheless severely limited under Federal law.[139]

Balancing the respective state and Federal interests, where did *Garcia* stand? The dissenters, in voting to affirm the judgment of the trial court, barely considered the issue. Justices Powell[140] and O'Connor[141] devoted pages to attacks on the evils of overruling *National League of Cities*. Justice Rehnquist[142] concurred with those attacks in a one paragraph opinion, and Chief Justice Burger[143] concurred without opinion. Justice Powell alone considered the merits and then only briefly in one paragraph.[144] The municipal operation of a mass transit system was,

---

135 *See* Railway Labor Act § 1, 45 U.S.C. § 151 (1982).

136 *See Long Island R.R.*, 455 U.S. at 686 n.12 (stating that only two out of seventeen commuter railroads were publicly owned at time of suit).

137 *See id.* at 688-89.

138 *See id.*

139 *See generally id.* at 689.

140 *See Garcia*, 105 S. Ct. at 1021-33 (Powell, J., dissenting).

141 *See id.* at 1033-38 (O'Connor, J., dissenting).

142 *See id.* at 1033 (Rehnquist, J., dissenting).

143 *See id.* at 1021.

144 *See id.* at 1032 (Powell, J., dissenting). Justice O'Connor, in her dissent, opined that the proper resolution of the case lay "in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States." *Id.* at 1037 (O'Connor, J., dissenting). She did not, however, attempt to apply a balancing test in the *Garcia* case in view of the majority's decision to overrule *National League of Cities*. *See id.* at 1038 (O'Connor, J., dissenting).

he wrote, a classic example of a local governmental unit "indistinguishable in principle from the traditional services of providing and maintaining streets, public lighting, traffic control, water, and sewerage systems."[145] It was the kind of service the quality and cost of which only local officials could adequately judge and provide. Therefore, he concluded, this type of local activity should also be immunized from Federal regulation under the principle of *National League of Cities*.[146] Although Justice Powell chastised Justice Blackmun for abandoning the balancing test he had advocated in his concurring opinion in *National League of Cities*,[147] Justice Powell himself, because he was preoccupied with the overruling of *National League of Cities*, did not properly employ a balancing test. He also failed to follow the essential reasoning of that case—that the application of the FLSA standards to almost all state and local governmental employees would burden those governments and lead to a reduction in services, or a rise in taxes.[148]

Let us now apply a balancing test. On behalf of the states, it can be said that public mass transit, by and large operating at a deficit, is no longer a business and, in any realistic sense of the word, no longer commerce.[149] Private industry has mostly abandoned the operation of public mass transit precisely because it cannot make money, and state and local governments have engaged in ownership and operation not to make money, but as a public service.[150] Today, the provision for mass transit is—like

---

145 *Id.* at 1032 (Powell, J., dissenting) (footnote omitted).

146 *Id.*

147 *Id.; see also supra* note 87 and accompanying text (discussing Justice Blackmun's balancing test in *National League of Cities*).

148 *See supra* note 108 and accompanying text.

149 "[P]ublic transit is provided at a heavily subsidized price. Fares are nominal and account for only 25 percent of operating expenses. While some of the fare subsidy is from federal funding, a larger portion is from tax revenues collected pursuant to . . . statute. . . . The reality of transit industry economics is that services cannot be provided at a profit." San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 453 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. (1985) (citations omitted). *But see* Tolchin, *Private Concerns Gaining Foothold in Public Transit*, N.Y. Times, Apr. 29, 1985, at A1, col. 4 (stating that supporters of shift to private ownership of mass transit claim that "private operators can manage and operate . . . with more efficiency and less expense").

150 "[G]overnment is today the primary provider of transit services. . . . By 1978, public transit accounted for 91 percent of total vehicle miles, 91 percent of linked passenger trips, 90 percent of revenues generated, and 87 percent of transit vehicles operated." San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 453-54 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985) (citation omitted).

the provision for an adequate road network, safe and suitable bridges, adequate sewage systems, and even a public airport—part of the infrastructure that state and local government must maintain to keep its community attractive to both business and residents.[151] Federal requirements imposed under the FLSA on these various kinds of noncommercial governmental activity hamper the states' and local governments' ability to serve these public needs, and lead either to a reduction in these services or to an increase in user fees or taxes. In either case, the public suffers. Only the labor unions are helped. Such is the argument based on *National League of Cities*.

This argument as applied to *Garcia*, however, overlooked one salient fact: the abiding Federal interest, not present in *National League of Cities*, that under the UMTA the Federal Government provided substantial revenue toward the cost of the transit system's operation as well as toward its capital and technical assistance cost.[152] In fact, as pointed out in *Kramer*, it was the Federal Government which by the terms of the UMTA initiated the present system of widespread public mass transit.[153] Under these circumstances, the Federal interest was far stronger and more complex than in *National League of Cities*. The Federal Government was not by regulation merely raising the wages of public mass transit employees. Since the amount of the grants was far in excess of any required overtime costs,[154] the Government was providing money out of which the raise might be paid. By the

---

151 "Public transit benefits the community as a whole, helping to eliminate air pollution, alleviate traffic congestion, conserve energy, and stimulate economic development." San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 453 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985) (citations omitted).

152 During SAMTA's first two fiscal years, UMTA grants provided $12.5 million toward operating expenses. *Garcia*, 105 S. Ct. at 1008. By way of comparison, fares generated only $10.1 million of revenue, and local taxes provided $26.8 million. *Id.* As the Solicitor General noted in his brief, these grants amounted to approximately 30% of SAMTA's operating expenses. Brief for the Secretary of Labor at 7, Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985). From December, 1970 until February, 1980, the San Antonio Transit System and SAMTA, its successor, received over $51 million in UMTA grants, of which $31,040,080 represented capital grants, $20,620,270 represented operating assistance, and $28,654 was for technical assistance. *Id.* at 7-8. In effect, the Federal Government was providing SAMTA with an average of $5 million a year—$3 million for capital costs and $2 million for operating expenses. Indeed, in addition to the above amounts, SAMTA received Federal funding commitments in 1979 in order to procure 325 buses. *Id.* at 8 n.10.

153 *See Kramer*, 677 F.2d at 309.

154 *See Garcia*, 105 S. Ct. at 1020. The Court stated: "In short, Congress has not simply placed a financial burden on the shoulders of States and localities that oper-

same token,[155] the states came out ahead. On the whole, their ability to provide the transit service was enhanced rather than hampered by the Federal involvement, and they could not fairly complain about the comparatively minimal burden of one aspect of that involvement. Also, by accepting large grants of Federal money for their operations, the states had essentially compromised the cause of state sovereignty. Since they were no longer functioning as separate and independent entities, the states could scarcely talk in terms of state and local autonomy.

Justice Blackmun, in his decision to overrule *National League of Cities*, did not overlook these factors.[156] In his judgment, however, the large Federal funding of local mass transit was not the determinative factor in deciding whether Congress had unconstitutionally burdened a traditional state function.[157] Rather, it was proof that the national political process, as it operates in and through Congress, had systematically protected the states from overburdensome regulation under the commerce clause.[158]

The conclusion offered here, that the large measure of Federal funding under the UMTA offset the lesser monetary burden imposed by the overtime requirements of the FLSA, was disputed by the trial court in *Garcia* for three reasons.[159] It was one thing, the court considered, for states voluntarily to accept Federal regulation in the form of conditions upon the acceptance of a grant, but another to suffer its imposition in the form of errant regulation.[160] This is true, but it does not meet the argument here ad-

---

ate mass-transit systems, but has provided substantial countervailing financial assistance as well." *Id.*

155 Pun not intended, but at the same time not suppressed.

156 *See Garcia*, 105 S. Ct. at 1020.

157 *See id.* at 1020 n.21. Justice Blackmun stated: "Our references to UMTA are not meant to imply that regulation under the Commerce Clause must be accompanied by countervailing financial benefits under the Spending Clause. The application of the FLSA to SAMTA would be constitutional even had Congress not provided federal funding under UMTA." *Id.*

158 *Id.* at 1020. Justice Blackmun stated:

> [T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual settings of these cases the internal safeguards of the political process have performed as intended.

Id.

159 San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 451-52 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

160 *Id.*

vanced that the errancy of the Federal regulation is to be judged in the realistic terms of whether the state operates as a separate and independent entity with respect to the matter regulated.[161] Empty, if proud, rhetoric is not helpful to the genuine complaints of states' rights advocates. The trial court further considered any reference to Federal funding unfaithful to the holding in *National League of Cities*.[162] In its estimation, the Federal Government had during fiscal year 1979 appropriated approximately $25 billion to the states for use in various functions such as law enforcement, administration of justice, health, and education, as well as for the construction of sewage treatment plants, not to mention the money additionally granted for mass transit.[163] The trial court also used the recent dramatic reductions in Federal funding to the states as an example of why the existence of Federal funding was an inappropriate consideration.[164] Since Federal funding was responsive to changing political demands, the trial court concluded it was not a reliable measure of the state's sovereign interest.[165]

These last two reasons suffer from the same defect as the first. The existence of the states as separate and independent sovereignties may be an ideal. It may be in the best interest of the people, and it may be what the framers of the Constitution had originally intended and what the authors of *The Federalist* contemplated.[166] But the reality is that the states have accepted billions of dollars from the United States for the performance of

---

161 *See supra* notes 153-155 and accompanying text (arguing state was not acting as a "separate and independent entity").

162 *See* San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 452 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

163 *See id.* See also the list of Federal funding authorizations for these various purposes collected in Justice Blackmun's opinion in *Garcia*. *Garcia*, 105 S. Ct. at 1019 & n.15.

164 *See* San Antonio Metropolitan Transit Auth. v. Donovan, 557 F. Supp. 445, 452 (W.D. Tex. 1983), *rev'd sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

165 *Id.*

166 James Madison, for instance, considered the existence of the several independent states as a guarantee against the Federal Government's oppression:

> [A]mbitious encroachments of the Federal Government, on the authority of State governments, would not excite the opposition of a single State or of a few states only. They would be signals of general alarm. Every Government [i.e., State governments,] would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combination in short would result from an apprehension of the foederal [sic], as was produced by the dread of a foreign yoke.

their ordinary governmental functions. As a result, they are hardly in a position to complain about the concomitant burden of costs imposed by the United States incident to the performance of the functions, so long as the costs imposed do not exceed the amount received for the performance. Or, to put it in the language of sovereignty, a state that financially depends upon another government for the funding of its basic functions is governmentally dependent. It has compromised both its independence and its sovereignty.

As long as that condition persists, the holding in *National League of Cities* that the mere Federal regulation of a state in the performance of one of its governmental functions (let us for the moment put aside the issue of whether it is, or needs to be, "traditional") is subject to serious reconsideration.[167] It should be pointed out, however, that the majority opinion in that case not only left open the question whether Congress, by the use of Federal funding under the spending power, could "affect integral operations of state governments,"[168] it also did not consider the effect of Federal funding on the exercise of Federal power under the commerce clause. Rather, the Court accepted the plaintiff's allegations that the cost to the state and local governmental units in complying with the Federal requirements for overtime had "a significant impact on the functioning of the governmental bodies involved."[169] While the amount of this impact was challenged, the accuracy of the plaintiff's estimate was not considered crucial to the determination.[170] The Court considered the impact on state and local governments significant in any event.[171] No countervailing Federal interest was argued.

In recent years, all these considerations have been placed in a different focus. In response to proposals by the Reagan Ad-

---

THE FEDERALIST No. 46, at 320 (J. Madison) (J. Cooke ed. 1961); *see also* THE FEDERALIST No. 28 (A. Hamilton).

Eventually these statements were used in justification of the famous Kentucky and Virginia resolutions of 1798 protesting against certain acts of Congress and the Adams administration, and purporting to "interpose" the powers of state government between the allegedly usurpative powers of the Federal Government and the people whose liberties the latter threatened. *See generally* THE FEDERALIST No. 51, at 350-51 (J. Madison) (J. Cooke ed. 1961) (advocating federal form of government).

167 This is based on the assumption of this article that the holdings of *National League of Cities* would, on a later challenge, be revived. *See supra* text accompanying notes 11 & 19.

168 *National League of Cities*, 426 U.S. at 852 n.17.

169 *Id.* at 846.

170 *Id.* at 846, 851.

171 *Id.* at 846.

ministration, Congress has substantially reduced the level of Federal aid to states and local governments.[172] Large measures of unwanted sovereignty have consequently been thrust back upon the state and local governmental units over their sometimes vociferous protests.[173] Responding to the President's further proposals that government at every level should return the performance of certain activities to private business wherever possible, the Urban Mass Transit Administration has been urging the states to return substantial segments of their public mass transit systems to private hands.[174] In this new political climate, state and local governmental units, with the support of President Reagan, pressed Congress to undo the overruling of *National League of Cities* and to amend the FLSA by discontinuing the basic requirements for overtime pay for state and local governmental employees.[175] Unions of state and local governmental employees lobbied against them.[176] A compromise was reached and adopted into law.[177]

Pursuant to the new law and subject to certain prescribed conditions, a public agency, whether it be a state, a political subdivision, or an interstate agency, may grant compensatory time off at the rate of "one and one-half hours for each hour of employment for which overtime cash compensation is [generally] required" by the provisions of the FLSA.[178] This, of course, benefits the public agency: As a result of *Garcia*, SAMTA was required to compensate for overtime in cash. On the other hand, the new arrangement to some extent benefits the employee since

---

172 *See, e.g., Governors Told Funds Will Be Cut*, Wash. Post, Feb. 26, 1985, at A1, col. 6; *States Are Warned Reductions in Store for Federal Grants*, Wash. Post, July 28, 1984, at A4, col. 3; *Aid to States, Localities Declines for First Time*, Wash. Post, Dec. 14, 1983, at A21, col. 4; *Reagan Runs Into Resistance on Transferring Programs to States*, Wash. Post, Mar. 2, 1981, at A11, col. 1.

173 *See, e.g., Mayors Rally Here to Save Urban Funds*, Wash. Post, Mar. 27, 1985, at A6, col. 1; *Cities Feel Stranded, Mayor Reports*, Wash. Post, Feb. 8, 1985, at A5, col. 1; *State, Local Leaders Cry Foul on Budget*, Wash. Post, Feb. 4, 1983, at A4, col. 1; *Governors Rap Reagan's Cuts in Programs*, Wash. Post, Sept. 29, 1981, at A4, col. 1; *State Legislators Gather Anxiously to Talk About Reagan's Fiscal Policies*, Wash. Post, July 29, 1981, at A2, col. 1.

174 *See Private Concerns Gaining Foothold in Public Transit*, N.Y. Times, Apr. 29, 1985, at A1, col. 4.

175 *See Reagan Will Push to Soften Court's Ruling on Overtime*, Wall St. J., Sept. 11, 1985, at 10, col. 1.

176 *See id.*

177 *See* Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 1985 U.S. CODE CONG. & AD. NEWS (99 Stat.) 787.

178 *Id.* § 2(a), 99 Stat. at 787.

under the preexisting rule of *National League of Cities*, he was not entitled to any form of overtime compensation.

The amendment further provides for the allowance of alternate time off compensation on the following conditions: (1) that it be made pursuant to a prior agreement, collective or personal, between the public agency and the union representative or the individual himself,[179] and (2) that it be limited to a specified number of accumulated, uncompensated overtime hours.[180] In the case of employees engaged in work connected with public safety, emergency response (including hospital work), or seasonal activities, compensatory time off may not exceed 480 hours.[181] In all other cases, compensatory time off may not exceed 240 hours.[182] In addition, compliance with the overtime and record keeping provisions of the FLSA is not required until April 15, 1986,[183] and to accommodate existing public agency budgets, actual cash payments for overtime may be deferred until August 1, 1986.[184] Incidental provisions regarding outside employment, compensation for volunteer workers, and the like were also made.[185]

This compromise seems to be in the best public interest. To some extent, and within limits, it codifies the existing and widely used practice whereby state and local governmental units compensate for overtime work with time off rather than cash.[186] The banking of compensatory time, thwarted by the *Garcia* decision, is now again permissible.[187] Such banking allows public agencies the flexibility they require in the allocation of their financial resources and minimizes the likelihood of arbitrary and sudden suspensions of services, or the unpopular imposition of additional taxes. Perhaps the compromise vindicates the optimism of Justice Blackmun regarding the political process and the ability of the states and their local governments through that process to

---

179 *Id.*

180 *Id.*, 99 Stat. at 788.

181 *Id.*

182 *Id.*

183 *Id.* § 2(c)(1). The statute provides, however, that existing collective bargaining agreements that permit compensatory time off shall generally remain effective. *Id.* § 2(b).

184 *Id.* § 2(c)(2), 99 Stat. at 789.

185 *See id.* §§ 3, 4, 99 Stat. at 789-90.

186 *See* Statement by National Association of Counties 1 (undated) (discussing the Fair Labor Standards Amendments of 1985).

187 *See id.*

persuade Congress of the reasonableness of their position.[188] In form, at least, the resolution of this issue should appeal to the present majority of the Court. The substance of the resolution, however, should appeal to the dissent, for it seems to vindicate the essence of Justice Rehnquist's position in *National League of Cities*.[189]

In fact, I suspect, the compromise effectuated in the recent amendment reflects a number of factors: the numerical strength of the dissent, the present underlying popular support for their substantive position, and the professional assessment of lobbyists and elected officials on Capitol Hill that anything short of this compromise would likely meet a renewed challenge in a "third round" of litigation in a Federal court.[190] Spurred by Justice Rehnquist's prophecy, if not invitation, of that litigation, the challenge would of course be raised at such time as, after appropriate changes in the Court's personnel, would seem likely to produce a successful outcome.[191]

As for Joe Garcia, who so graciously lent his name to the case that provoked the legislation, the amendment to the FLSA leaves him poorer in cash, albeit richer in time off, than he would have been had the Court itself decided the case on the merits and applied the balancing test it utilized in both *National League of Cities* and *Long Island Rail Road*.[192] Garcia, however, is not the first litigant to fall victim to the swirling winds of prevailing and countervailing judge-made constitutional doctrine. Nevertheless, it seems a shame. He should have won. That the states must retain their ability to fulfill their role in the Union in the service of the people, who are, after all, at the same time the people of the United States, is an important constitutional principle. Whether in a particular case a state retains that ability is, however, a question of fact. When the state is actually dependent, and therefore not sovereign, the question of so-called state sovereignty is irrelevant. Just as when the Federal Government obstructs the states in the performance of their essential functions, the question of Federal sovereignty is irrelevant. In both cases, sovereignty should yield to the central consideration—whether the needs of the people are met. Service of the people, not the fanciful doctrines of competing state and Federal power, is the reason for the

188 *See supra* notes 4-6, 157-158 and accompanying text.
189 *See supra* text accompanying notes 43-45.
190 *See supra* text accompanying note 11.
191 *See supra* text accompanying notes 13-18.
192 *See supra* text accompanying notes 133-138.

existence of governments. When, therefore, after a fair assessment, the Court has determined in a given case, as in *Garcia*, that the Federal Government has not obstructed but in fact aided the state in the service of local needs, no sound constitutional impediment exists to the enforcement of Federal policy such as the payment of overtime cash. In the ordinary pursuit of fact, the Court should eschew the positing of unnecessary constitutional doctrine, and in the reconciliation of local needs and individual claims, do justice in the case.