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Federalism and Federal Regulation of Public Employers: The Implications of National League of Cities v. Usery

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NOTES

FEDERALISM AND FEDERAL REGULATION OF PUBLIC EMPLOYERS: THE IMPLICATIONS OF *NATIONAL LEAGUE OF CITIES v. USERY*

ONE OF THE GREAT CHALLENGES in the drafting of the Constitution was the attempt to create a stronger central government than the one existing under the Articles of the Confederation, and at the same time to preserve the identity and sovereignty of the states.[1] The response to this challenge was the creation of a national government of specific, delegated powers, and the reservation of all non-delegated powers to the states and to the people unless specifically prohibited by the Constitution.[2] Though the allocation of powers in the Constitution between the federal and state governments is perhaps the distinctive characteristic of our system, "fascinating"[3] and difficult[4] problems of analysis are created where the ill-defined outer reaches of national power intrude deeply into the realm of state sovereignty. The purpose of this Note is to examine the limits of the federal commerce power[5] when applied to the states as states, using as a focal point, the controversies which have arisen in the application of the Fair Labor Standards Act of 1938 (FLSA)[6].

I. THE NATURE OF THE PROBLEM

At least four key Supreme Court decisions concerning state sovereignty and the reach of the commerce power have been rendered in cases involving the Fair Labor Standards Act of 1938. In the most recent of these cases, *National League of Cities v. Usery*,[8] the Court held that the minimum wage and overtime provisions of the FLSA[9] could not be ap-

[1] WARREN, THE MAKING OF THE CONSTITUTION 146-51 (1937).

[2] GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 81 (9th ed. 1975). The most notable delegation of powers to the national government in the Constitution is in section 8 of article I. Non-delegated powers are reserved to the states by the tenth amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited to it to the States, are reserved to the States respectively, or to the people." U. S. CONST. amend. X.

[3] Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 682 (1976).

[4] *See* BLACK, PERSPECTIVES IN CONSTITUTIONAL LAW 41 (1963).

[5] The commerce clause provides: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . ." U. S. CONST. art. I, § 8, cl. 3.

[6] Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060, (current version at 29 U.S.C. §§ 201-219 (1970 & Supp. V. 1975)). The FLSA is the basic federal law governing wages, hours and working conditions. *See* notes 24-31 *infra* and accompanying text.

[7] National League of Cities v. Usery, 426 U.S. 833 (1976); Employees v. Department of Health and Welfare, 411 U.S. 279 (1973); Maryland v. Wirtz, 392 U.S. 183 (1968); and United States v. Darby, 312 U.S. 100 (1941).

[8] *See* note 7 *supra*.

[9] 29 U.S.C. §§ 206-207 (1970 & Supp. V 1975).

plied to employees of state and local governments, invalidating a 1974 amendment to the Act which expressly provided for such application.[10] The Court found that extension of these guidelines to public employees would constitute an unconstitutional exercise of the commerce power in that federal regulation would "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions,"[11] contrary to "the federal system of government embodied in the Constitution."[12]

Immediately following the Supreme Court's decision in *National League*, a number of public employers moved for summary dismissals in suits brought by employees[13] under the Equal Pay Act,[14] and the Age Discrimination in Employment Act,[15] both of which Acts are related in scope and intent to the Fair Labor Standards Act. The Equal Pay Act of 1963, which prohibits discrimination in compensation on the basis of sex, is contained in section 6 of the FLSA. The Age Discrimination in Employment Act contains similar provisions to protect older workers, and incorporates the enforcement mechanisms of the FLSA. All of these Acts are codified in Title 29 of the United States Code, and each is based expressly upon a congressional finding of burdens on interstate commerce.[16] Congress extended coverage under all three Acts to employees of state and local governments in 1974 by amending the FLSA definition of "employer" to include public agencies.[17] Nevertheless, most courts[18] that have addressed the question have refused to hold that the Supreme Court's decision in *National League* precludes application of the sex and age discrimination provisions to public workers.

Both Circuits that have addressed the issue on appeal have held that

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[10] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 54 (*amending* 29 U.S.C. §§ 203(e), 203(r), 203(s), 203(x) (1970 & Supp. V 1975)).

[11] 426 U.S. 833, 852 (1976).

[12] *Id.*

[13] For a listing of cases in which it was held that the Equal Pay Act and the Age Discrimination in Employment Act apply to public as well as private employers, *see* note 171 *infra*. For the two cases that reached the opposite conclusion, *see* note 20 *infra*.

[14] Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970). The Act provides in part that "[N]o employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work." *Id.* § 206(d)(1).

[15] This Act provides in part:

> Sec. 4(a) It shall be unlawful for an employer —
> (1) to fail or to refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age . . . .

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 603 (codified as amended at 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975)).

[16] *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2(a)(4), 81 Stat. 602; Equal Pay Act of 1963, Pub. L. No. 88-38, § 2(b), 77 Stat. 56; Fair Labor Standards Act § 2(a), ch. 676, 52 Stat. 1060 (1938).

[17] *See* note 10 *supra*.

[18] *See* note 171 *infra* and accompanying text.

the Equal Pay Act is binding on state and local governments, and in one of these cases the Supreme Court denied certiorari.[19] A third appeal is now pending in the Sixth Circuit, however, in a case in which the district court held that the Equal Pay Act may not be applied to public employees in light of the *National League* decision.[20] Furthermore, in those circuits which have held the sex and age discrimination acts applicable to public employees, there is disagreement whether the acts are supportable under the commerce power, or only as valid exercises of the power granted by section 5 of the Fourteenth Amendment. The implications of the *National League* decision in these areas are as yet unresolved.

Similar difficulties appeared upon remand of the *National League* case as the district court attempted to fashion a decree implementing the Supreme Court's opinion.[21] First, the district court followed the majority of the lower courts which have considered the question in refusing to rule that the Equal Pay Act, the Age Discrimination in Employment Act, and the Portal-to-Portal Act[22] were inapplicable to state and local governments as a result of *National League*.[23] The court also declined to extend to *all* public employees the Supreme Court's invalidation of the minimum wage and overtime provisions, pointing out that Mr. Justice Rehnquist's opinion had referred only to "activities integral to and traditionally provided by government."[24]

As part of its final decree, therefore, the district court required the Secretary of Labor henceforth to publish in the Federal Register and the Code of Federal Regulations a listing of those non-traditional governmental functions that will be required to comply with the minimum wage and overtime standards of the FLSA.[25]

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[19] Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); Usery v. Charleston County School Dist., 558 F.2d 1169 (4th Cir. 1977).

[20] Usery v. Owensboro-Daviess County Hosp., 423 F. Supp. 843 (W.D. Ky.), *appeal filed*, No. 77-3069 (6th Cir. Dec. 20, 1976). A conclusion similar to that in the *Owensboro* case was reached in Howard v. Ward County, 418 F. Supp. 494 (D.N.D. 1976). In the latter case, however, the district court upheld the plaintiff's sex discrimination claim under Title VII of the Civil Rights Act, which provides essentially the same protections as the Equal Pay Act. *See* 42 U.S.C. § 2000e-2(a) (1970 & Supp. V 1975). For further treatment of the relationship between Title VII and the Equal Pay Act, *see* text at note 181 *infra*.

[21] National League of Cities v. Marshall, 13 Empl. Prac. Dec. 6933 (D.D.C. 1977) (per curium), *final decree entered sub nom.*, National League of Cities v. Usery, No. 74-1812 (D.D.C. 1977).

[22] The Portal-to-Portal Pay Act of 1947, ch. 52, 61 Stat. 84 (codified at 29 U.S.C. § 251-262 (1970 & Supp. V 1975)). This Act was passed to counteract judicial interpretations of the Fair Labor Standards Act which had resulted in enormous windfall recoveries for employees. It also serves to regulate suits under the FLSA, the Walsh-Healey Act, and the Bacon Davis Act. *See* H.R. REP. No. 71, 80th Cong., 1st Sess., *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1029.

[23] 13 Empl. Prac. Dec. at 6933, 6934.

[24] *Id.* at 6935.

[25] *See* National League of Cities v. Usery, No. 74-1812, slip op. at 1 (D.D.C. March 9, 1977). The regulations governing future enforcement of the minimum wage and overtime provisions of the FLSA against state and local governments were included as an appendix to the judge's opinion, and will be codified at 29 C.F.R. §§ 775.2, .3. The regula-

The lower courts have experienced notable difficulties in interpreting the meaning of the *National League* opinion as it affects both the extension of sex and age discrimination guidelines to public employers, and the continued application of the minimum wage and hour laws to non-traditional public workers. These difficulties are not surprising, considering that the case invoked rarely-used limits on a major constitutionally-delegated power. The case involved the delicate interrelationships between Congress and the Supreme Court,[26] and between the national government and the states, where the boundaries of power are often unclear. The basic shortcoming of the Court's opinion in *National League* was that it failed to articulate sufficiently its reasons for determining that Congress had overstepped the bounds of the commerce power and intruded unconstitutionally upon the states. Furthermore, the Court did not delineate the roles that Congress, the states, and the courts should assume in the application of a meaningful test. The absence of these elements in the Court's opinion is likely not only to create further confusion in the lower courts, but more importantly to cause misunderstandings regarding the allocation of power within the federal system.

II. THE FAIR LABOR STANDARDS ACT PRIOR TO NATIONAL LEAGUE OF CITIES V. USERY

A. *The Fair Labor Standards Act of 1938*

The FLSA was based upon the congressional finding that unfair labor practices by employers engaged in the production of goods for commerce causes unsatisfactory conditions to spread among the states, burdens the free flow of goods, constitutes an unfair method of competition,

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tions provide that the Secretary of Labor will not seek to enforce the wage and overtime guidelines, except where the government body has received 30 days notice that the employees are not performing "integral operations in areas of traditional governmental functions." 29 C.F.R. § 775.2(b). Such notice must be given either directly to the governmental body, or published in the Federal Register in the list of non-traditional governmental activities. The offending governmental unit will then be given the opportunity to comply voluntarily with the minimum wage and overtime guidelines before suit is filed. Any relief, moreover, will be prospective only when the suit involves any activity not previously determined to be non-traditional by judicial decision or administrative ruling. 29 C.F.R. § 775.2(d). Also, liquidated or double damages will not be recoverable in cases where there has not been a prior determination that the activity is non-traditional. *Id.* The only activity listed in the regulations as non-traditional is the operation of a railroad by a state or political subdivision. 29 C.F.R. § 775.3(a). This activity was specifically found to be non-traditional in the Supreme Court's opinion. *See* National League of Cities v. Usery, 426 U.S. 833, 854 n. 18 (1976).

[26] The importance of understanding the distinct roles of Congress and the Supreme Court in handling issues concerning the scope of the national government's powers was recently discussed in Tribe, *supra* note 3, at 695-97. In his article Professor Tribe argues that, subject to the unclear constitutional limits of federalism contained in the tenth and eleventh amendments, Congress has a "peculiar institutional competence" to allocate power within the federal system. The gist of this argument is that the states are represented in Congress and therefore are able to protect their interests. *Cf.* National League of Cities v. Usery, 426 U.S. 833, 876-77 (1976) (Brennan, J., dissenting). *But see* the majority opinion in *National League*, 426 U.S. at 841 n. 12. *See generally* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Mishkin, *Some Further Last Words on Erie — The Thread*, 87 HARV. L. REV. 1682 (1974); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

leads to labor disputes, and interferes with marketing.[27] By its terms, the Act was an express exercise of Congress' power to regulate commerce.[28] Major provisions of the Act establish minimum wages,[29] required premium pay for overtime,[30] outlawed the use of oppressive child labor,[31] and require records to be kept.[32] Employers who violate the wage and hour provisions of the Act are liable to the employees affected for double the amount of wages or overtime not properly paid, and are subject to possible criminal liability.[33] Enforcement actions may be brought by the employee, by his representative such as a union, or by the Secretary of Labor.[34]

B. *Federalism Challenges to the FLSA*

1. United States v. Darby

The Act originally applied only to employees actually engaged in commerce or in the production of goods for commerce.[35] The FLSA was declared constitutional in *United States v. Darby*,[36] which concerned the application of the Act to employees of a manufacturing firm which shipped goods to other states. The Supreme Court held that although manufacturing itself is not interstate commerce, the means adopted by Congress, regulating the local production of goods for commerce, were appropriate to the end of regulating interstate commerce itself. The Court also rejected the argument that the tenth amendment is a barrier to the legitimate exercise of the commerce power over "local" activities, commenting that "the amendment states but a truism that all is retained which is not surrendered."[37]

2. The 1961 and 1966 Amendments, and Maryland v. Wirtz

The FLSA was amended in 1961 to extend coverage to employees employed in "enterprises" engaged in commerce or in the production of goods for commerce.[38] The practical effect of this amendment was to

[27] 29 U.S.C. § 202(a) (1970 & Supp. V 1975).

[28] 29 U.S.C. § 202(b) (1970).

[29] 29 U.S.C. § 206 (1970 & Supp. V 1975).

[30] *Id.* § 207.

[31] *Id.* § 212.

[32] 29 U.S.C. § 211 (1970).

[33] 29 U.S.C. §§ 216(a), 216(b) (1970 & Supp. V 1975).

[34] 29 U.S.C. §§ 216(b), 216(c) (1970 & V 1975). Prior to the 1974 amendments, actions were brought by the Administrator of the Wage and Hour Division of the Department of Labor rather than by the Secretary of Labor. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 26, 88 Stat. 54 (amending 29 U.S.C. § 216(c) (1970)).

[35] *E.g.* Fair Labor Standards Act of 1938, ch. 676, §§ 6(a), 7(a), 52 Stat. 1060 (amended 1974).

[36] 312 U.S. 100, 121 (1941).

[37] *Id.* at 124. The Court overruled Hammer v. Dagenhart, 247 U.S. 251 (1918) which held that manufacturing was a matter of state or local concern, and that the tenth amendment precluded national regulation thereof. 312 U.S. 100, 115-17 (1941).

[38] Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 2(c), 75 Stat. 65 (codified at 29 U.S.C. §§ 203(r), 203(s)).

include all the co-workers of previously-covered employees without enlarging the number of covered employers. The Act was amended again in 1966 to include non-teaching public school employees, and employees of public hospitals, institutions, and transit systems.[39] This was the first time that any public employees had been covered by the Act.

In *Maryland v. Wirtz* the State of Maryland sued the Secretary of Labor to enjoin enforcement of the 1961 and 1966 amendments, arguing that both the enterprise concept and the extension of the Act to public employees were beyond the scope of the commerce power and therefore unconstitutional. Justice Harlan's opinion for the Court rejected both arguments, and the enterprise concept was upheld on three distinct grounds. First, a rational basis was found for Congress' finding that commerce is affected by the wages paid to coworkers of employees engaged in producing goods for commerce.[41] This was based upon the idea that a business paying substandard wages, even though only to employees not engaged directly in commerce or production for commerce, could compete unfairly with employers not paying substandard wages and thereby impede Congress' purpose. Second, the Court found a rational basis for the enterprise concept as a method of preventing labor unrest which could spread to employees actually engaged in commerce or production, thereby disrupting commerce.[42] Third, the Court found that an enterprise could be covered even if only a few of its employees were engaged in commerce or production, despite the argument that this would allow "the tail to wag the dog."[43] It was reasoned that Congress has the power to declare that an entire class of activities affects commerce, and while the Court may scrutinize the basis of Congress' finding, it should not exclude individual members of the class.[44] Otherwise it would be impossible to reach a type of activity substantially impeding commerce when the activity is carried out by a large number of individuals or businesses, many of which impede commerce only slightly.

The second and more important question addressed in *Wirtz* was

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[39] Employees of private schools, hospitals, institutions and transit systems had been covered previously. Fair Labor Standard Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 830 (amending 29 U.S.C. §§ 203(r), 203(s)).

[40] 392 U.S. 183 (1968).

[41] *Id.* at 190. The Court cited Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) in support of the proposition that the Court itself need only find that Congress had a rational basis for creating the regulatory scheme.

[42] 392 U.S. at 191-92.

[43] *Id.* at 192.

[44] The Court relied here on United States v. Darby, 312 U.S. 100 (1941), and on Wickard v. Filburn, 317 U.S. 111 (1942). *Darby* upheld application of the FLSA to a class of *intra*state activities — production of goods for commerce — as an appropriate means of regulating interstate commerce. 312 U.S. at 121. In *Wickard* the Court rejected the argument of an Ohio farmer that the Agricultural Adjustment Act could not constitutionally be applied to regulate wheat grown for home consumption. Justice Jackson's opinion stated that while the wheat grown by one individual would admittedly have a trivial impact on the national market price, that wheat together with the wheat of all the other farmers similarly situated would have a substantial impact. Therefore, to allow the plaintiff to be exempt from the Act would defeat the legitimate scheme of Congress to control interstate commodity prices. 317 U.S. at 127-29.

whether employees in public institutions could be included within the coverage of the FLSA. Justice Harlan first established that schools and state institutions have a substantial impact on interstate commerce through their purchases of millions of dollars of goods and equipment from out of state.[45] Strikes by public employees under these circumstances would clearly impede the flow of goods across state lines. The opinion then proceeded to dismiss the appellants' argument that Congress was interfering with sovereign governmental functions of the states. Relying upon the case of *United States v. California*,[46] in which the Safety Applicance Act[47] had been upheld in its application to a state-run railroad, the Court in *Wirtz* found no basis for distinguishing between activities carried on by the states and similar activities carried on by private interests. Assuming of course that there is a sufficient nexus to the power to regulate commerce, state activities as well as private ones may be regulated:

> [W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.[48]

Going further perhaps than the facts of the case required, Justice Harlan then stated that neither the "governmental" nor the "proprietary" functions of a state are immune from the valid exercise of a delegated power. Moreover, he denied that there was any basis for the appellants' contention that there was a constitutional doctrine implying that the national and state governments may not "interfere with the free and full exercise of the powers of the other."[49]

The far-reaching implications of Harlan's view of the breadth of national powers to regulate the states' governmental functions drew a strong dissent from Justice Douglas. The thrust of his dissent was that the 1966 amendments to the FLSA were an intrusion on state fiscal

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[45] 392 U.S. at 194.

[46] 297 U.S. 175 (1936).

[47] Safety Appliance Act, ch. 196, § 6, 27 Stat. 531 (1893), *as amended by* Act of April, 1, 1896, ch. 87, 29 Stat. 85 (1896).

[48] 392 U.S. at 196-197.

[49] *Id.* at 195. Justice Harlan was quoting here from the opinion of the Court in Case v. Bowles, 327 U.S. 92, 101 (1946). In *Bowles* the Court held that the sale of timber by the State of Washington to raise money for the support of the public schools was subject to the Emergency Price Control Act despite a provision of the congressional enabling act providing for the admission of Washington to the union which stipulated that the timber could not be sold for less than ten dollars per acre. (The timber was grown on lands granted to Washington by the federal government at the time of its admission.) The enabling act provision had in turn been incorporated into the state constitution. The ceiling price for such sales under regulations issued pursuant to the Emergency Price Control Act was lower than the minimum allowed by the enabling act and the state constitution. *See* further discussion of *Case v. Bowles* in text accompanying notes 152-57 *infra*.

policy and therefore impermissible under the tenth amendment.[50] While the dissent admitted that the states were not altogether immune from regulation under the commerce power, it posited a distinction "between the state as government and the state as trader."[51] There was no objection to regulating trade activities such as the sale by a state of mineral water,[52] but Douglas saw no reason to assume from the majority opinion that Congress, aided by the enterprise concept, could not take over virtually all state governmental activities involving expenditures of money, including drawing up each state's budget.[53] This would give Congress free rein to "devour the essentials of state sovereignty," contrary to what the dissent viewed as the protection of that sovereignty under the tenth amendment.[54] While only Justice Stewart joined Douglas in his dissent,[55] the position argued is essentially that propounded by the majority eight years later in *National League of Cities v. Usery*.

3. Enforcement of the 1966 Amendments: The Eleventh Amendment

The majority opinion in *Wirtz*, while upholding generally the extension of the FLSA to the public employees enumerated in the 1966 amendments, expressly reserved the question whether an employee denied the rights protected by the Act could sue his employer.[56] This question was presented squarely in *Employees v. Department of Public Welfare of the State of Missouri*.[57] The district court had dismissed a suit by state employees alleging violations of the overtime provisions of the Act on the grounds that the state had not consented to the suit, and that the action was therefore barred by the eleventh amendment.[58] The court of appeals affirmed *en banc*.[59]

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[50] 392 U.S. at 201-03.

[51] *Id.* at 205 (quoting New York v. United States, 326 U.S. 572, 579 (1946)) (opinion of Franfurter, J.).

[52] *See* New York v. United States, 326 U.S. 572 (1946).

[53] 392 U.S. at 204-05.

[54] *Id.* at 205.

[55] The majority consisted of Chief Justice Warren, and Justices Black, Brennan, White, and Fortas, in addition to Justice Harlan. Justice Marshall did not participate in the decision.

[56] This question was not reached in *Wirtz* because that case was an action for an injunction against enforcement of the 1966 amendments, and for a declaratory judgment to the effect that the amendments were unconstitutional. The plaintiffs attempted also to raise the question of the states' amenability to suit in federal court in light of the eleventh amendment, but the three judge court below ruled that the question should await an actual suit by an employee. 269 F. Supp. 826, 831 n. 12 (D. Md. 1967). The Supreme Court's opinion agreed with the ruling of the court below, 392 U.S. 183, 199-200, pointing to the separability provision of the Act, 29 U.S.C. § 219 (1970), and the abstract nature of the question.

[57] 411 U.S. 279 (1973).

[58] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[59] 452 F.2d 820 (8th Cir. 1971).

While the eleventh amendment by its terms bars only suits in federal courts against a state by citizens of another state, it has traditionally been interpreted as a bar against suits by citizens of the same state as well.[60] Nonetheless, it is clear that a state may be sued in a federal court it if consents, and the consent may be express or by waiver. In the 1964 case of *Parden v. Terminal Railway Co.*,[61] the Court had held that by continuing to operate a railroad, a state had impliedly consented to suits by employees under the Federal Employers' Liability Act, thereby waiving its eleventh amendment immunity. The issue in *Employees*, then, was whether Missouri had consented to suits under the Fair Labor Standards Act by continuing to operate its institutions after passage of the FLSA. The majority opinion by Justice Douglas held that it had not.

The opinion first distinguished *Parden* on the ground that the railroad involved in that case was operated for profit and was a relatively minor state function.[62] The state institutions brought within the coverage of the FLSA, on the other hand, were much larger enterprises and were not conducted for profit.[63] Although Congress had clearly expressed its intent to include certain public employees within the minimum wage and overtime sections of the Act, there was no amendment of the enforcement provisions[64] to expressly allow suit against the states which employed them. The Court refused, therefore, to assume that Congress had *sub silentio* required the states to waive their immunity from suit in federal courts as a condition of continuing to operate major public institutions.[65] Nor would the Court agree that Congress impliedly overrode the states' immunity by the use of the commerce power.[66] By denying the employees' right to sue on their own behalf the Court did not entirely deny them a remedy, since the FLSA allowed the Secretary of Labor to sue in their behalf[67] and the Court reasoned that he was an appropriate party to handle "the delicate federal-state relationship."[68]

Following the decision in *Employees* Congress moved quickly in the 1974 amendments to the FLSA to expressly provide to individual employees a right to sue "in any Federal or State court of competent juris-

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[60] This has been the rule since the decision in Hans v. Louisiana, 134 U.S. 1 (1890). *See* note 127 *infra*.

[61] 377 U.S. 184 (1964).

[62] 411 U.S. at 284-85.

[63] *Id.* at 284.

[64] 29 U.S.C. § 216 (1970).

[65] 411 U.S. at 285.

[66] *Id.* at 286-87.

[67] 29 U.S.C. § 216(c) (1970). However, Justice Brennan's dissent pointed out that "the Secretary of Labor has neither the staff nor resources to take on the enormous number of claims counted upon to be vindicated in private actions." 411 U.S. at 305. Suits brought by the Secretary of Labor would not be barred by the eleventh amendment, since they are considered to be suits by the United States, *e.g.* Mitchell v. Robert DeMario Jewelry, Inc., 260 F.2d 929, 932 (5th Cir. 1958), *rev'd on other grounds*, 361 U.S. 288 (1960). That the eleventh amendment does not provide the states with immunity from suit by the United States was decided in United States v. Mississippi, 380 U.S. 128, 140 (1965).

[68] 411 U.S. at 286.

diction."[69] Congress' now-clear intent[70] has had little impact, however, since the extension of the minimum wage and overtime provisions to all public employees was struck down in *National League*.

4. Passage of the 1974 Amendments

It took the Ninety-third Congress two tries to successfully extend the coverage of the Fair Labor Standards Act to non-supervisory public employees. President Nixon vetoed the amendments to the FLSA passed by Congress in 1973, based in part on his opposition to the expanded coverage.[71] During legislative hearings, the Nixon Administration had previously opposed the proposal to include public employees, arguing that it would be too great an interference with state prerogatives.[72] Congress had little reason to fear, however, that either the 1973 or 1974 amendments would be declared unconstitutional. *Wirtz* had upheld coverage of public school, institutional, and transit employees, and Department of Labor estimates showed that the extention of the minimum wage and overtime provisions to other non-supervisory public employees would have a minimal fiscal impact on state and local governments, smaller in fact than that of the 1966 amendments.[73] Furthermore, the amendments in their final form required premium pay for police, fire, and correctional employees only if they worked in excess of fifty-four hours per week averaged over a four-week period.[74] It appeared therefore that the political process had produced a bill that included concessions to valid budgetary concerns at the state and local level.[75] Moreover, the legislative history reveals an express finding by Congress that public employment has an impact on commerce. This impact results both from large purchases of goods, and from large gov-

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[69] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(d)(1), 88 Stat. 55 (amending 29 U.S.C. § 216 (1970)).

[70] The legislative history of the amendments makes it clear that Congress intended to alter the outcome in *Employees*. *See* Fair Labor Standards Amendments of 1974, H.R. REP. No. 93-913, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811, 2853.

[71] *See* Message from the President of the United States Vetoing H.R. 7935, H.R. Doc. No. 93-147, 93d Cong., 1st Sess 3 (1973).

[72] *Proposed Amendments to the Fair Labor Standards Act: Hearings on H.R. 4757 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess., 259 (1973) (statement of Peter J. Brennan).

[73] *See* H.R. REP. No. 93-913, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811, 2838. These estimates indicated that 138,000 additional public employees would be benefitted by a minimum wage of $2.30 per hour. The House Report indicated that the total number of state and local employees at that time was 6.3 million. According to the House Report, if a 40-hour week had been imposed on all covered employees, the impact on state and local budgets as a result of having to pay time-and-one-half for overtime would have been less than one per cent of their present payroll as of the date of the report.

[74] This figure was to be lowered by the Secretary of Labor on January 1, 1978 to the average number of hours worked in a 28-day period by public safety employees, if that average was less than 216. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6 (c)(1)(D), 88 Stat. 55, 61.

[75] *Cf.* National League of Cities v. Usery, 426 U.S. 833, 877 n. 13 (1976) (Brennan, J., dissenting).

ernment payrolls. The amendments undoubtedly reflected legitimate congressional concern that the benefits previously accorded employees in the private sector should not be withheld from the growing numbers of public employees.[76] Thus, given the concessions to critical local safety services, and given Justice Harlan's broad holding in *Wirtz* that no state activities are immune from a valid exercise of the commerce power,[77] there was good reason for Congress to assume that the 1974 amendments would withstand Supreme Court scrutiny.

III. National League of Cities v. Usery

A. *The Case Below*

The 1974 amendments took effect generally on May 1, 1974,[78] though the provisions relating to law enforcement, fire, and correctional security personnel were not to be effective until January 1, 1975.[79] On December 31, 1974, a three judge district court refused the petition of the National League of Cities and a number of state and local governmental bodies to enjoin the application of the amendments about to go into effect.[80] The court felt bound by *Wirtz*, although it expressed reservations about the amendments' constitutionality.[81] Later that same day, however, Chief Justice Burger, acting as Circuit Judge, entered an interim order granting temporary injunctive relief pending appeal to the full Court.[82]

B. *The Majority Opinion*[83]

The issue as framed by the Supreme Court was whether the manner in which Congress chose to exercise its power under the commerce clause breached an affirmative doctrine of inter-governmental immunity and was therefore unconstitutional.[84] Recognizing that the commerce power is limited by certain individual rights[85] contained in the first ten amendments, the majority submitted that similar limits are placed upon that power by the rights of the states.[86] The policy of federalism

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[76] Fair Labor Standards Amendments of 1974, S. Rep. No. 93-690, 93d Cong., 2d Sess. 24 (1974).

[77] *See* text accompanying note 49 *supra*.

[78] Pub. L. No. 93-259, § 29 (a), 88 Stat. 55 (1974).

[79] Pub. L. No. 93-259, §§ 6(c)(1)(A), 6(c)(2)(B), 88 Stat. 55 (1974).

[80] National League of Cities v. Brennan, 406 F. Supp. 826 (D.D.C. 1974).

[81] *Id.* at 827.

[82] 419 U.S. 1321 (1974). Probable jurisdiction was noted by the Supreme Court, 420 U.S. 906 (1975), but no decision was reached during the 1974 term. The case was reargued during the 1975 term.

[83] Justice Rehnquist's opinion was joined by Chief Justice Burger, and Justices Stewart, Blackmun, and Powell. Justice Blackmun also wrote a concurring opinion. All of these justices had been appointed to the Court since the decision in *Wirtz*, except Justice Stewart who had joined in the dissent in that earlier opinion.

[84] National League of Cities v. Usery, 426 U.S. 833, 841 (1976).

[85] *Id.* at 842.

[86] *Id.* at 842-46.

was found to be embodied in the tenth amendment.[87] As interpreted by the Court, this policy may be infringed upon by laws, otherwise within the plenary power of the national government, when these laws are directed "to the states as states."[88]

Having assumed that the determination of the wages, hours, and overtime compensation of state employees was "an undoubted attribute of state sovereignty," the Court considered whether the right to make the determination was a function "essential to separate and independent existence" of the states.[89] Since the principal concern was with the right of the states and local governments to make these decisions, questions of the precise financial impact of the FLSA amendments were considered to be of secondary importance.[90] Nevertheless, the opinion noted the appellants' claims that there would be significant increases in cost, and that certain programs would necessarily have to be diminished or abandoned altogether.[91] The appellees argued that the increased cost of overtime could be avoided by hiring additional employees who could be paid at the non-premium rate, and that this would further the policy of Congress to increase employment.[92] The Court rejected this argument, recognizing that although there was a rational relationship to commerce, the amendments would force state and local governments to alter traditional methods of delivering services. The Court noted further that local policies regarding compensatory time and volunteerism would be adversely affected.[93]

The conclusion of the Court was that regardless of the exact financial burdens, "both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral government functions" of State and local governments.[94] The Court specifically mentioned five services which have traditionally been rendered by these bodies, and which to a large degree constitute their *raison d'etre*: "fire prevention, police protection, sanitation, public health, and parks and recreation."[95] Loss of control over these and other traditional operations would leave

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[87] *Id.* at 842. Although the Court's opinion stated that this policy of federalism was embodied in the tenth amendment, the Court did not hold that the tenth amendment itself was a bar to the passage of the FLSA amendments being considered. For further discussion of this point, *see* the text commencing at note 112 *infra*.

[88] *Id.* at 845.

[89] *Id.*

[90] *Id.* at 846.

[91] *Id.* at 847-48.

[92] *Id.* at 849 (citing Brief for Appellee at 43).

[93] *Id.* at 850-51. While Mr. Justice Brennan conceeded in his dissent that the exact financial impact of the amendments was not material to the underlying issues of federalism, he noted that there was no agreement between the two sides as to the extent of this impact. He further noted that the Secretary of Labor "vigorously argue[d] in this Court that appellants' cost allegations are greatly exaggerated and based on misinterpretations of the 1974 amendments." *Id.* at 874 n. 12.

[94] *Id.* at 851.

[95] *Id.* at 851. The Court pointed out in a footnote that "[t]hese examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Id.* at 851 n. 16.

little of the "separate and independent existence of the states."[96] Based on these conclusions, the Court held that Congress had exceeded its power, and that the amendments were unconstitutional:

> This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.[97]

The Court then proceeded to distinguish *United States v. Fry*,[98] and to overrule *Wirtz*. *Fry* was distinguished because it involved an emergency measure, and because the terms of the regulation were carefully tailored in time and scope to meet a national crisis. In addition, no financial burdens were placed upon the states, and no new choices mandated. The states were simply told to maintain for a time the positions that they had already chosen. The Court declined to distinguish *Wirtz*, however, rejecting the argument of the appellees that the activities covered by the 1966 FLSA amendments only applied to governments when they entered fields simultaneously engaged in by private employers. Since those earlier amendments affected employment decisions relating to schools and hospitals, and since schools and hospitals were no less traditional governmental services than those reached by the 1974 amendments, *Wirtz* could not stand.[99] Thus the Court reinforced the position, minimized if not repudiated in *Wirtz*, that there is an essential constitutional distinction between legislation aimed at the "states as states" and that aimed at businesses and individuals.[100]

Justice Blackmun joined in the opinion of the Court, but also submitted a concurring opinion. His understanding of the majority opinion was that it implied a "balancing" test, and that congressional regulation of the states would still be permissible if justified by a more substantial national interest in uniformity among the states.[101]

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[96] *Id.* at 851 (quoting Coyle v. Smith, 221 U.S. 559, 580 (1911)). In *Coyle*, the Court invalidated a provision of the federal enabling act admitting Oklahoma to the union which provided that the state capital would not be removed from Guthrie, Oklahoma until 1913. The Court held that Congress could not place restrictions on a state's ability to locate its capital once it had become a state, and that to allow Congress to do so as an exercise of its power to admit states would have placed Oklahoma on a different footing than other states. U.S. CONST. art. IV, § 3. The Court noted further that the power to require a state to locate its capital in one place is not referable to any constitutional power.

[97] 426 U.S. at 852 (footnote omitted).

[98] 421 U.S. 542 (1975). In this case, an important prelude to *National League*, the Court upheld the Economic Stabilization Act of 1970 as applied to state governments. The purpose of this Act was to give the President power to control inflation, and regulations promulgated pursuant to the Act placed a freeze on all wages and salaries. Although the Act did not expressly authorize control of the earnings of state employees, Justice Marshall's opinion found that the legislative history and wording of the Act "leave no doubt" that they were to be covered. *Id.* at 545-46.

[99] 426 U.S. at 855.

[100] *Id.* at 854.

[101] *Id.* at 856.

C. *The Dissenters*

Justice Brennan's long, impassioned dissent attacked the majority opinion as ignoring judicial precedent, as importing "nothing but displeasure with a congressional judgement,"[102] and as "a catastrophic judicial body blow at Congress' power under the commerce clause."[103] His argument was essentially that there is no affirmative state sovereignty right, and that the only limits upon Congress within the bounds of the commerce power are self-imposed political judgements.[104] It is to Congress that the Constitution delegates the responsibility of protecting state interests, by virtue of the election of representatives to that body. The judiciary has no such constitutional charge.[105] The states, moreover, have more than sufficient power to protect their interests. The responsibility of the Court, on the other hand, should be to protect the national government against the erosion of its power by the States.[106]

Justice Stevens' dissent, while agreeing with the majority that the policy judgments of Congress had been unwise, adopted the view that the Court was without constitutional support in declaring the amendments to be invalid since Congress had acted within the scope of its delegated powers.[107]

IV. The Nature of the Affirmative Constitutional Right Breached by Congress in Extending the FLSA to State and Local Governments

A. *The Necessary and Proper Clause*

The essential difference between the majority and the dissent in *National League* was in their approach to determining the boundary between state and national power. The majority's position was that there is an affirmative, constitutionally-based right of sovereignty which protects the states, even though Congress may be acting within the scope of its delegated powers to regulate private interests. The dissent, on the other hand, argued that a delegated power is just that. Notwithstanding the fact that the scope of congressional power may have been formulated in cases involving regulations of private interests, the dissent argued that until Congress exceeds the scope of its delegated pow-

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[102] *Id.* at 872.

[103] *Id.* at 880.

[104] *Id.* at 857.

[105] *Id.* at 876.

[106] *Id.* at 878. *See* note 26 *supra.* One commentator has argued that Congress tends to be protective of the sovereignty rights of the states, and that the Framers of the Constitution viewed this as one of the important roles of the legislative branch in the national government. The Supreme Court was conceived as the one branch of the government whose "prime function" would be "the maintenance of national supremacy against nullification or usurpation by the individual states." Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 558-59 (1954).

[107] 426 U.S. at 880-81.

ers, the states have only their political clout to temper Congress' unquestioned power.

One method of conceptualizing this disagreement is to examine briefly the seminal case of *McCulloch v. Maryland*,[108] in which Chief Justice Marshall discussed the scope of the necessary and proper clause.[109] To speak of the scope of the commerce or other delegated powers is actually to refer to the scope of this important section of the Constitution.[110] The broad discretion given to Congress to carry into execution its delegated powers was laid out boldly in *McCulloch* as follows: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[111]

The dissents in *National League* appear to have focused principally upon this first part of this passage, that the means need only be "appropriate" and "plainly adapted" to a permissible end. The majority, on the other hand, argued that while the means chosen by Congress may have been permissible under other circumstances, they did not "consist with the letter and spirit of the constitution" since the constitution itself is premised upon the existence of not only a national government, but viable state governments as well.

B. The Tenth Amendment

A major problem in understanding the meaning of *National League* is that while Justice Rehnquist's opinion for the majority made it clear that the extension of the FLSA to state and local government employees transgressed an affirmative constitutional right, he did not specifically define that right nor indicate its source in the Constitution. One possible source is the guarantee clause,[112] but no reference is made to this source in the opinion, and the Court has traditionally considered the guarantee clause to be non-justiciable.[113]

The Court's opinion does refer to the tenth amendment as a declaration of the limit upon Congress' power to regulate the States.[114] While

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[108] 17 U.S. (4 Wheat.) 316 (1819).

[109] "The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution. . . ." U.S. CONST. art. I, § 8, cl. 13.

[110] The necessary and proper clause applies to powers delegated in other articles as well as to article I. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 266-67 (9th ed. 1975). *See also* Brief of the National Assoc. of Counties as Amicus Curiae, *passim*, National League of Cities v. Usery, 426 U.S. 833 (1976), which contains a thorough discussion of the application of the necessary and proper clause to the facts in the *National League* case.

[111] 17 U.S. (4 Wheat.) at 421.

[112] "The United States shall guarantee to every state in this Union a Republican Form of Government. . . ." U.S. CONST. art. IV, § 4.

[113] GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1624 (9th ed. 1975). *But see* EPA v. Brown, 521 F.2d 827, 838 (9th Cir. 1975), *vacated*, 97 S. Ct. 1635 (1977).

[114] 426 U.S. at 842.

Justice Rehnquist's reference to this amendment indicates that he views it as a significant expression of policy underlying the Constitution, it is probably true that the Court would have reached the same decision even if the tenth amendment had not been adopted. This position was urged expressly in the Appellants' brief,[115] and is supported by the treatment of the tenth amendment by members of the Court in recent cases and by the wording of the amendment itself.

From approximately 1837 to 1937[116] the Supreme Court took the position that the tenth amendment mandated a system of "dual sovereignty" between the national and state governments. The gist of this position was that there was a domain of local affairs not subject to federal regulation, and reserved to the states under the tenth amendment.[117] This view was abandoned in *NLRB v. Jones and Laughlin Steel Corp.*[118] There the Court held that the relationship between employer and employee could be regulated when it affected interstate commerce and was therefore within the scope of national power notwithstanding that the relationship was local in character.[119] Then, in *United States v. Darby*, the Court declared that the tenth amendment "states but a truism that all is retained which has not been surrendered."[120] Since *Darby* the predominant view of the tenth amendment has been that it confers no substantive rights over local affairs upon the states, but serves merely as a reminder that the national government is one of specific delegated powers.[121] The real issue where

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[115] [E]ven without such an amendment those who wrote the Constitution were unanimous in their view that the "Federalism" principles contained in the Constitution prior to and without the words of the Tenth Amendment guaranteed noninterference by either Federal or State Governments with the essential governmental powers of each. The decision here must therefore consider the whole of the Constitution to correctly evaluate the powers, functions, and cooperative "Federalism" thereby created.

Brief for Appellant, at 53, 59-60, National League of Cities v. Usery, 426 U.S. 833 (1976). "Federalism" looks to the entire Constitution as its constitutional basis. The Tenth Amendment is an additional and a specific bar to the takeover of state and local Government functions by the Federal Government under the 1974 Amendments.

Id. at 59-60.

[116] *See* note 118 *supra.*

[117] *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 276 (1918). In this case the Court held unconstitutional a federal law which would have closed the channels of interstate commerce to goods produced by child labor. The Court's holding was based on the concept that production is purely a local matter, subject only to the state's police power. *Id.* at 273-74. This case was overruled by United States v. Darby, 312 U.S. 100, 116-117 (1941).

[118] 301 U.S. 1 (1937).

[119] *Id.* at 37.

[120] Justice Stone's opinion for the Court continued:

There is nothing in the history of [the tenth amendment's] adoption to suggest that it is more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

312 U.S. 100, 124 (1941).

[121] One commentator has labelled the two principal schools of opinion regarding the

"local" affairs are concerned is to determine the scope of the delegated powers, and once it is determined that the national government is acting within the scope of these powers, the investigation ends without need to consider the scope of state powers of regulation.

In the 1975 decision of *Fry v. United States*, however, Justice Marshall stated in a footnote that "[w]hile the Tenth Amendment has been characterized as a 'truism' . . . it is not without significance."[122] Most of this footnote was incorporated into the opinion of the Court in *National League*, and the two opinions taken together perhaps suggest that the Court is returning to the view of the tenth amendment which predominated until the *Jones and Laughlin Steel* case; namely, that the amendment reserves a discrete area of local activities not open to federal regulation.

Several factors tend to discredit this suggestion. First, the words of the tenth amendment refer to "powers not delegated to the United States." The Court's opinion in *National League* adopts the position that Congress has plenary power to regulate commerce and activities affecting commerce.[123] No argument is made that government employment does not affect commerce and therefore falls outside the scope of this plenary power. Rather, the argument is that the plenary power cannot be exercised because it breaches the affirmative constitutional barrier of the sovereignty rights of the states.[124] Since the tenth amendment reserves only "powers not delegated to the United States", it cannot in itself be the source of affirmative constitutional rights other than the right to be protected against exercises of non-delegated power.[125]

A second factor which indicates that the Supreme Court in *National League* is not returning to the discredited view of the tenth amendment is suggested in Justice Rehnquist's dissent only one year earlier in *Fry*. There he objected to the extension of wage and price guidelines to state governments using essentially the same reasoning as in his opinion for the Court in *National League*. His position in *Fry* was that the tenth and the eleventh[126] amendments are not necessary to establish certain

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tenth amendment as Hamiltonian and Madisonian. The Hamiltonian view is that the national government may exercise its delegated powers to their fullest extent without regard for the powers of the states. This view is said to have predominated from the adoption of the tenth amendment in 1791 until 1837, and to have received its fullest articulation in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) and Gibbons v. Ogden, 22 U.S. (9 Wheat.)1 (1824). The second school, the Madisonian, holds that the Constitution, particularly the tenth amendment, establishes a compact between the national and state governments pursuant to which the "accustomed" powers of the states may not be abridged. This view first received Supreme Court approval in the case of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) and prevailed until NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937) resurrected the Hamiltonian interpretation. Castro, *The Doctrinal Development of the Tenth Amendment*, 51 W. VA. L. Q. 227 (1949).

[122] Fry v. United States, 421 U.S. 542, 547 n. 7 (1975). The footnote continued in part: "The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. . . ."

[123] 426 U.S. at 841.

[124] *Id.*

[125] *See* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 702 (1974).

[126] "The judicial power of the United States shall not be construed to extend to any

sovereignty rights of the states.[127] The source of these rights is rather in the fabric of the entire Constitution and the system it created, a system based upon the understanding of the Framers that there should be viable state governments as well as a national government. It follows that there is a basic difference between this view and the dual sovereignty approach. In part, this difference relates to the fact that the dual sovereignty approach was applied in cases where private businesses were claiming that their local activities were subject only to state regulation.[128] The newer view of state sovereignty rights, on the other hand, applies only where regulations are applied to states *qua* states. The other part of the difference seems to be that while the old view of the tenth amendment viewed a discrete area of activities as immune from federal regulation, the newer view implies a "structural" approach.[129] Since the tenth amendment does not reserve state sovereignty over any *particular* set of activities, even activities of the state governments themselves, decisions must be based upon reasoning from the text of the Constitution as a whole.[130]

C. *Sources of the Sovereignty Right in National League*

Accepting the premise that the majority in *National League* did not return to the view, discredited since the *Jones and Laughlin Steel* case, that there are certain purely local concerns not amenable to federal power, the problem of determining the scope and origin of the sovereignty right acknowledged to exist in *National League* becomes more complex. The approach taken by the Court was first to draw an analogy to certain individual rights, the right to a jury trial and to fifth amendment due process, which undeniably limit otherwise valid exercises of

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suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[127] Justice Rehnquist's position that the tenth and eleventh amendments are not necessary for the establishment of the sovereignty rights of the states was based on an analysis of Hans v. Louisiana, 134 U.S. 1 (1890). While the eleventh amendment provides expressly that states are immune from suits brought in federal courts by citizens of other states or countries, it is silent as to suits by citizens of the same state. However, in *Hans* the court extended this immunity to suits brought by citizens of the same state. Justice Rehnquist argued that the ground of that decision was a constitutional right of sovereignty which underlies the tenth and eleventh amendments, and is broader than the terms of either:

> As it was not the Eleventh Amendment by its terms which justified the result in *Hans*, it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the states were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.

421 U.S. 542, 556-57.

[128] *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918).

[129] *See* BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

[130] This approach is consistent with Chief Justice Marshall's mention of the need for considering the "letter and spirit" of the Constitution in *McCulloch*. *See* text accompanying notes 108-11 *supra*.

the commerce power.[131] The Court then suggested that there is a similar, constitutionally-based protection for the sovereignty rights of the states, and proceeded to argue that this right had been recognized in a number of cases. Not all the cases cited by the Court provided clear authority for this assertion, however, and other cases were not satisfactorily distinguished.

While it was stated in *Texas v. White*, for example, that "the constitution . . . looks to an indestructible union of indestructible states,"[132] that case established the right of the provisional government of Texas, created *by Congress* after the Civil War, to sue in a federal court. While the importance of the states to the union was no doubt recognized, the decision of the court in *Texas v. White* served to preserve the provisional government's right to United States treasury bonds illegally transferred to individuals by the admittedly invalid state government during the Civil War. Thus, the case involved protections for Texas against acts of an illegal state government and not against Acts of Congress.

Similarly, while *Metcalf & Eddy v. Mitchell* contains the statement that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers,"[133] that case upheld the federal tax in question as applied to an independent contractor working for a state. Moreover, the intergovernmental tax immunities which the opinion assumed to be valid were severely curtailed by later cases.[134] *Lane County v. Oregon*[135] is perhaps stronger authority, but the national interest to be protected in that case was tangential at best, and the case was ultimately resolved in large part upon grounds of statutory construction.[136]

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[131] 426 U.S. at 833, 841 (citing United States v. Jackson, 390 U.S. 570 (1968) (right to jury trial), and Leary v. United States, 395 U.S. 6 (1969) (fifth amendment due process)). This analogy is somewhat misleading, however, since the guarantees of individual rights are set forth clearly in the Bill of Rights, and by their terms they limit the means available to Congress to carry out its delegated powers. See quotation from *McCulloch v. Maryland* at note 111 *supra*.

[132] 74 U.S. (7 Wall.) 700, 725 (1868), *quoted in* National League of Cities v. Usery, 426 U.S. 833, 844 (1976). In *Texas v. White* the provisional government of Texas was suing defendants who had obtained United States treasury bonds from the Confederate government of Texas during the Civil War. The bonds were to be used to obtain needed supplies. The provisional government sought to stop payment on the bonds by the United States, and to secure their return.

[133] Helvering v. Gerhardt, 304 U.S. 405 (1938), severely limited the immunity from federal taxation previously enjoyed by state employees, and Graves v. New York *ex rel* O'Keefe, 306 U.S. 466 (1939) did away with it altogether. New York v. United States, 326 U.S. 572 (1946), is a key case in this area. It is discussed in the text commencing at note 140 *infra*.

[134] *See* note 133 *supra*.

[135] 74 U.S. (7 Wall.) 71 (1868).

[136] In this case the Court upheld an Oregon law requiring that state taxes be paid in gold and silver coin, despite a federal statute authorizing the issuance of notes, and declaring that they "shall be receivable of all taxes, internal duties, excises, debts and demands due to the United States . . . and shall be lawful money and legal tender in payment of all debts, public and private, within the United States." While arguing that the federal government could not interfere with the state's exercise of its taxing power, the Court also pointed out that the first quoted clause of the statute refers to taxes due

The Court's citation to *Wirtz* presented similar problems. The majority opinion quoted *Wirtz*, stating that the Court "had ample power to prevent the utter destruction of the State as a sovereign political entity."[137] That statement, as Justice Brennan pointed out in his dissent,[138] is quoted out of context. The power referred to is clearly the power of the Court to assure that Congress does in fact regulate commerce or activities having an impact on commerce, not the power to protect affirmative sovereignty rights. This view is supported by the fact that the majority in *National League* found it necessary to overrule the broad doctrine set forth in *Wirtz*.[139]

This is not to imply that judicial affirmation of the sovereignty rights of states is unprecedented. The most convincing authorities are Chief Justice Stone's opinion in *New York v. United States*[140] concerning the scope of the federal power to tax, and the footnote from *United States v. Fry*[141] on the significance of the tenth amendment. In the former case, the Court upheld a general federal tax which had been applied to the State of New York's production of mineral water, as well as to private production. Justice Frankfurter's plurality opinion, joined in only by Justice Rutledge,[142] upheld the tax on the ground that it was non-discriminatory, but Chief Justice Stone's concurring opinion, joined in by three other Justices on an eight-member court, went still further in declaring that even a non-discriminatory tax might be unconstitutional.[143] This would be the case if there were infringement upon a state's "performance of its functions as a government which the constitution recognizes as sovereign."[144] The opinion then asserted that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers."[145] Thus *New York v. United States* gives support to the proposition that the states *qua* states do have an immunity from certain forms of federal taxation. The boundaries of this immunity are uncertain, however, and its scope must therefore be gauged on a case by case basis. One expression of the parameters of intergovernmental immunity is found in the footnote from *Fry*:

> While the Tenth Amendment has been characterized as a "truism," stating merely that all is retained which has not been surrendered it is not without significance. The Amendment

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to the United States, but not those due to the states. 74 U.S. at 78-79. Further, the Court cited a number of cases which had held that a tax is not a debt. *Id.* at 79-80. Therefore, the Court stated that it would not assume that Congress intended to include payment of state taxes within the statute, *id.* at 81, and decided the case on statutory grounds.

[137] 426 U.S. at 842 (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968)).

[138] 426 U.S. at 860 n. 3.

[139] *See* text accompanying notes 46-51 *supra*.

[140] New York v. United States, 326 U.S. 572 (1946) (opinion of Stone, C.J.).

[141] *See* note 122 *supra* and accompanying text.

[142] 326 U.S. 572, 584 (1946).

[143] *Id.* at 587 (opinion of Stone, C.J.).

[144] *Id.* at 588.

[145] *Id.* at 589 (quoting Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926)). This passage is also quoted in the *National League* opinion. 426 U.S. at 844.

> expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.[146]

The reliance upon *Fry* is the keystone of the *National League* holding despite the Court's mention of *New York v. United States*, because *Fry* indicated that there are limits of state sovereignty upon the exercise of the commerce power as well as upon the taxing power. Although there is logical consistency in Justice Rehnquist's position that there is no difference between the limits upon these two powers,[147] the position of the Court in *United States v. California* was clearly to the contrary.[148] Justice Rehnquist also suggested in his *National League* opinion that not all of the powers delegated to the national government are necessarily subject to the same restraints. The spending power,[149] the powers delegated under section five of the fourteenth amendment,[150] and the power to make war[151] are specifically excluded from the Court's holding. That the fourteenth amendment was especially directed at the states and that Congress is given the power to assure compliance with its commands is evident from the face of the amendment.[152] That the states as a result have less protection against national intrusions on their sovereignty

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[146] National League of Cities v. Usery, 426 U.S. 833, 842-43 (quoting Fry v. United States. 421 U.S. at 547 n. 7 (1975) (citation omitted)). It is perhaps interesting to note that Justice Marshall's opinion in *Fry* contains no authority for the proposition, and that he dissented from the majority's interpretation of it in *National League*.

[147] *See* note 148 *infra*.

[148] 297 U.S. 175, 183-185 (1936). Chief Justice Stone's opinion for a unanimous Court, stated:

> [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The State can no more deny the power if its exercise has been authorized by Congress than can an individual.

Id. at 185. This followed the statement that:

> The analogy of the constitutional immunity of state instrumentalities from federal taxation . . . is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 522-524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it.

Id. at 184 (citations omitted).

In the majority opinion in *National League*, Justice Rehnquist distinguished *United States v. California* from the facts at bar, and characterized the first passage quoted above as "dicta," and "simply wrong." He argued that the state-owned railroad which was regulated in *California* was "not in an area that the States have regarded as integral parts of their governmental activities." 426 U.S. at 854 & n. 18. Applying the FLSA to regulate hours and wages of state employees, on the other hand, did interfere with integral state activities, and therefore was unconstitutional.

[149] 426 U.S. at 852 n. 17.

[150] *Id.*

[151] 426 U.S. at 855 n. 18.

[152] *E.g.*, U.S. CONST. amend. XIV, § 1: "No State shall make or enforce any law." Congressional power is further defined in section 5, where it is stated: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

based upon the fourteenth amendment than they have against intrusions based upon article I, section 8 powers was confirmed in *Fitzpatrick v. Bitzer*.[153] But it is more difficult, in theory at least, to decipher the reasons why sovereignty restraints upon the spending and war powers should differ from those upon the commerce and taxing powers. All four powers are contained in section 8 of article I, and all pose potentially grave threats to state sovereignty. In terms of the *National League* holding this is true *a fortiori*, since tax immunity cases[154] were cited to support the doctrine of sovereignty which the opinion sought to establish. The express justification for relying upon the tax cases in determining the scope of the commerce power in *National League* was that both of these powers were delegated in article I, section 8.[155] Therefore, the attempt by the Court without further explanation to distinguish away cases involving certain article I powers, while relying on the tax cases, is unsettling.

Two cases relied upon by Justice Brennan in his dissent, and not adequately distinguished by the majority, are pertinent here: *Case v. Bowles*[156] and *Sanitary District of Chicago v. United States*.[157] While the former case involved the exercise of the war power to control the price at which the State of Washington sold timber grown on federally granted land to raise revenue for the public schools, the holding is broad enough for application to other article I powers. The state argued that the federal government could not interfere because the sale "was for the purpose of gaining revenue to carry out an essential government function — the education of its citizens."[158] Justice Black's opinion for the Court rejected any distinction between essential and other state functions,[159] and focused instead on whether the national

[153] 427 U.S. 445, 455-56 (1976). This case was decided one week after *National League* and is discussed in the text at note 173 *infra*. Although *Fitzpatrick v. Bitzer* rejected a claim of state immunity from suit under the eleventh amendment, and *National League of Cities* involved policies embodied in the tenth amendment, the opinion in the former case made no distinction between intrusions into the "judicial, executive, and legislative spheres of autonomy previously reserved to the States." 427 U.S. at 455. *See also* Fry v. United States, 421 U.S. 542, 556-57 (dissenting opinion of Rehnquist, J.), discussed in note 127 *supra* and accompanying text.

[154] Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1868); Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926); New York v. United States, 326 U.S. 572 (1946).

[155] MR. JUSTICE BRENNAN suggests that "the Chief Justice was addressing not the question of a state sovereignty restraint upon the exercise of the commerce power, but rather the principle of implied immunity of the States and Federal Government from taxation by the other . . . ." *Post*, at 863-864. The asserted distinction, however, escapes us. Surely the federal power to tax is no less a delegated power than is the commerce power: both find their genesis in Art. I, § 8. Nor can characterizing the limitation recognized upon the federal taxing power as an "implied immunity" obscure the fact that this "immunity" is derived from the sovereignty of the States and the concomitant barriers which such sovereignty presents to otherwise plenary federal authority.

National League of Cities v. Usery, 426 U.S. 833, 843-44 n. 14.

[156] 327 U.S. 92 (1946).

[157] 266 U.S. 405 (1925).

[158] Case v. Bowles, 327 U.S. 92, 101 (1946).

[159] Justice Douglas dissented on grounds of statutory construction. He argued that the Emergency Price Control Act could be construed to exclude the states, and that the

government was within the scope of its powers. Finding that the war power did include the power to control prices, the Court summarily rejected the state's tenth amendment sovereignty argument.[160] The holding in *Case* runs counter to the suggestion in *National League* that "essential" state decisions as to "integral governmental functions" are not subject to federal interference.[161]

In the *Sanitary District* case, Justice Holmes' opinion for the Court granted an injunction against the public corporation responsible for sewage disposal for the City of Chicago to prevent excessive lowering of the water level of Lake Michigan. The Court found the Sanitary District's actions to be contrary to federal statute and an interference with the national power to regulate commerce. Noting that "this is not a controversy between equals,"[162] the Court held that "the authority of the United States to remove obstructions to interstate commerce . . . is superior to that of the States to provide for the welfare or necessities of their inhabitants."[163] This again runs counter to the idea of immunity from the application of the national commerce power to undeniably essential services[164] provided by local governments.

Court should adopt that interpretation to avoid "serious constitutional questions." The reasons for his dissent are actually set forth in Hulbert v. Twin Falls County, 327 U.S. 103, 105-06 (1946), to which he refers in Case v. Bowles, 327 U.S. 92, 103 (1946).

[160] Since the decision in *McCulloch v. Maryland*, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end — that is, to accomplish the full purpose of a granted authority — to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. And we have said, that the Tenth Amendment "does not operate as a limitation upon the powers, express or implied, delegated to the national government."

327 U.S. at 102 (citation omitted).

[161] National League of Cities v. Usery, 426 U.S. 833, 855 (1976). The holding in *Case* goes beyond that in Fry v. United States, 421 U.S. 542 (1976), because the result of the decision in *Case* was that there was both an interference with essential state operations (education) and a deprivation of revenue to be used for education. In *Fry* there was interference with decision making but no reduction in revenue. The special consideration given by the Court to interference with the states' budgets is evident in *National League*. *Compare* Employees v. Missouri Dep't of Public Health and Welfare, 411 U.S. 279, 286 (1973) (Court was hesitant to rule that Congress would subject the states to double damage recovery suits by public employees under the FLSA without an express provision to that effect) *and* Edelman v. Jordan, 415 U.S. 651, 664-65 (1974) (suits for back damages by welfare clients against the states barred by the eleventh amendment) *with Ex Parte* Young, 209 U.S. 123 (1908) (injunctive relief was allowed against the state, based on the fourteenth amendment). Less consideration is given to the fiscal burden upon the state in Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) because the claim in that action was based on section 5 of the fourteenth amendment. *See* text accompanying notes 173-84 *infra*.

[162] 266 U.S. 405, 425 (1925).

[163] *Id.* at 426. The Court found that the national government also had authority to prevent the draining of the lake under the treaty power, but the "main ground" was the authority to regulate commerce. *Id.* at 425-26.

[164] Sanitation, presumably including sewerage, was specifically mentioned by the Court in *National League* as an essential and traditional governmental function. 426 U.S. at 851 & n.16.

D. *Immunity for Essential State and Local Governmental Functions — A Summary*

A review of the cases cited by the majority and the dissent in *National League* reveals that there is ample support in past decisions[165] for a finding that certain governmental functions of the states may not be imposed upon by the national government, even when acting within its delegated powers. There is also support, however, for the contrary conclusion.[166] The shortcoming of the *National League* opinion is that it provides no clear test for determining when state sovereignty prevails over the national interest. Furthermore, the Court's holding, read alone, implies that certain state and local functions may never be interfered with under the commerce power[167] regardless of the national interest involved. This is the problem, arguably, which was recognized by Justice Blackmun in his concurring opinion in *National League* and which led him to suggest a balancing approach consistent with the Court's decision, but which would allow consideration of a greater national interest than was present in *National League*.[168] Justice Blackmun's approval of a balancing test in his concurrence, along with the fact that four justices dissented,[169] indicates that at least a bare majority of the court would approve regulation of the states *qua* states under the commerce clause given a sufficiently great national interest. A possible balancing approach is suggested in the final section of this Note.

V. Interpretations of National League by Lower Courts

The difficulties inherent in the Supreme Court's holding in *National League* became quickly apparent when a number of states and political subdivisions[170] faced with suits under the Equal Pay Act and the Age Discrimination in Employment Act moved for summary dismissals based on *National League*. In all but two of these cases the defendants' motions were denied, the courts holding that either the Equal Pay Act or the Age Discrimination Act was applicable to public employers.[171]

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[165] *See* notes 140-46 *supra* and accompanying text.

[166] *See* notes 156-64 *supra* and accompanying text.

[167] "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted by Congress by Art. I, § 8, cl. 3." 426 U.S. 833, 852. A footnote to the holding specifically excepts the question of its application to the other article I powers, but the Court's action there is not consistent. *See* notes 145-47 *supra* and accompanying text.

[168] 426 U.S. at 856.

[169] Justices Brennan, White, Marshall, and Stevens dissented. Although the idea of a balancing approach was not expressly adopted by the majority, it is not inconsistent with the majority opinion. *See* text accompanying notes 230-37 *infra*.

[170] Justice Rehnquist made it clear in his opinion that for purposes of applying the *National League* doctrine, there is no difference between states and their political subdivisions. 426 U.S. 833, 855 n. 20.

[171] Cases where motions to dismiss Equal Pay Act claims were denied include: Allegheny County Inst. Dist. v. Usery, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); Marshall v. City of Torrington, 14 Empl. Prac. Dec. 5579 (D. Conn. 1977); Usery v. City of Sheboygan, 13 Empl. Prac. Dec. 6383 (E.D. Wis. 1976); Usery v. Kenosha Unified School

Although the vast majority of the lower courts considering the question held that the Equal Pay Act and the Age Discrimination in Employment Act continue to apply to public employers, their reasons for reaching this conclusion have differed. Basically, these courts have adopted one of two approaches. The first involved reliance upon the fourteenth amendment and the Supreme Court's decision in *Fitzpatrick v. Bitzer*.[172] The second approach was to apply and distinguish the Court's holding regarding the minimum wage and overtime provisions of the FLSA considered in *National League*. This Note suggests that although there is a clear justification for the lower courts' denial of the motions on the first ground, the reliance upon *National League* in these cases was misplaced.

A. *The Fourteenth Amendment Ground*

1. Fitzpatrick v. Bitzer

That Congress has greater power to override state sovereignty concerns pursuant to its power under section 5 of the fourteenth amendment than under its article I powers was recognized by the Supreme Court in *Fitzpatrick v. Bitzer*, decided one week after *National League*. *Fitzpatrick v. Bitzer* involved a class action by retired male employees of the State of Connecticut against the Chairman of the State Employees' Retirement Commission. The plaintiffs alleged that they had been discriminated against on the basis of sex by the state's retirement plan.[173] The suit was brought under the sex discrimination provisions of Title VII of the Civil Rights Act of 1964,[174] which had been amended in 1972 to include public employers.[175] The defendant argued that the eleventh

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Dist., 13 Empl. Prac. Dec. 6409 (E.D. Wis. 1976); Brennan v. A & M Consol. School Dist., 13 Empl. Prac. Dec. 6756 (S.D. Tex. 1976); Usery v. Memphis State Univ., 13 Empl. Prac. Dec. 6543 (W.D. Tenn. 1976); Usery v. Washoe County School Dist., 13 Empl. Prac. Dec. 6213 (D. Nev. 1976); Usery v. Bettendorf Comm. School Dist., 12 Empl. Prac. Dec. 5446 (S.D. Iowa 1976); Usery v. Charleston County School Dist., 13 Empl. Prac. Dec. 6520 (D.S.C. 1976), *aff'd*, 558 F.2d 1169 (4th Cir. 1977); Brown v. County of Santa Barbara, 427 F. Supp. 112 (C.D. Cal. 1977); Usery v. Dallas Indep. School Dist., 421 F. Supp. 111 (N.D. Tex. 1976); Christensen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976).

Motions to dismiss Equal Pay Act claims were granted in: Usery v. Owensboro-Daviess County Hosp., 423 F. Supp. 843 (W.D. Ky. 1976), *appeal filed*, No. 77-3069 (6th Cir. Dec. 20, 1976), and Howard v. Ward County, 418 F. Supp. 494 (D.N.D. 1976). It is argued in this Note that these two cases reached an incorrect conclusion based on the Supreme Court's opinion in *National League*. *See* the discussion commencing in the text at note 216 *infra*.

[172] 427 U.S. 445 (1976).

[173] *Id.* at 449, 450 n. 4.

[174] It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .

Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1970 & Supp. V 1975).

[175] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103 (amending 42 U.S.C. § 2000e(a) (1970)).

amendment barred any order prescribing retroactive damages against the state,[176] relying on *Edelman v. Jordan*.[177] That case had held that a suit by welfare clients for past benefits wrongfully denied could not be maintained against the state. Justice Rehnquist's opinion for the Court in *Fitzpatrick* distinguished *Edelman* on the ground that neither of the federal statutes underlying the welfare program in issue in *Edelman* had authorized suits against a state.[178] Furthermore, the Court found that *Parden v. Terminal Railway Co.*,[179] which had found an implied waiver of eleventh amendment immunity, need not be distinguished due to the differences between the types of state activity involved in that case and in *Fitzpatrick*.[180] *Parden* involved state operation of a railroad, while Title VII applies to all state and local employees in coverage virtually identical to that of the Fair Labor Standards Act considered in *National League*.[181] This refusal to distinguish *Parden* was based on the Court's finding that the fourteenth amendment, is, unlike the commerce clause, "by [its] express terms directed at the states."[182] Therefore, passage of that amendment enlarged the power of Congress and diminished the sovereignty of the states. The states could not raise the eleventh amendment as a bar to suits to enforce the substantive provisions of the fourteenth amendment, since through ratification they had given Congress the power to enforce those provisions under section five "by appropriate legislation."[183] The state in *Fitzpatrick* did not argue that Title VII was inappropriate legislation to enforce the equal protection clause.[184]

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[176] The Act as amended allows employees to recover "back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). The plaintiffs here were seeking retroactive retirement benefits allegedly denied them because of their sex. 427 U.S. at 445, 449. There was no doubt but that any recovery would come from the state treasury and not from the individual defendants. *Id.* at 452 n. 8.

[177] 415 U.S. 651 (1974).

[178] 427 U.S. at 451-52.

[179] 377 U.S. 184 (1964).

[180] Fitzpatrick v. Bitzer, 427 U.S. 445, 452-53 (1976).

[181] *National League* did not overrule *Parden* because the Court specifically found that railroads are not activities which "the States have regarded as integral parts of their governmental activities." 426 U.S. 833, 854 n. 18.

[182] 427 U.S. at 453.

> Section 1 . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

U.S. CONST. amend. XIV.

[183] The Court found support for this position in Mitchum v. Foster, 407 U.S. 225, 238-39 (1972) (federal court may enjoin a state court proceeding in a suit based on 42 U.S.C. § 1983); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (upholding the remedial provisions of the Voting Rights Act of 1965, which was passed pursuant to section 2 of the fifteenth amendment); and *Ex parte* Virginia, 100 U.S. 339 (1880) (denying writ of habeas corpus to state judge who had been jailed for excluding blacks from juries in contravention of a federal statute).

[184] 427 U.S. at 456.

2. The Equal Pay Act and the Age Discrimination in Employment Act in Light of Fitzpatrick v. Bitzer

The Equal Pay Act and the sex discrimination provisions of Title VII of the Civil Rights Act of 1964 have been considered by the courts to be *in pari materia*, and are therefore to be construed in harmony.[185] Although Title VII outlaws discrimination in all aspects of employment while the Equal Pay Act applies only to compensation, the two pieces of legislation are clearly related. For example, section 703(h) of Title VII incorporates the employer defenses of the Equal Pay Act, providing in part that:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.[186]

This interrelationship has led to the rule that the Equal Pay Act provisions may not be construed in such a way as to "undermine the Civil Rights Act."[187] This interpretation has allowed lower courts faced with suits against public employers under the Equal Pay Act to avoid the implications of the *National League* decision, since *Fitzpatrick v. Bitzer* had clearly held that public employers are subject to Title VII. The fact that the FLSA and the Equal Pay Act were expressly based upon the commerce clause[188] was not really a problem, given the acknowledged similarity of the two sex discrimination acts, because Title VII had been upheld as a proper exercise of the power granted to Congress in section five of the fourteenth amendment.[189]

Although Title VII does not contain provisions prohibiting discrimination based on age, the lower courts considering age discrimination claims also relied in part on *Fitzpatrick v. Bitzer*.[190] These courts also assumed that Congress had the power under section five of the fourteenth amendment to pass the Age Discrimination in Employment Act in order to

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[185] *E.g.*, Orr v. Frank R. MacNeil & Son, Inc., 511 F.2d 166, 170 (5th Cir. 1975). *See also* Kanowitz, *Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L. J. 305, 345 (1968).

[186] 42 U.S.C. § 2000e-2(h) (1970). The reference to 29 U.S.C. 206(d)(1) is of course to the Equal Pay Act. That section allows differentials in rates of pay to members of the opposite sex performing similar work "where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."

[187] Schultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970).

[188] *See* note 16 *supra* and accompanying text.

[189] "Nor do we attach any significance to the fact that the legislative history of the Equal Pay Act does not explicitly rely on the fourteenth amendment. In exercising the power of judicial review, as distinguished from the duty of statutory interpretation, we are concerned with the actual powers of the national government." Allegheny County Inst. Dist. v. Usery, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

[190] Aaron v. Davis, 424 F. Supp. 1238 (E.D. Ark. 1976); Usery v. Board of Education of Salt Lake City, 12 E.P.D. ¶ 11,127 (D. Utah 1976).

enforce equal protection of the laws.[191] On this assumption, the Act could then be applied to public employers under *Fitzpatrick v. Bitzer*, and enforcement would not be inapplicable under *National League*. While this argument is less clear than that favoring the constitutionality of the Equal Pay Act since the Age Discrimination in Employment Act has no counterpart in Title VII, one district court decision noted that "[i]t is well settled that legislation authorized by section five of the fourteenth amendment can prohibit practices which might pass muster under the equal protection clause, absent an Act of Congress."[192] The lower court cited no authority for this assertion, but its position would seem to be supported by the ruling of the Supreme Court in *Katzenbach v. Morgan*.[193] In the *Katzenbach* case, the State of New York argued that unless a state statute denying voting rights to Spanish speaking persons had been found by the courts to violate equal protection, Congress was without power to enforce the Voting Rights Act of 1965 which, by requiring ballots to be printed in Spanish, effectively contravened the New York policy of permitting only English-speaking citizens to vote. The Court held, to the contrary, that section five grants to Congress the discretion to decide which legislation is necessary to enforce equal protection. The Court proceeded only to consider whether the legislation was "appropriate" to the end sought.[194] Under this liberal standard, reinforced by the Court's approval of the sex discrimination provisions of Title VII in *Fitzpatrick v. Bitzer*, there is little doubt that the Age Discrimination in Employment Act would withstand Supreme Court scrunity.[195]

B. The National League of Cities Ground

While it appears that *Fitzpatrick v. Bitzer* provided adequate authority for upholding both the Equal Pay Act and the Age Discrimination in Employment Act as applied to public employers, only two courts were content to rest their decisions on that ground alone.[196] While one district court simply denied the defendant's motion without citation to authority,[197] the others have attempted in various ways to apply the

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[191] 424 F. Supp. at 1241; 12 Empl. Prac. Dec. at 5446.

[192] Aaron v. Davis, 424 F. Supp. at 1241 n. 2.

[193] 384 U.S. 641 (1966).

[194] *Id.* at 651.

[195] *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) where the Supreme Court refused to find that age was a suspect classification which should be subjected to strict judicial scrutiny under the equal protection clause. The Court noted explicitly, however, that this was not an action under the Age Discrimination in Employment Act. 427 U.S. at 310 n. 2. A majority of the Court has likewise declined to treat sex as a suspect classification. *E.g.* Frontiero v. Richardson, 411 U.S. 677 (1973).

[196] Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); Usery v. Washoe County School Dist., 13 Empl. Prac. Dec. 6213 (D. Nev. 1976).

[197] Usery v. Charleston County School Dist., 13 Empl. Prac. Dec. 6520 (D.S.C. 1976). This district court decision was subsequently affirmed by the Fourth Circuit and a written opinion was issued. Usery v. Charleston County School District, 558 F.2d 1169 (4th Cir. 1977).

Court's holding in *National League*. The majority of the courts which applied the *National League* holding either concluded that the ability to discriminate among persons on the basis of sex or age was not an attribute of sovereignty, or applied a balancing approach.[198] Some courts used both approaches.[199]

1. The Attribute of Sovereignty Approach

An example of this approach is the decision in *Christensen v. Iowa*.[200] Here the district court noted first that the Supreme Court in *National League* had considered only the minimum wage and overtime provisions of the FLSA, and not the Equal Pay Act.[201] The court did not add, as some others did,[202] that the FLSA contains a broad severability provision stating that the entire Act would not be affected if one section were to be declared invalid, or if the Act were declared to be invalid as applied to a certain group of individuals.[203] The *Christensen* decision then discussed a number of the key phrases from the *National League* decision and applied them to the Equal Pay Act. In this manner the court found that the ability of a state or local government to deny equal pay for equal work was not a " 'function essential to separate and independent existence' of the state."[204] It found further that in enacting the Equal Pay Act "Congress has not sought : . . 'to wield its power in a fashion that would impair the States' ability to function in the federal system,' " that "such discrimination cannot validly be considered a 'fundamental employment decision' upon which the state's system for administering public laws and public services rests," and that "such discrimination is not, consistent with equal protection, an 'attribute of sovereignty.' "[205] Adding these findings together, the court concluded that the Equal Pay Act was a valid exercise of the commerce power.[206]

2. The Balancing Approach in the Lower Courts

The district court decision in *Usery v. Dallas Independent School District*[207] provides a typical example of the use of a balancing approach

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[198] One court upheld the Equal Pay Act in part as an exercise of the spending power. *See* Usery v. Memphis State Univ., 13 Empl. Prac. Dec. 6543 (W.D. Tenn. 1976).

[199] *E.g.*, Usery v. Kenosha Unified School Dist., 13 Empl. Prac. Dec. 6409 (E.D. Wis. 1976).

[200] 417 F. Supp. 423 (N.D. Iowa 1976).

[201] *Id.* at 424.

[202] *See, e.g.*, Brown v. County of Santa Barbara, 427 F. Supp. 112 (C.D. Cal. 1977).

[203] 29 U.S.C. § 219 (1970). *See* text accompanying note 222 *infra*.

[204] 417 F. Supp. at 425.

[205] *Id.*

[206] *Id.*

[207] 421 F. Supp. 111 (N.D. Tex. 1976). There was at least one other clear ground for the court's decision. This was that the Equal Pay Act did not increase budget pressures on the states because they could lower the wages of men to equal those of women. *Id.* at 116. However, this would be clearly prohibited by the Act which provides in part that:

in applying the *National League* holding. Here the court pointed out that while in *Fry v. United States*[208] the Supreme Court had upheld federal control over the wages paid by state and local governments, the Court in *National League* had overturned the minimum wage and overtime provisions of the FLSA. Assuming that the two Supreme Court decisions both involved legislation encroaching substantially upon "integral" state functions, the district court concluded that "[t]he two opinions can be reconciled only on the basis of an ad hoc balancing — a conclusion strongly reinforced by the concurring opinion of Justice Blackmun."[209] Based on this conclusion, the court found "that the policies of social justice underlying the legislation outweigh the State interest in exploiting employees because of their sex."[210]

C. *Problems With The Commerce Clause Arguments in the Lower Courts*

Neither approach adopted by the lower courts in attempting to apply the Supreme Court's holding in *National League* is satisfying. The problem with the balancing approach followed by the district court in *Usery v. Dallas Independent School District*[211] was the fact that it was ad hoc. Neither *National League* nor *Dallas* laid down guidelines by which the balancing was to be carried out. An ad hoc balancing test would leave the courts without any real formula by which to determine the proper allocation of power in the federal system. This is not to say, however, that a balancing approach with guidelines may not prove useful in federalism cases generally, or that such an approach is not justified by the *National League* opinion.[212]

The approach taken in *Christensen v. Iowa*[213] — that the ability of state and local governments to discriminate as to wages among men and women was not an attribute to sovereignty — is likewise unsatisfactory, for this approach dodges the underlying issue addressed by the Supreme Court in *National League*. While the specific issue before the Supreme Court was whether the wage and overtime provisions of the FLSA could be extended to state and local governments, the view of the Court seems to have been that Congress could not, by virtue of the commerce power, decide how these governments were to structure integral services, including the payment of wages. Putting aside for the moment the admittedly valid fourteenth amendment ground

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"an employer who is paying a wage differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1) (1970).

[208] 421 U.S. 542 (1975).

[209] 421 F. Supp. at 116.

[210] *Id.* at 116 n. 7.

[211] 421 F. Supp. 111 (N.D. Tex. 1976).

[212] Such a balancing test is suggested at the end of this Note. *See* section VI-B of the text *infra*.

[213] 417 F. Supp. 423 (N.D. Iowa 1976).

for upholding the Equal Pay Act as applied to public employees, it is difficult to see the difference on commerce clause grounds between Congress telling public employers to begin paying equal wages regardless of sex, and Congress telling such employers to begin paying a living wage. Both are intrusions upon "the States freedom to structure integral operations in areas of traditional government functions."[214] Moreover, if the purposes of the FLSA are to prevent labor unrest and the spread of undesirable labor conditions which burden commerce, there would seem to be no greater threat to commerce from the payment of discriminatory wages than from the failure to pay a living wage.

While it is a plausible argument that greater injustice results from the denial of equal pay for equal work on account of sex than the denial of what Congress considers to be a minimum wage for low skill jobs, this is essentially an equal protection question and has no real relevance to the commerce power. Therefore, while the lower courts considering the constitutional application of the Equal Pay Act and the Age Discrimination in Employment Act[215] were undoubtedly correct on the fourteenth amendment ground, the holding in *National League* did not, contrary to their findings, provide an independent ground of decision favoring application of the Acts to public employers.

D. Decisions Holding that Sex Discrimination Guidelines Cannot Be Extended to Public Employers

As mentioned earlier in this Note, two district courts have held that the Supreme Court's decision in *National League* precludes application of the Equal Pay Act to state and local governments. Both courts, however, appear to have given too broad a reading to the Supreme Court's holding in *National League*.

In the first case, *Howard v. Ward County*,[216] the court did not address at length the possibility that the Equal Pay Act provisions of the FLSA could be distinguished from the minimum wage and overtime provisions at issue in *National League*. Since both portions of the Act had been extended to state and local governments by the redefinition of "employer" to include "public agencies," the district court summarily ruled that the Equal Pay Act was inapplicable to public employers.[217] The practical effect of this holding was minimal for the parties involved, however, since the court upheld the plaintiff's companion claim brought under Title VII of the Civil Rights Act of 1964.[218]

A more substantial discussion was given to the issue in *Usery v. Owensboro-Daviess County Hospital*,[219] in which the plaintiff apparently filed no claim under Title VII. Basically, the *Owensboro* court followed

[214] *See* National League of Cities v. Usery, 426 U.S. 833, 852 (1976).

[215] Although this discussion has referred only to the Equal Pay Act, the same arguments apply to the Age Discrimination in Employment Act.

[216] 418 F. Supp. 494 (D.N.D. 1976).

[217] *Id.* at 500-01.

[218] *Id.* at 505.

[219] 423 F. Supp. 843 (W.D. Ky. 1976).

the same line of reasoning adopted in *Howard v. Ward County*, and held that publicly-run hospitals were no longer subject to any of the provisions of the FLSA since in the district court's view the term "employer" no longer included "public agencies" where any FLSA provision was involved.[220] The court rejected the defendant's argument that the severability provision of the FLSA should be used to allow the Equal Pay Act to stand despite nullification of the minimum wage and overtime provisions. Here the court reasoned without supporting authority that "Congress obviously intended the equal pay provisions to be co-extensive in coverage with the minimum wage provisions of the same Act."[221]

Followed to its logical conclusion, the court's reasoning would negate the purpose of the severability clause altogether. Although it could safely be said that Congress intended the Equal Pay Act and the wage and overtime provisions to be co-extensive at the time that it passed the 1974 amendments, there is no reason to assume that Congress either foresaw or intended that the Supreme Court's nullification of the former would result in the abrogation of the latter. This is especially true in light of the language of the severability clause: "If any provision of this chapter *or the application of such provision to any person or circumstance* is held invalid, the remainder of this chapter and *the application of such provision to other persons or circumstances* shall not be affected thereby."[222] Contrary to the *Owensboro* court's reasoning, the severability clause appears fully sufficient to allow the definition of "employer" to include public agencies in circumstances in which the Equal Pay Act is involved, even though the Act is less inclusive in cases involving the minimum wage and overtime provisions. The court's further assertion that such a result would "lead to chaos"[223] does not seem justified. If the *National League* holding is applicable to the equal pay cases, it is applicable only to the extent that public employees are engaged in a state activity to which the holding applies, and the Equal Pay Act cases would of necessity require a preliminary determination whether the activity in question was integral and traditional.[224] If a non-integral, nontraditional activity is found to be involved, then the Equal Pay Act, like the minimum wage and overtime provisions, would clearly apply. This two-step determination is certainly no less chaotic then placing all public employees clearly within the Equal Pay Act's coverage.

The *Owensboro* court declined even to consider the plaintiff's argument that the Equal Pay Act, if not valid under the commerce clause, could be held valid under the fourteenth amendment.[225] Here the court asserted that it could not uphold the Equal Pay Act under the

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[220] *Id.* at 845.

[221] *Id.* at 846.

[222] 29 U.S.C. § 219 (1970) (emphasis added). *See* notes 24-25 *supra* and accompanying text.

[223] 423 F. Supp. at 846. *See* notes 24-25 *supra* and accompanying text.

[224] *Id.* at 846-47.

[225] *Id.*

fourteenth amendment, since the Supreme Court refused to consider this basis for the FLSA in *National League*.[226] The district court seems clearly to have misread *National League* on this point. The Supreme Court in *National League* did expressly decline to address the extent to which section five of the fourteenth amendment allows Congress to infringe upon the sovereignty of the states.[227] A decision on that issue was simply not necessary in order to dispose of the case presented, however, because the minimum wage and overtime provisions could only be justified under the commerce clause, and no colorable argument could be made for Congress' power to pass them pursuant to any other section of the Constitution. In contrast, the Equal Pay Act cases present some issues of equal protection considered in *Fitzpatrick v. Bitzer*,[228] in which the Supreme Court upheld extension of Title VII to state and local governments as a legitimate exercise of Congress' power under the fourteenth amendment. Moreover, the fact that the preamble or legislative history of a given statute indicates that it is based on Congress' power under one section of the Constitution does not preclude it from being upheld as an exercise of a different section not expressly mentioned.[229] The *Owensboro* and *Howard* courts, therefore, seem clearly to have been in error in holding that the Equal Pay Act could not be applied to public employers in light of *National League*.

VI. A Balancing Approach for Cases Involving Regulation of the States Qua States Under the Commerce Clause in Light of National League

A. *Why a Balancing Approach is Needed*

The preceding analysis of the Equal Pay Act and Age Discrimination in Employment Act cases indicates that while Congress has significant power to regulate public employers in the equal protection area under powers granted in the fourteenth amendment, its power is not so great under the commerce clause and other article I provisions. Nevertheless, Justice Blackmun's concurrence in *National League*[230] pointed out the need for a balancing approach in federalism cases when the commerce clause, and not the fourteenth amendment, is involved. The dissenters in *National League* might still argue that there is no balance to strike as long as Congress acts within the scope of its delegated powers,[231] but it is clear from *National League*, *United States v. Fry*,[232] and *Employees v. Department of Public Health and Welfare*[233] that the

[226] *Id.* at 846.

[227] National League of Cities v. Usery, 426 U.S. 833, 852 n. 17 (1976).

[228] 427 U.S. 445 (1976).

[229] *See* note 189 *supra*.

[230] National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring).

[231] *See* discussion of the necessary and proper clause in text accompanying notes 108-11 *supra*.

[232] 421 U.S. 542 (1975).

[233] 411 U.S. 279 (1973).

states enjoy a special status when subjected to federal regulation under the commerce power. While language in the majority opinion in *National League* perhaps suggests that the states as states may never be regulated under the commerce power,[234] the majority opinion does not explicitly rule out such an approach. The fact that the majority chose to distinguish *Fry* rather than to overrule it indicates that state activities may be regulated under the commerce power in certain circumstances, and the concept of a national government would seem to contain within itself the idea that the interests of the states, even as to integral governmental functions, must at times bow to a greater national interest. This is not inconsistent with the idea of a special status for the states. An overriding national interest may be found to exist in situations such as those in *Fry*, *Case v. Bowles*,[235] and *Sanitary District*,[236] and in such circumstances federal regulation of the states as states should be upheld.

It is obvious that a balancing approach, to be useful, must include appropriate guidelines if the courts are not to become the sole arbiters in the allocation of power between the national government and the states.[237] The following section outlines a suggested approach to the determination of federalism questions which would include the guidelines implicit in the FLSA and other federalism decisions discussed above.

B. A Suggested Approach

This approach consists of three steps: 1) the determination of whether an integral and traditional state function is involved; 2) the finding of a clear statement by Congress; and 3) the determination of whether a substantial national interest is at stake.

The threshold question is whether an integral and traditional state function is to be regulated. The *National League* opinion assumed without explanation that "one undoubted attribute of state sovereignty is the States' power to determine the wages to be paid to those whom they employ in order to carry out their governmental functions."[238] The Court's failure to explain the basis of this assumption is regrettable. Nevertheless, those activities included with the rubric of undoubted attributes of state sovereignty are not unknown. State-operated railroads,[239] mineral water production,[240] and liquor stores[241] are clearly

[234] "Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. 833, 855 (1976).

[235] 327 U.S. 92 (1946).

[236] 266 U.S. 405 (1925).

[237] The absence of such guidelines was the problem with the *ad hoc* balancing approach adopted by the district court in Usery v. Dallas Independent School Dist., 421 F. Supp. 111 (N.D. Tex. 1976).

[238] 426 U.S. 833, 845 (1976).

[239] Parden v. Terminal Ry. Co., 377 U.S. 184 (1964); United States v. California, 297 U.S. 175 (1936). State-owned railraods are explicitly excluded from the *National League* holding, according to the district court's opinion on remand. *See* note 25 *supra*.

[240] New York v. United States, 326 U.S. 572 (1946).

[241] Ohio v. Helvering, 292 U.S. 360 (1934); South Carolina v. United States, 199 U.S. 437 (1905).

excluded. However, the Court's overruling of *Wirtz* indicates that state activities are not excluded merely because they are simultaneously provided by the private sector. The touchstones suggested by the Court are that state activities must be "integral" — that is, necessary for the state to carry out its role — and "traditional" — those integral activities which citizens have come to expect their state governments to provide. Some questions in the "grey area" of services provided simultaneously by public and private bodies will undoubtedly have to be resolved by litigation.[242] It is also likely that the word traditional will be defined so as not to include only those activities carried on by states for many years, in order to protect state sovereignty over newer, but nonetheless integral, services.[243]

Once it is determined that a regulation infringes upon an integral and traditional state function, the question becomes whether Congress has clearly stated its intent to regulate or interfere. If not, the Court is likely to adopt the same approach as in the *Employees* case where it merely assumed that Congress would not intend to re-arrange the allocation of power within the federal system without clearly stating so. There are cases such as *Fry*,[244] however, in which a substantial national need was clearly demonstrated. In such a case, congressional motivation might also be assumed.

The third step in attempting to strike a balance is to determine whether a substantial national interest is at stake. The existence of such an interest was clearly present in *Fry*, *Case v. Bowles*, and *Sanitary District* where federal power to regulate the states was upheld. By relinquishing certain powers such as the regulation of commerce to the national government, the states have necessarily consented to their use by that government whenever a serious problem with interstate consequences can only be solved by that means. The special status of the states which was recognized in *National League*, however, requires a showing of greater need for exercise of the power to regulate a state than would be necessary to regulate a private interest. Thus, it was clear in *Fry* that if the states were not included in a general national wage freeze, Congress would be unable to control the inflation then threaten-

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[242] National League of Cities v. Marshall, 13 Empl. Prac. Dec. 6933, 6935 (D.D.C. 1977).

[243] The need to accommodate changes over the passage of time in determining which functions are "governmental" was noted by Justice Douglas in his dissenting opinion in New York v. United States, 326 U.S. 572, 596 (1946). The problem is to avoid considering as governmental functions only those activities which governments may have conducted at the time of the drafting of the Constitution, while not permitting states to take advantage of their immunity from federal regulation by extending these immunities to nongovernmental fields. A partial solution was suggested by Justice Douglas in his opinion for the Court in Employees v. Missouri Dep't of Public Health and Welfare, 411 U.S. 279, 284 (1973). There he pointed out that asylums, while not operated by governments in 1789, were operated first by the public sector and not by the private sector. Thus activities might qualify as traditionally governmental if they have since their inception been conducted by the government, even though there are similar activities conducted by the private sector. However, the activity would also have to be regarded as "integral" in order to qualify.

[244] *See* note 98 *supra*.

ing the economy and interstate commerce. In *National League*, however, there was no clear threat to commerce by the failure of the states to pay minimum wages to 138,000 out of 6.3 million state and local government employees,[245] and was no substantial need for the exercise of the national power to regulate commerce.

This suggested approach helps to explain the different results in *National League* and *Fry*, and overcomes the suggestions in *National League* that certain integral and traditional governmental functions may never be regulated, regardless of the national interest at stake. It protects the states' prerogatives by requiring a clear statement by Congress and a demonstration of a substantial need for the exercise of a delegated power. It allows the national government to act, however, when the duties delegated to it in the Constitution clearly require some infringement upon state sovereignty.

VII. Conclusion

The history of the Fair Labor Standards Act provides a number of insights into the scope of the national power to regulate commerce as it affects the governmental activities of the states. *National League of Cities v. Usery* in particular was a landmark case because it clearly established that there are instances when Congress may not intrude upon the sovereignty of the states, though acting within the scope of its power to regulate private interests. Nevertheless, the majority opinion in that case was confusing because it did not clearly explain its method of reasoning, nor make sufficiently clear that the sovereignty right of the states is less than absolute. Doubtlessly, problems will arise in the future concerning the exact scope of the state governmental activities which merit special insulation from the exercise by Congress of its constitutionally-delegated powers. The Supreme Court will have to adopt a clearer method for determining that a substantial national interest is indeed present, and that state sovereignty must therefore be overridden. The approach suggested in this Note hopefully provides a step in that direction.

W. Harding Drane

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[245] *See* note 73 *supra*. The requirement that Congress demonstrate a substantial need for the exercise of its power to regulate is not the same as demonstrating that state governments have a substantial impact on commerce. Given the size of state and local governments today it cannot be denied that their payrolls and purchases of goods and services have such an impact. Nor is it enough for this purpose that the Court be able to find a rational basis for a congressional finding that an activity has a substantial and harmful effect on commerce. Although this would be sufficient to justify the regulation of a private, local activity, Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241, 258 (1964), *National League* clearly rejected this standard for regulation of the states *qua* states. 426 U.S. 833, 840-41 (1976). The higher standard of requiring a showing of an actual threat to commerce protects the power delegated to Congress by the states, while at the same time granting to the states ample "freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852.