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Constitutional Law—Commerce Clause—The Reaffirmation of State Sovereignty as a Fundamental Tenet of Constitutional Federalism—*National League of Cities v. Usery*.¹—On December 12, 1974, a group of plaintiffs including the National League of Cities, the National Governors' Conference, eighteen States of the United States, and a number of cities and municipalities² filed suit in federal district court seeking declaratory and injunctive relief from the enforcement of the 1974 amendments³ to the Fair Labor Standards Act (hereinafter Act or FLSA).⁴ The challenged amendments extended FLSA coverage to all States and municipalities and thereby purported to govern minimum wages, maximum hours, and overtime rates for state and municipal employees.⁵ The plaintiffs contended that this extension of coverage was beyond the power of Congress under the commerce clause and as such impermissibly intruded upon the States' performance of essential governmental functions.⁶ The argument to limit Congress' commerce authority was presented even in light of *Maryland v. Wirtz*,⁷ in which the Supreme Court, faced with a mark-

¹ 426 U.S. 833 (1976).

² The States included Arizona, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, and Wyoming. Other plaintiffs included the Metropolitan Governments of Nashville and Davidson County, Tennessee, and the cities of Cape Girardeau, Missouri, Lompoc, California, and Salt Lake City, Utah. 426 U.S. at 836 n.7.

³ Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (amending 29 U.S.C. §§ 201 *et seq.* (1970)).

⁴ Fair Labor Standards Act of 1938, ch. 676 § 1, 52 Stat. 1060 (1938) (current version at 29 U.S.C. §§ 201 *et seq.* (1970)). The original Act required employers to pay their employees a minimum hourly wage, 29 U.S.C. § 206 (a) (1940); to pay them at one and one-half their basic pay for time worked in excess of 40 hours per week, *id.* § 207(a)(3); to keep certain records to aid in enforcement of the Act, *id.* § 211(c); and to comply with certain child labor standards, *id.* § 212. These provisions were originally enacted as part of New Deal legislation intended to alleviate the effects of an economic depression by preventing the interstate shipment of goods manufactured under labor conditions detrimental to an employee's health, safety, and financial welfare. *See id.* § 202(a).

⁵ The 1938 Act had specifically excluded States and their political subdivisions. *Id.* § 203(d). The 1974 amendments redefined "employer" to specifically include a "public agency." 29 U.S.C. § 203(d) (Supp. V 1975). "Public agency" was in turn defined as including "the government of a State or political subdivision thereof . . ." *Id.* § 203(x). Furthermore, the definition of "enterprise engaged in commerce or in the production of goods for commerce" was amended to cover the "activity of a public agency." *Id.* § 203(s)(5). Administrative, executive or professional employees were, however, not covered by the 1974 amendments. *Id.* § 213(a)(1). The 1974 amendments also excluded from coverage any person who "holds a public elective office" or is appointed by an officeholder to be a "member of his personal staff" or "to serve on a policy valuing level," or to advise the officeholder "with respect to the constitutional or legal power of his office." *Id.* § 203(e)(2)(c).

⁶ Brief for Appellant at 9a. The plaintiffs contended that this intrusion resulted from new fiscal burdens placed upon state and local budgets which would require curtailment of governmental services and personnel and would thereby substantially affect the States' policy decisions as to the manner in which they structured their governmental services. *Id.* at 7a-9a.

⁷ 392 U.S. 183 (1968)

edly similar challenge, both upheld the constitutionality of the 1966 amendments to FLSA⁸ which extended the Act's coverage to employees of state-operated schools, hospitals, and related institutions and firmly established that it was improper to "carve up" Congress' commerce power to protect even sovereign state functions.⁹ A three-judge district court,¹⁰ hearing only arguments on the law, granted Secretary of Labor Usery's motion to dismiss the plaintiffs' complaint.¹¹ While acknowledging that it was "troubled" by the plaintiffs' contentions, the district court held that the *Wirtz* rationale controlled.¹² This was so because the state and municipal institutions now covered by FLSA made substantial purchases of out-of-state goods.¹³ Therefore, because interstate commerce was substantially affected, Congress pursuant to its delegated commerce authority could regulate the hours and wages of state employees.¹⁴

On review of the district court's order by direct appeal,¹⁵ the Supreme Court, in a 5-4 decision,¹⁶ reversed and HELD: The 1974

⁸ Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 831 (amending 29 U.S.C. §§ 201 *et seq.* (1964)). Except to this extent "any State or political subdivision of a State" was still excluded from the Act's definition of an "employer." 29 U.S.C. § 203(d)(1964). Congress' rationale for this extension was that public schools and hospitals, even those not operated for profit, "are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose." S. REP. NO. 1487, 89th Cong., 2d Sess. 2, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 3010; H. R. REP. NO. 1366, 89th Cong., 2d Sess. 16 (1966).

⁹ 392 U.S. at 198-99.

¹⁰ The district court was convened pursuant to 28 U.S.C. § 2282 (1970), which provides:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

¹¹ National League of Cities v. Usery, No. 74-1812 (D.D.C. Dec. 31, 1974) (per curiam), reprinted in brief for Appellant Appendix A at 10a. The district court stated that it was acting in accordance with Rules 12 and 56 of the Federal Rules of Civil Procedure. Upon dismissal, Chief Justice Burger, pursuant to his capacity as Circuit Justice, granted relief *pendente lite* and referred the case to the full Supreme Court precluding further lower court review of the litigants factual claims. National League of Cities v. Brennan, 419 U.S. 1321 (1974) (Burger, Circuit Justice).

¹² *Id.* at 9a. In *Wirtz*, the Supreme Court rejected as "untenable" the State of Maryland's contention that the 1966 amendments controverted principles of constitutional federalism by interfering with sovereign state functions. 392 U.S. at 195. Finding that state hospitals purchased significant amounts of out-of-state goods, the Court held that Congress pursuant to its delegated commerce authority could regulate the labor conditions in those state activities which had a substantial effect on interstate commerce. *Id.* For a discussion of *Wirtz* see text at notes 221-31 *infra*.

¹³ National League of Cities, No. 74-1812 (D.D.C. Dec. 31, 1974) (per curiam), reprinted in Brief for Appellant Appendix A at 7a.

¹⁴ *Id.*

¹⁵ The jurisdiction to review the district court's order by direct appeal is conferred by 28 U.S.C. § 1253 (1970).

¹⁶ Rehnquist, J., delivered the opinion of the Court, in which Burger, C.J. and Stewart, Blackmun, and Powell, J.J., joined. Blackmun, J., filed a concurring opinion.

amendments to FLSA are not within the authority granted Congress under the commerce clause¹⁷ insofar as they directly displace the States' freedom to structure integral operations in areas of traditional governmental functions.¹⁸ The Court further concluded that its earlier decision in *Wirtz* must be overruled because schools and hospitals covered by the 1966 amendments are an integral portion of those governmental services which States have traditionally afforded their citizens.¹⁹

In overruling *Wirtz*, *National League of Cities* can be viewed as the culmination of a trend of the Burger Court to protect state interests from federal reach.²⁰ Adopting an approach which apparently attempts to strike a proper balance between state and federal interests, the Court expressed concern that to endorse the 1974 FLSA amendments would be to sanction an impermissible shift of power from the States to the Federal government.²¹ Although *National League of Cities* specifically represents a sharp about-face from the holding in *Wirtz*, and generally reflects a "heightened solicitude for the role of the state within the federal system,"²² the decision is by no means unprecedented. Rather, the Court in *National League of Cities* drew upon historical principles of constitutional federalism which protect certain state governmental functions from federal encroachment under the commerce clause. As such, *National League of Cities* must be considered a landmark case which reaffirms state sovereignty as one of the fundamental tenets of federalism.

This note will first analyze the way in which the majority derived from historical concepts of federalism its holding that the otherwise

426 U.S. at 856. Brennan, J., filed a dissenting opinion in which White and Marshall, J.J., joined. *Id.* Stevens, J., filed a dissenting opinion. *Id.* at 880.

¹⁷ Congress' power under the commerce clause is "[t]o regulate Commerce with foreign Nations, and among several States, and with Indian Tribes." U.S. CONST. art. I § 8 cl. 3.

¹⁸ 426 U.S. at 852.

¹⁹ *Id.* at 855.

²⁰ See, e.g., *Rizzo v. Goode*, — U.S. —, 96 S. Ct. 598 (1976); *Hicks v. Miranda*, 422 U.S. 332 (1975); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Younger v. Harris*, 401 U.S. 37 (1971). See also *Paul v. Davis*, — U.S. —, 96 S. Ct. 1155 (1976); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973); *Oregon v. Mitchell*, 400 U.S. 112 (1970). For a discussion of *Employees v. Department of Health & Welfare* see note 260 *infra*. While these cases do not explicitly involve the protection of traditional state functions from direct congressional regulation, commentators have regarded them as displaying various strains of solicitude for state interests and a heightened concern for the role of the States within the federal system. See, e.g., Note, *Municipal Bankruptcy, The Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871, 1874-78 (1976).

²¹ 426 U.S. at 855. See *Elrod v. Burns*, 427 U.S. 347, 375 (1976) (Burger, C.J., dissenting). In *Elrod*, Chief Justice Burger explained that the Court in *National League of Cities* "took steps to arrest the denigration of States to a role comparable to the departments of France governed entirely out of the national capital."

²² Note, *Municipal Bankruptcy, The Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871, 1874 (1976).

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plenary commerce power may be limited by assertions of state sovereignty over traditional governmental functions. The second section will focus on Justice Brennan's dissent, which vigorously argued that there is no state sovereignty limitation on Congress' plenary commerce power and that past attempts to implement such a doctrine have proved "unworkable."²³ The third section will discuss Hamilton's and Madison's concepts of state sovereignty, as outlined in *The Federalist*,²⁴ in order to reveal the historical roots of the Court's view of constitutional federalism. The fourth section will trace the judicial development of these historical principles in cases where States have attempted to raise a similar state sovereignty limitation to bar the exercise of delegated federal powers. Finally, it will be argued that the majority's position in *National League of Cities* reflects most persuasively the proper sovereign relationship between the States and the Federal government as delineated by the Constitution.

I. AN AFFIRMATIVE STATE SOVEREIGNTY LIMITATION ON THE FEDERAL COMMERCE POWER

Because past Supreme Court decisions have established conclusively that Congress has a plenary grant of authority over interstate commerce,²⁵ the complainants in *National League of Cities* did not challenge the breadth of Congress' commerce power. Rather, the Court was asked to consider whether the constitutional doctrine of intergovernmental immunity allowed the States to resist the exercise of Congress' commerce power in the 1974 FLSA amendments.²⁶ The Court addressed this issue in three analytical stages. In the first part of its opinion, the Court resolved the question whether the States have spheres of autonomous power upon which the Federal government cannot infringe even pursuant to the exercise of a constitutionally delegated power.²⁷ In the second part of its opinion, the Court first postulated that the state functions covered by the 1974 amendments contained attributes of sovereignty and then examined whether federal requirements directly displaced the considered policy choices of the States as to how they desired to structure wage and hour provisions.²⁸ Finally, in the context of distinguishing earlier Supreme

²³ 426 U.S. at 865 (Brennan, J., dissenting).

²⁴ THE FEDERALIST (J. Cooke ed. 1961) [hereinafter cited as THE FEDERALIST].

²⁵ E.g., *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) ("The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere."); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) ("The power of Congress over interstate commerce plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in Constitution."); See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 197 (1824).

²⁶ 426 U.S. at 841. In contrast, the dissent viewed the complaint as an absolute challenge to the extent of Congress' commerce authority. *Id.* at 857-58.

²⁷ See text at notes 29-57 *infra*.

²⁸ See text at notes 59-79 *infra*.

Court decisions, the Court in the third section considered whether in certain situations the federal commerce power can regulate traditional state functions, thereby overriding state sovereignty.²⁹

A. *The Power of Congress under the Commerce Clause to Regulate Directly the Activities of States as Public Employers*

Because the critical first issue was not framed as a challenge to the extent of Congress' commerce power, the Court was not forced to reexamine the settled judicial principle that Congress can fully regulate any *private* activity that affects interstate commerce.³⁰ This principle, which formed the analytical basis of the *Wirtz* holding, is grounded in the supremacy clause³¹ of the Constitution which dictates that the Federal government may preempt express state regulatory authority where both are attempting to operate on the same private activity.³² In contrast to *Wirtz*, however, a majority of the Court in *National League of Cities* drew a fundamental distinction between the federal regulation of private and state activities. The Court reasoned that the supremacy principle, which allows displacement of state laws incompatible with federal regulations when both affect private interests, does not necessarily mean that the Federal government can directly regulate the State itself.³³

In deciding that the supremacy inquiry was inapposite, the Court was able to frame the issue as a conflict between sovereigns in a federal system where both have inviolable spheres of autonomous power.³⁴ Viewed from this perspective, the Court explained that the appropriate inquiry was whether the States as sovereigns operating within the constitutional system of government could raise an *affirmative* limitation as a bar to federal regulation of certain state activities regardless of the activities' relationship to interstate

²⁹ See text at notes 79-107 *infra*.

³⁰ The Supreme Court has often held that Congress' commerce authority extends to any private activity which bears a substantial and close relation to interstate commerce. *E.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964); *North Am. Co. v. S.E.C.*, 327 U.S. 686, 705 (1946).

³¹ The supremacy clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

³² See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) for an early construction of this clause.

³³ 426 U.S. at 845. Foreshadowing his opinion in *National League of Cities*, Justice Rehnquist in his dissent in *Fry v. United States*, 421 U.S. 542 (1975) stated: "[t]his well-recognized principle of the Supremacy Clause is traditionally associated with federal regulation of persons or enterprises, rather than with federal regulation of the State itself." *Id.* at 552.

³⁴ 426 U.S. at 844, citing *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1869).

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commerce.³⁵ Finding that there are limits on Congress' commerce power inherent in our federal system,³⁶ a majority of the Court held that States could affirmatively resist the federal regulations in the 1974 FLSA amendments insofar as they applied to traditional governmental functions.³⁷ Although it acknowledged that the Constitution expressly delegated the commerce power to Congress,³⁸ the Court reasoned that limitations on that power are appropriate when Congress seeks to regulate "*States as States*."³⁹

The Court identified the source of this affirmative limitation as the doctrine of state sovereignty which recognizes the "essential role of the States in our federal system of government."⁴⁰ The Court reasoned that the very structure of constitutional federalism is based on the fundamental principal that States are sovereigns. As such, a state in its capacity as a sovereign must be allowed to assert an affirmative constitutional right to be free from direct congressional regulation of its sovereign activities.⁴¹ Recognizing that Congress' commerce authority theoretically extends to the establishment of wage and hour regulations for all employees, the Court explained that the State does not have the constitutional right to claim the absence of congressional authority over the basic subject matter.⁴² Rather, the Court asserted that the State can block the *application* of federal commerce regulations to certain state functions as being an unconstitutional exercise of that authority.⁴³ To support this conclusion, the Court first pointed to the tenth amendment, which in the Court's view "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."⁴⁴

³⁵ 426 U.S. at 841.

³⁶ *Id.* at 842. See also Brief for Appellee at 30-41 (acknowledging limitations).

³⁷ 426 U.S. at 852. The Court also noted that other congressional commerce legislation has been found invalid on the grounds that the legislation infringed upon individual liberties protected by the Constitution. *Id.* at 841. See, e.g., *Leary v. United States*, 395 U.S. 6 (1969) (due process clause of the fifth amendment as a limitation on Congress' commerce authority); *United States v. Jackson*, 390 U.S. 570 (1968) (death penalty provision of Federal Kidnapping Act held unconstitutional as violative of the right to a jury trial embodied in the sixth amendment).

³⁸ 426 U.S. at 840.

³⁹ *Id.* at 845 (emphasis added).

⁴⁰ *Id.* at 844.

⁴¹ *Id.* at 845.

⁴² *Id.* In *Fry v. United States*, 421 U.S. 542, 547 (1975), the State of Ohio raised a challenge similar to the one raised in the instant case to the application of a federal commerce act to sovereign state functions. Speaking of the State's contention, Justice Rehnquist in dissent explained "the State is not simply asserting an absence of congressional legislative authority, but rather is asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority." *Id.* at 553.

⁴³ 426 U.S. at 841, 852.

⁴⁴ *Id.* at 840, citing *Fry v. United States*, 421 U.S. 542, 547 n. 7 (1975) (emphasis added). The majority opinion advanced that the tenth amendment was an "express declaration" of a state sovereignty limitation upon Congress' exercise of its commerce

In analyzing past Supreme Court decisions to buttress this reasoning, the majority also pointed to judicial recognition of state sovereignty limitations on various types of federal legislation. For example, in *New York v. United States*⁴⁵ the State of New York contended that it was immune from a federal excise tax imposed on sales of bottled mineral waters taken from state-owned springs because it "was engaged in the exercise of a usual, traditional and essential governmental function."⁴⁶ Although a plurality of the *New York* Court held that the State was not immune from the tax,⁴⁷ the majority in *National League of Cities* concluded that dictum in the three separate opinions supported the constitutional validity of the judicially implied doctrine of intergovernmental tax immunity.⁴⁸ The *National League of Cities* Court then analogized the tax immunity concept to the affirmative limitation sought in the instant case because both were "derived from the sovereignty of the States and the concomitant barriers which such sovereignty presents to otherwise plenary federal authority."⁴⁹ Further precedential support for the recognition of a state sovereignty limitation was found in the post-Civil War cases of *Texas v. White*⁵⁰ and *Lane County v. Oregon*.⁵¹ These early Supreme Court decisions pointed out

power. 426 U.S. at 842. By characterizing the tenth amendment as merely a "declaration," the majority apparently did not hold that the amendment was itself an explicit constitutional limitation. Rather, the Court looked to restraints on federal power implicit in the whole Constitution. This interpretation is supported by Justice Rehnquist's reasoning in his dissent in *Fry*. There, Justice Rehnquist carefully pointed out that the tenth amendment does not by its terms limit congressional action, but rather is an example of the "understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects . . ." 421 U.S. at 557 (emphasis added). *But cf.* *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered.").

⁴⁵ 326 U.S. 572 (1946).

⁴⁶ *Id.* at 574.

⁴⁷ *Id.* at 583-84.

⁴⁸ 426 U.S. at 843. Justice Frankfurter, joined by Justice Rutledge, delivered the judgment of the Court in *New York*. In his opinion Justice Frankfurter stated that he would uphold a tax upon state functions as long as it was not discriminatory. 326 U.S. at 582. However, Chief Justice Stone, joined by three others in his opinion, was "not prepared to say that the national government may constitutionally lay a nondiscriminatory tax on every class of property and activities of States and individuals alike." *Id.* at 586. Furthermore, the dissenters in *New York*, Justices Douglas and Black, stated that a constitutional rule sustaining a federal tax on any state activity unless it was discriminatory "would undermine the sovereignty of the States as it has been understood throughout our history." *Id.* at 592.

⁴⁹ 426 U.S. at 843 n. 14.

⁵⁰ 74 U.S. (7 Wall.) 700 (1869). In *Texas*, the Court upheld an injunction sought by the State of Texas against purchasers of United States' bonds which were issued payable to the State of Texas or bearer but were sold to the purchaser by the Confederate government. In allowing Texas to reclaim the bonds as public property, the Court declared that the maintenance and preservation of State governments was "as much within the design and care of the Constitution as the preservation of the Union and maintenance of the National government." 74 U.S. at 725.

⁵¹ 74 U.S. (7 Wall.) 71 (1869). In *Lane County*, the Court considered a conflict between a state statute that required county treasurers to pay over to the state treasurer taxes in gold and silver coin and congressional legislation that made United States'

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that the constitution embodied a fundamental principle of federalism that States have their own distinct, independent spheres of authority.⁵² In light of this principle, the majority in *National League of Cities* reasoned that the Supreme Court itself has consistently recognized the essential role of States as sovereign entities within the federal system.⁵³

In summary, the Court in *National League of Cities* concluded that the sovereign status of States within the federal system of government means that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress . . ."⁵⁴ Accordingly, the Court declared that the congressional exercise of the commerce power directly affecting the State as a sovereign entity, as distinguished from commerce legislation regulating only private interests, was the key factor which raised the state sovereignty limitation.⁵⁵ Thus the majority explained that Congress does not lack an affirmative grant of authority to regulate wages and hours in general; rather, the Constitution prohibits Congress from exercising the

notes lawful money and legal tender for debts. Although it construed the word "debts" in the federal legislation as not referring to state taxes, thereby allowing the state statute to stand, the Court in *Lane County* stated that "the people of each State composed a State, having its own government, and endowed with all functions essential to separate and independent existence." 74 U.S. at 76. The Court explained specifically that it was considering the relationship of the States to the Federal government. The Court further noted that Madison's concepts in *The Federalist* which recognized the distinct, independent authority of States paralleled its view of what constituted a proper relationship within the federal system. *Id.*

⁵² *Id.* at 76, 725.

⁵³ 426 U.S. at 844. In referring to the tax immunity and the post-Civil War cases, the Court is certainly subject to the criticism that it has virtually ignored decades of commerce clause precedent pointing to a broad and plenary congressional commerce authority. *Id.* at 857-58 (Brennan, J., dissenting). Nevertheless, this paucity of supporting precedent stems from the fact that the Supreme Court, except in *Wirtz* and *Fry v. United States*, 421 U.S. 542 (1975), has been confronted only one other time with a direct federal encroachment on essential state functions. In that situation the Court found the federal legislation unconstitutional as violative of state sovereignty. *Ashton v. Cameron County Dist.*, 298 U.S. 513, 531-32 (1936) (irrigation district organized under state law was a political subdivision of a state and its fiscal affairs were not subject to control or interference by the federal government pursuant to its bankruptcy power). The majority of the commerce clause cases, however, only involve the assertion of federal power over private interests rather than state functions. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickhard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941).

⁵⁴ 426 U.S. at 845. The Court did not offer a list of these "attributes," but cited to *Coyle v. Smith*, 221 U.S. 559, 565 (1911), which declared that it was exclusively a State's power to locate its seat of government, to decide when and how it could be changed from one place to another, and to appropriate the necessary funds for that purpose.

⁵⁵ 426 U.S. at 845. Explaining this distinction, the Court stated "that a State is not merely a factor in the 'shifting economic arrangements' of the private sector . . . but is itself a coordinate element in the system established by the Framers for governing our Federal Union." *Id.* at 849, citing *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

authority in a manner which interferes with state functions which have attributes of sovereignty.⁵⁶ The crux of this state sovereignty doctrine, then, is that the Federal government is prevented from regulating *all* State activities in the same fashion as it regulates private activities under its commerce authority. However, the implicit corollary of this state sovereignty rationale is that those state activities which do not have sovereign attributes can be fully regulated by Congress under its commerce authority.⁵⁷

B. *Impact of the 1974 FLSA Amendments upon Essential State Functions*

In the first stage of the opinion, the Court in *National League of Cities* found that Congress may not impair functions of state governments which have attributes of state sovereignty. The Court's task, then, in the second part of the opinion was to determine whether the state functions now regulated by FLSA are essential to a State's separate and independent existence.⁵⁸ Virtually assuming the answer, the Court declared that a State's power to determine wage scales, work hours and overtime rates of their employees is "[o]ne undoubted attribute of state sovereignty . . ."⁵⁹ In fact, the Court in dicta deemed such state activities as fire protection, police protection, sanitation, public health, and parks and recreation as essential state functions because they are examples of those performed by governments in their dual roles of administering public law and furnishing public services

⁵⁶ 426 U.S. at 845.

⁵⁷ *Id.* at 854 n. 18. See *Fry*, 421 U.S. 542, 557-58 (1975). Justice Rehnquist in dissent explained that railroads are so unlike traditional governmental activities that the Federal government can fully regulate state-owned railroads unfettered by any state sovereignty limitation. See also *United States v. California*, 297 U.S. 175 (1936).

⁵⁸ 426 U.S. at 845, citing *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869) ("[T]he people of each State compose a State having its own government, and endowed with all the functions essential to separate and independent existence."). It appears that this *Lane County* analysis was derived from Madison's discussion of principles of government under the proposed Constitution. Madison stated "that separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty." THE FEDERALIST No. 51 at 348 (J. Madison).

The dissent in *National League of Cities* characterized this analysis as the "essential-function test." 426 U.S. at 879. Although the Court in utilizing this test was determining which functions were "essential," the holding in *National League of Cities* referred to "traditional governmental functions." *Id.* at 852. Therefore, it is inferred that "essential" and "traditional" have the same meaning within the context of the instant case. By allowing a State to raise a state sovereignty limitation to protect "traditional" state functions, problems are presented when some States have traditionally operated an activity and others have not.

⁵⁹ 426 U.S. at 845. Other cases have recognized the States' power to control the labor conditions of state employees. See, e.g., *Wilson v. North Carolina ex. rel. Caldwell*, 169 U.S. 586, 594 (1898) ("In its internal administration the State (so far as concern the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office."). Cf. *Kotch v. Board of River Port Pilots Comm'rs*, 330 U.S. 552, 557 (1947) ("And an important factor in our consideration is that this case tests the right and power of a state to select its own agents and officers.").

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traditionally afforded their citizens.⁶⁰ By concluding that the state activities now within the ambit of FLSA were essential functions,⁶¹ the only unanswered question was whether the 1974 amendments impermissibly interfered with the functioning of these activities.

To determine the quantum of interference, the Court reviewed the appellants' estimates of substantial costs imposed by the 1974 amendments.⁶² The Court first pointed to four examples of how the increased *economic* costs would have "a significant impact on the functioning" of state governments;⁶³ the Court then focused on the *noneconomic* "adverse effects" of compliance such as the forced relinquishment of governmental activities.⁶⁴ However, apart from the economic costs and the forced relinquishment of services—burdens

⁶⁰ 426 U.S. at 851. The Court did caution, however, that these examples were "obviously not an exhaustive catalogue" of all types of essential state functions. *Id.* at 851 n. 16. The difficulty of delineating a definitive list of essential functions is illustrated by remarks made on the floor of Congress in 1938:

[N]o one knows where the court will fix the line of demarcation between essential functions of Government and other functions. For instance, are teachers essential agents of the Government? Is education an essential function of government? Is the establishment of parks and recreational places an essential function of government? Is fire protection an essential function of government? Municipalities did not have any firemen in 1776.

83 CONG. REC. 8058 (1938) (remarks of Sen. Green) (concerning application of federal income taxes to state employees after Supreme Court decision).

⁶¹ 426 U.S. at 851. The Court in this determination would classify as "essential" those state functions which involved considered policy choices of elected state officials about traditional governmental activities. *Id.* at 847. In adopting this "essential-function" test, the Court eschewed reference to the classic distinction between "governmental" and "proprietary" activities often used in past Supreme Court sovereign immunity decisions. Compare *New York v. United States*, 326 U.S. 572, 583 (1946) (Frankfurter, J., opinion) ("[W]e reject limitations upon the taxing power of Congress derived from such untenable criteria as 'proprietary' against 'governmental' activities of the states . . .") with *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973) (state mental hospitals, state cancer hospitals, and training schools are not proprietary and therefore are immune from suit by state employees under FLSA). However, it is conceivable that the "governmental" and "proprietary" distinction and the "essential-function" test protecting traditional governmental activities are equivalent. See *Fry v. United States*, 421 U.S. 542, 558 n. 2 (1975) (Rehnquist, J., dissenting).

⁶² 426 U.S. at 846. See Reply Brief for Appellant at 48, where conflicting claims are set forth in "Appellants' Government Impact Statement" and "Appellee's Non-Impact Claims." The Court maintained that the resolution of these factual disputes as to the effect of the amendments was not critical to the disposition; therefore, it accepted as true the well-pleaded allegations of the appellants which outlined substantial economic costs imposed by the 1974 amendments. 426 U.S. at 846.

⁶³ 426 U.S. at 846. The appellants contended: that the police and fire protection costs for Nashville and Davidson County, Tennessee would increase by \$938,000 per year; that the fire protection yearly budget of Cape Girardeau, Missouri would increase \$250,000 to \$400,000; that Arizona to continue its essential expenditures would have to increase its budget by \$2.5 million; and that California would have to increase its budget \$8 to 16 million per year. *Id.*

⁶⁴ *Id.* at 846-47. For example, California asserted it would have to curtail its Highway Patrol Cadet program because of the overtime expenses required by the Act. *Id.* at 847.

which were apparently not constitutionally significant⁶⁵—the Court explained that the determinative constitutional flaw in the amendments was that they would “significantly alter or displace the States’ abilities to structure employer-employee relationships”⁶⁶ This displacement of state policy choices in essential functions existed because the 1974 FLSA amendments, in removing the exemption for States, effectively required new federal records for all state employees, new federal personnel processes and procedures, and Department of Labor supervision.⁶⁷ The 1974 amendments also allowed new personnel appeals to Congress and new Federal class actions for purported violations.⁶⁸ The Court stated that even if the Act embodied a better economic policy than that utilized by any State,⁶⁹ there was no doubt that the amendments supplanted the considered policy choices historically left to the discretion of elected state officials.⁷⁰ Thus, the court viewed this loss of discretion as more constitutionally significant than possible increased expenses or diminished services.⁷¹

Although the Court had no factual record from the district court indicating that the amendments would substantially restructure the traditional ways in which States arranged their governmental affairs,⁷² the Court declared: “[o]ur examination . . . satisfies us that both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these [States].”⁷³ Admitting that there was disagreement over the true effect of the amendments, the Court, however, did “not believe that particularized assessments of actual impact are crucial”⁷⁴ Therefore, the Court

⁶⁵ 426 U.S. at 846, 851. *Cf.* *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527 (1941) (burdens placed on States by federal commerce legislation raise questions of policy, not constitutional issues).

⁶⁶ 426 U.S. at 851.

⁶⁷ See 29 U.S.C. § 211(a)(b)(c) (1970).

⁶⁸ *Id.* § 216(b) (Supp. V 1975).

⁶⁹ 426 U.S. at 848.

⁷⁰ *Id.* at 848-50. See note 59 *supra* for cases recognizing the States’ right to regulate the labor conditions of their state employees.

⁷¹ 426 U.S. at 847-48. Reinforcing this “loss of choice” impact analysis, the Court pointed to the new overtime requirements in the 1974 amendments as direct penalty on the “States for choosing to have governmental employees on terms different from those which Congress has sought to impose.” *Id.* at 849.

⁷² See Brief for Appellee at 6 n.6 (“The [district] court held no evidentiary hearing and made no factual findings.”)

⁷³ 426 U.S. at 851. Concerning the appellants’ factual allegations, the Supreme Court used such language as: “may substantially restructure traditional ways;” “enough can be satisfactorily anticipated for an outline discussion of their general import;” “appears likely to have the effect of coercing the States;” and “appears likely to be highly disruptive.” *Id.* at 849, 850. Therefore, it is reasonable to assume that the Court was not only considering the questions of law presented, but also weighing and sifting the facts to assess the likely impact of the 1974 FLSA amendments on the States. As to his assessment, the Secretary of Labor acknowledged that there was now federal regulation of the States; there were some increased costs because of the FLSA requirements; and there were now additional requirements imposed upon the States. Brief for Appellee at 12-16.

⁷⁴ 426 U.S. at 851.

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reasoned that since the 1974 amendments significantly altered employment relationships of States, they interfered with governmental decisions essential to the States' separate, sovereign existence; hence, they unconstitutionally encroached on state sovereignty.⁷⁵ The Court in *National League of Cities* thus indicated that the dispositive factor was not the proof of actual impairment of the States' policy choices, but rather was a mere prima facie showing that "Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wage and maximum hours to be paid by the States in their capacities as sovereign governments."⁷⁶ Thus the Court concluded that the "congressional attempt" to displace state policy choices concerning "fundamental employment decisions" in areas of traditional governmental functions controverted only principles of constitutional federalism.⁷⁷ Therefore without reference to the tenth amendment,⁷⁸ the Court held merely that the 1974 FLSA amendments were "not within the authority granted Congress by Art. I, § 8, cl.3."⁷⁹

C. *Extent to Which the Federal Government May Override the State Sovereignty Limitation*

Having found an affirmative state sovereignty limitation, and having found that this limitation prevented Congress from directly regulating "essential" state functions through the 1974 FLSA amendments, the Court in the third stage of the opinion attempted to distinguish *Maryland v. Wirtz*⁸⁰ and *Fry v. United States*.⁸¹ In *Wirtz*, the Supreme Court upheld the constitutionality of the 1966 FLSA amendments which allowed the Federal government to set the wage and hour standards of state employees working in public schools and hospitals.⁸² Rejecting the State of Maryland's contention that the 1966 amendments were beyond the scope of Congress' commerce power because they interfered with sovereign state functions,⁸³ the *Wirtz* Court declared that the Federal government under its commerce

⁷⁵ *Id.* at 852.

⁷⁶ *Id.*

⁷⁷ 426 U.S. at 851. The Court was unclear as to exactly what might constitute a "fundamental employment decision." For example, is the States' right to prohibit strikes by public sector employees a "fundamental employment decision?"

⁷⁸ See note 44 *supra* for discussion of the Court's view of the tenth amendment.

⁷⁹ 426 U.S. at 852. The literal meaning of this holding apparently conflicts with an earlier statement that the complaints did not challenge the scope of Congress' commerce authority. See text at note 25 *supra*.

⁸⁰ 392 U.S. 183 (1968).

⁸¹ 421 U.S. 542 (1975).

⁸² 392 U.S. at 201.

⁸³ *Id.* at 193. The State of Maryland also argued that Congress pursuant to its commerce authority could not expand FLSA coverage through the "enterprise concept;" that the remedial provisions of the Act conflicted with the eleventh amendment; and that the affected state activities did not have "the statutorily required relationship to interstate commerce." *Id.* at 187.

power could regulate state functions in the same manner as it could regulate private functions.⁸⁴

This rationale was based on the 1936 case of *United States v. California*⁸⁵ where the Court upheld the power of the Federal government to recover a penalty for a State's violation of the federal Safety Appliance Act. In *California*, the Court rejected the argument that the State was "engaged in performing a public function in its sovereign capacity" in operating a state-owned railroad in the port of San Francisco.⁸⁶ It declared, in dicta, that "[t]he state can no more deny the power if its exercise has been authorized by Congress than can an individual."⁸⁷

The majority in *National League of Cities* found that this dictum in *California* was "simply wrong."⁸⁸ However, the Court did not overrule *California* because its holding was found to be consistent with the instant case in that the operation of a railroad was not an integral governmental activity which gave rise to a state sovereignty limitation on federal commerce legislation.⁸⁹ On the other hand, because essential state functions were implicated in *Wirtz*, the majority in *National League of Cities* found the *Wirtz* reasoning, which was explicitly grounded in the *California* dictum⁹⁰ repugnant to its concept of state sovereignty. Accordingly, the Court summarily overruled *Wirtz*⁹¹ stating that "States as States stand on quite a different footing than an individual or a corporation when challenging the exercise of Congress' power to regulate commerce."⁹²

Although the Court could not distinguish between the state functions involved in *Wirtz* and those in *National League of Cities*,⁹³ the majority was able to find distinguishing factors which allowed its *Fry* decision to stand. In *Fry*, the Supreme Court upheld⁹⁴ the constitutionality of the Economic Stabilization Act of 1970 which authorized

⁸⁴ *Id.* at 197.

⁸⁵ 297 U.S. 175, 189 (1936). See Act of March 2, 1893, ch. 196 § 2, 6, as amended April 1, 1896, 29 Stat. 85.

⁸⁶ *Id.* at 183. The *California* Court noted, however, that "[a]ll the essential elements of rail transportation are present in the service rendered . . . [because there] are the receipt and transportation, for the public, for hire, of cars moving in interstate commerce." *Id.* at 182.

⁸⁷ *Id.* at 185.

⁸⁸ 426 U.S. at 854-55.

⁸⁹ 421 U.S. at 854 n.18. See *Fry v. United States*, 421 U.S. at 558 (Rehnquist, J., dissenting). ("[T]he activity of the State of California in operating a railroad was so unlike the traditional governmental activities of a State that Congress could subject it to the Federal Safety Appliance Act.").

⁹⁰ 392 U.S. at 198.

⁹¹ 426 U.S. at 855.

⁹² *Id.* at 854.

⁹³ Both the appellee Secretary and the district court agreed that the issues in *National League of Cities* and *Wirtz* were indistinguishable; therefore *Wirtz* required the rejection of the appellants' claims. Brief for Appellee at 18; see Brief for Appellants at 6a.

⁹⁴ 421 U.S. at 543-44.

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the President to freeze wages and salaries of all employees, including State and local government employees.⁹⁵ Noting that the Court in *Fry* had found "the degree of intrusion upon the protected area of state sovereignty . . . [to be] even less than . . . in *Wirtz*,"⁹⁶ the majority in *National League of Cities* distinguished *Fry* by pointing to at least four compelling national interests in that case which rendered a finding of a state sovereignty limitation inappropriate.⁹⁷ The first factor was that the Economic Stabilization Act challenged in *Fry* was enacted in response to an "extremely serious problem" which only collective national action could alleviate.⁹⁸ The second mitigating factor was that the duration of the federal encroachment was limited to a "specific period of time."⁹⁹ Third, the court suggested that there was a constitutional distinction between freezing wages and prescribing new limits because the States were not forced to remake choices, but were forced only to maintain the *status quo*.¹⁰⁰ Finally, the Court stated that the enactment at issue in *Fry* "operated to reduce the pressures upon state budgets rather than increase them."¹⁰¹

By distinguishing *Fry*, the majority in *National League of Cities* clearly indicated that the state sovereignty limitation is not absolute.¹⁰²

⁹⁵ Title II of the Act of Aug. 15, 1970, Pub. L. 91-379, 84 Stat. 799, as amended 12 U.S.C. § 1904 (Supp. I 1970).

⁹⁶ 426 U.S. at 852-53.

⁹⁷ Perhaps, the Court saw no compelling need to overrule *Fry* since the Economic Stabilization Act had expired. See 421 U.S. at 549 (Douglas, J.) (Justice Douglas would have dismissed the writ of certiorari in *Fry* as improvidently granted.).

⁹⁸ 426 U.S. at 853. This factor was similar to the wartime situation in *Case v. Bowles*, 327 U.S. 92 (1946), where prices of many products were frozen under the Emergency Price Control by the Federal government pursuant to its war power. See text at notes 260-68 *infra*.

⁹⁹ 426 U.S. at 853.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* This rationale that implies the constitutional infringement is based on economic burden runs counter to the previous reasoning in *National League of Cities* that suggested any direct regulation of essential state functions would be an impermissible interference with state sovereignty whether or not the state benefitted. *Id.* at 848.

¹⁰² *Id.* at 853. The Court explained that the state sovereignty limitation is "not so inflexible as to preclude temporary enactments tailored to combat a national emergency." *Id.* The basis of the Court's reasoning was *Wilson v. New*, 243 U.S. 333, 348 (1917), which held a national emergency may afford a reason for Congress to exert a power already granted such as prescribing a minimum wage in a national labor dispute. The majority thus buttressed the argument that *National League of Cities* does not stand for an absolute state sovereignty limitation on Congress' commerce power. *Wilson* relied upon the early case of *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1867), that stated a constitutional provision such as the right to a jury trial cannot "be suspended during any of the great exigencies of government." *Id.* at 121. This dictum was directly followed in the famous "emergency" case of *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528-29 (1935), where the Supreme Court explained:

Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government

Viewed in this light, the Court appeared to follow a "balancing approach," as recognized by Justice Blackmun in his concurring opinion,¹⁰³ which would allow federal regulation of state functions "where the federal interest is demonstrably greater and where state . . . compliance with imposed federal standards would be essential."¹⁰⁴ Although the Court seemingly disdained reliance on any factual examination in *National League of Cities*,¹⁰⁵ this approach suggests that in future cases the Supreme Court will engage in the difficult task of passing on the relative importance of various types of federal commerce legislation. The difficulty of this task is compounded by the fact that the Court did not articulate clearly the degree or the nature of the impact necessary to shift the balance in favor of the states. Despite these drawbacks, the balancing approach appears workable. In this respect, the Court in *National League of Cities*, in distinguishing *Fry*, did suggest four factors which would allow federal commerce regulation directed at States as States to stand.¹⁰⁶ Further, according to the Court, the balancing approach is triggered only after the essential function test has demonstrated that a state activity is within the area protected from federal encroachment, and the particular federal

with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.

Therefore because the majority did not overrule this doctrine that an emergency cannot expand constitutional authority, Congress must have a plenary grant of commerce power which actually extends to *all* state activities affecting interstate commerce. However, under ordinary conditions, the States are allowed to assert an affirmative state sovereignty limitation on Congress' commerce power directly to regulate traditional state governmental functions. Because Congress has a grant of authority over the basic subject matter, the state sovereignty limitation, then, is "flexible." This is so because the Court, weighing the state and federal interests in the balance, can remove the barrier to federal regulation in specific cases and restore Congress to its full granted powers.

¹⁰³ 426 U.S. at 856.

¹⁰⁴ *Id.* Justice Blackmun's approach, which requires not only an overriding national interest but also the unavailability of viable alternatives to the national legislation, appears rather stringent and weighted in favor of the States. Furthermore, in pointing to the area of environmental protection as an area of significant federal interest, Justice Blackmun illogically implies that this interest is more important than the federal interest in assuring that individual state workers are paid a minimum wage.

¹⁰⁵ *Id.* at 846. Nevertheless, the majority proceeded to evaluate in detail the impact of the 1974 FLSA amendments. *Id.* at 846-47. Justice Brennan in dissent agreed with the majority's reluctance to rely on the economic burdens as the measure of unconstitutionality, but he disputed the majority's assessment of the impact of the 1974 amendments on the States. *Id.* at 874 n. 12.

¹⁰⁶ *Id.* at 853. Restated these are: (1) the utilization of federal legislation is the only effective means to combat a pervasive national problem; (2) the national legislation is formulated to employ the least restrictive means to alleviate a national problem of limited duration; (3) the States are not forced to remake past policy decisions, but only forced to maintain the *status quo* until the national problem has subsided; or (4) the federal regulations do not appreciably affect the States' economic resources. *Id.*

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commerce legislation interferes with this activity.¹⁰⁷ It is probable, then, that in future state sovereignty challenges to federal commerce legislation, the Court will make a factual inquiry into the likely impact of the challenged legislation on the state interests. If there are compelling countervailing national considerations, the federal legislation will override the state sovereignty limitation and permit the federal government to regulate directly essential state functions. In so doing, the Court will be considering on a case-by-case basis whether particular federal intrusions disrupt the historical relationship between the Federal government and the States as embodied in concepts of constitutional federalism.¹⁰⁸

II. THE DISSENT

In a vituperative dissent, Justice Brennan, joined by Justices Marshall and White, challenged the majority's holding on three grounds.¹⁰⁹ First, the dissent asserted that judicial precedent firmly established the plenary nature of the federal commerce power.¹¹⁰ In particular the dissent pointed to *United States v. California*,¹¹¹ where the Supreme Court made explicit its view that "[t]he sovereign power of the states is necessarily diminished to the extent of grants of power to the federal government in the Constitution."¹¹² Based on this lan-

¹⁰⁷ *Id.* at 845-46.

¹⁰⁸ See *Fry v. United States*, 421 U.S. at 558 (Rehnquist, J., dissenting).

¹⁰⁹ In a separate dissent, Justice Stevens argued that it was difficult to perceive a "sovereign State's inherent right to pay a substandard wage to the janitor at the state capital." 426 U.S. at 880. Pointing to a list of valid federal regulations that affect activities of the State's janitor, Justice Stevens could not see meaningful distinctions between those regulations and the regulations in the 1974 FLSA amendments. Nevertheless, he agreed "that it is unwise for the Federal Government to exercise its power in ways described in the Court's opinion." *Id.* at 881. This disagreement with the legislation, however, would not affect his judgment with respect to its validity. Thus, while sympathizing with the Court's view, he has unable to discern a limitation on the federal power over the labor market. *Id.*

¹¹⁰ *Id.* at 857-58. An example of this precedent is *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), where the Court found that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, order (sic) than are prescribed in the constitution." *Id.* at 196. The Court stated, however, that "[a]lthough many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system." *Id.* at 198-99.

¹¹¹ 297 U.S. 175 (1936).

¹¹² *Id.* at 184. Although the dissent contended that this dictum clearly refuted any notion of a state sovereignty limitation on Congress' commerce power, the majority declared that this broad statement in *California* was "wrong." 426 U.S. at 854-55. Limiting *California* to its facts, the majority reasoned that direct federal regulation of a state-owned railroad was justified because the operation of a railroad was so unlike an essential state function. *Id.* at 854 n. 18. This conclusion is arguably correct because railroads have been considered traditionally an instrumentality of interstate commerce. See, e.g., *Wisconsin R. R. Comm. v. C. B. & Q. R. R.*, 257 U.S. 563 (1922). See also *Southern Ry. v. United States*, 222 U.S. 20, 27 (1911) (because interstate and intrastate railroad equipment often are commingled, Congress can extend the Safety Appliance

guage, the dissent reasoned that States, although sovereigns, must be subordinate to the Federal government's exercise of its constitutional commerce power.¹¹³ In this respect, and in contrast to the majority, the dissent did not view the conflict in *National League of Cities* as a controversy between equal sovereigns.¹¹⁴ Thus the principle first framed in *California*, and reaffirmed in *Wirtz*, supported the proposition that States engaging in economic activities stand on the same footing as private individuals or corporations when challenging commerce legislation.¹¹⁵

The dissent garnered further support for this proposition from the Court's 1946 decision in *Case v. Bowles*,¹¹⁶ which apparently rejected a state sovereignty limitation on Congress' war power. In *Case*, the Federal government sought to enjoin the sale of timber on school lands of the State of Washington at prices in excess of regulations enacted pursuant to the Emergency Price Control Act of 1942.¹¹⁷ The

Act to all vehicles using an interstate railroad whether or not the vehicles are engaging in intrastate commerce).

Not only was the State of California in direct competition with private economic interests, but also the State, by engaging in an activity traditionally regulated by the Federal government, must have consented to the Federal government's jurisdiction over that activity. See *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 280 n. 1 (1973). See also *Parden v. Terminal Ry.*, 377 U.S. 184, 186 (1964).

¹¹³ 426 U.S. at 859. See, e.g., *North American Co. v. SEC*, 327 U.S. 686 (1946), where the Court upheld the Public Utilities Holding Company Act under which the Securities and Exchange Commission had ordered the North American Company to divest itself of some properties. The Court in *North American* indicated that although the Framers of the Constitution did not intend for Congress to be an absolute sovereign, "so far as the commerce clause alone is concerned Congress has plenary power . . ." *Id.* at 705. Cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457-58 (1976) (Brennan, J., concurring) (sovereign immunity was relinquished to the Federal government at the time of the framing of the Constitution because the States granted Congress specific enumerated powers).

See also *Bethlehem Steel Co. v. New York State Board*, 330 U.S. 767 (1947), where Justice Frankfurter stated that Congress under its commerce authority could entirely displace a state policy when it conflicted with a federal policy. *Id.* at 780. The dissent in *National League of Cities* cited Frankfurter's opinion in *Bethlehem Steel* as support for its argument that because of the supremacy clause, "the enactment and enforcement of state laws" could be overridden by contrary federal legislation. 426 U.S. at 875. However, it should be noted that Frankfurter in *Bethlehem Steel* also declared:

But in legislating, Congress is not indulging in doctrinaire, hard-and-fast curtailment of the State powers reflecting special State interests. Federal legislation of this character must be construed with due regard to accommodation between the assertions of new federal authority and the functions of the individual states, as reflecting the historic and persistent concerns of our dual system of government.

330 U.S. at 779-80. Implicit in this statement is the notion that the "dual system of government" concept does not allow Congress to obliterate state sovereignty totally.

¹¹⁴ 426 U.S. at 859. See *Sanitary Dist. v. United States*, 266 U.S. 425-26 (1925). In *Sanitary Dist.* the Federal government was able to enjoin a state corporation, the Sanitary District of Chicago, from diverting water from Lake Michigan in excess of that amount authorized by the Secretary of War. See text and notes at notes 210-15 *infra*.

¹¹⁵ 426 U.S. at 873.

¹¹⁶ 327 U.S. 92 (1946).

¹¹⁷ *Id.* at 96. See Pub. L. 79-108, 59 Stat. 306 (1942).

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State's argument, based on the tenth amendment, was that the "Act cannot be applied to this sale because it was 'for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens.'"¹¹⁸ The Court rejected this argument because it found that the Emergency Price Control Act was valid exercise of the congressional war power.¹¹⁹ According to the dissent, since the war power and the commerce power are both delegated federal powers of equal stature,¹²⁰ the concerns expressed in *Case* about creating a state sovereignty limitation on the war power "are equally applicable to restrictions on the commerce power . . ."¹²¹

Based on this reading of precedent, the dissent concluded that a judicial balancing of federal and state interests would be unwarranted.¹²² Rather, the very structure of the constitutional form of government, with elected representatives from all States, ensures that state interests will be protected.¹²³ Thus, according to the dissent, the judicial "role" ends when it is established that "Congress has not

¹¹⁸ *Id.* at 101. The Federal government had originally granted the lands to the State of Washington upon condition they be used to support schools. *Id.* at 95.

¹¹⁹ *Id.* The *Case* Court noted to hold otherwise would "impair a prime purpose of the Federal governments' establishment." *Id.* at 102.

¹²⁰ 426 U.S. at 864 n. 6. The dissent expressed concern that the majority distinguished *Case* because they viewed Congress' war power as more crucial to the Federal government than the commerce power. To the dissent such a denigration of the commerce power was unjustifiable. The Supreme Court has considered the relative importance of the commerce clause power among Congress' enumerated powers. *See, e.g., H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533-35 (1949).

¹²¹ 426 U.S. at 864 n. 6.

¹²² *Id.* at 876. According to the dissent, the majority in *National League of Cities* chose to redistribute judicially the balance of powers between States and the Federal government in violation of "the fundamental tenet of our federalism that the extent of federal intervention into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress." *Id.* at 876-77. *But see New York v. United States*, 326 U.S. 572, 594 (1946), where Justice Douglas in dissent countered a similar argument with:

The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. There will often be vital regional interests represented by no majority in Congress. The Constitution was designed to keep the balance between the States and the nation outside the field of legislative controversy.

¹²³ 426 U.S. at 876. The dissent's contention ignores the fact that the Constitution provides for dual representation for the nation's citizens in both State and Federal governments. Thus congressional representation was not intended to substitute for or to usurp the constitutional right of a State's citizens to vote for their State and local governments. The dissent's approach to constitutional federalism which allows the federal government pursuant to its commerce power to regulate and control absolutely expenditures of State and local governments essentially negates this right by usurping the citizen's vote regarding State and local budgets. Therefore, when traditional governmental functions are implicated, such an *absolute* approach is apparently incompatible with another fundamental tenet of constitutional federalism—state sovereignty. *See Ashton v. Cameron County Dist.*, 298 U.S. 513, 531 (1936). Accordingly, in those situations, a *balancing* approach recognizing that both States and the Federal government have sovereign status is probably more consonant with constitutional federalism.

unreasonably regulated a subject matter of 'commerce'. . . ." ¹²⁴

Applying these principles to the facts of the instant case, the dissent maintained that Congress had "not made an unreasonable legislative judgment" that state employment activities affected interstate commerce;¹²⁵ the decision to extend FLSA coverage to States concerned a "policy issue" that had been resolved through the political system.¹²⁶

The second objection raised by the dissent concerned both the majority's interpretation of the tenth amendment and its use of precedent to find a state sovereignty limitation on the commerce power. First, the dissent was plainly "astound[ed]" by the majority's reliance on the tenth amendment as "an express declaration" of a state sovereignty limitation on the commerce clause.¹²⁷ Citing *Gibbons v. Ogden*,¹²⁸ in which Chief Justice Marshall rejected the argument that the States' "inseparable attribute of sovereignty . . . secured by the tenth amendment" was a limitation of Congress' commerce power,¹²⁹ the dissent declared that the majority departed "from a principle that has remained unquestioned for 150 years."¹³⁰ According to the dis-

¹²⁴ 426 U.S. at 861. *E.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) ("How obstructions in commerce be removed . . . is subject only to one caveat—that the means chosen by . . . [Congress] must be reasonably adopted to the end permitted by the Constitution."). *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), was the first case to reflect a similar viewpoint. The dissent in *National League of Cities* pointed out that past Supreme Court decisions have validated consistently federal commerce regulation of state activities as long as they were activities actually involving "commerce." 426 U.S. at 860. *See, e.g.*, *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466 (1938). ("[W]here federal control is sought over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention . . ."). This is the modern test for determining whether or not private activities can be regulated by the Federal government pursuant to its commerce powers. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964).

¹²⁵ 426 U.S. at 876.

¹²⁶ *Id.*, quoting *id.* at 881 (Stevens, J., dissenting).

¹²⁷ 426 U.S. at 862. The dissent pointed out that the majority relied upon a footnote in *Fry*, 421 U.S. at 547 n.7, stating that "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system" to conclude that the tenth amendment embodies a policy that state sovereignty may limit even an enumerated federal power. 426 U.S. at 861 n. 4. According to the dissent, the footnote merely restated the *Darby* interpretation that the Federal government may not intrude upon a State's sphere of autonomous power by exercising powers *not granted* to it. *Id.* Therefore, following the *Darby* construction, the dissent declared that because employee wages and hours were within the purview of the commerce clause, Congress by exercising this *granted* power through FLSA would not impermissibly invade state sovereignty in contravention of constitutional federalism. *Id.* at 871.

¹²⁸ 22 U.S. (9 Wheat.) 1 (1824) (acts of the legislature of the State of New York which granted to certain persons the exclusive right to operate steamboats between New York and New Jersey were held unconstitutional as violative of the commerce clause).

¹²⁹ *Id.* at 198-201.

¹³⁰ 426 U.S. at 861 n4. For early Supreme Court constructions of the tenth amendment *see, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406, (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 325-26 (1816). It is suggested, however,

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sent, the only significance of the tenth amendment was clearly established in *United States v. Darby*,¹³¹ which explained that the tenth amendment is but a truism reflecting the fact that the federal government has only specifically enumerated powers and as such cannot assume powers beyond those granted.¹³²

In addition, the dissent took issue with the majority's use of judicial precedent to support the conclusion that state sovereignty limited the federal commerce power. In particular, the dissent maintained that the majority's reliance on Chief Justice Stone's *New York* opinion was "plainly misplaced."¹³³ In light of the fact that the Court in *New York* upheld a nondiscriminatory federal tax on sales of bottled mineral waters by the State of New York, the dissent pointed out that Chief Justice Stone was addressing only the principles of an implied tax immunity and not the question of whether there existed a state sovereignty limitation upon the exercise of the commerce power.¹³⁴ According to the dissent, the proper application of *New York* to the instant case could be found in Justice Frankfurter's opinion, which explained that the only limitation on Congress' taxing power was that it cannot discriminate against States.¹³⁵ Because in the instant case the 1974 FLSA amendments applied equally to public and private employers, the dissent asserted that the amendments were not discriminatory.¹³⁶

that the tenth amendment, while not an express constitutional limitation on delegated federal powers, both reflects that States are indeed sovereigns and implicitly embodies the concept that state sovereignty is the "balancing mechanism" by which States retain autonomy over their designated spheres of authority. *Cf.* *New York v. United States*, 326 U.S. at 595 (Douglas, J., dissenting). With respect to this approach most Supreme Court decisions are inapposite to the question whether state sovereignty can limit the federal commerce power, for in decisions such as *Darby* state sovereignty was not threatened. Specifically, private interests were attempting to utilize the States' "balancing mechanism" to thwart congressional commerce regulation. In contrast, in cases involving the regulation of proprietary-type state activities such as in *California*, state sovereignty was threatened, but the balance was struck in favor of national legislation. This followed because the State became involved with a railroad, an instrumentality of commerce, clearly a function outside of the traditional internal concerns of States. See notes 86, 112 *supra*.

¹³¹ 312 U.S. 100, 124 (1941).

¹³² 426 U.S. at 862-63. The Court in *Darby* further explained that "[f]rom the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." 312 U.S. at 124.

¹³³ 426 U.S. at 863.

¹³⁴ *Id.* at 863-64. See *New York*, 326 U.S. at 583-84.

¹³⁵ *Id.* at 866 n. 7, citing *New York*, 326 U.S. at 582.

¹³⁶ 426 U.S. at 866 n.7. Apart from the discrimination issue, the dissent further noted that Justice Frankfurter stated that to the extent the State's immunity from taxation rested "on any vague sovereignty notions," it was inconsistent with *California*. *Id.* But Justice Frankfurter conceded in *New York* that "[t]here are, of course, State activities and State-owned property that partake of uniqueness from the point of inter-governmental relations These could not be included for purposes of Federal taxation in any abstract category of taxpayers without taxing the State as a State." 326 U.S. at 582.

The dissent further challenged the majority's reliance on post-Civil War cases such as *Texas v. White*¹³⁷ and *Lane County v. Oregon*¹³⁸ which spoke of the essential role of the States within the federal system. In view of their "unique historical setting," the dissent asserted that these cases could be distinguished.¹³⁹ In fact, the dissent pointed out that it was during the Reconstruction that Congress enacted three amendments, the thirteenth, fourteenth, and fifteenth, which enlarged federal power and at the same time contracted state power.¹⁴⁰ Thus, according to the dissent, these decisions simply did not support any state sovereignty limitation on the commerce power.¹⁴¹

Having concluded that neither the Constitution nor judicial precedent supported a state sovereignty limitation on Congress' commerce power, the dissent then attacked the majority's use of the "essential-function test." First, the dissent referred to *Case v. Bowles*, in which the Court had found that formulations of a state sovereignty standard based on distinctions between essential and nonessential state functions was "unworkable."¹⁴² To buttress this view, the dissent pointed to the standard's inconsistent application even within the majority's opinion. For example, the majority was willing to condone the federal impingement on essential state functions in *Fry* where the federal government was able to freeze the wages of all state employees pursuant to the Emergency Stabilization Act of 1970.¹⁴³ At the same time, the majority was unwilling to distinguish the state functions in *Wirtz* where FLSA regulations were applied to state hospitals and mental institutions.¹⁴⁴ Pointing to the obvious federal interference in *Fry*, the dissent suggested that the Economic Stabilization Act directly displaced the State's freedom of choice in their essential activities.¹⁴⁵ Thus, had the court not engaged in a "balancing" process, a literal application of the essential-function test should have permitted the States to raise their state sovereignty limitation to thwart the Economic

¹³⁷ 74 U.S. (7 Wall.) 700 (1869).

¹³⁸ *Id.* at 71. For a discussion of *Texas* and *Lane County* see notes 50, 51 *supra*.

¹³⁹ 426 U.S. at 867 n. 8.

¹⁴⁰ *Id.* See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (legislation enacted pursuant to the Civil War amendments sanctioned congressional intrusion into the States' spheres of autonomy with a corresponding diminution of state sovereignty).

¹⁴¹ 426 U.S. at 858.

¹⁴² *Id.* at 865, citing 327 U.S. at 101 n. 7. See *New York v. United States*, 326 U.S. at 580 (Frankfurter, J., opinion). According to its reading of the majority's essential function test, the dissent envisioned that Congress now would be precluded from regulating "[any areas] 'that States have regarded as integral parts of their governmental activities.'" 426 U.S. at 871, citing *id.* at 854 n. 18. Such an imprecise formulation would not only protect the state activities covered by the 1974 FLSA amendments but would also protect those activities involved in *California* and *Case. Id.* at 871. In view of this broad restriction on Congress' commerce power, the dissent disparaged the essential-function test as a "meaningless limitation" on the state sovereignty doctrine. *Id.*

¹⁴³ *Id.* at 852.

¹⁴⁴ *Id.* at 855.

¹⁴⁵ *Id.* at 872.

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Stabilization Act.¹⁴⁶ In contrast, *Wirtz* was overruled "by [an] exercise of raw judicial power" without a similar effort to balance or to distinguish the activities regulated by the 1966 FLSA amendments and those now covered by the 1974 amendments.¹⁴⁷

In view of the conflicting applications of the essential-function test to *Wirtz* and *Fry*, the dissent argued that the majority, in essence, was implementing a natural law of federalism approach found only in the now discredited decisions which had struck down federal commerce legislation during the 1930's.¹⁴⁸ Therefore, *National League of Cities* was characterized by the dissent as "a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress."¹⁴⁹

Even assuming *arguendo* that some state functions should be protected from direct federal encroachment, the dissent questioned the majority's application of the essential-function test to the record before the Court. According to the dissent, it was untenable to argue that the 1974 amendments impose federal policy objectives because decisions as to wages and hours were not seen to implicate state sovereignty.¹⁵⁰ The dissent speculated that on the basis of its holding the majority could "conclude that . . . any federal regulation under the commerce power 'will . . . significantly alter or displace the States' abilities to structure employer-employee relationships.'"¹⁵¹ The "ominous" result of this determination would be that as long as essential state functions were implicated, the state sovereignty limitation would absolutely prohibit Congress from regulating the wages and hours of State employees under the commerce clause.¹⁵²

¹⁴⁶ *Id.* Pinpointing only the weakest of the four factors that the majority used to distinguish *Fry* from *National League of Cities*, the dissent argued that the distinction "between curbs against increasing wages and curbs against paying wages lower than the federal minimum," which allowed *Fry* to remain undisturbed, was constitutionally insignificant. *Id.*

¹⁴⁷ *Id.* at 879.

¹⁴⁸ *Id.* at 867-68. The dissent equated the analysis of the majority to the reasoning in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), *United States v. Butler*, 297 U.S. 1 (1936), and *Hammer v. Dagenhart*, 247 U.S. 251 (1918), where the use of the tenth amendment to limit Congress' commerce authority over private activities ultimately provoked a constitutional crisis for the Court. *Id.* The dissent noted that this restrictive construction of the commerce clause was rejected eventually in *United States v. Darby*, 312 U.S. 100 (1941), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). 426 U.S. at 868.

¹⁴⁹ 426 U.S. at 876.

¹⁵⁰ *Id.* at 873. The majority, of course, concluded that the 1974 FLSA amendments impermissibly displaced "the States' abilities to structure employer-employee relationships . . ." *Id.* at 851. Yet, as viewed by the dissent, the only possible constitutional basis for this determination in the 1974 amendments was the new limitation on the range of decisions made by States with regard to their employees' wages and hours. *Id.* at 873-74.

¹⁵¹ *Id.* at 874, quoting *id.* at 851.

¹⁵² *Id.* at 875. This conclusion, which left the dissent "incredulous," *id.*, was perhaps an oblique reference to possible implications in *National League of Cities* on the invalidity of the equal pay provisions of FLSA. See, e.g., *Usery v. Allegheny County Inst.*

III. FEDERALISM CONCEPTS: THE HISTORICAL BASIS FOR THE DIVERGENT POSITIONS IN NATIONAL LEAGUE OF CITIES

The narrow legal issue resolved in *National League of Cities* was whether Congress' commerce authority extended to the regulation of the wages and hours of state employees involved in essential state functions. However, as was recognized by both the majority and the dissent, the Court's resolution of this issue had broader ramifications for the nature of the "constitutional" relationship between the States and the Federal government within the federal system.¹⁵³ More specifically, the majority concluded that the 1974 FLSA amendments not only infringed upon the authority of State governments to make essential policy decisions,¹⁵⁴ but also subordinated the States' sovereign status to a level on par with individual citizens.¹⁵⁵ According to the majority's view, this subordination, if permitted would affect a "startling restructuring of our federal system. . . ."¹⁵⁶ Thus the Court in *National League of Cities* perceived the intent of the Framers to be that the Federal government, when exercising a specifically granted constitutional power, does not have plenary authority to regulate every activity that somehow affects that power. Rather, the federal constitutional system is so constructed that States are sovereign entities which retain spheres of autonomous power which cannot be subordinated even to an explicitly granted federal power.¹⁵⁷ By contrast, the dissent

Dist., 544 F.2d 148 (3rd Cir. 1976); *Christensen v. Iowa*, 417 F. Supp. 423 (N.D. E.D. Iowa, 1976) (in both decisions the equal pay provision of FLSA were upheld against state sovereignty challenges as to their constitutionality). See note 157 *infra*.

Nevertheless, the dissent did suggest that Congress could meet its objectives by conditioning grants of federal funds to States upon compliance with the minimum wage and maximum hour provisions in FLSA. 426 U.S. at 880. Cf. *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 143-44 (1947). ("We do not see any violation of the state's sovereignty in the hearing or order. Oklahoma adopted the 'simple expedient' of not yielding to what she urges is federal coercion The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." (citations omitted)). Furthermore, the majority in *National League of Cities* stated:

We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I § 8, cl. 1, or § 5 of the Fourteenth Amendment.

426 U.S. at 852 n. 17; See also *Fitzpatrick v. Bitzer* 427 U.S. 445 (1976) (the 1972 amendments to the Civil Rights Act (Title VII) which extended coverage to the States as employers were not limited by state sovereignty because legislation enacted pursuant to the fourteenth amendment permits Congress to intrude into the States' spheres of autonomy).

¹⁵³ See 426 U.S. at 856 (Blackmun, J., concurring).

¹⁵⁴ *Id.* at 851.

¹⁵⁵ *Id.* at 855 n. 19.

¹⁵⁶ *Id.*, quoting *id.* at 875 (Brennan, J., dissenting).

¹⁵⁷ But see *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In *Fitzpatrick*, male state employees claimed a State's statutory retirement benefit plan discriminated against them on the basis of sex. *Id.* at 448. The Court held that the eleventh amendment and the principle of sovereign immunity which it embodies are limited by the federal enforce-

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viewed the intent of the Framers to be that Congress, not the Court, would decide the extent of the intervention of the commerce power upon state functions.¹⁵⁸

It is important to note that a strikingly similar divergence of opinion over the nature of constitutional federalism can be found in the writings of the Framers themselves. This note will examine the writings of Hamilton and Madison in *The Federalist* as being representative of these opposing views.¹⁵⁹ In order to place *National League of Cities* in its proper historical perspective, the note will then trace the development of this fundamental conflict in four lines of Supreme Court decisions implicated in the *National League of Cities* opinion. Finally, the holding in *National League of Cities* will be reconsidered and analyzed as a proper accommodation of the Madisonian and Hamiltonian approaches to constitutional federalism.

A. Madison's Position

As Madison pointed out in *The Federalist*, experience and reason have shown that a precise test cannot be formulated to define the

ment provisions of the fourteenth amendment. *Id.* at 456. Therefore, awards for retroactive retirement benefits and attorney fees under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et. seq.* (1970), are not precluded by the eleventh amendment. *Id.* at 456-57. Justice Rehnquist, writing the majority opinion in *Fitzpatrick*, clearly indicated that Congress exercised its power under § 5 of the fourteenth amendment when it extended coverage to state employees in the 1972 amendments to the Civil Rights Act (Title VII). Pub. L. 92-318, 86 Stat. 375. Furthermore, in language that appears to be contradictory to *National League of Cities*, Justice Rehnquist acknowledged that such cases as *Katzenbach v. McClung*, 379 U.S. 294 (1964), "sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." 427 U.S. at 455. Thus, Justice Rehnquist admitted that the Civil Rights legislation "was grounded on the expansion of Congress' power—with the corresponding diminution of state sovereignty." *Id.* Nevertheless, he attempted to reconcile this statement with his historical concept of state sovereignty outlined in *National League of Cities* by explaining this "diminution" was "found to be intended by the Framers and made part of the Constitution upon the State's ratification of those Amendments . . ." *Id.* at 455-56.

By distinguishing *Fitzpatrick* from *National League of Cities*, the Court has apparently answered in the negative the question whether a State could discriminate on any basis against its own employees despite contrary federal regulations. Therefore, it is submitted that the States will be able to raise the affirmative state sovereignty limitation of *National League of Cities* to object only to federal commerce legislation which attempts directly to regulate essential and traditional state functions. *See, e.g.,* *Usery v. Allegheny County Hosp. Inst. Dist.*, 554 F. 2d 148, (3rd Cir. 1976), where the Court upheld the Equal Pay Act of 1963, 29 U.S.C. § 206 (d) (1) (1970), stating that the Act is severable from the Fair Labor Standards Act and is implicitly based on the fourteenth amendment. *See also* *Christensen v. Iowa*, 417 F. Supp. 423 (N.D. E.D. Iowa, 1976), where the court upheld the Equal Pay Act because sex discrimination could not validly be "considered 'fundamental employment decisions' upon which the state's system for administering the public law and furnishing public services rested." 417 F. Supp. at 425.

¹⁵⁸ 426 U.S. at 876.

¹⁵⁹ In that "legislative history" of the Constitution, both Hamilton and Madison sought ratification of the proposed Constitution which provided for a stronger Federal

exact boundaries of authority held by the Federal and State governments.¹⁶⁰ Nevertheless, Madison, like Hamilton, maintained that the proposed Constitution would be ratified by the States in their sovereign capacity.¹⁶¹ Therefore, since the will of the people was to be performed though the medium of independent States, the act of ratification would establish a *federal* as opposed to a *national* Constitution.¹⁶² According to Madison, the importance of this distinction was reflected in the operation of the government itself: in a *purely* federal system the Federal government's power would operate only on the States in their political or sovereign capacity.¹⁶³ However, Madison acknowledged that the new Constitution also had aspects of a national government, for it operated on the nation's citizens in their individual capacities.¹⁶⁴ At the same time, he cautioned that while the extent of a *purely* national government's authority would naturally embody an indefinite supremacy over individual and States alike,¹⁶⁵ the proposed Constitution would not incorporate such an approach. Rather, Madison asserted that the Constitution would be essentially federal in its foundations, for States would have distinct and independent spheres of authority not subject to the authority of the Federal government.¹⁶⁶ Therefore, the Federal government's powers would extend to certain enumerated objects only, and the States would be left with "a residuary and inviolable sovereignty over all other objects."¹⁶⁷

Although Madison did not address directly the issue whether the Federal government could constitutionally encroach upon state sovereignty when acting pursuant to a granted power, it appears that he envisaged the powers deposited to the Federal government as only those "indispensably necessary to accomplish the purposes of the Union."¹⁶⁸ With respect to the extent of these federal powers, Madison believed that the Federal government would not have the capacity to annihilate the State governments¹⁶⁹ which were "arrayed with cer-

government invigorated with a *new* power to regulate interstate commerce. THE FEDERALIST No. 45 at 314 (J. Madison); No. 23 at 145-46 (A. Hamilton).

¹⁶⁰ *Id.* No. 37 at 234 (J. Madison).

¹⁶¹ *Id.* No. 39 at 254 (J. Madison).

¹⁶² *Id.*

¹⁶³ *Id.* at 255.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 256.

¹⁶⁶ *Id.* at 256, 257.

¹⁶⁷ *Id.* at 256. Thus, Madison explained that the State governments will be imbued with a sovereign status and "will retain under the proposed Constitution a very extensive portion of active sovereignty . . ." *Id.* No. 45 at 310 (J. Madison). Not only will States be considered "essential parts of the federal Government," *id.* at 311, but also their powers will be numerous, indefinite and will "extend to all objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." *Id.* at 313.

¹⁶⁸ *Id.* No. 46 at 323 (J. Madison).

¹⁶⁹ *Id.* On the issue of whether the Federal government would attempt to enlarge its sphere of autonomy at the expense of the States, Madison believed that the Federal government will be "disinclined to invade the rights of the individual States, or the prerogatives of their governments." *Id.* at 319. This disinclination would be nurtured by the

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tain dignities and attributes of sovereignty."¹⁷⁰ Accordingly, Madison characterized the newly proposed commerce clause as a federal power necessary only to superintend the reciprocal trade between the States.¹⁷¹ Such a characterization implies that this delegated federal power would be limited to the regulation of the incidents of interstate trade to prevent deleterious commercial warfare between the States.¹⁷² Under Madison's view, then, the Federal government acting pursuant to its commerce power seemingly was incapable of encroaching upon the sphere of autonomous powers reserved to the States.

Since Madison's time, of course, the scope of the commerce clause has been judicially construed to extend the sphere of Congress' commerce authority to the point where it tends to overlap with spheres of sovereign state power.¹⁷³ Implicit in this developing congruency of powers is a shift from the original tangential relationship of independent spheres of authority contemplated by Madison to a concrescent situation whereby the Federal government would intrude upon the States' autonomous powers.¹⁷⁴ Yet, to Madison, the idea that federal powers could go so far as to infringe upon state sovereignty was a "degree of madness" that stood far outside his conception of a federal-state system of allocated mutually exclusive powers.¹⁷⁵ In his view, the Federal government's powers were narrowly defined so as practically to assure affirmative state resistance to any encroachment on state sovereignty.¹⁷⁶

In sum, on the basis on his assertions of the importance of state sovereignty and the concomitant narrowly defined role of enumerated federal powers,¹⁷⁷ it can be maintained that Madison's theory of constitutional federalism is irreconcilable with a theory that allows encroachment on the valuable rights of States or the prerogatives of their sovereign governments, even pursuant to a delegated federal power. Consequently, Madison's writings have been interpreted to advocate a position of solicitude for state sovereignty whereby even del-

predispositions of the members of Congress toward local interests. *Id.* at 317. The States' representatives will more likely be "partizans" of their respective States rather than "guardians" of national interests. *Id.* at 318. *See also id.* No. 17 at 106 (A. Hamilton). Nevertheless, Madison stated clearly that any attempt at an ambitious encroachment on the State governments' authority would arouse the concerted resistance of all States to prevent the annihilation of their governments. *Id.* No. 46 at 320 (J. Madison).

¹⁷⁰ *Id.* No. 45 at 309 (J. Madison).

¹⁷¹ *Id.* No. 42 at 284 (J. Madison).

¹⁷² *Id.* at 283.

¹⁷³ *Cf. Perez v. United States*, 402 U.S. 146, 157 (1971). In dissent in *Perez* Justice Stewart stated that "I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity [loan sharking] through the enactment of federal criminal laws."

¹⁷⁴ *Cf. Elrod v. Burns* 427, U.S. 347, 375-76 (1976), where Chief Justice Burger in dissent discussing *National League of Cities* stated that: "Constant inroads on the powers of the States to manage their own affairs cannot fail to complicate our system and centralize more power in Washington."

¹⁷⁵ THE FEDERALIST No. 46 at 320 (J. Madison).

¹⁷⁶ *Id.* No. 46 at 320, 323 (J. Madison).

¹⁷⁷ *Id.* No. 39 at 256; No. 45 at 313 (J. Madison).

egated federal powers are not permitted to affect adversely sovereign state functions.¹⁷⁸

B. *Hamilton's Position*

Hamilton, like Madison, wanted to correct the "radical vice" of the existing confederation where general legislation was directed only toward the States in their corporate or collective capacities and not toward the individuals within the States.¹⁷⁹ To that end, Hamilton sought a strong national government which would "contain in itself every power requisite to the full accomplishment of the objects committed to its care . . . free from every other control, but [with] a regard to the public good and to the sense of the people."¹⁸⁰ According to this view, the national government then would be empowered to pass all laws and regulations having a relationship to any matter within the Federal government's jurisdiction.¹⁸¹ Thus, Hamilton's position has been construed as one which holds that the Federal government, operating pursuant to supreme delegated powers, has no correlative obligation to preserve a particular sovereign relationship between the States and the Federal government.¹⁸²

However, Hamilton steadfastly maintained that "State governments, by their original constitutions, are invested with complete sovereignty."¹⁸³ As echoed in some current judicial sentiments,¹⁸⁴ Hamilton's plan for the constitutional system did not envisage a complete consolidation of the States into one absolute sovereignty where State governments would be subordinate, retaining only residual powers granted by the general will.¹⁸⁵ Still, it has been suggested that "Hamilton's assurance that the state governments retain all the rights of sovereignty that they had before, and that were not exclusively del-

¹⁷⁸ See Cowen, *What is Left of the Tenth Amendment?* 39 N.C.L. REV. 154, 157 (1961).

¹⁷⁹ THE FEDERALIST No. 15 at 93 (A. Hamilton).

¹⁸⁰ *Id.* No. 31 at 195 (A. Hamilton).

¹⁸¹ *Id.* No. 23 at 149 (A. Hamilton).

¹⁸² G. Dietze, *The Federalist, A Classic on Federalism and Free Government* 167 (1960) [hereinafter cited as Dietze].

¹⁸³ THE FEDERALIST No. 31 at 197-98 (A. Hamilton).

¹⁸⁴ See note 174 *supra*.

¹⁸⁵ THE FEDERALIST No. 32 at 199-200 (A. Hamilton). Hamilton explained: [T]he plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which similar authority in the States would be absolutely and totally contradictory and repugnant.

Id. at 200.

egated to the United States is a mere truism;¹⁸⁶ his proposition implies that the Federal government surely has all the powers delegated to it and has displaced all State powers in those areas.

The conclusion that Hamilton sought a "high degree of power concentration in the national government"¹⁸⁷ under the new Constitution is exemplified in his statements that the regulation of interstate and foreign commerce was to be one of the principle purposes of the Federal government.¹⁸⁸ To Hamilton, one of the chief sources of contention between the States under the Articles of Confederation was the cutthroat commercial competition "owing to the fact that the regulation of interstate commerce was not vested in the federal government, but belonged to the jurisdiction of the states."¹⁸⁹ The new Constitution, as framed by Hamilton, would correct this problem by expressly delegating all authority over interstate commerce to the Federal government. Since this power was to be executed exclusively by the national government, Hamilton asserted that the Constitution "authorizes the national legislature to pass all *necessary* and *proper* laws" to regulate interstate commerce.¹⁹⁰ In other words, insofar as the Constitution exclusively delegates the commerce power to Congress, Hamilton maintained that Congress could pass any laws to regulate interstate commerce, and these laws were to be *supreme* regardless of their effect on the States.¹⁹¹ In sum, though Hamilton recognized the existence of residual state powers under the proposed Constitution—an unavoidable consequence of a true federal system—Hamilton was above all an advocate of national power who believed that because the power over interstate commerce was exclusively delegated to Congress state rights in this area necessarily were limited.¹⁹²

The practical consequence of the fact that conflicting theoretical viewpoints on constitutional federalism emerged in *The Federalist* is that the Supreme Court has attempted to interpret the Constitution in a manner that reflected either the Madisonian or Hamiltonian philosophy of the federal-state system of government.¹⁹³ Unfortu-

¹⁸⁶ Dietze, *supra* note 182, at 166-67. See *United States v. Darby*, 312 U.S. 100, 124 (1941).

¹⁸⁷ Dietze, *supra* note 182, at 166.

¹⁸⁸ THE FEDERALIST No. 23 at 146-47 (A. Hamilton).

¹⁸⁹ Dietze, *supra* note 182 at 205. See generally *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533-35 (1949).

¹⁹⁰ THE FEDERALIST No. 33 at 205 (A. Hamilton). Furthermore, Hamilton maintained that the national government in the first instance must judge the necessity and propriety of the laws to be passed to execute the commerce power, but the people should take measures to redress the injury done to the Constitution if the federal government exceeds its authority and makes "a tyrannical use of its powers." *Id.* at 206.

¹⁹¹ *Id.* at 204-05. Hamilton admitted, however, that it does not follow "that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land." *Id.* at 207.

¹⁹² Dietze, *supra* note 182, at 170.

¹⁹³ Castro, *The Doctrinal Development of the Tenth Amendment*, 51 W. VA. L. Q. 227, 228 (1949).

nately, because these philosophies have been judicially construed to represent opposing positions on state sovereignty, past decisions involving state sovereignty challenges have tended to oscillate between two extreme positions depending on the Court's prevelant political philosophy.¹⁹⁴ Following a Madisonian view of federalism, some Courts have construed the concepts of sovereignty embodied in the tenth amendment to hold that the Court must preserve a particular relationship between the States and the Federal government.¹⁹⁵ In some older decisions, however, this Madisonian viewpoint had been developed to the extreme position of permitting the States under the guise of state sovereignty to thwart the Federal government's commerce authority.¹⁹⁶ On the other hand, the prevelant trend of the Court since the late 1930's has been toward a Hamiltonian position.¹⁹⁷ Under this view, the Court has construed concepts of national supremacy delineated in the supremacy clause to hold that the Court is under no "constitutional compulsion" to recognize state sovereignty and thereby has found virtually no limitations on the Federal government's commerce power.¹⁹⁸ Except for *Wirtz*,¹⁹⁹ however, most modern decisions involving concepts of state sovereignty have eschewed the extreme Hamiltonian approach of allowing direct federal regulation where essential state functions are implicated.

Four lines of cases were implicated in *National League of Cities* in which state sovereignty was advanced as a limitation on Congress' commerce authority over essential state functions.²⁰⁰ The following

¹⁹⁴ *Id.* at 231-32.

¹⁹⁵ *Id.* at 228.

¹⁹⁶ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (the tenth amendment was advanced as a limitation on Congress' commerce authority over private interests); *United States v. Butler*, 297 U.S. 1 (1936) (same); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (same). This extreme Madisonian philosophy was discredited in such cases as *Wickard v. Filburn*, 317 U.S. 111 (1942), *Darby v. United States*, 312 U.S. 100 (1940), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

¹⁹⁷ *Castro*, *supra* note 193, at 245.

¹⁹⁸ *Id.* at 228, 246-47.

¹⁹⁹ This extreme Hamiltonian approach of *Maryland v. Wirtz*, 392 U.S. 183 (1968) has now been discredited in *National League of Cities*, 426 U.S. at 855. See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). The *Jones & Laughlin* Court succinctly explained the problem:

The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause establishes between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

(emphasis added). Cf. *Ashton v. Cameron County Dist.*, 298 U.S. 513, 531 (1936) ("The sovereignty of the state essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation.").

²⁰⁰ See 426 U.S. at 855, 843, 852, 843. These lines of cases are not an exhaustive list of all judicial decisions involving the state sovereignty concept embodied in constitutional federalism. See, e.g., *Ashton v. Cameron County Dist.*, 298 U.S. 513, 530-32 (1936); *Indian Motor Cycle Co. v. United States*, 283 U.S. 570, 575-76 (1931); *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71,

analysis of these lines will demonstrate that in most decisions the Court has attempted to accommodate federal and state interests by adopting a balancing approach incorporating elements of both the Hamiltonian and Madisonian philosophies of constitutional federalism. Viewed in this respect, the Court's resolution in *National League of Cities* of whether an affirmative state sovereignty limitation protects essential state activities from direct federal commerce regulations can best be characterized as a shift away from the extreme Hamiltonian philosophy as advocated by the dissent toward a view more consistent with the Madisonian philosophy. *National League of Cities*, however, is not a total swing toward the discredited extreme in that it incorporates a balancing approach to constitutional federalism in which the States and the Federal government maintain spheres of inviolable powers.

IV. AN HISTORICAL ANALYSIS OF THE JUDICIAL DEVELOPMENT OF STATE SOVEREIGNTY LIMITATION ON THE FEDERAL COMMERCE POWER

A. Federal Regulation of State Proprietary-type Activities

The first line of cases dealing with state sovereignty involve the steady expansion of the federal commerce power over proprietary-type activities of States and eventually over nonproprietary state functions as well. This series began in 1824 with the seminal decision of *Gibbons v. Ogden*.²⁰¹ *Gibbons* involved a dispute over the question whether the States could license private vessels conducting trade between two states. Chief Justice Marshall, holding that only the Federal government could license vessels involved in interstate commerce, defined the extent of Congress' commerce power as a grant of plenary authority which "acknowledges no limitations, other than are prescribed in the constitution."²⁰² However, he also acknowledged that Congress' power to license vessels "implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police."²⁰³ It seems, then, that Chief Justice Marshall subscribed to the Hamiltonian theory that the new Constitution expressly granted to Congress the supreme authority over interstate commerce.²⁰⁴ Thus, while he did point out that "the State governments remain, and constitute a most important part of our system,"²⁰⁵ it appears that Marshall, like Hamilton, would not find a state sovereignty limitation on Congress' power to regulate matters affecting interstate commerce.

76 (1869). See notes 50, 51 *supra* for discussion of *Texas* and *Lane County*. See note 291 *infra* for discussion of *Ashton*.

²⁰¹ 22 U.S. (9 Wheat.) 1 (1824).

²⁰² *Id.* at 196.

²⁰³ *Id.* at 204.

²⁰⁴ Castro, *supra* note 193, at 232-35.

²⁰⁵ 22 U.S. (9 Wheat.) at 199.

Having laid the foundations for a broad application of Congress' commerce authority in the first quarter of the nineteenth century in *Gibbons*, the Supreme Court nearly a hundred years later in the *Minnesota Rate Cases*²⁰⁶ further developed the Hamiltonian theme of a strong central government. The *Minnesota Rate Cases* involved a challenge to a state commission's intrastate rates for private railroads which apparently forced some interstate carriers to lower their rates in order to stay competitive. Although the Court found that the States' inherent power to set intrastate rates was not in itself a burden on interstate commerce,²⁰⁷ the decision clearly forewarned the future diminution of state power and the concomitant expansion of the federal commerce power. The Court proclaimed that "[t]here is no room . . . for the assertion of state power in hostility to the authorized exercise of Federal power . . . ; [however,] [t]his is not to say that the Nation may deal with the internal concerns of the State, as such. . . ." ²⁰⁸ Thus, the Supreme Court in the *Minnesota Rate Cases* acknowledged that States retain residual sovereign powers to control intrastate commerce, but concluded that state burdens on interstate commerce, under any guise, would impermissibly interfere with an authority granted only to the national legislature.²⁰⁹

Although the *Minnesota Rate Cases* established that a State's rate-making power over intrastate commerce was a sovereign state function,²¹⁰ the Court twelve years later in *Sanitary District v. United States*²¹¹ implied that residual state powers could never limit the federal commerce power. In *Sanitary District* the Attorney General of the United States sought to enjoin a corporation of Illinois from withdrawing water from Lake Michigan via a drainage channel in excess of the amount authorized by the Secretary of War pursuant to an international treaty with Great Britain.²¹² Allowing the injunction, the Court rejected the State of Illinois' claim that the water withdrawal was necessary for the accomplishment of the purely internal public health concerns of sewage disposal.²¹³ In a strong declaration of the Hamiltonian philosophy, the Court made it quite clear that this was "not a controversy between equals."²¹⁴ Thus, the Supreme Court concluded that in this case the United States was asserting its sovereign power to regulate interstate and foreign commerce and that this

²⁰⁶ 230 U.S. 352 (1931).

²⁰⁷ *Id.* at 431-32.

²⁰⁸ *Id.* at 399.

²⁰⁹ *Id.* at 396-97.

²¹⁰ *But see* *Houston, E. & W. Texas Ry. v. United States*, 234 U.S. 342 (1914) (intrastate railroad rates set by state commission might be reset by the Federal government if there is an adverse effect on interstate commerce).

²¹¹ 266 U.S. 405 (1925).

²¹² *Id.* at 423-24. The Secretary of War pursuant to the Act of March 3, 1899, § 10, 30 Stat. 1121, 1151, authorized the limit on water withdrawal by the State from Lake Michigan. *Id.*

²¹³ 266 U.S. at 425.

²¹⁴ *Id.*

"power is superior to that of the States to provide for the welfare or necessities of their inhabitants."²¹⁵

Despite the special factors of an international treaty and the involvement of several states affected by the diversion of water in *Sanitary District*, the Court later affirmed *Sanitary District's* "unequal sovereign" concept in *United States v. California*.²¹⁶ In *California*, the Federal government sought to recover a fine for a State's violation of the federal Safety Appliance Act²¹⁷ in the operation of a state-owned railroad.²¹⁸ The State of California argued that it was "performing a public function in its sovereign capacity," and therefore, it could not be constitutionally subjected to this federal act.²¹⁹ The Supreme Court, again following the Hamiltonian rationale that the national government's commerce power extends to States and private interests alike, thought that it was "unimportant to say whether the state conducts its railroad in its 'sovereign' or its 'private' capacity."²²⁰ In holding that the State had to comply with the federal act, the Court stated "[t]he sovereign power of the states is necessarily diminished to the

²¹⁵ *Id.* at 426. Certainly federal legislation or regulations enacted pursuant to an international treaty may be differentiated from congressional enactments only directed to internal domestic concerns when their constitutionality is challenged by the States. *Cf. Missouri v. Holland*, 252 U.S. 416, 434 (1920) ("Valid treaties of course 'are binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States' No doubt the great body of private relations usually fall within the control of the State, but a treaty may also override its power." (citations omitted)). *Cf. also Reid v. Covert*, 354 U.S. 1, 18 (1956) ("To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.").

Nevertheless, the dissent in *National League of Cities* cited *Sanitary Dist.* as supporting the proposition that States must always be subservient to the federal commerce power. 426 U.S. at 859. This support was gleaned from the *Sanitary Dist.* Court's dictum that the State could not validly "affect the level of the Lakes . . . without the consent of the United States, even were there no international covenant in the case." 266 U.S. at 426. This consent was deemed necessary because of the Federal government's "ultimate interest in the Lakes" resulting from the water level's effect, not only on several States, but also on foreign power. *Id.* Therefore, because of the confluence of international treaty implications with the interstate commerce aspects of controlling navigable waters touching several States, *Sanitary Dist.* is probably inapposite to the dissent's contention. Furthermore, the *Sanitary Dist.* Court pointed out that the State of Illinois had not operated the drainage channel traditionally, but rather had opened it only with the permission of the Federal government. *Id.* at 428-9. Accordingly, the *Sanitary Dist.* Court was not compelled to determine whether sewage disposal was an essential state function. The federally permitted activity, the drainage channel, could not, by definition, be a traditional state activity. In view of this fact, the *Sanitary Dist.* Court did not reach the question central to *National League of Cities* whether Congress pursuant to its commerce authority could regulate directly all state functions.

²¹⁶ 297 U.S. 175, 184 (1936).

²¹⁷ Act of March 2, 1893 c. 196, §§ 2, 6, 27 Stat. 531, as amended April 1, 1896, 29 Stat. 85.

²¹⁸ *Id.* at 180.

²¹⁹ *Id.* at 183.

²²⁰ *Id.*

extent of the grants of power to the federal government in the Constitution."²²¹

In contrast to *California*, which clearly involved a nonessential or nontraditional state function, the Supreme Court for the first time in the 1968 case of *Maryland v. Wirtz*²²² squarely faced the issue whether Congress' commerce power extended to more traditional state functions—such as state-operated hospitals and schools. In *Wirtz*, the Court upheld the 1966 amendments to FLSA, finding that these provisions established only minimum wages and maximum hours with respect to state employees of hospitals, institutions, and schools; they did "not otherwise affect the way in which school and hospital duties are performed."²²³ Rejecting the State's contention that the Act unconstitutionally interfered with "sovereign state functions," the Court relied on *Sanitary District* and declared that "the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."²²⁴ Thus, expressly following the Hamiltonian rationale of *California* which rejected any limits on Congress' commerce authority where a state activity was implicated,²²⁵ the Court in *Wirtz* upheld the constitutionality of the amendments.²²⁶ In so doing, the Court found that Congress had a "rational basis" to prescribe minimum labor standards for schools and hospitals, including those operated by States.²²⁷ In sum, the Court allowed Congress to expand its regulatory commerce powers to include state functions because it concluded that the state sovereignty doctrine may not be used to "protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens."²²⁸

Although ostensibly an insignificant extension of the "rational basis" test previously utilized by the Court to sanction the scope of congressional commerce legislation,²²⁹ *Maryland v. Wirtz* established a new constitutional principle. In particular, the decision indicated that in future state challenges to commerce regulations, the Supreme Court would apparently examine only the effect of a particular state enterprise upon interstate commerce. Accordingly, the Court would give little merit to claims of state sovereignty. Thus, wherever state

²²¹ *Id.* at 184. See also *California v. Taylor*, 353 U.S. 553, 568 (1957); *California v. United States*, 320 U.S. 577, 586 (1944); accord, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). See text and notes at notes 111-12 *supra* for the relationship of *California* to *National League of Cities*.

²²² 392 U.S. 183 (1968).

²²³ *Id.* at 193.

²²⁴ *Id.* at 195.

²²⁵ *Id.* at 198 ("The principle of *United States v. California* is controlling here.").

²²⁶ 392 U.S. at 201.

²²⁷ *Id.* at 195.

²²⁸ *Id.* at 198-99.

²²⁹ E.g., *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964).

NOTES

enterprises significantly affect interstate commerce,²³⁰ *Wirtz* pushed the Hamiltonian philosophy to an extreme and portended a potential demise of state sovereignty, in that federal commerce legislation could "disrupt the fiscal policy of the States and threaten[ed] their autonomy in the regulation" of traditional internal concerns.²³¹

B. *State Sovereignty Concepts in the Doctrine of Inter-governmental Tax Immunity*

The second line of cases in which a state sovereignty limitation has been raised to bar federal regulations is that involving the implied doctrine of intergovernmental tax immunity. Although no such express constitutional immunity exists, the doctrine of an implied limitation was first developed by Chief Justice Marshall in *McCulloch v. Maryland*.²³² This doctrine was first employed to accord to all officials of one government immunity from taxation by the other.²³³ However, subsequent Supreme Court decisions have significantly eroded this protection.²³⁴ At present, therefore, Congress may impose an income tax on all state employees regardless of whether they are participating in a function characterized as essential to the maintenance of a state

²³⁰ 392 U.S. at 204 (Douglas J., dissenting). Justice Douglas contended that state governments themselves made substantial purchases of goods flowing in interstate commerce, and therefore fit the statutory definition of an 'enterprise' substantially affecting interstate commerce. Furthermore, although state-operated hospitals and schools arguably compete with their private counterparts, States cannot be deemed to have consented to federal commerce jurisdiction; this is not a situation where a state is engaging in a traditional instrumentality of interstate commerce such as with the state-owned railroads in *California*. See note 112 *supra*.

²³¹ *Id.* at 203 (Douglas, J., dissenting). This demise would occur as Congress enacted any commerce legislation extending regulation to essential state functions. As Justice Douglas posited in dissent in *Wirtz*, constitutional principles of federalism should limit Congress' commerce regulation to functions not essential to the States, otherwise "the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment." *Id.* at 204-05. In light of this potential demise of state sovereignty, the Court in *National League of Cities*, following Justice Douglas's reasoning, effectively rejected the "rational basis" rationale when essential state functions are implicated. 426 U.S. at 845.

²³² 17 U.S. (4 Wheat.) 316 (1819). The related doctrine of sovereign immunity of a State from suit in a federal court by her own citizens is grounded on the eleventh amendment. See *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 280 (1973). For discussion of the doctrine of sovereign immunity, see note 260 *infra*.

²³³ See, e.g., *The Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871).

²³⁴ See, e.g., *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (state taxation of federal officials permitted). *Helvering v. Gerhardt*, 304 U.S. 405 (1938) (federal taxation of state officials permitted). The *Gerhardt* Court, reflecting a Madisonian philosophy, did acknowledge, however, that:

[T]here may be state agencies of such a character and so intimately associated with the performance of an indispensable function of state government that any taxation of it would threaten such interference with the functions of government itself as to be considered beyond the reach of the federal taxing power.

304 U.S. at 424.

government.²³⁵ Nevertheless, in the context of a tax on state functions themselves, support might be found in the tax immunity doctrine for a state sovereignty limitation on the commerce clause.²³⁶ Specifically, the Supreme Court in the 1926 tax case of *Metcalf & Eddy v. Mitchell*,²³⁷ expressing a strong Madisonian viewpoint, articulated a test similar to an essential-function test that might be utilized to protect certain state functions from direct federal taxation. In *Metcalf & Eddy*, the plaintiffs protested a tax assessed on income of a copartnership because they claimed that they were exempt under the War Revenue Act of 1917;²³⁸ they further contended that Congress had no power to tax the income which was compensation for their services as consulting engineers under contracts with States and municipalities.²³⁹ Although the Court held that these engineers were not "employees" of a State or its subdivision whose earnings were exempt under the War Revenue Act,²⁴⁰ the Court also considered whether the "constitutional system of dual sovereign governments is such as to prohibit impliedly the federal government from taxing the instrumentalities of a state government. . . ."²⁴¹

In this regard, the Court in *Metcalf & Eddy* explained that agencies "intimately connected with the necessary functions of government" through which a State "immediately and directly exercises its sovereign powers" should be afforded tax immunity.²⁴² The Court in *Metcalf & Eddy* offered a rationale for this "necessary function" exemption based on its interpretation of *McCulloch v. Maryland*:²⁴³

Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other.²⁴⁴

However, the *Metcalf & Eddy* Court did warn that it was necessarily an unclear distinction that separates those state activities which are

²³⁵ *Fry v. United States*, 421 U.S. at 554 (Rehnquist, J., dissenting).

²³⁶ See 426 U.S. at 843, 844.

²³⁷ 269 U.S. 514 (1926).

²³⁸ Act of October 3, 1917, ch. 63, § 209, 40 Stat. 300.

²³⁹ 269 U.S. at 518.

²⁴⁰ *Id.* at 520.

²⁴¹ *Id.* at 521.

²⁴² *Id.* at 522.

²⁴³ 17 U.S. (4 Wheat.) 316 (1819).

²⁴⁴ 269 U.S. at 523. See also *The Collector v. Day* 78 U.S. (11 Wall.) 113, 127 (1871) (overruled); *Dobbins v. The Commissioners of Erie County*, 41 U.S. (16 Pet.) 435, 447 (1842). The *Day* Court explained that "the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; an any government, whose means employed in conducting its operations, if subject to the control of another

"essential" and those which are not, and that "[e]xperience has shown that there is no formula by which that line may be plotted with precision in advance."²⁴⁵

The difficulty of determining which state activities are deemed essential and therefore protected from federal taxation manifested itself again in the divided opinion of *New York v. United States*.²⁴⁶ The Court in this 1946 case was clearly troubled with the tax immunity doctrine when it considered whether the Federal government could impose a nondiscriminatory tax on a State's mineral water business. The State of New York contended that it should be allowed a tax immunity because it was "'engaged in the exercise of a usual, traditional and essential governmental function.'"²⁴⁷ The Court was unable to reach a majority on the issue; therefore, a plurality of the Court barely upheld the tax. Justice Frankfurter, following a Hamiltonian philosophy, announced the judgment of the Court in a separate opinion in which he recognized "that ours is a federal constitutional system, as expressly recognized in the Tenth Amendment. . . ."²⁴⁸ Nevertheless, he maintained that to rest the federal taxing power on a proprietary versus governmental function distinction was "too shifting a basis for determining constitutional power."²⁴⁹ Thus, the Federal tax was valid as long as it was not exercised in a discriminatory manner.²⁵⁰

Three members of the Court concurred with Chief Justice Stone who, in a more Madisonian tone, stated that a nondiscriminatory federal tax "may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government."²⁵¹ Additionally, two dissenting Justices clearly reflecting the Madisonian viewpoint declared that a nondiscriminatory federal tax on any state activity would undermine the historical understandings of state sovereignty embodied in the tenth amendment, thereby placing "the Sovereign States on the same plane as private citizens, and mak[ing] the Sovereign States pay the federal government for the privilege of exercising the

and distinct government, can only exist at the mercy of that government." 78 U.S. at 127.

²⁴⁵ 269 U.S. at 523. See *Fry v. United States*, 421 U.S. at 558 (Rehnquist, J., dissenting) ("Such a distinction would undoubtedly present gray areas to be marked out on a case-by-case basis, as is true in applying any number of other constitutional principles.").

²⁴⁶ 326 U.S. 572 (1946).

²⁴⁷ *Id.* at 574 (Frankfurter, J., opinion).

²⁴⁸ *Id.* at 575.

²⁴⁹ *Id.* at 580.

²⁵⁰ *Id.* at 583-84.

²⁵¹ *Id.* at 587 (Stone, C.J., concurring). Chief Justice Stone's opinion revealed that he would apply a two-step analysis similar to that used in *National League of Cities*. Specifically, after determining whether a particular state activity was a governmental function, Chief Justice Stone would then consider whether such a nondiscriminatory tax on that activity unduly interferes with the State's performance of its sovereign functions. *Id.* at 588.

powers of sovereignty guaranteed them by the Constitution."²⁵²

Despite the implication that a majority of the *New York* Court would have recognized a state sovereignty limitation on a delegated federal power,²⁵³ it can be credibly maintained that *New York* concerned only the extent of the federal *taxing* power.²⁵⁴ In this respect, the "necessary function" limitation outlined in *Metcalfe & Eddy*, which might restrict the federal government from taxing traditional state functions, does not necessarily support a state sovereignty limitation on Congress' commerce authority.²⁵⁵ This conclusion is predicated upon the unique stature of the taxing power among Congress' enumerated powers. If the Federal government could forbid all state taxation as being incompatible with federal taxation, the economic vitality of State governments could cease²⁵⁶—without doubt unconstitutionally upsetting the federal-state system.²⁵⁷ Therefore, this reciprocal immunity of State and Federal governments from taxation necessarily flows from the destructive force inherent in an indefinite power to tax lodged exclusively with one government.²⁵⁸ No such considerations are attendant to the power over interstate commerce; thus, this exclusive congressional authority to prevent "competitions of commerce"²⁵⁹

²⁵² *Id.* at 596 (Douglas, J., dissenting). Justices Douglas and Black apparently advocated a state sovereignty doctrine similar to the limitation found in *National League of Cities*.

²⁵³ After analyzing the comments of the six Justices in the concurring and dissenting opinions in *New York*, the majority in *National League of Cities* concluded that these Justices recognized historical doctrines of state sovereignty and were unwilling to permit the Federal government under its taxing power to rank all state functions on par with private activities. 426 U.S. at 843 n. 13. See also *Fry v. United States*, where Justice Rehnquist, in dissent reasoned that the tax immunity "rest[s] solely on a concept of constitutional federalism which should likewise limit federal power under the Commerce Clause." 421 U.S. at 554.

²⁵⁴ See 426 U.S. at 863-64 (Brennan, J., dissenting).

²⁵⁵ See *id.* at 866 n. 7 (Brennan, J., dissenting); *United States v. California*, 297 U.S. 175, 185 (1936). Even with regard to a state sovereignty limitation on the taxing power, the dissent in *National League of Cities* adverted that the tax immunity doctrine should be narrowly limited because of "[t]he danger to the federal power to tax hypothesizing any constraint, derived from state sovereignty . . ." 426 U.S. at 869 n. 10.

²⁵⁶ Cowen, *What is Left of the Tenth Amendment?*, 39 N.C.L. REV. 154, 182 (1961).

²⁵⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429-31 (1819). See also *New York v. United States*, 326 U.S. 572, 593 (Douglas, J., dissenting). Even Hamilton recognized that concurrent jurisdiction over the power to tax was the only practical solution to prevent a coerced subordination of state authority to the Federal government. THE FEDERALIST No. 33 at 208 (A. Hamilton). Hamilton explained:

The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities of which the States are not explicitly divested in favour of the Union remain with them in full vigour, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution.

Id. No. 32 at 230 (A. Hamilton).

²⁵⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). See THE FEDERALIST No. 34 at 215 (A. Hamilton).

²⁵⁹ THE FEDERALIST No. 7 at 39 (A. Hamilton).

cannot be reasonably analogized to the divided power to tax. In sum, despite the Madisonian-type sentiments expressed by many of the Justices in the tax immunity cases, the existence of a tax immunity doctrine is inapposite to the question whether there exists an affirmative state sovereignty limitation on Congress' commerce power.²⁶⁰

C. Federal Preemption of State Functions during a National Emergency

While decisions involving the doctrine of intergovernmental tax immunity do not squarely support or reject the state sovereignty limitation on the federal commerce power, the 1946 decision of *Case v. Bowles*²⁶¹ is indicative of a third line of cases in which a State has apparently been denied the right to raise a state sovereignty defense to prevent the enforcement of a federal power. In *Case*, the State of Washington contended that it could sell timber on state school lands at a price in excess of that set under the Federal Emergency Price Control Act²⁶² because it was "for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens."²⁶³ The Supreme Court, explaining that the Act had been sustained as a congressional exercise of the war power, rejected the suggestion that the federal war power should be limited by restricting

²⁶⁰ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 200 (1824). The analogous common-law doctrine of sovereign immunity of a State from suit by its own citizens also does not support or reject the principle that state sovereignty bars commerce legislation from directly regulating essential state functions. However, the sovereign immunity decisions of *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), and *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973), both involving suits under federal commerce regulation, reveal that the "governmental" versus "proprietary" distinction may retain current vitality. This distinction has been utilized to determine which functions of state governments possess attributes of sovereignty.

In *Parden*, the State of Alabama contended that Congress was without power to subject it to a federal suit under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1970). The Court held that the sovereign immunity doctrine did not bar a state employee injured while working on a state-owned railroad from suing under FELA. 377 U.S. at 190-91. Since FELA was enacted pursuant to Congress' commerce authority, the Court reasoned that sovereignty defenses were invalid in this case because "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." *Id.* at 191. The State of Alabama thus was deemed to have consented to suits in federal courts under FELA by operating a railroad. *Id.* at 186. On the other hand, the Court in *Employees*, faced with a similar issue of whether a State could assert a sovereign immunity defense to an employee suit brought under FLSA, upheld the State's defense. 411 U.S. at 287. The Court reaffirmed the doctrine that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Id.* at 280. Furthermore, the Court distinguished *Parden*, which had allowed a state railroad employee's suit, on the basis that the nonprofit hospitals and training schools involved in *Employees* were not proprietary. *Id.* at 284. By allowing the sovereign immunity defense, the Court apparently embraced the Madisonian principle that "harmonious federalism" necessitated the protection of certain state functions from suit, in this case those "not proprietary." *Id.* at 286.

²⁶¹ 327 U.S. 92 (1946).

²⁶² Emergency Price Control Act of 1942, Pub. L. 79-108, 59 Stat. 306.

²⁶³ 327 U.S. at 101.

its operation on essential state governmental functions.²⁶⁴ Thus following the Hamiltonian rationale of *California* where the Court had previously rejected the dichotomy between proprietary and governmental functions,²⁶⁵ the Court stated that to hold otherwise on the facts in *Case* would "impair a prime purpose of the Federal Government's establishment"—the power to make war.²⁶⁶ In subordinating the State's power to sell timber to Congress' exercise of its war power the Court in *Case* gave short shrift to the State's essential-function defense and did not articulate whether the selling of timber, allegedly to provide education revenue, actually constituted an essential-function. Although arguably the sale of timber was not in an area traditionally regarded by States as an essential governmental function, *Case* does lend support for the Hamiltonian philosophy that the Federal government's enumerated powers cannot be limited by state sovereignty.²⁶⁷ However, the holding was grounded on the war power which has been exercised historically only during great national exigencies. These circumstances apparently allow delegated federal powers to operate to the full extent of their theoretical scope unrestrained by the state sovereignty limitations existant during normal situations.²⁶⁸

Similarly, in circumstances of exceptional economic conditions, congressional authority was permitted to operate unrestrained by limitations of state sovereignty in *Fry v. United States*.²⁶⁹ In *Fry*, the Federal government sued to enjoin the State of Ohio from granting wage increases to State employees in excess of those permitted under the Economic Stabilization Act.²⁷⁰ The Court, manifesting a Hamiltonian philosophy, rejected the contention that the federal action impermissibly interfered with sovereign state functions.²⁷¹ Following the *Wirtz* rationale which held that the Fair Labor Standards Act could be constitutionally applied to state hospitals and schools, the Court in *Fry* said that the Economic Stabilization Act was an "emergency measure to counter severe inflation."²⁷² Further, the commerce clause gave "the President authority to freeze virtually all wages and prices, in-

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 101. See *California*, 297 U.S. at 183-84.

²⁶⁶ 327 U.S. at 102.

²⁶⁷ If the sales in *Case* are characterized as raising revenue for education, then certainly the activity must qualify as an essential state function. It should be noted, however, that most states would not be able to claim that sales of timber were essential functions unless the funds received were designated traditionally by law for the use of education.

²⁶⁸ See *Fry v. United States*, 421 U.S. at 558 (Rehnquist, J., dissenting) ("Congress may well in time of declared war have extraordinary authority to regulate activities in the national interest which could not be reached by the commerce power alone."). See THE FEDERALIST No. 45 at 313 (J. Madison); Cowen, *supra* note 256, at 164-69.

²⁶⁹ 421 U.S. 542 (1975).

²⁷⁰ *Id.* at 545. See Title II of the Act of Aug. 15, 1970, Pub. L. 91-379, 84 Stat. 299, as amended 12 U.S.C. § 1904 (Supp. I 1970).

²⁷¹ *Id.* at 547-48.

²⁷² *Id.* at 548.

cluding the wages of state and local government employees."²⁷³ However, Justice Rehnquist, in dissent, declared that the Framers of the Constitution understood that:

[T]he 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.²⁷⁴

Case and *Fry* certainly reflect elements of the Hamiltonian approach to constitutional federalism in that States were not permitted to frustrate national legislation in the name of state sovereignty. In retrospect, however, both these decisions might be understood to represent particular situations where, on balance, compelling national considerations overrode state sovereignty interests allowing the Federal government pursuant to a delegated power to regulate fully all state functions. It can be reasoned then that these cases do not refute the existence of a possible state sovereignty limitation on delegated federal powers, but rather are examples of a "balancing approach" to constitutional federalism.²⁷⁵

D. *The Tenth Amendment as a Specific Limitation on the Commerce Clause*

The last line of Supreme Court cases in which a state sovereignty limitation is discussed is that in which the tenth amendment²⁷⁶ was raised as a specific limitation on the federal commerce power. The tenth amendment was originally adopted as part of the Bill of Rights to reaffirm the concept of sovereignty implicit in statehood.²⁷⁷ This explicit reaffirmation was thought necessary to counterbalance the concept of federal supremacy expressly embodied in the "necessary and proper"²⁷⁸ and "supremacy"²⁷⁹ clauses of the Constitution.²⁸⁰ Faced with these conflicting concepts incorporated in the tenth amendment and the supremacy clause respectively, the early Supreme Court decisions, following a Hamiltonian philosophy,²⁸¹ construed the tenth

²⁷³ *Id.*

²⁷⁴ *Id.* at 557.

²⁷⁵ 426 U.S. at 856 (Blackmun, J., concurring). For a discussion of this balancing approach analysis see text and notes at notes 102-08 *supra*.

²⁷⁶ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

²⁷⁷ Cowen, *supra* note 256, at 154-55.

²⁷⁸ U.S. CONST. art. I § 8, cl. 18.

²⁷⁹ *Id.* at art. VI, cl. 2.

²⁸⁰ Cowen, *supra* note 256, at 156.

²⁸¹ See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

amendment narrowly with an accompanying broad construction of the commerce clause that has never yet been exceeded.²⁸² For example, Chief Justice Marshall articulated in *McCulloch* "that the government of the Union, though limited in its powers is supreme within its sphere of action" and the tenth amendment was merely "formed for the purpose of quieting the excessive jealousies which have been excited"²⁸³

However, from Marshall's death until the late 1930's, the Supreme Court began to follow a Madisonian ideology giving effect to the tenth amendment.²⁸⁴ In particular, the amendment was utilized as a basis for striking down national commerce legislation which purportedly invaded the autonomous powers of state governments. Specifically, in *Schechter Poultry Corp. v. United States*²⁸⁵ the Supreme Court overturned indictments for violations of the codes of fair competition in the poultry industry in part because the federal enabling legislation was held to be an invalid delegation of power.²⁸⁶ Furthermore, federalism implications drawn from the tenth amendment were advanced as authority for the proposition that the scope of the commerce clause could not embrace all private activities having an *indirect* effect on interstate commerce.²⁸⁷ This limitation was raised to prevent the denigration of state authority over purely domestic concerns.²⁸⁸ Similarly, other congressional commerce acts regulating wages and hours of the mining industry²⁸⁹ and reducing farm surplus through the regulation of acreage and production²⁹⁰ were nullified based on state sovereignty implications in the tenth amendment.²⁹¹

²⁸² *Wickard v. Filburn*, 317 U.S. 111, 120 (1942).

²⁸³ 17 U.S. (4 Wheat.) at 405-6 (1819). However, Chief Justice Marshall did not hold the tenth amendment as meaningless because he recognized that "whether a particular power . . . has been delegated to the one government, or prohibited to the other . . . [will] depend on a fair construction of the whole [Constitution]." *Id.* at 406.

²⁸⁴ See generally *Castro*, *supra* note 193, at 235-243.

²⁸⁵ 295 U.S. 495 (1935).

²⁸⁶ *Id.* at 551.

²⁸⁷ *Id.* at 546-49.

²⁸⁸ *Id.* at 549.

²⁸⁹ *Carter v. Carter Coal Co.*, 298 U.S. 238, 293 (1936) (Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991).

²⁹⁰ *United States v. Butler*, 297 U.S. 1, 68 (1936) (Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31).

²⁹¹ See also *Ashton v. Cameron County Dist.*, 298 U.S. 513 (1936). In *Ashton* Congress had attempted in 1937 to amend the Bankruptcy Act by removing the previous exemption for States and their political subdivisions. Act of May 24, 1934, 48 Stat. 798. However, the amendments were struck down as being unconstitutional on the basis of state sovereignty. 298 U.S. at 531-32. The Court acknowledged that an irrigation improvement district organized under state laws to reclaim arid land was a political subdivision of a State. Consequently, the district could not avail itself of the Act and declare bankruptcy because its fiscal affairs were deemed affairs of the State and not subject to control or interference by the Federal government. *Id.* at 528. Explaining this conclusion in language that appears irreconcilable with the *California* opinion of the same year, the Court advanced:

The sovereignty of the State essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by

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However, following the attempted court-packing plan of 1937, the Supreme Court began a shift back to the Hamiltonian approach by "taking a broader view of the commerce power."²⁹² The culmination of this Hamiltonian revival was in *United States v. Darby*²⁹³ where the Court rejected the tenth amendment challenge to the validity of the Fair Labor Standards Act of 1938 by a lumber manufacturer indicted for violations of the Act. The Court dismissed the tenth amendment as merely "a truism that all is retained which has not been surrendered"²⁹⁴ and held "that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it."²⁹⁵

Following this Hamiltonian rationale, the Supreme Court in subsequent decisions began to extend Congress' commerce power into areas previously considered within the purview of the States.²⁹⁶ This broadening of the scope of the commerce power accompanied by the concomitant retraction of state sovereignty concepts apparently sounded the "death knell" for the tenth amendment.²⁹⁷ This conclusion follows because, in contrast to most pre-1937 decisions where the tenth amendment was found to be an express state sovereignty limita-

any form of legislation . . . [T]he Federal Government, acting under the bankruptcy clause, may [not] impose its will and impair state powers—pass laws inconsistent with the idea of sovereignty.

Id. at 528.

²⁹² Cowen, *supra* note 256, at 169. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In *Jones & Laughlin*, where a corporation refused to obey NLRB orders to cease unfair labor practices, the Supreme Court upheld the National Labor Relations Act of 1935 as being within the federal commerce power and not an unconstitutional invasion of the States' reserved powers over their local concerns. *Id.* at 30. The Court reasoned that Congress had the power to regulate even intrastate activities if they had such a "close and substantial relationship" to interstate commerce that their control was essential and appropriate to protect interstate commerce from impermissible burdens. *Id.* at 36.

²⁹³ 312 U.S. 100 (1941). It should be noted, however, that both *Darby* and *Jones & Laughlin* involved the regulation of private activities. Therefore, these decisions did not hold squarely that the Federal government could directly regulate traditional state governmental activities. Rather, these cases broadened the scope of Congress' commerce power over *private* entities that affected interstate commerce.

²⁹⁴ 312 U.S. at 124.

²⁹⁵ *Id.* at 119-20.

²⁹⁶ E.g., *Wickard v. Filburn*, 317 U.S. 111 (1942). The Supreme Court in *Wickard* upheld the constitutionality of the Agricultural Adjustment Act of 1938, ch. 30, § 1, 52 Stat. 31, as amended, 7 U.S.C. § 1281 *et. seq.* (1941) that extended federal commerce regulation to production of farm goods not intended in any part for commerce, but wholly for consumption on the farm. *Id.* at 128-29. In rejecting a wheat farmer's suit for declaratory judgment that the Act's wheat marketing provisions were not sustainable under the commerce clause, Justice Jackson echoed sentiments from *Gibbons* warning that effective restraints on the federal commerce power "must proceed from the political rather than from judicial processes." *Id.* at 120. The dissent in *National League of Cities* expressly followed this *Wickard* dictum. 426 U.S. at 857-58. See also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

²⁹⁷ Cowen, *supra* note 256, at 173.

tion on federal powers, *Darby* and subsequent cases treated the amendment as a relatively unimportant truism.²⁹⁸ Accordingly, from 1937 federal regulation of *private* activities having an indirect but substantial effect on interstate commerce was consistently sustained. The only attendant limitation on this authority was that Congress could not *unreasonably* regulate a subject matter of "commerce."²⁹⁹

This analytic approach parallels Hamilton's theory on the scope of the commerce clause.³⁰⁰ Arguably, however, such decisions as *Darby*, in extending Congress' regulatory purview over both intrastate and interstate private activities, only prevent *private* interests from asserting the States' tenth amendment defense in an attempt to thwart congressional regulation. Nevertheless, implications amalgamated from decisions like *California*, *Case*, *New York*, and *Wirtz* lend color to the Hamiltonian-based rationale that the Court can extend Congress' commerce power over all state functions unrestrained by the tenth amendment.³⁰¹ In refusing to accept a state sovereignty restriction based on distinctions between essential (traditional) and nonessential (proprietary) governmental activities, *Sanitary District, California*, Justice Frankfurter's *New York* opinion, and of course *Wirtz*, implicitly reject the argument that the tenth amendment embodies any state sovereignty limitation on delegated federal powers. Based on the same analysis, *Case* explicitly discarded the tenth amendment as a limitation on Congress' war power being exercised to combat national exigencies.³⁰²

V. CONSTITUTIONAL FEDERALISM REQUIRES A BALANCING OF STATE SOVEREIGNTY INTERESTS AGAINST THE FEDERAL COMMERCE POWER

In comparison to most recent commerce clause precedent, the Court's holding in *National League of Cities* may at first glance appear to portend a shift toward a Madisonian-type philosophy and a heightened solicitude for States' interests.³⁰³ Nevertheless, it is submitted that *National League of Cities* embodies a correct approach to constitutional federalism. The validity of this viewpoint is based on three factors: a close assessment of past precedent; an historical perspective of the concepts of constitutional federalism as recognized by both Hamilton and Madison; and a recognition of the concepts of state

²⁹⁸ Cf. *Sperry v. Florida*, 373 U.S. 379, 403 (1963) (The Court labeled the State's tenth amendment contention that it could enjoin a nonlawyer, registered to practice before the United States Patent Office, from preparing patent applications in Florida as "singularly without merit.").

²⁹⁹ 426 U.S. at 860 (Brennan, J., dissenting).

³⁰⁰ See text at notes 187-91 *supra*.

³⁰¹ One commentator suggested that decisions such as *New York* "can never be made to coincide with the constitutional doctrines on which the United States federal-state system of government was founded." Castro, *supra* note 193, at 247.

³⁰² 327 U.S. at 101.

³⁰³ See Note, *Municipal Bankruptcy, The Tenth Amendment and the New Federalism*, 89 HARV. L. R. 1871, 1874 (1976).

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sovereignty embodied in the tenth amendment.

With respect to past precedent, it must be noted that very few commerce clause decisions are relevant to the inquiry made in *National League of Cities*. First, while expounding a strong Hamiltonian theme of a broad scope for Congress' commerce power, tenth amendment decisions such as *Darby* are inapposite. *Darby* correctly expanded Congress' commerce power over *private* interests where federal regulations are meant to be plenary, but its broad tenth amendment dictum cannot be applied correctly to a situation involving essential state governmental interests.³⁰⁴

Additionally, the tax immunity decisions, while recognizing that state sovereignty may ultimately limit the Federal government's right to tax state governmental functions as such, also cannot be appropriately analogized to a state sovereignty challenge to the application of the federal commerce power. This is so because the taxing power is not exclusively delegated to the Federal government as is the commerce power and because the commerce power does not necessarily have the destructive potential inherent in the power to tax.³⁰⁵

Finally, although the *Wirtz* line of cases are clearly on point, *Wirtz* was based solely on dicta in *Sanitary District* and *California*;³⁰⁶ both decisions are factually distinguishable from *Wirtz* and *National League of Cities*. *Sanitary District* concerned only a limitation on a State's right to control the flow of water in a drainage channel affecting a traditional instrumentality of interstate commerce—the navigable waters of several States and a foreign nation.³⁰⁷ Furthermore, the drainage channel involved in *Sanitary District* was constructed only with the permission of the Federal government, thus removing it from the category of a traditional state function.³⁰⁸ While extending the *Sanitary District* rationale to limit a State's power over a railroad, another traditional instrumentality of commerce, the *California* Court did not intend for the holding to be extended to limit the States' right to control their essential governmental functions.³⁰⁹ Nevertheless, the *Wirtz* Court, divorcing the *Sanitary District* and *California* rationales from their factual situations, improperly limited the States' power over their traditional governmental functions. By contrast, the *Fry* and *Case* decisions indicate the proper approach to constitutional federalism.³¹⁰ Under this approach the commerce power remains plenary where nonessential state functions are implicated.³¹¹ However, when federal policy decisions interfere with governmental functions

³⁰⁴ See text and notes at notes 127-32 *supra*.

³⁰⁵ See text at notes 232-60 *supra*.

³⁰⁶ 392 U.S. at 195, 198-99. See text and notes at notes 222-31 *supra*.

³⁰⁷ 266 U.S. at 423-25. See text and notes at notes 211-15 *supra*.

³⁰⁸ 266 U.S. at 428.

³⁰⁹ Compare *United States v. California*, 297 U.S. 175, 184-85 (1936) with *Ashton v. Cameron County Dist.*, 298 U.S. 513, 531-32 (1936).

³¹⁰ See text at notes 260-75 *supra*.

³¹¹ 426 U.S. 845, 854 n. 18.

basically having no private counterparts—essential state functions—the Court will balance state and federal interests to determine whether the federal interests are such as to override state sovereignty.³¹²

This "balancing approach" utilized by the Court in *National League of Cities*³¹³ provides a more flexible and practical framework for determining whether federal commerce legislation directly affecting States as States comports with the federal system of government. In allowing federal commerce legislation to override state sovereignty because of compelling countervailing national considerations, the Court permits Congress to tailor legislation to combat pervasive national problems.³¹⁴ At the same time, this approach accommodates both federal and state interests and preserves the sovereign relationship between the States and the Federal government as recognized by the Framers of the Constitution and expressly reflected in the tenth amendment.

An analysis of the historical concepts of constitutional federalism embodied in the "legislative history" of the Constitution reveals that both Hamilton and Madison framed an essential role for the States as sovereigns within the federal system.³¹⁵ While disagreeing on the exact scope of the new commerce power, both Hamilton and Madison advocated that the sovereignty of States would be a fundamental tenet of constitutional federalism.³¹⁶ This state sovereignty principle, then,

³¹² See text and notes at notes 102-08 *supra*. The district court in *National League of Cities* conceded that most "governmental functions . . . are not seriously in competition with private industry." *National League of Cities*, Civil No. 74-1812 (D.D.C. Dec. 31, 1974) (per curiam) reprinted in Brief for Appellant Appendix A at 7a. Thus the rationale for the 1974 FLSA amendments was essentially based on the principle that States, as employers, should be subject to the same legislation as private employers. See *Hearings on H. R. 7130 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. pt. 1 at 552 (1971); *Hearings on S. 1861 & S. 2259 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. pt. 1 at 29 (1971); Brief for the Appellant at 25-26. Therefore without any pervasive national economic interests at stake, the Court in *National League of Cities* framed the issue as an encroachment on state sovereignty because the 1974 amendments to FLSA under the broad penumbra of the commerce clause attempted to interfere with traditionally internal affairs of the States. 426 U.S. at 852. This interference was the result of a shift to a federal level of the policy decisions concerning state employees engaged in governmental activities not seriously in competition with private counterparts—essential state functions. *Id.* at 848.

³¹³ *Id.* at 856 (Blackmun, J. concurring); *Id.* at 872 (Brennan, J., dissenting).

³¹⁴ The Court's opinion is unclear as to exactly what factors will be considered in this balancing of interests. Apparently, the Court will approach the problem only on a case-by-case basis. The analysis used to distinguish *Fry* suggests that the Court will weigh the pervasiveness of the national problem under attack against the temporal aspects of the federal legislation, the new financial burdens imposed on the States, and the degree of imposition of new federal policy choices on the States. The Court's opinion is also unclear as to whether a factual inquiry is necessitated to consider these factors. Furthermore, it should be noted that the last factor, unlike the first three, is not readily discernible in a factual inquiry.

³¹⁵ See text at notes 158-92 *supra*.

³¹⁶ See text at notes 177, 182 *supra*.

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prevents the Federal government from encroaching upon the States' spheres of autonomous powers even pursuant to the constitutionally delegated commerce power.

The tenth amendment expressly reflects this policy of the sovereign relationship between the States and the Federal government.³¹⁷ Without doubt the exact contours of this relationship have shifted since the ratification of the Constitution. Nevertheless, the tenth amendment embodies a continuing guarantee that sovereign States stand on a different plane than private parties when challenging the exercise of a delegated federal power.³¹⁸ In those rare situations where there is a "clashing of sovereignty" between the States and the Federal government, the tenth amendment cannot be disregarded as in *Wirtz*, but must be viewed as something more than a truism.³¹⁹ These situations occur only when essential or traditional state functions are infringed upon by federal commerce legislation and no compelling countervailing national considerations are present. If these conditions obtain, the Supreme Court, as final arbiter, must decide whether the tenth amendment, as the "balancing mechanism" in constitutional federalism, mandates the invalidation of the federal legislation in order to preserve state sovereignty.

CONCLUSION

In light of the essential role framed for the States within the federal system and the balancing policy toward constitutional federalism embodied in the tenth amendment, the invalidation of the 1974 amendments to the Fair Labor Standards Act in *National League of Cities* should not be viewed as an unwarranted restriction on Congress' commerce power. Retaining the Hamiltonian approach to Congress' plenary commerce authority over private activities and nonessential or nontraditional state functions, the *National League of Cities* Court employed a balancing approach to evaluate *only* the propriety of federal commerce regulation directly affecting essential state functions. This approach is not, then, a total shift to an extreme Madisonian position of the supremacy of States' rights where the Federal government would be absolutely barred from regulating any aspects of any state functions.³²⁰ Rather, the decision can be more appropriately viewed as a necessary protection of a fundamental tenet of

³¹⁷ See *New York v. United States*, 326 U.S. 572, 594-95 (1946) (Douglas, J., dissenting). See note 130 *supra*.

³¹⁸ *Id.* at 596.

³¹⁹ *Id.* at 597.

³²⁰ Many commentators have viewed the holding in *National League of Cities* as severely restricting Congress' commerce authority to extend preemptive federal collective bargaining rights to State and local governmental employees. See, e.g., Aaron, *Labor Law Decisions of the Supreme Court, 1975-76 Term*, 92 LAB. REL. REP. 311, 345 n.30 (1976). Thus proposed bills for public sector bargaining at the State and local levels, see, e.g., H.R. 77, 94th Cong., 1st Sess. (1975); S.3294 & S.3295, 93rd Cong., 2nd Sess. (1974), which would remove the exemption for State and their political divisions from the Na-

constitutional federalism as recognized by both Hamilton and Madison—the preservation of the States' sovereignty over their respective spheres of authority.

ROBERT THOMAS MORGAN

Constitutional Law — Freedom of Speech and Association — Government Employees—*Elrod v. Burns*.¹ In December, 1970, petitioner Richard Elrod, a Democrat, replaced Republican Joseph Woods as Sheriff of Cook County, Illinois.² The Sheriff's Office is staffed by approximately three thousand employees, half of whom are "merit employees" protected from discharge without cause.³ After taking office as Sheriff, Elrod continued the long-standing local practice of discharging the vast majority of noncivil service opposition party employees and replacing them with employees who shared his political affiliations. When Elrod instituted this practice, three discharged employees and one employee threatened with discharge brought suit in the United States District Court for the Northern District of Illinois, seeking declaratory and injunctive relief.⁴ They alleged that the patronage system of employment as practiced by Sheriff Elrod in combination with Mayor Richard J. Daley,⁵ the Democratic Organization of Cook County, and the Democratic Central Committee of Cook County⁶ violated their first and fourteenth amendment rights, and

tional Labor Relations Act, see 29 U.S.C. § 152 (2) (1970), are constitutionally suspect in light of *National League of Cities*. Such a direct federal regulation of State and local governmental employer-employee relationships might be considered by the Supreme Court more intrusive of state sovereignty than the congressional extension of the minimum wage and maximum hour provisions in the 1974 FLSA amendments. See ABA, SECTION OF LABOR RELATIONS LAW, *Labor Relations Law in the Public Sector, Part I: Federal Regulation of the Public Sector* (Jan. 1977) for a more extensive discussion of the implications of *National League of Cities* on proposed federal regulation of state public sector labor relations.

¹ 427 U.S. 347 (1976).

² *Id.* at 350.

³ See *id.* at 377 (Powell, J., dissenting).

⁴ *Id.* at 349-350. The discharged respondents included the Chief Deputy of the Process Division, who supervised various departments of the office, a bailiff and a security guard at the juvenile court, and an "employee." *Id.* at 350-51.

⁵ Mayor Daley's involvement was grounded in part upon his position as leader of the party organization in Cook County. Appendix at 6. *Elrod v. Burns*, 427 U.S. 347 (1976).

⁶ Plaintiffs alleged a conspiracy on the part of all the defendants to carry out the unlawful firings. Defendants allegedly effectuated the conspiracy

(a) By screening the political party affiliation of the members of plaintiff class. (b) By soliciting members of plaintiff class to meet the conditions [for continuing employment, such as obtaining sponsorship letters, shifting party affiliation and the like]. (c) By supplying letters of recommendation or approval, commonly known as patronage letters, to certain members of