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NATIONAL LEAGUE OF CITIES V. USERY—THE COMMERCE POWER AND STATE SOVEREIGNTY REDIVIVUS

*BERNARD SCHWARTZ**

I. INTRODUCTION

Like Hamlet's father, state sovereignty is a ghost that refuses to remain in repose. Not too long ago, the concept of the states as independent sovereignties appeared to be an anachronistic survival from pre-Civil War days. The century since that time has seen a dramatic shift in the federal system's constitutional center of gravity. It is, in Justice Jackson's words, "undeniable that . . . we have been in a cycle of rapid centralization, and Court opinions have sanctioned a considerable concentration of power in the federal government with a corresponding diminution in the authority and prestige of state governments."[1]

During the past four decades the Supreme Court has all but overturned the previous limitations on the exercise of federal authority.[2] So far-reaching had the development in this respect become that observers could have asked whether it portended the replacement of the federal system by a unitary government in which the states would be reduced to vestigial appendages of an all-powerful nation. If the states still had "something of the magic of Athens and of Rome,"[3] perhaps they were also destined to share the ultimate fate of those once-flourishing polities, so far as the reality of governmental power is concerned.

With the decision of the Supreme Court in *National League of Cities v. Usery*,[4] it may turn out that the demise of the federal system bears a resemblance to the now legendary report of Mark Twain's death. For the first time since the "constitutional revolution" of the 1930's, the Court struck down an exercise of congressional power under the commerce clause, and it did so on the ground that the federal statute at issue invalidly impinged upon the operation of the states as coordinate independent governments. If anything seemed inconsistent with the past four decades of concentration of authority in the federal government, it was the notion that the states still possess the attributes of

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1. R. Jackson, The Supreme Court in the American System of Government 65-66 (1955) *See generally* Kurland, *Foreword, The Supreme Court, 1963 Term*, 78 Harv. L. Rev. 143, 162-63 (1964).

2. *See* notes 34-63 *infra* and accompanying text.

3. H. Laski, The American Democracy 139 (1948).

4. 426 U.S. 833 (1976).

sovereignty. Now the Supreme Court itself has relied upon "traditional aspects of state sovereignty"[5] in invalidating a federal statute. This led Justice Brennan to refer to "the newly announced 'state sovereignty' doctrine of *National League of Cities v. Usery*."[6]

How far does this doctrine extend? What are its implications? These are the questions to which this Article is directed. But first a brief discussion of the *National League of Cities* decision itself is appropriate.

II. *National League of Cities v. Usery*

National League of Cities v. Usery arose out of certain sections of the Fair Labor Standards Amendments of 1974.[7] The original Act of 1938[8] specifically excluded the states and their political subdivisions from its coverage.[9] By the 1974 amendments, Congress removed the exclusion, expressly extending the federal minimum wage and maximum hour requirements to public employees employed by the states and by their various political subdivisions.[10] Appellants in *National League of Cities* challenged the validity of the 1974 amendments. The Court upheld their challenge and ruled that the amendments invalidly attempted to impose upon the states the same wage and hour requirements already imposed upon private employers.

The Court recognized that the conditions of employment of the public employees covered by the 1974 amendments were not beyond the scope of the federal commerce power had those employees been employed in the private sector. But the decisions establishing the breadth of congressional authority under the commerce clause involved laws regulating private individuals and businesses.[11] A different situa-

5. *Id.* at 849.

6. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 822 n.4 (1976) (dissenting opinion)

7. Pub. L. No. 93-259, § 6(a)(1), (5), (6), 88 Stat. 55 (amending 29 U.S.C. § 203(d), (s), (x) (1970)).

8. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (current version at 29 U.S.C. §§ 201-219 (1970 & Supp. IV 1974)).

9. "As used in this Act . . . 'Employer' . . . shall not include the United States or any State or political subdivision of a State . . . ." *Id.* § 3 (current version at 29 U.S.C. § 203(d) (Supp. IV 1974)).

10. "As used in this chapter . . . 'Employer' includes . . . a public agency . . . ." 29 U.S.C § 203(d) (Supp. IV 1974). "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce . . . ." *Id.* § 203(s). " 'Public agency' means . . . the government of a State or political subdivision thereof; any agency of . . . a State, or a political subdivision of a State; or any interstate governmental agency." *Id.* § 203(x).

11. *See* notes 34-64 *infra* and accompanying text. An exception was Maryland v. Wirtz, 392 U.S. 183 (1968), involving state operation of schools and hospitals. *See* text accompanying notes 87-89 *infra*.

tion exists when Congress seeks to exercise the commerce power in a manner which infringes upon the existence of the states as essential elements of the federal system: "[T]here are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution."[12]

As stated by the Court, *National League of Cities* involves a simple application of the principle that the powers enumerated in article I, section 8, may not be exercised in violation of other constitutional provisions. Thus the power to tax and spend has been construed most broadly in the past quarter century.[13] But Congress may not impose a tax upon newspapers alone in violation of the first amendment.[14] Nor may it exercise its taxing power to compel self-incrimination in violation of the fifth amendment, through registration and tax payment requirements which reveal violations of the comprehensive state and federal drug and gambling prohibitions.[15] The same is true of the commerce clause, which the *National League of Cities* opinion itself refers to as a grant of plenary authority.[16] Congressional enactments fully within the grant of legislative authority contained in the commerce clause may nonetheless be invalid when found to infringe on first amendment liberties[17] or to offend against the right to jury trial[18] or due process.[19]

The Fair Labor Standards Amendments of 1974 may have fallen within the breadth of authority granted by the commerce clause; but when Congress sought to regulate the activities of the states as public employers, it transgressed a limitation on exercise of its power comparable to the provisions of the first, fifth, and sixth amendments referred to in the prior paragraph. The states are immune from federal regulation in the performance of their governmental activities, and the challenged provision violated this immunity by directly supplanting the choices of the states as to employment policies. Congress may not exercise its commerce clause authority in a fashion that would impair the states' ability to function effectively as separate and independent entities that is implicit in the federal system embodied in the Constitution.

12. 426 U.S. at 842.

13. *See* notes 113-23 *infra* and accompanying text.

14. Grosjean v. American Press Co., 297 U.S. 233 (1936).

15. *See* Leary v. United States, 395 U.S. 6 (1969); Marchetti v. United States, 390 U.S. 39 (1968).

16. 426 U.S. at 840.

17. *See id.* at 858 (Brennan, J., dissenting).

18. *See* United States v. Jackson, 390 U.S. 570 (1968).

19. *See* Leary v. United States, 395 U.S. 6 (1969).

III. COMMERCE CLAUSE CASES

A. *From Marshall to* Darby

The *National League of Cities* decision represents the first Supreme Court check on congressional exercise of the commerce power since the course of commerce clause jurisprudence was drastically altered by *NLRB v. Jones & Laughlin Steel Corp.*[20] four decades ago. The starting point of the commerce clause case law is, of course, *Gibbons v. Ogden,*[21] where "Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded."[22] His expansive interpretation did not, however, survive Marshall himself. For a century after the great Chief Justice's death the Court adopted a more circumscribed interpretation of the commerce power.

The key words in the commerce clause are the noun "commerce" (which determines the subjects to which congressional power extends) and the verb "to regulate" (which determines the type of authority that Congress can exert). Both the noun and the verb were defined most broadly by Marshall, and both were drastically restricted by the post-Marshall Court. Marshall had an organic conception of commerce;[23] the test of whether a particular activity was subject to congressional power was in his conception not mere movement across state lines, but whether the particular commerce affected more than one state. In the post-Marshall Court the criterion became the physical crossing of state lines. While commerce remained within a state, it remained solely within state power. It did not matter that it had impacts that radiated beyond the state's borders:

> Nor can it be properly concluded, that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase *foreign commerce,* or fairly implied in any investiture of the power to regulate such commerce.[24]

The result was to exclude from the federal commerce power virtually all productive activities. "Commerce," declared the Court in 1895, "succeeds to manufacture, and is not a part of it."[25] The same

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20. 301 U.S. 1 (1937).
21. 22 U.S. (9 Wheat.) 1 (1824).
22. Wickard v. Filburn, 317 U.S. 111, 120 (1942).
23. *See* F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 42 (1937).
24. Veazie v. Moor, 55 U.S. (14 How.) 567, 574 (1852).
25. United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).

was true of agriculture,[26] mining,[27] oil production,[28] electric power generation,[29] and all other productive industries.[30]

A comparable restriction was imposed upon the reach of the congressional power to regulate. "[W]hat is this power?" Marshall had asked.[31] "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed."[32] To Marshall's successors, the determination that the law at issue prescribed a rule by which the particular commerce was to be governed was not the end of the inquiry. The Court also had to determine whether the congressional prescription of the rule was motivated by an improper purpose. Thus a federal law prohibiting transporation in interstate commerce of goods made in factories that employed child labor was, on its face, patently a *regulation* of commerce; *i.e.*, it prescribed the prohibitory rule by which the goods concerned were to be governed. But the congressional purpose was to suppress child labor, and *Hammer v. Dagenhart*[33] held that that rendered the law invalid. Congress could not use its prohibitory power over interstate transportation to exert regulatory authority over manufacturing, which, under the then-prevailing law, was not commerce.

The restricted post-Marshall interpretation of the commerce clause is, however, now a matter of legal history. Starting with *Jones & Laughlin*[34] in 1937, the Court returned to the expansive Marshall conception of federal power. *Jones & Laughlin* itself rejected the notion that production was not commerce. The crucial test became, not the crossing of state lines by the regulated activity, but whether that activity affected commerce. Mines and mills, factories and farms—all theretofore excluded because they were engaged in production rather than commerce in the Court's restricted sense—were brought within the sweep of the commerce clause, provided only that they exerted *some* effect upon interstate commerce. As the Court has more recently put it, "there is no question of Congress' power under the Commerce Clause to include otherwise ostensibly local activities within the reach of federal economic regulation, when such activities sufficiently implicate interstate commerce."[35]

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26. *See* United States v. Butler, 297 U.S. 1 (1936).
27. *See* Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923).
28. *See* Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210 (1932).
29. *See* Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932).
30. *See, e.g.*, Coe v. Errol, 116 U.S. 517 (1886) (lumbering)
31. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).
32. *Id.*
33. 247 U.S. 251 (1918).
34. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
35. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 196-97 (1974).

Nor, under the post-*Jones & Laughlin* cases, does the effect upon commerce have to be substantial. The commerce power turns not upon volume, but upon effect; the quantitative aspect is irrelevant. The given individual's contribution to commerce may be trivial by itself, but, taken together with that of others in the same position, it may be anything but trivial.[36] Thus the Court could say, of a family-owned restaurant, that "viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant . . . ."[37] But Congress could rightly assume that its business was only "representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."[38]

In addition, the post-*Jones & Laughlin* cases adopt a concept of causation so attenuated as to bring within the commerce power virtually all economic activity in the nation. The Fair Labor Standards Act (the statute involved in the *National League of Cities* case) has been held applicable to employees engaged in the maintenance and operation of a building in which goods were produced for interstate commerce,[39] as well as employees of a window-cleaning company, the greater part of whose work was on the windows of people engaged in interstate commerce.[40]

Under cases like these, the commerce power can support federal regulation of all local action, "since it is conceivable that such activity, however remotely, 'affects' commerce."[41] "It is but to repeat, in another form, the old story of the pebble thrown into the pool, and the theoretically infinite extent of the resulting waves, albeit too tiny to be seen or felt by the exercise of one's senses."[42] By what Chief Justice Stone termed "a house-that-Jack-built"[43] chain of causation, there may be brought within the sweep of the commerce clause every stage of economic activity—even the ultimate *causa causarum*—which results in any effect upon commerce.

The post-*Jones & Laughlin* cases also return to the Marshall definition of the power to regulate under the commerce clause. In *United States v. Darby*,[44] the Court expressly overruled *Hammer v.*

36. *See* Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

37. Katzenbach v. McClung, 379 U.S. 294, 300 (1964).

38. *Id.* at 301 (quoting Polish National Alliance of the United States v. NLRB, 322 U.S. 643, 648 (1944)). *Compare id. with* Perez v. United States, 402 U.S. 146, 154 (1971).

39. Kirschbaum Co. v. Walling, 316 U.S. 517, 524-25 (1942).

40. Martino v. Michigan Window Cleaning Co., 327 U.S. 173, 176 (1946).

41. Kirschbaum Co. v. Walling, 316 U.S. 517, 527 (1942) (Roberts, J., dissenting).

42. Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 94 (1942) (Roberts, J., dissenting).

43. Borden Co. v. Borella, 325 U.S. 679, 685 (1945) (dissenting opinion).

44. 312 U.S. 100 (1941).

Dagenhart[45] and held that the type of inquiry into congressional motives undertaken there was improper. Under *Darby* (as under *Gibbons v. Ogden*) the sole question is whether a challenged federal law does prescribe a governing rule for commerce. If it does, it is valid regardless of the ends that may have induced its enactment.

B. *Bootstrapping*

The *Darby* case tied together the two key words in the commerce clause (the noun "commerce" and the verb "regulate") in a manner which gives Congress a means to extend its commerce authority virtually as far as it wishes. *Darby* sustained the Fair Labor Standards Act's prohibition against interstate shipment of goods produced by employees whose wages and hours did not conform to the statute's requirements. The prohibition was valid as a regulation of commerce (*i.e.*, it prescribed the rule by which the commerce was to be governed), regardless of the motive of controlling wages and hours in production which induced Congress to enact the prohibition. But the Court went further and also upheld the statute's direct requirement that employees engaged in production conform to the federal wages and hours standards. The Court did so both by relying upon the "affecting commerce" rationale[46] and by using the commerce-prohibiting technique to validate direct controls on local activities.

The commerce-prohibiting technique follows from the validity of the statute's prohibition on interstate shipment already discussed. "Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities."[47] The direct wage and hour regulation of production may thus be sustained as a "necessary and proper" means; *i.e.*, one reasonably adapted to attaining the permitted end of excluding nonconforming goods from interstate commerce.

The implications are far-reaching. Professor Gunther well characterizes this *Darby* approach as a "super-bootstrap" technique.[48] He asks whether this technique would permit Congress to "regulate any intrastate activity through a two-step bootstrap device: (1) prohibiting interstate movement of goods or persons connected with that activity;

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45. *See* note 33 *supra*.
46. *See* note 41 *supra* and accompanying text.
47. 312 U.S. at 121.
48. G. Gunther, Cases and Materials on Constitutional Law 199 (9th ed 1975).

and (2), as a 'means reasonably adapted to the attainment of the permitted end,' directly regulating the intrastate activity."[49]

The *Darby* technique enables us to answer the issue of the extent of congressional power left unresolved by *United States v. Five Gambling Devices*.[50] The case arose out of prosecutions for dealing in gambling devices without registering and reporting sales and deliveries as required by an Act of Congress.[51] The indictments did not allege that the devices had ever moved in interstate commerce. A plurality of the Supreme Court held that Congress had not intended the statute to apply to such intrastate matters.[52] The lower courts, however, had gone further and declared that, if the law did undertake to regulate such purely intrastate transactions, it went beyond congressional power.[53]

Though the plurality opinion limited itself to the holding already referred to on congressional intent, four Justices, dissenting, did discuss the constitutional question.[54] According to them, the lower courts were wrong in finding that Congress had exceeded its power. The registration and filing requirements for intrastate transactions were an appropriate means for enforcing the ban on interstate transportation of gambling devices.[55] Yet even the dissent did not go so far as to imply that a local activity like intrastate gambling was now wholly within the commerce power. What it said in support of congressional authority was limited to the registration and filing requirements: "If Congress by § 3 had sought to *regulate* local activity, its power would no doubt be less clear."[56]

It is difficult to see the basis for this hesitation on the issue of whether congressional regulatory power is valid in such a case. Under *Darby,* Congress can plainly ban interstate transportation of gambling devices and can choose "means reasonably adapted to the attainment

49. *Id.* at 189.

50. 346 U.S. 441 (1953).

51. Act of Jan. 2, 1951, ch. 1194, 64 Stat. 1134 (current version at 15 U.S.C. §§ 1171-1177 (1976)).

52. 346 U.S. at 449-50 (Jackson, J., joined by Frankfurter & Minton, JJ.). The concurring Justices found that the statute was broad enough to cover interstate sales, but affirmed on the ground that it was unenforceable for vagueness. 346 U.S. at 452-54 (Black, J., joined by Douglas, J.).

53. United States v. Braun, 119 F. Supp. 646, 647 (S.D. Ga.), *aff'd sub nom.* United States v. Five Gambling Devices, 346 U.S. 441 (1953); United States v. Denmark, 119 F. Supp. 647, 649-50 (S.D. Ga.), *aff'd sub nom.* United States v. Five Gambling Devices, 346 U.S. 441 (1953).

54. 346 U.S. at 454-63 (Clark, J., dissenting, joined by Warren, C.J., and Reed & Burton, JJ.).

55. *Id.* at 454-56 (Clark, J., dissenting). However, under Marchetti v. United States, 390 U.S. 39 (1968), the registration requirements may now be considered violative of the privilege against self-incrimination.

56. 346 U.S. at 462 (Clark, J., dissenting).

of the permitted end, even though they involve control of intrastate activities."[57] If registration and filing requirements are appropriate means for enforcing the ban on interstate transportation, why is the same not true of direct regulation, as it was in the case of the *Darby* ban? If this enables Congress to bootstrap regulation of purely local gambling to the plane of constitutional legality, that is just what the *Darby* technique permits.

The Court itself has applied the *Darby* bootstrap technique in the more recent case of *Perez v. United States*.[58] A federal statute[59] which made "loan sharking" (*i.e.*, the threat of violence to collect debts) a crime was applied to petitioner, a "loan shark" in New York City who had used threats of violence to collect $3,000 he had loaned to the owner of a local butcher shop. The Court affirmed petitioner's conviction, stating that there was "a tie-in between local loan sharks and interstate crime."[60] The required nexus was found in congressional hearings and reports indicating that loan sharking furnished organized crime with much of its revenue: "[L]oan sharking in its national setting is one way organized interstate crime . . . syphons funds from numerous localities to finance its national operations."[61]

Justice Stewart, who dissented, asserted that there was no rational basis for the conclusion "that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime."[62] If there is a justification, in commerce clause terms, for the majority decision, it may be the following: "The key to the *Perez* decision may be found in the difficulty of proving in each individual case that the loan shark had an interstate connection even when it existed."[63] In other words, as a "means reasonably adapted to the attainment of the permitted end"[64] of outlawing loan sharking with interstate connections Congress may reach all loan sharking, even in cases where no interstate attributes are shown; *i.e.*, the *Darby* bootstrapping technique.

C. *The Outer Limits*

The cases between *Jones & Laughlin* and *Perez* reveal an almost inexorable unfolding of the commerce power. In *Perez*, the Court

57. 312 U.S. at 121.
58. 402 U.S. 146 (1971).
59. 18 U.S.C. §§ 891-896 (1976).
60. 402 U.S. at 155.
61. *Id.* at 157.
62. *Id.*
63. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 Ariz. L. Rev. 271, 278 (1973).
64. 312 U.S. at 121.

stated that it had, after more than a century, returned to the sweeping view of Marshall.[65] Yet, in its recent decisions, the Court has construed the power more broadly than the great Chief Justice had ever done. "Even a lawyer who fought for a realistic interpretation which would recognize that in commercial matters the United States was one nation finds himself surprised at where we are now—and at how readily the recent expansion is accepted."[66]

The "ease with which the public and the judiciary now swallow the federal regulation of what were once deemed exclusively local matters"[67] has led to the natural question of whether any limitations still remain upon the commerce power. In posing that question in 1972, this writer stated that "[a] categorical answer is anything but easy. To attempt to draw the outer limits of this plenary power is to essay what the highest Court has expressly refrained from undertaking."[68]

Six years later, this statement is still accurate. But we now have suggestive indications that the Constitution does not permit Congress to sweep within its control any and all activities carried on in the country. That the commerce clause even today does not go to that extreme is indicated by a recent case which involved the constitutionality of a federal law enacted to protect wild horses and burros on federal lands. A three-judge district court ruled the statute invalid, holding that it could not be sustained under the commerce clause because the wild burros in question did not migrate across state lines.[69] The Supreme Court did not deal with the commerce clause issue, since it was able to sustain the statute under Congress' power to regulate federal property.[70] Even under today's expanded commerce clause, however, it is difficult to see how nineteen wild burros on federal grazing land in New Mexico can have even the most attenuated effect on commerce.

Yet even if that be true, it hardly involves a limitation of practical import upon the reach of federal regulatory power. The same cannot be said of *National League of Cities* and the limitation imposed by it. Under that decision, governmental activities of the states themselves are beyond the reach of the commerce power. The consequence, as Justice Brennan has noted,[71] is a revival of the doctrine of state sovereignty as a barrier to federal power.

65. 402 U.S. at 151.

66. Stern, *supra* note 63, at 284.

67. *Id.*

68. B. Schwartz, Constitutional Law: A Textbook 104 (1972) (footnote omitted).

69. New Mexico v. Morton, 406 F. Supp. 1237 (D.N.M. 1975), *rev'd sub nom.* Kleppe v. New Mexico, 426 U.S. 529 (1976).

70. Kleppe v. New Mexico, 426 U.S. 529, 535-41 (1976).

71. *See* text accompanying note 6 *supra.*

What is particularly striking about the revived doctrine is that it may apply to all state activities, rather than only to those which may be considered to involve essential governmental functions.[72] In an era of expanding state activity, this may have significant implications:

> A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable.[73]

Does this mean that, as the states take over activities traditionally within the realm of private enterprise, the activities become immune from the reach of federal regulatory power? As states undertake more and more social and economic functions that not too long ago were thought to be beyond the legitimate sphere of government, will these functions be placed beyond the outer limits of the commerce power?

IV. INTERGOVERNMENTAL IMMUNITIES

"What is the fundamental characteristic of the United States considered as an association of states?"[74] asks the leading English study of federal government. The answer that it offers is the principle that the general and regional governments are coordinate and independent in their respective spheres.

> The answer seems to be that the Constitution of the United States establishes an association of states so organized that powers are divided between a general government which in certain matters . . . is independent of the governments of the associated states, and, on the other hand, state governments which in certain matters are, in their turn, independent of the general government.[75]

Maintenance of the federal system requires a doctrine of intergovernmental immunities, so that both federal and state governments can remain independent of each other. The starting point of the doctrine was, of course, Marshall's now classic opinion in *McCulloch v. Maryland*.[76] Building upon his famous dictum that "the power to tax involves the power to destroy,"[77] Marshall laid down a broad principle of immunity for federal agencies from state taxation[78] and, by implication, state regulation.

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72. *See* notes 96-102 *infra* and accompanying text.
73. New York v. United States, 326 U.S. 572, 591 (1946) (Douglas, J., dissenting)
74. K. Wheare, Federal Government 2 (4th ed. 1964).
75. *Id.* (footnote omitted).
76. 17 U.S. (4 Wheat.) 316 (1819).
77. *Id.* at 429.
78. *Id.* at 435-37. For a recent discussion, see United States v. County of Fresno, 429 U.S. 452 (1977).

After *McCulloch,* it was assumed that implicit in its holding was a reciprocal doctrine of intergovernmental immunity, which protected the states as well as the federal government.[79] During this century, however, it appeared settled that the earlier assumption of equivalence in intergovernmental immunities was unwarranted.[80] Federal immunity is grounded squarely upon the supremacy clause, which covers all valid federal action. There is no basis for distinguishing between different federal agencies because of the nature of the functions that they perform. A different rule applies to state immunity. It is based not upon a categorical constitutional command like the supremacy clause, but upon implications arising from the nature of federalism.[81] If that is the case, state immunity extends only as far as necessary to preserve the states themselves. Only when a state agency is performing an essential governmental function is there immunity from federal laws. If, on the contrary, the function is not one traditionally associated with government, there is no exemption.

These principles have been applied both to immunity from taxation[82] and immunity from regulation. A federal regulatory law could not operate to curtail the exercise by a state of its essential governmental functions. On the other hand, where a state engages in economic activities that are validly regulated by the federal government when engaged in by private persons, the state too may be forced to conform its activities to federal regulation.[83] When a state operates a railroad, the railroad must comply with the Federal Safety Appliance Act,[84] as well as the requirements of the Interstate Commerce Act[85] and the Railway Labor Act.[86]

The most recent of the pre-*National League of Cities* cases—*Maryland v. Wirtz*[87]—upheld an amendment to the Fair Labor Standards Act[88] which extended federal wage and hour requirements to employees of state-operated schools and hospitals. The Court rejected

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79. New York v. United States, 326 U.S. 572, 576 (1946).

80. *Id.* at 577.

81. Helvering v. Gerhardt, 304 U.S. 405, 414 (1933).

82. *See* New York v. United States, 326 U.S. 572 (1946) (federal tax on sale of mineral waters by state); South Carolina v. United States, 199 U.S. 437 (1905) (federal tax on sale of liquor by state).

83. Maryland v. Wirtz, 392 U.S. 183, 197 (1968).

84. 45 U.S.C. §§ 1-16 (1970); *see* United States v. California, 297 U.S. 175, 185 (1936).

85. 49 U.S.C. §§ 1-27 (1970 & Supp. V 1975) (part I); *see* California v. Taylor, 353 U.S. 553, 564 & n.10 (1957).

86. 45 U.S.C. §§ 151-188 (1970); *see* California v. Taylor, 353 U.S. 553, 563-68 (1957).

87. 392 U.S. 183 (1968).

88. Act of Sept. 23, 1966, Pub. L. No. 89-601, § 102, 80 Stat. 830 (codified at 29 U.S.C. § 203(d), (s)(4) (1970)).

the claim that the amendment interfered with sovereign state functions, stating:

> [V]alid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.[89]

The dividing line under these decisions, it was thought, was between cases in which the states were performing functions which could only be performed by the states as states—"Only a State can own a Statehouse"[90]—and those where the states were engaged in activities not essential to government as we have traditionally known it. The distinction was developed in the cases on the constitutional immunity of state instrumentalities from federal taxation, where "we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power."[91]

The just-quoted statement is from the opinion in *United States v. California,*[92] where it was held that a state-operated railroad was subject to the Federal Safety Appliance Act.[93] That case went even further than the discussion in the last paragraph; after noting the line drawn in the tax cases, the Court stated: "But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."[94]

The *National League of Cities* opinion expressly rejects this assertion that there is no limitation comparable to that upon federal taxing power upon the commerce power: "[W]e have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from *United States v. California,* simply wrong."[95] Does this mean then, as the *Wirtz* decision seemed to imply, that state immunity from federal regulation under the commerce power turns upon the same principles that restrict federal taxing power exerted against the states?

The *National League of Cities* decision struck down the 1974 amendments to the Fair Labor Standards Act on the ground that they

89. 392 U.S. at 196-97.
90. New York v. United States, 326 U.S. 572, 582 (1946).
91. United States v. California, 297 U.S. 175, 185 (1936).
92. 297 U.S. 175 (1936).
93. *See* note 84 *supra* and accompanying text.
94. 297 U.S. at 185.
95. 426 U.S. at 854-55 (footnotes omitted).

displaced state policies regarding the manner in which delivery of governmental services such as police and fire protection would be structured. As such, "the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[96] Had the Court chosen to do so, it could have made its *National League of Cities* decision consistent with that in *Wirtz,* since, as the *National League of Cities* opinion recognized, "there are obvious differences between the schools and hospitals involved in *Wirtz,* and the fire and police departments affected here."[97] The Court did not, however, base its decision on these "obvious differences." Instead, it overruled *Wirtz,* refusing to distinguish between federal regulation applicable to state and local agencies such as police and fire departments and those (as in *Wirtz*) applicable only to schools and hospitals.

The Court in *National League of Cities* declined to distinguish between the two types of state functions because "each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens."[98] The implication is that all state and local agencies that provide such governmental services are now immune from federal laws. If this is correct, *National League of Cities* turns around the law of intergovernmental immunities, so far as state immunities are concerned. *United States v. California* and *Maryland v. Wirtz* were based on the premise that "[i]f a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."[99] The railroad in *California* and the schools and hospitals in *Wirtz* fell within the principle thus stated.

As already noted, a distinction was not drawn in *National League of Cities* between state employees working in schools and hospitals, on the one hand, and policemen and firemen, on the other. Though the Court concedes that "[t]here are undoubtedly factual distinctions between the two situations,"[100] it indicated that the immunity from the commerce power regulation applied to both. The question no longer is whether the state is performing a function which only government performs, as opposed to engaging in activities which are also engaged in by others. The test now is whether the state is performing a service

96. *Id.* at 852.
97. *Id.* at 855.
98. *Id.* (footnote omitted).
99. Maryland v. Wirtz, 392 U.S. at 197; *see* United States v. California, 297 U.S. at 183-84.
100. 426 U.S. at 854.

which the states "have traditionally afforded their citizens,"[101] or whether the state "activity to which the congressional command was directed was . . . in an area that the States have regarded as integral parts of their governmental activities."[102] Operation of schools and hospitals has for years been considered an integral part of state activities, even though both were originally operated solely as private institutions and, even today, there is still an important private sector in the field of education and health.[103]

National League of Cities distinguished the state activity at issue in *United States v. California,* stating that, as the operation of a railroad engaged in common carriage, it was not in an area which the states have traditionally regarded as integral parts of their governmental services. The difficulty is that pointed out by Justice Douglas in his dissent in *New York v. United States*[104]: the area of state activity from which immunity is removed is one of particular significance to modern government, which is increasingly undertaking social and economic functions that a century ago were thought beyond the sphere of government. "A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit . . . . What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable."[105]

V. SPENDING POWER

In his dissent in *National League of Cities* Justice Brennan asserted that the decision effected "a catastrophic judicial body blow at Congress' power under the Commerce Clause . . . [but] Congress may nevertheless accomplish its objectives—for example, by conditioning grants of federal funds upon compliance with federal minimum wage and overtime standards."[106] The implication is that Congress may use its spending power to achieve indirectly the aim of state compliance with wage and hour requirements which, under *National League of Cities,* it could not achieve directly by regulation under the commerce clause.

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101. *Id.* at 855 (footnote omitted).

102. *Id.* at 854 n.18.

103. *See generally* Grafton v. Brooklyn Law School, 478 F.2d 1137, 1143 (2d Cir. 1973) (private law school); Barrett v. United Hospital, 376 F. Supp. 791, 799 (S.D.N.Y. 1974) (private hospital).

104. 326 U.S. 572, 590-98 (1946) (Douglas, J., dissenting).

105. *Id.* at 591 (Douglas, J., dissenting).

106. 426 U.S. at 880 (Brennan, J., dissenting).

The Brennan assertion is based upon the expansion of the congressional power to tax and spend that has occurred during the past forty years. The development of the taxing and spending power in this respect has paralleled that of the commerce power itself. Under *Hammer v. Dagenhart,*[107] the commerce power might not be used to prohibit interstate transportation if the congressional purpose was to regulate production which, under the restricted definition followed before 1937, did not constitute commerce.[108] In *United States v. Butler,*[109] the same approach was applied to the power to tax and spend. The Court there struck down the Agricultural Adjustment Act of 1933.[110] It sought to eliminate overproduction of food products by providing farmers with financial inducements to curtail production. A processing tax was levied on agricultural commodities, and the proceeds used to pay farmers who reduced their productive acreage. The congressional purpose was plainly regulation of agricultural production, and such a purpose rendered the law invalid. Congress could not, under the pre-*Jones & Laughlin* decisions, directly regulate agricultural production;[111] nor could it do so indirectly under the guise of its power to tax and spend, through what Justice Stone termed a scheme of "purchased regulation."[112]

The cases since *Butler* have repudiated the limitation imposed by that decision upon the taxing and spending power. The Court has rejected the *Butler* approach that barred utilization of taxing power to accomplish regulatory ends arguably beyond the direct authority of Congress. The courts no longer look behind a tax law to see whether it is motivated by an improper purpose.[113] The same is also now true where spending of revenue is concerned. The Social Security Act cases[114] settled that funds disbursed to promote what Congress deemed the general welfare could not be invalidated because the money was being spent to induce action in an area that Congress might not be able to control directly.

The breadth of the congressional spending power was underscored by the entire Court in *Buckley v. Valeo,*[115] which upheld the public

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107. 247 U.S. 251 (1918).
108. *See* text accompanying note 33 *supra.*
109. 297 U.S. 1 (1936).
110. Ch. 25, 48 Stat. 31 (current version codified in scattered sections of 5, 7 U.S.C.).
111. *See* note 26 *supra* and accompanying text.
112. 297 U.S. at 85 (dissenting opinion).
113. *See* United States v. Kahriger, 345 U.S. 22, 25-31 (1953).
114. Helvering v. Davis, 301 U.S. 619 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).
115. 424 U.S. 1 (1976).

financing provisions of the Federal Election Campaign Act of 1971,[116] as amended, against challenges that public financing of presidential election campaigns was contrary to the general welfare. The Court declared that the general welfare clause is a "quite expansive [grant of power]. . . . It is for Congress to decide which expenditures will promote the general welfare . . . . Whether the chosen means appear 'bad,' 'unwise,' or 'unworkable' to us is irrelevant."[117] The power of the purse may be conditioned in ways that Congress deems "necessary and proper" to promote the general welfare;[118] Congress may impose conditions that must be complied with before particular funds are disbursed. Conditional grants-in-aid have been a major instrument in changing the federal balance during the past four decades.

Nor may congressional grants be condemned because the money is spent to induce action by the states which Congress could not compel. This was settled by *Steward Machine Co. v. Davis*,[119] the first Social Security Act case, and confirmed in *Oklahoma v. United States Civil Service Commission*.[120] The latter case is particularly significant in the context of *National League of Cities*. It involved application of the Hatch Act[121] provision that no state official employed in activities financed in whole by federal funds should take any active part in political activities. The United States Civil Service Commission ordered the removal of a state Highway Commissioner who was state Democratic chairman. If the state did not comply, it risked a reduction in federal highway grants. The Court rejected Oklahoma's claim that federal funds could not be conditioned on the state's compliance with the Hatch Act. "While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed."[122]

The relevance of the *Oklahoma* case to the question of whether Congress could use its spending power to accomplish what *National League of Cities v. Usery* held was prohibited under the commerce power is apparent. The underlying principles of federalism upon which the *National League of Cities* decision was based also prevent Congress

116. Pub. L. No. 92-225, 86 Stat. 3 (current version codified in scattered sections of 2, 18, 26 U.S.C.).

117. 424 U.S. at 90-91.

118. *Id.* at 91.

119. 301 U.S. 548 (1937).

120. 330 U.S. 127 (1947).

121. Ch. 410, 53 Stat. 1147 (1939) (current version codified in scattered sections of 2, 18, 26 U.S.C.).

122. 330 U.S. at 143.

from imposing a direct prohibition upon political activities by state employees. Yet *Oklahoma* allowed Congress to attain the same result by conditioning its grants to the state. The Court blandly assumed that such an "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."[123] If a condition such as that in the Hatch Act is not unusual, why should a condition on federal grants that states follow wage and hour requirements be treated any differently?

The *National League of Cities* opinion itself specifically 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."[124] Under the cases discussed, particularly *Oklahoma v. United States Civil Service Commission,* congressional power to impose wage and hour requirements as conditions to federal grants appears settled.

The Court's refusal in *National League of Cities* to take a position on the matter does not expressly affect the established case law. One may nevertheless wonder whether the *National League of Cities* majority would be receptive to use of the spending power as a device to accomplish the very result held forbidden under the Fair Labor Standards Amendments of 1974.

If the contrary is true and Congress can affect integral functions of state governments by exercise of the spending power, *National League of Cities* itself imposes no more than a formal barrier to congressional encroachments upon state operations. Provided that Congress act through conditions imposed upon grants rather than through direct exercises of other enumerated powers, the "limits upon the power of Congress to override state sovereignty,"[125] which *National League of Cities* so eloquently proclaimed, will prove nonexistent. If that is the case, was there any real point to the *National League of Cities* decision? Was it truly necessary for the Court to march the king's men up the hill in a commerce clause case only to offer to march them down ignominiously if the spending power were instead invoked?

VI. CONCLUSION

One may sympathize with the *National League of Cities* effort to preserve the states as independent governments, free from federal

123. *Id.* at 144 (footnote omitted).
124. 426 U.S. at 852 n.17.
125. *Id.* at 842.

control in their integral operations. One can, however, be left with a modest doubt as to whether the Court has drawn a workable line to mark the area of state immunity. The prior cases (notably *United States v. California*[126] and *Maryland v. Wirtz*[127]) had distinguished between state functions such as operation of schools and hospitals and those such as providing police and fire protection.[128] However, *National League of Cities* holds that there is no basis for this distinction since all the functions are an integral part of those governmental services which the states have traditionally provided. Does this mean that all state officers who provide services which the states have furnished for some years are now beyond the reach of federal regulation? Perhaps the states should be free from the federal wage requirement which "directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment."[129] Is the same true of other federal requirements, such as safety regulations[130] or the national speed limit imposed during the gas crisis?[131]

In some ways, the most disturbing aspect of the *National League of Cities* decision is the Court's gratuitous revival in it of the concept of state sovereignty. Even those who applaud the effort to hold back the onrushing flood of federal power may feel some unease at the language used by the Court, which relies on the attributes of state sovereignty to strike down an infringing federal law. State sovereignty has not been a viable legal concept since the ratification of the Federal Constitution. That fundamental document is basically inconsistent with the notion of the states as separate sovereignties, an inconsistency recognized since the classic decisions of the Marshall Court and reinforced by the decision at the Appomattox Courthouse over a century ago.

Perhaps the *National League of Cities* opinion was only employing Humpty Dumpty's method[132] in using the language of state sovereignty. But the Court cannot use a term with the connotations that "state sovereignty" has always had without lending its imprimatur to state sovereignty advocates and the baneful effect that they have had throughout our history. The Court itself has consistently been the

126. 297 U.S. 175 (1936).

127. 392 U.S. 183 (1968).

128. *See* notes 87-99 *supra* and accompanying text.

129. 426 U.S. at 848.

130. The Occupational Safety and Health Act now excludes the states and their subdivisions from its definition of employer. 29 U.S.C. § 652(5) (1970).

131. N.Y. Times, Jan. 3, 1974, at 1, col. 7.

132. " 'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' " L. Carroll, Through the Looking Glass, ch. 6.

strongest opponent of state sovereignty, whether its claims were raised in opposition to federal enforcement of fugitive slave laws in the North[133] or the equal protection guaranty in the South.[134] Now apparently the Court itself has revived the ghost with what Justice Brennan terms its "novel state-sovereignty doctrine,"[135] a doctrine which even resurrects the notion of the tenth amendment as "an express declaration of [a state sovereignty] limitation."[136] Yet such a notion had seemingly been put to rest in a famous passage in the *Darby* case.[137]

The Court, of course, was only seeking to answer the question at issue in the case before it. If some of its language was intemperate, that was by no means unusual for contemporary judicial opinions. The evil that may be done by raising the ghost of state sovereignty may, however, outlive the immediate decision of the Court, important though it may be. Regardless of the merits of the decision and its implications for the commerce power and intergovernmental immunities, it is unfortunate that the Court saw fit to frame its opinion in terms of state sovereignty. It is to be hoped that, in future cases involving ramifications of the *National League of Cities* decision, the Justices will take the occasion to repudiate the state sovereignty language used by them. Hopefully this will occur before states' rights extremists are able to employ *National League of Cities* to gain a mantle of respectability.

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133. *See* Ableman v. Booth, 62 U.S. (21 How.) 506 (1858).

134. *See* Cooper v. Aaron, 358 U.S. 1 (1958).

135. 426 U.S. at 863 (dissenting opinion).

136. *Id.* at 861 (dissenting opinion).

137. "The amendment states but a truism that all is retained which has not been surrendered." 312 U.S. at 124. The quotation is referred to in both the plurality and dissenting opinions in *National League of Cities*. *Compare* 426 U.S. at 842-43 *with id.* at 862-63.