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The Essential Governmental Function After National League of Cities: Impact of an Essentiality Test on Commuter Rail Transportation

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NOTES

THE ESSENTIAL GOVERNMENTAL FUNCTION AFTER *NATIONAL LEAGUE OF CITIES*: IMPACT OF AN ESSENTIALITY TEST ON COMMUTER RAIL TRANSPORTATION

I. Introduction

The Supreme Court in *National League of Cities v. Usery*[1] limited the applicability of the 1974 amendment[2] to the Fair Labor Standards Act[3] (FLSA), which sought to regulate those state and municipal employees engaged in traditional governmental functions.[4] The Court held that Congress, by enacting this amendment, had exceeded its powers under the commerce clause.[5] In reaching its decision in *National League of Cities*, the Supreme Court relied on the vague definition of an "essential governmental function" suggested in *New York v. United States*.[6] Although the Court in *National League of Cities* prohibited Congress from using the commerce clause to enforce the wage and hour provisions of the FLSA in areas in which states are considered to be performing an essential governmental function,[7] the Court did not satisfactorily delineate what constitutes an essential activity.[8] Consequently,

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1. 426 U.S. 833 (1976).

2. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified in scattered sections of 29 U.S.C. (1976)).

3. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-219 (1976)) [hereinafter cited as FLSA].

4. 426 U.S. at 836.

5. *Id.* at 852. Congress derives its commerce power from the United States Constitution. "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." U.S. CONST. art. I, § 8, cl. 3. *See generally* Comment, *National League of Cities and the Parker Doctrine: The Status of State Sovereignty Under the Commerce Clause*, 8 FORDHAM URB. L.J. 300 (1980).

6. 326 U.S. 572 (1946). *See* notes 36-47 *infra* and accompanying text.

7. 426 U.S. at 851.

8. *Id.* The Court defined "essential" merely by using words such as "traditional," "integral," "typical" and "fundamental." *Id.* at 851. One would assume that the Court intended that these words be used interchangeably. The Court uses both "integral" and "traditional" in the same phrase: "integral operations in areas of traditional governmental functions," *id.*

courts have been compelled to make a case-by-case determination as to whether a particular governmental function should be considered essential.[9]

The lack of a clear definition of essentiality is particularly significant in the area of railroad employee regulation, where, prior to *National League of Cities*, the consensus was that railroads do not perform an essential governmental function.[10] However, there are several cases in which the contrary argument has recently been made that at least commuter rail transportation should be considered an essential governmental function.[11]

The purpose of this Note is threefold. First, *National League of Cities* will be examined in light of prior case law. Second, the controversial "essential governmental function" language of *National League of Cities* will be analyzed in light of subsequent decisions in order to formulate a clear definition of an essential governmental function. Finally, the impact of a clear definition of essentiality on local regulation of commuter rail transportation will be considered.

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at 852; and "an integral portion of those governmental services which the states and their political subdivisions have traditionally afforded their citizens." *Id.* at 855. *See* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1172 n.28 (1977). Professor Michelman suggests two possible meanings for "integral" which can be gleaned from the context of the decision: "functions that cannot be foregone or impaired without impairing other functions," and "those [functions] which exemplify some . . . notion of a core of governmental competency or responsibility." *Id.*

9. *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 423-26 (1978) (Burger, C.J., concurring); United Transp. Union v. Long Island R.R., No. 80-7199 (2d Cir. Sept. 15, 1980), *petition for rehearing filed*, Oct. 14, 1980; Amersbach v. City of Cleveland, 598 F.2d 1033, 1036-37 (6th Cir. 1979); Alewine v. City Council, No. CV 179-113 (S.D. Ga. Oct. 22, 1979) (order denying motion to dismiss). *See* notes 95-108, 109-21, 175-87, and 188-92 *infra* and accompanying text.

10. *See, e.g.*, California v. Taylor, 353 U.S. 553 (1957); United States v. California, 297 U.S. 175 (1936). *See* notes 138-47 *infra* and accompanying text. *See also* note 150 *infra* and accompanying text.

11. *See, e.g.*, Staten Island Rapid Transit Operating Auth. v. International Bhd. of Electrical Workers, 57 A.D.2d 614, 393 N.Y.S.2d 773 (1st Dep't), *appeal denied*, 42 N.Y.2d 804, *cert. denied*, 434 U.S. 934 (1977); United Transp. Union v. Long Island R.R., No. 80-7199 (2d Cir. Sept. 15, 1980); New York City Transit Auth. v. Loos, 2 Misc. 2d 733, 154 N.Y.S.2d 209 (Sup. Ct. 1956), *aff'd*, 3 A.D.2d 740, 161 N.Y.S.2d 564 (2d Dep't 1957). *See* notes 159-87 *infra* and accompanying text.

II. Employee Regulation Prior to *National League of Cities*

A. Early Case Law

In *Lochner v. New York*,[12] the Supreme Court struck down a New York statute which limited the number of hours an employee could work in a bakery.[13] The *Lochner* Court held that, in the employer-employee relationship, the principle of "freedom of contract" ought to prevail over the right of a state to regulate such relationships.[14] In addition, the Court suggested that a centralized federal determination of individual rights should be made, particularly in the area of contract law, in order to protect the individual's constitutional right to freedom of contract.[15]

In *Hammer v. Dagenhart*,[16] the Supreme Court, relying on the principle of freedom of contract espoused in *Lochner*, declared unconstitutional federal legislation[17] which prohibited the shipment in interstate commerce of products of child labor.[18] The Court sanctioned these questionable employment practices for more than twenty years until a unanimous Supreme Court overruled *Dagenhart* in *United States v. Darby*.[19] In *Darby*, the Court upheld the constitutionality of the FLSA as a proper exercise of congressional power under the commerce clause to prevent traffic in interstate commerce of any product of child labor.[20] The Court also

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12. 198 U.S. 45 (1905).

13. *Id.* at 64. The Court's rationale was one of freedom of contract. *Lochner*, however, is predicated on a fear of according the states too much leeway in the exercise of their police power. *See id.* at 56-58.

14. *Id.* at 61.

15. *Id.*

16. 247 U.S. 251 (1918).

17. Act of Sept. 1, 1916, ch. 432, 39 Stat. 675.

18. 247 U.S. at 276-77. The Court relied on several of its earliest decisions, *e.g.*, Gibbons v. Ogden, 9 Wheat. 1 (1824), to justify its interpretation of the commerce power. The *Dagenhart* opinion cited Chief Justice Marshall's definition of the commerce power: "[i]t is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." 247 U.S. at 269 (quoting Gibbons v. Ogden, 9 Wheat. at 196). The Court in *Dagenhart* construed this statement to mean that "the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities." 247 U.S. at 269-70.

19. 312 U.S. 100 (1941).

20. *Id.* at 115. Congress expanded the application of the commerce power by prohibiting the interstate shipment of goods manufactured with child labor. *Id.* at 113. Congress was thus able to impose on the states indirectly those federal wage and hour provisions which it

circumvented its prior reliance in *Lochner* and *Dagenhart* on the principle of freedom of contract, justifying its intrusion into essentially *intrastate* activity by declaring that it was an extension of congressional commerce power to regulate those intrastate activities which strongly affect *interstate* commerce.[21]

B. The Fair Labor Standards Act

In 1938, Congress enacted the Fair Labor Standards Act (FLSA).[22] The FLSA authorized Congress pursuant to its commerce power to implement minimum wage and maximum hour provisions on the state and municipal level, in stark contrast to *Lochner* and *Dagenhart,* which prohibited government regulation of the employer-employee relationship. Following the Supreme Court's decision in *Darby,* Congress expanded the application of the FLSA to include an increased number of employees.[23] In 1974 Congress expanded the definition of employer[24] and professed the right to regulate all employees of a public agency[25] engaged in an

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could not impose directly.

21. *Id.* at 118.

22. Ch. 676, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-19 (1976)).

23. The 1966 amendment permitted the regulation of employees of state hospitals, institutions and schools. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830. The 1974 amendment expanded the scope of the FLSA to encompass employees of a public agency. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified in scattered sections of 29 U.S.C. (1976)). It was the 1974 amendment which led to the suit by the National League of Cities. *See* note 27 *infra* and accompanying text.

24. Pub. L. No. 93-259, sec. 6(2)(1), § 3(d), 88 Stat. 55 (1974) (codified at 29 U.S.C. § 203(d) (1976)). The Fair Labor Standards Act of 1938 had specifically excluded states and political subdivisions from its coverage. " 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State. . . ." Fair Labor Standards Act of 1938, ch. 676, § 3, 52 Stat. 1060. The 1966 amendment expanded the definition of employer to include a state or political subdivision only with regard to employees in a hospital, institution or school. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, sec. 102(b), § 3(d), 80 Stat. 830. The 1974 amendment deleted the language restricting the application of the term employer to states and political subdivisions and revised the definition to include them as employers *except* with regard to hospitals, institutions or schools. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, sec. 6(a)(1), § 3(d), 88 Stat. 55 (codified at 29 U.S.C. § 203(d) (1976)).

25. The 1974 amendment enlarged the definition of "enterprise engaged in commerce or in the production of goods for commerce" to include one which "is an activity of a public agency." Pub. L. No. 93-259, sec. 6(a)(5), § 3(s), 88 Stat. 55 (codified at 29 U.S.C. § 203(s) (1976)). The amendment also inserted a paragraph defining "public agency" as follows: " 'Public agency' means the Government of the United States; the government of a state or

enterprise involving interstate commerce.[26] The thrust of this amendment was to promote by the use of the commerce power, to regulate all employees, except those considered so essential to the independent existence of local government that their regulation required action by the individual state or municipality.

The National League of Cities, individual cities and states, and the National Governors' Conference brought suit in federal court challenging the constitutionality of the 1974 amendment.[27] A three-judge panel, relying on *Maryland v. Wirtz*,[28] dismissed the complaint, although it was "troubled" by what it perceived to be valid arguments by the plaintiffs that the FLSA amendments interfered with the states' ability to deliver essential governmental services.[29] The Supreme Court reversed the lower court and rein-

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political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency." *Id.* sec. 6(a)(6), § 3(x), 88 Stat. 55 (codified at 29 U.S.C. § 203(x) (1976)). A public agency, then, employs essentially all state and municipal employees, whether in the role of a regulator or supervisor, or a participant in the market place.

26. "Enterprise engaged in interstate commerce" was added in 1966 to include "activities performed for a business purpose," Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, sec. 102(a), § 3(r), 80 Stat. 830 (1966), which at that time included activities performed by employees of state or municipal hospitals, institutions and schools. States objected to Congress' assertion of its commerce power in the area of state and municipal employee regulation. The states argued that the regulation of their own employees was beyond the province of the federal government and was instead solely within the legitimate exercise of their own power as sovereigns. *See* National League of Cities v. Usery, 426 U.S. 833, 841-46 (1976).

27. Petitioners in *National League of Cities* brought suit against the Secretary of Labor, seeking declaratory and injunctive relief against application of federal wage and hour provisions to state and local government employees. Petitioners also questioned the overall validity of the 1974 amendment to the FLSA. A three-judge panel in the United States District Court for the District of Columbia dismissed the complaint for failure to state a claim upon which relief might be granted. The Supreme Court noted probable jurisdiction in order to determine the continuing validity of Maryland v. Wirtz, 392 U.S. 183 (1968), which had held that states did not have the power to challenge congressional invocation of the commerce power. *See* 426 U.S. at 839-40. The Supreme Court, reversing the lower court, held that Congress in attempting "to regulate directly the activities of States as public employers, [had] transgresse[d] an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution." 426 U.S. at 841.

28. 392 U.S. 183 (1968).

29. 426 U.S. at 839. The district court held that it considered the plaintiffs' contentions to be

> substantial and it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of [MARYLAND v. WIRTZ]; but that is a deci-

stated the complaint. The Court stated that the plaintiffs had articulated a legitimate claim when they alleged that congressional interference with certain state and local employment conditions infringed upon a local government's constitutional right to be free from federal violation of intergovernmental immunity.[30]

The Supreme Court in *National League of Cities* relied on *Darby* to permit some degree of federal control of employee regulation and on *Lochner* to limit the extent of that regulation.[31] While *National League of Cities* arguably protects the rights of the state as sovereign, rather than the rights of the employee as an individual citizen,[32] these sovereign rights are confined to the supervision of employees involved in a function essential to the independent existence of local government. In all other instances of employee regulation, *National League of Cities* reinforces the notion of centralized government regulation, that is, the ability of the federal government to prohibit local government action, enunciated in *Lochner* and *Dagenhart*.[33] The Supreme Court in both *Lochner*

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sion that only the Supreme Court can make, and as a Federal district court we feel obliged to apply the *Wirtz* opinion as it stands.

National League of Cities v. Brennan, 406 F. Supp. 826, 828 (D.D.C. 1974).

30. 426 U.S. at 836.

31. *See* 426 U.S. 833. *National League of Cities* adheres to the reasoning of *Lochner* by prohibiting states from regulating the wages and hours of their employees. But in areas of "traditional government functions," *National League of Cities* prohibits the federal government from acting to exercise any commerce power (in direct contrast to *Lochner*). It then becomes the state's prerogative to regulate these functions.

32. 426 U.S. at 845. The Court stated:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

Id. See generally Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

33. First, *National League of Cities* limited a state's ability to impose minimum wage and maximum hour provisions. (*Lochner* had prohibited maximum hour regulations altogether.) Second, as *National League of Cities* barred states from regulating employees performing proprietary as opposed to essential functions the responsibility for regulating these proprietary employees was left to a third party, the federal government. (Similarly, in *Lochner*, the federal government determined that all employee regulation was the responsibility

and *Dagenhart* upheld the right of the federal government to oversee employee regulation. While *National League of Cities* and *Darby* differ in result, both decisions exhibit similar reasoning. Both uphold the right of Congress in certain instances to exercise its commerce power to enforce federal minimum wage and maximum hour provisions.[34]

III. Formulating a Clear "Essential Governmental Function" Test

The Supreme Court in *National League of Cities* turned to the general definition of an essential governmental function suggested in *New York v. United States*[35] to determine whether federal or state governments ought to regulate local government employees.[36] However, rather than delineating a working definition of an essential governmental function, the *National League of Cities* Court merely stated several examples of activities considered to be essential.[37] The Supreme Court's equivocal analysis of essentiality in *National League of Cities* has left the ultimate determination of the meaning of essentiality to confused lower courts and puzzled

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of another third party, the individual employer, under a theory of freedom of contract.) The main difference between *National League of Cities* and *Lochner* is that in *Lochner* the state sought to implement maximum hour legislation and was prevented from doing so, whereas in *National League of Cities* the states wanted to exempt local governments from federal minimum wage and maximum hour regulations and were successful as to essential government employees.

34. In *Darby*, the FLSA was enforced against all employers, public and private, who by the use of child labor affected interstate commerce, *see* notes 15-16 *supra* and accompanying text, whereas in *National League of Cities* the FLSA was enforced on behalf of all public employees *not* performing an essential governmental function. Those employees performing essential governmental functions were exempt from coverage. 426 U.S. at 851-52.

35. 326 U.S. 572, 574, 582-84 (1946).

36. 426 U.S. at 843-52.

37. *Id.* at 851. The Court mentions "such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* However, the Court retreats from an absolute determination of essentiality by saying that "[t]hese examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Id.* at 851 n.16. Rather, the Court continued

> [t]hese activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens . . . [and which are essential to their] separate and independent existence.

Id. at 851 (footnote omitted).

commentators.[38]

A. The Origin of the Essentiality Standard

In *New York v. United States*,[39] the State of New York articulated the phrase "essential" or "traditional" governmental function to support its argument of immunity from a federal tax statute.[40] New York, relying on the principle of sovereign immunity,[41] argued that the statute, which taxed a state owned and operated water bottling process,[42] interfered with the "exercise of a usual, traditional and essential governmental function."[43] The Supreme Court, in upholding the federal tax statute,[44] acknowledged the growing dissatisfaction with the principle of sovereign immunity and rejected the notion that a state was totally immune from federal regulation. The Court noted that a line must be drawn "between taxa-

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38. *See, e.g.*, United Transp. Union v. Long Island R.R., No. 80-7199 (2d Cir. Sept. 15, 1980); Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979); and Alewine v. City Council, No. CV 179-113 (S.D. Ga. Oct. 22, 1979) (order denying motion to dismiss). *See also* Michelman, *supra* note 8; Tribe, *supra* note 32.

39. 326 U.S. 572 (1946).

40. *Id.* at 574.

41. *Id.* at 576. The Court noted that the federal constitutional system gave rise to a policy of intergovernmental immunity almost from the beginning.

> [T]he fear that one government may cripple or obstruct the operations of the other early led to the assumption that there was reciprocal immunity of the instrumentalities of each from taxation by the other. It was assumed that there was an equivalence in the implication of taxation by a State of the governmental activities of the National Government and the taxation by the National Government of State instrumentalities. This assumed equivalence was nourished by the phrase of Chief Justice Marshall that 'the power to tax involves the power to destroy.' . . . The phrase was seized upon as the basis of a broad doctrine of intergovernmental immunity. . . .

Id.

42. The Court thought that the distinction between "proprietary" and "governmental" should not provide the basis for limiting congressional taxing power. *Id.* at 583. Rather, the Court suggested that state immunity from federal taxation be based on a finding that the state was performing an activity on which "a tax [was] . . . exacted equally from private persons upon the same subject matter." *Id.* at 583-84. In reaching this conclusion, the Court in *New York v. United States* achieved a result similar to that in prior cases which addressed the question of state immunity from tax liability. *See* Helvering v. Powers, 293 U.S. 214 (1934) (federal government has the right to impose income tax on a Boston street railway as a business enterprise of the state); Ohio v. Helvering, 292 U.S. 360 (1934) (state is not immune from federal tax on the sale of alcohol, a business enterprise). South Carolina v. United States, 199 U.S. 437 (1905) (state is required to pay federal tax on proceeds from sale of alcohol, a business enterprise).

43. 326 U.S. at 574.

44. *Id.* at 575.

tion of the historically recognized governmental functions of a State, and business engaged in by a State of a kind which theretofore had been pursued by private enterprise. . . . [T]here is a constitutional line between the State as government and the State as trader."[45]

There are problems inherent in any attempt to draw such a distinction.[46] Justice Frankfurter, dissenting in *New York v. United States,* called distinctions between "proprietary" functions (business normally conducted by private enterprise) and "governmental" functions (a service usually provided by government) "untenable criteria"[47] for making a decision on employee regulation. Subsequent decisions in the area of sovereign immunity have wrestled with the theory of consent to suit,[48] or waiver of immunity.[49] In *Parden v. Terminal Railway,*[50] the Supreme Court held that the State of Alabama, which had assumed the operation of an interstate railroad, had "consented" to suits by its railroad employees under the Federal Employers' Liability Act.[51] Although federal regulation under a theory of implied consent differs from federal regulation pursuant to the commerce clause, courts relying

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45. *Id.* at 579. *See also* Parden v. Terminal Ry., 377 U.S. 184, 191-93 (1964), where the Supreme Court, applying the proprietary-governmental distinction, held that the state had consented to suit by engaging in interstate commerce and so therefore was not permitted to assert sovereign immunity.

46. 326 U.S. at 580. The Court, however, was not able to determine an effective method for making that distinction. The Court confined its observations on essential governmental functions to the following: "[t]o rest the federal taxing power on what is 'normally' conducted by private enterprise in contradiction to the 'usual' governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion." *Id.*

47. *Id.* at 583.

48. *See, e.g.,* Nevada v. Hall, 440 U.S. 410, 414-18 (1979); Alabama v. Pugh, 438 U.S. 781, 782 (1978); Parden v. Terminal Ry., 377 U.S. 184 (1964); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); Public Serv. Co. v. Federal Energy Regulatory Comm'n, 587 F.2d 716 (5th Cir.), *cert. denied,* 100 S.Ct. 166 (1979); Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973) (alternative holding). *See also* note 127, *infra* and accompanying text.

49. *See, e.g.,* Quern v. Jordon, 440 U.S. 332, 341-45 (1979); Hutto v. Finney, 437 U.S. 678, 698-700 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Edelman v. Jordan, 415 U.S. 651, 674 (1974); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Flota Maritima Browning v. Motor Vessel Cuidad de la Habana, 335 F.2d 619 (4th Cir. 1964); Markham v. Newport News, 292 F.2d 711 (4th Cir. 1961).

50. 377 U.S. 184 (1964).

51. Federal Employers Liability Act, ch. 149, 35 Stat. 65 (codified at 45 U.S.C. §§ 51-60 (1976)).

on either of these theories have reached similar results. However, in *Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare*,[52] the Supreme Court, relying on the commerce clause theory expressed in *Maryland v. Wirtz*[53] and refusing to apply the consent theory enunciated in *Parden*, permitted citizen employees of the state of Missouri to sue their employer for overtime compensation under the FLSA.[54]

In *Wirtz*, the Supreme Court upheld the application of the FLSA to state-run schools and hospitals.[55] The Court rejected the contention that states are not immune from all federal regulation merely because of their status as sovereigns.[56] The Court reiterated that Congress, pursuant to the commerce clause, could "override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."[57]

The Supreme Court in *Fry v. United States*,[58] relying on *Wirtz*, approved the imposition of federal wage controls on state employees.[59] In rejecting a suit brought by state employees challenging the controls the Court reasoned, first, that general economic stabilization would require the efforts of all employees, regardless of their employer or their function.[60] Second, as Congress "in financing the [Economic Stabilization] Act, . . . specifically rejected an amendment that would have exempted employees of state and local governments,"[61] it thereby expressed a clear intent to include all employees within the group to be regulated. The Supreme Court stated that Congress, pursuant to the commerce clause could regulate activity in any area in which the activity in question might affect interstate commerce,[62] regardless of the function

52. 411 U.S. 279 (1973).
53. 392 U.S. 183 (1968).
54. 411 U.S. at 200.
55. 392 U.S. at 193-95.
56. *Id.* at 193-96.
57. *Id.* at 195.
58. 421 U.S. 542 (1975).
59. *Id.* at 548.
60. *Id.* at 546.
61. *Id.*
62. *Id.* at 547. "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." *Id.* The Supreme Court upheld the same congressional action under the supremacy clause to displace a state law with a

performed.

By permitting the application of these controls to all state and municipal employees, the *Fry* Court ignored the "essential governmental function" language of *New York v. United States*. In *National League of Cities* the Supreme Court resurrected the "essential governmental function" and overruled *Maryland v. Wirtz*.[63]

B. *National League of Cities'* Interpretation of Essentiality: Emerging Theories of State Sovereignty

The Supreme Court in *National League of Cities* understood the determination of essentiality to be a two-tiered analysis.[64] The first step required a determination as to which powers were conferred upon the states by virtue of their sovereign status, that is, their power to act independently.[65] The second step required a determination as to when this sovereign status might be invoked.[66] One commentator has noted that the Supreme Court in *National*

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federal law. *Id.* at 548.

63. 426 U.S. at 855. The Court agreed with the conclusion reached by Justice Douglas dissenting in *Wirtz* that unchecked assertions of federal power would allow "the National Government [to] devour the essentials of state sovereignty. . . ." 392 U.S. at 205.

> While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and political subdivisions have traditionally afforded their citizens. We are therefore persuaded that *Wirtz* must be overruled.

426 U.S. at 855.

64. *See* 426 U.S. at 845, where the Court suggested, first, that there were certain "attributes of sovereignty attaching to every state government which may not be impaired by Congress. . . ." 426 U.S. at 845. The *National League of Cities* Court however, did no more than cite one prior example of such an attribute (that is, the location and financing of a state capital by a state) discussed in Coyle v. Oklahoma, 221 U.S. 559, 565 (1911). *Id.* The Court did not offer a specific test for determining "attributes of sovereignty." Second, once a decision had been made as to the sovereignty of a state, then an additional determination had to be made as to the ability of the state to invoke its sovereignty in a particular situation. *See* 426 U.S. at 845.

65. 426 U.S. at 845. The Court concluded that a state's power to regulate its own employees was a sovereign power.

> One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.

Id.

66. *Id.* "The question we must resolve here, then, is whether these determinations [that is, as to state employee wages and hours] are 'functions essential to separate and independent existence,' " *id.* (quoting Lane County v. Oregon, 7 Wall. 71, 76 (1869)).

League of Cities "was unclear as to the source of the state sovereignty limitation on congressional power under the commerce clause."[67] He further argued that the Court in *National League of Cities* apparently relied on the tenth amendment and on a "national mood [which is] increasingly . . . one of disenchantment with centralized power and a desire for local autonomy."[68]

While no clear reasoning as to the essentiality of certain types of employment has been advanced to justify the Supreme Court's decision in *National League of Cities,* four theories of state sovereignty emerge. The first theory advanced by Professor Laurence Tribe suggests that *National League of Cities* established a new spectrum of state and municipal rights.[69] The second contends that the Supreme Court singled out existing state rights for added protection.[70] The third proposes that the state, as opposed to the federal government, should act as the guardian of the rights of its individual citizens.[71] Finally, the fourth theory, advanced by Professor Frank Michelman, sees the state's choice to allocate certain functions to the private sector (by electing not to perform them itself) as "no less significant or purposive than its choice to create governmental responsibilities."[72] Such an interpretation of *National League of Cities* necessarily adopts a "welfare-oriented, functional view of the *government* as service provider."[73]

The first theory espoused by Professor Tribe points out that while *National League of Cities* "may be taken to have established new 'rights' of states as against the national government. . . . Such an interpretation . . . cannot be squared with the distinc-

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67. *See* Tribe, *supra* note 32, at 1067 n.17.

68. *Id.* at 1068-69.

69. *Id.* at 1072-74.

70. *Id.* at 1074.

71. *Id.* at 1074-75.

72. Michelman, *supra* note 8, at 1169. Professor Michelman observed that it is difficult to maintain the distinction between government and private activity because "[n]either type of choice seems any more a matter of a state's . . . 'integrity.' . . . [T]here seems no *a priori* ground for treating either of the reciprocally defining possibilities as primary." *Id.* According to the service-provider theory, the government is but one of many agents (public and private) manipulated by the state for purposes of structuring society. *Id.* at 1168. Because the government under this theory plays a role like that of any private party, Michelman is "at a loss to explain why a *state's* immunity to congressional regulation should encompasss only its governmental organs." *Id.*

73. *Id.*

tions drawn by the Court in the process of reaching its conclusion."[74] Professor Tribe argues that the Court employed a dual standard to determine what constituted a permissible intrusion into a state's proprietary, as opposed to its governmental, functions. Yet the Court in *National League of Cities* suggests that its main concern is with a state's ability to decide how to allocate its limited financial resources, in which case any intrusion by the federal government, whether into a proprietary or a governmental area, would be significant.[75]

A second theory proposed by Professor Tribe sees *National League of Cities* as "an attempt [by the Court] to isolate those functions most essential to the continued significance of states as separate governmental entities and then to provide enhanced protection in those areas."[76] But the Court only seems willing to permit the state to regulate its employees when it functions as an employer providing a service, and not when it functions as a legislative or regulatory body.[77] Under this second theory, however, the Court does not address the fact that this restriction interfered with the lawmaking ability of a state, one of its most fundamental rights and responsibilities.[78] The Court in *National League of Cities* concluded that federal regulation of state employees would impair an individual state's ability to structure employer-employee relationships in areas where the government both administers and furnishes a public service traditionally afforded citizens by government.[79] This language suggests that essentiality be defined not in terms of preserving sovereignty *per se*, as under the first theory,

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74. Tribe, *supra* note 32, at 1072.

75. Professor Tribe suggests that any attempt to distinguish proprietary from governmental at this point would not prove helpful. "[I]f the 'right' being protected in *National League of Cities* is a state's claim to fiscal autonomy, it is difficult to see why interference with a state's proprietary functions would be any less intrusive or destructive of the 'right' than would interference with the 'traditional governmental functions' held sacrosanct in the opinion." *Id.* at 1072-74.

76. *Id.* at 1074.

77. "[I]t is difficult to justify the Court's willingness to protect the state in its role as an employer and provider of services and not in its role as a law-maker and regulator of private conduct." *Id.*

78. It is also difficult to justify the Court's unwillingness to respond to the criticism that its decision interferes with decentralized decision-making by obstructing the state's regulatory functions. *See id.* at 1075.

79. 426 U.S. at 851. *See also* note 36 *supra* and accompanying text.

but rather in terms of preserving a state's ability to function as an independent governmental entity. The ability to regulate its employees enables an employer state to provide services for which it is responsible to its citizens. Thus the ability of a state to regulate its employees is at the core of its existence as an independent entity.[80]

Professor Tribe's third theory of essentiality is one which recognizes the power of a state to regulate employees so as to safeguard their rights as individual citizens.[81] Whether this theory stems from the second theory, that is, that the independent existence of a state depends on the ability to regulate its own employees so as to provide its citizens with certain services, or whether it simply sees the protection of an individual citizen's rights as paramount, is not crucial. What *is* crucial, however, is that when this third theory is examined closely, the inference can be drawn that because local governments have provided certain services over a period of time, the receipt of these services, while initially a privilege, has given rise to the existence of protected expectations in the form of rights to such services.[82] Thus, the delivery of such a service, which was once a proprietary function, becomes an essential governmental function, and is therefore no longer subject to federal regulation.[83]

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80. Tribe, *supra* note 32, at 1076.

81. *Id.* at 1075-76. As Professor Tribe observes, "introducing consideration of the claims of *individuals* against government . . . provides an alternative . . . basis for invalidating legislation otherwise concededly within congress' commerce powers." *Id.* at 1075. The Court in *National League of Cities* examined in detail many government-operated programs, such as affirmative action police recruiting and general police and fire protection budgets in cities across the country and observed that, should the municipalities be required to conform their wage provision to the federal regulations, they would be forced to shut down many of these services or programs because of higher wages. 426 U.S. at 846-48. Such action would operate as a penalty to those individual citizens who depend on their local governments to provide such services. Tribe, *supra* note 32, at 1079-80.

82. Once citizens come to depend on the government for the provision of such services, then, it is possible that rights to those services do attach, and in this instance, those rights would perhaps be endangered. "[This federal] legislation . . . is constitutionally problematic . . . because it hinders and may even foreclose attempts by states or localities to meet their citizens' legitimate expectations of basic government services." Tribe, *supra* note 32, at 1076.

83. The gradual assumption by local governments of responsibility for the provision of certain services which formerly were provided by the federal government to the states creates a new federal duty not to interfere with the delivery of these services: "[w]hile the individual right is against the [federal] government, when the federal government leaves to

The fourth theory of state sovereignty suggests that the states have elected to delegate the performance of certain functions to the private sector and to shoulder the obligation to provide the remaining, theoretically more essential, services themselves.[84] The controversy over whether states ought to be regulated in the provision of these services, and if so, to what extent, stems from an attempt to isolate from federal regulation those governmental services or functions which are deemed essential. Two problems emerge from the service-provider theory of the government espoused by Professor Michelman. First, it is difficult to define and set apart essential functions.[85] Second, it is equally difficult to implement a policy which is able to apportion responsibility for those functions without impinging on a state's ability to distribute that responsibility between the public and private sectors.[86]

Professor Michelman observes that reliance on the service-provider theory to determine whether a particular governmental function is essential has met with differing results.[87] One interpretation sees an essential service as a "public good" more satisfactorily provided by the public than the private sector.[88] A second interpretation views an essential function as one which social justice demands be freely available.[89] Still another interpretation suggests that in a legitimate political struggle to protect the community's interests, the service in question, in order to be deemed essential, must enjoy sufficient local support in order to prevail.[90] None of these interpretations has commanded a consensus. A closer examination reveals the flaws in each perspective.

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states and localities the fulfillment of the government duty, it cannot act so as to undermine the ability of states and their subdivisions to perform that duty." *Id.* at 1090.

84. *See* Michelman, *supra* note 8, at 1173-75.

85. Professor Michelman discusses general "puzzles" which arise in the attempt to formulate a definition of essentiality. *Id.* at 1175-78.

86. *Id.* at 1180.

87. *Id.* at 1177. According to Michelman one must presuppose that the service was being funded out of general local tax revenues, and not that the service was "unique" or of "intrinsic importance." "Essentiality" would then be inferred simply by observing the needs of the electorate. *Id.*

88. *Id.* "[C]ollective provision . . . tends towards better satisfaction of private preferences than the private market could achieve. . . ." *Id.*

89. The free availability of the service would operate to satisfy a concept of social justice which appeals to the electorate. *Id.*

90. *Id.*

First, necessary services in such diverse areas as education, garbage collection, insurance and entertainment are provided by a combination of government and private sector activity.[91] Such an overlap suggests that essentiality cannot be defined solely in terms of public funding. Second, a small group of services are protected because they are traditionally provided for citizens by their governments.[92] Yet, how essential can a particular service be if citizens insist that the activity be subsidized in the form of exemption from minimum wage regulations?[93] Third, the determination that a particular service is essential is one which is being made by the courts (thus necessarily rejecting either Congress' or the local sovereign's assessment as to whether the function is essentially federal or local in character). Such a determination, that is, which legislative body is better qualified to regulate the delivery of a certain service by the local government, constitutes unwarranted judicial intervention into local decisionmaking.[94]

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91. *Id.* at 1175. This raises a question as to whether Congress is acting responsibly when it imposes regulations on the private sector service-provider and not on the government service-provider. *Id.*

92. *Id.* at 1179.

93. The irony of the situation is clear. Under these terms, people are willing to pay more for a service that is not considered essential than for one that is considered essential.

> Goods or services that cannot be provided and sold to a willing electorate at a tax price that covers those costs are, then, apparently less "essential" than whatever it is the people prefer to purchase instead. It hardly seems apt to call "essential" a group of governmental services that the electorate will buy only insofar as those services receive a (relative) subsidy in the form of exemption from an otherwise universal minimum wage.

Id. at 1175. It is apparent, then, that some other, more workable definition of essentiality is necessary.

94. *Id.* at 1176. Courts attempting to determine what is best for the welfare of a state or political subdivision may be involving themselves in "political questions." *See* Powell v. McCormack, 395 U.S. 486 (1969); Baker v. Carr, 369 U.S. 186 (1962). Courts are ill-equipped to make such a determination, particularly in the face of a struggle between proponents of local sovereignty and adherents of congressional policy as to what constitutes an essential service.

> The Court's official position has been that valuation of conflicting welfare concerns is not a proper judicial function. The conceded "social importance" of an interest or need provides, according to the established view, no basis for a court's demanding special government solicitude for that interest or need. Only *constitutional* recognition of an interest as a "right" can provide such a basis, but none of the social services that ostensibly stirred the Court's concern in the [*National League of Cities*] case can claim such recognition.

Id.

C. The Essential Governmental Function After *National League of Cities*: An Attempt at Clarification

In *City of Lafayette v. Louisiana Power & Light Co.*,[95] the Supreme Court narrowed the significance of the term "essential governmental function." The Court confronted with an antitrust suit brought by the City of Lafayette and several other cities owning electric utility systems against an investor-owned electric utility, held that when Congress enacted the Sherman Act[96] it did not intend to exempt municipalities from antitrust liability.[97]

The Court in reaching this decision devoted a significant part of its discussion to the permissible levels of monopoly activity on the state and local government level.[98] The Court analyzed, among other things, whether cities were altogether exempt from regulation as agents of the state;[99] whether they ought to be subject to the same sanctions as individual "persons";[100] and whether the Sherman Act was intended to reach a party allegedly providing a public service and not merely abusing a private power.[101] Chief Justice Burger, concurring in *Lafayette*, was convinced, however, that the issue was simply "whether the Sherman Act reache[d] the proprietary enterprises of municipalities."[102] Turning to the Court's prior analysis of the proprietary/governmental distinction,[103] the Chief Justice stated that the Supreme Court in

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95. 435 U.S. 389 (1978).

96. Sherman Act, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7 (1976)).

97. 435 U.S. at 408. *See* Parker v. Brown, 317 U.S. 341 (1943); City of Mishawaka v. American Elec. Power Co., 616 F.2d 976, 985 (7th Cir. 1980); Glenwillow Landfill Inc. v. City of Akron, 485 F. Supp. 671, 677 (N.D. Ohio 1979).

98. 435 U.S. at 397-417.

99. Id. at 398-400. *See* California Retail Liquor Dealers Assoc. v. Midcal Aluminum Inc., 445 U.S. 97 (1980) (antitrust immunity can be claimed for governmental action only when the action is taken pursuant to a clearly articulated and affirmatively expressed policy, actively supervised by the state); Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18, 20 (2d Cir. 1980); Community Communications v. City of Boulder, 485 F. Supp. 1035 (D. Colo. 1980).

100. 435 U.S. at 400-02. *See also* Quern v. Jordan, 440 U.S. 332, 356 (1979) (Brennan, J., concurring). See generally *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 204-10 (1980).

101. 435 U.S. at 403-08.

102. *Id.* at 422. (Burger, C.J., concurring).

103. *Id.* at 422 nn.3 & 4. The Chief Justice uses the term "proprietary" to describe those activities in which the government participates as a competitor, *id.* at 422 n.3, and, with an eye to prior decisons, observes that "[states'] business activities are not entitled to *per se*

National League of Cities reached the same conclusion as did the Court in *Lafayette* as to the recognized distinction between the state as sovereign and the state as entrepreneur.[104] According to the Chief Justice "the threshold inquiry . . . is whether the activity is *required* by the State acting as sovereign."[105] If it is, then the activity ought to be left to the individual city or state to regulate.[106] If it is not, then the activity ought to be subject to the same regulation as action by private sector employers in the same field.[107] The Chief Justice concluded that "the running of a business enterprise is not an integral operation in the area of traditional government functions."[108]

D. The Criteria for Essentiality: The *Amersbach* Test

In *Amersbach v. City of Cleveland*,[109] the Sixth Circuit articulated a clear definition of an essential governmental function.[110] The court in *Amersbach* held that the operation of a municipal airport was an integral function of the city government and therefore its employees were not governed by the wage and hour provisions of the FLSA.[111] After "analyzing the services and activities which the [*National League of Cities*] Court characterized as typi-

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exemption from [federal regulation]." *Id.* at 422 n.4. *See also* notes 39-47 *supra* and accompanying text.

104. 435 U.S. at 423. "The *National League of Cities* opinion focused its delineation of the 'attributes of sovereignty' . . . on a determination as to whether the State's interest involved functions essential to separate and independent existence." *Id.* In other words, if a state performed a function which proved essential to its independent existence, that function would be a factor in determining a state's sovereignty in that particular area.

105. *Id.* at 425 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975)).

106. The Chief Justice "would have [cities and states] demonstrate that the exemption . . . was essential to [their] plan." 435 U.S. at 425, n.6. But in this instance "there seems no *a priori* ground for treating either of the reciprocally defining possibilities as primary." Michelman, *supra* note 8, at 1169.

107. Other cases in the antitrust area also uphold this dual standard. *See, e.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579, 596 (1976) ("There is no logical inconsistency between requiring such a firm [*i.e.*, a state or municipality] to meet regulatory criteria insofar as it is exercising its natural monopoly and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy."). *See also* Otter Tail Power Co. v. United States, 410 U.S. 366, 389 (1973); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963); Public Systems v. Federal Energy Reg. Comm'n, 606 F.2d 973, 982 (D.C. Cir. 1979).

108. 435 U.S. at 424.

109. 598 F.2d 1033 (6th Cir. 1979).

110. *See* notes 112-114 *infra* and accompanying text.

111. 598 F.2d at 1037.

cal of those performed by governments" the Sixth Circuit noted "certain elements common to each which serve to clarify and define a method by which a protected government functon may be identified."[112] The court then identified four factors to be considered in determining whether or not a particular government function is essential.[113] These factors include: "(1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a community-wide need for the service or activity."[114]

After the Sixth Circuit established what constitutes an "essential governmental function," it then turned to the question of whether Cleveland's municipal airport performed such a function.[115] The *Amerbach* court, after observing that the city government played a vital role in the operation of the airport, concluded that, based on the enumerated criteria, the city was indeed performing an essential governmental function by operating the airport.[116]

First, the maintenance of the airport benefited the community as a whole and its services, while not free, were substantially subsidized by the city.[117] Second, Cleveland, in maintaining the airport is not interested in making a profit, but rather is concerned with providing a service to commuters.[118] Third, as nearly all of the country's airports are municipal, the government clearly is the principal provider of this service.[119] And fourth, the government is

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112. *Id.*

113. *Id.*

114. *Id. See* UTU v. LIRR, slip op. at 5612 (fourth criterion held applicable to commuter rail service).

115. *Id.* at 1037-38.

116. *Id.* at 1037. "[W]e conclude that operation of the Cleveland Hopkins International Airport is an integral governmental function within the meaning of *National League of Cities*. In operating the airport, the City is providing terminal facilities for commercial air carriers and related services vital to an effective air transportation system. . . . [furthermore] airports are indispensable in a nation where airplanes are relied upon as a principal mode of passenger transporation." *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1038. The court observed that all but two of the 475 commercial airports in

best suited to deliver this service because of the general community need for an airport.[120] The Sixth Circuit concluded that it would be difficult to believe that "the maintenance of a municipal airport is not an integral function of government."[121]

Both the Sixth Circuit in *Amersbach* and Chief Justice Burger, concurring in *Lafayette*, have tried to clearly define what constitutes an essential governmental function in light of *National League of Cities*.[122] In order to determine whether local commuter railroads are considered to be performing an essential governmental function, legislative intent and case law must be examined.

IV. The Essential Governmental Function Test as Applied to Railroads

A. Federal Legislation in the Area of Transportation

1. The Urban Mass Transportation Act

In 1964, Congress enacted the Urban Mass Transportation Act[123] (UMTA). The UMTA was adopted as a response on the part of Congress to the realization that increased national urbanization required better mass transportation systems.[124] The congressional declaration of findings and purpose[125] indicate Congress' belief "that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally-aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services."[126] Accordingly, Congress intended "to assist in the development of improved mass transportation facilities . . . with the cooperation of mass transportation companies both public and private,"[127] and

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the United States and its territories were publicly owned and operated. *Id.* at 1038 n.7.

120. *Id.*

121. *Id.* at 1038.

122. *See also* United States v. Best, 573 F.2d 1095, 1102 (9th Cir. 1978) (the suspension of an individual's California driver's license by the federal government exceeded the scope of federal authority, and was unduly intrusive on a state's ability to regulate its highways).

123. Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302 (codified at 49 U.S.C. §§ 1601-1614 (1976)).

124. *Id.* §§ 1601-1601b.

125. *Id.*

126. *Id.* § 1601(a)(2).

127. *Id.* § 1601(b)(1). This would include a state or municipality as an employer engaged

"to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs."[128]

In each of the amendments to the UMTA, the language is increasingly emphatic in its recognition of the essential nature of transportation, to the point of promoting regulation by local governments,[129] a fact which is by no means inconsistent with prior railroad legislation.[130]

2. The Railway Labor Act

Congress enacted the Railway Labor Act (RLA)[131] first, to establish a procedure for resolving national labor disputes involving railroad workers[132] and second, to remove the operation of railroads from the hands of the government and place them into the hands of private ownership.[133] The legislative history of the RLA, as well as the Act itself, implies that there is a distinction to be drawn

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in the business of public transportation.

128. *Id.* § 1601(b)(3). The choice of language in the amendments is particularly interesting. The original UMTA points out that "[f]ederal financial assistance [for mass transportation] . . . is essential to the solution of these urban problems." *Id.* § 1601(a)(3).

129. *Id.* § 1601(a). ("[I]t is imperative, if efficient, safe and convenient transportation compatible with soundly planned urban areas is to be achieved, to continue and expand the provisions of this chapter. . . .") *Id.* By 1974, when the second amendment was adopted, the congressional findings expressed the sentiment that "transportation is the lifeblood of an urbanized society," *id.* § 1601b(2); and that "the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service." *Id.* § 1601b(7). Finally, in 1977, Congress passed an amendment providing for annual reimbursement of states and municipalities "for the cost of financially supporting or operating rail passenger service." *Id.* § 1614(a).

It is important to note that although the federal government has authorized increased expenditures for mass transportation, "[t]his fact does not affect the state immunity determination . . . [because] schools, hospitals and law enforcement all receive federal aid, but are considered integral state governmental functions." *UTU v. LIRR*, slip op. at 5615 n.26.

130. Railway Labor Act, Pub. L. No. 69-257, 44 Stat. 577 (codified at 45 U.S.C. §§ 151-188 (1976)).

131. *Id.*

132. *Id.* §§ 152-160, which provide for mediation and arbitration procedures.

133. Staff of Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 93rd Cong., 2d Sess., Legislative History of The Railway Labor Act, as Amended (1926 through 1966) 390 (Comm. Print 1974). In fact, the legislative intent is clear from congressional discussion: "This bill turns us away from Government ownership. It takes the Government almost entirely out of the question of operating the railroads and settling disputes arising in their operation." *Id.*

between freight and passenger railroads. The RLA refers to carriers of interstate commerce,[134] as opposed to local commuter railroads, suggesting that the RLA pertains solely to interstate freight service. The legislative history of the RLA also focuses on the interstate freight nature of American railroads. At one point, the legislative history even highlights the United States' annual total freight delivery in contrast to freight deliveries in other countries.[135] However, the legislative history of the RLA does not reflect an express congressional desire to impose restrictions on local commuter rail service. The absence of a legislative statement should not, however, be interpreted as signifying a congressional presumption in favor of federal regulation of essentially intrastate, local commuter rail transportation. In all likelihood, Congress did not envision such a service in 1926.

The RLA seems more suited to the regulation of national railroads, whereas the apparent focus of the UMTA on mass commuter rail transportation suggests that this type of transportation, once funded by the UMTA, is particularly suited to local government regulation. While the RLA deals with privately-owned and operated national freight railroads, the UMTA is concerned with municipally-owned and operated local commuter rail transportation. The applicability of either the RLA or the UMTA to a particular railroad controversy does not preclude the validity of the other Act in a different situation. The two acts simply apply to different factual situations and therefore one ought not to be seen as encompassing or displacing the other.

B. The Essentiality of State-Provided Railroad Service: The Initial Perspective

Since its enactment, the Supreme Court has reviewed the application of the RLA to several state-owned and operated railroads.

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134. 45 U.S.C. § 151 (1976).

135. Staff of Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 93rd Cong., 2d Sess., Legislative History of The Railway Labor Act, as Amended (1926 through 1966) 391 (Comm. Print 1974). "The United States Department of Commerce shows that our railroads move more than [400 billion] tons of freight 1 mile each year. To do this they employ a ratio of 5 men for each [1 million] tons of freight 1 mile. The ratio is 23 in Germany, 24 in Italy, and 31 in Switzerland." *Id.* The legislative history suggests that when the RLA refers to railroads and railroad workers, it refers exclusively to freight service on a national scale.

The decisions in this area[136] reflect the belief that, because the RLA provided for federal intervention in labor disputes involving railroad employees,[137] such intervention in disputes involving state-owned and operated railroads was appropriate first, because railroads were invariably associated with interstate commerce and second, because the state was acting in a business capacity.

The Supreme Court in *United States v. California*[138] held that the State Belt Railroad,[139] although owned and operated by the State of California, was a common carrier engaged in interstate commerce, and as such, was subject to federal regulation.[140] The Court stated that through congressional invocation of the commerce clause "[t]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."[141] The Supreme Court's determination that state-provided transport (specifically railroads) was not considered an essential governmental function stood unchallenged for more than twenty years.

The Supreme Court in *California v. Taylor*[142] held that Congress had authority under the commerce clause to regulate the employ-

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136. California v. Taylor, 353 U.S. 553 (1957); United States v. California, 297 U.S. 175 (1936); Reeves, Inc. v. Kelly, 603 F.2d 736, 738 n.2 (8th Cir. 1979); Staten Island Rapid Transit Operating Auth. v. International Bhd. of Electrical Workers, 57 A.D.2d 614, 393 N.Y.S.2d 773 (1st Dep't), *appeal denied*, 42 N.Y.2d 804, *cert. denied*, 434 U.S. 934 (1977).

137. 45 U.S.C. §§ 157-158 (1976).

138. 297 U.S. 175 (1936).

139. The State Belt Railroad was a terminal railroad shipping interstate freight along the San Francisco waterfront to and from connecting carriers which transported the goods in interstate commerce. *Id.* at 182.

140. This federal regulation consisted of congressional exercise of the commerce power, in the form of the Safety Appliance Act, Act of March 2, 1893, ch. 196, 27 Stat. 531 (codified at 45 U.S.C. §§ 1-46 (1976)), which permitted the federal government to override the State's power to regulate its own enterprises regardless of whether the state operated in its "sovereign" or "private" capacity. 297 U.S. at 183.

The Supreme Court, in Helvering v. Powers, 293 U.S. 214 (1934), held that the trustees of a state-owned street railway were not exempt from the payment of income taxes simply because they managed a governmental enterprise. The Supreme Court pointed out that by the operation of a street railway "the State . . . is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State." *Id.* at 227. However, the Court did not define an "essential" governmental function. *See also* notes 39-47, 103 *supra* and accompanying text.

141. 297 U.S. at 184.

142. 353 U.S. 553 (1957).

ees of the State Belt Railroad.[143] The Court reasoned that even though the railroad was owned and operated by the State of California, it was considered a common carrier engaged in interstate commerce.[144] The Court in *Taylor* disregarded the argument made in *United States v. California* that because the RLA was not expressly applicable to the states, the states as sovereigns were exempt from its coverage.[145] The *Taylor* Court, however, relied on *United States v. California* to voice its concern for the unequal effect an adverse decision would have on a private sector employee performing the same tasks as an exempt public sector employee.[146]

In sum, the Supreme Court in *Taylor* found the RLA to be applicable to the State Belt Railroad. The Court observed that "if California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships."[147]

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143. *See* note 124 *supra*. *See also* Reeves Inc. v. Kelly, 603 F.2d 736, 738 n.2 (8th Cir. 1979).

144. 353 U.S. at 563-64. The facts in *Taylor* are similar to those in United States v. California, 297 U.S. 175 (1936). In *United States v. California*, the same state-owned railroad sought exemption on behalf of its employees from the Federal Safety Appliance Act, *see* note 120 *supra*, arguing that the state, by operating the railroad, was performing an essential governmental function. In *Taylor*, the controversy centered around the application of a federal labor statute, the Railway Labor Act, which is discussed at notes 112-16 *supra* and accompanying text.

145. 353 U.S. at 562. The Court relied on *United States v. California* to dismiss this claim. The presumption that "a federal statute . . . [does not] . . . restrict a constituent sovereign State unless it expressly so provides . . . 'is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated.'" *Id.* (quoting United States v. California, 297 U.S. at 186).

146. 353 U.S. at 562-63.

> We can perceive no reason for extending it [the presumption] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action.

Id. at 562-63 (quoting United States v. California, 297 U.S. at 186). Thus the *Taylor* Court reached the same conclusion as did the Court in *United States v. California* on the question of federal regulation of railroads.

147. 353 U.S. at 568. For an illustration of the Court's general consistency in this field, *see* Parden v. Terminal Ry., 377 U.S. 184 (1964). The Supreme court in *Parden* held that a state could not be sued without its consent. The Court found that the State of Alabama had "consented" to potential lawsuits by assuming control of a railroad which the state knew to

Despite the fact that this language is somewhat reminiscent of the consent theory vitiated by *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare*[148] and that a broad interpretation of congressional power pursuant to the commerce clause is no longer valid,[149] *California v. Taylor* and *United States v. California* are still considered to be persuasive.[150]

C. Recent Decisions in the Area of Transportation

1. The Effect of Injunctions Against Suit: Which Court Has Jurisdiction?

One element of the essentiality determination is the issue of which court, state or federal, has jurisdiction in a dispute involving the right of state or local government employees to strike. Generally, the federal anti-injunction statute[151] will bar injunctions against pending state proceedings in the absence of three clear exceptions.[152] Two reasons have been expressed to justify these exceptions. First, there is a long-standing federal policy of avoiding undue interference with legitimate state activities.[153] Second, an injunction is an equitable remedy, and a federal court cannot exercise equity jurisdiction if an adequate remedy is available under

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be operating in interstate commerce. *See also* Public Serv. Co. of N.C., Inc. v. Federal Energy Regulatory Comm'n, 587 F.2d 716 (5th Cir. 1979), in which the Fifth Circuit also concluded that when a state either provides a service or moves a product in interstate commerce (as in *Parden*), the state has opened itself to federal regulation in that area.

148. 411 U.S. 279 (1973).

149. Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440 (1977); Hughes v. Alexandria Scrap Co., 426 U.S. 794 (1976). *See generally The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 58-62 (1976).

150. *See* National League of Cities, 426 U.S. at 854 n.18, in which the Supreme Court states that its prior holdings in *United States v. California, Taylor* and *Parden* are "consistent with" and "unimpaired by" this decision. *But see* 426 U.S. at 854-55, where the Court limits its approval of *United States v. California*, by disavowing dicta which does not reflect the need to restrict congressional exercise of the commerce power so as not to "force directly upon the States [Congress'] choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id.* at 854-55. *See also* Massachusetts v. United States, 435 U.S. 444, 454-60 (1978).

151. 28 U.S.C. § 2283 (1976).

152. *See* note 158 *infra* and accompanying text.

153. This policy draws support from the tenth amendment to the United States Constitution, which provided that "[t]he 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.

state law.[154] Thus, the only time an injunction will issue is when the party seeking the injunction can demonstrate an otherwise irreparable injury, coupled with either a showing of bad faith harassment by the adverse party or a flagrantly unconstitutional state statute which authorizes the adverse party's activity. The question of whether an injunction should issue, and if so, under which court's jurisdiction, was considered by the Supreme Court in *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers.*[155]

In *Atlantic Coast Line,* the Court held that a federal injunction obtained by the striking union against the enforcement of a state ordered anti-picketing injunction previously obtained by the railroad was improper.[156] Relying on principles of federalism, comity, and state sovereignty,[157] the Supreme Court denied a lower federal court the right to contest the decision of a parallel state court absent certain specifically defined exceptions.[158] The inference can be

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154. *See, e.g.,* Steffel v. Thompson, 415 U.S. 452 (1974); Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Great Lakes Co. v. Huffman, 319 U.S. 293 (1943).

155. 398 U.S. 281 (1970).

156. Petitioner railroad (ACL) sought to enjoin respondent union (BLE) from picketing its switching yard. ACL first sought an injunction in federal district court in Florida but was unsuccessful. ACL then submitted the same request for relief to a Florda state court, which granted the injunction. In 1969, two years after the anti-picketing injunction was issued, the union moved in state court to remove the injunction, relying on Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969). *Jacksonville Terminal* decided after ACL had sought its first injunction, invalidated, in certain instances, state court injunctions which interfered with a federally protected right, such as the right to picket under the Railway Labor Act. The state court denied the motion, holding that *Jacksonville Terminal* was not controlling. BLE then moved for injunctive relief in the same federal district court that had denied ACL's initial motion for an anti-picketing injunction and was granted an injunction restraining the continuation of the state court injunction. The Florida Court of Appeals affirmed the power of the federal district court to issue such an injunction. The Supreme Court reversed, holding that the union should have pursued the review of the state court decision in the Florida appellate courts and then, if necessary, in the Supreme Court. 398 U.S. at 296. The Court also held that the district court's initial denial of ACL's motion for an injunction could not be interpreted as a decision creating a federal right to overrule an injunction based on state law. (Thus the denial of ACL's motion for injunctive relief could not be held to anticipate *Jacksonville Terminal,* as the union tried to argue for the first time in the Supreme Court). Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. at 293.

157. *Id.* at 286-88.

158. The three exceptions to the otherwise absolute prohibition against a federal court's enjoining state court proceedings are: (1) if the injunction is expressly authorized by Act of Congress; (2) where the injunction is necessary in aid of its [the federal court's] jurisdiction;

drawn from *Atlantic Coast Line* that if an employment dispute is essentially local in character, the resolution of the dispute is within the jurisdiction of the *state courts*. If, however, the employment dispute has national consequences, there is a presumption that a federal question is at issue. Therefore, the resolution of the dispute is within the purview of the *federal courts* and cannot be considered to be an interference with an essential local governmental function.

2. *Invocation of the Anti-Strike Injunction at the Local Level*

In *New York City Transit Authority v. Loos*,[159] the New York City Transit Authority sought an injunction restraining members of the Motormen's Benevolent Association from striking under the New York Public Employees' Fair Employment Act (the Taylor Law).[160] The New York City Transit Authority alleged that commuter transportation performed an essential governmental function like the police and fire departments and therefore were subject to the anti-strike provisions of the Taylor Law.[161] The New York County Supreme Court, Special Term, in granting the injunction, held that "[t]he operation of rapid transit facilities in the City of New York is properly and necessarily a governmental function."[162]

The *Loos* court, focusing on the fact that the standard for governmental functions is necessarily a dynamic and not a static one,[163] noted that the rapid transit system was responsible for seeing that millions of people arrived at work safely, including those personnel who perform other essential governmental functions.[164]

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and (3) if the injunction is necessary to protect or effectuate its [the federal court's] judgments. 28 U.S.C. § 2283 (1976).

159. 2 Misc. 2d 733, 154 N.Y.S.2d 209 (Sup. Ct. 1956), *aff'd*, 3 A.D.2d 740, 161 N.Y.S.2d 564 (2d Dep't 1957).

160. N.Y. Civ. Serv. Law §§ 200-214 (McKinney 1976).

161. 2 Misc. 2d at 735, 154 N.Y.S.2d at 212.

162. *Id.* at 737, 154 N.Y.S.2d at 214.

163. "The defendants deny that the operation of such rapid transit facilities is properly a governmental function. But this is not the nineteenth century and the City of New York is not a horse and buggy town." *Id.*

164. According to the court:

> all essential services would soon be disrupted; those who work to supply the people with food and other necessities of life, the police who guard us against crime and disorder and the men who protect us in case of fire, to say nothing of doctors, nurses,

In response to the argument that the operation of a rapid transit system is a proprietary, and not a governmental function, the New York Supreme Court concluded that "the traditional distinction between governmental and proprietary functions [was] somewhat outworn."[165] However, as stated earlier,[166] there is also an important distinction to be made between the types of rail service discussed in *United States v. California* and in *New York City Transit Authority v. Loos*. The former deals with the transportation of essentially interstate commerce in freight and the latter deals with the transport of essentially local commerce in passengers.

The distinction between local and national labor disputes articulated in *Atlantic Coast Line* had earlier played an important role in *Staten Island Rapid Transit Operating Authority* ("*SIRTOA*") v. International Brotherhood of Electrical Workers.[167] In *SIRTOA*, the New York Supreme Court enjoined a union from striking against SIRTOA "pursuant to the Taylor Law."[168]

The Second Department, in upholding the application of the Taylor Law in SIRTOA, observed that a railroad operating in interstate commerce falls within the ambit of the commerce clause and is thereby subject to federal regulation.[169] Similarly, the Sec-

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pharmacists and countless other indispensable workers, would be unable to reach their appointed places of duty.

Id. at 737-38, 154 N.Y.S.2d at 214.

The Second Circuit in *UTU v. LIRR* reached the same conclusion observing that "without the LIRR commuters would find it difficult or impossible to get to their jobs and the reduced influx of people into N.Y.C. would have a significant impact upon the economy of the city and the State." *UTU v. LIRR*, slip op. at 5611.

165. *Id.* at 739, 154 N.Y.S.2d at 215. The court saw the distinction as being developed initially to limit

> civil liability by a city . . . for the acts of its employees engaged in performing a governmental function. . . . Such distinctions between governmental and proprietary functions are no longer necessary when there are statutes . . . making municipalities liable for wrongful acts of police, firemen and others performing the purest [most essentially] governmental services within the strictest meaning of the phrase.

Id.

166. *See* notes 123-135 *supra* and accompanying text.

167. 57 A.D.2d 614, 393 N.Y.S.2d 773 (1st Dep't), *appeal denied*, 42 N.Y.2d 804, *cert. denied*, 434 U.S. 934 (1977).

168. *Id.* at 615, 393 N.Y.S.2d at 775. The court reached this conclusion despite the fact that the RLA had been judicially determined to permit primary strikes. *Id.*

169. The court in *SIRTOA* relied on California v. Taylor, 353 U.S. 553, when it observed that "there is no doubt that when a State or one of its political subdivisions owns and

ond Department noted that the operation of a railroad has traditionally not been considered to be an integral govermental function left to the individual states for regulation under a theory of state sovereignty.[170] However, the court determined that SIRTOA was not operating a railroad in the traditional sense and was therefore not subject to regulation under the commerce clause.[171] The court made an important distinction between railroads engaged in interstate commerce and SIRTOA. "SIRTOA is essentially an intrastate passenger or commuter operation, fully akin to the city's rapid transit system."[172]

SIRTOA's status as an essentially intrastate, local commuter rail service led the appellate division to conclude that SIRTOA was an essential part of the city's commuter rail system, was performing an essential governmental function, and was therefore entitled to invoke the Taylor Law. Applying the essential governmental func-

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operates a railroad which is directly engaged in interstate commerce, it thereby subjects itself to the commerce power and that Congress can regulate its employment relationships." 57 A.D.2d at 615, 393 N.Y.S.2d at 775.

170. *Id.* Here, the court based its observation on the holding in National League of Cities v. Usery, 426 U.S. at 854 n.18. "The operation of a railroad in interstate commerce is not an integral part of State governmental activities which are protected from congressional impairment by principles of State sovereignty." *Id.*

171. 57 A.D.2d at 615-16, 393 N.Y.S.2d at 775-76.

172. *Id.* The court then observed that the city was "committed" to absorbing the corporation's deficit and held that its operation was "in no way comparable to the State-owned switching or terminal railroads held subject to federal jurisdiction in *California v. Taylor*. . . . The connection between SIRTOA and interstate commerce is extremely tenuous. . . . It is not a vital link in the national transportation system, the continued operation of which is important to the national flow of commerce; and the instant labor dispute does not present problems of national or even regional magnitude." *Id.* at 615-16, 393 N.Y.S.2d at 775-76. The court reached its decision after considering the argument that SIRTOA was technically within the ambit of the Railway Labor Act, as the union asserted, because its employees had "a strong history of bargaining under that act." *Id.* at 615, 393 N.Y.S.2d at 775. For two reasons both the state trial and appellate courts rejected this argument. First, although the Railway Labor Act has extensive provisions for arbitration and negotiation which serve as a model for settling disputes, they were not expressly made applicable to the employees involved in the SIRTOA dispute. Therefore, the prior use of the RLA's bargaining provisions by SIRTOA employees indicated merely a desire to apply a workable negotiating format to their situation, not an intent to be bound by the strictures of the Act in all future disputes.

Second, the fact that SIRTOA came literally within the scope of the RLA because of two technicalities (*e.g.*, the prior arbitration and SIRTOA's operation pursuant to an ICC certificate) was not sufficient reason for the court to find in favor of the union. *See also* UTU v. LIRR, slip op. at 5602-04.

tion test established in *Amersbach*,[173] SIRTOA's status as an employer whose employees are engaged in an essential function becomes clear. First, the government service or activity—in this case, commuter rail transportation—does benefit the community as a whole and is available to the public at little or no direct expense, because the city underwrites SIRTOA's operating deficit. Second, the service or activity in this case is certainly one undertaken for the purpose of public service rather than pecuniary gain, again because SIRTOA operates at a substantial deficit. Third, government, in this case, the city, is clearly the principal provider of the service or activity, and fourth, this government is ideally suited to provide the service of commuter transportation because of a demonstrated community need for the service.[174]

D. Essential Governmental Function Test Applied to Commuter Rail Transportation

SIRTOA is similar to a recent Second Circuit decision, *United Transportation Union v. Long Island Rail Road (UTU v. LIRR)*.[175] *In UTU v. LIRR*, seven unions representing LIRR employees struck the LIRR on December 8, 1979.[176] On February 12, 1980, the unions brought suit in federal district court to enjoin the LIRR's invocation of the Taylor Law. As in *Atlantic Coast Line*, the district court refused to permit a federal action which contested the authority of a parallel state court.[177] LIRR succeeded in obtaining an injunction pursuant to the Taylor Law in state court on February 13, 1980. Shortly afterward, the UTU moved in the United States District Court for the Eastern District of New York for a declaration that the LIRR and its employees are covered by the RLA and not by the Taylor Law, and for an injunction re-

173. *See* notes 109-14 *supra* and accompanying text.

174. *See* notes 123-29 *supra* and accompanying text for a discussion of the UMTA, reflecting Congress' determination that mass transportation is essential to the continued viability of urban areas.

175. No. 80-7199 (2d Cir., Sept. 15, 1980).

176. The union members returned to work six days later by Presidential order for a sixty-day cooling-off period. Exec. Order No. 12182, 44 Fed. Reg. 74785 (1979). The President's urgent tone reflects the potential disruption in service a strike would precipitate: "This dispute, in the judgment of the National Mediation Board, threatens substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service. . . ." *Id.* This language mirrors the UMTA.

177. *See* notes 155-58 *supra* and accompanying text.

straining the LIRR's pending state proceeding. The district court granted the declaratory and injunctive relief sought by UTU. The court held that the LIRR was a carrier within the Interstate Commerce Act and the Railway Labor Act and that as such, its employees were governed exclusively by the RLA and were therefore not subject to the Taylor Law.[178]

The principal issue on appeal is whether the LIRR is a carrier subject to the RLA or whether the LIRR is an essentially local commuter passenger rail service (like SIRTOA), performing an essential governmental function.

Although the Second Circuit recognized that the LIRR is technically a carrier within the meaning of the Interstate Commerce Act and the Railway Labor Act,[179] the court held that the employees of the LIRR are subject to the anti-strike provisions of the Taylor Law.[180] In reaching this conclusion the Second Circuit noted first, that the RLA ought not to be applied literally to circumstances it had never anticipated, that is, an essentially local commuter rail

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178. UTU v. LIRR, No. 79-3118, (E.D.N.Y. March 5, 1980). *See* Delta Air Lines, Inc. v. Dramarsky, 485 F. Supp. 300, 309 (S.D.N.Y. 1980). In *Delta Air Lines*, provisions of New York's Disability Benefits Law, N.Y. WORK. COMP. LAW § 205(3) (McKinney 1976), were held not to be preempted by collective bargaining provisions of the RLA. The court in *Delta Air Lines* concluded that state legislation can avoid federal preemption where:

> (1) the conduct regulated by the state touches interests "so deeply rooted in local feeling and responsibility that, in absence of compelling congressional direction, [a court] could not infer that Congress had deprived the States of the power to act. (citation omitted) or
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> (2) the state's regulation pertains to activity that is "a merely peripheral concern" of federal labor policy.

485 F. Supp. at 309 (citing San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959); Lodge 76, Int'l Assoc. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 137 (1976)) 485 F. Supp. at 308. *See also* Goodyear Tire & Rubber Co. v. Department of Indus., Labor and Human Relations, 87 Wis. 2d 56, 273 N.W.2d 786 (Ct. App. 1978).

179. UTU v. LIRR, slip op. at 5602-03. *See* Brotherhood of Locomotive Eng'rs v. SIRTOA, Finance Docket No. 29011 (Nov. 8, 1979) (Interstate Commerce Commission held LIRR to be a carrier subject to the RLA). The Second Circuit noted that the opinion of the ICC, although not conclusive, did have "some persuasive value." UTU v. LIRR, slip op. at 5603. The court also distinguished United States v. California, 297 U.S. 175 (1936), *see* notes 138-41 *supra* and accompanying text. The court found that, unlike the State Belt Railroad, which "was solely a freight service," UTU v. LIRR, slip op. at 5611, the LIRR "as a provider of passenger transportation in a metropolitan area, furnishes a very important public service which has come to be supplied primarily by state and local governments." *Id.*

180. UTU v. LIRR, slip op. at 5618-19.

system,[181] and second, that the LIRR does perform an essential governmental function, despite contrary dicta in *National League of Cities*.[182]

LIRR contended that, analyzed in light of the criteria established in *Amersbach*, it must be considered to be performing an essential governmental function.[183] First, the service provided by the LIRR benefits the entire metropolitan community. In addition to serving over 260,000 commuters daily at a small direct cost to the riders, as compared with the overall operating cost of the railroad, the LIRR saves the city from the automobile congestion which would otherwise result. Second, the primary purpose of the LIRR is to provide a public service and not to make a profit. This purpose is evidenced by the fact that the LIRR consistently operates at a loss.[184] Third, because the Metropolitan Transportation Authority (the parent of the LIRR) is a public benefit corporation, the government is the principal provider of the service in question. Fourth, because of the demonstrated community need for the LIRR and the extensive expenditures required for its operation, the government is particularly suited to provide this service.[185] The

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181. *Id.* at 5604.

> While it is argued that Congress also would have created an exclusion for the LIRR if it could have foreseen how the railroad would evolve, we decline to legislate such an exception. Apart from a general reluctance to undertake such a task, we note that it is not clear what Congress would have done in this instance.

Id.

182. *Id* at 5610-11.

183. *See* notes 109-14 *supra* and accompanying text.

184. UTU v. LIRR, slip op. at 5615. These losses have been extensive. According to the LIRR:

> The State has poured over a billion dollars into the New York metropolitan area commuter network in general, and hundreds of millions of dollars into the LIRR, in particular. For example, in 1979 alone, New York provided the LIRR's passenger operations with its own and local subsidies of $129 million, as well as allocating an additional $9 million of scarce federal Urban Mass Transportation Act entitlements to the LIRR. In 1979, the State and its municipalities also contributed over $550 million to the operating deficits of the New York metropolitan area transit network. In addition to the direct subsidies, New York has granted tax exemptions to the LIRR since 1950. In fact, the LIRR barely survived the post-World War II years, and then only as a result of this tax relief and indirect and direct subsidies.

Brief for Defendant-Appellant at 7, UTU v. LIRR, No. 80-7199 (2d Cir. Sept. 15, 1980).

185. UTU v. LIRR, slip op. at 5615. The LIRR pointed out that

> New York is operating the LIRR, not as a private freight business, but rather in the exercise of its traditional function of providing commuter transportation services to the New York metropolitan area. New York has poured over a billion dollars into the

LIRR successfully argued that an additional element should be added to the *Amersbach* test: in determining whether an employee is performing an essential governmental function, a court should consider that any interruption of the public service in question would cause great harm to the community.[186] The Second Circuit held that the LIRR satisfies this additional requirement.[187]

In a similar vein, in *Alewine v. City Council*,[188] the United States District Court for the Southern District of Georgia has been asked to extend the FLSA to bus drivers who are employed by the City of Augusta. In *Alewine*, bus drivers sued the City of Augusta, seeking back overtime pay under the FLSA.[189] The City of Augusta, once again relying on *National League of Cities*, has argued that the FLSA minimum wage and maximum hour provisions are not applicable to employees of a state or political subdivision as a matter of law.[190] The city contends that these provisions have "directly displaced the states' freedom to structure integral operations in areas of traditional governmental functions."[191] In denying the city's motion to dismiss, the district court observed that the city had failed to establish "that the operation of a city bus service is a 'traditional' governmental function within the ambit of the rule in

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metropolitan commuter system without any expectation or hope of financial return. The LIRR itself has generated deficits well into the hundreds of millions of dollars which the State has reimbursed. No private business would continue to operate such a system under the circumstances. New York, however, continues to subisidize the LIRR as it has done for many years in its efforts to continue uninterrupted commuter rail service within the metropolitan area, because that service is vital to the well being of the metropolitan area—as essential as sanitation, park and recreational services.

Brief for Defendant-Appellant at 28, UTU v. LIRR, No. 80-7199 (2d Cir. Sept. 15, 1980).

186. Brief for Defendant-Appellant at 22.

187. UTU v. LIRR, slip op. at 5608. "By precluding the State from enforcing this legislation, including its no-strike provision, the Railway Labor Act eliminates a key provision in the State's legislative effort to provide its citizens with continuous public transportation." *Id. See Effect of Railroad Mergers on Commuter Transportation: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 1138 (1970) (Statement of William J. Ronan, former Chairman of the New York State Metropolitan Commuter Transit Authority).

188. No. CV 179-113 (S.D. Ga., Oct. 22, 1979) (order denying motion to dismiss).

189. *Id.* at 1.

190. *Id.* at 2.

191. *Id.* at 3. The court took note of the Seventh Circuit's holding in Marshall v. City of Sheboygan, 577 F.2d 1 (7th Cir. 1978), to conclude that the FLSA standards were still applicable to employees working "in areas which are not 'integral parts of [a State's] governmental activities.'" Order denying motion to dismiss at 3-4.

National League of Cities."[192]

V. Conclusion

The Supreme Court in *National League of Cities,* relying on *Fry, Darby, New York v. United States* and *Lane County v. Oregon,*[193] emphasized its awareness that the states performed an essential role within our federal system. The Court understood that state employees performing "essential governmental functions" must be free from federal regulation. Unfortunately, the Court neither definitively established what constitutes an essential governmental function nor constructed a workable test for making such a determination.

Subsequent decisions, in particular *Amersbach* and *UTU v. LIRR,* have constructed an "essential governmental function" test to facilitate a case-by-case determination of essentiality. The test requires a showing that the government service or activity benefits the entire community at little direct expense, that it is undertaken for public service and not for profit, that the government is the principal provider because of a particular capacity for such a service, and that any interruption of this essential public service would cause great harm to the community. Under this test, it appears that the historical exclusion of railroad operation from the

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192. The district court concluded that the cases which the City of Augusta cited "only serve[d] to reveal the doubt in this area and thus to underscore the impropriety of resolving the issue on a Motion to Dismiss." Order denying motion to dismiss at 4. The court also found defendant's other arguments insufficient to compel a finding in its favor. For example, the city asserted that "there is not a viable private transit industry remaining in the United States." Brief for Defendant (cited in order denying motion to dismiss at 4). The court found this assertion inconclusive without other authority. Order denying motion to dismiss at 3-4. Second, the court disagreed with the city's reliance on the state's method of classifying municipal functions, holding that while the court need not be bound by such classifications, "the Georgia Court's decision of those functions as 'proprietary' or 'governmental' may be instructive in determining whether city transit service is a 'traditional' function within the meaning of *National League of Cities. . . .*" *Id.* at 4. Third, the court held that the city failed to address the bus drivers' contention that the city had waived any possible immunity under *National League of Cities* when it accepted federal funds to purchase a private carrier under a section of the UMTA which was designed to protect "individual employees against a worsening of their positions with respect to their employment." 49 U.S.C. § 1609(c)(3) (1976) Order denying motion to dismiss at 4. *But see* UTU v. LIRR, slip op. at 5615 n.26. The bus drivers argue that this agreement has been violated by the city's failure to comply with the FLSA wage and hour provisions, and has in effect worsened their (the drivers') position relative to employees of a private transit system. *Id.* at 4-5.

193. 7 Wall. 71 (1869).

sphere of essential government activity and the current extension of such exclusion to local commuter rail service (which was reinforced in decisions such as *United States v. California* and *California v. Taylor*), is subject to re-examination. Upon re-inspection, local commuter rail service, in the face of conflicting congressional policy pronouncements,[194] and in light of the important role it plays in the effective functioning of any metropolitian region,[195] can be considered an "essential governmental function" and thereby exempt from federal regulation under either the RLA or the FLSA.

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194. *See* notes 123-35 *supra*. *See also* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

195. Staten Island Rapid Transit Operating Auth. v. International Bhd. of Electrical Workers, 57 A.D.2d 614, 393 N.Y.S.2d 773 (1st Dep't), *appeal denied*, 42 N.Y.2d 804, *cert. denied*, 434 U.S. 934 (1977); New York City Transit Auth. v. Loos, 2 Misc. 2d 733, 154 N.Y.S.2d 209 (Sup. Ct. 1956), *aff'd*, 3 N.Y.2d 740, 161 N.Y.S.2d 740, 161 N.Y.S.2d 564 (2d Dep't 1957); Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302 (codified at 49 U.S.C. §§ 1601-1614 (1976)).