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# *National League of Cities v. Usery*: Its Implications for the Equal Pay Act and the Age Discrimination in Employment Act

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# *NATIONAL LEAGUE OF CITIES v. USERY:* ITS IMPLICATIONS FOR THE EQUAL PAY ACT AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT

In 1974 Congress amended the Fair Labor Standards Act (FLSA)[1] to extend coverage to most nonsupervisory federal, state, and local government employees. Governmental employers became subject to the FLSA minimum wage and maximum hours provisions and to the Equal Pay Act (EPA)[2] which was enacted separately in 1963 but was incorporated into the FLSA. The 1974 Amendments also extended the Age Discrimination in Employment Act of 1967 (ADEA)[3] to cover governmental employees.

In *National League of Cities v. Usery,*[4] the Supreme Court invalidated the application of the FLSA minimum wage and maximum hours provisions to certain essential state government activities as an unconstitutional intrusion on state sovereignty. This article will explore the implications of that decision with respect to the application of the EPA and the ADEA to state and local governments.

Part I contains a brief discussion of the Fair Labor Standards Act and Amendments. Part II discusses *National League* with reference to traditional commerce clause interpretation. Part III analyzes the difficulties of applying the decision, particularly the problem of defining the essential state functions immunized by the tenth amendment from federal regulation. It is suggested that *National League* should be interpreted as requiring a balancing of the federal interest and the degree of federal intrusion against the state claim to immunity. While Part IV explains the background of the EPA and the ADEA, Part V discusses the effect of the *National League* decision on the application of the EPA and the ADEA to the states.

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[1] 29 U.S.C. §§ 201-219 (1970 & Supp. V 1975), *as amended by* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 [hereinafter cited as 1974 Amendments].

[2] 29 U.S.C. § 206(d)(1) (1970).

[3] 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975), *as amended by* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 55. The ADEA incorporates the enforcement provisions of § 16 of the FLSA, 29 U.S.C. §§ 216, 626 (1970 & Supp. V 1975). *See* note 9 *infra*.

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

## I. THE FAIR LABOR STANDARDS ACT: BACKGROUND

The Fair Labor Standards Act of 1938,[5] enacted pursuant to the commerce clause, was based, in part, on a congressional determination that "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" burden interstate commerce, provoke labor disputes, and constitute an unfair method of competition.[6] The Act was intended to eliminate substandard labor conditions "as rapidly as practicable . . . without substantially curtailing employment or earning power."[7] The FLSA prescribed two major fair labor standards: a minimum wage[8] and an overtime rate for work in excess of a forty-hour week.[9] In 1963 the Equal Pay Act added an additional fair labor standard requiring equal pay for equal work.[10]

Although the FLSA originally applied only to workers engaged in interstate commerce or in the production of goods for interstate commerce, the coverage of the Act has been expanded by a series of amendments. The 1961 Amendments significantly broadened the scope of the FLSA by introducing the "enterprise" concept of coverage.[11] The purpose of this extension was to reach all employees of an enterprise which has any employees engaged in

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[5] 29 U.S.C. §§ 201-219 (1970 & Supp. V 1975). The motive, purpose, and scope of the original Act were construed, and its constitutionality upheld, in United States v. Darby, 312 U.S. 100 (1941), and Kirschbaum Co. v. Walling, 316 U.S. 517 (1942). *See also* Powell v. United States Cartridge Co., 339 U.S. 497 (1950); Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943); Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88 (1942).

[6] FLSA § 2(a), 29 U.S.C. § 202(a) (1970).

[7] FLSA § 2(b), 29 U.S.C. § 202(b) (1970).

[8] FLSA § 6, 29 U.S.C. § 206 (1970 & Supp. V 1975). This section incorporates the Equal Pay Act, 29 U.S.C. § 206(d) (1970).

[9] FLSA § 7, 29 U.S.C. § 207 (1970 & Supp. V 1975).

Section 16(a) of the FLSA, 29 U.S.C. § 216 (1970), provides criminal penalties for willful violation of the Act. A private cause of action is authorized in § 16(b), 29 U.S.C. § 216(b) (Supp. V 1975), against any employer (including a public agency) in any federal or state court of competent jurisdiction by any one or more employees to recover withheld compensation and an additional equal amount in liquidated damages. However, a class action on behalf of other employees similarly situated requires the written consent of each employee joined as a party plaintiff. The right to file a private action terminates upon the filing of proceedings under § 217 by the Secretary of Labor to enjoin any further delay in the payment of withheld compensation owed to the employee.

Section 16(c), 29 U.S.C. § 216(c) (Supp. V 1975), authorizes the Secretary of Labor to supervise settlements and to bring an action in any court of competent jurisdiction to recover withheld wages and liquidated damages. The private right of action provided in § 16(b) terminates upon the filing of a complaint by the Secretary.

Section 17, 29 U.S.C. § 217 (1970), grants jurisdiction to enjoin violations of the Act to the federal district courts.

[10] *See* part IV. A. *infra*.

[11] Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65 (amending 29 U.S.C. § 203(s) (1970)). The enterprise concept increased the number of employees protected without increasing the number of employers subject to the Act.

interstate commerce or in the production of goods for commerce. In 1966 the FLSA was extended to state and local government workers employed in hospitals and related health care institutions, special schools and educational institutions, and local transit operations.[12] The 1974 Amendments extended coverage to nearly all federal, state, and local government employees.[13] The original Act's exemption for executive, administrative, and professional employees was retained,[14] and additional exemptions were established for elected officials and their immediate staffs.[15] The legislative history of the 1974 Amendments reflected a policy not only of regulating commerce, but also of assuming an affirmative federal responsibility to increase the minimum wage of all public sector employees.[16]

The enterprise concept and the limited 1966 extension of coverage to government employees were upheld as constitutional under the power of the federal commerce clause in *Maryland v. Wirtz*.[17] Using traditional commerce clause analysis,[18] the Court held that Congress had a rational basis for the regulation of enterprises involved in interstate commerce because it could find that substandard wages and hours have a substantial, disruptive effect on interstate commerce.[19] The Court rejected the challenge that the

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[12] Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (amending 29 U.S.C. § 203(1970)). Section 3(d) was amended to include a state or political subdivision within the definition of "employer;" § 3(r) was amended to include these activities within the definition of "enterprise;" and § 3(s) was amended to make it clear that these state operations qualify as an "enterprise engaged in commerce or in the production of goods for commerce."

[13] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (amending 29 U.S.C. § 203 (1970)). "Employer" was redefined to include a public agency in § 3(d); the definitions of "enterprise" and "enterprise engaged in commerce or in the production of goods for commerce" in § 3(r) and (s) were amended to include the activities of a public agency; "public agency" was defined to include the government of a state or any interstate governmental agency in § 3(x).

[14] FLSA § 13(a)(1), 29 U.S.C. § 213(a)(1) (1970).

[15] FLSA § 3(e)(2)(C), 29 U.S.C. § 203(e)(2)(C) (Supp. V 1975).

[16] H.R. REP. NO. 913, 93d Cong., 2d Sess. 7-9, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811, 2817-19. As a means of enforcing the amended Act, Congress specifically authorized a private cause of action against state and local government employers. 29 U.S.C. § 216(b) (Supp. V 1975). This explicit authorization of a private "16(b)" action against government employers was the legislative response to the decision in Employees v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973), which held that there was no clear expression of congressional intent in the FLSA to deprive states of their eleventh amendment immunity to suit. H.R. REP. NO. 913, 93d Cong., 2d Sess. 41, 45, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811, 2850, 2853. The decision in *Employees* implied that a clear expression of congressional intent to override state immunity to suit would suffice to subject the states to suit under the FLSA. 411 U.S. at 284-85.

[17] 392 U.S. 183 (1968). The Court in *National League* overruled the *Wirtz* holding that the 1966 Amendments were constitutional as applied to the states. 426 U.S. at 840, 853-54.

[18] *See* notes 29-39 and accompanying text *infra*.

[19] 392 U.S. at 189-92. The substantial effect on interstate commerce rested alternatively on (1) the congressional finding that substandard wages and excessive hours gives the employer an unfair competitive advantage, or (2) the congressional finding that substandard labor conditions lead to labor disputes which disrupt the free flow of goods. Both findings were deemed to have a rational basis, thus exhausting the scope of judicial review.

Amendments impermissibly interfere with state sovereignty.[20] According to the *Wirtz* Court, the Act requires only that the state employer be bound by the same restrictions that bind a wide range of private employers whose activities affect interstate commerce. As a valid regulation of interstate commerce, the 1966 Amendments affect state and private employers equally so that the federal interest cannot be outweighed by a state claim of sovereign immunity.

## II. *NATIONAL LEAGUE OF CITIES v. USERY*

In *National League of Cities v. Usery*,[21] a five-to-four decision with Justice Rehnquist writing for the majority,[22] the Supreme Court rejected the "far reaching implications" of *Maryland v. Wirtz*.[23] The Court held that insofar as the 1974 FLSA Amendments "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress" under the commerce clause.[24] In the Court's view, the power to determine the wages and hours of employees performing governmental functions is an "undoubted attribute of state sovereignty."[25] Justice Rehnquist concluded that the 1974 Amendments operate directly on "the States *qua* States," displacing state policy choices regarding the manner in which they will structure delivery of governmental services, and substantially restructuring "traditional ways in which the local governments have arranged their affairs."[26] Where the states exercise "functions essential to separate

[20] *Id.* at 195-96. According to *Wirtz*, there is a rational basis for a congressional finding that these state-operated schools and hospitals are sufficiently related to interstate commerce because either (1) such institutions are major users of interstate goods, or (2) the labor disputes in these governmental agencies will disrupt interstate commerce. The state claim of sovereign immunity was upheld by the *National League* majority in the context of the 1974 FLSA Amendments. *See* part II. A. *infra*.

[21] 426 U.S. 833 (1976). *See* Beaird & Ellington, *A Commerce Power Seesaw: Balancing National League of Cities*, 11 GA. L. REV. 35 (1976); Percy, *National League of Cities v. Usery: The Tenth Amendment Is Alive and Doing Well*, 51 TUL. L. REV. 95 (1976).

[22] Justices Burger, Stewart, Powell, and Blackmun joined Justice Rehnquist in the majority opinion. Justice Blackmun wrote a separate concurring opinion. Justice Brennan filed a dissenting opinion joined by Justices White and Marshall, and Justice Stevens filed a separate dissent.

[23] National League of Cities v. Usery, 426 U.S. 833, 840, 853-54 (1976).

[24] *Id.* at 852. This summary of the holding by the Court is not wholly consistent with the majority's analysis of the Amendments as fully within the grant of legislative authority under the commerce clause, but nevertheless invalid as offending a separate constitutional limitation expressed in the tenth amendment. There is a certain conceptual confusion in the opinion as a result of the majority's failure to precisely define the reach of the commerce power and the nature of the limit on commerce clause regulations which directly affect state and local governments. *See* part II. A. *infra*.

[25] *Id.* at 845.

[26] *Id.* at 847-49.

and independent existence,"[27] the tenth amendment was held to operate as an "express declaration" of a "constitutional barrier"[28] against interference by the federal government.

### *A. The Tenth Amendment As A Limitation On the Commerce Power*

The reasoning in *National League* differs significantly from prior cases interpreting the "plenary" scope of the commerce clause and the limited nature of judicial review over exercises of this power.[29] According to the traditional interpretation of the commerce clause, Congress may statutorily declare that certain activities have a sufficiently substantial effect upon interstate commerce to justify federal regulation. Judicial review is then limited to three questions: first, whether there is a rational basis for the congressional finding that the regulated activity substantially affects interstate commerce; second, whether the selected means of regulation are reasonably related to the legislative objective; and finally, whether

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[27] *Id.* at 845, *quoting* Coyle v. Smith, 221 U.S. 559, 580 (1911), *quoting* Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869).

[28] *Id.* at 841-42.

[29] In United States v. Darby, 312 U.S. 100 (1941), the Court upheld the original Fair Labor Standards Act against the challenge that it impermissibly interfered with the authority of the states, reserved to them by the tenth amendment, to control the conditions of production. The Court held that Congress could regulate intrastate activities where they have a substantial effect on interstate commerce. This authority may be implemented by a wide choice of appropriate means, provided that the object of the regulation is sufficiently related to interstate commerce. Faced with a congressional determination that a specific subject of regulation affects commerce, "the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal powers." *Id.* at 120-21.

The Court in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), upheld the constitutionality of Title II of the Civil Rights Act of 1964. The Court concluded that Congress had a rational basis for finding that racial discrimination by motels affected commerce and that the means chosen to eliminate the obstruction were appropriate and reasonably adapted to a permitted end. In Katzenbach v. McClung, 379 U.S. 294 (1964), the Court deferred to a congressional finding that discrimination in restaurants inhibited interstate commerce. Justice Clark articulated the two-part inquiry before the Court:

> [T]he mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. The only remaining question . . . is whether the particular restaurant either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce.

*Id.* at 303-04.

For other examples of the rational basis analysis of commerce clause regulations, *see* Maryland v. Wirtz, 392 U.S. 183 (1968), discussed at notes 17-20 and accompanying text *supra*; Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943); Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88 (1942); Kirshbaum Co. v. Walling, 316 U.S. 517 (1942); Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941); Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). *See also* note 36 *infra*.

the affected party or business is properly within the regulated class.[30]

The majority opinion in *National League* evaded a "rational basis" analysis of the 1974 FLSA Amendments by interposing the tenth amendment as an express "affirmative limitation" which may restrict the exercise of power otherwise expressly delegated to Congress.[31] This constitutional limitation is triggered, in the Court's view, when Congress seeks to directly regulate the activities of the states as employers.[32] Accordingly, the 1974 FLSA Amendments were invalid not because Congress lacked affirmative authority to reach state employers under the commerce clause, but

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[30] The third inquiry, which focuses on the application of the statute in the particular case before the Court, will not lead to invalidation of the regulation where the complainant's impact on interstate commerce is individually trivial or remote if the class is rationally defined and the aggregate effect of like persons similarly situated is substantial. Maryland v. Wirtz, 392 U.S. 183, 192-93 (1968); Katzenbach v. McClung, 379 U.S. 294, 300-01 (1964); Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

[31] 426 U.S. at 841. Until the late 1930's, the tenth amendment had been interpreted as reserving to the states the exclusive regulation of certain "local" concerns—*i.e.*, productive industries (agriculture, mining, and manufacuturing) and employment conditions prior to any interstate movement. Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918). This use of the tenth amendment to support the exclusive right of the states to regulate certain private activity was rejected as a limitation on the federal commerce power in United States v. Darby, 312 U.S. 100, 116-17, 123 (1941). The *National League* Court used the tenth amendment not to demarcate an area of commerce which the states alone may control, but to limit federal regulations directly affecting the state itself as an employer. 426 U.S. at 841.

[32] The majority opinion does not clearly define the source or scope of the "constitutional barrier" against this exercise of congressional authority. At one point, however, it referred to the "established constitutional doctrine of intergovernmental immunity consistently recognized in a long series of our cases." 426 U.S. at 837. This doctrine is not explicitly based on the text of the Constitution, but was developed by judicial implication. *See* notes 60-73 and accompanying text *infra*. The majority opinion in *National League* also referred to "limits upon the power of Congress to override state sovereignty" imposed by "our federal system of government." *Id.* at 842. The Court apparently found an affirmative declaration of this federalism limitation in the tenth amendment, and applied it, in a manner similar to the limitations of the fifth and sixth amendment, to restrict the exercise of delegated federal powers.

In his dissenting opinion, Fry v. United States, 421 U.S. 542 (1975), Justice Rehnquist stated:

> [A]n individual who attacks an Act of Congress on the ground that it is not within congressional authority under the Commerce Clause asserts only a claim of lack of legislative power. . . . [T]his individual's claim is ordinarily very difficult to sustain. But an individual who attacks an Act of Congress, justified under the Commerce Clause, on the ground that it infringes his rights under, say, the First or Fifth Amendment, is asserting an affirmative constitutional defense of his own, one which can limit the exercise of power which is otherwise expressly delegated to Congress. That the latter claim is of greater force, and may succeed when the former will fail, is well established. . . .
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> . . . [In *Fry*] the State is not simply asserting an absence of congressional legislative authority, but rather is asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority. *Whether such a claim on the part of a State should prevail against congressional authority is quite a different question,* but it is surely no answer to the claim to say that a "state can no more deny the power if its exercise has been authorized than can an individual."

*Id.* at 552-53, *quoting in part* United States v. California, 297 U.S. 175, 185 (1936) (emphasis added).

because the effect of the regulations impaired the states' "ability to function effectively within a federal system."[33] According to the *National League* Court, the state employer, as a "coordinate element" in the federal system, may not be regulated in the same manner as a private employer.[34]

The *National League* interpretation of the tenth amendment as a functional limitation on the exercise of the commerce power is a departure from the traditional understanding of this amendment literally applicable only to powers not delegated to the federal government.[35] The Court has frequently refused to construe it as a limitation upon the exercise of a specifically granted power, even when states have been directly affected by a federal regulation.[36] In responding to a challenge to the original Fair Labor Standards Act, Justice Stone declared that the tenth amendment "states but a truism that all is retained which has not been surrendered."[37] This now-familiar pronouncement was qualified in the majority opinion in *Fry v. United States*,[38] upholding the application of federal wage controls to the states:

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

[33] 426 U.S. at 852, *quoting* Fry v. United States, 421 U.S. at 547 n.7.

[34] 426 U.S. at 849.

[35] U.S. CONST. amend. X provides: "The powers not delegated to the United States by the Consitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[36] *See, e.g.*, Public Util. Comm'n v. United States, 355 U.S. 534 (1958) (California statute requiring approval by PUC of carrier rates for public property held unconstitutional in view of comprehensive federal government procurement policy); California v. Taylor, 353 U.S. 553 (1957) (national policy of collective bargaining incorporated in the Railway Labor Act supersedes a state's right to control employment relations of a state-owned railroad); United States v. California, 297 U.S. 175 (1936). *See* notes 68-70 and accompanying text *infra*; Board of Trustees of the Univ. of Ill. v. United States, 289 U.S. 48 (1933) (state tax immunity narrowly read as inapplicable to federal right to levy customs duties on state imports pursuant to the commerce power); Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925) (authority of the United States to remove obstructions to interstate commerce by enjoining withdrawal of water from Lake Michigan held superior to the city's need to provide sewage disposal for its inhabitants); The Minnesota Rate Cases, 230 U.S. 352 (1913). *Accord*, Murphy v. O'Brien, 485 F.2d 671 (Temp. Emer. Ct. App. 1973) (freeze order issued under economic stabilization order did not unconstitutionally infringe a state's right to raise revenue for legitimate state ends); Briggs v. Sagers, 424 F.2d 130 (10th Cir. 1970), *cert. denied*, 400 U.S. 829 (1970) (upheld 1966 FLSA Amendments against a challenge based on the eleventh amendment immunity of a state to suit in federal courts). *See also* Case v. Bowles, 327 U.S. 92 (1946), and United States v. Oregon, 366 U.S. 643 (1961) (federal exercise of war power overrides state claim of tenth amendment immunity); Parden v. Terminal Ry., 377 U.S. 184 (1964) (by operating a railroad in interstate commerce, a state waives its eleventh amendment immunity to suit under federal commerce clause regulations); Sperry v. Florida *ex rel.* Fla. Bar, 373 U.S 379 (1963) (power to establish inferior courts and the power to grant patents upheld against a tenth amendment claim); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) (federal spending power construed to outweigh sovereign state interest).

[37] United States v. Darby, 312 U.S. 100, 124 (1941).

[38] 421 U.S. 542 (1975).

> Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.[39]

The *National League* majority relied upon this language in support of the view that federal intrusion into areas of state sovereignty affronts a specific constitutional prohibition.[40]

Justice Brennan, who was joined in his dissent by Justices White and Marshall, criticized the interposition of the tenth amendment as an affirmative restriction on the exercise of the commerce power.[41] In the dissenters' view, the tenth amendment offers no justification for treating states and private parties differently where federal commerce regulations are involved; if a regulation is constitutional, then it extends equally to both.[42] Justice Brennan contended that the majority opinion departed from precedent by inventing an express state sovereignty limitation on the commerce power and by extending the scope of judicial review of commerce clause regulation.[43] Instead of applying the rational basis test to federal commerce clause legislation, the *National League* Court chose to invoke the tenth amendment to correct what it regarded as an imbalance in the federal system. Implicit in the decision is a more active role for the federal judiciary as arbiter of the appropriate line between federal regulation and state governmental immunity.[44]

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[39] *Id.* at 547 n.7. Whatever significance the tenth amendment has under this view, it was not sufficient to invalidate the regulations at issue in *Fry*. *See* notes 86-91 and accompanying text *infra*.

[40] 426 U.S. at 842-43.

[41] Justice Brennan stated, "[T]here is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on the commerce power." *Id.* at 858 (Brennan, J., dissenting). The majority's construction of the tenth amendment was a "meaningless limitation," *id.* at 871, "an abstraction without substance, founded neither in the words of the Constitution nor on precedent," *id.* at 860, and "a transparent cover for invalidating a congressional judgment with which they disagree," *id.* at 867.

[42] *Id.* at 861, 873 (Brennan, J., dissenting).

[43] *Id.* at 875-76. Justice Brennan concluded: "It is unacceptable that the judicial process should be thought superior to the political process in this area. Under the Consitution the judiciary has no role beyond finding that Congress has not made an unreasonable legislative judgment respecting what is 'commerce.' " *Id.* at 876.

[44] The rational basis test commonly applied to federal exercises of the commerce power reflects an attitude of judicial deference to the legislative judgment in this area. Prior cases have suggested that Congress has special competence in resolving conflicts engendered by federal-state intergovernmental relations. Under this view, states should rely upon political restraints as a check on excessive federal power with the appropriate arena for resolving disputes as Congress rather than the Court. New York v. United States, 326 U.S. 572, 581-82 (1946) (opinion of Frankfurter, J.); United States v. Darby, 312 U.S. 100, 114-15 (1941); United States v. Butler, 297 U.S. 1, 78-80 (1936) (Stone, J., dissenting) ("For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824). *See* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-60

### *B. The Effect of the FLSA Amendments As Applied to the States*

The Supreme Court in *National League* also departed from traditional commerce clause analysis by not specifically considering the constitutionality of the FLSA Amendments as applied to the facts of the case. Instead, it engaged in a sweeping invalidation of the statute on federalism grounds, even though the cost of compliance and the extent of disruption in the delivery of government services resulting from the 1974 Amendments were disputed issues.[45] The Court discussed particular allegations to support its result, but stated that an evaluation of the actual impact was not critical to its decision.[46] It was sufficient that the broad outline of the 1974 Amendments "appears likely" to substantially disrupt traditional state employment practices.[47]

It is questionable whether the 1974 FLSA Amendments were actually as broad or inflexible as Justice Rehnquist suggested. In upholding the 1966 FLSA Amendments, the court in *Maryland v. Wirtz*[48] held that wages and hours of state-operated schools and hospitals could be regulated, because the requisite connection between these institutions and interstate commerce could be established by substantial use of interstate goods.[49] The Court noted

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(1954). Professor Wechsler argues that Congress, not the Court, is vested with ultimate authority for managing federalism. *See generally* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 613-16 (1975); Freund, *Umpiring the Federal System*, 54 COLUM. L. REV. 561 (1954); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See also* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 694-96 (1976). Professor Tribe contends that judicial inroads on state sovereignty, which are limited by the eleventh amendment, should be distinguished from congressional power to abrogate state soverign immunity, which is based on the "peculiar institutional competence of Congress in adjusting federal power relationships." *Id.* at 696. A similar argument is found in Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1441-42 (1975). Professor Nowak argues that the politically unresponsive nature of the courts prevents effective recourse from a judicial decision limiting or expanding congressional power, and that the balancing required by federalism should be flexibly resolved by Congress.

[45] *Compare* Complaints for Appellant National League and Appellant State of California, *with* Appellant's Motion to Affirm at 8, 19-25, and Brief for Appellee at 45-53, *National League*, 426 U.S. 833 (1976). The three-judge district court held no evidentiary hearing and made no factual findings. In granting defendant's motion to dismiss, however, the court commented that it was troubled by the substantial allegations of cost and disruption contained in the plaintiffs' complaints. National League of Cities v. Brennan, 406 F. Supp. 826, 828 (D.D.C. 1974). The degree of intrusion appears to be a critical factor in drawing the line between permissible and impermissible federal regulation of state activities, despite the fact that it was not adequately assessed in the Supreme Court's majority opinion. *See* notes 92-97 and accompanying text *infra*.

[46] 426 U.S. at 846, 851.

[47] *Id.* at 850.

[48] 392 U.S. 183 (1968).

[49] *Id.* at 194. *See* note 20 *supra*.

that where the impact of interstate government operations on interstate commerce is slight, extensive federal regulation is unjustified.[50] Nevertheless, the Court declined to decide whether a particular hospital or school actually had employees engaged in commerce, thus qualifying under the Act, or whether those institutions fell within the Act's exemption for an "ultimate consumer" of interstate goods.[51] These possible limitations on the applicability of the FLSA to state employees were not considered in *National League*. The Court also overlooked the possibility that existing statutory exceptions[52] might mitigate the disruptive effects of the 1974 Amendments.

The broad invalidation of the Amendments without a specific analysis of their actual impact suggests that *National League* has potentially sweeping implications with respect to all aspects of the FLSA as applied to the states. Once a state function is found to be essential, the majority opinion protects state wage-hour decisions from any federal displacement, regardless of the degree of interference. The Court's failure to analyze either the financial cost at stake or the extent of displacement of state policies makes it difficult to ascertain how the *National League* rationale affects other federal legislation involving state employment practices.

## III. AMBIGUITIES OF *NATIONAL LEAGUE v. USERY*

### *A. The "Essential Government Function" Test*

The *National League* Court held that states have a sovereign right to operate "traditional governmental functions" free from

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[50] *Id.* at 196 n.27.

[51] *Id.* at 200-01. The definition of "goods" in section 3(i) of the FLSA, 29 U.S.C. § 203 (i) (1970), specifically excludes goods after their delivery into the physical possession of the ultimate consumer. The importation of interstate goods by such a consumer will not qualify the importer as an enterprise engaged in commerce. The question whether particular governmental agencies have the requisite interstate connection to come within the Act's coverage is discussed in Brennan v. Iowa, 494 F.2d 100 (8th Cir. 1974), *cert. denied*, 421 U.S. 1015 (1975). The court upheld application of the FLSA upon finding that some employees were engaged in activities in interstate commerce, thus qualifying the entire agency as an enterprise, and that the interstate connection was established where employees sell, handle, or use goods which have moved in interstate commerce. The dissent argued that the activities were purely local and should come within the "ultimate consumer" exception of 29 U.S.C. § 203(i) (1970).

[52] *See*, in particular, the overtime exceptions for hospital employees and for police and firemen. FLSA § 7(j), (k), 29 U.S.C. § 207(j), (k), (Supp. V 1975); § 13(b)(20), 29 U.S.C. § 213(b)(20) (Supp. V 1975). To provide additional flexibility, the 1974 Amendments provided for phased-in compliance with the minimum wage over a four-year period for employees brought within the Act for the first time, FLSA § 6(b), 29 U.S.C. § 206 (Supp. V 1975). There are exceptions to the maximum hour regulations for seasonal employment in FLSA & 7(c), (d), 29 U.S.C. § 207(c), (d) (Supp. V 1975). *Also* FLSA § 13, 29 U.S.C § 213 (1970 & Supp. V 1975), contains numerous occupational exemptions, including the broad category of executive, administrative, or professional employees. FLSA § 14, 29 U.S.C. § 214 (Supp. V 1975), authorizes the Secretary of Labor to approve employment of learners, apprentices, students, and handicapped workers at less than the minimum wage "to the extent necessary in order to prevent curtailment of opportunities for employment."

disruptive federal interference.[53] The major difficulty with this holding is that the Court established a test which is inherently difficult to apply, while offering little guidance as to what standards should be embodied in the test. Relying on *Fry v. United States*,[54] Justice Rehnquist suggested that the tenth amendment is violated when Congress attempts to "exercise power in a fashion that impairs the State's integrity or their ability to function effectively in a federal system."[55] When the states are engaged in "functions essential to separate and independent existence,"[56] they are immunized from federal law under the commerce clause. The protected state enclave includes the "dual functions of administering the public law and furnishing public services," such as fire prevention, police protection, sanitation, public health, and parks and recreation.[57] Beyond these categories, cited by Justice Rehnquist as "typical" but not exhaustive, it is difficult to say what state activities are comprehended. The majority opinion does not distinguish "essential" from "traditional" state functions, and the interchangeable use of these terms becomes especially imprecise when applied to dynamically expanding governmental activity.

Furthermore, it is unclear whether state governmental activities are absolutely immunized from federal laws enacted pursuant to the commerce clause[58] or are only exempted from regulations which displace the states' ability to "structure" employer-employee relationships. The latter proposition requires drawing a second line, once an essential government function has been identified, between laws which interfere with the employment structure and those which do not.[59] Although a narrow reading of *National*

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[53] 426 U.S. at 852.

[54] 421 U.S. 542 (1975).

[55] 426 U.S. at 843, *quoting* Fry v. United States, 421 U.S. at 547 n.7.

[56] *Id.* at 845. The language is drawn from Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869) (power of taxation is an essential state function), *quoted in* Coyle v. Smith, 221 U.S. 559, 580 (1911). Justice Rehnquist quotes the *Coyle* Court's illustration of an "essentially and peculiarly" state power — the power to locate and appropriate public funds for a state capitol.

[57] 426 U.S. at 851 & n.16. The opinion does not identify a common denominator for these activities: "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 their political subdivisions have traditionally afforded their citizens." *Id.* at 855.

[58] The Court declined to decide whether Congress may affect integral state governmental operations under the spending power or section 5 of the fourteenth amendment. *Id.* at 852 & n.17. Federal intrusion may be permissible pursuant to the war power, *see* discussion of Case v. Bowles, 327 U.S. 92 (1946), at notes 99-100 and accompanying text *infra;* or in the context of a national emergency, *see* discussions of United States v. Fry, 421 U.S. 542 (1975), at notes 86-91 and accompanying text *infra*.

[59] In Elrod v. Burns, 96 S. Ct. 2673 (1976), the Court held that public employees, discharged as a result of the political patronage system of state employment, were deprived of constitutional rights secured by the first and fourteenth amendments. Chief Justice Burger argued in dissent that the decision interfered with legislative and policy matters better left to the States and to Congress at the federal level. He suggested that *National League's*

*League* would mean only that Congress cannot interfere with the wages and hours of employees carrying on essential and traditional state activities, most of the decision's language is cast in broader terms. The decision invokes the tenth amendment as a constitutional barrier against federal commerce clause regulations which disrupt the delivery of essential state services. It is unclear what federal legislation, other than wage-hour regulation, may be invalidated under this rationale.

In support of the concept of an enclave of immune state activities, Justice Rehnquist drew on precedents associated with the theory of implied intergovernmental tax immunity.[60] In attempting to limit the broad immunity of states from federal taxation, the Court had developed a distinction between a state's "governmental" activities, which enjoyed tax immunity, and its "proprietary" activities, which were subject to federal taxation.[61] *Helvering v. Gerhardt* [62] further restricted the states' reciprocal immunity, permitting it only where the function involved was "essential to the maintenance of a state government."[63] In *New York v. United States*,[64] which upheld a federal tax on the state's sale of its mineral waters, it was conceded that there was a limited area of tax-immune activities uniquely characteristic of the states, but the Court was divided in its analysis of the issue.[65] Nevertheless, the

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prohibition of federal "inroads on the powers of the States to manage their own affairs" should control the result in *Elrod*. *Id.* at 2690-91.

[60] Derived from Chief Justice Marshall's opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), this theory supported intergovernmental tax immunity until the late 1930's. *See* New York v. United States, 326 U.S. 572 (1946); Alabama v. King & Boozer, 314 U.S. 1 (1941); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939); Helvering v. Gerhardt, 304 U.S. 405 (1938); Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931); Collector v. Day, 78 U.S. (11 Wall.) 113 (1871). *See* McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C.L. REV. 485 (1973); Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633 (1945); Powell, *The Remnant of Tax Intergovernmental Immunities*, 58 HARV. L. REV. 757 (1945); Tribe, *supra* note 44.

[61] Helvering v. Powers, 293 U.S. 214 (1934) (state-operated street railway taxed); Ohio v. Helvering, 292 U.S. 360 (1934) (state liquor business taxed); South Carolina v. United States, 199 U.S. 437 (1905) (same).

[62] 304 U.S. 405 (1938).

[63] *Id.* at 417. If the activity could be carried on by a private enterprise, it did not qualify under *Gerhardt* as a function essential to the state as a governmental entity. The *Gerhardt* Court rejected the argument that the increased economic burden of federal taxation unconstitutionally infringed upon state sovereignty:

> Even though, to some unascertainable extent, the tax deprives the states of the advantage of paying less than the standard rate for the services which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states. At most it may be said to increase somewhat the cost of the state governments . . . .

*Id.* at 420.

[64] 326 U.S. 572 (1946).

[65] Justice Frankfurter, joined by Justice Rutledge, announced the opinion of the Court; Rutledge also filed a separate concurrence. Justice Stone, joined by Justices Reed, Murphy, and Burton, wrote a separate concurring opinion. Justice Douglas, joined by Justice Black, filed a dissenting opinion.

governmental-proprietary distinction was firmly rejected by a majority of the Court as an unworkable test.[66]

Even if the demarcation techniques of the intergovernmental tax immunity theory were agreed upon by the Court and capable of application, they were traditionally applied successfully only to exercises of the federal taxing power. Until *National League*, state claims to immunity from federal regulatory control under the commerce clause had not been accepted.[67] In *United States v. California*,[68] the leading case in this area prior to *National League*, a distinction was articulated between the federal taxing power, which is subject to a limited state immunity, and the federal commerce clause power, which is plenary. Upholding the application of the statutory penalties of the Federal Safety Appliance Act to a state-operated railway, the Court rejected the state's argument that it was immune from federal regulation when acting in a sovereign capacity.[69] Furthermore, the Court considered the analogy of state immunity to federal taxation to be inappropriate where commerce clause regulations are involved as in this case:

> [We] look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate Commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.[70]

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[66] Justice Frankfurter dismissed the governmental-proprietary distinction as "untenable" and argued that the tax immunity should be limited to sources of revenue "uniquely capable of being earned only by a State." 326 U.S. at 582-83. Justice Stone, whose opinon was relied upon by the majority in *National League*, 426 U.S. at 843 & nn.13-14, also rejected the governmental-proprietary distinction, but he suggested that even nondiscriminatory taxes applied equally to private persons and the state may unconstitutionally interfere with the state's performance of its sovereign functions. Justice Stone suggested, for example, that a nondiscriminatory property tax could not be applied to the state's capitol, its statehouse, its public school houses, or public parks. *Id.* at 587-88. This illustration is noted by Justice Rehnquist in the majority opinion in *National League*, 426 U.S. at 843. Justice Brennan, dissenting in *National League*, regarded New York v. United States, 326 U.S. 572 (1946), as inapposite, because it dealt with limitations applicable only to the federal taxing power and not to the commerce power, 426 U.S. at 863-64. Moreover, he argued that even the state's tax immunity was severely limited, in Justice Frankfurter's view, to taxes which discriminate against the states. *Id.* at 866 n.7.

[67] *See* Maryland v. Wirtz, 392 U.S. 183 (1968) (overruled in *National League*); Parden v. Terminal Ry., 377 U.S. 184 (1964), California v. Taylor, 353 U.S. 553 (1957), and United States v. California, 297 U.S. 175 (1936) (all harmonized in *National League*); Case v. Bowles, 327 U.S. 92 (1946) (distinguished in *National League*). *See* note 36 *supra*.

[68] 297 U.S. 175 (1936).

[69] The Court stated:

> The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.

*Id.* at 183-84.

[70] *Id.* at 185.

The Court relied upon the *California* analysis in *Maryland v. Wirtz*[71] in order to conclude that the 1966 FLSA Amendments permissibly subjected the states to the same restrictions applied to a wide range of private employers whose operations affect commerce. The *Wirtz* Court held that the federal government, pursuant to the delegated commerce power, "may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."[72] Provided that the law constitutes an otherwise valid regulation of commerce, the principle of *California* was held to be "controlling."[73]

While it rejected the *California* distinction between limitations on the federal taxing power and those on the commerce power,[74] the *National League* Court did not overrule *California*. Because state operation of a railroad was considered not to be within the immune sphere of integral state activities,[75] the distinction between the reach of the federal taxing and commerce powers became superfluous.[76] The Court construed the federal commerce power as limited by the same state sovereignty restraint tradition-

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[71] 392 U.S. 183, 197-98 (1968). *See* notes 17-20 and accompanying text *supra*.

[72] 392 U.S. at 195.

[73] *Id.* at 198. The Court concluded:

> This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens.

*Id.* at 198-99.

[74] The majority opinion stated: "[W]e have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from United States v. California simply wrong." 426 U.S. at 854-55, *citing* United States v. California, 297 U.S. at 185, *quoted* in text accompanying note 70 *supra*.

[75] *National League*, 426 U.S. at 854 n.18. The same reasoning is used by the *National League* majority to reconcile Parden v. Terminal Ry., 377 U.S. 184 (1964), and California v. Taylor, 353 U.S. 553 (1957), both of which applied the *California* rule. Some contrary language appears in *Parden*, however, where the Court held that by adopting and ratifying the commerce clause which empowered Congress to regulate commerce, the states "necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." 377 U.S. at 192. The state is subject to federal regulation equally with private persons if it engages in activity regulated by Congress and not within the sphere of "exclusively" state activities. *Id.* at 196-97. *See National League*, 426 U.S. at 870 n.11 & 871 (Brennan, J., dissenting).

[76] The distinction between the taxing and commerce powers was not "dicta" in the *California* opinion; in the face of the state's assertion that the railroad was a sovereign activity, the Court found that it was not necessary to decide whether the railroad was a sovereign activity or not because, in its view, even sovereign state activities must yield to valid regulations of interstate commerce. *California*, 297 U.S. at 183-84.

Other precedents sustaining the federal regulatory power against state claims to immunity were also dismissed by the *National League* Court. The irreconcilable holding and "reasoning" in *Wirtz* were overruled. 426 U.S. at 840, 853-54. Case v. Bowles, 327 U.S. 92 (1946), was distinguished as an exercise of the war power. *Id.* at 854 n.18.

ally applied to the federal taxing power,[77] and it applied the intergovernmental tax immunity precedents to support its result.

Although cases prior to *National League* had sharply distinguished the federal taxing and commerce powers in terms of state immunity, the legitimacy of the distinction has not been carefully analyzed. Federal exercises of both powers may involve serious interferences with the institutional autonomy and fiscal integrity of the states and may present similar problems in reconciling competing interests of the states and the federal government. There are perhaps justifiable, even though unarticulated, grounds for the majority's assimilation of the implications for federalism involved in these two powers. The majority opinion, however, does not offer a principled analysis of its realignment of precedents. Further, even if the taxing and commerce powers should be similarly construed in terms of their impact on state sovereignty, the Court did not satisfactorily explain why the controlling interpretation should be supplied by the intergovernmental tax immunity cases, which failed to develop any workable test for determining which state activities are properly subject to federal interference.[78] The rational basis review used in the commerce clause precedents provides as justifiable an approach while recognizing the institutional competence of Congress in resolving conflicts in the federal system.[79]

As an alternative to overruling *Wirtz,* the cities and states in *National League* argued that *Wirtz* might be limited to state activities in competition with the private sector, such as schools and hospitals, and that a different rule could be developed for essential government functions uniquely performed by the state, such as

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[77] The two immunities are held to be derived from a common source:

> Surely the federal power to tax is no less a delegated power than is the commerce power: both find their genesis in Art. I, § 8. Nor can characterizing the limitation recognized upon the federal taxing power as an "implied immunity" obscure the fact that this "immunity" is derived from the sovereignty of the States and the concomitant barriers which such sovereignty presents to otherwise plenary federal authority.

426 U.S. at 843-44 n.14.

[78] *See* note 161 and accompanying text *infra*. Justice Brennan criticized the majority's use of the intergovernmental tax immunity analogy concluding:

> That no precedent justifies today's result is particularly clear from the awkward extension of the doctrine of state immunity from federal taxation—an immunity conclusively distinguished by Mr. Justice Stone in *California*, and an immunity that is "narrowly limited" because "the people of all the states have created the national government and are represented in Congress," *Helvering v. Gerhardt* . . .—to fashion a judicially enforceable restraint on Congress' exercise of the commerce power that the Court has time and again rejected as having no place in our constitutional jurisprudence.

*Id.* at 869-70.

[79] *See* Tribe, *supra* note 44, at 700-13.

police and fire protection.[80] Such a restriction of *Wirtz* would have raised difficult questions concerning which state activities are in competition with the private sector. Declining to use this criterion, the *National League* Court overruled *Wirtz*. Thus, activities carried on competitively or concurrently by government and private parties may be drawn within the area of immunity, if performed by the state and qualifying as essential functions under *National League*, regardless of the state's competitive advantage in its freedom to pay substandard wages.

*National League* does not offer functional standards for determining which state functions are immune; the "essential," "traditional," and "governmental" categories have been used interchangeably to refer to an undefined sphere which the Court will have to more clearly delineate.[81] The historical standard of what functions have "traditionally" been performed by states is inadequate in identifying those functions that are essential to the states' separate existence. In an era of dynamically expanding governmental activity, "essential" state functions should be defined by flexible standards sensitive to shifting demands on state and local governments. Under the *National League* decision, however, the scope of protected state activities must be determined constitutionally by the courts, rather than politically by Congress.[82] In view of the failure of the *National League* Court to provide criteria for identifying immune state functions, applying the essential function test will necessarily involve policy judgments which will vary with individual justice's views of what is "essential" or "traditional."

### *B. An Ad Hoc Balancing Test?*

The *National League* majority mechanically defined state sovereign immunity in terms of the nature of the activity displaced by federal regulation without weighing the countervailing federal policy involved in the FLSA. Several factors suggest, however,

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[80] Brief for Appellant National League at 18, 26, and Brief for Appellant State of California at 45-47, *National League*, 426 U.S. 833 (1976). The district court had also noted the possibility of limiting *Wirtz* in this respect. National League v. Brennan, 406 F. Supp. 826, 827 (D.D.C. 1974).

[81] The difficulty of ascertaining immune state functions was recognized by Justice Rehnquist in Fry v. United States:

> It is conceivable that the traditional distinction between "governmental" and "proprietary" activities might in some form prove useful in such line drawing. The distinction suggested in New York v. United States . . . between activities traditionally undertaken by the State and other activities might also be of service, although it too was specifically rejected in *California*.

421 U.S. 542, 558 n.2 (1975) (Rehnquist, J., dissenting). *See also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974).

[82] *See* notes 43-44 and accompanying text *supra*.

that the *National League* test may be more flexible than a literal reading of the majority opinion might indicate.

The fifth vote required for a majority was supplied by Justice Blackmun,[83] who, in a separate concurrence, stated that he joined the opinion of the Court only with the understanding that the Court was adopting a "balancing approach." In his view, state sovereign immunity yielded to a paramount federal power in areas where the federal interest is greater and where state compliance with imposed federal standards is essential.[84] A balancing process, through which state immunity can be overridden, modifies the idea that federal regulation cannot pierce the "constitutional barrier" surrounding essential state functions. It is not clear, however, what standards would be used to identify a paramount federal interest.[85] The strong federal policy expressed in the wage-hour regulations of the FLSA of eliminating substandard labor conditions and disruptive labor disputes was apparently not a sufficiently important federal interest to displace state decisions as shown by the decision reached in *National League*.

Support for a balancing test is also found in *National League's* approval of *Fry v. United States*.[86] The Court in *Fry* upheld the application of federal wage and salary controls to state employees pursuant to the Economic Stabilization Act of 1970.[87] Unrestrained wage increases would have significantly affected interstate commerce and impaired the effectiveness of federal action to combat a nationwide economic problem. Holding that under the commerce clause Congress may regulate even purely intrastate activity where the aggregate impact of like conduct affects interstate commerce, the Court rejected the argument that the federal wage controls impermissibly interfered with sovereign state functions. The tenth amendment was held to prohibit only federal regulation which interferes with the states' "ability to function effectively in a federal system."[88]

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[83] 426 U.S. at 856 (Blackmun, J., concurring). *See* note 22 *supra*.

[84] *Id.* Justice Blackmun cited only one specific example—environmental protection.

[85] Justice Brennan, in dissent, criticized Justice Blackmun's balancing approach as a "thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress." *Id.* at 876 (Brennan, J., dissenting).

[86] *Id.* at 852-53. Justice Rehnquist filed a dissenting opinion in *Fry* calling for a reconsideration of United States v. California and Maryland v. Wirtz. 421 U.S. 542, 549-59 (1975) (Rehnquist, J., dissenting). The dissent is similar in structure and reasoning to his opinion for the Court in *National League*. Because Justice Rehnquist would have invalidated the *Fry* regulations on grounds similar to those articulated in *National League*, and because every other member of the *National League* majority approved the *Fry* result, the *Fry* case is an important key to the implications of the *National League* case. *See* notes 89-91 and accompanying text *infra*.

[87] Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (1970).

[88] 421 U.S. at 547-48. *See* notes 38-40 and accompanying text *supra*.

As construed in *National League*,[89] the result in *Fry* turned on three critical factors. First, the statute there was an emergency measure enacted to counter a national problem peculiarly susceptible to a federal solution. Second, the federal interference was temporary and only mildly intrusive on state interests. Third, the purpose and effect of the regulation was to relieve rather than increase the fiscal burdens on the states. Both *National League* and *Fry* dealt with commerce clause wage regulations directed at the state as an employer. Although *Fry* upheld a federal ceiling on state salaries, while *National League* involved the imposition of a minimum floor, both infringed upon the same prerogative of the states to structure pay scales.[90] These cases, however, are distinguishable on the grounds of the federal interest involved and the degree of federal intrusion on state interests. Taking *National League* in conjunction with *Fry*, it becomes apparent that the tenth amendment argument is, as Blackmun understood it, a question of balancing rather than a rigid demarcation of a protected state enclave. Accordingly, a national problem, which requires a uniform federal solution, and which does not displace legitimate state choices or impose disruptive financial burdens, may foreclose the tenth amendment issue, as it did in *Fry*.[91]

Although the extent to which the *National League* Court considered the degree of federal intrusion is unclear,[92] state financial burdens have usually been considered irrelevant where federal policy implementation is involved.[93] Although the majority opinion stated that resolution of the disputed cost issue is not critical to the decision,[94] it concluded that the financial cost of the FLSA

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[89] 426 U.S. at 852-53.

[90] It is difficult to draw a legitimate constitutional distinction between the federal power to prohibit wage increases and the federal power to force them above a minimum level.

[91] 421 U.S. at 548.

[92] *See* notes 45-47 and accompanying text *supra*.

[93] Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508, 528 (1941); Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 432 (1925); Brennan v. Iowa, 494 F.2d 100, 104 (8th Cir. 1974), *cert. denied*, 421 U.S. 1015 (1975); Briggs v. Sagers, 424 F.2d 130, 134 (10th Cir. 1970), *cert. denied*, 400 U.S. 829 (1970). *See also* the treatment of the increased economic burden of federal taxation in the United States v. City of Detroit, 355 U.S. 466, 469, 472 (1958); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 483-86 (1939); Helvering v. Gerhardt, 304 U.S. 405, 420-21 (1938).

In the context of eleventh amendment immunity from suit under the FLSA, the Court stated:

> Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States.

Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 284 (1973). *But cf.* Edelman v. Jordan, 415 U.S. 651, 664-65 (1974), *approving* Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973) (cost to state of retroactive payments for improperly withheld welfare funds balanced against, and found to outweigh, benefit to recipient).

[94] 426 U.S. at 846, 851. Justice Rehnquist stated that an "outline discussion" of the "general import" of the 1974 FLSA Amendments, rather than "particularized" assessments

Amendments amounted to a "significant impact."[95] In addition, the Court predicted other adverse effects, such as the curtailment of governmental services and the substantial restructuring of work periods and existing employment practices.[96] The *Fry* Court had suggested that some minimal threshold level of federal interference is tolerable, at least where reasonably related to a national problem requiring a federal solution. But the *National League* Court failed to analyze the precise impact of the FLSA Amendments, or even to consider such an inquiry necessary to its result leaving uncertain the quantum of federal interference necessary to trigger the tenth amendment.[97]

A further factor supporting a more flexible reading of the *National League* test is that the test applies only where an exercise of the commerce clause affronts state sovereignty. The Court expressed no view concerning whether the same result would be reached if Congress sought to interfere with state sovereign functions pursuant to the spending power or section 5 of the fourteenth amendment.[98] In distinguishing *Case v. Bowles*,[99] the Court also refused to address the scope of the federal war power.[100] While the

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of actual impact, was all that was necessary to show an impermissible federal instrusion. He maintained that, even under the federal government's assessments, the states' ability to structure employment relations was significantly displaced. *Id.* at 851.

[95] *Id.* at 846. Based on a 1970 feasibility study by the Department of Labor, Congress predicted the impact of the 1974 Amendments to be "virtually non-existent" in view of the overtime exemption for police and firemen, 29 U.S.C. § 207(j), (k) (Supp. V 1975). H.R. REP. No. 913, 93d Cong., 2d Sess. 29, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811, 2838. *See* note 52 *supra*. Justice Brennan argued in his *National League* dissent that the appellants' allegations exaggerated and misapplied the Amendments. 426 U.S. at 874 n.12. He further claimed tht the plurality's refusal to rely on the cost-of-compliance factor produced a broad rule capable of invalidating any federal regulation, however insignificant the cost. *Id.* at 874-75.

[96] 426 U.S. at 846-52.

[97] The briefs of the appellants proposed that the decision be made in a commerce clause context but that the court use a stricter standard of review than the traditional rational basis test. Brief for Appellant National League at 46-47, 96-108, and Brief for Appellant State of California at 23-24, *National League*, 426 U.S. 833 (1976). Under this view, the tenth amendment, construed as a fundamental right, would increase the burden on the government to justify the law by a compelling federal interest, analogous to the standard of judicial review of suspect classifications in equal protection cases. The *National League* majority opinion, however, pursued a different route to invalidation by avoiding the commerce clause altogether. The Court focused on the nature of the displaced state function, without specifying what burden must be borne by a state challenging a federal regulation or what legitimate state interests can override the congressional judgment.

[98] 426 U.S. at 852 n.17. For a discussion of section 5 of the fourteenth amendment *see* part V. B. *infra*.

[99] 327 U.S. 92 (1946).

[100] 426 U.S. at 854-55 n.18. The Court in *Case* upheld the application of the price restraints of the Emergency Price Control Act to the sale of timber by the state of Washington for the support of its public schools. The state argued that the federal war power did not extend to the state's exercise of "essential government functions," such as raising revenue for the support of education. 327 U.S at 101. The Court rejected this criterion as unworkable, citing United States v. California, 297 U.S. 175 (1936), and New York v. United States 326 U.S 572 (1946). Justice Black, writing for the majority, held that Congress has adequate power to accomplish the full purpose of a delegated power including all appropriate means

specific holding in *National League* is limited to an invalidation of commerce clause legislation, the opinion offers no logical grounds for precluding the extension of its tenth amendment analysis to exercises of other delegated powers. If the tenth amendment is an affirmative constitutional limitation on the commerce power, it is not clear why it would not be an equally effective limitation where a different federal constitutional power is asserted.

## IV. THE EQUAL PAY ACT AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT: BACKGROUND

### *A. The Equal Pay Act*

The Equal Pay Act of 1963[101] forbids sex discrimination in the payment of wages to employees in an enterprise engaged in commerce or in the production of goods for commerce. The EPA, enacted pursuant to the commerce clause, is based upon a congressional finding that sex-based wage differentials have a substantial, adverse impact on interstate commerce.[102] Adding to the FLSA a fair labor standard requiring equal pay for equal work,[103] the EPA is broadly remedial.[104] The EPA employs the remedies and en-

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plainly adapted to that end. *Id.* at 102. The Court considered the tenth amendment as not operating as a limitation upon the express or implied power granted to the federal government.

The Court in *National League* distinguished the war power involved in *Case* from the commerce clause power stating that to sustain state immunity in *Case* would " 'impair a prime purpose of the Federal Government's establishment.' " 426 U.S. at 855 n.18, quoting Case v. Bowles, 327 U.S. at 102. Justice Brennan, dissenting in *National League*, argued that *Case*, not the *New York* analysis of intergovernmental tax immunity, was the proper precedent for the questions presented in *National League*. *See* notes 64-66 and accompanying text *supra*.

[101] Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206 (1970)). 29 U.S.C. § 206(d)(1) (1970) provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .

[102] Section 2 of the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

[103] 29 U.S.C. § 206(d)(1) (1970).

[104] *See* Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973), *cert. denied*, 414 U.S. 822 (1973); Hodgson v. Square D Co., 459 F.2d 805 (6th Cir. 1972), *cert. denied*, 409 U.S. 967 (1972); Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972); Shultz v American Can Co.-Dixie Prod., 424 F.2d 356 (8th Cir. 1970); Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970), *cert. denied*, 398 U.S. 905 (1970); Shultz v. First Victoria Nat'l Bank, 420 F.2d 648 (5th Cir. 1969); Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 VAL. L. REV. 326 (1971); Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act 1963-70*, 39 U. CINN. L. REV. 615 (1970).

forcement procedures of the FLSA[105] but is limited to the FLSA coverage of employees entitled to the federal minimum wage.[106]

The purpose of the Equal Pay Act of 1963 is similar to that of Title VII of the 1964 Civil Rights Act.[107] Although there is an overlap in coverage, Title VII was not intended to preempt the EPA,[108] which continues to provide a narrower remedy for sex-based wage differentials.[109] The EPA is harmonious in purpose with Title VII and has been construed so as not to undermine the broader Act.[110] Title VII is not limited by the EPA's coverage, its definition of equal work, or its statutory exceptions.[111] Rather, it

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[105] 29 U.S.C. §§ 216-217 (1970 & Supp. V 1975). *See* note 9 *supra*. By tying the Equal Pay Act to the FLSA, Congress intended to take advantage of the established enforcement procedures and existing interpretations of the FLSA. H.R. REP. No. 309, 88th Cong., 1st Sess. 2-3, *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 687, 688.

[106] The extension of the coverage of FLSA effected by the FLSA Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830, and by the 1974 Amendments, Pub. L. No. 93-259, 88 Stat. 55, applied equally to the EPA.

[107] Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e-2000e-15 (1970 & Supp. V 1975)). Section 703(a), 42 U.S.C. § 2000e-2(a) (1970), provides that it shall be an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ."

[108] Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1970) deals specifically with the relationship to the EPA; a wage differentiation authorized by the EPA will not be considered an unlawful employment practice under Title VII. The Equal Employment Opportunity Commission's (EEOC) Sex Discrimination Guidelines state that the coverage of Title VII is broader than the EPA, which is limited by the reach of the FLSA. A defense based upon the EPA may be raised in a proceeding under Title VII, in which case the EEOC will give appropriate consideration to, but will not be bound by, the Department of Labor's interpretation of the EPA. 29 C.F.R. § 1604.8 (1975). *See* Piva v. Xerox Corp., 376 F. Supp. 242 (N.D. Cal. 1974); Herbert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U.L. REV. 449, 450 (1971); Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HAST. L.J. 305, 344 (1968); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 885 (1972). *See also* Larson, *Remedies for Racial Discrimination in State and Local Government Employment: A Survey and Analysis*, 5 COLUM. HUMAN RIGHTS L. REV. 335, 345-46 (1973).

[109] Sape & Hart, *supra* note 108, at 851. The EPA initially enjoyed more effective remedies than those provided for Title VII, but the 1972 Amendments to the Civil Rights Act have minimized the differences by providing more effective enforcement powers for the EEOC under § 706, the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-5 (Supp. V 1975)).

[110] *E.g.*, Shultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970), where the court stated that the EPA and Title VII are "in pari materia," both serving the same fundamental purpose, with the result that the exceptions to the EPA should be broadly construed so as not to undermine Title VII. Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166, 170 (5th Cir. 1975), *cert. denied*, 423 U.S. 865 (1975); Ammons v. ZIA Co., 448 F.2d 117, 119 (10th Cir. 1971); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 727 (5th Cir. 1970); Shultz v. First Victoria Nat'l Bank, 420 F.2d 648, 658-59 (5th Cir. 1969). Kanowitz, *supra* note 108, at 350; Landau & Dunahoo, *Sex Discrimination in Employment: A Survey of State and Federal Remedies*, 20 DRAKE L. REV. 417, 497-99 (1971).

An example of the close interrelationship between the EPA and Title VII is provided in the recent Supreme Court decision in General Elec. Co. v. Gilbert, 45 U.S.L.W. 4031 (Dec. 7, 1976). The Court stated that interpretations of the EPA are applicable to Title VII and further suggested that, in construing Title VII, the legislative history and interpretive regulations of the EPA take precedence over more recent EEOC Guidelines interpreting Title VII.

[111] 29 U.S.C. § 206(d)(1) (1970); *see* note 101 *supra*.

establishes an independent statutory remedy[112] which covers more types of discrimination.

### *B. The Age Discrimination in Employment Act*

The Age Discrimination in Employment Act of 1967[113] prohibits employers, employment agencies, and labor unions from discriminating on the basis of age against individuals between the ages of forty and sixty-five in matters of hiring, job retention, compensation, and other terms and conditions or privileges of employment. The purpose of the Act is to promote the employment of older persons on the basis of their ability rather than age, to prohibit arbitrary age discrimination in employment, and to assist employers and workers in dealing with the problems arising from the impact of age on employment.[114] Like the EPA, the ADEA was enacted pursuant to commerce clause authority and is based on legislative findings that arbitrary age discrimination "burdens commerce and the free flow of goods."[115] The ADEA is enforced in accordance with the powers, remedies, and procedures provided in the FLSA.[116]

Although age discrimination was not prohibited in Title VII,[117] the ADEA parallels Title VII in its fundamental purpose to ensure and promote employment without regard to arbitrary criteria. There are also a number of structural similarities between the two statutes.[118] Accordingly, the courts have used Title VII precedents to construe the provisions of the ADEA.[119]

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[112] H.R. REP. No. 238, 92d Cong., 1st Sess. 18-19, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2154; Piva v. Xerox Corp., 376 F. Supp. 242 (N.D. Cal. 1974); Herbert & Reischel, *supra* note 108, at 450-51.

[113] Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975)).

[114] 29 U.S.C. § 621(b) (1970).

[115] 29 U.S.C. § 621(a) (1970).

[116] 29 U.S.C. § 216 (1970 & Supp. V 1975). *See* note 9 *supra*. Before suit can be brought, however, the statute requires that an attempt at voluntary compliance be made by the Secretary of Labor through informal methods of conciliation, conference, and persuasion. 29 U.S.C. § 626(b) (1970). *See* Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974).

[117] Section 715 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-14 (1970), authorized the Secretary of Labor to investigate and make specific recommendations concerning age discrimination in employment. The report, *The Older American Worker—Age Discrimination in Employment*, submitted June 30, 1965, documented widespread age discrimination. The ADEA was passed December 6, 1967. H.R. REP. No. 805, 90th Cong., 1st Sess. 1-2, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2214.

[118] The court in Hodgson v. First Fed. Sav. & Loan Ass'n, 445 F.2d 818, 820 (5th Cir. 1972), noted, "With a few minor exceptions the prohibitions of this enactment are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that 'age' has been substituted for 'race, color, religion, sex, or national origin.' " *Accord,* Morelock v. NCR Corp., 14 FEP Cases (BNA) 65-68 (6th Cir. 1976); Burgett v. Cudahy Co., 361 F. Supp. 617, 620 (D. Kan. 1973).

[119] *See, e.g.,* Hiscott v. General Elec. Co., 521 F.2d 632 (6th Cir. 1975), Burgett v. Cudahy Co., 361 F. Supp. 617 (D. Kan. 1973), and Blankenship v. Ralston Purina Co., 62

## V. THE EFFECT OF THE HOLDING IN *NATIONAL LEAGUE* ON THE APPLICATION OF THE EPA AND THE ADEA TO THE STATES

### *A. Remaining Validity under the Commerce Clause*

The decision in *National League* invalidated the minimum wage and maximum hours provisions of the 1974 FLSA Amendments insofar as they interfered with essential state functions. While *National League* does not seem to limit the FLSA, the EPA, and the ADEA where nonessential or nontraditional governmental activities are involved, it is not clear how the decision will affect the application of the EPA and the ADEA to essential state functions. The Court did not discuss either the EPA or the ADEA,[120] and it is submitted here that, unlike the FLSA wage-hour regulations involved in *National League*, the extension of the EPA and the ADEA to essential state functions should not be invalidated under the *National League* rationale.

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F.R.D. 35 (N.D. Ga. 1973) (cases construing the provision requiring notice of intent to sue, 29 U.S.C. § 626(d) (1970) of ADEA and 42 U.S.C. § 2000e-5(b)-(f) (Supp. V 1975) of Title VII). Courts have also used Title VII precedents to construe the bona fide occupational qualification (BFOQ) exception of the ADEA. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976); Hodgson v. Greyhound Lines, Inc., 449 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). Concerning the right to a jury trial in ADEA cases, *see* Morelock v. NCR Corp., 14 FEP Cases (BNA) 65 (6th Cir. 1976). The burden of proof established in Title VII actions is also used widely in ADEA actions. Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972); Bishop v. Jelleff Assoc., 398 F. Supp. 579 (D.D.C. 1974). *Cf.* Laugeson v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975) (unwilling to apply Title VII burden of proof automatically to ADEA jury trial).

The ADEA and Title VII have been similarly construed. *See* Levien, *The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments*, 13 DUQ. L. REV. 227, 247 (1974); Note, *Age Discrimination in Employment: Available Federal Relief*, 11 COLUM. J. LAW & SOC. PROB. 281, 289, 295-96, 301-03, 308 (1975); Note, *Procedural Aspects of the Age Discrimination in Employment Act of 1967*, 36 U. PITT. L. REV. 914, 922, 926-27 (1975); Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311, 1328 (1974).

In several respects the ADEA is a more limited remedial statute than Title VII. It has more liberal bona fide seniority and merit exceptions, 29 U.S.C. § 623(f) (1970), and it applies only to persons in the 40-65 age group, 29 U.S.C. § 631 (Supp. V 1975). *See* Weiss v. Walsh, 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd mem.*, 461 F.2d 846 (2d Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973); Note, *Age Discrimination in Employment: The Problem of the Worker Over Sixty-Five*, 5 RUT.-CAM. L.J. 484 (1974). While the purpose of the ADEA is generally viewed as similar to that of Title VII, some courts have differentiated the two acts by giving the procedural aspects of the ADEA a less liberal construction. *See, e.g.*, Edwards v. Kaiser Alum. & Chem. Sales, Inc., 515 F.2d 1195 (5th Cir. 1975); Powell v. Southwestern Bell Tel. Co., 494 F.2d 485 (5th Cir. 1974); Hiscott v. General Elec. Co., 521 F.2d 632 (6th Cir. 1975); Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380 (1976); Note, *State Deferral of Complaints Under the Age Discrimination in Employment Act*, 51 NOTRE DAME LAW. 492 (1976) [hereinafter cited as *State Deferral of Complaints*].

[120] The appellants broadly framed their challenge to include the EPA and ADEA, but the issues presented by these acts were never argued. The opinion of the three-judge district court also did not mention the EPA and the ADEA. National League of Cities v. Brennan, 406 F. Supp. 826 (D.D.C. 1974).

Several federal district courts have considered the question whether *National League* restricts federal power to require state compliance with the EPA[121] and the ADEA.[122] These courts have uniformly upheld the constitutionality of applying these acts to state employees, either as independent assertions of the federal commerce power, severable from the wage-hour regulations of FLSA,[123] or as valid congressional implementations of the fourteenth amendment.[124] These cases have involved hospitals, universities, or school districts, all of which are expressly immunized from FLSA wage-hour regulations under the essential state function test of *National League*.[125]

The *National League* opinion suggests that the sovereign state rights it protects may be narrowly defined:

> 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. The question we must resolve, then, is whether these determinations are "functions essential to separate and independent existence," . . . so that Congress may not abrogate the States' otherwise plenary authority to make them.[126]

It is not entirely clear whether the *National League* decision protects the states from federal regulation where they are engaged in delivering essential services or where they are determining wage rates and hourly schedules in state employment. It appears to

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[121] Usery v. Allegheny County Hosp. Dist., 13 FEP Cases (BNA) 1188 (3d Cir. 1976); Brown v. County of Santa Barbara, 45 U.S.L.W. 2351 (C.D. Cal. Jan. 14, 1977); Usery v. Dallas Independent School Dist., 22 WH Cases (BNA) 1377 (N.D. Tex. Oct. 19, 1976); Usery v. University of Texas at El Paso, 22 WH Cases (BNA) 1388 (W.D. Tex. Oct. 14, 1976) (motion to dismiss denied); Usery v. Washoe County School Dist., 22 WH Cases (BNA) 1373 (D. Nev. Oct. 14, 1976) (motion to dismiss denied); Usery v. Fort Madison Community School Dist., No. C-75-62-1 (S.D. Iowa Sept. 1, 1976) (motion to dismiss denied); Usery v. Bettendorf Community School Dist., 13 FEP Cases (BNA) 634 (S.D. Iowa Sept. 1, 1976) (motion to dismiss denied); Usery v. Charleston County School Dist., No. 76-249 (D.S.C. Aug. 25, 1976) (motion to dismiss denied); Usery v. Sioux City Community School Dist., No. C-76-4024 (N.D. Iowa Aug. 20, 1976)(motion to dismiss denied); Christensen v. Iowa, 13 FEP Cases (BNA) 161 (N.D. Iowa Aug. 4, 1976) (motion to dismiss denied).

[122] Usery v. Board of Educ. of Salt Lake City, 13 FEP Cases (BNA) 717 (D. Utah Sept. 1, 1976); Riley v. University of Lowell, Civ. No. 76-1118-M (D. Mass, July 22, 1976) (motion to dismiss denied).

[123] The severability provision of the FLSA, 29 U.S.C. § 219 (1970) provides: "If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby."

[124] *See* part V. B. *infra*.

[125] 426 U.S. at 855.

[126] *Id.* at 845-46.

immunize certain employment decisions, such as wages and hours, within certain state functions characterized as essential or traditional. The Court relies only upon examples of the disruptive effect of federal wage-hour regulation in reaching the conclusion that the FLSA Amendments impose a substantial fiscal burden and displace state employment decisions.[127] The opinion did not consider whether employment discrimination in essential state functions is a sovereign right included within the Court's immunization of "accepted employment practices"[128] or "considered policy choices"[129] of the states.[130]

If *National League* is viewed as creating an ad hoc balancing test, in which the degree of federal intrusion and the federal policy implemented by the regulation are weighed against the state interest involved,[131] the particular balance struck in *National League* between wage-hour regulations and states' fiscal and governmental integrity may be distinguished from the balance implicated in the application of EPA and ADEA to the states.[132] Even if these acts are potentially disruptive of state sovereignty under the *National League* rationale, the degree of interference and the particular interests involved should shift the balance in favor of upholding their applicability to the states.[133]

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[127] *Id.* at 845-52.

[128] *Id.* at 850.

[129] *Id.* at 848.

[130] In Christensen v. Iowa, 13 FEP Cases (BNA) 161, 163 (N.D. Iowa Aug. 4, 1976), the court stated that sex discrimination should not be included within any of the court's formulations of immunized state activities because the right to discriminate is not a "fundamental employment decision," an "attribute of sovereignty," or a "function essential to separate and independent existence of the states." *See* Brown v. County of Santa Barbara, 45 U.S.L.W. 2351, 2352 (C.D. Cal. Jan. 14, 1977); Usery v. University of Texas at El Paso, 22 WH Cases (BNA) 1388, 1389 (W.D. Tex. Oct. 14, 1976); Usery v. Bettendorf Community School Dist., 13 FEP Cases (BNA) 634, 635 (S.D. Iowa Sept. 1, 1976). The court in Usery v. Dallas Independent School Dist., 22 WH Cases (BNA) 1377, 1377-79 (N.D. Tex. Oct. 19, 1976), stressed the independent integrity of the EPA, the fact that it was passed separately and was based on a distinct legislative history, and the fact that the FLSA provides for the severability of its provisions, concluding that the state actions protected by *National League* are limited to "internal, administrative, management or housekeeping functions," such as wage-hour decisions. *Id.* at 1379. *See* Usery v. Allegheny County, 13 FEP Cases (BNA) at 2252.

[131] *See* part III. B. *supra.*

[132] The failure of the majority opinion to expressly adopt a balancing approach leaves obscure the question of what standards would be used if it did. The only guide to predicting what types of federal regulation could override state sovereign immunity is the Court's analysis of *Fry* and its subsequent decision in Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976), discussed at notes 144-48 and accompanying text *infra.*

[133] *See, e.g.,* Usery v. Dallas Independent School Dist., 22 WH Cases (BNA) 1377, 1379-80 (N.D. Tex. Oct. 19, 1976), where the court suggested that a substantial federal intrusion is required to justify tenth amendment immunity and that the state interest may be overridden by a strong federal interest. The EPA's interference with the sovereignty of a state employer is justified under the balancing process suggested by the *National League* endorsement of *Fry,* 426 U.S. at 852-53, and by Justice Blackmun's concurring opinion, 426 U.S. at 856. The court in Usery v. Board of Educ. of Salt Lake City, 13 FEP Cases (BNA)

Although linked to the FLSA to facilitate enforcement, the EPA and the ADEA were enacted separately from the FLSA and were based upon independent congressional assessments of the adverse impact of sex and age discrimination in employment. The EPA and the ADEA reflect a strong federal policy against employment discrimination, analogous to the policy pursued in Title VII.[134] These acts should not be included in the *National League* invalidation of the FLSA Amendments, especially in view of the absence of any specific reference to them by the Court and the differing federal interests involved.[135] The impact on state budgetary priorities is less severe with the EPA and the ADEA than with the FLSA requirements of a floor on all wages paid and a minimum rate for overtime. These acts do not require a restructuring of "work patterns" in the sense used in the *National League* opinion. The references in the opinion to the protected state right to "structure" employment relations are illustrated by examples of the conflict between FLSA wage-hour regulations and various local alternatives to the minimum wage and premium overtime. The effect of federal preemption of state decisions in this area is either to impose a substantial economic burden on state governments or to force relinquishment of important governmental activities. The purpose and effect of the EPA and the ADEA are distinguishable under this rationale. These acts require only that the terms and conditions of employment chosen by the states be extended equally to all employees regardless of age or sex.[136] Like the wage controls

717, 718 (D. Utah Sept. 1, 1976), similarly construed *National League* to require a balancing approach permitting the significant federal interest incorporated in the ADEA to override a state claim of immunity. An "absolute interpretation" which insulates essential state functions from any federal intrusion would undermine congressional power to protect statutorily individual employment rights.

[134] *See* part IV. *supra. See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971); Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970); Civil Rights Act of 1964, S. REP. NO. 872, 88th Cong., 2d Sess. 8-24, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355, 2362-77; Equal Employment Opportunity Act of 1972, H.R. REP. NO. 238, 92d Cong., 1st Sess. 3-5, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS. 2137, 2139-41, 2152-54.

[135] *See* Usery v. Dallas Independent School Dist., 22 WH Cases (BNA) 1377, 1378 (N.D. Tex. Oct. 19, 1976), where the court stated: "While *National League of Cities* does effect a modest resurrection of state sovereignty, this court doubts in the absence of any further indication from the Supreme Court, that *National League of Cities* is intended to generally and fundamentally alter the balance of state and federal powers."

[136] The court in Usery v. Board of Educ. of Salt Lake City, 13 FEP Cases (BNA) 717, 719 (D. Utah Sept. 1, 1976), argued that the "minimal" degree of intrusion involved in compliance with the ADEA is a factor in the balancing process. The ADEA "imposes a limited negative obligation on the state employer not to arbitrarily use age as an employment criterion, however the remaining criteria may be structured, rather than an affirmative obligation to totally restructure an integral state operation." *Id.* at 719. It also distinguished the ADEA from wage-hour regulations as merely an "indirect" intrusion, not a direct displacement of state employment relations prohibited under *National League*. *Id.*

upheld in *Fry*, the fiscal burden, the interference with the state prerogative to determine employment relations, and the federal policy implicated in the EPA and the ADEA distinguish these acts from the wage-hour regulations invalidated in *National League*. The decision's rationale supporting state freedom to fashion flexible alternatives to the wage-hour structure of FLSA does not justify discretion at the state or local level to discriminate in public employment on the basis of age or sex.[137]

While the EPA and the ADEA are distinguishable from the wage-hour regulations specifically invalidated in *National League*, the majority's sweeping rationale has disturbing implications. Even if the *National League* decision cannot be read to invalidate the application of these acts to state employees, a more difficult question is whether the construction given the tenth amendment by the majority will be applied in other contexts to limit the reach of federal legislation. If the tenth amendment functions as an affirmative limitation on federal regulations which disrupt either state fiscal determinations or state policy choices, the theory of *National League* could logically be developed to reach a wide range of federal legislation. In fact, the Court's rationale could even be applied to the EPA and the ADEA though their antidiscrimination standards arguably intrude less on the states' prerogative to structure employment relations than the wage-hour provisions of the FLSA. The difficulty with the *National League* decision is that it fails to adequately analyze the nature or degree of constitutionally

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[137] The appellant cities and states in *National League* made only one reference to the ADEA in their brief. Citing ADEA § 633(a), 29 U.S.C. § 633(a) (1970), they suggested that this provision explicitly recognizes the desirability of federal-state cooperation in age discrimination cases. Brief for Appellant National League at 75-76, *National League*, 426 U.S. 833 (1976). Section 633 provides:

> (a) Federal action superseding State action.
>
> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.
>
> (b) Limitation of Federal action upon commencement of State proceedings.
>
> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . .

Some courts have interpreted § 633 as a mandatory requirement of deferral to available state remedies. Goger v. H.K. Porter Co., 492 F.2d 13 (3d Cir. 1974); Vaughn v. Chrysler Corp., 382 F. Supp. 143 (E.D. Mich. 1974). This result is not based on the view that age discrimination is peculiarly within the competence of the states or that the federal act infringes upon state sovereignty, but rather upon an analogy between § 633(b) and 42 U.S.C. § 2000e-5(c) (Supp. V 1975) of Title VII. *See* Note, *State Deferral of Complaints*, *supra* note 119. Title VII does not have a literal counterpart to § 633(a). Although 42 U.S.C. § 2000e-7 (1970) is similar, the ADEA provision more explicitly provides for federal preemption of state laws.

impermissible intrusion and it fails to expressly adopt a balancing approach for resolving conflicting state and federal interests.

### *B. Section 5 of the Fourteenth Amendment*

A number of courts have suggested that an alternative ground for sustaining the application of the EPA and the ADEA to the states is the congressional power to enact appropriate enabling legislation to guarantee equal protection of the laws pursuant to section 5 of the fourteenth amendment.[138] Because *National League* applied the tenth amendment limitation only to legislation enacted pursuant to the commerce clause, it is suggested that the EPA and the ADEA continue to be fully enforceable against the states because they instead are supported by the grant of power to Congress in section 5. This argument is based upon an analogy between these acts and Title VII and upon the fact that congressional reliance on section 5 to extend Title VII to state employers has been held to foreclose state claims to sovereign immunity under the eleventh amendment.[139]

The fourteenth amendment restructured federal-state relations by direct restrictions on state power and by a specific grant of authority to Congress to enforce its prohibitions by appropriate legislation.[140] This delegation of federal power has been interpreted as vesting in Congress a broad choice of means to effectuate the purposes and policies of the amendment. Legislation enacted pursuant to section 5 enjoys a presumption of validity so that Congress' resolution of competing federal, state, and individual interests is valid if there is a rational basis for it.[141]

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[138] Usery v. Allegheny County Hosp. Dist., 13 FEP Cases (BNA) 1188 (3d Cir. 1976); Brown v. County of Santa Barbara, 45 U.S.L.W. 2351 (C.D. Cal. Jan. 14, 1977); Usery v. Dallas Independent School Dist., 22 WH Cases (BNA) 1377 (N.D. Tex. Oct. 19, 1976); Usery v. Washoe County School Dist. 22 WH Cases (BNA) 1373 (D. Nev. Oct. 14, 1976); Usery v. Bettendorf Community School Dist., 13 FEP Cases (BNA) 634 (S.D. Iowa Sept. 1, 1976); Usery v. Board of Educ. of Salt Lake City, 13 FEP Cases (BNA) 717 (D. Utah Sept. 1, 1976).

[139] The Civil Rights Act of 1964 was enacted pursuant to the commerce clause, but the legislative history of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972), which extended the coverage of the Civil Rights Act to state and local governments, expressly relied upon the congressional power granted in the enabling clauses of the thirteenth and fourteenth amendments. H.R. REP. NO. 238, 92d Cong., 1st Sess. 19, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2154. Because it does not depend solely on the commerce power, the extension of Title VII is unaffected by *National League's* tenth amendment analysis.

[140] Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976); Mitchum v. Foster, 407 U.S. 225, 238-39 (1972); Katzenbach v. Morgan, 384 U.S. 641, 648 (1966); *Ex parte* Virginia, 100 U.S. 339, 345-46, 348 (1879). *See also* Gomillion v. Lightfoot, 364 U.S. 339 (1960), interpreting the effect of the fifteenth amendment on state sovereignty: "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Id.* at 347.

[141] In Katzenbach v. Morgan, 384 U.S. 641 (1966), the scope of section 5 was given a

The Equal Employment Opportunity Act of 1972[142] extended the coverage of Title VII to state and local governments two years before the FLSA was amended to reach state employers. Although the 1964 Civil Rights Act was enacted pursuant to the commerce clause and reached the private sector, the 1972 Act was expressly based upon the congressional power to implement the thirteenth and fourteenth amendments.[143]

The Court in *Fitzpatrick v. Bitzer*[144] upheld congressional power under section 5 to authorize a private right of action and monetary damages for sex discrimination against a state employer under the 1972 Amendments to Title VII. In an opinion written by Justice Rehnquist, the Court ruled that the eleventh amendment does not preclude a backpay award, because the principle of sovereignty embodied in that amendment is "necessarily limited"[145] by the enforcement provisions of section 5 of the fourteenth amendment. The Court's rationale was based upon a liberal interpretation of the power of Congress to intrude on state sovereignty when acting pursuant to section 5, and it appears to be equally valid in restricting state claims to immunity under the tenth amendment. The *Fitzpatrick* Court did not consider whether Title VII is a legitimate exercise of congressional authority under section 5 of the fourteenth amendment,[146] noting, however, that Congress may, "in

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construction similar to the broad interpretation given the necessary and proper clause in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). 384 U.S. at 650. Section 5 is a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 651. *See* Oregon v. Mitchell, 400 U.S. 112, 141-43 (1970) (Douglas, J., dissenting and concurring), 248-49 (Brennan, J., dissenting and concurring); United States v. Guest, 383 U.S. 745, 761-62 (1966) (Clark, J., concurring), 782-84 (Brennan, J., concurring); *Ex parte* Virginia, 100 U.S. 339, 346 (1879). *See also* the liberal construction of section 2 of the fifteenth amendment in South Carolina v. Katzenbach, 383 U.S. 301, 324-27 (1966).

[142] Pub. L. No. 92-261, 86 Stat. 103 (amending the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-15 (1970)). The constitutionality of this extension in coverage was upheld against a state challenge based on the eleventh amendment immunity to suit in Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976). *See* notes 144-48 and accompanying text *infra*. *See* Singer v. Mahoning County Bd. of Mental Retard., 10 Empl. Prac. Dec. (CCH) ¶ 10,287 (6th Cir. 1975); Gilliam v. Omaha, 524 F.2d 1013 (8th Cir. 1975); Henry V. Link, 12 Empl. Prac. Dec. (CCH) ¶ 10,992 (D.N.D. March 16, 1976); United States v. Milwaukee, 10 Empl. Prac. Dec. (CCH) ¶ 10,385 (E.D. Wis. June 25, 1975).

[143] H.R. REP. No. 238, 92d Cong., 1st. Sess. 19, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2154, states:

> The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.

[144] 96 S. Ct. 2666 (1976).

[145] *Id.* at 2671.

[146] *Id.* at 2671 n.11. The district court's finding that the state violated Title VII was not appealed. The Court was presented only with the eleventh amendment issue as to the

determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the fourteenth amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.''[147] According to the *Fitzpatrick* Court, the substantive provisions of the fourteenth amendment were specifically intended to restrict state powers with section 5 expressly authorizing congressional action to enforce its terms. Distinguishing *National League,* the Court stated that congressional authority is broader under the fourteenth amendment than under the commerce clause and is not similarly restricted by state sovereign immunity.[148]

The Court in *Fitzpatrick* suggested that when Congress seeks to protect federally-created rights by directly regulating state actions, as distinct from displacing the states' ability to regulate private parties, section 5 may furnish a stronger constitutional basis for congressional power than the commerce clause.[149] Nevertheless, the scope of congressional power to define and to remedy substantive violations of the fourteenth amendment as well as to preempt

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appropriate remedy and not with the question as to whether the application of Title VII to the states violates the tenth amendment. The Court stated, 96 S. Ct. at 2670 n.9, that the 1972 Amendments to Title VII were unquestionably an exercise of congressional power under section 5 with the practical effect of the decision being to grant full relief on the Title VII cause of action.

[147] *Id.* at 2671.

[148] The Court relied upon *Ex parte* Virginia, 100 U.S. 339 (1879), South Carolina v. Katzenbach, 383 U.S. 301 (1966), and Mitchum v. Foster, 407 U.S. 225 (1972), in support of its view that the fourteenth amendment altered federal-state relations, expanding the one and necessarily contracting the other. 96 S. Ct. at 2671. In separate concurring opinions, Justices Brennan and Stevens both expressed the view that the commerce clause is broad enough to sustain Title VII rights and remedies without express reliance on section 5. *Id.* at 2672 (Brennan, J., concurring), at 2672-73 (Stevens, J., concurring).

[149] The Court in *National League* declined to consider whether legislation pursuant to section 5 is subject to the tenth amendment limitation. 426 U.S. at 852 n.17. The *Fitzpatrick* opinion does not offer a satisfactory constitutional explanation for the significant distinction between the plenary scope of congressional power under section 5 and the more limited scope of the commerce clause. With respect to the private sector, the commerce clause has provided a more effective basis for legislation prohibiting discrimination because it avoids the state action requirement of the fourteenth amendment. The landmark cases upholding Title II of the Civil Rights Act of 1964 relied upon the commerce clause without reaching the question whether section 5 presented an alternative ground. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). *See also* Daniel v. Paul, 395 U.S. 298 (1969), upholding Title II of the Civil Rights Act of 1964 as a valid commerce regulation. Justice Black, dissenting, argued that the public accommodations provision was invalid under the commerce clause but could be upheld, in his view, if Congress had relied upon section 5 of the fourteenth amendment. 395 U.S. at 309 (Black, J., dissenting).

Justice Stevens, concurring separately in *Fitzpatrick,* argued that Title VII is more properly justified by the commerce power, rather than the fourteenth amendment, despite specific congressional reliance on section 5:

> [I] do not believe plaintiffs proved a violation of the Fourteenth Amendment, and because I am not sure that the 1972 Amendments were "needed to secure the guarantees of the Fourteenth Amendment," see *Katzenbach v. Morgan,* . . . I question whether section 5 of that Amendment is an adequate reply to Connecticut's Eleventh Amendment defense.

96 S. Ct. at 2672.

existing state laws, absent a judicial determination that certain conduct violates that amendment, has not been completely resolved by the Court.[150] While it has been held that congressional enactments pursuant to section 5 will be subject to only limited judicial review to determine a rational basis for the legislation,[151] this deference to the legislative judgment presumes that Congress actually decided that the legislation was, in its view, necessary to secure the guarantees of the fourteenth amendment. The most serious weakness of the argument that section 5 provides an alternative ground for sustaining the EPA and the ADEA is that Con-

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[150] *See generally* Cohen, *supra* note 44; Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971); Fiss, *The Fate of An Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after Brown v. Board of Education*, 41 U. CHI. L. REV. 742 (1974); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964).

A majority of the Court in United States v. Guest, 383 U.S. 745 (1966), concluded that Congress had power under section 5 to prohibit all conspiracies to interfere with fourteenth amendment rights, with or without state action. *Id.* at 745, 761-62 (Clark, J., concurring), at 782-84 (Brennan, J., concurring and dissenting). Justice Brennan stated that section 5 is a "positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens." *Id.* at 784. The Court in Katzenbach v. Morgan, 382 U.S. 641 (1966), held that Congress could displace an inconsistent state law by appropriate legislation to enforce the equal protection clause, absent a prior judicial determination that the precluded state law actually violated the amendment. Section 5 authorizes Congress to employ any means appropriately adapted to implement the fourteenth amendment and it will be sustained on review if the judiciary can perceive a rational basis for it. *Id.* at 650-53. For a similar analysis of section 2 of the fifteenth amendment, *see also* South Carolina v. Katzenbach, 383 U.S. 301, 325-27 (1966). *But see* Oregon v. Mitchell, 400 U.S. 112 (1970), where a majority of the Court held that Congress had no power under the fourteenth amendment to lower the voting age in state elections because qualifications for voting are expressly reserved to the states. There are five separate opinions in *Oregon*, and it is difficult to say to what extent the case narrows *Morgan's* construction of congressional power to legislate in the area of equal protection. In Mitchum v. Foster, 407 U.S. 225 (1972), the Court interpreted 42 U.S.C. § 1983 (1970), enacted pursuant to section 5. The Court stated that Congress intended to fundamentally alter the relations between the states and the national government with the result that Congress' role as a guarantor of federally-created rights against state power was clearly established. 407 U.S. at 238-42.

In Washington v. Davis, 426 U.S. 229 (1976), the Court held that the standards applicable to Title VII cases should not be applied to determine whether allegedly racially discriminatory employment testing violated the due process clause of the fifth amendment. Statutory causes of action involve a different burden of proof and a "more probing judicial review of, and less deference to, the seemingly reasonable acts" of government officials. 426 U.S. at 247. The case clearly recognizes that Congress can statutorily define more rigid standards in prohibiting employment discrimination than would a court applying traditional equal protection review. Congress, acting through Title VII, could create a cause of action and a remedy for violation of a constitutionally-protected right where none had previously existed. *Cf.* General Elec. Co. v. Gilbert, 45 U.S.L.W. 4031 (Dec. 7, 1976), holding that a private employer's disability plan which excluded pregnancy-related benefits did not violate Title VII. The majority opinion suggests that the legislative standard of Title VII may be construed by reference to judicial interpretations of the equal protection clause, in particular the decision upholding exclusion of pregnancy benefits in a state-operated disability plan, Geduldig v. Aiello, 417 U.S. 484 (1974). 45 U.S.L.W. at 4033, 4034. The *General Electric* decision did not displace a specific congressional determination that this type of disability plan violates equal protection. Rather, it overruled the administrative interpretation of the relevant Title VII provision and construed the Act by relying on the judicial interpretation in *Aiello* that exclusion of pregnancy benefits does not create a sex-based classification.

[151] *See* notes 140-41 and accompanying text & note 149 *supra*.

gress did not expressly rely on section 5 in extending the coverage of these acts to the states.

Originally intended only to reach the private sector and linked to the coverage of the FLSA, the acts were extended to the states by the 1974 FLSA Amendments[152] which relied on the connection between state governmental activities and interstate commerce. Although the federal district courts which have sustained the EPA and the ADEA on section 5 grounds have not been troubled by the failure of Congress to expressly rely on that source of power,[153] there is no reason to assume that the Court will necessarily infer a congressional intention to invoke section 5. Moreover, the *National League* decision reflects an activist judicial attitude toward the role of the Supreme Court in displacing legislative judgments on the question of federal-state relations. While the *Fitzpatrick* court stated that the federal power involved was the crucial factor in its decision to override eleventh amendment immunity, there is no suggestion that the same result would be reached if Congress had not expressly relied on section 5. Furthermore, in the absence of an applicable congressional enactment implementing the fourteenth amendment, judicial review of equal protection does not subject sex and age discrimination to strict scrutiny.[154]

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[152] Pub. L. No. 93-259, 88 Stat. 55 (1974).

[153] In Usery v. Allegheny County Hosp. Dist., 13 FEP Cases (BNA) 1188, 1193 (3d Cir. 1976), the Third Circuit Court of Appeals, concluding that section 5 provided a "clear constitutional jusitification" for the EPA, refused to be limited by congressional reliance on the commerce power. "In exercising the power of judicial review, as distinguished from the duty of statutory interpretation, we are concerned with the actual powers of the national government." *Id.* at 1193-94. The severable EPA statute, which may be justified under section 5 of the fourteenth amendment, is not invalid as applied to the states simply because it is located in a section of the Code enacted pursuant to the commerce clause. Similarly, in Usery v. Dallas Independent School Dist., 22 WH Cases (BNA) 1377, 1378-79 (N.D. Tex. Oct. 19, 1976), the court ruled that the defendant employer has the burden of establishing that there is no plausible constitutional basis for sustaining a presumptively valid federal statute. Despite specific congressional reliance on the commerce power, the court found that the EPA was "easily sustained" under the fourteenth amendment. The court in Usery v. Board of Educ. of Salt Lake City, 13 FEP Cases (BNA) 717, 719-20 (D. Utah Sept. 1, 1976), argued that Congress had not clearly defined the constitutional foundation for the ADEA and, on the basis of an analogy to Title VII, it concluded that the legislation was supportable under either the commerce clause or the fourteenth amendment. In Brown v. County of Santa Barbara, 45 U.S.L.W. 2351, 2352 (C.D. Cal. Jan. 14, 1977), the court held that the express reliance by Congress on the commerce clause did not preclude application of the fourteenth amendment as a supportable ground for the EPA because the state had not established that Congress intended to exclude other applicable bases.

[154] For cases interpreting the sex classification, *see* Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976), upheld Title VII's statutory remedy for sex discrimination in employment against a state employer.

For cases interpreting the age classification, *see* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Weiss v. Walsh, 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd mem.*, 461 F.2d 846 (2d Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973).

The *Weiss* Court, refusing to hold that age ceilings upon eligibility for employment are inherently suspect, discussed the somewhat unique nature of age classifications:

> [T]he absence of specific reference to age in the Fourteenth Amendment does not

If the argument that section 5 provides constitutional authority for the EPA and the ADEA has any validity at all, it must rest on an analogy between these acts and Title VII[155] and on the inference that Congress regarded violations of these statutes as a denial of equal protection to trigger the exercise of section 5 powers by Congress. These three acts represent a federal policy against discrimination in employment, and, as implemented in Title VII, this policy overrides state claims to immunity.[156] The 1972 Amendments to Title VII announced a congressional intention to implement a national policy against discrimination in state and local governments by providing governmental employees with effective remedies equivalent to those afforded private employees.[157] Both

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alone insulate age classifications from constitutional scrutiny any more than does the absence of mention of poverty or residency for example. . . . But being a classification that cuts fully across racial, religious, and economic lines, and one that generally bears some relation to mental and physical capacity, age is less likely to be an invidious distinction.

324 F. Supp. at 77. The per curiam decision in *Murgia* applied a rational basis standard to evaluate a challenge that compulsory retirement of state police officers at age 50 violates equal protection. The classification established by the state statute did not separate a historically disadvantaged class or a discrete and insular group, nor did it infringe upon a fundamental right. In finding that the classification rationally furthered legitimate state purposes, the Court acknowledged that "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." 427 U.S. at 314. The Court in *Murgia* made no claim under the ADEA, and the Court held only that the state statute does not deny equal protection of the laws. It is not clear whether the Court would defer to the congressional judgment incorporated in the ADEA that lines drawn between the ages of 40 and 65 impermissibly burden interstate commerce when that judgment collides with a state policy requiring early retirement for policemen performing essential state functions.

[155] *See* notes 107-12, 117-19 and accompanying text *supra*.

[156] *See* note 134 *supra*. One aspect of the relationship between the policies implemented by Title VII and state sovereignty is the controversy over the discriminatory effect of state "protective" legislation. Many state laws provide protective regulations which are applicable only to women including laws governing minimum wages and maximum hours. The issue is whether such state legislation establishes a bona fide occupational qualification (BFOQ exception within § 703(e) of Title VII, 42 U.S.C. § 2000e-2(e) (1970)), and thus an affirmative defense for the employer, or whether the state laws conflict with the Title VII policy of requiring employers to hire on the basis of individual abilities. The trend has been toward a recognition that the federal policy of the Civil Rights Act is paramount to any state right to make this type of employment decision. State legislation will not be allowed to define and limit federally-created rights. *See* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219 (C.D. Cal. 1968), *aff'd*, 444 F.2d 1219 (9th Cir. 1971); Equal Employment Opportunity Comm'n Guidelines interpreting Title VII, 29 C.F.R. § 1604.2(b)(1) (1975)—state protective legislation discriminates on the basis of sex, conflicts with Title VII, and is not a defense to an otherwise established unlawful employment practice under Title VII; Wage and Hour Guidelines interpreting the EPA, 29 C.F.R. § 800.163 (1975)—legal restrictions in state or other laws will not operate to make otherwise equal work unequal or to justify a prohibited wage differential; Durant, *The Validity of State Protective Legislation for Women in Light of Title VII of the Civil Rights Act of 1964*, 6 SUFFOLK U.L. REV. 33 (1971); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1186-95 (1971).

[157] The House Report states:

The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration

the EPA[158] and the ADEA[159] are supported by substantial legislative findings of widespread and arbitrary discrimination in employment. The parallel is most persuasive with respect to the EPA because a denial of equal pay for equal work is also a cognizable violation of Title VII. Similarly, in many cases, the two acts provide alternative remedies.[160]

If the EPA and the ADEA are sustainable under Congress' section 5 power, then the constitutionality of the intrusion on state sovereignty may be resolved by the rational basis approach used for section 5 analysis.[161] Utilization of this approach might provide more consistent validation of federally-protected rights than would a construction of *National League* to require a balancing of the federal and state interests involved.

## VI. CONCLUSION

The impact of *National League* on the continued effectiveness of the EPA and ADEA, as applied to state and local government

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of justice) with the result that the credibility of the government's claim to represent all the people equally is negated.

H.R. REP. NO. 238, 92d Cong., 1st Sess. 17, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2153. The examples cited by Congress as involving particularly egregious state discrimination would qualify as essential state functions under the *National League* test. *See* Morton v. Mancari, 417 U.S. 535, 545-47 (1974); Chandler v. Roudebush, 425 U.S. 840 (1976).

[158] S. REP. NO. 176, 88th Cong., 1st Sess. (1963); H.R. REP. NO. 309, 88th Cong., 1st Sess., *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 687; *The Equal Pay Act: Hearings on H.R. 3861 Before the Special Subcomm. on Labor of the House Comm. on Educ. and Labor*, 88th Cong., 1st Sess. (1963); *The Equal Pay Act: Hearings on S. 882 and S. 910 Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 88th Cong., 1st Sess. (1963). *See* Berger, *supra* note 104.

[159] S. REP. NO. 723, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213; H.R. REP. NO. 805, 90th Cong., 1st Sess. (1967); *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 90th Cong., 1st Sess. (1967); *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90th Cong., 1st Sess. (1967); U.S. DEP'T. OF LABOR, REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965).

[160] *See, e.g.*, Usery v. Washoe County School Dist., 22 WH Cases (BNA) 1373 (D. Nev. Oct. 14, 1976); Christensen v. Iowa, 13 FEP Cases (BNA) 161 (N.D. Iowa Aug. 4, 1976). *See* Berger, *supra* note 104.

[161] The Court in Katzenbach v. Morgan, 384 U.S. 641 (1966), stated:

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected. . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.

*Id.* at 653. *See also* South Carolina v. Katzenbach, 383 U.S. 301, 327-37 (1966); Gomillion v. Lightfoot, 364 U.S. 339, 343-45 (1961).

employers, is unclear because the scope of the *National League* holding is difficult to ascertain. The FLSA, including the EPA, and the ADEA remain fully enforceable against state operations found to be nonessential or nontraditional. The EPA and the ADEA may be enforceable even as to essential government functions on the ground that the *National League* Court did not intend to include freedom to violate these statutes in the states' sovereign right to structure employment relations. Even if freedom to violate these statutes is a protected sovereign decision, the state interest served is outweighed by the federal antidiscrimination interest involved combined with the less severe degree of intrusion. Further, even if treated as invalid exercises of the commerce clause under the *National League* analysis, the EPA and the ADEA, as applied to state and local governments, may be sustainable as enabling legislation enacted pursuant to section 5 of the fourteenth amendment. Therefore, despite the uncertainty about the implications of the *National League* rationale, the decision should not be interpreted as invalidating the application of the EPA and the ADEA to state and local governments.

—*Ellen B. Spellman*