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State Governmental Immunity from Federal Regulation based on the Commerce Clause - National League of Cities v. Usery

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NOTES

STATE GOVERNMENTAL IMMUNITY FROM FEDERAL REGULATION BASED ON THE COMMERCE CLAUSE—*NATIONAL LEAGUE OF CITIES V. USERY*

A new constitutional immunity from federal regulatory authority was established by the United States Supreme Court's decision in *National League of Cities v. Usery*.[1] Basing its holding on the state sovereignty implicit in the Tenth Amendment[2] and the federal system, the Supreme Court invalidated federal wage and hour regulations as applied to employees of state and local governments. Now, the otherwise plenary power of Congress under the Commerce Clause[3] may not be exercised in a manner that displaces "the States' freedom to structure integral operations in areas of traditional governmental functions."[4]

Prior to this decision, the Supreme Court upheld federal wage and hour provisions as originally enacted in the Fair Labor Standards Act (FLSA) of 1938.[5] Subsequent amendments in 1961[6] and 1966[7] to extend coverage to additional numbers and types of employees also were up-

1. 96 S.Ct. 2465 (1976) [hereinafter cited as *National League*].

2. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The terms "delegated" and "reserved" are used in this casenote in this constitutional sense.

3. U.S. CONST. art. I, §8, cl. 2: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

4. 96 S.Ct. at 2474.

5. The Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. §202 *et seq.* (1940). The Act prescribed minimum wages, maximum hours, and other basic conditions of employment (such as child labor) for private-sector workers engaged in interstate commerce or the production of goods for interstate commerce. As originally enacted, the FLSA specifically exempted the employees of state and local governments. 52 Stat. 1060 §(3)(d), 29 U.S.C. §203(d) (1940).

6. 75 Stat. 65, 29 U.S.C. §§203(r) and (s), 206(b), 207(a)(2) (1964). The 1961 amendments expanded coverage to include not only employees engaged in commerce, but also all employees of an "enterprise" having any employees so engaged.

7. 80 Stat. 831, 29 U.S.C. §§203(d), 203(r), 203(s), 206(d) (1970). The original exemption of state employees from coverage was removed, and state hospitals and schools were specifically defined as "enterprises" subject to the Act. The combined effect of the 1961 and 1966 amendments was to include virtually all nonprofessional employees of specified state institutions under FLSA coverage, whether or not their activities individually affected interstate commerce.

held.[8] Of particular significance was the Court's decision in *Maryland v. Wirtz*[9] in 1968 that coverage of the employees of state hospitals and schools did not violate any constitutional prohibition based on state sovereignty.

In 1974, Congress further amended the Act to extend coverage to virtually all non-supervisory and non-elected personnel of state and local governments.[10] These amendments were challenged in *National League of Cities v. Usery* by the National League of Cities and a number of state and local governments.[11] Plaintiffs sought to enjoin the Secretary of Labor from enforcing the amendments.[12] Without making a fact

8. The original act was upheld by the Supreme Court in United States v. Darby, 312 U.S. 100, *amended*, 312 U.S. 657 (1941). Both the 1961 and the 1966 amendments received the Court's sanction in Maryland v. Wirtz, 392 U.S. 183 (1968). Other unsuccessful challenges by states to the FLSA amendments included Dunlop v. New Jersey, 522 F.2d 504 (3d Cir. 1975); Brennan v. Indiana, 517 F.2d 1179 (7th Cir. 1975); Brennan v. Iowa, 494 F.2d 100 (8th Cir. 1974), *cert. denied*, Iowa v. Dunlop, 95 S.Ct. 2422 (1975). *But see* dissent in Brennan v. Indiana, 517 F.2d 1179 (7th Cir. 1975) (vast paternalist federal bureaucracy is destroying last vestiges of state sovereignty).

9. 392 U.S. 183 (1968). *Maryland v. Wirtz* dealt with an issue almost identical to the issue in *National League*: whether the extension of Fair Labor Standards Act coverage to state governmental employees violated protected areas of state sovereignty. In *Wirtz*, only state school and hospital employees were involved, while in *National League*, almost all state employees were covered. The majority in *Wirtz* ruled that state governments are subject to federal regulatory authority to the same extent as are private individuals. A dissent by Justices Douglas and Stewart objected to the heavy fiscal burdens imposed upon state governments by the FLSA amendments, and expressed the apprehension that the rationale of the majority would permit Congress to "devour the essentials of state sovereignty." *Id.* at 205.

10. 88 Stat. 55, 29 U.S.C. §§203(d), 203(x) (Supp. V, 1975) ("employer" covered by the Act includes public agencies such as states and their political subdivisions). Exemptions were provided for executive and professional personnel, 29 U.S.C. §213(a)(1), and for elected officials and certain of their advisors. 29 U.S.C. § 203(e).

11. Twenty states and four local governments joined the National League of Cities and the National Governors' Conference as plaintiffs in the action. 96 S.Ct. at 2466 n.7.

12. Plaintiffs alleged grave damage to their fiscal integrity, sovereignty, and continued existence as independent governments. Representative of the claims made were the allegations that the 1974 amendments would dictate 85% of total state and local government budgets, transfer control of the governments to federal bureaucrats, usurp essential functions in personnel matters for nearly 11 million employees, prohibit volunteer firefighters, and result in "homogenous State and City Governments, indistinguishable except as to name and geography, with uniform governmental services." Appellant's Jurisdictional Statement at 5, 6, 15, 17, 32, National League of Cities v. Usery, 96 S.Ct. 2465 (1976). Costs of compliance would be over one billion dollars. Suppl. Brief for Appellant on Reargument at 5-6, National League of Cities v. Usery, 96 S.Ct. 2465 (1976).

Appellee, in contrast, contended that the FLSA amendments imposed no policy goals on governments, merely proscribed substandard working conditions and wages, and had no effect on volunteers. Brief for Appellee at 22, 38, 49. The wages of only 95,000 employees

determination, the three-judge District Court dismissed the action.[13] That same day, Chief Justice Burger, acting in his capacity as Circuit Justice, granted relief pendente lite and referred the case to the full Supreme Court.[14]

In a five-Justice majority opinion,[15] the Supreme Court expressly overruled *Maryland v. Wirtz*[16] and departed from a substantial body of precedent on the federal commerce power in relation to state prerogatives.[17] The following discussion of the issues raised will include an ex-

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(or 3.6% of total municipal and state employees) would be affected, constituting only 2% of governmental wage costs. Costs of compliance would be less than half a million dollars. Motion of Appellee to Affirm at 20-22, National League of Cities v. Usery, 96 S.Ct. 2465 (1976).

The Court essentially accepted the plaintiffs' contentions and found the major impact of the amendments to be the loss of flexibility in structuring employee working schedules to meet local administrative needs without incurring prohibitive liabilities for overtime pay.

13. National League of Cities v. Brennan, 406 F. Supp. 826 (D.D.C. 1974). The decision was rendered only one day after hearing arguments, the district court feeling bound by the precedent in Maryland v. Wirtz, 392 U.S. 183 (1968). The decision noted that the depositions and affidavits of the litigants would be made part of the record, and stated that "the foregoing will constitute our finding of fact." National League of Cities v. Brennan, 406 F. Supp. 826, 828 (D.D.C. 1974).

14. National League of Cities v. Brennan, 95 S.Ct. 532 (Burger, Circuit Justice, 1974). The rapid action was due to the fact that Department of Labor regulations based on the 1974 amendments were scheduled to take effect less than five hours after Burger's action. The result was that the Supreme Court was presented with an issue of substantial constitutional import with only cursory examination at lower levels and no resolution of the vastly disparate factual claims of the litigants.

15. The majority consisted of Chief Justice Burger and Justices Stewart, Blackmun, Powell and Rehnquist. Blackmun, who had joined in the majority, wrote a short concurring opinion dissociating himself from some of the implications of the decision. A sharp dissent by Brennan, White, and Marshall described the decision as, *inter alia*, "absurd," "roughshod," "devoid of meaningful content," 96 S.Ct. at 2478-84, "thinly veiled rationalization," "unworkable," and "catastrophic," 96 S.Ct. at 2486-88. The three Justices argued that the federal government is supreme and unrestricted in the exercise of its constitutional powers, and that safeguards from abuse arise not by prohibitions based on state sovereignty but rather by the political process within Congress. In addition, Stevens filed a separate dissent, stating that no constitutional principle invalidated the FLSA amendments that would not also invalidate other federal laws that he considered unquestionably valid.

16. 96 S.Ct. at 2468, 2475.

17. *See, e.g.*, Fry v. United States, 421 U.S. 542 (1975) (states are not immune from regulation under the Commerce Clause merely because of their sovereign status); California v. Taylor, 353 U.S. 553 (1957) (federal labor relations policy supersedes state civil service laws); United States v. California, 297 U.S. 175, 184-85 (1936) (state sovereignty imposes no limitation on the exercise of the commerce power); Sanitary Dist. v. United States, 266 U.S. 405, 425-26 (1925) (when state power conflicts with federal commerce power, the United States will prevail).

amination of the status of state sovereignty in the traditional Commerce Clause analysis, the basis for implying a new immunity for the states in intergovernmental disputes, and the scope of the new immunity. Since the conclusion of this Note is that the scope of the new immunity is not well-defined, a method for alleviating this problem is suggested.

STATE SOVEREIGNTY IN THE TRADITIONAL COMMERCE CLAUSE ANALYSIS

The Supreme Court's liberal interpretation of federal power to regulate interstate commerce, since the early 1930's, limited judicial inquiry to two factors: whether the challenged legislation effectuates a legitimate objective affecting interstate commerce, and whether the means chosen by Congress bear a rational relationship to that objective.[18] The increase in federal regulation of the economy and the concurrent increase in state governmental activity in the economic sphere resulted in repeated litigation of issues concerning federal authority to regulate state activities.[19]

Although the rational relationship standard was developed principally in decisions concerning federal regulation of the private sector,[20] the Supreme Court also applied that standard to the federal regulation of state and local governments.[21] If the rational relationship standard had been adhered to, the Court's finding in *National League* that the

18. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (the only questions are whether the activities affect commerce and whether the means chosen by Congress are reasonable); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (if Congress has a rational basis for regulating commerce, judicial investigation is at an end); Wickard v. Filburn, 317 U.S. 111 (1942) (commerce power extends to even intrastate activities if the regulation is an appropriate means for the effective execution of the power over interstate commerce); United States v. Darby, 312 U.S. 100, 118 (1940) (commerce power includes all "appropriate means to the attainment of a legitimate end"); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (power to regulate commerce includes power to enact "all appropriate legislation").

19. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183 (1968) (regulation of wages of state employees in hospitals and schools); Case v. Bowles, 327 U.S. 92 (1946) (regulation of sale price of state-owned timber); California v. United States, 320 U.S. 577 (1943) (regulation of wharfage procedure and fees of state port authority); United States v. California, 297 U.S. 175 (1936) (regulation of state-operated railroad); Sanitary Dist. v. United States, 266 U.S. 405 (1925) (regulation of municipal sewage disposal); City of Dallas v. Bowles, 152 F.2d 464 (Emer. Ct. App. 1945) (regulation of rent of municipally-owned housing); United States v. Ohio, 354 F.2d 549 (6th Cir. 1965) (agricultural acreage quotas applied to state prison land).

20. Each of the cases cited in note 18, *supra*, concerned regulation of private individuals or businesses.

21. Each of the cases cited in note 19, *supra*, held that the challenged federal legislation was valid since it concerned interstate commerce and was rationally related to a legitimate objective. The fact that the entities subjected to regulation were state and local governments did not affect the result.

Fair Labor Standards Act amendments were rationally related to a legitimate Commerce Clause objective[22] would have been dispositive of the case.

Prior to *National League*, Supreme Court decisions uniformly indicated that the existence of countervailing state policies or interests was of no consequence in adjudicating challenges to the exercise of the commerce power,[23] since the national government is paramount within the sphere of its constitutional powers.[24] In this perspective, the Tenth Amendment was not a limitation on the authority of Congress to act within its appropriate powers, but merely an obvious "truism" that the powers not granted to the national government are reserved to the states.[25] The Tenth Amendment could be invoked properly only after the judiciary determined that Congress had transgressed the states' reserved powers. States were considered to be "subordinate" to federal

22. 96 S.Ct. at 2473. The accusation in the dissent, 96 S.Ct. at 2482, that the majority reverted to the discredited philosophy of Hammer v. Dagenhart, 247 U.S. 251 (1918) and United States v. Butler, 297 U.S. 1 (1936) is therefore incorrect. The majority created an implied immunity for states from regulation that admittedly affects interstate commerce, while *Hammer* and *Butler* temporarily established an immunity for individuals on the basis that their activities were not in interstate commerce.

23. *See, e.g.*, Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941) (it is not for the Court to determine if detriment to the state outweighs the value of the federal commerce enactment); Illinois Natural Gas Co. v. Central Ill. Pub. Serv. Co., 314 U.S. 498 (1942) (when Congress determines that national interests outbalance state interests, courts may not overturn that judgment); Sanitary Dist. v. United States, 266 U.S. 405 (1925) (argument that federal regulation would cost city "a hundred million dollars" is irrelevant since federal power is paramount). This analysis is clearly apparent in the two precedents most apposite to the issues in *National League*: Maryland v. Wirtz, 392 U.S. 183 (1968) and Fry v. United States, 421 U.S. 542 (1975). *Wirtz* indicated that "the only question for the court is . . . whether the class is 'within the reach of the federal power.'" 392 U.S. at 192. In *Fry*, the finding that wage increases for state employees "could have a significant effect on commerce," 421 U.S. at 547, was dispositive. The objection based on state sovereignty was dismissed in a single paragraph.

24. U.S. CONST. art. VI, para. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

25. United States v. Darby, 312 U.S. 100, 124 (1941). *Accord*, Sperry v. Florida *ex rel.* Florida Bar, 373 U.S. 379 (1963) (Tenth Amendment is not violated by exercise of a delegated power, despite concurrent effects on matters otherwise within state control); Case v. Bowles, 327 U.S. 92 (1946) (Tenth Amendment does not limit federal power to accomplish a legitimate end); Fernandez v. Wiener, 326 U.S. 340, 362 (1945) ("Tenth Amendment does not operate as a limitation upon the power, express or implied, delegated to the national government."); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941) (Tenth Amendment does not limit the national government in the exercise of a granted power); United States v. Sprague, 282 U.S. 716, 733-34 (1931) (Tenth Amendment adds nothing to meaning of Constitution).

regulations and could no more deny the exercise of a granted power than could an individual.[26]

Based on this premise, the Supreme Court countenanced congressional interference in a broad range of governmental operations,[27] specifically including the employment relations of state and local governments with their own civil servants.[28] Even pervasive regulation of governmental functions, resulting in enormous fiscal burdens, received the Supreme Court's express sanction.[29]

Prior to *National League*, only two sources of protection were available to the states to preserve their autonomy from the encroachments of the federal commerce power. One source was the inherent limitations of the Commerce Clause phrase, "commerce with foreign Nations and among the several States."[30] The expansive modern interpretation of

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26. *See* United States v. California, 297 U.S. 175, 185, 197 (1936); cited with approval in, *e.g.*, California v. United States, 320 U.S. 577 (1944); Parden v. Terminal Ry. of the Ala. State Dock Dep't, 377 U.S. 184, 191-92 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968); Fry v. United States, 421 U.S. 542 (1975).

27. *See, e.g.*, United States v. Ohio, 354 F.2d 549 (6th Cir. 1966), *rev'd*, 385 U.S. 9 (1966) (per curiam) (crops grown on prison farms); Case v. Bowles, 327 U.S. 92 (1946) (sales of timber to raise revenue for public schools); California v. United States, 320 U.S. 577 (1944) (public wharf facilities); Board of Trustees v. United States, 289 U.S. 48 (1933) (purchase of imported scientific apparatus by a state university); Sanitary Dist. v. United States, 266 U.S. 405 (1925) (municipal sewage disposal); City of Dallas v. Bowles, 152 F.2d 464 (Emer. Ct. App. 1945) (state-owned housing).

28. The federal courts have consistently held that states as employers are subject to the same controls as other employers. *See, e.g.*, Parden v. Terminal Ry. of the Ala. State Dock Dep't, 297 U.S. 175 (1936) (Railroad Safety Appliance Act); Fry v. United States, 421 U.S. 542 (1975) (Economic Stabilization Act); Maryland v. Wirtz, 392 U.S. 183 (1968) (Fair Labor Standards Act); NLRB v. Local 254, Bldg. Serv. Employees Int'l Union, 376 F.2d 131 (1st Cir. 1967) (state department of education is an "employer" under National Labor Relations Act); Florida v. Mathews, 526 F.2d 319 (5th Cir. 1976) (Medicaid legislation); Colorado v. United States, 219 F.2d 474 (10th Cir. 1954) (Packers and Stockyards Act); California v. Taylor, 353 U.S. 553 (1957) (Railway Labor Act). Justice Douglas' comment that the states "are not entirely immune from federal regulation," Maryland v. Wirtz, *supra* at 203, is therefore an enormous understatement.

29. *See* Employees v. Missouri Health Dep't, 411 U.S. 279, 285-86 (1973) (Congress is permitted to "place new or even enormous fiscal burdens on the States" or to impose "pervasive" regulation). This decision created the anomaly that state agencies are subject to coverage under the FLSA as fully as are employers in the private sector, but are not subject to suits by their employees to enforce FLSA rights as are employers in the private sector. The Court accepted state sovereign immunity from lawsuits by citizens, but rejected state sovereign immunity from regulation by the federal government.

30. U.S. CONST. art. I, §8, cl. 2. The extremely few Supreme Court decisions invalidating federal laws under the Commerce Clause all involved a restrictive interpretation of interstate commerce, which has since been discredited. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (coal may not be regulated when it is mined but only when it later enters interstate commerce); Schechter Poultry Co. v. United States, 295 U.S. 495 (1935)

interstate commerce, however, permits federal regulation of virtually all activities having even an indirect or insubstantial effect on commerce.[31] The second source of protection for state sovereignty was completely outside of judicial purview. According to previous Supreme Court decisions,[32] the political process within Congress provided adequate safeguards for states' rights, making judicial involvement unnecessary.[33]

(slaughtering of chickens grown in other states is not in interstate commerce); Hammer v. Dagenhart, 247 U.S. 251 (1918) (child labor producing goods later sold in interstate commerce is "purely local in its character").

31. Activities may be regulated under the interstate commerce power even though they are not interstate and not in commerce; Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); even though moral and social issues are involved and state policy choices thereby displaced; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964); even though the effect on commerce is indirect; Katzenbach v. McClung, 379 U.S. 294 (1964); or trivial; Perez v. United States, 402 U.S. 146 (1971); Wickard v. Filburn, *supra*.

32. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (commerce power is absolute, restrained from abuse solely by "the wisdom and discretion of Congress" and the influence which constituents possess at elections). *See also* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 HARV. L. REV. 682, 695 (1976); 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, 546 (1954).

33. Justice Brennan, in his dissent in *National League*, argued that the interests of state governments are better protected by Congress than by the judiciary because the members of Congress are "*elected from the States.*" 96 S.Ct. at 2486, *quoting* J. Madison, *The Federalist No. 45*, at 311-12 (J. Cooke ed. 1961) (emphasis in Brennan's opinion). Members of Congress are of course "elected from the States" in the sense that electoral districts follow state boundaries, but they do not necessarily represent the interests of state governments, 96 S.Ct. at 2469 n.12 (majority opinion), and may well have national rather than local perspectives. Brennan's use of a quotation from Madison to support national regulation of state governmental activity is questionable, since Madison is generally portrayed as an advocate of state autonomy, in conflict with Hamilton, who favored a more powerful central government. *See, e.g.*, Cowen, *What is Left of the Tenth Amendment?*, 39 N.C. L. REV. 154, 157 (1961).

Since Madison's time, major changes have occurred in the balance of power between state and national governments, and in the factors influencing national legislators. Of key significance was the Sixteenth Amendment, creating the income tax, a vast new revenue and power base of the central government. *See* Freund, *Umpiring the Federal System*, in FEDERALISM, MATURE AND EMERGENT 159, 160 (A. Macmahon ed. 1962); Blough, *Fiscal Aspects of Federalism*, in FEDERALISM, MATURE AND EMERGENT 384, 385, 398 (A. Macmahon ed. 1962). Among other major changes are the Seventeenth Amendment (Senators no longer elected by state legislatures) and judicial interpretation of the Commerce Clause since the New Deal.

The dissent avers that federal intervention into state affairs results in effect from "decisions of the States themselves." 96 S.Ct. at 2486. That FLSA coverage of state employees was a decision made by states themselves must surely come as a surprise to the 36 state governments (more than a 70% majority of the 50) that have resorted to lawsuits to

This rationale effectively abdicated judicial responsibility and left the preservation of the constitutional system of federalism dependent upon the sufferance of the transient congressional majority.[34]

The established analysis of the Commerce Clause and the Tenth Amendment, therefore, provided virtually no meaningful judicial protection for state sovereignty. States were accorded no greater consideration than were individuals and were deemed adequately protected by extra-judicial forces. The result has been a continual expansion of federal regulation into areas previously reserved to state governments.[35]

Basis for Implying an Immunity from Federal Regulation

The Court, in *National League*, departed from the conventional analysis and instead relied on implied protections of the federal system which appear throughout the Constitution.[36] Support was found in two analogies. The first analogy posited that the Tenth Amendment protects state prerogatives against intrusive federal regulations just as the First,[37] Fifth,[38] and Sixth[39] Amendments have been held to protect individual

challenge the FLSA amendments. (The total of 36 was derived by adding each of the states involved in *National League* and previous FLSA cases, *see* note 8 *supra*, counting states that participated in more than one suit only once).

34. *See* New York v. United States, 326 U.S. 572, 594 (1946) (Douglas & Black, JJ., dissenting). Justice Douglas further stated that the "Constitution was designed to keep the balance between the States and the nation outside the field of legislative controversy." *Id.* Support for this position is also found in Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868) ("The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States"); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926) ("neither government may destroy the other nor curtail in any substantial manner the exercise of its power); C. Black, Perspectives in Constitutional Law 29 (1970); Note, *Is Federalism Dead? A Constitutional Analysis of the Federal No-Fault Automobile Insurance Bill: S. 354*, 12 Harv. J. Legis. 668, 681-82 (1975).

35. *See* notes 17 & 18 and accompanying text *supra*.

36. References to the existence, powers, rights, and obligations of states are seen in the Constitution of the United States in Articles I (legislative representation apportioned to states, and some elements of state sovereignty surrendered to the Union), II (executive to be selected by electors from the states), III (judiciary to have jurisdiction over interstate controversies), IV (relations between states, admission of new states), V (amendment by state action), VI (state judges and legislators bound by Constitution), and VII (ratification by states). Further mention of states is made in 15 of the 25 amendments (numbers II, VI, X to XII, XIV to XVII, XIX, and XXI to XXIV).

37. U.S. Const. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

38. U.S. Const. amend. V: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

39. U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

liberties from federal usurpation.[40] Secondly, the well established implied immunity of state governments from federal taxation was extended by analogy to include an immunity from federal regulation.[41]

Justice Rehnquist, the author of the majority opinion in *National League*, has stated elsewhere that an affirmative argument that particular legislation intrudes impermissibly on constitutional rights has a far greater likelihood of success than the negative contention that the legislation exceeds the delegated powers of the national government.[42] Thus, it is not surprising that he drew an analogy between individual liberties and state prerogatives in order to protect the latter. The First, Fifth, and Sixth Amendments each create affirmative rights of individuals which limit the otherwise plenary commerce power.[43] The Tenth Amendment may be similarly interpreted to create an affirmative constitutional right of state governments to be free from federal intrusions into sovereign state functions, even when the national enactment concededly

40. 96 S.Ct. at 2469. The First and Sixth Amendments prevent Congress from exercising its commerce power in such a manner as to invade the rights to free speech, Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (regulation of newspaper employees permissible since the press was not singled out for special taxation or penalties) or trial by jury, United States v. Jackson, 390 U.S. 570 (1968) (Federal Kidnaping Act, based on the Commerce Clause, impermissibly burdens the right to trial by jury). Fifth Amendment protections from self-incrimination and deprivation of property without due process similarly limit the regulatory authority of Congress. *See, e.g.*, Monongahela Navigation Co. v. United States, 148 U.S. 312, 336 (1893); Marchetti v. United States, 390 U.S. 39 (1968) (privilege from payment of tax on wagering, which is illegal in almost every state); Grosso v. United States, 390 U.S. 62 (1968) (defense to prosecution for failure to pay tax on wagering); Haynes v. United States, 390 U.S. 85 (1968) (defense to prosecution for possession of an illegally unregistered weapon); Leary v. United States, 395 U.S. 6 (1969) (privilege from registering as a person dealing in marijuana).

41. 96 S.Ct. at 2470 n.14. The limited tax immunity is recognized in, *e.g.*, New York v. United States, 326 U.S. 572 (1946); United States v. California, 297 U.S. 175 (1935); Metcalf & Eddy v. Mitchell, 269 U.S. 504 (1925).

42. Fry v. United States, 421 U.S. 542, 552-53 (1975) (Rehnquist, J., dissenting). As an illustration of this principle, note the varying treatment accorded two challenges to the same piece of congressional legislation, the Marihuana Tax Act, 26 U.S.C. §4741 *et seq.* (1970). The Act required persons dealing in marijuana to register with the Internal Revenue Service, and taxed all transfers of the substance to unregistered transferees at $100 per ounce or fraction of an ounce. In United States v. Sanchez, 340 U.S. 42 (1950), negative assertions that the tax was a penalty and therefore not within the federal taxing power were flatly and decisively rejected. In Leary v. United States, 395 U.S. 6 (1969), however, the petitioner's affirmative privilege against self-incrimination was held to be a complete defense.

43. National League of Cities v. Usery, 96 S.Ct. 2465, 2469, 2477 (1976).

bears a rational relationship to a legitimate congressional objective.[44]

The analogy is imperfect in that the First, Fifth, and Sixth Amendments each expressly limit the exercise of federal powers, while the Tenth Amendment merely emphasizes the distinction between powers granted to the national government by the Constitution and powers reserved to the states. The Tenth Amendment contains no express limitation on national regulatory authority. In *National League*, therefore, the Supreme Court gave the Tenth Amendment a broader interpretation than its express terms require. The Court treated the amendment as evidence of the necessary existence of states with sovereign prerogatives in the dual system of government that is recognized throughout the Constitution.[45] The Tenth Amendment would be wholly redundant if it did not at a minimum prevent the federal Congress from "devouring the essentials of state sovereignty" through the unlimited exercise of regulatory powers.[46]

The lack of an express constitutional protection for states has not been an insuperable barrier in the field of intergovernmental immunities from taxation. The principle that taxation of one government by another is antithetical to the federal structure was established in *M'Culloch v. Maryland*,[47] in which the Supreme Court invalidated state taxation of a national instrumentality. The principle was later extended to protect states from the federal taxing power.[48]

Early cases held states and their officers to be absolutely immune from federal taxation,[49] but a series of subsequent decisions restricted

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44. *Id.* at 2470-71; Fry v. United States, 421 U.S. 542, 553 (1975) (Rehnquist, J., dissenting).

45. 96 S.Ct. at 2470-71; Coyle v. Smith, 221 U.S. 559 (1911) (Congress may not infringe on peculiarly state prerogatives, such as selecting the location of the state capitol); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868) ("in many Articles of the Constitution, the necessary existence . . . and the independent authority of the States is distinctly recognized"); Brush v. Commissioner, 300 U.S. 352, 364-65 (1937) (explaining basis for implied constitutional immunity from taxation).

46. Maryland v. Wirtz, 392 U.S. 183, 204-05 (1968) (Douglas & Stewart, JJ., dissenting). *Cf.* Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States").

47. 17 U.S. (4 Wheat.) 316 (1819).

48. *See, e.g.*, Collector v. Day, 78 U.S. (11 Wall.) 113 (1870).

49. United States v. Baltimore & O. R.R., 84 U.S. (17 Wall.) 322, 327-28 (1872):

> The right of the states to administer their own affairs . . . is conceded by the uniform decisions of this Court. . . . This carries with it an exemption . . . from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted.

This case was cited with approval by Justices Douglas and Black in their dissent in New York v. United States, 326 U.S. 572, 592 (1946). For the early view of the state immunity from federal taxation, see Brush v. Commissioner, 300 U.S. 352 (1936) (municipal water

the immunity to state functions that were deemed to be intrinsically "governmental" or "essential."[50] Enterprises that seemed to have "proprietary" or quasi-private characteristics, such as state-operated railroads[51] or liquor monopolies,[52] were not exempt from taxation.[53] The Supreme Court consistently recognized, however, that some limitations on the federal taxing power were required to protect states from excessive or unjustified interference with sovereignty.[54]

The analogy between the taxation and the commerce power had been previously considered and rejected as "not illuminating" by the Su-

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supply official exempt from federal income tax); Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931) (police department exempt from small federal excise tax on motorcycle sales; "Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute."); Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) (federal government may not destroy or curtail activities of state government through taxation of state officers; plaintiff, however, found not to qualify as an officer); Collector v. Day, 78 U.S. (11 Wall.) 113 (1870). The last two cases were overruled in Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 486 (1939).

50. The distinction was expressed using a variety of terms. Helvering v. Powers, 293 U.S. 214 (1934) (state personnel not in "usual governmental" functions are not exempt from federal income tax); Helvering v. Gerhardt, 304 U.S. 405 (1938) (tax on state employees' salaries permissible since "essential governmental functions" were not affected); Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938) (tax on income from leased school lands not a "substantial interference" with the state); Board of Trustees v. United States, 289 U.S. 48 (1933) (import tariff applies to states since it does not damage the dual form of government).

51. United States v. California, 297 U.S. 175 (1936).

52. South Carolina v. United States, 199 U.S. 437 (1905); Ohio v. Helvering, 292 U.S. 360 (1934) (when a state engages in a business of a private nature, such as selling liquor, that business is not withdrawn from the taxing power of the nation).

53. *See also* Helvering v. Powers, 293 U.S. 214 (1934) (public streetcar line); New York v. United States, 326 U.S. 572 (1946) (state mineral-water bottling operation). The distinction between "proprietary" and "essential" functions was compromised and perhaps abandoned in New York v. United States, *supra*, although the several divergent opinions in the case make the holding doubtful. The plurality of only two Justices (Frankfurter and Rutledge, who also wrote a concurring opinion) rejected the "essential functions" test, limiting the immunity to taxes discriminating against a state. Four Justices, concurring, did not discuss the "essential functions" issue, but indicated that even a nondiscriminatory tax might unduly interfere with sovereign functions. Douglas and Black, dissenting, rejected all taxes on activities of a sovereign state, whether or not "essential." Jackson did not participate. In *National League*, both the majority and the dissent were able to find support in the several opinions of *New York v. United States*.

54. New York v. United States, 326 U.S. 572 (1946), limited the tax immunity more severely than other decisions. *See* notes 49-52 *supra*. Even in *New York*, however, eight Justices agreed that states are not wholly subordinate to the federal taxation power, although they disagreed on the scope of the exemption.

preme Court.[55] In *United States v. California*,[56] the Court described the tax immunity as "implied from the nature of our federal system," and necessary to protect both the national and state governments in the exercise of their powers.[57] However, it is difficult to understand why this description would not apply to regulatory legislation with equal or greater force. The practical effect of taxation is frequently so closely akin to regulation as to be virtually indistinguishable.[58] State immunity from federal regulation may well be even more vital to the preservation of the federal system than immunity from taxation, since regulation affects state policy choices as well as revenues.[59]

It may have been the implicit recognition of these criticisms that led to a softening of the Court's dicta in the two cases of the last decade most apposite to the issues in *National League*. In *Maryland v. Wirtz*,[60] the Supreme Court upheld the FLSA as applied to state hospital and school employees because of the effects of these institutions on commerce. The Court emphasized the limited nature of the interference with state functions, however, and acknowledged that the Court had power to prevent "the utter destruction of the state."[61] In *Fry v. United*

55. United States v. California, 297 U.S. 175, 184-85 (1935). *Accord*, Case v. Bowles, 327 U.S. 92 (1946); Board of Trustees v. United States, 289 U.S. 48, 59 (1933). The dissent in *National League* relied upon *United States v. California* as a "complete refutation" of the majority decision. 96 S.Ct. at 2481.

56. 296 U.S. 175 (1935).

57. *Id.* at 184.

58. *See* United States v. Sanchez, 340 U.S. 42, 44 (1950) (upholding a tax of $100 per ounce of marijuana, the Court indicated that a tax is valid even though it "regulates, discourages or definitely deters the activities taxed," and, somewhat cryptically, even though the tax affects "activities which Congress might not otherwise regulate"); Fernandez v. Wiener, 326 U.S. 340, 362 (1945) (estate tax, like all others, has an inseparably concomitant regulatory effect); Sonzinsky v. United States, 300 U.S. 506, 513 (1936) (firearms tax upheld; "every tax is in some measure regulatory"); Mangano Co. v. Hamilton, 292 U.S. 40, 44 (1933) (prohibitive state tax on margarine valid even though effect is to restrict or even destroy certain occupations); McCray v. United States, 195 U.S. 27 (1903) (federal tax which allegedly would destroy margarine industry upheld).

59. Fry v. United States, 421 U.S. 542, 553-54 (1975) (Rehnquist, J., dissenting). For the relation of the taxation and regulatory immunities, see also National League of Cities v. Usery, 96 S.Ct. 2465, 2470 (1976) (asserted distinction between the two immunities escapes majority of the Court); Maryland v. Wirtz, 392 U.S. 183, 204 (1967) (Douglas & Stewart, JJ., dissenting) ("The exercise of the commerce power may also destroy state sovereignty").

60. 392 U.S. 183 (1968).

61. *Id.* at 196. The dissent in *National League* attempts to vitiate the significance of the *Wirtz* statement, ascribing its meaning to the Supreme Court's power to invalidate legislation that does not affect interstate commerce. 96 S.Ct. at 2478 n.3. In view of the inclusive modern scope of the commerce power, *see* note 18 *supra*, such an interpretation would reduce judicial "protection" of state sovereignty to an inconsequential formality.

States,[62] the Court upheld the imposition of maximum wage controls on state employees since the legislation bore a rational relationship to a congressional objective within the scope of the commerce power.[63] Nevertheless, the opinion has been recognized as an example of a "growing sensitivity to federalistic limits,"[64] and has been cited by lower courts in support of the position that federal regulatory power is not limitless.[65] The majority noted that the Tenth Amendment is "not without significance," declaring that congressional power may not be exercised "in a fashion that impairs the States' ability to function effectively in a federal system."[66] Although the wage freeze was "even less" of an imposition on the states than that in *Wirtz*, the decision suggested that a "drastic invasion" of sovereignty could not be tolerated.[67]

Wirtz and *Fry* indicate a substantial shift in the Supreme Court's thinking, away from the traditional analysis of the Commerce Clause,[68]

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62. 421 U.S. 542 (1975).

63. *Id.* at 547. The Supreme Court found that wage increases to state employees might jeopardize the congressional goal of stabilizing the economy.

64. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 125-26 (9th ed. 1975). *See also The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 50 (*Fry* indicates that the Court may enunciate restrictions "in future cases involving more comprehensive, long-term intrusions into state operations"); Tribe, *supra* note 32, at 698-99 (a drastic invasion of sovereignty could be invalidated even if clearly intended by Congress). Each of these sources mentioned *National League* in footnotes, before the Supreme Court decision was announced, as a significant possible future development. Tribe accurately predicted that if the Court in *National League* struck down the FLSA amendments, it will have created "a limited state enclave secure from federal power." *Id.* at 698 n.78.

65. District of Columbia v. Train, 521 F.2d 971, 994 (D.D.C. 1975), *cert. granted*, 96 S.Ct. 2224 (1976). This decision also cited Fry v. United States, 421 U.S. 542 (1975) for the principle that the federal government is to avoid "drastic" invasions of state sovereignty. *Id.* at 993.

66. 421 U.S. 542, 547 n.7 (1975). In an unpersuasive endeavor to avoid the apparent meaning of this statement, that even delegated powers have federalistic limits, the dissent in *National League* argues that the statement means only that powers not delegated may not be exercised. 96 S.Ct. at 2478-79 n.4.

67. 421 U.S. 542, 547-48 (1975).

68. The holdings of Maryland v. Wirtz, 392 U.S. 183 (1968) and Fry v. United States, 421 U.S. 542 (1975) must be distinguished from some of the language contained in their majority and dissenting opinions. In both cases, dissents argued the necessity of preserving state autonomy from unlimited federal regulation, and the majorities agreed to the principle. 392 U.S. at 196 (majority) and 205 (Douglas & Stewart, JJ., dissenting); 421 U.S. at 548 n.7 (majority) and 549-50 (Rehnquist, J., dissenting). In this sense, the two opinions may be recognized as supporting the judicial attitude toward state prerogatives that became most clearly apparent in *National League*. Nevertheless, the majorities upheld the intrusions into state affairs in both *Wirtz* and *Fry* because the federal legislation at issue bore a rational relationship to interstate commerce, and because the intrusions were not found to be excessively burdensome to the states. The rationale underlying the Supreme Court's decision in *National League* to overrule the holding in *Wirtz*, 96 S.Ct.

and away from the virtually unrestricted supremacy of the federal regulatory power expressed in *United States v. California*.[69] While an otherwise valid exercise of commerce power would not be defeated merely because it affected state prerogatives, *Wirtz* and *Fry* recognized that some measures might unconstitutionally exceed federalistic limits. *National League*, in this context, represents merely the first application by the Supreme Court of this developing philosophy of federalism to invalidate a piece of congressional regulatory legislation.[70]

Scope of the Implied State Immunity from Federal Regulation

Now that the existence of an implied immunity is established, the critical question is the nature, extent, and limitations of the immunity. The holding of the case in this vital respect is unclear and internally inconsistent, and provides inadequate guidance to the lower courts for future decisions. The explicit characterization of the protection as sweeping[71] conflicts with other indications that a balancing test is being employed or that an "essential functions" test is being borrowed from the taxation cases.[72] The language of the Court indicated that even minimal interference with state activities would violate the constitutional prohibitions enunciated in the opinion.[73] The federal government, Rehnquist asserted, may not "directly displace the states' freedom to structure integral operations in areas of traditional governmental functions" or interfere with "fundamental employment decisions" made by the state in the performance of its functions.[74] Stated in such encom-

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at 2474, while expressly leaving unimpaired the holding in *Fry*, 96 S.Ct. at 2475, is therefore questionable. If *Wirtz* were to be overruled, then logically *Fry* should also have been overruled.

69. 297 U.S. 175, 184 (1935): "In each case the power of the state is subordinate to the constitutional exercise of the granted federal power." The Supreme Court in *United States v. California* made clear its rejection of intergovernmental immunity protecting state governments from the plenary federal power to regulate commerce. "The State can no more deny the power if its exercise has been authorized by Congress than can an individual." *Id.* at 185.

70. Since the 1930's, the Supreme Court had not held a federal statute unconstitutional on the basis that it exceeded federal power to regulate interstate commerce. Cowen, *What is Left of the Tenth Amendment?*, 39 N.C. L. Rev. 154, 171 (1961). The author predicted that "the Tenth Amendment will never again be successfully used to nullify an act of Congress based on the Commerce power." *Id.* at 173.

71. *See* note 73 *infra*.

72. *See* cases cited in notes 47-52 *supra*.

73. The Court referred at length to the plaintiffs' complaints of grievous disruption and unsupportable burdens resulting from the FLSA amendments, but disclaimed reliance on these disputed allegations as a basis for its decision. 96 S.Ct. at 2471, 2474.

74. 96 S.Ct. at 2474.

passing terms, the new immunity might have far-reaching implications.[75] The national government could be excluded entirely from legislating in the protected area of internal state governmental operations. Congressional action to extend the coverage of employment-related legislation to include state governmental personnel might be found unconstitutional, since such legislation frequently interferes with governmental operations and employment decisions to some degree.[76]

However, it is unlikely that the Court meant to carve out such a broad exception for the states from the federal commerce power. A methodology of balancing state and federal interests is suggested by Rehnquist's attempt to explain why it was not necessary to overrule *Fry v. United States*,[77] a case which seemingly was diametrically opposed to the result in *National League*. Three factors were utilized to distinguish the holding in *Fry* from that in *National League*: the importance of the national interests involved, the financial impact on the states, and the length of time of the intrusion.[78] These factors are relevant to a balancing test, but not to an absolute immunity.[79] If legislation in the field of state

75. 96 S.Ct. at 2484-85 (Brennan, J., dissenting).

76. State and local government employees have been excluded from the coverage of a significant amount of federal labor and social legislation. *See, e.g.*, National Labor Relations Act §2(2), 29 U.S.C. §52(2) (1970); Equal Employment Opportunity Act, 42 U.S.C. §2000(e) (1964); Social Security Act, 26 U.S.C. §3121(b)(7) (1970), 42 U.S.C. §410(a)(7)(1970); Fair Labor Standards Act, 29 U.S.C. §203(d) (1940). In recent years, however, the original exemption for governmental employees has been removed in some instances. *See, e.g.*, Equal Employment Opportunity Act, 42 U.S.C. §2000(e) (Supp. V, 1975); Fair Labor Standards Act, 29 U.S.C. §203(d) (1970). *See also* H.R. 10210, a bill currently pending in the 94th Congress, proposing extension of unemployment compensation to governmental workers. On the basis of *National League*, such extensions could be found to impermissibly intrude on integral governmental functions. *But see* notes 89-91 and accompanying text *infra*.

77. 421 U.S. 542 (1975).

78. 96 S.Ct. at 2474-75. Even if the above criteria are valid, it is questionable whether they were applied properly. Equally persuasive arguments may be made that *Fry* sanctioned a greater intrusion into state affairs than was at issue in *National League*. The 1974 FLSA amendments extended coverage to only 30% of all state and local government personnel (or 55% when combined with those covered by the 1966 amendments upheld in *Maryland v. Wirtz*). They specifically excluded employees in policy-making positions such as elected officials, executives, and administrators, and provided for the particular needs of police and fire departments. The Economic Stabilization Act at issue in *Fry*, in contrast, affected virtually all employees, with no special recognition for the unique nature of local governmental employment. Both the Labor Standards and the Stabilization Acts imposed mandatory wage controls displacing state interests and decisions that were in conflict, justified by the commerce power. *See* Suppl. Brief for Appellee on Reargument at 13-14, National League of Cities v. Usery, 96 S.Ct. 2465 (1976). *See also* 96 S.Ct. at 2484 (Brennan, J., dissenting).

79. The concurring and dissenting opinions suspected that state and federal interests

governmental "employer-employee relationships" is indeed beyond the scope of Congressional authority, as the *National League* decision averred,[80] then logically the maximum wage controls challenged in *Fry* and the minimum wage standards at issue in *National League* should be equally impermissible. The asserted social importance, low cost, or short duration of a congressional enactment cannot supply a power that the Constitution denies.[81]

An alternative to the interpretation that the Court is employing an unarticulated balancing test is the possibility that it is extending the

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were being weighed, but (with good reason) expressed uncertainty. 96 S.Ct. at 2476 (Blackmun, J., concurring) ("I do not read the opinion so despairingly as does my Brother Brennan. . . . [I]t seems to me it adopts a balancing approach. . . ."); *id.* at 2487 (Brennan, J., dissenting) ("Are state and federal interests being silently balanced?"). Both sides of the litigation also proposed balancing tests, although the relative weights to be accorded the competing federal and state interests were, of course, different. See Brief for Appellee at 33 *et seq.* (commerce power may not be used to destroy sovereignty, but FLSA has no serious effect on federalism; judicial task is to assess balances and degrees); Reply Brief for Appellant at 22 *et seq.* (Balancing of trivial nexus to commerce and damaging impact to federalism requires that 1974 amendments be invalidated).

80. 96 S.Ct. at 2474.

81. Wilson v. New, 243 U.S. 332, 348 (1917) (emergency affords an occasion for the exercise of existing authority, but does not create new authority). This decision is cited by the *National League* majority, incongruously, in support of the statement that the "national emergency" of economic inflation justified the wage freeze at issue in *Fry*. 96 S.Ct. at 2475. This use of precedent lends further support to the conclusion that the majority intended to create a balancing test rather than a total exclusion of Congress from certain areas of state governmental operations.

In Blackmun's concurring opinion, a balancing approach is suggested by the statement that the federal interest is "demonstrably greater" in environmental concerns than in the economic and labor concerns at issue in *National League*. 96 S.Ct. at 2476. He made no attempt to substantiate this assertion, nor to explain why one area of regulation is prohibited while another area, also within the commerce power, is permissible. It is possible that Blackmun's opinion was prompted by a case on federal environmental legislation currently on the Supreme Court docket. Brown v. Environmental Protection Agency, 521 F.2d 827 (9th Cir. 1975), *cert. granted*, 96 S.Ct. 2224 (1976). The Supreme Court consolidated 15 cases into *Brown*, which has been scheduled for oral argument. The actions were based on regulations under the Clean Air Act §101 *et seq., as amended*, 42 U.S.C.A. §1857 *et seq.* The three circuit courts which had considered the actions independently ruled that the regulations were constitutionally prohibited to the extent that they required states to administer programs promulgated by the E.P.A. The grounds utilized were consistent with the majority opinion in *National League*. The opinion of the Ninth Circuit Court of Appeals in *Brown* stated that if the federal government could commandeer the administrative machinery of states, a "Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress." *Id.* at 839. *See* Note, *Constitutional Law—Interstate Commerce—Federal Regulations Requiring States to Enact Statutes Enforcing Federal Air Pollution Control Programs Exceed the Commerce Power By Intruding upon State Sovereignty Protected by the Tenth Amendment*, 29 VAND. L. REV. 276 (1976).

"essential functions" test developed in the taxation cases.[82] This possibility is suggested by the references in *National League* to "traditional" and "integral" governmental functions.[83] In addition, the opinion leaves unimpaired the decision in *United States v. California*[84] that a state-operated railroad enjoys no immunity from federal regulation.[85] Finally, there is the fact that Rehnquist suggested the use of the "essential functions" test in his *Fry* dissent, conceding that it would involve "many grey areas, to be marked out on a case-by-case basis."[86]

Initial reaction to the *National League* decision suggests that the limitation on federal commerce power will be narrowly construed. In *Usery v. Board of Education*,[87] a United States district court opinion rendered only two months after the Supreme Court's decision in *National League*, the imposition on state governments of the federal Age Discrimination in Employment Act[88] was held to be within the scope of congressional authority. Interpreting *National League* to establish a balancing approach even where "integral state functions" were involved, the district judge found that the national interest in preventing arbitrary age discrimination outweighed the state's interest in discriminatory employment practices.[89] This decision supported the assessment of the Department of Labor's legal spokesperson that *National League* would not affect the validity of the Age Discrimination or Equal Pay Acts.[90] The possibility of extending federal collective bargaining rights

82. *See* cases cited notes 50-54 *supra*.

83. 96 S.Ct. at 2473, 2474, 2476.

84. 297 U.S. 175 (1936). United States v. California, *id.* at 184-85, however, specifically rejected the proprietary distinction in regulatory cases. *Cf.* New York v. United States, 326 U.S. 572, 580 (1946) (opinion of Frankfurter, J., for the Court) (distinction between normally private and usual governmental functions is "too shifting" and "too entangled in expediency" to serve as a dependable legal criterion).

85. 96 S.Ct. at 2475 n.18.

86. Fry v. United States, 421 U.S. 542 (1975).

87. Usery v. Board of Educ., Docket No. C 75-510 (D. Utah, Aug. 31, 1976).

88. 29 U.S.C. §§623, 630(b) (1970).

89. The district court stated three independent bases for decision:

1. The balancing approach, derived from *National League's* discussion of Fry v. United States, 421 U.S. 542 (1975). *See* text accompanying notes 77-79 *supra*.

2. The assertion that the Age Discrimination Act imposed only a "negative obligation" to refrain from discrimination, and therefore did not "*directly* displace the State's freedom to structure integral operations" (emphasis added by district judge to *National League* quotation).

3. The existence of adequate federal authority under the Fourteenth Amendment to protect civil liberties.

90. The Solicitor of Labor's "preliminary assessment" of *National League*, 1976 BNA Daily Labor Report No. 127, A-6, A-7 (June 30, 1976), *quoted in* Aaron, *Labor Law Decisions of the Supreme Court, 1975-76 Term*, 92 LAB. REL. REP. 311 (1976).

to state and local governmental employees, however, appears to have received a serious setback as a result of *National League*.[91]

RECOMMENDED APPROACH

An absolute rule in favor of either national or state interests does not afford an adequate or realistic analysis of the interrelated needs of the two levels of government in the federal system. In future decisions involving federal intrusions into state affairs based on the interstate commerce power, it would be logical for the Supreme Court to adopt an approach explicitly balancing the competing governmental interests. The federal interest in uniform, enforceable, and effective regulation of matters affecting interstate commerce should be weighed against the state interest in preserving a sphere of sovereign and autonomous operation within the federalistic context.[92]

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91. The Solicitor of Labor and the speaker at the ABA Labor Law section convention agree on this point. Aaron, *Labor Law Decisions of the Supreme Court, 1975-76 Term*, 92 LAB. REL. REP. 311, 345 n.30 (1976).

92. The specific factors to be considered would have to be developed in the context of factual disputes presented for adjudication. The factors could include the following:

1. Necessity of state compliance to assure achievement of congressional objectives; *see* Fry v. United States, 421 U.S. 542 (1975) (effectiveness of federal action to stabilize economy would be drastically impaired if state employees were exempt); Case v. Bowles, 327 U.S. 92, 102 (1946) (exemption of states from federal price controls would deprive Congress of ability to effectively combat inflation); United States v. California, 297 U.S. 175, 185 (1936) (federal goal of safeguarding commerce from obstructions due to defective railroad appliances requires compliance by both privately-owned and state-owned railroads);
2. Availability of alternative means to accomplish the same goals with substantially less imposition on the states; *cf.* Shelton v. Tucker, 364 U.S. 479, 488 (1960) (despite legitimacy of governmental purpose, legislation that broadly intrudes on constitutional rights is invalid if less drastic alternative means are available); Steward Machine Co. v. Davis, 301 U.S. 548, 588-89, 593 (1936) (Congress established nationwide cooperative federal-state system of unemployment compensation through tax rebates and without coercion of states or impairment of state sovereignty);
3. Magnitude of the fiscal impact on state governments, necessitating the imposition of new state taxes or the curtailment of state governmental programs; Maryland v. Wirtz, 392 U.S. 183, 203 (1968) (Douglas, J., dissenting) (federal law unconstitutionally overwhelms state fiscal policy); New York v. United States, 326 U.S. 572, 586 *et seq.* (1946) (Stone, J., concurring) (federal tax which unduly burdens state government is impermissible); *id.* at 594 (Douglas, J., dissenting) (federal taxes are impermissible when they effect states' ability to operate social programs); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926) ("neither government may destroy the other nor curtail in any substantial manner the exercise of its powers");
4. Degree of interference with state policy decisions; *see* M'Culloch v. Mary-

The balancing approach is subject to the criticism that it might permit judges to substitute their own subjective evaluation of the factors underlying challenged legislation for the social policy choices appropriately made by Congress.[93] This criticism, however, is misdirected. The subjectivity to be avoided would be manifested in a confusing and contradictory body of case law. An explicit balancing test would provide clearer guidelines for reconciling or distinguishing cases such as *National League*, on the one hand, and *Fry v. United States* on the other. The balancing approach would be a development rather than a departure from precedent on the Commerce Clause in relation to state sovereignty. At the same time, explicit balancing would tend to reduce the likelihood of such disputes, because Congress would have notice of the factors to be considered in adjudicating challenges to legislation[94] and could formulate legislation accordingly.

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land, 17 U.S. (4 Wheat.) 316, 429 (1819) (there is "a repugnancy between a right in one government to pull down what there is in another to build up"); Maryland v. Wirtz, 392 U.S. 183, 202-03 (1968) (Douglas, J., dissenting) (law unacceptably forces state to curtail services, refrain from entering new fields of activity, or raise taxes);

5. Discrimination against state governments, involving the imposition of constraints not also applicable to the private sector; *cf.* New York v. United States, 326 U.S. 572, 582 (1945) (federal tax on activities or property with no counterpart in private sector, such as maintaining a statehouse, is impermissible); Maryland v. Wirtz, 392 U.S. 183, 194 (1968) (challenged law merely requires state to adhere to same restrictions applicable to private employer).

For other views of balancing, see the district court opinion in Maryland v. Wirtz, 269 F. Supp. 826, 850 (D. Md. 1967) (Thomsen, C.J., concurring); Comment, *An Affirmative Constitutional Right: The Tenth Amendment and the Resolution of Federalism Conflicts*, 13 SAN DIEGO L. REV. 876 (1976); Note, *Is Federalism Dead? A Constitutional Analysis of the Federal No-Fault Automobile Insurance Bill: S. 345*, 12 HARV. J. LEGIS. 668, 686-91 (1975). *But see* United States v. Darby, 312 U.S. 100, 114 (1940); United States v. California, 297 U.S. 175 (1936).

93. *See* dissenting opinions in *National League* at 2486 (Brennan) ("balancing approach . . . is a thinly veiled rationalization for judicial supervision of a policy judgment that our system reserves to Congress"); 2488 (Stevens) (personal disagreement with wisdom of legislation may not affect judgment of its validity). *See also* criticism of *National League* majority and concurring Justices as "superlegislators," Aaron, *Labor Law Decisions of the Supreme Court, 1975-76 Term*, 92 LAB. REL. REP. 311, 314 (1976). *See generally* Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 788 (1945) (Black, J., dissenting) (the Court improperly acts as "super-legislature" when it weighs competing state and national interests to determine validity of a state law affecting interstate commerce); Oklahoma *ex rel.* Philips v. Guy F. Atkinson Co., 313 U.S. 508, 527-28 (1940) (it is not for Court to determine if detriment to state outweighs national interests promoted by federal legislation).

94. *See* note 92 *supra*.

CONCLUSION

The significance of *National League of Cities v. Usery* is that it establishes a new constitutional limitation on the exercise of the federal commerce power. The principles underlying the new immunity are consistent with those enunciated as early as 1819 in *M'Culloch v. Maryland*,[95] that the federal system impliedly necessitates constraints upon both the state and the federal levels of government in the exercise of their powers. Prior to *National League*, these principles were applied asymmetrically. The federal government enjoyed freedom from the burdens of both taxation and regulation by the states.[96] The states, however, were granted only a qualified immunity from federal taxation; they were denied protection from federal regulation under the commerce power. *National League* partially resolves this problem, and thereby should enhance the effective functioning of the federal system. However, the scope and definition of the states' new immunity is not clear. Although the boundaries can only be marked out on a case-by-case basis, a clear statement of the criteria used by the Court to judge these cases would provide an improved framework for reconciling the competing interests of the sovereign components of the federal system.

Robert C. Art

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95. 17 U.S. (4 Wheat.) 316 (1819). The Supreme Court in *M'Culloch v. Maryland* stated that in the implied necessity for intergovernmental immunity,

> We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve.

Id. at 430.

96. Cases on state immunity from taxation are discussed in notes 50-54 *supra*. The federal freedom from taxation by any state or political subdivision (unless the national government consents to be taxed) is established in, *e.g.*, Federal Land Bank v. Board of County Comm'rs, 368 U.S. 146 (1961); S.R.A. v. Minnesota, 327 U.S. 558 (1946); Cleveland v. United States, 323 U.S. 329 (1945); Van Brocklin v. Tennessee, 117 U.S. 151 (1886); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Similarly, the federal government is immune from state regulation which would impede or burden the exercise of federal functions. United States v. Georgia Pub. Serv. Comm'n, 371 U.S. 285 (1963); Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285 (1945); Arizona v. California, 283 U.S. 423 (1931); Johnson v. Maryland, 254 U.S. 51 (1920); United States v. City of Chester, 144 F.2d 415 (3d Cir. 1944).