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The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States As Agents of the Nation

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THE POLITICAL SAFEGUARDS OF FEDERALISM REDUX: INTERGOVERNMENTAL IMMUNITY AND THE STATES AS AGENTS OF THE NATION

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INTRODUCTION

The states and their political subdivisions play a significant, perhaps essential, role in the administration and enforcement of many national statutes. The states administer national rate design and service standards for electric utilities;[1] they formulate and enforce plans to reduce the emission of air pollutants from motor vehicles in order to meet national ambient air quality standards;[2] they enforce minimum national environmental standards for surface mining;[3] they manage national price regulations for natural gas;[4] and they enforce a national prohibition on the use of natural gas in decorative outdoor lights.[5] Congress' power to employ the states as agents of the nation[6] in implementing each of these programs has been attacked.[7] States' rights proponents contend that statutes providing for state administration and enforcement of national law reduce the states to "puppets of a ventriloquist Congress"[8] and threaten an independent role for the states in our federal system.

Although states' rights is no longer primarily a refuge for scoundrels,[9] it is often difficult to discern whether states' rights proponents

1. *See infra* text accompanying notes 610-91.

2. *See infra* text accompanying notes 486-88 & 693-704.

3. *See infra* text accompanying notes 559-80.

4. *See infra* note 564.

5. *See infra* text accompanying notes 705-13.

6. Professor Holcombe coined the phrase "states as agents of the nation" to describe the employment of "[s]tate officers in the execution of federal powers." Holcombe, *The States as Agents of the Nation,* 1 S.W. POL. SCI. Q. 307, 309 (1921).

7. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126 (1982) (state administration of national rate design and service standards for electric utilities); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Hodel v. Indiana, 452 U.S. 314 (1981) (state implementation of national environmental standards for surface mining); Atlanta Gas Light Co. v. Department of Energy, 666 F.2d 1359 (11th Cir. 1982) (state administration of national standards for the use of natural gas in outdoor decorative lights); Oklahoma v. Federal Energy Regulatory Comm'n, 661 F.2d 832 (10th Cir. 1981) (state implementation of national price regulations governing intrastate and interstate sales of natural gas), *aff'g,* 494 F. Supp. 636 (W.D. Okl. 1980), *cert. denied sub nom.* Texas v. Federal Energy Regulatory Comm'n, 102 S. Ct. 2902 (1982); United States v. Ohio Dep't of Highway Safety, 635 F.2d 1195 (6th Cir. 1980) (state enforcement of national motor vehicle air pollution restrictions), *cert. denied,* 451 U.S. 949 (1981); Mountain States Legal Found. v. Costle, 630 F.2d 754 (10th Cir. 1980) (same), *cert. denied,* 450 U.S. 1050 (1981); Pacific Legal Found. v. Costle, 627 F.2d 917 (9th Cir. 1980) (same), *cert. denied,* 450 U.S. 914 (1981).

8. Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975), *vacated,* 431 U.S. 99 (1977), *on remand,* 566 F.2d 665 (9th Cir. 1977).

9. States' rights has, until recently, often been the veil for opposition to civil rights for racial minorities. Senator Thurmond's proposal to repeal the Voting Rights Act of 1965 or to frustrate

are motivated by some principle of federalism or whether they use states' rights as a convenient legal mantle for objections to substantive national policies.[10] Regardless of motive, states' rights advocates draw political support from popular frustration with "big government" and the probably ill-founded expectation that state regulation would be less intrusive and more efficient than the national regulation.[11] They draw their legal theory from the Supreme Court's 1976 decision in *National League of Cities v. Usery (NLC)*[12] which upset the easy, then-settled assumption that the only checks on Congress' power to control the states' relationship with the nation were political and substituted a vague concept of judicially enforceable federalism restraints.

NLC did not address directly the question of Congress' power to employ the states as its agents to regulate private activity. It addressed a related question of intergovernmental immunity—Congress' power to

effective administration of the Act by expanding its application to include states that have no history of racial discrimination in voting suggests that the states' rights theory still serves this purpose. Pear, *Congress Begins Fight over Extension of Voting Act,* N.Y. Times, April 18, 1981, at 10, col. 2 (national ed.); Rule, *Blacks and States' Rights: President's Revival of Concept has Upset Those Who Associate Term with Past Discrimination,* N.Y. Times, March 11, 1981, at 14, col. 4 (national ed.).

10. "[T]he proponents of states' rights sought to have it both ways. When their interests were being served by national action, no voice asserting states' rights was to be heard. Only when a national program seemed to them harmful to their interests was the challenge made." R. LEACH, AMERICAN FEDERALISM 36-38 (1970). Most states' rights challenges to national statutes are brought by private parties and not by the states themselves. Although the paucity of state suits is in large part explained by limitations on state standing, the prevalence of private parties' claims of states' rights suggests that states' rights is often a legal vehicle for objections to national policy. *See* Choper, *The Scope of National Power Vis-a-vis the States: The Dispensability of Judicial Review,* 86 YALE L.J. 1552, 1577-79 (1977) [hereinafter cited as *Dispensability of Judicial Review*].

11. Governor Bruce Babbitt of Arizona is a proponent of the "new" states' rights:

> The concept of states' rights has a bad name, because the flag of states' rights over the last three or four decades has been waved by reactionaries, by people who were resisting civil rights, who were against addressing social concerns, a functioning welfare system and who did not want any level of government to address issues of medical care. My experience as governor has brought me to understand that the issue of states' rights shouldn't be identified with those people. There are a lot of us who view ourselves as progressives, who really believe that states ought to pick up responsibilities and address issues. We've been frustrated in trying to do that by the enormous, unyielding, unresponsive federal presence that pervades everything from A to Z.

Notable and Quotable, Wall. St. J., Oct. 24, 1980, at 34, col. 4 (facsimile ed.).

For an argument that state regulations will fill the void created by national deregulation and that the result of deregulation at the national level may well be that private activity is regulated more thoroughly and completely by the states than it was ever controlled by the national government, see Noam, *The Interaction of Federal Deregulation and State Regulation,* 9 HOFSTRA L. REV. 195 (1980).

12. 426 U.S. 833 (1976).

regulate the states and their political subdivisions.[13] The Supreme Court, unfortunately, failed to articulate any neutral principle[14] adequate to support the holding that most state and local government employees are immune from the minimum wage and overtime requirements of the national Fair Labor Standards Act.[15] Notwithstanding this widely deplored theoretical inadequacy,[16] most courts and commentators have been content to apply one or more of three sterile approaches to intergovernmental regulatory immunity that *NLC* seemingly invited: federalism restraints are found to apply to statutes enacted under the commerce power but not to statutes enacted under other powers;[17] an aspect of state activity or government is labeled "traditional" or "integral" and held immune from national control;[18] or the scope of national power is determined by balancing state and national interests.[19] Although a few scholars have essayed more thoughtful and original analyses of intergovernmental regulatory immunity in the wake of *NLC*,[20] no one has advanced a theory that will permit effective implementation of national policy and preserve the states as essential components of our federal system.

The absence of any coherent theory of Congress' power to regulate the states and to use the states as its agents in implementing national policy has, as yet, had little immediate effect on the allocation of power between the states and the nation. Although the *NLC* decision has inspired many challenges to Congress' power, most courts have found

13. The issue in *NLC* was whether Congress had the power to apply the minimum wage and overtime provisions of the Fair Labor Standards Act to state and local government employees. The case did not raise any question of Congress' power to employ the states in applying these requirements to private employers.

14. "Neutral principles" are, as Professor Herbert Wechsler originally intended and as Professor Greenawalt has emphasized, "reasons that in their generality and their neutrality transcend any immediate result;" that is, principles that judges will apply to every situation that they reach regardless of the result. Greenawalt, *The Enduring Significance of Neutral Principles,* 78 COLUM. L. REV. 982, 985-90 (1978); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 19 (1959). Professor Wechsler found that the question of a neutral principle for "the limits put on the Congress as against the states" was "intriguing." Wechsler, *supra,* at 23-24. This Article develops a principle of political accountability as an answer to his intriguing question.

15. 426 U.S. at 852.

16. *E.g.,* Cox, *Federalism and Individual Rights Under the Burger Court,* 73 NW. U. L. REV. 1, 22-25 (1978); Note, *Municipal Bankruptcy, The Tenth Amendment and the New Federalism,* 89 HARV. L. REV. 1871, 1878-84 (1976) [hereinafter cited as *Municipal Bankruptcy*].

17. *See infra* text accompanying notes 121-24.

18. *See infra* text accompanying notes 116-17.

19. *See infra* text accompanying notes 118-20.

20. *See infra* text accompanying notes 731-802.

wanting federalism objections to national regulation of state and local government and to state implementation of national programs.[21] However, the Supreme Court's *NLC* decision, with its attendant ambiguity, has made Congress more cautious. Congress has been reluctant in recent years to regulate the states and their political subdivisions[22] and has expressed doubts about its power to use the states as agents of the nation.[23]

The Court recently has limited the reach of *NLC* by sustaining Congress' power to employ the states as its agents to implement national

21. Arguments that national statutes intrude impermissibly on state autonomy and are unconstitutional under *NLC* have been raised in over 200 reported cases. Apart from cases following *NLC* directly and holding that the FLSA is unconstitutional as applied to particular state and local government employees, *see infra* note 115, only a handful of courts has ever held a national statute unconstitutional under *NLC*, and most of these decisions were subsequently reversed or discredited. As of June 1, 1982, there are only two outstanding judgments that a national statute is unconstitutional under *NLC*. District courts in Wyoming and Montana have held, contrary to the great weight of authority, that the Age Discrimination in Employment Act is unconstitutional as applied to a state employee. Taylor v. Department of Fish & Game, 523 F. Supp. 514 (D. Mont. 1981); EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981), *prob. juris. noted,* 102 S. Ct. 996 (1982) (No. 81-554). *See infra* notes 373-74 and accompanying text.

22. Congress' failure to enact a statute providing collective bargaining rights for state and local government employees similar to the rights of private employees under the National Labor Relations Act is, at least in part, attributable to doubts, inspired by *NLC*, about the constitutionality of such legislation. *See* Chanin, *Can a Federal Collective Bargaining Statute for Public Employees Meet the Requirements of* National League of Cities v. Usery*?: A Union Perspective,* 6 J.L. & EDUC. 493 (1977); Jascourt, *Can a Federal Collective Bargaining Law for Public Employees Meet the Requirements of* National League of Cities v. Usery*: An Introduction,* 6 J.L. & EDUC. 491 (1977); Weil & Manas, *Can a Federal Collective Bargaining Statute for Public Employees Meet the Requirements of* National League of Cities v. Usery*?: A Management Perspective,* 6 J.L. & EDUC. 515 (1977); Note, *Constitutional Implications of a Federal Collective Bargaining Law for State and Local Government Employees,* 11 CREIGHTON L. REV. 863 (1978).

Congress drafted the 1978 Amendments to the municipal bankruptcy statute, 11 U.S.C. §§ 901-946 (Supp. IV 1980), with a wary eye on *NLC*. *See* S. REP. No. 989, 95th Cong., 2d Sess. 110-11 (1978); H. REP. No. 595, 95th Cong., 1st Sess. 262-64, 394-95, 398 (1977). Bills that would impose the registration and disclosure requirements of national securities laws on municipal issuers have also produced congressional analysis of the reach of *NLC*. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role,* 79 COLUM. L. REV. 847, 848 n.8 (1979).

23. Congress altered the mechanism for obtaining state enforcement of national restrictions on motor vehicle air pollution in response to *NLC*. *See infra* text accompanying notes 693-704. Proposals for state administration of national workers' compensation standards may have failed in part because of doubts about Congress' power to use the states as its agents. *See Hearings on S. 3060 Before the Subcomm. on Labor of the Senate Comm. on Human Resources,* 95th Cong., 2d Sess. 1-2, 51 (1978); *Hearings on S. 2018 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 94th Cong., 2d Sess. 751-58 (1976) (testimony of Professor Arthur Larson); Solomons, *Workers' Compensation for Occupational Disease Victims: Federal Standards and Threshold Problems,* 41 ALBANY L. REV. 195, 237-38 (1977).

standards for electric utilities,[24] to administer national environmental standards for surface mining,[25] and to apply national labor relations policies to the employees of a state-owned commuter railroad.[26] The Court did not, however, refine the *NLC* concept of state autonomy. Absent principled criteria governing Congress' power to regulate the states and to use them as the nation's agents, *NLC*'s vague concept of state autonomy remains an open invitation to litigation. It also creates a significant risk that a series of ad hoc decisions will impose unprincipled and impractical restraints on national power in the name of states' rights and will inhibit effective government of the nation. This unfortunate result can be avoided if the Court: (1) determines the states' role in the federal system; (2) identifies the effects on the states of Congress' power to regulate private activity, to regulate the states themselves, and to require the affirmative exercise of state authority over private activity in the administration and enforcement of national law; (3) and evaluates the extent to which the national political process both justifies and limits national political authority over the states.

The framers intended that the states, like the nation, would be political communities with the power to make decisions about government: political decisions about substantive rules for private conduct, the structure and organization of their decisionmaking processes, the package of goods and services to be provided collectively, and the allocation of governmental resources. These powers, which make the states self-governing, political decisionmaking units, are then state interests that merit some protection if the states' role in the federal system is to be preserved. In creating a second political community—the nation—the framers recognized that state exercise of these powers would not be completely independent; however, apart from a very broad outline, they did not determine the extent to which one political decisionmaking unit (the states) would be subject to the control of another, larger political community (the nation). Thus, the question created by the establishment of two political communities in a single constitutional system is whether there is any rule for giving preference to the larger,

24. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126 (1982). *See infra* text accompanying notes 610-91.

25. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Hodel v. Indiana, 452 U.S. 314 (1981). *See infra* text accompanying notes 559-80.

26. United Transp. Union v. Long Island R.R., 102 S. Ct. 1349 (1982). *See infra* text accompanying notes 498-513.

national political community consistent with the states' role as political decisionmaking units.

A rule of preference between political choices of the states and the nation can be found in the operation of the national political process. When national political decisions are the product of a national majority, preference for the political choice of the nation over the political choices of subnational majorities serves the framer's intentions that the national political process would be an alternative to parochial state political processes and that the actual allocation of political authority in the federal system would be determined by the electorate. National political decisions are the product of a national majority when Congress is politically accountable or answerable to the national electorate. The political accountability of Congress turns on political checks inherent in the national political process. These political checks are simply the impact of national policy on private activity and the imposition of the administrative and financial costs of enforcing national policies on the national electorate. To the extent that political checks make Congress politically accountable, they ensure that national political decisions are the product of a national majority and justify national authority to intrude on state autonomy. Political checks also limit intrusions on the states' interests in independent political decisionmaking. Thus, political checks and Congress' political accountability, and not simply the representation of state interests in Congress by representatives elected from the states, are the political safeguards of federalism;[27] they justify judicial deference to the national political process and protect the states' role as political communities in the federal system. When political checks make Congress politically accountable, intrusion on the independence of state political decisionmaking is permissible; that is, the political safeguards of federalism are sufficient. Conversely, when Congress is not politically accountable, courts should protect state interests in political decisionmaking.

This Article first develops the framers' understanding that both the nation and the states would be political communities with significant

27. Professor Herbert Wechsler first stated the theory that there are safeguards of state interests inherent in the national political process and that these safeguards are adequate to protect our federal system of government. 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 (1954). His explanation of the political safeguards of federalism and the elaboration of political accountability as the safeguard of the states' role in the federal system is developed *infra* at notes 803-11 & 829-49.

political decisionmaking powers and that the actual allocation of political authority would turn on the electorate's preference between the states and the nation. It explains how Congress' power to regulate private activity, to regulate the states, and to require the affirmative exercise of state authority over private activity diminishes the states' autonomy in making political decisions. It then analyzes the concept of state autonomy announced in *NLC* and reviews lower court efforts to determine the extent to which state autonomy limits Congress' authority under the war, spending, Civil War Amendment enforcement, commerce, and tax powers to regulate both private activity and the states and to employ the states as the nation's agents in regulating private activity. Since these lower court decisions provide a comprehensive overview of Congress' power to control the allocation of political authority in the federal system, they establish the full range of national and state relations to be explained by any principled theory of federalism. With this background, the Article then advances a theory of political accountability as both a justification for and a limitation on Congress' power over the states, and it defines the scope of Congress' power to control the allocation of political authority in the federal system.[28]

28. This Article addresses all but two areas of federalism limits on Congress' power. The first omission is the question of Congress' power to abrogate the states' eleventh amendment immunity to suit in federal courts. The Supreme Court has recognized Congress' power to abrogate the states' eleventh amendment immunity under the enforcement clause of the fourteenth amendment. Hutto v. Finney, 437 U.S. 678 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The Supreme Court has not yet settled the question of Congress' article I powers to abrogate state eleventh amendment immunity, but most lower courts have recognized this power. *E.g.,* Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979) (war power); Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979) (copyright and patent power); Jennings v. Illinois Office of Educ., 589 F.2d 935 (7th Cir. 1979) (war power), *cert. denied,* 441 U.S. 967 (1979). Apart from the light they shed on the general issue of states' rights restraints on Congress' powers, cases raising eleventh amendment issues are not discussed directly because these issues have already been thoroughly and brilliantly analyzed. *See* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One,* 126 U. PA. L. REV. 515 (1978); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States,* 126 U. PA. L. REV. 1203 (1978).

Congress' power to control state courts is the only other aspect of federalism limits on the national legislature that is not discussed in this Article. The Supreme Court's 1976 decision in *National League of Cities* has revived old, and largely unsettled, questions of national power over state courts. *E.g., In re* Marriage of Lopp, 268 Ind. 690, 378 N.E.2d 414 (1978) (Congress' power to prescribe rules of evidence for state courts), *cert. denied,* 439 U.S. 1116 (1979); Thiboutot v. Maine, 405 A.2d 230 (1979) (Congress' power to abrogate state common law sovereign immunity when a state is sued in state court), *aff'd,* 448 U.S. 1 (1980); People v. Shapiro, 50 N.Y.2d 747, 431 N.Y.S.2d 422, 409 N.E.2d 897 (1980) (Congress' power to prescribe rules of evidence for state

The theory of political accountability advanced here is largely consistent with the existing pattern of national and state relations, although it supplies a new explanation for the results. It permits a wide range of national and state cooperation. Thus, it is consistent with a workable system of government. Moreover, it provides some protection for the states as political decisionmaking units by limiting the means that Congress can use to regulate the states and to employ the states as its agents. Most importantly, reliance on the political process to determine the allocation of political power between the states and the nation reduces the risk of substituting judicial policy for congressional policy because it provides a modest, principled basis for judicial superintendence of our federal system of government.

I. THE STATES' ROLE IN THE FEDERAL SYSTEM

A. Original Understanding: The States as Political Decisionmaking Units

The commonplace observation that the framers of the Constitution did not define clearly the role of the states in our federal system confuses two separate questions: whether the framers had a sharp concept of the states' role, and whether they determined precisely the allocation

courts); Sharp v. Commonwealth, 29 Pa. Commw. 607, 372 A.2d 59 (1976) (Congress' power to abrogate state common law sovereign immunity when a state is sued in state court). Nevertheless, the breadth of these issues and the clear historical understanding that state courts would hear federal cases if Congress neglected to create inferior federal courts or to vest them with full jurisdiction over cases within the article III judicial power, *see infra* note 995 and accompanying text, requires separate analysis of the question of national control of state courts. The author hopes to undertake this task elsewhere.

In addition to these two areas of federalism restraints on Congress, this Article also defers consideration of states' rights limits on the powers of the federal courts. Even before *NLC*, the Supreme Court began to restrict federal court interference with state court proceedings and to limit review of state court judgments on habeas corpus. *E.g.,* Francis v. Henderson, 425 U.S. 536 (1976); Younger v. Harris, 401 U.S. 37 (1971). These restrictions on federal court interference with state court proceedings and judgments have been augmented since *NLC* was decided and have been carefully analyzed. Moore v. Sims, 442 U.S. 415 (1979); Stone v. Powell, 428 U.S. 465 (1976); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court,* 86 YALE L.J. 1035 (1977); Fiss, *Dombrowski,* 86 YALE L.J. 1103 (1977). *NLC* has generated other broad questions of federalism limits on the powers of federal courts. *E.g.,* New York State Ass'n for Retarded Children, Inc. v. Carey, 631 F.2d 162 (2d Cir. 1980) (federal court power to compel a state officer to act in excess of or contrary to his state law authority); Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980) (federal common law); Turpin v. Mailet, 579 F.2d 152 (2d Cir.) (implied constitutional cause of action against a state for damages), *vacated,* 439 U.S. 974 (1978), *modified on remand,* 591 F.2d 426 (2d Cir. 1979). Questions of states' rights limits on federal courts will be explored in a subsequent article.

of power between the states and the national government. Contrary to received wisdom, there is an historical answer to the first question: the framers understood that the states, like the nation, would be political communities or political decisionmaking units.[29] Recognition of this basic concept of the states' role is in turn the first step in answering the allocation of power question, which the framers, in large measure, left open.

The most elementary and perhaps the only indisputable characteristic of the federal form of government established by the Constitution is that it provides for two governments—national and state.[30] The Constitution that established a national government assumed the continued existence of state governments.[31] This assumption is the key to the framers' understanding of the states' role because a government presumes an underlying political community or society. In maintaining state governments in the constitutional system, the framers recognized the continued existence of the states as political communities[32]

29. *See infra* text accompanying notes 30-39.

30. The Constitution established neither a pure federal government or confederacy, in which "the central body is entirely dependent legally upon [the] will of associated states retain[ing] all the sovereign power" over individuals, nor a national or unitary government with complete sovereignty; instead it created a "compound" of these two forms of government (which we now commonly style "federal") in which both the states and the national government exercise "some portion of the whole governing power." Diamond, *The Federalist's View of Federation,* in ESSAYS IN FEDERALISM 21, 22, 37 (1961) [hereinafter cited as Diamond]; Diamond, *The* Federalist *on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both",* 86 YALE L.J. 1273 (1977).

The retention of a measure of the whole governing power in the states was, as Professor Herbert Wechsler observed, hardly a point on which there was any choice, and the principle of two governments was the clearest point of consensus among the drafters of the Constitution. Wechsler, *supra* note 27, at 543. *See* S. DAVIS, THE FEDERAL PRINCIPLE 114 (1978); R. LEACH, *supra* note 10, at 8.

31. The Constitution explicitly recognizes state government in the guarantee to each state of a republican form of government. U.S. CONST. art. IV, § 4. Implicit recognition of state government is provided by references to the organs of state government. *E.g.,* U.S. CONST. art. I, § 2, cl.1 (state legislature); art. I, § 2, cl.4 (state executive); art. I, § 3, cl.1,2 (state legislature); art. I, § 3, cl.2 (state legislature and state executive); art. I, § 4, cl.1 (state legislature); art. I, § 8, cl.17 (same); art. II, § 1, cl.2 (same); art. IV, § 1 (state judiciary); art. IV, § 2, cl.2 (state executive); art. IV, § 3, cl.1 (state legislature); art. IV, § 4 (state legislature and state executive); art. V (state legislature); art. VI, cl.2 (state judiciary); art. VI, cl.3 (state legislature, executive, and judiciary).

32. The tenth amendment's reservation of powers, not delegated to the United States nor prohibited by the Constitution, "to the States respectively, or to the people" provides clear textual support for the concept of the state as a political community. U.S. CONST. amend. X. The use of the disjunctive "or" equates the state with its people and suggests that the people of the state will determine whether and how the reserved powers will be executed through state government. *See* Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essen-*

that would have the power to make decisions about the government of their own communities. The power to make decisions about government clearly includes the power to structure and organize the processes of government.[33] Unless we are to construe this power to make political decisions[34] as an empty vessel, it also necessarily includes the power of the political community organized in a government to regulate private conduct, to determine the package of goods and services financed through taxes and provided collectively, and to allocate governmental (executive, legislative, and judicial) resources.[35]

The framers clearly did not intend, however, that the states would be completely independent in the exercise of these political decisionmaking powers. The Constitution directly imposes significant, specific restraints[36] and duties[37] on the states. Most importantly, in the same

tial Government Services, 90 HARV. L. REV. 1065, 1067 n.17 (1977) [hereinafter cited as *Unraveling NLC*]. *Cf.* National League of Cities v. Usery, 426 U.S. 833, 869 n.9 (1976) (Brennan, J., dissenting) (language of tenth amendment differentiates people and states). Other provisions of the Constitution also suggest that the framers viewed the states as political communities that would have a government. The guarantee of a republican form of government is obviously made to the people of a state and not to some abstract, formal institution. Texas v. White, 74 U.S. (7 Wall.) 700, 721 (1869); U.S. CONST. art. IV, § 4. Congress' power to submit amendments to the Constitution to either state legislatures or conventions in the states recognizes a distinction between the state as a government and the state as a political community. U.S. CONST. art. V. In Texas v. White, 74 U.S. (7 Wall.) 700, 720-21 (1869), Chief Justice Chase said that the term "state" was used in the Constitution to designate "the combined idea of people, territory, and government," and he concluded the principal concept was that a state was a "political community."

33. Although the Constitution assumed that each state's government would include an executive, legislative, and judicial branch, *see supra* note 31, it did not, apart from the general guarantee of a republican form of government, control the form or operation of state government. U.S. CONST. art. IV, § 4.

34. A "political decision" is by definition one about government and public policy. OXFORD ENGLISH DICTIONARY (Oxford University Press 1971).

35. These categories of state political decisionmaking powers are consistent with the well-settled concept that the states have broad "police" powers and enjoy all possible governmental powers, except those denied to any government or allocated to the national government. *See* Parker v. Brown, 317 U.S. 341, 359-60 (1943); Munn v. Illinois, 94 U.S. 113, 124-25 (1876); New Orleans v. United States, 35 U.S. (10 Pet.) 662, 736 (1836). Other commentators have attributed similar basic powers to the states as political communities. Kaden, *supra* note 22, at 849-53. *Cf.* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1166-73 (similar list of state powers inherent in sovereignty was implicitly rejected by the plurality opinion of the Supreme Court in *NLC*) [hereinafter cited as *Permutations of Sovereignty*].

36. U.S. CONST. art. I, § 10.

37. The Constitution requires the states to participate in the national political process by electing members of the Congress, by appointing presidential electors, and by passing on proposed amendments. U.S. CONST. art. I, §§ 2-4; art. II, § 1; art. V; amends. XII, XVII. The Constitution also imposes duties on states in their dealings with other states. U.S. CONST. art. IV, § 1 (full faith

instrument that recognized the states as political communities, the framers established a government for the nation and thus recognized a different, larger political community[38] with major political decisionmaking powers.[39] The existence of two political communities necessarily created the potential for competition and conflict in the exercise of political decisionmaking powers, and to the extent that the nation predominated, the states' role as political decisionmaking units would be reduced.

Although the founding fathers recognized the conflict inherent in establishing two political decisionmaking units in a single constitutional system, they did not resolve it.[40] In the Constitution and the debate

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and credit to state judicial proceedings); art. IV, § 2, cl.2 (rendition of fugitives from justice). The Court emasculated the duty to extradite fugitives from justice in Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861), much as it earlier emasculated the duty to return fugitive slaves in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). *See infra* text accompanying notes 1009-20 & 1026-32.

38. In Texas v. White, 74 U.S. (7 Wall.) 700, 721 (1869), the Supreme Court expressly noted the existence of two political communities in our federal system:

> A state, in the ordinary sense of the Constitution, is a *political community* of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater *political unit*, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.

Id. (emphasis added). Professor Kaden also identifies the states as political communities, but he does not explicitly recognize that both the states and the nation are political communities. *See* Kaden, *supra* note 22, at 849-53.

39. The Constitution divides national political powers between the legislative, executive, and judicial branches of the government that it establishes. The principal heads of legislative power are: art. I, § 4 (time, plan, and manner of congressional elections); art. I, § 8 (*e.g.*, taxes, spending, commerce); art. IV, § 1 (full faith and credit to state acts and judicial proceedings); and art. IV, § 3, cl.2 (rules and regulations for United States territories and property). Subsequent amendments extended these legislative powers to other subjects. U.S. CONST. amend. XIII (slavery), XIV (privileges or immunities, due process, and equal protection), XV (voting), XVI (income tax), XIX (women's suffrage), XX (presidential election and succession), XXIII (national representation of the District of Columbia), XXIV (poll tax), and XXVI (minors' suffrage). Political decisionmaking powers are conferred on the executive and the judiciary by article II, sections 2-3, and article III, section 2, respectively.

40. S. DAVIS, *supra* note 30, at 95; R. LEACH, *supra* note 10, at 8-10. The whole debate over the adoption of the Constitution between the federalists and the antifederalists focused on the question of the extent to which political power would be centralized in the national government, and the price of adoption was ambiguity. Diamond, *supra* note 30, at 42-51.

Although the framers did not define precisely the scope of an individual state's political powers with respect to the nation, they did provide a mechanism to prevent the states from combining to expand their political powers at the expense of the nation. The compact clause prevents the states from entering an agreement or compact that expands their political powers in relation to the national government without the consent of Congress. U.S. CONST. art. I, § 10, cl.3. *See* United States Steel Corp. v. Multistate Tax Comm'rs, 434 U.S. 452 (1978); Frankfurter & Landis, *The*

over its adoption, the framers carefully sidestepped questions about the division of the governing power between the two political communities and the extent to which one political decisionmaking unit (the states) would be subject to the control of the other political decisionmaking unit (the nation). The Constitution does impose some specific restraints on the political power allocated to the nation and it does confine the national political community to the exercise of the enumerated powers. The specific restraints, however, do little more than assure the formal existence of the states[41] or protect particular exercises[42] of state political decisionmaking authority. The restriction of the national political community to enumerated powers,[43] even bolstered by the tenth amendment's reservation of nondelegated powers,[44] could protect the states' role only if the enumerated powers were narrowly defined and construed because the Constitution provides for the supremacy of

Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 YALE L.J. 685, 693-95 (1925).

41. The Constitution obligates the United States to guarantee every state a republican form of government and to protect the states against invasion and domestic violence. U.S. CONST. art. IV, § 4. It prohibits alteration of state boundaries and reduction of state representation in the Senate without the consent of the state's legislature. U.S. CONST. art. IV, § 3, cl.1; art. V. On the question of the power of the courts and Congress to enforce the guarantee of a republican form of government, see *infra* note 441. The prohibition against any national action giving a preference to the ports of one state over those of another indirectly protects the formal existence of the states. U.S. CONST. art. I, § 9, cl.6.

42. The Constitution explicitly protects state power to determine the qualifications of voters (art. I, § 2, cl.1; amend. XVII), to appoint the officers of the militia (art. I, § 8, cl. 16), and to regulate liquor (amend. XXI). State power to levy property taxes is indirectly protected by the apportionment clause, which makes a national property tax administratively difficult. U.S. CONST. art. I, § 9, cl.4; Dam, *The American Fiscal Constitution,* 44 U. CHI. L. REV. 271, 289 (1977). The Constitution protected the states' power to control the importation of slaves until 1808. U.S. CONST. art. I, § 9, cl.1.

43. THE FEDERALIST argued that the jurisdiction of the national government was limited to certain enumerated objects only, and the power of the national government has always been so understood. THE FEDERALIST No. 14, at 86 (J. Madison) (J. Cooke ed. 1961). *E.g.,* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

44. U.S. CONST. amend. X. The tenth amendment has always been read merely to confirm the basic principles that the national government is confined to the exercise of the delegated powers and that the states are free to exercise powers not prohibited by the Constitution. It does not limit or explain the nature or extent of the powers delegated to the national government. United States v. Darby, 312 U.S. 100, 124 (1941); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406-07 (1819). The history of the adoption of the tenth amendment confirms this interpretation. *Dispensability of Judicial Review, supra* note 10, at 1611-13, and sources cited therein. Even when the Supreme Court revived state sovereignty as a limit on Congress' powers in *National League of Cities*, it read the tenth amendment only as a declaration of a broader constitutional policy and not as a specific limit on the powers of the national government. *See infra* notes 94-96 and accompanying text.

valid national law.[45] Although the proponents of the Constitution argued that the enumerated powers were limited in number and scope,[46] others (the antifederalists) argued that these powers, especially when coupled with a broad provision of power to execute them,[47] could significantly diminish the states' role.[48] The Constitution, which contains no standard to confine the interpretation of the national political powers, provides no answer to these conflicting interpretations.[49] More importantly, apart from a minimum guarantee of formal existence and provision for a few particular state powers,[50] the Constitution provides no specific protection for the states' role as political decisionmaking units. The proponents of the Constitution were forced to argue that the states and nation could coexist as political communities and that the states would be the predominate political unit because the people would prefer state government over the national government.[51]

The framers' intention that the states would be an integral part of our federal form of government and their understanding that the states, like the nation, would function as political decisionmaking units may

45. U.S. CONST. art. VI, cl.2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). The supremacy clause does not speak to the question of what powers are delegated to the national government; it provides simply that when the national government acts within its powers, it is supreme. Although reliance on the supremacy clause to answer the question of the proper subjects and scope of national powers begs the question, the Supreme Court has occasionally committed this error. *See* Testa v. Katt, 330 U.S. 386, 389 (1947) (question of Congress' power to compel a state court to enforce a penal statute answered in part by asserting supremacy of national law); *see infra* text accompanying notes 644-46.

46. THE FEDERALIST No. 45, at 313 (J. Madison) (J. Cooke ed. 1961) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite"). Madison also suggested that the powers of the states and the national government were distinct and separate. *Id.* No. 14, at 86; No. 45, at 313; No. 46, at 315 ("The Federal and State Governments are . . . instituted with different powers, and designated for different purposes"). This line of argument gave rise to the theory of dual federalism. *See infra* note 78 and accompanying text.

47. U.S. CONST. art. I, § 8, cl.18 ("necessary and proper" clause).

48. Scheiber, *Federalism and The Constitution: The Original Understanding,* in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 95-96 (L. Friedman & H. Scheiber, eds. 1978).

49. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("the question respecting the extent of powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.").

50. *See supra* notes 41 & 42.

51. Diamond, *supra* note 30, at 42-51; Scheiber, *supra* note 48, at 91. *See* W. MURPHY, THE TRIUMPH OF NATIONALISM 403-04 (1967).

seem trivial in light of their failure to determine the extent to which this state role would be preserved and how it would be protected against the power of the national political community. Although the Constitution does not determine the extent to which one political decisionmaking unit (the states) is subject to the control of another political decisionmaking unit (the nation), identification of the states' role is nonetheless significant because it teaches that contests between the states and nation are contests of political decisionmaking power between political communities. It also suggests that the resolution of such contests lies in the determination of a principle for giving preference to one political process over the other[52]—a suggestion that is strongly bolstered by the argument in *The Federalist* that popular support would determine whether the nation or the states would predominate.[53]

B. National Power to Control the Allocation of Political Authority Between the States and the Nation

In the absence of any precise determination of the extent to which the states would be politically subordinate to the larger political community of the nation, it was theoretically possible that the states would have significant political power to make decisions about the substantive rules for individual behavior, the structure and organization of their decisionmaking processes, the package of goods and services financed through taxes and provided collectively, and the allocation of their executive, legislative, and judicial resources. It was, however, also theoretically possible that the states' political decisionmaking powers would be significantly diminished by the exercise of national political powers to regulate private activity, to regulate the states, and to control the "affirmative exercise of state authority" over private activity.[54]

52. *Cf. Permutations of Sovereignty, supra* note 35, at 1171 ("no firm ground for preferring the 'integrity' of state and local politics to that of national politics").

53. Scheiber, *supra* note 48, at 89 ("settlement of conflicts between the states and Congress would have to be decided by the informal political process"). THE FEDERALIST argued that the predominance of the states or the nation would turn on popular loyalty and that the states would probably prevail; however, the emphasis on the states as centers of political power was an effort to overcome the antifederalists' fear of a strong central government, and the authors of THE FEDERALIST in fact understood that the national government would probably win the competition for popular loyalty. Diamond, *supra* note 30, at 42-56.

54. These three categories of national law that affect the states' role as political decisionmaking units are drawn in part from Professor Hart's analysis of the relation of national substantive law and state law. Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 495 (1954). Professor Hart distinguished national substantive law that regulates state authority by

1. State and National Power to Regulate Private Activity

Political power to prescribe substantive rules directly controlling private activity can, in theory, be allocated between the states and the nation in a number of ways. Congress may make certain matters completely subject to national regulation[55] or, alternatively, leave them completely to state statutory and common law.[56] State control of a

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requiring or prohibiting its exercise and national substantive law that displaces state law and controls private activity directly. *Id.* at 495, 515-36. A third category of national law is added here—national substantive law that controls state and local government and activity. While Professor Hart focused on the problems of two sources of law, the focus here is the relation of two political communities and the effect of national law on the political decisionmaking powers of the states.

55. If Congress has the constitutional power to regulate an activity, the preemption doctrine determines the extent to which state power to regulate is displaced. This doctrine rests on the supremacy clause, which provides that the Constitution and laws of the United States shall be the supreme law of the land. U.S. CONST. art. VI, cl.2. When Congress states expressly the precise extent to which state laws must be displaced in order to accomplish constitutionally valid ends sought by the national legislature, the courts defer to the congressional allocation of governmental power. When Congress does not declare precisely the extent to which state law is superseded, the courts have the difficult task of determining whether state law should be invalidated because it conflicts with a national statute. Murphy & La Pierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption,* 76 COLUM. L. REV. 392, 437-45 (1976); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 COLUM. L. REV. 623 (1975). The crucial question, of course, is what matters Congress can regulate against claims that Congress has intruded unconstitutionally on state autonomy. That question is addressed below. *See infra* text accompanying notes 850-73. If Congress does have the constitutional power to regulate a particular matter, preemption follows automatically if Congress has made its intent sufficiently clear. Murphy & La Pierre, *supra,* at 440-45.

56. Individual activity is left completely to state control where Congress has not acted, unless a court concludes that, even in the absence of national legislation, the mere grant of power to Congress excludes state legislation. *E.g.,* Goldstein v. California, 412 U.S. 546, 552-60 (1973) (article I, section 8, clause 8, copyright power does not exclude all state copyright legislation); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (state requirement of contour mudguards on trucks invalid under the commerce clause). Congress, however, can remove the barrier of its dormant or unexercised legislative powers. *E.g.,* Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981) (Congress can consent to state regulation of insurance that would otherwise be invalid under the commerce clause); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (same); National Agric. Chems. Ass'n v. Rominger, 500 F. Supp. 465, 470-71 (E.D. Cal. 1980) (Congress can permit state regulation of pesticides that would otherwise be invalid under the commerce clause). *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 270-71, 355-57 (10th ed. 1980). Although there is no definitive rationale for Congress' power to enact statutes consenting to state laws that would otherwise be inconsistent with the grant of legislative power to the nation, such statutes can be understood as an example of the principle that the allocation of political power between the states and the nation is to be determined by the national political process.

The doctrine of national immunity from state regulation and taxation may prevent the application to the national government and its instrumentalities of state law rules for private activity;

particular private activity is not necessarily synonymous with different, and perhaps conflicting, substantive rules in other states; an accommodation of state laws is possible.[57] Reciprocal legislation,[58] interstate compacts,[59] and informal cooperation in matters like regional planning[60] may approach the degree of interstate coordination or uniformity achievable by direct national regulation. Between the two extreme ends of the spectrum, political power to regulate private activity can be shared by the states and the nation. National law may be interstitial;[61] that is, national control of private activity may be confined to distinct, discrete areas with the remainder left to the states. A joint role for the exercise of state and national political decisionmaking powers over private activity is also established when national statutes are designed to enforce state law,[62] when national and state substantive rules are complementary,[63] when both governments adopt identical standards,[64] and

however, Congress can provide for complete state control of a particular subject matter by waiving national immunity. *Compare* First Agric. Nat'l Bank v. State Tax Comm'n, 392 U.S. 339 (1968) (national bank immune from state taxation) *and* Johnson v. Maryland, 254 U.S. 51 (1920) (requirement that employee of Post Office have a state driver's license invalid) *with* Hancock v. Train, 426 U.S. 167 (1976) (national installations must comply with state air pollution standards applicable to similar private facilities, but national installations do not have to comply with state permit requirements unless Congress states such an intention clearly) *and* 12 U.S.C. § 1768 (1976) (real and tangible personal property of national credit unions subject to nondiscriminatory state and local taxation).

57. Hart, *supra* note 54, at 536. *See generally* Koenig, *Federal and State Cooperation Under the Constitution,* 36 MICH. L. REV. 752 (1938).

58. The National Conference of Commissioners on Uniform State Laws has drafted over 100 acts and codes, and many of them have been widely adopted. *See generally* U.L.A. (Master Edition).

59. *E.g.,* 4 U.S.C. § 112(a) (1976) (consent to agreements or compacts for the prevention of crime and criminal law enforcement); 33 U.S.C. § 1253(b) (1976) (consent to compacts for the control of pollution). Both reciprocal legislation and formal agreements are subject to the restraints of the compact clause. *See supra* note 40.

60. *E.g.,* 42 U.S.C. § 7402(a) (Supp. IV 1980) (encourage interstate cooperation in air pollution control).

61. Hart, *supra* note 54, at 498.

62. *E.g.,* United States v. Five Gambling Devices, 346 U.S. 441 (1953) (national statute prohibited shipment of gambling devices into any state except those which acted to exempt themselves from the statute); Kentucky Whip & Collar Co. v. Illinois Central R.R., 299 U.S. 334 (1937) (national statute prohibited shipment of convict-made goods into any state that prohibited the receipt, sale, or possession of such goods).

63. When national and state statutes regulate the same aspects of individual behavior, the state law may be preempted if Congress has expressly stated its intention that the national regulation displaces state law or if the state law conflicts with the national statute. *See supra* note 55. If, on the other hand, the national and state statutes are complementary, both sets of regulations can be enforced. *E.g.,* Askew v. American Waterways Operators Inc., 411 U.S. 325 (1973) (liability

when the national government and the states cooperate in enforcing their laws.[65]

When Congress exercises its political power to regulate some aspect of private activity, there is a significant effect on the states as political decisionmaking units. For example, in the Fair Labor Standards Act of 1938 (FLSA), Congress established minimum wage and maximum hour requirements for employees engaged in commerce or in the pro-

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under national statutes for costs to national government of cleaning up oil spills in the ocean and liability under state law for damages to the state or private persons).

National and state environmental quality acts are a prominent example of duplicate legislation. The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1976), requires the preparation of environmental impact statements evaluating the costs and benefits of any "major federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(C). Approximately half of the states have statutes imposing similar requirements, and when a project is within the terms of NEPA and the state environmental quality acts, two different, but often similar environmental impact statements must be filed. 43 Fed. Reg. 55,978, 55,986-87 (1978); 40 C.F.R. § 1506.2 (1981) (provisions to eliminate duplication between NEPA and comparable state requirements).

64. When state law voluntarily adopts national standards or a national law incorporates state standards, uniformity can be achieved without any intrusion on the substantive policy for private activity determined by the state political process. For example, during World War II, many state and local governments enacted statutes and ordinances making violations of national Office of Price Administration regulations a state or local offense. Mermin, *"Cooperative Federalism" Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements,* (pts. 1-2), 57 YALE L.J. 1, 201 (1947); Note, *State Legislation in Support of the N.I.R.A.,* 34 COLUM. L. REV. 1077 (1934) (state statutes adopting provisions of national codes as standards of fair competition). Informal cooperation that respects state political decisions can also be accomplished by statutes incorporating state law. For example, the national Assimilative Crimes Act and the Federal Tort Claims Act both incorporate state law standards for individual behavior. 18 U.S.C. § 13 (1976); 28 U.S.C. § 1346(b) (1976). National tax, copyright and bankruptcy law also may incorporate state law. *E.g.,* Flournoy v. Wiener, 321 U.S. 253 (1944).

65. The states, for example, have assisted in enforcing treaty regulations governing salmon fishing, the national Prohibition laws, and draft regulations. *See infra* notes 945, 952 & 1032.

Interstate cooperation, *see supra* notes 58-60 and accompanying text, and informal cooperation between the states and the national government were thoroughly discussed in the legal literature of the late 1930's and 1940's because Supreme Court decisions limiting national authority on states' rights grounds spurred investigation of alternative solutions to pressing national problems that seemed to be beyond the political or institutional capacity of individual states. *See, e.g.,* J. CLARK, THE RISE OF A NEW FEDERALISM (1938); J. KALLENBACH, FEDERAL COOPERATION WITH THE STATES UNDER THE COMMERCE CLAUSE (1942); *Symposium on Cooperative Federalism,* 23 IOWA L. REV. 455-650 (1938); Frankfurter & Landis, *supra* note 40. Not surprisingly, with the subsequent recognition of broad national power under the commerce clause, commentators became less interested in the mechanisms of interstate cooperation and informal cooperation between the states and the national government. The absence of current scholarly analysis belies the reality of a pervasive pattern of close cooperation between the states and the national government. State administration of national regulations is thoroughly discussed *infra* at notes 920-1032.

duction of goods for interstate commerce.[66] The basic decision to control these aspects of the employer-employee relationship has a significant impact on the states as political communities: one substantive policy for private activity determined in the national political process (wage and hour regulation) is substituted for the substantive policy choice of the states' political processes (no or different wage and hour regulation). This particular impact of the FLSA on the states' role as political decisionmaking units may appear to be de minimus. Viewed in isolation, the FLSA is an example of interstitial national law—it controls wages and hours of employment, but all other aspects of the employment relationship are left to state law.

The FLSA, however, cannot be viewed in isolation if the effect of direct national regulation of private activity is to be understood. As the scope of national control over a particular activity is expanded, it becomes progressively more difficult to view national law as interstitial because the political power of the states to prescribe substantive rules for private conduct is correspondingly diminished. Thus, the states' actual role in controlling the employer-employee relationship cannot be evaluated without consideration of many other national statutes which substitute comprehensive nationally determined employment policies for the policy choices of the states' political processes.[67] Since many other types of private activity may be or are subject to similarly com-

66. Fair Labor Standards Act of 1938, §§ 6(a), 7(a), 52 Stat. 1060, 1062, 1063, 29 U.S.C. §§ 201-219 (1940). The Supreme Court held that Congress had the power to enact this statute under the commerce clause in United States v. Darby, 312 U.S. 100 (1941). The Fair Labor Standards Act is a convenient vehicle for examining the effect of national statutes on state political decisionmaking powers because subsequent amendments produced two other major Supreme Court decisions on federalism issues. *See* National League of Cities v. Usery, 426 U.S. 833 (1976); Maryland v. Wirtz, 392 U.S. 183 (1968).

67. Among other things, these statutes: (1) prohibit age discrimination and mandatory retirement, Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. IV 1980); (2) require equal pay for male and female employees, Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976); (3) establish workplace safety and health standards, Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976 & Supp. IV 1980); (4) impose collective bargaining responsibilities, National Labor Relations Act, 29 U.S.C. §§ 151-158, 159-168 (1976 & Supp. IV 1980); (5) regulate pension plans, Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1368 (1976 & Supp. IV 1980); (6) prohibit discrimination against certain veterans, Vietnam Era Veterans Readjustment Act of 1974, 38 U.S.C. §§ 2011-2014 (1976 & Supp. IV 1980); (7) require affirmative action to hire and advance qualified handicapped persons by employers who perform national contract work or who receive national funds, Rehabilitation Act of 1973, 29 U.S.C. §§ 793-794 (1976 & Supp. IV 1980); and (8) prohibit racial and religious discrimination, Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980).

prehensive national control,[68] national regulation of private activity substantially diminishes the states' role as political decisionmaking units.

2. National Power to Regulate the States

Direct national regulation of private activity has a significant effect on the states as political communities because it displaces the substantive policy choices of the states' political processes. If Congress exercises its national political powers to regulate the states or local government[69] by extending rules for private activity to similar activity of state and local governments, there is a second, distinct effect on state political decisionmaking powers—the states' choice of goods and services financed through taxes and provided collectively may be altered. To continue the Fair Labor Standards Act example, when the minimum wage and maximum hour regulations were extended to apply to most state and local government employees,[70] many states complained that the cost of government would be increased and that they would either have to reduce services and benefits or increase taxes.[71] Although

68. For a comprehensive survey of national regulatory programs, see COMPTROLLER GENERAL, FEDERAL REGULATORY PROGRAMS AND ACTIVITIES (1978).

69. National regulation of local government may have two distinct types of effects. First, local governments, like the states, are political communities, and national regulation of local government may interfere with local autonomy in political decisionmaking in the same ways that it interferes with state autonomy. Second, national regulation of local government may also affect the states. Since local government units are creatures of the states, national regulation of local government may interfere with the states' control of their political subdivisions. The effects of national regulations on the autonomy of the states and local government in making political decisions are not discussed separately, but it should be noted that the Court has not decided whether local governments as well as the states enjoy any constitutional immunity from national regulation. *See infra* notes 130 & 473. National regulation of local government that interferes with the states' control over the allocation of power to their political subdivisions is discussed *infra* at notes 257-63.

70. When the Fair Labor Standards Act was first enacted in 1938, it specifically exempted states and their political subdivisions. Fair Labor Standards Act of 1938, § 3(a), 29 U.S.C. § 203(d) (1940). In 1966, Congress amended the Act and applied the minimum wage and maximum hour regulations to employees of hospitals, schools, and institutions operated by state and local governments. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(a)(1), (b), (c), 80 Stat. 831, 832. The 1966 Amendments were upheld in Maryland v. Wirtz, 392 U.S. 183 (1968). In 1974, Congress again amended the Act to make the minimum wage and maximum hour requirements applicable to most employees of state and local governments. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § (6)(a)(1), (5), (6), 88 Stat. 58-60 (current version at 29 U.S.C. § 203(d), (s)(5), (x) (1976)).

71. National League of Cities v. Usery, 426 U.S. 833, 845-51 (1976). The Supreme Court held that the 1974 amendments were an unconstitutional intrusion on state autonomy and over-

the actual weight of the FLSA on the states can be disputed, the general effect cannot be denied.[72]

3. National Power to Require the Affirmative Exercise of State Authority Over Private Activity

In addition to direct regulation of private activity and the application of such regulations to the states, national statutes can also affect the states' role as political decisionmaking units by requiring the affirmative exercise of state authority over private activity.[73] When Congress induces or requires the states to act as agents of the nation in administering and enforcing national regulatory or social welfare programs,[74] the states must exercise affirmative authority over private activity. If, for example, Congress decided to employ the states as its agents in en-

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ruled *Maryland v. Wirtz*, which had previously upheld Congress' power to apply the requirements of the FLSA to a limited class of state employees. 426 U.S. at 840, 852, 855. *NLC* is discussed in detail *infra* at notes 85-134.

72. The impact of national regulations on the states is perhaps more readily understood if one considers that Congress could possibly apply all of the statutes regulating private employers, *see supra* note 67, to the states in their capacities as employers. For an overview of the application of fair employment laws to public and private employers, see [1981] EMPL. PRAC. GUIDE (CCH).

73. National law, either statutory or constitutional, may prohibit the exercise of state authority over private activity as well as require the affirmative exercise of state authority over private activity. Hart, *supra* note 54, at 517. Three categories of national law that affect the states' role as political decisionmaking units have been postulated: regulation of private activity, regulation of the states, and regulations requiring the affirmative exercise of state authority over private activity. *See supra* note 54 and accompanying text. No fourth category of national law that prohibits the exercise of state authority is necessary because a national statutory prohibition of state control over private activity is in fact nothing more than an alternative description of direct national regulation of private activity and preemption of conflicting state law. *See supra* note 55. Thus, the minimum wage and maximum hour regulations of the FLSA can be viewed alternatively as direct national regulation of employers preempting state law or as a prohibition of state law governing these matters. Similarly, if the FLSA standards are applied to the states, the national statute can be described as one regulating the states as employers or as prohibiting the exercise of state authority to pay its employees less than the FLSA requires. Although a national statute can be described alternatively as one regulating directly private or state activity or as one prohibiting the exercise of state authority, the effect on the state political process is the same—nationally determined substantive policy is substituted for the policy choice of the states' political processes and the states' choices of publicly provided goods and services may be altered.

If the Constitution is the source of the prohibition on the exercise of state authority, the effects on the states as political decisionmaking units are the same, but the restraints are imposed by the courts and not by Congress. The power of the courts to control the role of the states in our federal system is a separate and complex topic that the author plans to address elsewhere. *See supra* note 28.

74. Congress has employed the states as the nation's agents since 1789. *See infra* text accompanying notes 993-1032. The mechanisms employed by Congress to obtain state administration and enforcement of national regulations are discussed *infra* at notes 920-92.

forcing the FLSA minimum wage and maximum hour regulations applicable to individual, private employers,[75] a state legislature might have to enact a statute that establishes the national standards as state law and that creates and funds an administrative agency. The state executive would have to administer and enforce the FLSA requirements, and the state courts would have to adjudicate controversies between employers and employees. The affirmative exercise of state authority over private activity in implementing the national minimum wage and maximum hour standards or other national regulations has a major impact on state autonomy. The states must allocate their legislative, executive, judicial, and financial resources to satisfy national political demands at the expense of implementing state policies and fulfilling the demands of its own political community.

4. Transfer of Political Decisionmaking Power from the States to the Nation

As consideration of the Fair Labor Standards Act suggests, the states' role as political decisionmaking units is reduced to the extent that direct national regulation of private activity is expanded, that these regulations are applied to the states, and that the states are employed as Congress' agents in implementing national policy. It was, of course, theoretically possible to maintain a significant role for the states as political decisionmaking units by leaving most private activity to exclusive state control and by confining national law to a supplementary or complementary function. For the first 150 years of our constitutional history, the states exercised significant political decisionmaking powers.[76] Today, however, seven years from the bicentennial of the Constitution, there is little dispute that the nation is the predominant political decisionmaking unit and that the expansion of national powers has been at the expense of the states.[77] The mere, now trite, observation that the nation has grown in importance as a political decisionmaking unit at the expense of the states begs the question of limits on Congress'

75. The Fair Labor Standards Act is administered by the Wage and Hour Division of the Department of Labor. 29 U.S.C. § 204 (1976). Since Congress has provided for state implementation of many similar national programs, *see supra* text accompanying notes 1-5, state administration of the FLSA is a reasonable possibility.

76. *See* Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives,* 9 U. TOL. L. REV. 619, 622-44 (1978).

77. *Id.* at 622-23, 644-49, 657; S. DAVIS, *supra* note 30, at 146.

power to control the allocation of political authority in the federal system.

The significant transfer of political power from the states to the nation that has occurred over the past forty years has been tolerated, if not blessed, by the Supreme Court. Although the Court embraced the concept of dual federalism for many years and checked Congress' power to order national and state relations,[78] it now acquiesces, for the most part, in broad assertions of national political authority. Since 1937 the Court has accepted direct national regulation of private activity not previously regulated by any government and of private activity historically subject to state control.[79] At least before the *NLC* decision in 1976, the doctrine of intergovernmental immunity was not a significant restraint on Congress' power to regulate the states.[80] In the absence of any conclusive challenge to Congress' power to require the affirmative exercise of state authority over private activity,[81] the states administer and enforce many major national regulatory and benefit programs.[82]

The lack of judicial interference with the exercise of national political power over the last forty years is, at least in effect, a judgment that the political process provided adequate protection for the states' role as political decisionmaking units. Questions about the nature of the states' role in the national system, the manner and extent to which the political process protects the states, and judicially enforceable restraints on Congress were not raised as long as the basic patterns of national and state relations were accepted or at least tolerated. *NLC* has opened the door to a reconsideration of these questions. The answers supplied

78. *E.g.,* Carter v. Carter Coal Co., 298 U.S. 238 (1936). The concept of "dual federalism" embraces the idea that certain state legislative powers are "an independent limitation on national power" and that "certain *subject-matters*" are reserved for state legislation and are beyond the reach of "any valid exercise of national power." Corwin, *The Passing of Dual Federalism,* 36 VA. L REV. 1, 16 (1950) (emphasis in original).

79. *E.g.,* Perez v. United States, 402 U.S. 146 (1971); Wickard v. Filburn, 317 U.S. 111 (1942).

80. *E.g.,* California v. Taylor, 353 U.S. 553 (1957); Case v. Bowles, 327 U.S. 92 (1946).

81. *See infra* text accompanying notes 549-58.

82. Although the national government administers many regulatory and benefits programs directly, it usually "enlist[s] the efforts of other levels of government or the private sector in attaining national objectives." 1 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH, *A Crisis of Confidence and Competence* A-77, at 39 (1980) [hereinafter cited as ACIR STUDY].

by the Supreme Court and elaborated by lower courts and commentators are uniformly inadequate.

II. *NATIONAL LEAGUE OF CITIES* AND FEDERALISM LIMITS ON CONGRESS' POWERS

The plurality decision in *National League of Cities v. Usery*[83] is but one example of the Supreme Court's recent revival of federalism restraints on national power. *NLC*, however, stands apart from the other cases, which recognized federalism limits on the powers of the federal courts,[84] because it invoked the doctrine of intergovernmental immunity as a check on Congress' power to order the relationship between the nation and the states. The Court, unfortunately, did little more than declare that there are limits on Congress' power to regulate the states. It did not articulate any clear principle or rationale of intergovernmental regulatory immunity; it failed even to define the precise extent of state immunity from the statute at issue. In the absence of any precise holding or clear theory, and in the absence of subsequent clarification from the Court, lower courts and commentators have struggled, for the most part without notable success, in identifying federalism limits on Congress' power.

A. National League of Cities v. Usery—*The Decision*

The 1974 Amendments to the Fair Labor Standards Act (FLSA) applied national minimum wage and maximum hour regulations governing private employees[85] to most state and local government employees.[86] Although the Supreme Court in *Maryland v. Wirtz* had

83. 426 U.S. 833 (1976). Justice Rehnquist wrote the plurality opinion, in which the Chief Justice and Justices Powell and Stewart joined, and Justice Blackmun concurred specially. Justices Brennan and Stevens wrote separate dissents, and Justices White and Marshall joined in the Brennan dissent.

84. *See supra* note 28.

85. *See supra* note 66 and accompanying text.

86. The 1974 Amendments extended the coverage of the FLSA by amending the definition of "employer" to include "a public agency," which was in turn defined to include states and their political subdivisions. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1), (6), 88 Stat. 58-60 (current version at 29 U.S.C. § 203(d), (x) (1976)). Although Congress asserted the power to regulate all state and local government employees, it exempted some public employees and limited the application of the wage and hour regulations to certain categories of public employees. Congress provided exemptions for public employees not subject to state or local civil service laws, for holders of elective office, and for several types of assistants to elected officials. Pub. L. No. 93-259, § 6(a)(2), 88 Stat. 59 (current version at 29 U.S.C. § 203(e)(2)(C) (1976)).

upheld the constitutionality of the 1966 Amendments to the FLSA, which extended minimum wage and maximum hour regulation to a narrow group of public employees,[87] the issue of intergovernmental immunity in *NLC* was framed in broad terms. The plaintiffs[88] sought a declaratory judgment that the 1974 Amendments were unconstitutional and not a limited declaration with respect to particular types of public employees.[89] A three-judge district court rejected the constitutional claim on the authority of *Maryland v. Wirtz*,[90] but the plaintiffs' broad attack was eventually rewarded, albeit somewhat ambiguously.

The Supreme Court declined to hold that the 1974 Amendments were unconstitutional on their face, but the plurality opinion specifically held that they were beyond Congress' power where they "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[91] Justice Blackmun cast the deciding vote on his understanding that the plurality had balanced national and state interests and because the states' interest outweighed the national interest.[92] Although the plurality opinion was able to capsulize the holding, its theory of intergovernmental immunity was more elusive than Justice Blackmun suggested, and the lower court on remand[93] faced the difficult task of determining the precise extent to which state and local governments as employers are immune from the FLSA.

Justice Rehnquist's plurality opinion recognized Congress' broad power under the commerce clause[94] to regulate private activity,[95] but

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Congress also limited the application of the FLSA to employees engaged in law enforcement, fire protection, and security at correctional facilities. Pub. L. No. 93-259, § 6(c)(1), (2), 88 Stat. 60, (current version at 29 U.S.C. §§ 207(k), 213(b)(20) (1976 & Supp. IV 1980)).

87. *See supra* note 70.

88. The plaintiffs were twenty states, four political subdivisions, the National League of Cities, and the National Governors' Conference. 426 U.S. at 836 n.7. Two states filed briefs amici curiae supporting the plaintiffs, and three states filed briefs amici curiae urging the validity of the 1974 amendments. 426 U.S. at 835 n.†.

89. National League of Cities v. Brennan, 406 F. Supp. 826, 827 (D.D.C. 1974) (three-judge court).

90. *Id.* at 828.

91. 426 U.S. at 852.

92. *Id.* at 856-57.

93. *Id.* at 856.

94. U.S. CONST. art. I, § 8, cl.3. The FLSA and subsequent amendments to the Act were enacted under the commerce clause. 29 U.S.C. § 202 (1976).

95. Justice Rehnquist's statements that the 1974 Amendments are "not within the authority granted Congress by art. I, § 8, cl.3" and that the 1966 Amendments "transgress the bounds of

he found that a concept of state sovereignty, rooted in the states' essential role in the federal system and expressly declared by the tenth amendment,[96] limited the exercise of this power. Although he recognized that national regulation of wages and hours in the private sector diminishes state sovereignty,[97] Justice Rehnquist found that the "States as States stand on a quite different footing" than private employers.[98] States stand on a different footing because determinations about the wages and hours of public employment are not only an "undoubted attribute of state sovereignty,"[99] but they are also "functions essential to [the] separate and independent existence" of the states.[100] On the basis of the effects of the FLSA on the states, Justice Rehnquist concluded that the states' ability to structure the employer-employee relationship was essential to their "ability to function effectively in the federal system."[101] He found that direct national regulation of the wages and hours of public employment would increase state and local

authority granted Congress under the Commerce Clause" might be read to suggest that he found limits on Congress' power to regulate local activity under the commerce power. 426 U.S. at 852, 855. Nevertheless, a careful reading of the plurality opinion clearly demonstrates that he did not intend to confine Congress' broad power under the commerce clause to regulate private activity. 426 U.S. at 836, 840-41, 849.

96. There is some support in Justice Rehnquist's opinion for the view that he read the tenth amendment itself as the source of limits on Congress' power to regulate state activity. He drew an analogy to the limits imposed by the fifth and sixth amendments on Congress' enumerated powers, and he stated that the tenth amendment is an "express declaration" of the limits on Congress' powers to override state sovereignty. *Id.* at 841-42. Nonetheless, he found these limits, not in the tenth amendment itself, but implicit in the nature of a federal system of government that contemplates an essential role for the states. *Id.* at 844-45, 849. Although Justice Rehnquist did not develop a careful or comprehensive theory of the states' role, *see infra* text accompanying notes 125-30, the limits were the product of a structural, and not merely a textual, analysis.

Justice Brennan argued that the plurality opinion had misread the tenth amendment. 426 U.S. at 861 n.4. He reasoned that the tenth amendment simply declares that all powers not delegated are reserved and that state sovereignty is protected by confining Congress to the exercise of its enumerated powers. *Id.* As a matter of linguistics and history, Justice Brennan is undoubtedly correct. *See supra* note 44. Nevertheless, his criticism is not responsive to the structural analysis underlying Justice Rehnquist's invocation of the tenth amendment.

97. National regulation of wages and hours of private employment diminishes state sovereignty because it substitutes substantive policy declared by the nation for the substantive policy choices of the states' political processes. *See supra* text following note 66. Justice Brennan's dissenting opinion made this point expressly. 426 U.S. at 875. Justice Rehnquist apparently accepted this proposition although he did not identify the manner in which national regulation of private activity affects the states. *See id.* at 845.

98. 426 U.S. at 854.

99. *Id.* at 845.

100. *Id.*

101. *Id.* at 852.

government costs forcing abandonment of important governmental activities[102] and would "[displace] state policies regarding the manner in which they will structure the delivery of those governmental services which their citizens require."[103] Justice Rehnquist concluded that the 1974 Amendments to the FLSA were invalid to the extent that they "directly displace"[104] or "impermissibly interfere with"[105] what he variously described as the "integral"[106] or "traditional"[107] governmental functions of the states and their political subdivisions in providing public services such as "fire prevention, police protection, sanitation, public health, parks and recreation".[108] He also concluded that the 1966 Amendments previously upheld in *Maryland v. Wirtz* were invalid because of interference with the governmental function of operating schools and hospitals.[109]

On remand, the district court expressly refused to hold that the FLSA is inapplicable to all state and local government employees, and it read *NLC* to establish a "traditional governmental functions" test of state immunity from national regulation.[110] Although its declaratory

102. Justice Rehnquist quoted estimates of the increased costs and cited assertions that the increased costs of employment would force a reduction in the number of hours of police cadet training and an abandonment of affirmative action and college internship programs. 426 U.S. at 846-47.

103. *Id.* at 847. The plurality opinion found that the FLSA would displace state policies for (1) the hiring of unskilled individuals, part-time employees, and teenagers for summer jobs at less than the national minimum wage; (2) the work week of policemen and firemen; (3) the use of compensatory time off as compensation for overtime work; and (4) reliance on volunteers for services like fire protection. *Id.* at 847-51. The displacement of these state employment policies would in turn interfere with the delivery of governmental services. Although these examples and the cost estimates, *see supra* note 102, were accepted as true because the district court had dismissed the complaint, the Secretary of Labor contested the plaintiffs' allegations about the impact of the FLSA. *Id.* at 874 n.12 (Brennan, J., dissenting).

104. 426 U.S. at 852.

105. *Id.* at 851.

106. *Id.*

107. *Id.* at 852.

108. *Id.* at 851.

109. *Id.* at 855. The Supreme Court vacated two judgments applying the 1966 Amendments to state-operated hospitals and schools. Dunlop v. New Jersey, 522 F.2d 504 (3d Cir. 1975), *vacated and remanded sub nom.* New Jersey v. Usery 427 U.S. 909 (1976); Brennan v. Indiana, 517 F.2d 1179 (7th Cir. 1975), *vacated and remanded sub nom.* Indiana v. Usery, 427 U.S. 909 (1976). *Cf.* Marshall v. Board of Educ., 575 F.2d 417 (3d Cir. 1978) (upholding application of the 1966 Amendments to employees of a public school and an award of past wages where the judgment was not appealed and vacating a prospective injunction to comply with the FLSA because a city board of education performs a traditional governmental function).

110. National League of Cities v. Marshall, 429 F. Supp. 703, 705-06 (D.D.C. 1977) (three-judge court). The court expressly held that *NLC* applies only to the minimum wage and maxi-

judgment simply paraphrased the *NLC* plurality's formulation of the holding,[111] the district court approved an interpretive rule of the Department of Labor that read *NLC* to bar application of the FLSA to public employers engaged in traditional governmental functions and to permit national wage and hour regulation of public employers performing nontraditional functions.[112] This distinction between traditional and nontraditional governmental functions as a basis for determining the immunity of state and local governments from national wage and hour regulation follows readily from the plurality's examples of protected activities[113] and its explicit approval of national regulation of state activities, such as the operation of a railroad, that are not "integral parts of their governmental activities."[114]

Although the courts have had little difficulty concluding that the FLSA does not apply to a wide range of state and local government activity,[115] *NLC* provides no clear guidance in determining the nature

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mum hour provisions of the FLSA and declined to hold that state and local governments are exempt from other statutes (the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), the Portal to Portal Act, 29 U.S.C. §§ 251-262 (1976), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. IV 1980)) that are codified with the FLSA or rely on its definitions. *Id.* at 704.

111. *Compare* 429 F. Supp. at 706 *with* text *supra* accompanying note 91.

112. 429 F. Supp. at 706-07; 29 C.F.R. §§ 775.2-.3 (1981). The interpretive rule recognized the difficulty of distinguishing between traditional and nontraditional governmental functions. It provided that the states and their political subdivisions would be given notice and an opportunity to comply voluntarily before suit was filed, and it limited the circumstances in which the government would seek liquidated damages. 29 C.F.R. § 775.2(b)-(d) (1981). Schools, hospitals, fire prevention, police protection, sanitation, public health, parks and recreation were identified as traditional government functions; operation of a railroad was identified as a nontraditional function. These categories of traditional and nontraditional governmental activities were drawn directly from the plurality opinion. *See supra* text accompanying notes 108 & 109 and *infra* text accompanying note 114. The Administrator of the Wage and Hour Division of the Department of Labor subsequently added libraries and museums as traditional governmental functions and identified eight additional nontraditional governmental functions: alcoholic beverage stores; off-track betting corporations; local mass transit systems; generation and distribution of electric power; provision of residential and commercial telephone and telegraphic communication; production and sale of organic fertilizer as a by-product of sewage processing; production, cultivation, growing or harvesting of agricultural commodities for sale to consumers; and repair and maintenance of boats and marine engines for the general public. 29 C.F.R. §§ 775.3-.4 (1981).

113. *See supra* text accompanying notes 108 & 109.

114. The plurality opinion expressly approved three cases that had upheld the application of commerce-power based regulations to state-operated railroads. 426 U.S. at 854 n.18.

115. The absence of any criteria for distinguishing between traditional and nontraditional governmental functions has not been a practical problem in determining the immunity of state and local governments from national minimum wage and maximum hour regulations because the courts, for the most part, have simply invoked the decision itself or the plurality's formulation of

and extent of state immunity from other national statutes and regula-

the holding as the basis for their conclusions that state or local government employers are exempt from the FLSA. EEOC v. Kenosha Unified School Dist. No. 1, 620 F.2d 1220, 1222 n.4 (7th Cir. 1980) (local school district maintenance employees); Weppler v. School Bd., 551 F.2d 1055, 1055 (5th Cir. 1977) (public school teachers); Wentworth v. Solem, 548 F.2d 773, 775 (8th Cir. 1977) (convicts working in a state prison); Davis v. Balson, 461 F. Supp. 842, 851 (N.D. Ohio 1978) (patient workers in a state mental hospital); Aiello v. City of Wilmington, 426 F. Supp. 1272, 1275 n.1 (D.Del. 1976) (city firemen); Association of Court Reporters v. Superior Court, 424 F. Supp. 90, 93 (D.D.C. 1976) (court reporters because District of Columbia considered a "state"); Bowen v. Sonnenburg, 411 N.E.2d 390, 393 n.1 (Ind. App. 1980) (patients in institutions for mentally handicapped and mentally retarded abandoned FLSA claim after *NLC* decided); Court Fund v. Cook, 557 P.2d 875, 879 (Okla. 1976) (court bailiff); Townsend v. Clover Bottom Hosp. & School, 560 S.W.2d 623, 625 (Tenn.) (inmate employees of a state hospital), *cert. denied,* 436 U.S. 948 (1978).

Before the Court's 1982 decision in *United Transportation Union*, *see infra* notes 498-513, only two courts attempted distinctions between traditional and nontraditional governmental functions. In holding that a municipality in its capacity as an employer operating an airport or an urban bus transit system is immune from the FLSA, both courts concluded that the concept of traditional governmental functions included new services formerly provided by the private sector as well as time-honored collective services. Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979) (municipal airport); Alewine v. City Council, 505 F. Supp. 880 (S.D. Ga. 1981) (municipal transit system). The conclusion of the district court that a municipal transit system is a traditional governmental function is directly contrary to the position of the Department of Labor. *See supra* note 112. After the Court's 1982 *United Transportation Union* decision, upholding Congress' power to apply national labor relations policies to a state-owned railroad on the ground that operation of a commuter railroad is not a traditional governmental function, a distinction between traditional and nontraditional functions will play a more significant role in the resolution of FLSA cases. Indeed, one court has now broken the ranks and upheld the application of the FLSA to a municipal transit authority on the ground that the operation of a mass transit system is not a traditional governmental function. *See infra* note 454.

Although the courts have readily and uniformly held that state and local governments are immune from the FLSA, arguments that *NLC* bars application of the FLSA to private employers who receive state funds and who are controlled by the state have proved more troublesome. Two courts have rejected invitations to extend the constitutional immunity of state government from the FLSA to state-regulated and state-funded private employers. Williams v. Eastside Mental Health Center, 669 F.2d 671 (11th Cir. 1982) (private not-for-profit corporation that receives state funds and operates under a contract with the state to provide community mental health services subject to the FLSA), *rev'g,* 509 F. Supp. 579 (N.D. Ala. 1980); Bonnette v. California Health and Welfare Agency, 525 F. Supp. 128 (N.D. Cal. 1981) (the state and public assistance recipients are joint employers of domestic workers where the state makes a grant of state and national funds to public assistance recipients to hire domestic workers and the state as a joint employer is subject to the FLSA). One court, however, has held that a private employer is exempted from the FLSA by virtue of its relation with a state. In *Richland County Association v. Marshall,* a district court held that a private nonprofit corporation that receives state and national funds to provide deinstitutionalized care for developmentally disabled adults is immune from the FLSA because it is performing a traditional state function. *See* 660 F.2d 388 (9th Cir. 1981). The Ninth Circuit ultimately entered an opinion reversing the district court's judgment, but it remains in effect because the government erred in seeking review by the court of appeals rather than direct review by the Supreme Court. In reviewing the district court's judgment, the Ninth Circuit entered two separate

tions. The opinions invite at least three different tests of state immunity from national regulation. One possible interpretation of the plurality opinion is, as the district court concluded on remand, that traditional state activity is absolutely immune from all national control. Absolute immunity from national regulations affecting the delivery of traditional state and local governmental services is suggested by the plurality's focus on the type of state activity affected, without any practical assessment of the actual effects.[116] This view is bolstered by the plurality's almost complete failure to give any weight to the national interests underlying the application of wage and hour regulation to public employment.[117] Put simply, regardless of the actual effect of national regulations and regardless of the reasons for the regulations, traditional state activities are immune.

The absolute immunity test must compete with at least two other equally plausible interpretations of *NLC*. The decision directly invites a balancing test to determine state immunity from national regulation because Justice Blackmun cast his deciding vote on the ground that the plurality opinion had applied a balancing test permitting the application of national regulations to the states when the national interest is "demonstrably greater."[118] Although the plurality opinion may have carved out an area of absolute immunity for traditional governmental functions, a close reading provides some support for Justice Black-

opinions. In an opinion reported in the advance sheets at 641 F.2d 1361, which was subsequently withdrawn, the Ninth Circuit at first affirmed the district court's judgment. The Supreme Court, however, vacated this judgment because the right to direct review by the Supreme Court deprived the court of appeals of jurisdiction. Donovan v. Richland County Ass'n for Retarded Citizens, 102 S. Ct. 713 (1982). The Supreme Court also disapproved a second opinion and judgment of the Ninth Circuit reversing the district court's judgment. The second judgment was entered after notice of appeal from the first judgment had been filed, and the Supreme Court concluded that "the filing of the notice of appeal clearly divested the Court of Appeals of any jurisdiction that it otherwise had to decide the merits . . . ." *Id.* at 714 n.3. Given the Ninth Circuit's lack of jurisdiction to enter its judgment either to affirm or reverse the district court and the expiration of the time to seek direct Supreme Court review of the district court's judgment, the district court's determination on the merits that a private employer who receives state funds to perform a traditional state function is immune from the FLSA is the final word in this case.

116. Although the actual costs and effects of the FLSA on the states and their political subdivisions were disputed, the plurality explicitly disdained any need to resolve this dispute or for "particularized assessments of actual impact." 426 U.S. at 846, 851, 874 n.12.

117. Apart from a passing recognition that the overtime requirements would have the "salutary result" of discouraging overtime work and spreading employment, the plurality, as Justice Brennan noted, did not discuss, much less assess, the national interest in applying minimum wage and maximum hour regulations to public employees. *Id.* at 847, 872.

118. *Id.* at 856.

mun's conclusion. The plurality expressly approved the holding in *Fry v. United States*[119] that Congress has the power to freeze the salaries and wages of state and local government employees. In distinguishing *Fry* from *NLC* on the grounds that there was less intrusion on the states and that the national interest was greater,[120] the plurality opinion employed a balancing test.

A third test of state immunity is suggested by the plurality's careful disclaimers about the reach of its decision. The plurality opinion stressed that it was not deciding any questions of state immunity from national statutes enacted under the spending power,[121] the power to enforce the fourteenth amendment,[122] or the war power.[123] These pointed disclaimers, written without any elaboration, suggest that the states are either not immune or somehow enjoy less immunity from statutes enacted by Congress under these powers than under the commerce power.[124]

Apart from the immediate question of state immunity from national wage and hour regulation, the *NLC* decision provides no clear test of state immunity from national regulation. This failure to establish a practical test is a consequence of two deeper, theoretical problems—a failure to determine the states' role in the federal system, and a failure

119. 421 U.S. 542 (1975).

120. Justice Rehnquist found that there was less intrusion on state autonomy in *Fry* than in *NLC* because the wage and salary limitations were imposed only for "a very limited, specific period of time," "displaced no state choices as to how governmental operations should be structured," and reduced rather than increased pressures on state budgets. He described severe inflation as a national emergency and as "an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall." 426 U.S. at 853. Justice Brennan analyzed the plurality's distinction of *Fry* as a balancing process. *Id.* at 872.

121. *Id.* at 852 n.17 ("We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl.1, or § 5 of the Fourteenth Amendment."). Justice Brennan suggested that Congress could achieve the objectives of the 1974 Amendments to the FLSA under the spending power, U.S. CONST. art. I, § 8, cl.1, "by conditioning grants of federal funds upon compliance with federal minimum wage and overtime standards . . . ." *Id.* at 880.

122. *See supra* note 121.

123. 426 U.S. at 854 n.18 ("Nothing we say in this opinion addresses the scope of Congress' authority under its war power."). The plurality opinion also expressly approved a decision upholding an exercise of the war power against state sovereignty claims. *Id.*

124. The plurality opinion noted that state sovereignty imposes the same restraints on the commerce power and the taxing power. *Id.* at 843 n.14. Justice Brennan urged that the states enjoyed greater immunity from national taxation than from commerce power-based regulations. *Id.* at 863-64, 869.

to analyze the capacity of the national political process to protect this role. The plurality opinion never goes beyond platitudes in describing the states' role; its analysis amounts to nothing more than repeated invocations that the "States as States"[125] are different than private citizens with respect to Congress' powers and that the states are essential, indestructible parts of our federal system.[126] In the absence of any specification of the states' role and in the absence of any identification of state interests that must be protected from national interference, any theory of state immunity is necessarily opaque.

It is tempting to say that the plurality identified the provision of traditional governmental services as one state interest essential to the states' role in the federal system. Nevertheless, this limited specification of the states' role cannot withstand close scrutiny. The plurality did not distinguish the provision of traditional governmental services from another aspect of state autonomy, regulation of private activity, recognized as subject to national control.[127] Moreover, the plurality suggested that the states' interest in providing governmental services may be affected by statutes enacted under powers other than the commerce power.[128] The extension of immunity from the FLSA to state political subdivisions as well as to states themselves demonstrates the absence of any clear theory of the states' role.[129] It is not clear whether political subdivisions enjoy immunity because they share in the states' role in providing traditional governmental services or because they are creatures of the states and national regulation intrudes on the allocation of political power within the states.[130]

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125. *Id.* at 842, 845, 847, 854.

126. *Id.* at 844, 849. Although the plurality did quote a prior reference to the states as sovereign political entities, the concept was not developed. *Id.* at 842.

127. *See supra* note 97 and accompanying text.

128. *See supra* notes 121-23 and accompanying text.

129. 426 U.S. at 855 n.20.

130. Although the Constitution contemplates a role for the states in the federal system, *see supra* text accompanying notes 30-39, it does not contemplate either explicitly or implicitly any role for their political subdivisions. *See* Lincoln County v. Luning, 133 U.S. 529 (1890) (eleventh amendment does not prohibit suit against political subdivision of a state in federal court). It would seem, then, that any immunity enjoyed by state political subdivisions would follow from the state's interest in controlling the local governments to which it has allocated political authority. *See, e.g.,* Milliken v. Bradley, 433 U.S. 267, 291 (1977) (structure of local government and method or structure of state or local financing are an aspect of state sovereignty). The language of the plurality opinion supports an inference of immunity for political subdivisions as a consequence of the states' interest in controlling their local government units. 426 U.S. at 855 n.20 ("local governmental units . . . derive their authority and power from their respective States . . . ."). *See* City

The failure of the Court[131] to define the states' role in the federal system leads, perhaps inevitably, to a second, more fundamental problem—the absence of any principled explanation for judicial intervention in the national political process. Without a definition of the states' role, it is, of course, impossible to assess whether and how the national political process may provide protection for that role or to determine whether the operation of national political process justifies intrusions into that role. Since the *NLC* Court had no definition of the states' role, it could address the question of judicial deference to the national political process only superficially. On the one hand, Justice Rehnquist, writing for the plurality, apparently concluded that because the application of the FLSA to public employers affected state sovereignty, the political process had proved inadequate to the task of protecting the states and judicial intervention was required.[132] On the other hand, Justice Brennan simply concluded that because the states are represented in Congress there is no need for judicial intervention to protect

of Rome v. United States, 446 U.S. 156, 201 n.11 (1980) (Powell, J., dissenting). The plurality opinion may, however, have based its finding that political subdivisions enjoy immunity from the FLSA on the ground that local government, like state government, provides traditional public services. 426 U.S. at 855 n.20 ("interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself."). *See* Association of Court Reporters v. Superior Court, 424 F. Supp. 90 (D.D.C. 1976) (FLSA inapplicable to the District of Columbia as employer of court reporters because Congress intended that the District of Columbia would enjoy sovereignty like that of a state with respect to employees in provision of public services). The question whether *NLC* protects local government itself or the states' authority over their political subdivisions continues to divide the Court. *See infra* note 473.

131. The failure of the plurality opinion to define the states' role in the federal system, *see supra* text accompanying notes 125-30, was matched by the failure of any other opinion even to address this question.

132. Justice Rehnquist concluded that the Court had a responsibility to protect the states' role in the federal system because the political process is not, either in theory or practice, an adequate means of protecting state interests. 426 U.S. at 841 n.12. The theory that state representation in Congress protected state interests was undermined by the popular election of Senators which eliminated their accountability to state legislators. Even if Congress does represent state interests, judicial protection for the states is required if the political process has broken down and Congress has in fact enacted a statute intruding on the states' sovereignty. The Court's responsibility to protect the states was based on an analogy to two cases in which the Supreme Court had invalidated statutes on separation of powers grounds notwithstanding the Chief Executive's power to protect his prerogatives with his national constituency and veto power. Justice Rehnquist's analogy, however, is not apt. Although the President has political power to protect his office from Congress, the interests of the executive branch are not represented in the legislative branch of the national government; state interests are arguably represented in Congress, and the issue is the adequacy of that representation.

the states.[133]

Their analyses of the capacity of the national political process to protect the states and of any corollary need for judicial intervention to protect state sovereignty are equally superficial. Although Justice Rehnquist identified a state role in providing traditional public services, a role that warrants judicial protection, he failed to consider either the capacity of the national political process to check national interference with this aspect of state autonomy or the question whether the operation of the national political process justified an intrusion on the states. Justice Brennan did not identify any particular state role or explain the manner and extent to which the national political process actually works to protect the states. Given the long history of judicial deference to the political process as the principal check on Congress' power to order national and state relations,[134] a more complete analysis of the political process is required before state sovereignty is invoked as a check on Congress' powers. Given legitimate concerns about protecting the states, judicial deference to congressional political decisions affecting the states requires more careful analysis of how the national political process actually works to protect the states and how national political decisions intruding on state interests can be justified.

B. The Courts and NLC*—An Overview*

In the six years since *NLC* was decided, the Supreme Court has not addressed, much less resolved, the basic theoretical deficiencies of that decision. The Court has not defined the states' role in the federal system; it has not justified judicial superintendence of national and state relations by explaining why the national political process either is incapable of protecting the states or provides an insufficient justification for incursions on particular state interests.[135]

Notwithstanding these deficiencies, the Court has established, rather mechanically and without reasoned analysis, some guidelines for Congress' power to regulate state and local government and activity. On

133. Justice Brennan invoked the theory of political checks on Congress' exercise of the commerce power and the representation of state interests in Congress as adequate means to protect state interests. *Id.* at 857-58, 876-78, 878 n.14. He did not, however, explain how the national political process works to protect any particular interests or role.

134. *See infra* text accompanying notes 813-28.

135. The Court has considered the political process as an alternative to judicial protection of the states in only one case decided after *NLC*. Massachusetts v. United States, 435 U.S. 444 (1978). *See infra* note 541.

the one hand, the Court has held that the states are not immune from statutes enacted by Congress under its power to enforce the Civil War Amendments,[136] and it has suggested that the states do not enjoy any immunity from statutes enacted under the spending power,[137] the foreign commerce power,[138] or the property clause.[139] On the other hand, the Court has reaffirmed the rule that Congress' power under the commerce clause is subject to federalism limitations, but it has not determined whether state immunity turns on a distinction between traditional and nontraditional state functions or on a balancing of state and national interests.[140] Although the test of state immunity from

136. *See infra* text accompanying notes 345-53.

137. The Supreme Court summarily affirmed a judgment rejecting the concept of state sovereignty recognized in *NLC* as a limit on Congress' spending power. North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978). Subsequently, the Court has refused to review cases raising similar challenges to Congress' spending power. *E.g.*, New Hampshire Dep't of Employment Sec. v. Marshall, 616 F.2d 240 (1st Cir. 1980), *cert. denied*, 449 U.S. 806 (1980); Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied sub nom.* Texas Landowners Rights Ass'n v. Director, Federal Emergency Management Agency, 444 U.S. 927 (1979); Florida Dep't of Health and Rehab. Servs. v. Califano, 449 F. Supp. 274 (N.D. Fla.), *aff'd per curiam*, 585 F.2d 150 (5th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979).

138. In Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979), the Court held that a state property tax was invalid under the dormant foreign commerce power. In dictum, the Court stated that it has never suggested that Congress' power to regulate foreign commerce could be limited by the considerations of federalism and state sovereignty recognized in *NLC*. *Id.* at 448-49 n.13. *See In re* Guardianship of D.L.L. & C.L.L., 291 N.W.2d 278, 281 (S.D. 1980) (tenth amendment does not limit Congress' power under article I, section 8, clause 3, "to regulate commerce . . . with the Indian Tribes.").

139. U.S. CONST. art. IV, § 3, cl.2, provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

In Kleppe v. New Mexico, 426 U.S. 529, 539 (1976), which was decided only a week before *NLC*, the Court described the property power as "without limitations" and unanimously upheld national regulation of wild horses and burros on the lands of the United States over state objections that the statute intruded on its sovereignty. Lower courts have subsequently concluded that the tenth amendment does not limit Congress' power under the property clause. Nevada *ex rel.* Nevada State Bd. of Agric. v. United States, 512 F. Supp. 166, 172 (D. Nev. 1981); National Ass'n of Property Owners v. United States, 499 F. Supp. 1223, 1259-61 (D. Minn. 1980), *aff'd sub nom.* Minnesota v. Block, 660 F.2d 1240, 1251-53 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1645 (1982). For an argument that *NLC* should limit the property power, see Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 820-33 (1980). *See also* Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693 (1981).

140. In 1980 the Court read *NLC* to require a balancing test. United States v. Gillock, 445 U.S. 360, 373 (1980). *See infra* text accompanying notes 478-81. A year later the Court approved

commerce power regulations remains unsettled, the Court has held explicitly that *NLC* does not limit Congress' power to regulate private activity under the commerce clause.[141] The Court also has rejected arguments that *NLC* restricts Congress' power to use the states to implement national regulatory standards for electric utilities[142] and surface mining.[143] It has, however, neither explained the relation of *NLC* limits on national power to regulate the states to federalism limits on Congress' power to employ the states as its agents nor stated any principle justifying such exercises of national political authority.

The basic theoretical deficiences of *NLC* are, not surprisingly, mirrored and magnified in lower court decisions addressing a wide range of state immunity issues in myriad contexts. Viewed as a whole, these lower court decisions reach a remarkable near uniformity of result in rejecting claims of state sovereignty as a limitation on Congress' powers. Nevertheless, these lower court decisions illustrate the problems inherent in the tests of state immunity derived from *NLC* and the necessity of defining the states' role and evaluating the national political process as the alternative to judicial intervention.

1. State Autonomy and the Constitutional Source of Congress' Power

The lower courts have been quick to honor the suggestions in *NLC*

both balancing and traditional functions tests. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 & n.29 (1981). *See infra* text accompanying notes 446-50. Two years later the Court in 1982 upheld the application of the Railway Labor Act to a state-owned railroad primarily on the ground that the operation of a railroad is not a traditional state function, but the Court also approved a balancing test. United Transp. Union v. Long Island R.R., 102 S. Ct. 1349, 1353-54, 1353 n.9 (1982). *See infra* text at notes 505-11.

The problems of determining what state functions are sufficiently important to be immunized from national regulation are suggested by United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). In assessing a claim that a state statute was invalid because it impaired the obligation of a contract contrary to the guarantee of article I, section 10, clause 1, the majority first addressed the question whether the statute creating the obligation, allegedly impaired by a second statute, was valid. Invoking the rule that a state cannot "contract away" its police powers and the power of eminent domain, the Court concluded that the contract created by the statute was valid because a state "could bind itself in the future exercise of the taxing and spending powers." *Id.* at 23-24 (footnote omitted). As Justice Brennan noted in dissent, there is no clear, underlying concept of state sovereignty that explains this implicit ordering of state governmental powers. *Id.* at 51 n.15.

141. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 286 (1981). *See infra* text accompanying notes 458-64.

142. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126 (1982). *See infra* text accompanying notes 610-91.

143. 452 U.S. at 288-93. *See infra* text accompanying notes 559-80.

that its federalism principles do not apply when Congress exercises certain powers other than the commerce power,[144] and they have consistently concluded that *NLC* is inapposite to statutes enacted under the defense powers,[145] the spending power,[146] and the power to enforce the Civil War Amendments.[147] Although statutes enacted under any of these three powers may intrude upon the same state interests to the same extent as statutes enacted under the commerce power, many courts simply and mechanically cite *NLC* as full support for the conclusion that there is no unconstitutional infringement of state interests.

Some courts, however, have elaborated a theory to support their conclusions. Statutes enacted under the spending power are distinguished on the ground that state acceptance of a national grant and compliance with the attached conditions are "voluntary"; statutes enacted to enforce the Civil War Amendments are distinguished on the ground that the purpose of these amendments was to expand the nation's powers at the expense of the states. Nonetheless, the failure to confront directly the states' role in the federal system, to identify the impact of a national statute on that role, and to evaluate the capacity of the national political process to protect the states and to justify particular intrusions means that these distinctions between the commerce power and Congress' other powers are, at bottom, distinctions without a difference. Although the formal bounds of state immunity from national statutes enacted under the defense powers, the spending power, and the power to enforce the Civil War Amendments are now rather firmly established by the decisions of lower courts, the analysis is wooden and the effort to confine the reach of *NLC* is transparent.

2. *State Autonomy: Immunity for Traditional or Integral Functions and Balancing Tests*

In contrast to the lower courts' mechanical application of the Supreme Court's suggestions that *NLC* is inapplicable to statutes enacted under the war power, the spending power, or the power to enforce the Civil War Amendments, they have followed in form only the

144. *See supra* notes 121-23 and accompanying text.

145. The "defense powers" include the power to declare war and the related powers to raise and to maintain an army and a navy and to make rules for their governance. U.S. CONST. art. I, § 8, cls.11-14.

146. U.S. CONST. art. I, § 8, cl.1.

147. U.S. CONST. amends. XIII, § 2; XXIV, § 5; XV, § 2.

rule that *NLC* limits Congress' power under the commerce clause to regulate the states. Lower courts, with a few notable and aberrational exceptions, have upheld statutes enacted under the commerce power on the ground either that the affected state function is not traditional or integral or that the national interest outweighs the state interest. These courts, however, have not stated any workable criteria for distinguishing traditional and nontraditional functions or for balancing competing state and national interests.

C. State Autonomy and the Constitutional Source of Congress' Power—The Defense Powers

The inadequacy of distinctions based on the power invoked by Congress is clearly illustrated by the decisions rejecting state sovereignty challenges to statutes enacted under the defense powers. Regardless whether the statute establishes substantive rules for private activity, regulates the states in their capacity as employers, or requires the affirmative exercise of state authority over individual conduct, the courts have consistently rejected states' rights challenges to statutes enacted under the defense powers. In rejecting these challenges, the courts have frequently invoked a rule that *NLC* is inapplicable to statutes enacted under the defense powers, but they have also relied on a distinction between traditional and nontraditional state functions and on a balancing of state and national interests.

1. Regulation of Private Activity

In *In re Levy*,[148] the Second Circuit held that Congress has the power to provide for the escheat of a veteran's estate to the United States and that a state estate tax is preempted. Although the national substantive rule for the escheat of a veteran's estate displaced the state's substantive rule and reduced the state's tax revenues, the court dismissed the *NLC* objection on the grounds that the state's powers of escheat were not "integral functions" and that the national statute did not interfere "in the day-to-day affairs of the states."[149]

148. 574 F.2d 128 (2d Cir.), *aff'd sub nom.* New York v. United States, 439 U.S. 920 (1978). Prior to *NLC*, the Supreme Court upheld a corresponding provision against the claim that devolution of property is a matter reserved to the states under the tenth amendment. United States v. Oregon, 366 U.S. 643, 648-49 (1961).

149. 574 F.2d at 131 n.6.

2. Regulation of the States

The courts also have upheld statutes enacted under Congress' defense powers that provide for regulation of the states in their capacities as employers. The Veterans' Reemployment Rights Act (VRR)[150] requires private employers as well as the states and their political subdivisions to reinstate former employees called to active service in the armed forces and authorizes suit for award of lost wages and benefits and for reinstatement. Although the VRR Act and the Fair Labor Standards Act both affect the states' ability to structure the employer-employee relationship, increase the costs of delivering traditional governmental services, and displace state policies, the courts have consistently held that the constitutional grant of the defense powers in itself justifies these intrusions.[151] For example, in *Schaller v. Board of Education*,[152] the court held that a state political subdivision was liable for damages for its failure to reinstate a public school teacher even through no job was available. The defendant argued that reinstatement would increase the cost of education, a function recognized as "traditional" in *NLC*,[153] but the court concluded that states' rights did not limit national power because principles of federalism have "less significance in the area of Congress' authority to raise and support armies."[154]

The balancing implicit in this reasoning was employed explicitly in *Peel v. Florida Department of Transportation*.[155] The Fifth Circuit held that a state agency performing the traditional governmental function of transportation regulation was liable for back wages and had to reinstate a former employee. The employee had interrupted his state employment for fifty-nine days of active service in the National Guard and had been fired because state law authorized a maximum of seventeen

150. Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, tit. IV, § 404(a), 88 Stat. 1594 (current version at 38 U.S.C. §§ 2021-2026 (1976 & Supp. IV 1980)).

151. Jennings v. Illinois Office of Educ., 589 F.2d 935 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979); Schaller v. Board of Educ., 449 F. Supp. 30 (N.D. Ohio 1978); Peel v. Florida Dep't of Transp., 443 F. Supp. 451 (N.D. Fla. 1977), *aff'd*, 600 F.2d 1070 (5th Cir. 1979). *See* Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981) (tacit assumption that VRR Act applies to local government). The Fifth and Seventh Circuits also held that the eleventh amendment did not bar a suit against the state for damages or reinstatement. *See also* Comancho v. Public Serv. Comm'n, 450 F. Supp. 231 (D.P.R. 1978).

152. 449 F. Supp. 30 (N.D. Ohio 1978).

153. *See supra* text accompanying note 109.

154. 449 F. Supp. at 33.

155. 443 F. Supp. 451 (N.D. Fla. 1977), *aff'd*, 600 F.2d 1070 (5th Cir. 1979).

days for military leave.[156] The *Peel* court concluded that because the VRR Act was a valid exercise of Congress' war powers it outweighed the minor impact of requiring a state to reemploy "a person whom the state itself had previously hired."[157] The court cautioned that all exercises of the war power would not be "immune from limitations of the tenth amendment,"[158] but its balancing test suggests reliance on the underlying premise that *NLC*'s concept of state sovereignty does not restrain Congress in the exercise of the defense powers. The national side of the balance was simply the source of Congress' power,[159] not the national interest in raising military forces by guaranteeing reemployment rights. The court also understated the impact of the VRR Act on the state. The *Peel* court noted that there was no interference with the state's discretion in selecting employees, but the court did not consider the potential disruption caused by the prolonged absence of an employee or the frustration of the states' policy for the length of military leaves.

3. Regulation Requiring the Affirmative Exercise of State Authority Over Private Activity

In addition to the direct regulation of private activity and the application of analogous regulations to the states,[160] a court also may have sustained Congress' authority under the defense powers to require the affirmative exercise of state authority over private activity. The Veter-

156. 600 F.2d at 1073.

157. *Id.* at 1082-85.

158. *Id.* at 1084 n.16.

159. *Id.* at 1083 ("assess and weigh the source of the congressional power"); *id.* ("balance the exercise of Congress' war power against the impact . . . on Florida's integral governmental functions"); *id.* at 1085 ("weighing the legitimate exercise of congressional power against the intrusion into areas of state sovereignty").

160. The Veterans' Reemployment Rights Act imposes the same obligation on private and public employers to reinstate former employees who have been absent for military service; however, a national statute governing retirement pay of military reserve personnel imposes an obligation solely on public (state and local) employers. This statute prohibits any pension plan established by law from excluding a period of reserve military service in calculating eligibility or the amount of benefits. 10 U.S.C. § 1336 (1976). In Cantwell v. County of San Mateo, 631 F.2d 631 (9th Cir. 1980), *cert. denied,* 450 U.S. 998 (1981), the court held that this statute preempted a provision of the California County Employees Retirement Law that was applied to deny credit in a pension plan for a period of service in the military reserves. Although the Ninth Circuit recognized that this statute and *NLC* involved the same state interest in the amount of its employees' compensation, the court quickly concluded that states' rights do not limit the constitutional grant of the defense powers. *Id.* at 636-37.

ans' Administration's (VA) Educational Assistance Programs[161] provide for direct payments to veterans[162] to assist them in improving their vocational and educational status. Public and private educational institutions[163] have a duty to make periodic reports about the enrollment and attendance of veterans[164] so that the VA can pay benefits only to eligible veterans who are actually pursuing approved courses by attending classes. Although the VA pays a reporting fee to each educational institution,[165] the duty to participate in the administration of this educational benefits program is not simply a condition of the grant. Educational institutions are liable to the United States beyond the small amount of the reporting fee (seven dollars to eleven dollars per veteran) for "overpayments" made by the VA to a veteran if they willfully or negligently fail to report changes in a veteran's status as a student that would require the VA to terminate the veteran's benefits.[166] The Veterans' Educational Assistance Programs also require approval of the veterans' courses.[167] The VA can approve courses itself, but the statute encourages the governor of each state to establish a "state approving agency" to perform this responsibility.[168]

The State of Colorado established such an approving agency.[169] In *Colorado v. Veterans Administration*,[170] the state and two of its educational institutions sought a declaratory judgment that the requirement imposed on the schools to reimburse the United States for overpay-

161. 38 U.S.C. §§ 1651-1698, 1770-1799 (1976 & Supp. IV 1980), *amended by* Veterans' Health Care, Training, and Small Business Loan Act of 1981, Pub. L. No. 97-72, tit. II, § 201, 95 Stat. 1054; Veterans' Disability Compensation, Housing, and Memorial Benefits Amendments of 1981, Pub. L. No. 97-66, tit. VI, § 606, 95 Stat. 1037; Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XX, §§ 2003(b), (c), 2004, 2005(b), (d), 95 Stat. 782-83.

162. *Id.* § 1681 (1976), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XX, § 2003(b)(4), 95 Stat. 782.

163. *Id.* § 1652(c).

164. *Id.* § 1784(a) (Supp. IV 1980).

165. *Id.* § 1784(b).

166. *Id.* § 1785.

167. *Id.* §§ 1683, 1772(a) (1976).

168. *Id.* § 1771.

169. COLO. REV. STAT. § 23-60-303(2) (1973).

170. 430 F. Supp. 551 (D. Colo. 1977), *aff'd with modification,* 602 F.2d 926 (10th Cir. 1979), *cert. denied,* 444 U.S. 1014 (1980). The case was decided before the provisions requiring educational institutions to report the status of veterans and imposing liability for overpayments, *supra* notes 164-66, were amended in 1977 and 1980. Act of Nov. 23, 1977, Pub. L. No. 95-202, tit. III, § 304(a)(1)(2), 91 Stat. 1442; Act of Oct. 17, 1980, Pub. L. No. 96-466, tit. III, § 343(a), (b)(1), § 344, tit. VI, § 601(e), 94 Stat. 2198-99, 2208. These amendments do not make any significant changes with respect to the federalism issues raised by the reporting and liability provisions.

ments made by the VA to veterans was unconstitutional. The state argued that the required reports on veterans' class attendance interfered with its "internal procedures for monitoring student class attendance and progress."[171] It is difficult to determine the precise holding of the case. The best view is that it was decided on the narrow ground that the school's duty to report on the veterans' status was established with the state's consent by contract between the VA and the Colorado approving agency.[172] Nevertheless, the district court also appears to have sustained Congress' power to use the state colleges to administer a national benefits program on the broader ground that Congress has the power to impose a duty to report. The district court found that Congress has the "right to establish a procedure for disbursement of benefits to veterans" under its power to raise and maintain an army and navy[173] and that placing monetary liability on those schools which have a duty to report changes in a veteran's educational status is rationally related to a legitimate governmental function.[174] The district court then applied a balancing test and dismissed claims of interference with state sovereignty on the ground that the reporting requirement did not require the schools to restructure substantially the traditional ways in which they arranged their affairs.[175] Although the district court did not address directly any claim that Congress was controlling the exercise of state authority over private activity by requiring reports, the language of the opinion is consistent with the proposition that Congress has the power to compel the states to act as its agents in regulating private activity.

171. 430 F. Supp. at 555-56.

172. The district court specifically found that the duty to report was created by a contract between the Colorado approving agency and the VA. 430 F. Supp. at 558. The Tenth Circuit sustained the district court's rejection of the state sovereignty claim on this ground. 602 F.2d at 927. In his brief in opposition to the state's petition for a writ of certiorari, the Solicitor General argued that the schools' duty to report was created by the contract, and he did not address the question of Congress' power absent a contract. Memorandum for Respondents in Opposition at 2-3, 5, Colorado v. Veterans' Administration, 444 U.S. 1014 (1980) (No. 79-582). The state argued that its contract with the VA concerned only the approval of courses and did not bind the state schools to report on a veteran's educational status. Petition for Certiorari at 5-6, Colorado v. Veteran's Administration, 444 U.S. 1014 (1980) (No. 79-582).

173. 430 F. Supp. at 558-59.

174. *Id.* at 558.

175. *Id.* at 559. The rejection of federalism limits also rested in part on the district court's conclusion that *NLC* limits only the commerce power. *Id.*

D. State Autonomy and the Constitutional Source of Congress' Power—The Spending Power

The national spending power is the most significant of all Congress' powers in terms of its actual impact on the states' role in the federal system.[176] By attaching conditions to grants, Congress can employ the spending power to regulate private activity, to regulate the states, and to require the affirmative exercise of state authority over individual conduct. Congress can regulate private activity and displace state substantive policies by direct grants to individuals and organizations. Conditions attached to such expenditures may require state and local governments to alter the structure and processes of government or to exercise affirmatively authority over private conduct. Grants to state and local governments may have a similar broad impact on state political decisionmaking powers. To accept these grants the states may have to comply with conditions requiring the adoption of nationally determined substantive policy for private conduct or requiring changes in the package of goods and services provided collectively. Conditions attached to these expenditures may affect the structure and organization of government or the allocation of political authority within state government or between the state and its political subdivisions. These conditions may also require the affirmative exercise of state authority over private activity.

These effects on the states are not, standing alone, the reason why the spending power has the greatest actual impact on the states' role in the federal system. Statutes enacted under other article I, section 8 powers or under the enforcement clauses of the Civil War Amendments may have identical effects. The impact of the spending power is, instead, a function of the extent to which Congress exercises this power. In 1978, there were approximately 182 national income transfer programs ranging from agricultural price supports to traditional welfare programs, like public housing and disability benefits, that provided over $250 billion in direct cash and in-kind assistance to individuals and private organizations.[177] National assistance to state and local governments in 1980 exceeded $90 billion in nearly five hundred programs providing

176. G. GUNTHER, *supra* note 56, at 224.

177. *See* 3 ACIR STUDY, *Public Assistance: The Growth of a Federal Function* A-79, *supra* note 82, at 1-2. *See also* 1 *Id., A Crisis of Confidence and Competence* A-77, at 49. *See generally* W. LAWRENCE & S. LEEDS, AN INVENTORY OF FEDERAL INCOME TRANSFER PROGRAMS: FISCAL YEAR 1977 (1978).

funds for almost every type of state and local government service, and these grants constituted about twenty-five percent of all state and local government expenditures.[178]

Although statutes enacted under the spending power have the greatest impact in the aggregate on the states' role, the courts have not made any distinctions in terms of the recipients of the grants or in terms of the particular effects on the states, and they have not considered the combined effect of such statutes. Instead, they have mechanically rejected claims that a spending program impermissibly intrudes on state autonomy by invoking either the *NLC* Court's apparent disclaimer of an intention to limit the spending power[179] or the notion that participation in a spending program and compliance with any and all conditions are "voluntary."

1. Grants to Private Recipients

Grants to private recipients are invariably made on conditions that Congress believes will promote the purpose of the expenditure. These conditions typically apply directly to the recipient, establish eligibility, and control the use of the funds, but other conditions may apply directly to the states and require some action as prerequisite to any payments to a private recipient. When a grant is conditioned upon certain conduct by a private recipient, the effect is at most to displace state substantive policy. If the condition applies to the states, the potential private recipients will resort to the state's political process to demand whatever action is necessary to make them eligible for the grant. State compliance with conditions that make private recipients eligible for national grants may have a substantial impact on state autonomy.

a. Conditions that Regulate Private Activity

The Agricultural Adjustment Act of 1933[180] affords an easy example

178. COMPTROLLER GENERAL, FEDERAL ASSISTANCE SYSTEM SHOULD BE CHANGED TO PERMIT GREATER INVOLVEMENT BY STATE LEGISLATURES 1 (1980). For a comprehensive overview of the role of the national government in providing services traditionally performed by state and local governments, see generally 5 ACIR STUDY, *Intergovernmentalizing the Classroom: Federal Involvement in Elementary and Secondary Education* A-81; 6 *id., The Evolution of a Problematic Partnership: The Feds and Higher Ed* A-82; 7 *id., Protecting the Environment: Politics, Pollution, and Federal Policy* A-83; 8 *id., Federal Involvement in Libraries* A-84; 9 *id., The Federal Role in Local Fire Protection* A-85.

179. *See supra* note 121.

180. Act of May 12, 1933, ch. 25, 48 Stat. 31.

of the effect on the states of most grants to private recipients. This Act authorized payments to farmers on the condition that they reduce crop acreage, and it controlled a private activity otherwise subject to state control to the extent that farmers accepted the payments and complied with the condition. Although the Supreme Court held this statute unconstitutional in *United States v. Butler*,[181] statutes establishing similar programs are legion today.[182] National grants to private recipients may not only establish a rule for private conduct, but they may also displace contrary or conflicting state substantive policy. For example, several national grants provide subsidies for the construction of privately owned rental housing for low or moderate income families. As a condition of the national subsidy, the landlord must agree to national rent regulation so that the housing will be provided to the class of persons whom Congress intended to benefit. In the only case to consider a *NLC* challenge of a national grant to a private recipient with conditions directly applicable to the recipient, a federal district court found that a local rent control regulation was preempted.[183] This court easily rejected the argument that the national program impermissibly interfered with the states' historic power to control landlord-tenant relations on the basis of the Court's assumption in *NLC* that state sovereignty

181. 297 U.S. 1 (1936). The Court held that the spending power could not be used to regulate agricultural production because Congress has no such expressly delegated power.

182. *See* Agriculture and Food Act of 1981, Pub. L. No. 97-98, 95 Stat. 1213. *See generally* S. REP. No. 126, 97th Cong. 1st Sess. *reprinted in* [1981] U.S. CODE CONG. & AD. NEWS 1965. Since 1933, Congress has exercised direct control over farmers' planting and marketing decisions by authorizing direct cash payments and loans on conditions requiring crop acreage reduction and diversion of crop land to conservation uses. *See, e.g.,* Agriculture and Food Act of 1981, Pub. L. No. 97-98, tit VI, § 602, 95 Stat. 1242-47 (to be codified at 7 U.S.C. § 1441(i)) (loans, purchases, and payments to rice farmers who comply with acreage limitations and divert crop land to conservation and wildlife uses).

183. A regulation expressly prohibited the application of state or local rent controls to nationally subsidized housing projects. The district court initially granted a preliminary injunction against the application of the Boston rent control ordinance to subsidized housing, but it denied a motion for summary judgment because the question of the degree of conflict between the ordinance and the regulation was unresolved. City of Boston v. Hills, 420 F. Supp. 1291 (D. Mass. 1976). The court subsequently construed the national regulation as an express preemption provision obviating the need to evaluate the degree of actual conflict and granted the motion for a summary judgment that the ordinance was invalid under the supremacy clause. City of Boston v. Harris, 461 F. Supp. 1201 (D. Mass. 1978), *aff'd,* 619 F.2d 87 (1st Cir. 1980). In the absence of an express preemption provision, state regulation of private recipients of national grants may be valid. *See* Kargman v. Sullivan, 552 F.2d 2 (1st Cir. 1977) (no implied preemption of Boston rent control ordinance by one of the nationally subsidized housing programs at issue in *Boston v. Harris*); *supra* note 55.

does not limit Congress' power over private activity.[184]

Although this reading of *NLC* may explain the inapplicability of its concept of state sovereignty to conditions directly imposed on private recipients of national grants, it cannot, of course, explain the validity of private grants made with conditions imposed directly on the states. Such conditions in private grants have been upheld on a different theory. Beginning with the unemployment compensation provisions of the Social Security Act of 1935, which the Supreme Court upheld in *Steward Machine Co. v. Davis*,[185] and through a series of post-*NLC* cases challenging the 1976 amendments of the unemployment compensation program and the National Flood Insurance Program, the courts have consistently rejected claims of impermissible intrusion on state sovereignty on the ground that the states' compliance with the conditions of a grant is "voluntary".

b. Conditions that Regulate the States and Require the Affirmative Exercise of State Authority Over Private Activity

i. State Unemployment Compensation Programs for Private Employees

The Social Security Act of 1935 combined a tax and credit system with direct payments to the states to provide for the establishment of state unemployment compensation programs.[186] The Act imposed a tax on private employers, but it also provided the taxpayer with a credit of up to ninety percent of the national tax for taxes paid under a state

184. 420 F. Supp. at 1298. See *supra* note 97 and accompanying text. The First Circuit did not address the issue of state sovereignty, but a concurring opinion noted that there was no interference with traditional state regulation because the "landlord-tenant relationships would not exist but for the federal legislation." 619 F.2d at 97 n.2 (Kunzig, J., concurring).

In addition to *City of Boston v. Harris*, one other court has considered the question of federalism limits on Congress' power to make a grant to a private recipient with conditions directly applicable to the recipient, but the challenge was based solely on the tenth amendment and the court did not consider the effect of *NLC*. In Central Fla. Legal Servs., Inc. v. Perry, 406 So.2d 111 (Fla. App. 1981), a state court held that a state court order appointing a legal services attorney as counsel for a defendant in a criminal proceeding was invalid because it conflicted with the condition of a national grant to a private, nonprofit legal services corporation that legal service attorneys would provide legal assistance to indigents only in civil matters. Although the national grant condition interfered with the state's power to regulate the practice of law, the court found on the basis of pre-*NLC* authority that the tenth amendment objection was without merit because the establishment of a legal services program was a valid exercise of the spending power. *Id.* at 114.

185. 301 U.S. 548 (1937).

186. Act of Aug. 14, 1935, ch. 531, tits. III, IX, 49 Stat. 626, 639.

unemployment compensation plan that conformed to national standards.[187] This credit was in effect a grant to a private recipient (the employer-taxpayer) on a condition directly applicable to the state—the adoption and implementation of an unemployment compensation plan meeting national standards. If the state adopted such a plan, the Act also authorized direct grants to the states to administer their unemployment compensation programs.[188] This basic statutory scheme is still in effect today, although Congress has from time-to-time increased the tax on private employers, imposed additional standards for approval of state plans, and provided supplemental benefits.[189]

187. 301 U.S. at 574-76.

188. *Id.* at 577-78. Under another statute, states with plans meeting the national standards were also eligible for grants to operate public employment offices. Act of June 6, 1933, ch. 49, 48 Stat. 113 (current version at 29 U.S.C. §§ 49-49k (1976)), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. VII, § 702, 95 Stat. 521).

189. The tax and credit provisions as amended are now commonly known as the Federal Unemployment Tax Act and have been reclassified at 26 U.S.C. §§ 3301-3311 (1976 & Supp. IV 1980), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XIV, §§ 2406(a), 2408(a), 95 Stat. 876, 880; Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, tits. I, § 124(e)(2)(A), VIII, § 822(a), 95 Stat. 200, 351. The other unemployment compensation provisions of the 1935 Act as amended are now codified at 42 U.S.C. §§ 501-504, 1101-1108, 1321-1324 (1976 & Supp. IV 1980), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XXIV, § 2407, 95 Stat. 879. For the most part, the amendments to the 1935 Act have simply increased the tax on private employers in one of three ways: (1) increasing the wage base on which the tax is laid, (2) increasing the tax rate, or (3) enlarging the category of employees on whose wages the tax is based. More significant changes were made by a series of amendments enacted in the 1970's. The Employment Security Amendments of 1970 established three new requirements for national approval of state unemployment compensation plans. During periods of high unemployment, the states and the national government each pay 50% of the cost of "extended benefits" for employees who have exhausted their regular benefits under the state's plan. Other provisions of the 1970 Amendments require the states to provide unemployment compensation coverage for employees of nonprofit organizations and employees of state hospitals and higher education institutions as a condition for national approval of the state's plan, but no tax is levied on the state or nonprofit organization as employers. Finally, these amendments require the states to permit local governments to provide coverage for their hospital and higher education employees. Pub. L. No. 91-373, 84 Stat. 695. A 1974 Amendment established a third level of "emergency" benefits for workers who had exhausted their regular and extended benefits. The emergency benefits are funded solely by the national government, but only states with approved plans can participate. Emergency Unemployment Compensation Act of 1974, Pub. L. No. 93-572, 88 Stat. 1869. This program has now lapsed. Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95-19, 91 Stat. 39. A second 1974 Amendment provided nationally financed benefits to workers, including state and local government employees, who were not normally covered by state and local unemployment compensation plans. Emergency Jobs and Unemployment Assistance Act of 1974, Pub. L. No. 93-567, 88 Stat. 1845. This provision for covering public employees was replaced with a different scheme by the 1976 Amendments discussed *infra* at notes 198-206. For a concise, thorough description of the unemployment compensation program prior to the 1976 Amendments, see STAFF OF THE SENATE COMM. ON FINANCE,

By 1937, every state had adopted an unemployment compensation program in compliance with national standards.[190] The tax and credit provisions of the 1935 Act were responsible for this success because they generated strong political pressure on each state to comply with the condition for the credit or grant to private employers. If the state did not have any program, the employers would be subject to the national tax, but the employees would not receive any benefits.[191] If the state adopted an unemployment compensation program that did not comply with the national standards, private employers would be subject to a double tax—the national tax and any state tax necessary to finance the state's program. Employers could avoid double taxation and benefits would be available to employees only if the state adopted an unemployment compensation program meeting the national standards. Given the obvious political pressure from employers and employees to adopt a program meeting national standards, the result is hardly surprising. Although the states retained some significant policy discretion in designing their unemployment compensation programs[192] and the programs were adopted through each state's political process, the 1935 Act had a significant effect on the states. It substituted a nationally determined substantive policy for private activity (unemployment compensation) for state policy (no unemployment compensation), and it required the states, by taxing employers and distributing benefits to employees, to exercise affirmative authority over private activity.

Notwithstanding these effects on the states, the Court held in *Steward Machine Co.* that the tax and credit in combination are not "weapons

94TH CONG., 2D SESS., STAFF DATA AND MATERIALS ON UNEMPLOYMENT COMPENSATION AMENDMENTS OF 1976, 1-21 (Comm. Print 1976) [hereinafter cited as MATERIALS ON THE 1976 AMENDMENTS].

190. NATIONAL COMM'N ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT COMPENSATION: FINAL REPORT 10 (1980).

191. The Act as amended has never provided for any national mechanism to distribute unemployment compensation benefits in the event that a state should fail to adopt a plan.

192. Steward Machine Co. v. Davis, 301 U.S. 548, 574-76, 593-94 (1937). The national standards for approval of state unemployment compensation plans impose general requirements designed to assure that the taxes collected from private employers are spent to aid needy workers and to protect these funds by requiring them to be deposited in the national treasury subject to withdrawal by the state as necessary to pay benefits. *See* 26 U.S.C. § 3304(a) (1976 & Supp. IV 1980). The national standards, however, leave the states with broad discretion to determine both eligibility for, and the amounts of, unemployment compensation benefits, and each state is free to require contributions from employees in addition to the tax on private employers. MATERIALS ON THE 1976 AMENDMENTS, *supra* note 189, at 6, 10-13.

of coercion, destroying or impairing the autonomy of the states."[193] Even though the Court recognized that Congress had employed "the whip of economic pressure" to drive state legislatures to enact unemployment compensation laws,[194] it was unwilling to find impermissible coercion of the states. The national statute eliminated the problem that enactment by one state of an unemployment compensation law would place it in a position of economic disadvantage with its sister, competitor states, and the states were given an opportunity to assist in resolving the national problems of a severe economic depression.[195] Moreover, no state complained[196] and each state was free to repeal its unemployment compensation statute at any time.[197] The heritage of *Steward Machine Co.* is that the constitutional test of conditions directly applicable to the states in private spending programs is whether state action is voluntary or coerced.

ii. Unemployment Compensation Benefits for State and Local Government Employees

Courts have applied this test in *NLC*-inspired challenges to a 1976 amendment to the national unemployment compensation statutes and to the National Flood Insurance Program, which also make grants to private individuals on conditions directly applicable to state government. The Unemployment Compensation Amendments Act of 1976 was enacted in part for the purpose of extending the benefits of unem-

193. 301 U.S. at 586. *See* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 526 (1937). The Court also held that the national requirements for state unemployment compensation plans (the conditions for the credit) did not require the states to surrender "powers essential to their quasi-sovereign existence." 301 U.S. at 593. The Court did not pass on the constitutionality of Congress' power to make direct grants to the states to administer unemployment compensation plans, *see supra* text accompanying note 188, on the condition that the states adopt plans in conformity with national standards. *Id.* at 598.

In upholding the validity of the tax and credit scheme, the Court invoked Florida v. Mellon, 273 U.S. 12 (1927), in which it had approved a national estate tax with a credit of up to 80% of the national tax for taxes paid to a state. The *Mellon* Court rejected the claim that the national statute coerced the states to enact inheritance taxes. *Id.* at 13. *See* Perkins, *State Action Under the Federal Estate Tax Credit Clause,* 13 N.C. L. REV. 271 (1935). The concept that conditions of grants do not infringe state sovereignty because the states are free to accept or reject the grant first appeared as dictum in Massachusetts v. Mellon, 262 U.S. 447, 480 (1923).

194. 301 U.S. at 587.

195. *Id.* at 587-88.

196. The plaintiff was a private employer, not a state. *Id.* at 589. *See* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) (state defense of its unemployment compensation law enacted to conform with the national statute).

197. 301 U.S. at 595-96.

ployment compensation coverage to state and local government employees,[198] and these amendments rely on the basic tax and credit mechanism of the 1935 Act to achieve this end. The 1976 Amendments made the provision of unemployment compensation benefits to most state and local government employees[199] a requirement for national approval of state unemployment compensation programs.[200] The state programs may provide for state or local coverage of local government employees, but if the state requires contributions from its political subdivisions, the state must give them the option of reimbursing the state for benefits paid to former employees or contributing on the same basis as private employers.[201] These requirements are in effect additional conditions imposed directly on the states for the credit or grant to private employers who are subject to the national tax.[202]

The new conditions imposed by the 1976 Amendments increase substantially the impact of the unemployment compensation statutes on the states. In addition to the previous displacement of state substantive policy for private employment,[203] the states and their political subdivisions in their capacities as employers are subject to the same nationally determined substantive policy as private employers.[204] The end result

198. Pub. L. No. 94-566, 90 Stat. 2667 (amending scattered sections of 26 & 42 U.S.C.). This Act also increased the amount of wages subject to taxation and the tax rate. Given previous national coverage of state and local government employees, *see supra* note 189, the 1976 Amendments shifted the costs of benefits for these employees from the national government to the states and their political subdivisions. Note, *Federal Conditions and Federalism Concerns: Constitutionality of the Unemployment Compensation Amendments of 1976,* 58 B.U.L. REV. 275, 278 (1978).

199. The states are not required to provide unemployment compensation coverage for elected officials, temporary employees working in an emergency situation, major policy making employees, and others. Pub. L. No. 94-566, tit. I, § 115(b), 90 Stat. 2670, 26 U.S.C. § 3309(b)(3) (1976).

200. Pub. L. No. 94-566, tit. I, § 115(a), (c)(2), 90 Stat. 2670-71, 26 U.S.C. §§ 3304(a)(6)(A), 3309(a)(1)(B) (1976 & Supp. IV 1980).

201. Pub. L. No. 94-566, tit. V, § 506(a), (b), 90 Stat. 2687, 26 U.S.C. §§ 3304(a)(6)(B), 3309(a)(2) (1976 & Supp. IV 1980). *See* Note, *supra* note 198, at 288 n.97.

202. In part because Congress doubted its constitutional power, no tax is imposed on state and local governments in their capacities as employers. 26 U.S.C. §§ 3301, 3306(c)(7) (1976); Note, *supra* note 198, at 278-79. The states are free to fund unemployment compensation for public employees from any revenue source they choose, but state funds for unemployment compensation benefits for public employees must be paid over to the national treasury for safe keeping and for requisition as needed in common with the funds raised by the state tax on private employers. *See* 26 U.S. §§ 3304(a)(3), (6) (1976), 42 U.S.C. § 503(a)(4) (1976).

203. *See supra* text following note 192.

204. Compensation of public employees is generally on the same basis, amount, terms, and conditions as compensation payable to employees in the private sector. 26 U.S.C. § 3304(a)(6)(A) (1976). The states retain broad discretion with regard to these basic aspects of their unemployment compensation plans. *See supra* note 192.

in states that satisfy the conditions for the grant to private employers by amending state law to provide unemployment compensation benefits for public employees is, of course, the same as direct regulation of the states under the commerce power. For example, at least in terms of the ultimate effects, there is little or no difference between the FLSA and the 1976 Unemployment Compensation Amendments. Both control state and local governments in their capacities as employers, increase the cost of government, and may force either a reduction in goods and services provided collectively or an increase in taxes.[205] The 1976 Amendments do, however, affect the states in one fashion that goes beyond the impact of the FLSA; the 1976 Amendments control the allocation of political power between the states and their political subdivisions by denying the states the authority to control the financing of unemployment compensation by local governments.[206]

Notwithstanding the effects of the 1976 Unemployment Compensation Amendments on the states and the opposition of many state and local government officials and organizations,[207] every state except New

205. State and local government opponents of the 1976 Amendments alleged that the annual cost of financing unemployment compensation benefits for public employees would be between $385 million and $2 billion. These costs would require a reduction of existing services, loss of new services and programs, or increased taxes that might be barred by state constitutional or statutory limits on taxes or deficit spending. State and local governments would be forced to restructure their personnel policies to avoid staff reductions and to restrict the use of seasonal, temporary, and part-time employees in order to minimize the costs of unemployment benefits. Joint Brief for Appellants, County of Los Angeles v. Marshall, 631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980). These allegations parallel the claims made in *NLC*. *See supra* notes 102 & 103 and accompanying text. The courts' analysis of the constitutionality of the 1976 Amendments did not require an assessment of their actual impact. *See infra* text accompanying notes 211-16

206. The state unemployment compensation law must permit political subdivisions to elect to pay for coverage of their employees by contributions equivalent to the state's payroll tax on private employers or by retroactive reimbursement for benefits paid to their employees. *See supra* text accompanying note 201.

207. In the hearings on the 1976 Amendments, most state and local government officials and organizations opposed extension of unemployment compensation coverage to public employees. *See Unemployment Compensation Amendments of 1976: Hearings on H.R. 10210 Before the Senate Comm. on Finance,* 94th Cong., 2d Sess. 53, 55, 59 (1976). After enactment, seven states and over 1200 local government units challenged the constitutionality of the 1976 Amendments. County of Los Angeles v. Marshall, 442 F. Supp. 1186, 1187 (D.D.C. 1977), *aff'd,* 631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980). On appeal from the district court's denial of a preliminary injunction, an impressive array of local government associations filed a brief in support of the challenge. 631 F.2d at 767. New Hampshire brought a separate action challenging the constitutionality of the 1976 Amendments. New Hampshire Dep't of Employment Sec. v. Marshall, 616 F.2d 240 (1st Cir.), *appeal dismissed and cert denied,* 449 U.S. 806 (1980). Opposition was not uniform. The state of Michigan filed a brief amicus curiae in support of the 1976 Amendments, 631 F.2d at 767, and prior to the enactment of the 1976 Amendments over half of the states

Hampshire conformed and enacted statutes amending their unemployment compensation programs to provide coverage for public employees.[208] Although a state's refusal to conform to the conditions of the 1976 Amendments results in the loss of several direct national grants,[209] Congress' success in obtaining state unemployment compensation coverage for public employees is a tribute to the powerful political pressure created by conditioning a grant to a private recipient on action by state government. Testimony from representatives of the states opposed to public employee unemployment compensation reveals their belief that they were forced to comply with this national requirement in order to avoid the loss of the national credit to private employers who would then be subject to both national and state unemployment taxes.[210]

State claims of coercion did not, however, persuade the courts that the new conditions of the unemployment compensation statutes crossed the limits recognized in *Steward Machine Co.* or were proscribed by the concept of state sovereignty recognized in *NLC*. The First Circuit up-

provided mandatory coverage for state employees and permitted political subdivisions to elect coverage. MATERIALS ON THE 1976 AMENDMENTS, *supra* note 189, at 34.

208. New Hampshire Dep't of Employment Sec. v. Marshall, 616 F.2d 240, 246 n.7 (1st Cir.), *appeal dismissed and cert. denied,* 449 U.S. 806 (1980). For an example of a state statute conforming to the requirements of the 1976 Amendments, see PA. STAT. ANN. tit. 43, §§ 891-893 (Purdon Supp. 1965-1981) (state employees), §§ 911-914 (political subdivision employees).

209. Direct grants to the states to administer their unemployment compensation programs and to operate public employment offices, *see supra* note 188 and accompanying text, are not available if the state plan is not approved by the national government. New Hampshire Dep't of Employment Sec. v. Marshall, 616 F.2d 240, 242 (1st Cir.), *appeal dismissed and cert. denied,* 449 U.S. 806 (1980). The national government's share of extended benefits, *see supra* note 189, is also terminated. County of Los Angeles v. Marshall, 442 F. Supp. 1186, 1188 (D.D.C. 1977), *aff'd,* 631 F.2d 767, *cert. denied,* 449 U.S. 837 (1980).

210. *See* 616 F.2d at 246; 442 F. Supp. at 1189-91. After New Hampshire initiated its challenge to the 1976 Amendments, its legislature enacted a statute to conform the state's unemployment compensation laws to the new national requirements, but the state legislature specifically claimed that it was coerced "under the threat of costing the businesses of this state loss of their offset credit against taxes imposed by the Federal Unemployment Tax Act which would amount to in excess of 40 million dollars, a price which is totally disproportionate to the cost of benefits to governmental employees . . . ." 1979 N.H. LAWS ch. 328. This cost would be the consequence of subjecting private employers to both state and national unemployment taxes without a credit on the national taxes for taxes paid to the state under a plan conforming to national standards. This "double-tax" would surely have the effects of discouraging new business from locating in New Hampshire and of encouraging private employers to leave the state. *See* County of Los Angeles v. Marshall, 442 F. Supp. 1186, 1191 n.4 (D.D.C. 1977), *aff'd,* 631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980). Although New Hampshire enacted a statute in an effort to conform its unemployment compensation plan with the 1976 Amendments, the First Circuit concluded that the case challenging these amendments was not moot because the statute alone could not bring the state into full compliance. 616 F.2d at 243 n.**.

held Congress' power to require the states to provide unemployment compensation benefits to public employees as a condition of grants to private employers on two alternative grounds.[211] The court first concluded that *NLC* is limited to statutes based on the commerce power that impose commands affecting state sovereignty and that *NLC* does not impair the authority of *Steward Machine Co.* because statutes based on the spending power give states the choice of conforming to national requirements or refusing to participate.[212] Although the 1976 Amendments increased the stakes by imposing an additional condition for the credit to the private employers, the court found that the basic mechanism of the 1935 Act had not been altered, and it rejected the state's claim that Congress had coerced compliance "by holding private employers 'ransom.' "[213]

On an alternative reading of *NLC* as barring intrusions on state sovereignty regardless of the source of Congress' power, the court concluded that the 1976 Amendments did not impair state sovereignty.[214] Although the cost of government would be increased, the 1976 Amendments were distinguished from the FLSA because there was no national control of wages and hours and because the state administered the unemployment compensation program.[215] The Court of Appeals for the District of Columbia upheld the 1976 Amendments on the basis of the First Circuit's distinction between voluntary compliance with spending power programs and mandatory controls under the commerce power.[216]

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211. New Hampshire Dep't of Employment Sec. v. Marshall, 616 F.2d 240 (1st Cir.), *appeal dismissed and cert. denied,* 449 U.S. 806 (1980).

212. *Id.* at 245. The court noted that the Supreme Court in *NLC*, *see supra* note 121, had left open the question "whether the spending power could be unconstitutionally used to impair state sovereignty . . . ." *Id.* at 247.

213. *Id.* at 246.

214. *Id.* at 249.

215. *Id.* at 248. Apart from the financial impact, the court did not address the arguments that the 1976 Amendments would interfere with the states' ability to provide traditional governmental services and with state personnel policies. *See supra* note 205.

216. County of Los Angeles v. Marshall, 442 F. Supp. 1186 (D.D.C. 1977), *aff'd,* 631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980).

iii. National Flood Insurance Program: State Implementation of National Standards for Private Land Use

The National Flood Insurance Program (NFIP),[217] like the national unemployment compensation program, illustrates Congress' ability to achieve its regulatory goals through grants to private recipients on conditions directly applicable to the states. The purposes of the NFIP, as originally established by the National Flood Insurance Act of 1968, were to encourage state and local governments to adopt land use control measures that minimize flood damage and to encourage landowners in flood-prone areas to purchase flood insurance.[218] To achieve these ends, Congress authorized grants in the form of subsidized flood insurance[219] for landowners on the condition that the appropriate public body adopt land use control measures consistent with national standards for reducing flood losses.[220] Congress intended that property owners who wanted subsidized insurance, much like the employers who wanted a national tax credit for taxes paid under a state unemployment compensation plan, would pressure local government to adopt land use control measures meeting national standards. The program did not work, and by January, 1973, only two thousand commu-

217. 42 U.S.C. §§ 4001-4128 (1976 & Supp. IV 1980), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. III, subtit. A, pt. 4, § 341, 95 Stat. 418-19. The National Flood Insurance Program was established by the National Flood Insurance Act of 1968, tit. XIII of the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 587, *as amended,* and the Flood Disaster Protection Act of 1973, Pub. L. No. 93-234, 87 Stat. 975, *as amended.* For a detailed analysis of the program, see Holmes, *Federal Participation in Land Use Decisionmaking at the Water's Edge—Flood Plains and Wetlands,* 13 NAT. RESOURCES LAW. 351, 359-64 (1980), and sources cited in Note, *Toward New Safeguards on Conditional Spending: Implications of* National League of Cities v. Usery, 26 AM. U. L. REV. 726, 747 n.138 (1977).

218. Pub. L. No. 90-448, tit. XIII, § 1302(a), (c), 82 Stat. 572, 42 U.S.C. § 4001(a), (c) (1976).

219. Prior to the enactment of the National Flood Insurance Act of 1968, insurance against flood losses was not available because private companies determined that flood insurance was not profitable and feared that catastrophic damages would exceed their reserves. The 1968 Act provided a national subsidy for flood insurance principally by establishing a fund for reinsuring private companies against the risks of extraordinary, excessive losses. Flood insurance policies were issued directly by an underwriting association through 1977; however, as the Act permitted, the national government then assumed direct responsibility for issuing flood insurance policies. *See* National Flood Insurers Ass'n v. Harris, 444 F. Supp. 969 (D.D.C. 1977); 44 C.F.R. § 62 (1981); Maloney & Dambly, *The National Flood Insurance Program—A Model Ordinance For Implementation of Its Land Management Criteria,* 16 NAT. RESOURCES J. 665, 671-72, 678 (1976); Smith, *Litigation on the National Flood Insurance Program,* 1979 INS. L.J. 524, 525-26.

220. Pub. L. No. 90-448, tit. XIII, §§ 1305(c), 1315, 82 Stat. 574, 578 (current version at 42 U.S.C. §§ 4012(c), 4022 (1976)).

nities had adopted flood control measures.[221] The failure of the program established by the 1968 Act has been explained as a function of the public's low perception of flood risks.[222] In contrast to the clear benefit to an employer of a credit against the national unemployment tax, the benefit to the individual landowner of subsidized flood insurance was simply not sufficient to create a strong demand for state or local governments to enact the requisite land use control measures.[223]

To remedy this deficiency, Congress amended the NFIP in 1973[224] and made all national grants for "construction or acquisition purposes" in an area with special flood hazards subject to the condition that the community[225] participate in the national flood insurance program by enacting and enforcing land use control measures that meet national standards for minimizing flood damages.[226] Congress' purpose was to

221. *Oversight of the National Flood Insurance Program: Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs,* 95th Cong., 1st Sess. 404 (1977) (statement of Ruth Prohop).

222. S. REP. NO. 583, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 3217, 3220.

223. *See* Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025, 1027 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied sub nom.* Texas Landowners Rights Ass'n v. Director, Federal Emergency Management Agency, 444 U.S. 927 (1979).

224. Flood Disaster Protection Act of 1973, Pub. L. No. 93-234, 87 Stat. 975.

225. A community is defined as a state or its political subdivision which has zoning and building code jurisdiction over a particular area with special flood hazards. 42 U.S.C. § 4003(a)(1) (1976).

226. 42 U.S.C. §§ 4105, 4106(a) (1976 & Supp. IV 1980). The NFIP imposes the condition of adoption of land use control measures both on grants to private recipients and on grants to state and local governments because "financial assistance for acquisition or construction purposes" is defined to include grants for publicly and privately owned property. 42 U.S.C. § 4003(a)(4) (Supp. IV 1980). The 1973 Act also prohibited financial institutions regulated or insured by the national government from making loans in flood-prone areas of communities that had not adopted land use control measures, but this restriction on private funds was repealed in 1977. Pub. L. No. 93-234, § 202(b), 87 Stat. 982, *codified by* 42 U.S.C. § 4106(b) (1976), *repealed by* Pub. L. No. 95-128, tit. VII, 91 Stat. 1144, 42 U.S.C. § 4106(b) (Supp. IV 1980).

If a community becomes eligible for flood insurance by adopting the requisite land use control measures, the 1973 Act also requires property owners to purchase flood insurance as a second condition for national financial assistance and as a condition for loans from private financial institutions regulated or insured by the national government. 42 U.S.C. § 4012a(a), (b) (1976). *See, e.g.*, 12 C.F.R. § 523.29(b) (1981) (banks regulated by the Federal Home Loan Bank Board). This restriction on private loan funds has the same effect as the repealed provision of the 1973 Act that prohibited nationally regulated private financial institutions from making loans in communities without flood control measures. Since flood insurance is available only through the NFIP, *see supra* note 219, a requirement that nationally regulated financial institutions can make loans only to landowners who have flood insurance means in practice that these financial institutions can make loans to property owners in flood-prone areas only if the community participates in the NFIP by adopting and enforcing land use and control measures. Thus, in an indirect but effective

require state and local governments to adopt and enforce zoning and building codes for flood-prone areas.[227] The revised NFIP succeeds[228] where its predecessor failed because it substantially increases the political pressure on state and local governments to comply with the national statute. If a community refuses to enact and enforce the requisite land use control measures, landowners in parts of the community that are subject to flooding are denied a wide array of national financial assistance, including the purchase or subsidization of mortgages and mortgage loans by the Federal Housing Authority and the Veterans' Administration,[229] most private mortgage and construction loan funds,[230] other loans,[231] and disaster assistance.[232] The NFIP demonstrates Congress' ability to make the benefits of several grants to private recipients so substantial that state and local governments must comply with the conditions that make the private recipients eligible for the funds.

The effects on state and local governments of participation in the NFIP are quite substantial. National policy for land use by private

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fashion, the NFIP denies property owners mortgage and construction loans from nationally regulated financial institutions unless the community adopts the requisite flood control measures.

The NFIP has a separate provision for flood insurance for state-owned property in flood-prone areas. In order to be eligible for national financial assistance, the states are not required to purchase flood insurance if they have an adequate policy of self-insurance approved by the national government. 42 U.S.C. § 4012a(c) (1976); 44 C.F.R. § 75 (1981). Nevertheless, state-owned property in areas with local flood control regulations established under the NFIP must comply with these regulations or with flood control measures established by the state for its properties. 44 C.F.R. § 60.12 (1981).

227. In contrast with Congress' stated purpose in the 1968 Act of "encouraging" the states and local governments to adopt land use control measures, *see supra* text accompanying note 218, the purpose of the 1973 amendment of the NFIP was to "require" adoption and enforcement of such regulations. Pub. L. No. 93-234, § 2(b)(3), 87 Stat. 976, 42 U.S.C. § 4002(b)(3) (1976); S. REP. NO. 583, 93d Cong., 1st Sess. 4, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 3217, 3220 (sanctions to mandate community adoption of land use regulations).

228. Sixteen thousand communities participated in the NFIP in 1980. Holmes, *supra* note 217, at 364.

229. 42 U.S.C. § 4003(a)(4) (Supp. IV 1980); Holmes, *supra* note 217, at 361.

230. *See supra* note 226.

231. *See, e.g.,* 13 C.F.R. § 116.11 (1982) (Small Business Administration loans).

232. 44 C.F.R. §§ 200.38-.39 (1981). *See* 42 U.S.C. § 4003(a)(4) (Supp. IV 1980). Nationally regulated financial institutions must notify landowners who seek construction loans or mortgages for property in a flood-prone area that national disaster relief assistance will not be available if the community is not a participant in the NFIP. 42 U.S.C. § 4106(b) (Supp. IV 1980). *See, e.g.,* 12 C.F.R. § 339.5(b) (1982) (sample notice to be issued by banks regulated by the Federal Deposit Insurance Corporation).

parties in flood plains[233] is substituted for the substantive policy established by the state or local political process. The community must exercise its lawmaking powers to adopt regulations meeting national standards,[234] and it must assume the costs of administering and enforcing these regulations.[235] In short, state and local governments must affirmatively exercise their authority over private activity by adopting and enforcing national standards for the use of privately owned lands. Moreover, the level and choice of collective goods and services provided by the community may be affected by administrative costs or by losses to the local tax base from the deterrence of investment in flood prone areas.[236] Notwithstanding these effects and Congress' careful orchestration of political pressure on state and local governments, the District Court for the District of Columbia concluded, in *Texas Landowners Rights Association v. Harris*,[237] that the NFIP is a constitutionally valid exercise of the spending power because state and local governments have a choice between accepting or rejecting the national financial benefits.[238]

The conclusion that state and local government participation in the NFIP is voluntary followed readily from the court's refusal to address the basic question whether the sanctions for nonparticipation make the program mandatory. Although the court formulated the question in these terms,[239] it did not assess the actual impact of the conditional grants to property owners. Instead, the court simply assumed the an-

233. The national standards generally restrict development in flood-prone areas, require flood-proof construction, and impose an obligation to plan land use to avoid flood damages. 42 U.S.C. § 4102 (1976); 44 C.F.R. § 60 (1981).

234. *See* 44 C.F.R. § 59.22(a)(1)-(3), (b) (1981) (national approval of community participation in the NFIP requires submission of statutes, ordinances, and regulations).

235. *See* 44 C.F.R. § 59.22(a)(8) (1981) (national approval of community participation in the NFIP requires a community commitment to take official action necessary to carry out the program).

236. *See* Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025, 1028 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied sub nom.* Texas Landowners Rights Ass'n v. Director, Federal Emergency Management Agency, 444 U.S. 927 (1979). For a thorough assessment of the impact of the NFIP on states and local governments, see Note, *supra* note 217, at 753-61.

237. 453 F. Supp. 1025 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied sub nom.* Texas Landowners Rights Ass'n v. Director, Federal Emergency Management Agency, 444 U.S. 927 (1979).

238. *Id.* at 1030. The district court also rejected fifth amendment taking and due process challenges to the NFIP. *Id.* at 1031-33.

239. *Id.* at 1029.

swer to the question at issue by characterizing the NFIP as offering "certain inducements for state participation."[240] Since the national grants are merely inducements, the states and local governments have a choice whether to participate in the NFIP based on their measurement of "the potential local benefits of flood insurance against the costs of participation to local sovereignty and pocket books."[241] By this reasoning, the court brought the NFIP within the rule of *Steward Machine Co.* that Congress can exercise the spending power to induce participation in national programs[242] and avoided the bar of *NLC* which the court read to prohibit only mandatory imposition of national requirements on the states.[243]

The court's analysis of the NFIP is, of course, entirely unsatisfactory because it ignores reality. Congress intended the NFIP to be mandatory.[244] Congress carefully orchestrated political pressure on the states and local government. It made adoption of land use controls a condition for landowners in flood-prone areas to obtain a wide array of national grants and to be eligible for vital mortgage and construction loan funds.[245] Moreover, the NFIP has, at the very least, as substantial an effect on states as the FLSA, which was held unconstitutional in *NLC*.[246] Although the court's reluctance to make a difficult distinction between inducements and coercion in spending power programs is understandable, there is no justification for its conclusion that state and local government participation in the NFIP is voluntary in the absence of such an inquiry.

2. Grants to the States

Grants of national funds to state and local governments on conditions directly applicable to these recipients are a more familiar and typical exercise of the spending power than grants to private recipients.[247]

240. *Id.* at 1030.

241. *Id.*

242. *See supra* text following note 197.

243. 453 F. Supp. at 1029-30. On the basis of a textual analysis of the *NLC* plurality's formulation of the holding, *see supra* text accompanying note 91, the court read *NLC* to prohibit national regulations that have a "direct" effect on the states and concluded that there is no direct intrusion on state sovereignty if a state has a choice whether to accept national funds.

244. *See supra* note 227 and accompanying text.

245. *See supra* notes 224-32 and accompanying text.

246. *See supra* text accompanying notes 233-36.

247. *See supra* text accompanying notes 177-78.

The states rarely refuse grants,[248] and they must comply with the conditions of a grant if they accept it.[249] Conditions imposed on national

248. Instances of state rejection of national funds are so rare that a rejection is "news." For example, in 1980 both the New York Times and the Wall Street Journal reported that the Metropolitan Transit Authority of New York had decided not to comply with a national regulation requiring transit systems to provide special access for handicapped persons although compliance with the regulation was a condition for over $400 million in national transportation aid. *New York Rejects U.S. Rule on Handicapped,* N.Y. Times, September 20, 1980, at 9, col. 1 (national ed.); *Review and Outlook*, Wall St. J., September 24, 1980, at 22, col. 1 (facsimile ed.). Other instances of state refusals of national grants are also reported. *See, e.g., $1 Million School Aid Rejected by Oklahoma,* N.Y. Times, September 28, 1980, at 8, col. 5 (national ed.).

249. The sanction for failure to comply with the conditions of a national grant is that the funds are withheld. *See, e.g.,* Natural Resources Defense Council, Inc. v. Costle, 564 F.2d 573, 580 (D.C. Cir. 1977). For example, the Department of Transportation withheld national highway aid funds from South Dakota because it failed to comply with regulations governing the removal of billboards. *See infra* notes 313-14 and accompanying text. The Environmental Protection Agency has cut off funds to states that fail to adopt programs to test motor vehicle air pollution emissions. *See infra* notes 693-704 and accompanying text.

This sanction of withholding national funds from states that fail to comply with the conditions of a grant is often practically or politically difficult to invoke, especially in election years. The Secretary of the Department of Education has compared proposals to cut off national higher education assistance to states that fail to desegregate colleges in compliance with Title VI of the Civil Rights Act of 1964 to "killing the patient the doctor can't treat," and the newspapers reported that withholding these funds would hurt former President Carter in his bid for reelection in 1980. *U.S. to Pursue Texas College Desegregation Order,* N.Y. Times, Sept. 29, 1980, § A, at 10, cols. 1-3 (national ed.). *See* North Carolina v. Department of Health, Educ. and Welfare, 480 F. Supp. 929 (E.D.N.C. 1974) (court refuses to interfere with an administrative proceeding brought to determine whether North Carolina's higher education system complies with Title VI); Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977) (suit to enjoin the Department of Health, Education and Welfare to enforce Title VI by cutting off funds to states that operate segregated systems of higher education).

A second example of the political difficulty of withholding funds is provided by a New York legislator who temporarily blocked a bill that would have made the state eligible for a national grant of several million dollars because he did not believe that the President would cut off funds with a presidential election only a little more than a year off. *New York Faces Loss of U.S. Aid over Car Fumes,* N.Y. Times, June 23, 1979, at 23, col. 1 (national ed.).

Although the power of an administrative agency to withhold national funds from a state that fails to comply with the conditions of a grant is well-settled, it is not clear whether courts are limited to the corresponding power to prohibit the use of national funds or whether the courts also have the power to invalidate state law that is contrary to the requirements of a national grant. *See* Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement,* 58 VA. L. REV. 600, 633 (1972). On the one hand, the Court has suggested that the termination of a grant is the appropriate remedy and that a state must revise its law to permit compliance with the requirements of a grant. Rosado v. Wyman, 397 U.S. 397, 421-22 (1970). On the other hand, the Court has also suggested that a state can accept or continue to receive a national grant with conditions contrary to state law by holding that state law prohibiting compliance with the conditions of a national grant is invalid under the supremacy clause and is preempted. King v. Smith, 392 U.S. 309, 333 n.34 (1968). The distinction between these two alternative means of enforcing the conditions of national grants is addressed *infra* at notes 325-35.

grants to the states may displace the states' substantive policies for private activity, control the structure and organization of the states' political processes, regulate the goods and services provided collectively, and require the states to allocate legislative, judicial, or executive resources to implement policies determined by the national political process. Moreover, compliance with the conditions of national grants usually entails enactment of legislation, adoption of regulations, and appropriation of state funds.[250]

Although conditional grants have the same effects on the states as direct regulation of the states or direct requirements that the states exercise affirmative authority over private activity, the courts have consistently upheld Congress' power to impose conditions on grants. These courts have rejected *NLC*-based arguments that the conditions of national grants intrude on state sovereignty on the grounds that the Court did not intend to apply *NLC*'s federalism limits to the spending power;[251] that state participation in national spending programs is voluntary;[252] and that this use of the spending power is generally accepted.[253] The only exception to the general approval of Congress' power to impose conditions on grants to the states is that several state courts have questioned Congress' power to control the allocation of authority between the Governor and the state legislature over national funds.[254]

a. Conditions that Regulate the States

National grants contain a wide range of conditions prescribing rules

250. Many national grants are "matching grants" that require the states or their political subdivisions to appropriate funds to cover a portion of the total costs of a program. *See infra* note 317.

251. *See supra* note 121 and accompanying text.

252. In some 40 cases decided after *NLC* and raising the question of federalism constraints on Congress' power to attach conditions to national grants, only one judge has questioned the proposition that conditions of a national grant do not intrude on state sovereignty because the state's decision to accept the grant is voluntary. Walker Field v. Adams, 606 F.2d 290, 298-300 (10th Cir. 1979) (McKay, J., dissenting). *See infra* note 261. The Court has held, however, that the conditions of a grant must be stated clearly because otherwise a state's acceptance of a grant cannot be understood as voluntary. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17-18 (1981). *See* Gilbert v. New Jersey Dep't of Human Servs., 167 N.J. Super. 217, 227, 400 A.2d 803, 809 (App. Div. 1979) (Conford, P.J.A.D. dissenting).

253. *See, e.g.,* Lau v. Nichols, 414 U.S. 563, 569 (1974); King v. Smith, 392 U.S. 309, 333 n.34 (1968); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 142-43 (1947).

254. *See infra* notes 282-305 and accompanying text.

for state government, and no survey of the cases challenging these conditions can reveal completely their rich variety and broad impact. Nonetheless, the cases do reveal that the courts have approved, as conditions of national grants, many regulations that would, if imposed directly under the commerce power, fall within *NLC*'s proscription. The courts, for example, have held that Congress can regulate the organization of a state administrative agency as a condition of national financial assistance to the state in providing social welfare services.[255] The courts have also held that Congress can regulate the states and their political subdivisions in their capacities as employers by requiring collective bargaining with the former employees of a private transit company acquired by a municipality with national funds.[256]

255. In *Florida Department of Health and Rehabilitation Services v. Califano*, the district court held that conditioning national funds on the adoption of a particular governmental structure did not encroach on state sovereignty because any intrusion on the state was "indirect", the condition was related to assuring the proper functioning of the national program, *NLC* did not limit the spending power, and state participation in the national program is voluntary. 449 F. Supp. 274 (N.D. Fla.), *aff'd on opinion below*, 585 F.2d 150 (5th Cir. 1978), *cert. denied,* 441 U.S. 931 (1979). Long before its decision in *NLC*, the Court sustained a condition of a grant regulating the personnel of state administrative agencies. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 142-44 (1947) (as a condition of all national grants, state employees who administer any national spending program prohibited by the Hatch Act from taking part in political campaigns or management). Although conditions controlling the organization and structure of state and local agencies are a typical component of most national grants, Congress has attempted to reduce the impact of some of these conditions by providing the heads of national agencies with the authority to waive requirements that a single or specific state agency must administer the grants. 42 U.S.C. §§ 4214, 4255(c) (1976).

256. The Urban Mass Transportation Act, 49 U.S.C. §§ 1601-1618 (1976 & Supp. IV 1980), *amended by* Omnibus Budget Reconcilation Act of 1981, Pub. L. No. 97-35, tit. XI, subtit. C, § 1111(a), 95 Stat. 627, provides national funds to assist states and local governments to acquire private transit companies on the condition, inter alia, that they make arrangements to protect the employees' interests, including the continuation of collective bargaining agreements. 49 U.S.C. § 1609(c) (1976). *See generally* Note, *Transit Funding Under the Urban Mass Transportation Act,* 9 TRANSP. L. J. 391 (1977).

At the end of the October 1981 term, the Court held that state law governs collective bargaining agreements made by public transit authorities as a condition of national aid and that unions do not have a federal cause of action to enforce these agreements. Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 102 S. Ct. 2202 (1982). This decision implicitly sustains Congress' power to make grants on the condition that a public agency engage in collective bargaining with its employees because the Court assumed the existence of other means to enforce the condition. *Id.* at 2210 n.13. Before this decision, one court expressly held that protection of employee rights to collective bargaining is a valid condition of a national grant because the states have an option whether to accept the grant. City of Macon v. Marshall, 439 F. Supp. 1209, 1216-18 (M.D. Ga. 1977). Five circuits also implicitly sustained Congress' power to require the states to engage in collective bargaining with their employees in finding federal jurisdiction and an implied private cause of action for municipal transit employees to enforce collective bargaining rights

b. Conditions that Regulate the Allocation of Political Power Within a State

The conditions of other national grants may have a profound impact

recognized by a public transit authority as a condition for national financial assistance. *See* Division 587, Amalgamated Transit Union v. Municipality of Seattle, 663 F.2d 875 (9th Cir. 1981); Division 1447, Amalgamated Transit Union v. Louisville & Jefferson County Transit Auth., 659 F.2d 722 (6th Cir. 1981), *vacated and remanded,* 102 S. Ct. 2919 (1982) (for further consideration in light of Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 102 S. Ct. 2202 (1982)); Division 1235, Amalgamated Transit Union v. Metropolitan Transit Auth., 650 F.2d 1389 (6th Cir. 1981); Local Div. 1285, Amalgamated Transit Union v. Jackson Transit Auth., 650 F.2d 1379 (6th Cir. 1981), *rev'd,* 102 S. Ct. 2202 (1982); Local Div. No. 714, Amalgamated Transit Union v. Greater Portland Transit Dist., 589 F.2d 1 (1st Cir. 1978); Local Div. 519, Amalgamated Transit Union v. LaCrosse Mun. Transit Util., 585 F.2d 1340 (7th Cir. 1978); Division 1287, Amalgamated Transit Union v. Kansas City Area Transp. Auth., 582 F.2d 444 (8th Cir. 1978), *cert. denied,* 439 U.S. 1090 (1979). *Cf.* Division 580, Amalgamated Transit Union v. Central N.Y. Regional Transp. Auth., 578 F.2d 29 (2d Cir. 1978) (jurisdictional question moot). Although the Eleventh Circuit broke the ranks and held, consistent with the Supreme Court's judgment, that federal courts lack jurisdiction over suits by public transit employees to enforce collective bargaining rights, this decision also did not question Congress' power to make grants on the condition that a public agency engage in collective bargaining with its employees. Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth., 667 F.2d 1327 (11th Cir. 1982).

One court has held that agreements between a public transit authority and a union made as a condition of Urban Mass Transportation grants and requiring public transit authorities to engage in collective bargaining with their employees do not preempt state law. This court found that Congress intended only that grants for public acquisition of private transit companies would be a weapon to force the states to respect the rights of employees of these companies and that denial or loss of national funds would be the sole sanction for a state's failure to change its laws to recognize collective bargaining rights for public employees. Local Div. 589, Amalgamated Transit Union v. Massachusetts, 666 F.2d 618, 627-36 (1st Cir. 1981), *cert. denied,* 102 S. Ct. 2928 (1982). *See* Division 587, Amalgamated Transit Union v. Municipality of Metropolitan Seattle, 663 F.2d 875, 879-80 (9th Cir. 1981) (question not reached whether agreement between public transit system and union made as a condition of national grant preempts state law in absence of any conflict); Division 580, Amalgamated Transit Union v. Central N.Y. Regional Transp. Auth., 556 F.2d 659 (2d Cir. 1977) (suggestion that agreement between public transit authority and union made as a condition of a national grant does not preempt state law restrictions on rights of public employees). *But see* Division 1287, Amalgamated Transit Union v. Kansas City Area Transp. Auth., 582 F.2d 444, 452-53 (8th Cir. 1978) (terms of an agreement between public transit authority and union made as a condition of national grant override state law); Division 1287, Amalgamated Transit Union v. Kansas City Area Transp. Auth., 485 F. Supp. 856, 862-65 (W.D. Mo. 1980) (terms of an agreement between public transit authority and union do not conflict with state law but in the event of a conflict state law does not control the validity of the agreement).

Collective bargaining rights for public employees as a condition of a grant has a heritage reaching back to Depression-era loans and grants for the construction of municipal power plants. Memphis Power & Light Co. v. City of Memphis, 172 Tenn. 346, 362-64, 112 S.W. 2d 817, 823 (1937); Note, *Municipal Corporations: Validity of Federal Grants and Loans for Municipal Power Plants,* 26 CORNELL L. Q. 314 (1941).

In addition to imposing collective bargaining on state and local government, Congress has also

on the allocation of political authority within a state. These conditions may require the states to expand the powers of their political subdivisions, to confer political authority on quasi-autonomous private groups, or to alter the allocation of political power between their executive and legislative branches.

i. Allocation of Political Power Between a State and Its Political Subdivisions

The powers of a state's political subdivisions may be expanded either by national grants to local governments that purport to authorize the recipient to act in excess of or contrary to its authority under state law, or by national grants to a state on conditions that its political subdivisions be allowed to exercise particular powers. Only one court has expressed doubt about Congress' power to expand the political authority of a state's political subdivisions. In *Rogers v. Brockette*,[257] a school district argued that a national statute providing subsidized breakfasts for school children authorized it to refuse to participate in the program notwithstanding a state statute that required participation. Although the Fifth Circuit assumed that *NLC* imposed some limits on national

regulated the wages of state and local government employees as a condition of grants. For example, the Local Public Works Capital Development and Investment Act of 1976, as amended in 1977, 42 U.S.C. §§ 6701-6710 (1976 & Supp. IV 1980), requires state and local governments to pay the minimum prevailing wage on similar construction in the locality to their employees who work on capital projects completely financed by the national government. 42 U.S.C. § 6708 (Supp. IV 1980). The Attorney General construed the original 1976 Act to apply this wage requirement solely to private contractors who received funds for capital projects through state and local grantees. Pub. L. No. 93-369, tit. I, § 109, 90 Stat. 1001; 43 Op. Att'y Gen. 8 (January 11, 1977). The Attorney General based his construction on the statute, the legislative history, and *NLC*'s warning against interference with state and local governmental wage scales. *Id.* at 7. When Congress amended the Act in 1977, it repealed the statutory language on which the Attorney General's construction was based and presumably extended the wage requirement to public employees. *See* Pub. L. No. 95-28, tit. I, § 108, 91 Stat. 119; H.R. REP. NO. 230, 95th Cong., 1st Sess. 14, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 168, 174.

Other national grants also have conditions regulating the wages paid to public employees. The revenue sharing program established by the State and Local Government Financial Assistance Act requires that public employees whose wages are paid in whole or in part with these national funds must be paid at least as much as other employees in similar public occupations. 31 U.S.C. § 1243(a)(7) (Supp. IV 1980). The wages of state and local government employees who held public service jobs created through national funds under the Comprehensive Employment and Training Act of 1973 were also regulated. 29 U.S.C. §§ 848(a)(2), 964(b)(3) (1976). *See* 43 Op. Att'y Gen. 8 (1977). These wage regulations were subsequently deleted when the Act was completely revised in 1978. *See* Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909.

257. 588 F.2d 1057 (5th Cir.), *cert. denied,* 444 U.S. 827 (1979).

interference with a state's internal allocation of political authority, it was uncertain whether these limits applied solely to the commerce power or whether they also applied to the spending power. The court then avoided a resolution of the constitutional issue by finding that there was no conflict between the national and state statutes because the national statute did not confer power on individual school districts to decide whether to accept financial assistance.[258]

The court's concern about national interference with the state's power to control its political subdivisions rested on the recognition that "different political interests [have] different degrees of influence" at various levels of government and that, for example, a "statewide minority [may be] a majority in certain localities."[259] By conferring on a state political subdivision the power to decide whether to accept a grant, Congress may inadvertently or intentionally achieve a result

258. *Id.* at 1070-73. *Accord* Dupler v. City of Portland, 421 F. Supp. 1314 (D. Me. 1976) (a municipality cannot complain of being bound by a state's decision to participate voluntarily in a national spending program); Memphis Power & Light Co. v. City of Memphis, 172 Tenn. 346, 362-64, 112 S.W.2d 817, 823 (1937) (state statute authorized municipality to accept national grants and to agree to conditions). For an argument that Congress' power to control the allocation of political authority between a state and its political subdivisions as a condition of a grant should be determined by balancing national interests against the state's interest, see Comment, *Municipal Corporation Standing to Sue the State:* Rogers v. Brockette, 93 HARV. L. REV. 586, 595-96 (1980).

Although the *Rogers* court avoided the constitutional question of Congress' power to control the allocation of political power between a state and its political subdivisions by finding that the condition of a national grant did not authorize a political subdivision to act contrary to state law, another court has upheld a national statute that it construed to authorize a local government to act contrary to state law. The Payment In Lieu of Taxes Act (PILOT), 31 U.S.C. §§ 1601-1607 (1976 & Supp. IV 1980), *amended by* Military Construction Authorization Act of 1981, Pub. L. No. 97-99, tit. IX, § 912(a), 95 Stat. 1387, provides payments to local governments as compensation for the burdens of providing services for national lands that are constitutionally immune from state and local taxes. *See generally* Comment, *The Payment In Lieu of Taxes Act: A Legislative Response to Federal Tax Immunity,* 85 DICK. L. REV. 455 (1981). In *Lawrence County v. South Dakota*, a district court construed the PILOT Act to give local governments total discretion in the distribution of PILOT funds and held, albeit without any consideration of federalism limits on Congress' power to interfere with a state's control over its political subdivisions, that a state law regulating the distribution of national PILOT funds was preempted. 513 F. Supp. 1040 (D.S.D. 1981), *vacated and remanded with direction to dismiss for want of federal jurisdiction,* 668 F.2d 27 (8th Cir. 1982). Disputes between the states and their political subdivisions over the distribution of national grants are common. *E.g.,* Town of Bloomsburg v. Pennsylvania, 527 F. Supp. 982 (M.D. Pa. 1981).

For another example of a national grant to local government bypassing the state similar to the grants at issue in *Rogers* and *Lawrence County*, see D. MANDELKER & D. NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 22 (1977).

259. 588 F.2d at 1062.

with respect to the implementation of the substantive policy of a national grant that would not prevail at the state level.

Other courts, seemingly unaware that the state's political process determines the level of government at which particular decisions are made, have not been troubled by conditions of grants to the states or local governments that require the states to expand the powers of their political subdivisions. For example, in *Walker Field, Colorado, Public Airport Authority v. Adams*,[260] the Tenth Circuit held that Congress could make a grant to a state airport authority on a condition that two other state political subdivisions, a city and a county, also assume financial obligations as cosponsors of an airport improvement project to be financed by the grant. Although this condition had the effect of requiring the state to expand the authority of its city and county governments to assume indebtedness contrary to state policy that only airport authorities could assume such financial obligations, the court found no impermissible intrusion on state sovereignty because the state could avoid these effects by declining the grant.[261]

Similarly, in *County of Los Angeles v. Adams*,[262] the District of Columbia Circuit upheld a grant to a state with a condition that expanded the powers of the state's political subdivisions by making their approval of a nationally funded highway project a prerequisite for a state request for national aid. Although the national statute in effect gave an organization of local governments a veto over a project deemed desirable by the state government, the court easily found that there was no adverse impact on state sovereignty because the state could refuse the grant.[263]

260. 606 F.2d 290 (10th Cir. 1979).

261. *Id.* at 297. In dissent, Judge McKay argued that since the possibility of refusing national funds is more apparent than real, any distinction between the spending power and the commerce power in terms of freedom of choice is a fiction. Accordingly, he would have applied *NLC* and held that the condition impermissibly regulated the state's governmental structure. *Id.* at 298-300.

262. 574 F.2d 607 (D.C. Cir. 1978).

263. *Id.* at 609. The district court addressed a different argument that the requirement of approval by an organization of local governments, designated by the state, impermissibly diminished the county's prior authority to select projects under an agreement with the state. County of Los Angeles v. Coleman, 423 F. Supp. 496, 500 (D.D.C. 1976), *aff'd*, 574 F.2d 607 (D.C. Cir. 1978). This court concluded that notwithstanding the reduction of the county's state law authority there was no valid *NLC* objection because the state's power to select projects was not diminished. *Id.* at 502, n.27. The district court's focus on the effect on the county apparently blinded it from seeing the real issue correctly identified by the court of appeals.

ii. Allocation of Political Power to Private Groups: Establishment of a Quasi-Autonomous Political Process

Conditions of some national grants go beyond requiring states to expand the powers of their political subdivisions and force the states to confer political authority on private groups and to establish a quasi-autonomous political decisionmaking process. The National Health Planning and Resources Development Act of 1974 (NHPRDA),[264] for example, completely displaces the states' political decisionmaking process for health care planning and substitutes at both the local and state levels a complex quasi-autonomous private decisionmaking process. At the local level, the Act provides for the establishment of a Health Systems Agency (HSA), which may be either a nonprofit, private corporation or a public entity.[265] Both private and public HSAs must have a governing body comprised of health care consumers, providers of health care, and public officials or representatives of state and local government.[266] The HSA is selected by the Secretary of Health and Human Services after consultation with the Governor,[267] and it has broad responsibility for regulating the delivery of health care services[268] and the authority to approve or disapprove the use of most national health care funds in its area.[269] At the state level, the Governor

264. Pub. L. No. 93-641, 88 Stat. 2225 (current version at 42 U.S.C. §§ 300k to 300t (1976 & Supp. IV 1980), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. IX, subtit. A, §§ 902(e)(1), (g)(4)-(6), subtit. E, §§ 933-937, subtit. F, § 949(c), (d), 95 Stat. 560, 561, 570-72, 578)). For a concise overview of the Act, see National Gerimedical Hosp. & Gerontology Center v. Blue Cross, 452 U.S. 378, 383-88 (1981); Montgomery County v. Califano, 449 F. Supp. 1230, 1231-34 (D.Md. 1978), *aff'd mem.*, 599 F.2d 1048 (4th Cir. 1979); Note, *The National Health Planning and Resources Development Act and State Action: A Reappraisal of the Role of Private Health Care Institutions,* 57 B.U.L. REV. 511, 513-17 (1977). The effects of this Act on the states have been challenged in three significant cases. *See infra* text accompanying notes 276-81, 282-83 & 306-12.

265. 42 U.S.C. § 300*l*-1(b)(1) (1976). An HSA must be created for every health service area, and each state is divided into Health Service Areas established by the Governor under national standards and approved by the Secretary of Health and Human Services. *Id.* §§ 300*l*, 300*l*-4 (1976 & Supp. IV 1980).

266. 42 U.S.C. § 300*l*-1(b)(3)(A), (C) (Supp. IV 1980). The HSA must establish a process for selecting the members of its governing body. *Id.* § 300*l*-1(b)(3)(D) (Supp. IV 1980).

267. *Id.* § 300*l*-4 (1976 & Supp. IV 1980).

268. *Id.* § 300*l*-2(a)-(c) (1976 & Supp. IV 1980). National grants support the HSAs. *Id.* § 300*l*-3, -5 (Supp. IV 1980). Given financial assistance to private corporations serving as HSAs, it would also be possible to analyze this aspect of the Act as a grant to a private recipient. *See supra* text accompanying notes 180-84.

269. 42 U.S.C. § 300*l*-2(e) (Supp. IV 1980).

must select a state agency to serve as the State Health Planning and Development Agency (SHPDA) to fulfill certain duties of the state government under the Act.[270] The SHPDA is, however, subject to the control of a Statewide Health Coordinating Council (SHCC) which has the ultimate responsibility for health care planning at the state level and which has power to disapprove state applications for national funds.[271] Since at least sixty percent of the members of the SHCC must be appointed by the Governor from a list of nominees submitted by the HSAs,[272] entities which are governed by persons selected outside of the state's political process,[273] the Act vests significant political decisionmaking power at the state level in an entity which is only partially and indirectly accountable through the state's political process.

Thus, through a series of interrelated conditions for obtaining a wide range of national health grants,[274] the NHPRDA requires each state to adopt at the state and local levels a decisionmaking process that conforms to national standards. Moreover, the Act in effect establishes a semiautonomous and nonaccountable decisionmaking process in each state.[275] The states are required to vest political authority over health care planning and regulation at the local level in an HSA which is either a private, nonprofit corporation or a public entity with a governing body selected outside the states' political process, and at the state level political decisions about health care are made by an entity (the SHCC) controlled by the HSAs.

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270. *Id.* § 300m to m-6 (1976 & Supp. IV 1980). The effect of the Act on the respective powers of the Governor and the state legislature is discussed *infra* at notes 282-83. The SHDPA's duty to administer a certificate of need program is discussed *infra* at notes 306-12.

271. *Id.* § 300m-3(c) (1976 & Supp. IV 1980). *See* Note, *supra* note 264, at 516 n.27. If the SHCC disapproves an application for national funds, the Secretary may override the disapproval and make a grant upon submission of a detailed statement of reasons to the SHCC. 42 U.S.C. § 300m-3(c)(6) (Supp. IV 1980).

272. 42 U.S.C. § 300m-3(b) (1976 & Supp. IV 1980).

273. *See supra* note 266 and accompanying text.

274. 42 U.S.C. §§ 300*l*-2(e), 300m(d), 300m-3(c)(6) (Supp. IV 1980), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. IX, subtit. A, § 902(g)(4)-(6), 95 Stat. 561. For example, North Carolina was threatened with the loss of $50-55 million under 42 national health assistance programs for failing to comply with one condition of the NHPRDA. *See infra* notes 306-10 and accompanying text.

275. Other national statutes have similar effects. *See* Cervantes v. Guerra, 651 F.2d 974, 975-78 (5th Cir. 1981) (Community Action Agencies established under the Economic Opportunity Act of 1964, 42 U.S.C. §§ 2781-2837 (1976 & Supp. IV 1980), *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. VI, subtit. B, § 683(a), 95 Stat. 519, function as "autonomous bodies responsive to the poor in the community" and exercise governmental power without direct supervision by the national, state or local governments).

Notwithstanding this impact on the states, the court in *Montgomery County v. Califano*[276] upheld the NHPRDA on the grounds that the economic incentive of national grants did not constitute coercion[277] and that the federalism limits of *NLC* applied solely to statutes enacted under the commerce power.[278] The court, however, may not have fully appreciated the effects of the NHPRDA on a state's political decisionmaking process. Although most HSAs are private, nonprofit corporations,[279] the constitutional challenge to the Act was brought by a county that had been designated as an HSA.[280] Since the HSA in this case was a state political subdivision, the court may not have considered carefully the question of Congress' power to require a state to transfer political decisionmaking power to a private group as a condition of a national grant. Even though the governing body of a public HSA is selected outside the state's political process, the allocation of political authority to a private group is not as stark as when the HSA is itself a private, nonprofit corporation. Nevertheless, the court's praise of the Act as "carefully drawn to disperse widely the authority over health planning"[281] suggests that the court would not have reached a different result if the case had involved a private HSA. This praise

276. 449 F. Supp. 1230 (D. Md. 1978), *aff'd mem.*, 599 F.2d 1048 (4th Cir. 1979).

277. *Id.* at 1247. The court did not determine the amount of the grants that would be terminated if the state failed to comply with the conditions of the Act.

278. *Id.* at 1247-48. Without any analysis, the court also concluded that the NHPRDA would also have been a valid exercise of the commerce power within *NLC* because it did not impair the state's integrity or "unduly restrict" the state's freedom to structure its health care functions. *Id.* at 1248. The court also rejected a guarantee clause claim as nonjusticiable. *Id.* at 1242-43. For the conclusion that NHPRDA is unconstitutional under a balancing test derived from *NLC*, see Note, *Emerging Concepts of Federalism: Limitations on the Spending Power and National Health Planning*, 34 WASH & LEE L. REV. 1133 (1977).

279. There are 203 HSAs, of which 180 are private, nonprofit agencies, 5 are units of local government, and 18 are public regional planning bodies. U.S. DEPT. OF HEALTH & HUMAN SERVICES, DIRECTORY—HEALTH SYSTEMS AGENCIES, STATE HEALTH PLANNING AND DEVELOPMENT AGENCIES, AND STATE HEALTH COORDINATING COUNCILS (1980). The courts that have addressed the role of private HSA's under the Act have not considered any claim that the Act is an unconstitutional intrusion on state sovereignty. *See* Texas Acorn v. Texas Area 5 Health Systems Agency, Inc., 559 F.2d 1019 (5th Cir. 1977); Aldamuy v. Pirro, 436 F. Supp. 1005 (N.D.N.Y. 1977); Mid-America Regional Council v. Mathews, 416 F. Supp. 896 (W.D. Mo. 1976).

280. The plaintiff was Montgomery County, Maryland. By invalidating several national regulations that gave the private governing body of the HSA authority over the county as an HSA, the court reduced the extent of national interference with the county's authority over health planning. 449 F. Supp. at 1234-42.

281. *Id.* at 1247.

makes the allocation of political authority pursuant to national standards a virtue and not an intrusion on state autonomy.

iii. Allocation of Political Power Between the Governor and the State Legislature: Who Speaks for the State?

In contrast to the courts' acquiescence in conditions of national grants that affect the allocation of political power among the state government, its political subdivisions, and private groups, two state courts have strongly suggested that a condition of a national grant altering a state's constitutional allocation of power between the Governor and the state legislature would be unconstitutional. In *Opinion of the Justices*,[282] the New Hampshire Supreme Court found that a condition precluding the state legislature from designating the state agency to receive national health grants under the NHPRDA and giving the sole authority of designation to the Governor contrary to the state constitution would be an impermissible intrusion on state sovereignty. The court, however, construed the national statute to avoid this issue.[283] The Pennsylvania Supreme Court also has construed a national statute narrowly to avoid interference with the state's constitutional allocation of power between the Governor and the legislature. In *Shapp v. Sloan*,[284] the court read the state constitution to give the legislature power to appropriate national grant funds received by the state and rejected the argument that Congress intended to give the Governor the

282. 118 N.H. 7, 381 A.2d 1204 (1978). This case is discussed in Brown, *Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs,* 28 AM. U.L. REV. 279, 311-12 (1979).

283. The issue in this case was whether the NHPRDA gave the Governor exclusive authority to designate a state agency as the State Health Planning and Development Agency. 42 U.S.C. § 300m(b)(1) (1976 & Supp. IV 1980). *See supra* text accompanying note 270. The court interpreted the phrase "selected by the Governor" to mean selected by the Governor in compliance with the state's constitutional processes that gave the legislature the power to determine the agency to administer national grant funds. 118 N.H. at 13-16, 381 A.2d at 1208-10. The court reasoned that this interpretation was necessary to avoid an intrusion on state powers barred by *NLC*. *Id.* at 16-19, 381 A.2d at 1210-11. Another provision of the NHPRDA raises a similar issue of national control of the powers of the state executive and legislative branches. 42 U.S.C. § 300m-3(b)(2) (Supp. IV 1980) (Governor selects the chairman of the SHCC, *see supra* text accompanying note 271, with the advice and consent of the state senate or of a unicameral state legislature).

284. 480 Pa. 449, 391 A.2d 595 (1978), *appeal dismissed sub nom.* Thornburgh v. Casey, 440 U.S. 942 (1979). This case is discussed in Brown, *supra* note 282, at 308-11, and in Comment, *Federal Interference with Checks and Balances in State Government: A Constitutional Limit on the Spending Power,* 128 U. PA. L. REV. 402, 405-11 (1979).

exclusive authority to accept and expend these funds without legislative approval.

It is hardly surprising that these two state courts resorted to statutory interpretation[285] to avoid confrontation with a condition of a national grant that, contrary to state law, expands the power of the Governor at the expense of the state legislature. Such conditions raise the question of Congress' power to control who speaks for the state in deciding whether to accept a national grant and to take the actions required for compliance.[286] The conditions of most grants simply raise the question of Congress' power to require the states to take particular actions; and, as in most of the cases discussed above, the power of the Governor, the legislature, or both to take the actions necessary to make the state, its political subdivisions, or a private recipient eligible for a national grant

285. In both cases the statutes expressly provided that the Governor should take the action necessary to meet a condition of the grant. 42 U.S.C. § 300m(b)(1) (1976 & Supp. IV 1980); 42 U.S.C. § 3723(a)(1) (1976), *deleted by* Justice System Improvement Act of 1979, Pub. L. No. 96-157, § 203, 93 Stat. 1167, 1174. In the light of legislative history the courts concluded, however, that Congress did not intend to preclude participation by the state legislature. 118 N.H. at 17, 381 A.2d at 1210; 480 Pa. at 469, 391 A.2d at 604.

Three other state courts avoided resolving the issue of Congress' power to confer exclusive control of national funds on a Governor by holding that as a matter of state law the legislature had no authority over these funds. Navajo Tribe v. Arizona Dep't of Admin., 111 Ariz. 279, 528 P.2d 623 (1974); MacManus v. Love, 179 Colo. 218, 499 P.2d 609 (en banc 1972); State *ex rel.* Sego v. Kirkpatrick, 86 N. M. 359, 524 P.2d 975 (1974), *discussed in* Brown, *supra* note 282, at 289-90. The question of the roles of the state legislature and the executive in accepting national grants and in meeting the conditions has excited great interest. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INFORMATION BULLETIN NO. 76-4 (November 1976) (state legislatures should assert greater control over national grants). *See generally Hearings Before the Subcomm. on Intergovernmental Relations of the Sen. Comm. on Governmental Affairs on Role of State Legislatures in Appropriating Federal Funds to States,* 95th Cong., 1st Sess. (1977); COMPTROLLER GENERAL, *supra* note 178; Brown, *supra* note 282, at 282-88.

286. By avoiding the question of the constitutionality of a condition controlling who speaks for the state, the courts also avoided a difficult question of the remedy for a state's failure to comply with a grant condition. If the courts had held that the condition was valid, they would then have had to address the Governors' arguments that the national statute preempted conflicting state law provisions giving the legislatures power to act on the grant and that under the national statute the Governors had exclusive power to act. 118 N.H. at 10, 16-19, 381 A.2d at 1206, 1210-11. *See* 480 Pa. at 469-70, 391 A.2d at 605. The remedy for a state's failure to comply with the conditions of a national grant is discussed *infra* at notes 325-35. For an argument that a condition of a national grant controlling the allocation of political authority between the Governor and the legislature is unconstitutional under *NLC* because it interferes with the state's system of checks and balances and that such a condition, if valid, is enforceable only by a funding cut-off and not by preempting the state law provision for legislative authority, see Comment, *supra* note 284, at 417-23, 425-28.

is controlled by state law.[287] When a condition of a national grant also controls who speaks for the state by specifying that the action of the state is to be taken by a particular branch of state government,[288] it has a fundamental impact on the state similar to the effects of a condition authorizing a political subdivision of a state to act in excess of or contrary to state law.[289] To comply with the condition, the state may have to change its political decisionmaking process.[290]

If, for example, a condition requires the Governor alone to take an action for which the state constitution requires executive and legislative authorization, then the state constitution must be amended to give the Governor exclusive power. This reallocation of political decisionmaking power between the two branches of state government is a change in the state's principle of separation of powers. A change in the state's political decisionmaking process may in turn yield significantly different results with respect to the implementation of national grants.[291]

287. When the decision to accept or to refuse a grant is made for the state by the Governor and legislature in accordance with their state law powers and no condition of a grant controls the authority of these two branches of state government to act, the sole issue is whether the requirement that the state take particular actions to obtain national funds intrudes impermissibly on state sovereignty. The court does not have to consider the separate, anterior question of who speaks for the state. Thus, for example, in *County of Los Angeles v. Marshall* and *New Hampshire Department of Employment Security v. Marshall*, there was no question who decides if the state will take the actions necessary to make private employers eligible for a national tax credit. *See supra* notes 203-16 and accompanying text. Similarly, in *Florida Department of Health and Rehabilitation Services v. Califano*, the power of the executive and legislative branches of state government to reorganize a state bureaucracy as a condition of a grant was not at issue. *See supra* note 255 and accompanying text. In *Montgomery County v. Califano*, the powers of the Governor and the legislature to establish a semiautonomous health care decisionmaking process were not at issue. *See supra* notes 264-81 and accompanying text.

288. Most grants are made to the states and not to a particular branch of state government, but they often assign specific responsibilities to the executive branch. Brown, *supra* note 282, at 282. If the condition is read to assign exclusive responsibility to the Governor and to preclude legislative participation as required by state law, then the effect is to control who speaks for the state.

289. *See supra* text accompanying notes 257-59. A grant condition that expands the authority of a state's political subdivision reduces the power of the Governor and the legislature. A condition that expands the Governor's power reduces the power of the legislature. In the first instance, political authority is reallocated between two levels of subnational government; in the second instance, political authority is reallocated between two branches of state government.

290. The New Hampshire and Pennsylvania courts construed the national statute narrowly because they interpreted *NLC* to deny Congress the power to control the state's political decisionmaking process. Opinion of the Justices, 118 N.H. 7, 18-19, 381 A.2d 1204, 1211 (1978); Shapp v. Sloan, 27 Pa. Commw. 312, 325 n.4, 367 A.2d 791, 799 n.4 (1976), *aff'd*, 480 Pa. 449, 468-69, 391 A.2d 595, 604 (1978), *appeal dismissed sub nom.* Thornburgh v. Casey, 440 U.S. 942 (1979).

291. It might, of course, be argued that no change would be made in the state's political decisionmaking process unless a change in result is also desired; therefore, the distinction between a

Various political interest groups, differing in degrees of strength at the state and local levels of government,[292] may also have different degrees of influence in the legislative and executive branches of state government. A Governor, who is subject to a different constellation of political pressures than the legislature, may well exercise the discretion permitted by a national grant in a different fashion than would the legislature.[293]

Gilbert v. New Jersey Department of Human Services[294] affords an excellent example of how a condition controlling who speaks for the state changes both the state's decisionmaking process and the actual decision whether to accept a national grant. In the Volunteers in Service to America (VISTA) program,[295] Congress provides financial assistance to state and local governments through the services of "volunteers" who are paid a national stipend. The volunteers are assigned by a national officer to work in public and private social welfare programs, but the Governor of each state has the power to disapprove the assignment of a volunteer.[296] One condition of the VISTA program is that the stipend paid to the volunteers by the national government may not be included in the determination of eligibility for benefits under any other governmental program.[297] The State of New Jersey and its local governments provide financial aid to poor persons through a General Public Assistance (GPA) program that is supported completely by state and local funds, and a state regulation requires that all income obtained from the national government must be considered in

change in process and a change in result is a distinction without a difference. This argument neglects several crucial points. Changes in the allocation of a political authority between the Governor and the legislature usually require an amendment of the state's constitution by the electorate. Even if the voters understand that an amendment will produce a particular result with respect to one grant, a generally applicable change in the distribution of executive and legislative powers will affect other grants in ways that can not be anticipated.

292. *See supra* text accompanying note 259.

293. In *Shapp v. Sloan*, the underlying issue in the contest between the legislature and the Governor for control over the expenditure of the national grant was a dispute concerning the use of funds for an investigation of political and official corruption. 480 Pa. at 479-81, 391 A.2d at 610 (dissenting opinion). *See* Brown, *supra* note 282, at 309 n.210.

294. 167 N.J. Super. 217, 400 A.2d 803 (App. Div. 1979).

295. 42 U.S.C. §§ 4951-4958 (1976 & Supp. IV 1980).

296. 42 U.S.C. § 4953(d) (Supp. IV 1980).

297. *Id.* § 5044(g) (Supp. IV 1980). Although Congress amended this provision in 1979 after the decision in *Gilbert* and added a limit on the total governmental benefits paid to a VISTA volunteer, the basic requirement that benefits be paid without regard to the stipend was not changed. Pub. L. No. 96-143, § 9, 93 Stat. 1077, 42 U.S.C. § 5044(g) (Supp. IV 1980).

the determination of an individual's state benefits under its GPA program.[298] In accordance with this regulation, a local welfare department denied a VISTA volunteer GPA benefits because her national stipend brought her monthly income above the eligibility level for the state GPA benefits.[299]

In *Gilbert*, a majority of the state court concluded that the state regulation was invalid under the supremacy clause of the Constitution because it was in conflict with the national statute.[300] The court determined that the state had to pay GPA benefits to VISTA volunteers without regard to their national stipend.[301] The majority also held that this national interference with the state-funded welfare program was not barred under *NLC* because gubernatorial approval of the assignment of VISTA volunteers demonstrated that the state's participation in the program was voluntary[302] and because the VISTA program did not substantially increase the cost to the state of providing relief for the needy.[303]

The majority's analysis of the state sovereignty issue in *Gilbert* was superficial. The *Gilbert* majority put only one condition of the VISTA program at issue—the requirement that all governmental assistance be calculated without reference to a volunteer's national stipend. The majority failed to recognized that the provision for gubernatorial disapproval of the assignment of a VISTA volunteer was also a condition of the national program. The court compounded this error by reading the condition to make the state's participation in the VISTA program voluntary. This provision for gubernatorial disapproval would make the state's participation voluntary only if state law authorized the Governor alone to accept for the state the grant of nationally financed volunteer services; otherwise, this second condition dictated who spoke for the state in deciding whether to accept national assistance and thus al-

298. 167 N.J. Super. at 220-21, 400 A.2d at 805.

299. *Id.*

300. *Id.* at 223, 227, 400 A.2d at 806, 808. The court construed the national statute to require that assistance under all governmental programs, including programs funded solely from state and local revenues, must be provided without regard to the national stipend paid to VISTA volunteers.

301. *Id.* at 227, 400 A.2d at 809.

302. *Id.* at 225, 400 A.2d at 807.

303. *Id.* at 226-27, 400 A.2d at 808. The majority also suggested that *NLC* did not preclude national interference with a state welfare program because national participation in the total scheme of welfare services is so pervasive that state welfare services may no longer be "traditional" and hence may no longer be an aspect of state sovereignty as recognized by the Supreme Court in *NLC*. *Id.*

tered the state's constitutionally established decisionmaking process by excluding the legislature. If the New Jersey constitution required joint legislative and executive action for a state decision either to accept a national grant or to authorize an amendment of a regulation in conflict with a condition of a grant,[304] then the state's political decisionmaking process was circumvented by the Governor's independent action of accepting the assignment of a VISTA volunteer. The conflict between the state regulation and the national grant condition may have demonstrated either that the legislature did not have an opportunity to consider the grant or that it had determined not to accept the grant of VISTA volunteer services.

If the *Gilbert* majority had recognized that joint legislative and executive action was required for a decision by the state to accept the national grant or to change a regulation in conflict with a condition of the grant, then it might have considered more carefully its holding that the state regulation was preempted.[305] The court could have held that the state could not accept the grant until the state regulation was changed by the joint action of the Governor and the legislature to permit the state to comply with the conditions of the grant. The effect of the grant on the state would then have been simply to require the state to amend its constitution to give the Governor the sole authority to accept a grant or to require the state legislature to take the appropriate action to change the regulation to exclude the VISTA stipend from the calculation of GPA benefits. By holding that the state regulation was preempted, the majority exacerbated the effects of the national grant on

304. In his dissent, Judge Conford argued that the state constitution required legislative action to change the GPA regulation and that the Governor alone could not waive it by a decision not to disapprove the assignment of a VISTA volunteer. Although he recognized that the state constitution limited the Governor's power, he did not pursue the argument here that the provision for gubernatorial disapproval is a condition of a national grant that changes the state's political decisionmaking process. His dissent, instead, focused on the effect on the state's welfare policy of the requirement that benefits be calculated without regard to a VISTA volunteer's national stipend. He concluded that *NLC* probably precluded national interference with a state policy to deny welfare benefits to employed persons with an income above a certain level and construed the required exclusion of the VISTA stipend to apply solely to governmental assistance financed at least in part with national funds and not to apply to a welfare program like the GPA, which is funded solely by state and local revenues. *Id.* at 227-29, 400 A.2d at 809 (Conford, P.J.A.D., dissenting).

305. A determination that a condition of a national grant preempts state law is rare, and the usual remedy is to withhold the grant until the state changes its law. *See supra* note 249. The significantly different effects of these two remedies on the states are explained *infra* at notes 325-35 and accompanying text.

the state. Instead of requiring the state to change its political decisionmaking process, national law made the change and expanded the Governor's powers at the expense of the state legislature; the Governor in effect was empowered by national law to disregard the GPA regulation without the legislature's participation.

Regardless whether the change in the state's political decisionmaking process is made by the state or by national preemption, the change rather obviously may lead to a different result with respect to the assignment of VISTA volunteers. If, for example, the VISTA program is more popular with the Governor than with the legislature, then exclusive gubernatorial power may lead to the assignment of volunteers that the legislature would otherwise block.

c. Conditions that Require the Affirmative Exercise of State Authority Over Private Activity

Just as the courts have upheld conditions of national grants that regulate directly state and local government and control the allocation of political decisionmaking power, they also have routinely sustained conditions of national grants that require the affirmative exercise of state authority over private activity. For example, in *North Carolina ex rel. Morrow v. Califano*,[306] the court upheld Congress' power, as a condition of many related grants, to require the states to regulate the construction or expansion of privately owned health care facilities under a certificate of need (CON) program.[307] The state argued that its constitution prohibited such regulation of private activity[308] and that its inability to establish a CON program would result in loss of over $50 million in forty-two national health assistance programs.[309] The court concluded, however, that the necessity for the state to amend its constitution to comply with a condition of a national grant was not an uncon-

306. 445 F. Supp. 532 (E.D.N.C. 1977) (three judge court), *aff'd mem.*, 435 U.S. 962 (1978). *Accord* Goodin v. State *ex rel.* Oklahoma Welfare Comm'n, 436 F. Supp. 583 (W.D. Okla. 1977).

307. The requirement that the states establish a CON program is part of the system of national, state and local health planning established by the National Health Planning and Resource Development Act. *See* 42 U.S.C. §§ 300m-2(a)(4)(B), 300m-6 (Supp. IV 1980); *supra* text accompanying notes 264-81.

308. 445 F. Supp. at 533, 535. In a classic economic substantive due process decision, the North Carolina Supreme Court had previously held that under the state constitution the regulation of private property under a state certificate of need law was a deprivation of liberty without due process. *In re* Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

309. 445 F. Supp. at 533, 535.

stitutional intrusion on state autonomy.[310] The state was not coerced because it could have refused the grant,[311] and *NLC* applies only to direct regulation under the commerce clause and not to the spending power.[312]

The courts also have upheld Congress' power to require the states to regulate private individuals who construct or maintain billboards adjacent to interstate and primary highways. Under the Highway Beautification Act, a state that fails to regulate the use of billboards by landowners and advertisers in accordance with detailed national standards may be denied ten percent of its national-aid highway funds.[313] This requirement that the states exercise affirmative governmental authority over private activity was upheld in *South Dakota v. Adams* on the ground that the threat of loss of national funds is not coercive.[314]

310. *Id.* at 534. *Cf.* Wheeler v. Barrera, 417 U.S. 402, 417 (1974), *modified,* 422 U.S. 1004 (1975) (Congress did not intend that compliance with a condition of a grant would require the states to amend their constitutions).

311. The court found that the loss of $50 million in national health care grants was not coercive when measured against state revenues of $3.1 billion. 445 F. Supp. at 535.

312. *Id.* at 536 n.10. The threat of the loss of the national grants apparently dissolved the state constitutional barriers, and the state enacted a CON program after the court's decision. 1977 N.C. Sess. Laws, 2d Sess. ch. 1182, *amended by* 1981 N.C. Sess. Laws, ch. 651; N.C. GEN. STAT. §§ 131-175 to -188 (1981 Cum. Supp.). The North Carolina legislature specifically noted that this statute was enacted to avoid the loss of $55 million of national funds. N.C. GEN. STAT. § 131-175(5) (1981 Cum. Supp.).

313. 23 U.S.C. § 131 (1976 & Supp. IV 1980). *See generally* D. MANDELKER & D. NETSH, *supra* note 258, at 555-88.

314. 506 F. Supp. 50, 58-59 (D.S.D.), *aff'd sub nom.* South Dakota v. Goldschmidt, 635 F.2d 698 (8th Cir. 1980), *cert. denied sub nom.* South Dakota v. Lewis, 451 U.S. 984 (1981). *See also* South Dakota v. Adams, 506 F. Supp. 60 (D.S.D.), *aff'd sub nom.* South Dakota v. Goldschmidt, 635 F.2d 698 (8th Cir. 1980), *cert. denied sub nom.* South Dakota v. Lewis, 451 U.S. 984 (1981) (companion case upholding determination of the Secretary of Transportation to withhold national-aid highway funds as a penalty for the state's failure to institute effective control of billboards). The court's analysis of both the spending power and state sovereignty limits on that power is puzzling. Contrary to received wisdom, the court apparently assumed that the reach of the spending power is limited by Congress' other enumerated powers. *Compare* 506 F. Supp. at 55, 57 (grant condition requiring states to regulate billboards is within Congress' spending power because Congress has power to regulate billboards directly under the commerce clause) *with* United States v. Butler, 297 U.S. 1, 16-19 (1936) (spending power is an independent power and is not limited to effectuation of other enumerated powers). With this understanding and the assumption that if Congress had decided to regulate billboards directly it would have done so under the commerce power, the Court considered the question whether *NLC* would preclude direct national regulation of billboards. Since national regulation of billboards would fall on private activity rather than directly on the state, *NLC* would not bar national control of billboards even though it displaced traditional state and local regulation of land use. 506 F. Supp. at 55-56. The purpose of this line of analysis is difficult to fathom because the court ultimately recognized that the issue was state enforcement of national standards for private activity. When the court reached

In sustaining Congress' power to require the states to regulate the construction of hospital facilities and the use of billboards, these two courts in effect recognized that Congress can use the spending power to employ the states as its agents in regulating private activity.

The constitutionality of national grant conditions that require the states to regulate private activity is by no means settled. A major test of the validity of such conditions is presented by a requirement of grants under the Clean Air Act that the states regulate motor vehicle air pollution by establishing inspection and maintenance programs to ensure that privately owned vehicles conform to national air pollutant emission standards and by denying registration to vehicles failing to comply with the national standards.[315] More importantly, the Supreme Court recently has cast some doubt on Congress' well-settled practice of employing the states as its agents in social welfare programs.

In many national social welfare spending programs, the states administer the distribution of goods, services, and benefits. For example, in the Medicaid, Food Stamp, and Aid to Families with Dependent Children (AFDC) programs, grants are made to the states to assist low-income persons by providing medical care, by increasing food purchasing power, and by covering the daily living expenses of needy depen-

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the question of Congress' power to require the state to regulate private activity as a condition of a national grant, it relied on *Steward Machine Co.*, *see supra* text accompanying notes 193-97, to conclude that the conditional grant was valid because the state was not coerced, and it did not consider directly the effect, if any, of *NLC*. 506 F. Supp. at 57-58. The *Steward* rationale was also employed in a pre-*NLC* challenge to the Highway Beautification Act in which the court upheld a requirement that a state must pay just compensation to persons whose billboards were removed. Vermont v. Brinegar, 379 F. Supp. 606 (D.Vt. 1974). *See also* Lamm v. Volpe, 449 F.2d 1202 (10th Cir. 1971), *cert. denied,* 405 U.S. 1075 (1972) (challenge to just compensation requirement dismissed on alternative grounds that plaintiff state legislator lacked standing and that controversy was moot after state legislature enacted a statute to comply with the just compensation requirement).

The notorious 55 mph national maximum speed limit is another condition of a national-aid highway grant that requires the states to regulate private activity. To obtain financial assistance for highway construction the states must establish and enforce a 55 mph maximum speed limit. 23 U.S.C. § 154 (1976 & Supp. IV 1980), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XI, subtit. B, § 1108, 95 Stat. 626. In an opinion of remarkable misapprehension, the Arkansas Supreme Court concluded that Congress has the power to establish this maximum speed limit. Newkirk v. State, 260 Ark. 526, 542 S.W.2d 282 (1976). The court incorrectly assumed (without reference to the statute) that Congress had exercised the commerce power to establish the maximum speed limit. In a complete non sequitur, it then concluded that there was no intrusion on state sovereignty because the Arkansas legislature, not Congress, had established the 55 mph speed limit. Thus, the court never considered the issue of Congress' power to require the states to regulate the speed of private motor vehicles as a condition of a national grant.

315. *See infra* note 703 and accompanying text.

dent children.[316] These grants are typically made on the condition that the state appropriate funds to match all or a portion of the national aid[317] and on the condition that these national and state funds will be passed through the state to particular classes of recipients.[318] In administering these grants, the states serve as the nation's agents[319] in regulating individual activity because the basic public policy decisions are

316. 42 U.S.C. §§ 1396-1396d (1976 & Supp. IV 1980), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XXI, subtit. C, §§ 2161-2184, 95 Stat. 786-828 (Medicaid); 7 U.S.C. §§ 2011-2029 (Supp. IV 1980), *amended by* Omnibus Budget Reconcilation Act of 1981, Pub. L. No. 97-35, tit. I, subtit. A, §§ 101-117, 95 Stat. 358 (Food Stamps); 42 U.S.C. §§ 601-645 (1976 & Supp. IV 1980), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XXIII, subtit. A, ch. 1, §§ 2301-2321, 95 Stat. 843 (AFDC). For a brief overview of national and state roles in the Food Stamp and AFDC programs, see 3 ACIR STUDY, *Public Assistance: The Growth of a Federal Function* A-79, *supra* note 82, at 29-32, 73-89.

317. Approximately 60% of 442 national grant programs in 1978 required grantee matching. 3 ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *Categorical Grants: Their Role and Design* A-52, at 111 (1978) [hereinafter cited as *Categorical Grants*]. *See generally id.* at 111-15, 143-95.

318. In addition to specifying the use of the funds and eligibility criteria, conditions of social welfare grants usually include fiduciary, administrative and planning requirements, provisions for public participation, and prohibitions of racial discrimination. *See* Brown, *Beyond the New Federalism—Revenue Sharing in Perspective,* 15 HARV. J. ON LEGIS. 1, 8-10 (1977).

319. There is some question whether national social welfare grants employ the states as the nation's agents and should be characterized as national aid to individual beneficiaries administered by the states or, alternatively, whether they should be characterized as national aid to the states to assist them in providing governmental services to their citizens. The proper characterization of national social welfare grants turns on distinctions between categorical grants, block grants, and the general revenue sharing program. Categorical grants require the states to spend national funds for discrete, well-defined purposes, and other conditions of these grants frequently impose planning, fiscal management, and administrative organization requirements. Although there is no sharp line between categorical grants and block grants, the states have greater discretion under block grants that limit the purposes of the expenditure only to a broad functional area like law enforcement and otherwise permit the states to determine the use of the national grant. The states have the greatest discretion under the general revenue sharing program. Under this program, funds are distributed on the basis of a formula with few constraints, other than anti-discrimination requirements, on the purposes to which they may be applied. *Categorical Grants*, *supra* note 317, at 5-6.

Since the states have broad discretion to determine the package of goods and services provided to their citizens with funds distributed in block and revenue sharing grants, it is, then, appropriate to characterize these two kinds of grants as financial assistance to the states for the purpose of executing their governmental functions. In categorical grants, however, the relationship between Congress and the states is one of agency because the states must follow a detailed national plan for distribution of the benefits. The state is merely the administrative funnel for the distribution of national funds.

It should be noted that this distinction between national aid to individuals in categorical grants administered by the states as the nation's agents and aid to the states in block and revenue sharing grants to assist them in providing governmental services is blurred if the states and the nation have identical social policies for the provision of benefits. *See infra* note 320.

made at the national level and executed at the state level. The determination to provide benefits and the establishment of eligibility criteria are both made by the national political process,[320] and the states execute these national policies by administering the distribution of the grants to the individual beneficiaries. In serving as the nation's agent in administering these grants, a state must exercise affirmative governmental power over private beneficiaries to whom it distributes the nationally financed benefits. The state must establish, in conformity with national standards, rules governing the eligibility of beneficiaries, and it must enforce rules requiring the beneficiaries to comply with the conditions of the grant to the state.[321]

The courts have uniformly dismissed claims that discrete conditions of social welfare grants requiring state regulation of individuals are an unconstitutional invasion of state autonomy,[322] but no court has considered the broader question of Congress' power to use the states to administer these programs. In *Pennhurst State School and Hospital v. Haldermann*,[323] however, the Supreme Court suggested that the con-

320. It is true of course that state participation in spending programs indicates approval or at least acquiesence in these national political decisions, but it is also true that the state political community, acting in the absence of national financial assistance, might decide to provide a different set of benefits. At a minimum, national grants for particular social welfare programs which require state matching funds influence the state's priorities and may alter the package of collective goods and services provided by the state to its residents. In short, national social welfare grants affect the states' welfare policies.

Perhaps because national social welfare programs are so well-established, there is little or no analysis of their effects on the states. Although there is a substantial body of political science literature, political scientists often beg the question of the effect of these programs on state autonomy by assuming that the states and the nation share the same substantive goals in the provision of benefits. Blinded by this assumption, political scientists then ignore the fact that the states function as the nation's agents in implementing national policy, and they focus instead on identifying the mix of national, state, and local responsibility necessary to achieve common goals most efficiently and on categorizing different allocations of authority under rubrics like "cooperative federalism." *E.g.*, D. ELAZAR, THE AMERICAN PARTNERSHIP (1962); M. GRODZINS, THE AMERICAN SYSTEM (1966); M. REAGAN, THE NEW FEDERALISM (1972); 1-10 PUBLIUS—THE J. OF FEDERALISM, *passim.*

321. For example, in Stiner v. Califano, 438 F. Supp. 796, 798 (W.D. Okla. 1977), a grant condition established a staff ratio for day care centers, and the state enforced it by refusing to pass on national funds to day care centers that did not meet the staff ratio requirement.

322. *See, e.g.*, Williams v. Wohlgemuth, 540 F.2d 163 (3d Cir. 1976) (condition establishes who is eligible to receive the benefits); Oklahoma v. Harris, 480 F. Supp. 581 (D.D.C. 1979) (amount of state matching funds required as a condition of a grant), *aff'd sub nom.* Oklahoma v. Schweiker, 655 F.2d 401 (D.C. Cir. 1981); Stiner v. Califano, 438 F. Supp. 796 (W.D. Okla. 1976) (staff requirements for nationally funded day care centers).

323. 451 U.S. 1 (1981).

cept of state sovereignty recognized in *NLC* may limit Congress' power to impose affirmative duties on the states as a condition of national social welfare grants.[324]

3. Sanctions: Loss of the Grant or Preemption

No court has held that a condition of a national grant to private recipients or to the states and their political subdivisions is an unconstitutional intrusion on state autonomy and is prohibited by *NLC*.[325] Regardless of the effects on a state of complying with a condition of a national grant, courts reaching the merits have held that the conditions are constitutional because state participation in national spending programs is voluntary and that the states can avoid any adverse effects by the simple expedient of refusing the grant. Most of the courts have then either explicitly or implicitly assumed that the only sanction for a state's failure to comply with the conditions of a grant is the loss of national financial assistance. A few courts, however, have held that a state law provision which is inconsistent with a condition of a grant is invalid under the supremacy clause and is preempted.[326] A distinction

324. *Id.* at 17 n.13. The Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6000-6081 (1976 & Supp. IV 1980), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. IX, subtit. B, §§ 911-913, 95 Stat. 563, provides financial assistance to the states to care for and treat the developmentally disabled. The principal issue was whether a particular provision of this Act required the states to fund certain very expensive types of care and services. The Court concluded that the states did not have to provide these benefits for developmentally disabled persons because the provision at issue was merely hortatory and was not a condition of the grant. *Id.* at 11-27. Once the Court eliminated by statutory interpretation the question of Congress' power to impose an affirmative obligation on the states to provide particular services for its citizens, it then cautioned that *NLC* might constrain this power.

The three dissenting Justices found that the provision at issue was a condition of the grant, and the argument that the state could avoid the requirements of the Act by refusing the grant was apparently their answer to the question of Congress' power to impose affirmative obligations on the states as a condition of a grant. *Id.* at 33-47 (White, Brennan, and Marshall, JJ., dissenting).

325. Since no condition of a grant has been held invalid, no court has considered the appropriate relief. A court might either hold the whole grant invalid or treat the unconstitutional condition as severable and direct the grant to be made to a recipient who complied with all other conditions. Although the effect of severing the invalid condition would be to force Congress to make a grant on less than all the terms it deemed appropriate, Congress could always withdraw the grant.

326. Three courts that rejected *NLC* arguments that a condition of a grant was unconstitutional have expressly held that a provision of state law in conflict with the condition is preempted. Williams v. Wohlgemuth, 540 F.2d 163, 170 (3d Cir. 1976); City of Boston v. Harris, 461 F. Supp. 1201, 1202-03 (D. Mass. 1978), *aff'd*, 619 F.2d 87 (1st Cir. 1980) (discussed *supra* at notes 183-84); Gilbert v. New Jersey Dep't of Human Servs., 167 N.J. Super. 217, 223, 400 A.2d 803, 806 (App. Div. 1979) (discussed *supra* at notes 294-303). *See* Lawrence County v. South Dakota, 513 F.

between these two sanctions is important because preemption has a significant impact on a state entirely apart from and in addition to the effects of the condition itself.

On the one hand, if the only sanction for a state's failure to change its law to permit and effect compliance with a condition is that the state cannot accept the grant or, conversely, that the national government will withhold its financial aid, there is no interference with a state's political decisionmaking process. Although the state may have to comply with conditions that affect its autonomy by regulating the organization and conduct of state government,[327] the allocation of political power within the state,[328] or the state's control of private activity,[329] the decision to accept a national grant and to comply with these regulations is made through the political process established by state law. Congress takes a state's political decisionmaking process as it finds it with certain powers allocated by state law to the Governor, the legislature, and its political subdivisions. Congress defers to a state's political decisionmaking process because the power of the Governor, the legislature, or a state political subdivision to accept a national grant and to comply with its conditions is determined by state law.

On the other hand, preemption of a provision of state law that con-

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Supp. 1040 (D.S.D. 1981), *vacated and remanded with direction to dismiss for want of federal jurisdiction*, 668 F.2d 27 (8th Cir. 1982) (discussed *supra* at note 258); Central Fla. Legal Servs. v. Perry, 406 So.2d 111 (Fla. App. 1981) (discussed *supra* at note 184). Three other courts avoided the question whether a condition of a national grant preempted state law by finding no conflict. Rogers v. Brockette, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979) (discussed *supra* at notes 257-59); Opinion of the Justices, 118 N.H. 7, 381 A.2d 1204 (1978) (discussed *supra* at notes 282-83); Shapp v. Sloan, 480 Pa. 449, 391 A.2d 595 (1978), *appeal dismissed sub nom.* Thornburgh v. Casey, 440 U.S. 942 (1979) (discussed *supra* at note 284). *Cf.* Local Div. 589, Amalgamated Transit Union v. Massachusetts, 666 F.2d 618, 627-36 (1st Cir. 1981) (question whether condition of national grant preempts state law avoided by finding that Congress intended loss of national funds to be the only sanction), *cert. denied*, 102 S. Ct. 2928 (1982) (discussed *supra* note 256). Each one of these cases, except *City of Boston v. Harris*, involved a national grant to a state. As discussed *infra* at notes 327-35, preemption of a provision of a state law that conflicts with a condition of a national grant to a state or its political subdivisions interferes with the political process established by state law for deciding whether to accept the grant and to comply with its conditions. If a grant is made to a private recipient, there is no risk of interfering with the state's political procedure for deciding whether to accept the grant because the grant is not offered to the state. Thus, in *City of Boston v. Harris*, where the grant was made to a private recipient and the court held that a condition of the grant applicable to the recipient preempted a provision of local law, *see supra* notes 183-84, there was no national control of the local political decisionmaking process. Preemption of the local law simply displaced local substantive policy for private activity.

327. *See supra* notes 255-56 and accompanying text.

328. *See supra* text accompanying notes 257-305.

329. *See supra* text accompanying notes 306-24.

flicts with a condition of a national grant cuts deeply into the state's political decisionmaking process. A state law provision in conflict with a condition of a national grant is, of course, a product of the state's political process. The conflicting provision can be changed through the same state political process which created it; but if the state law provision is held invalid under the supremacy clause and preempted, Congress circumvents the process required by state law for a decision to accept a grant and to comply with its conditions. In circumventing the state's political decisionmaking process, Congress alters the state's allocation of power to the Governor, the legislature or its political subdivisions by allowing action when there could be none in the absence of preemption. Congress thus in effect controls the state's political decision whether to accept the grant. The difference between withholding a national grant and preempting state law provisions that conflict with grant conditions is, in essence, the difference between permitting the state's political process to decide whether to comply with the terms of a national grant and national control of the state's political decisionmaking process.

The impact of preemption on a state's political decisionmaking process is easily illustrated by considering situations where a state or its political subdivisions are prohibited by a provision of state law from complying with a condition of a national grant. A state may be prohibited from complying with the terms of a grant by a state statute or the state's constitution, and in both cases judicial invalidation of the state law provision may interfere significantly with the state's political decisionmaking process.[330] If, for example, a Governor has state law authority to accept a grant without the approval or participation of the state legislature, as the majority in *Gilbert v. New Jersey Department of Human Services* implicitly assumed, and a condition of the grant preempts a regulation promulgated pursuant to a state statute, then Congress has in effect expanded the Governor's power to amend a state statute without action by the state legislature.[331] In contrast, the sanc-

330. Similar problems of circumventing the state's political process arise when Congress attempts to delegate national authority to state officers, agencies, or political subdivisions to take actions in excess of or contrary to their state law authority. *See infra* text accompanying notes 941-78.

331. *See supra* text accompanying note 304. In *Gilbert*, national interference in the state's political decisionmaking process may be analyzed in two different fashions. If state law requires joint action by the Governor and the legislature to accept a grant, a condition that requires an exclusive gubernatorial decision frustrates the state's allocation of power to the legislature. Even

tion of withholding the grant does not interfere with the state's allocation of political power. The grant is simply withheld unless the state legislature amends the state statute and regulation to permit compliance with the grant condition. Any gubernatorial attempt to accept the grant without such legislative action could presumably be barred by a suit to enforce the state statute and regulation.

If, instead of state statutes, a state constitutional provision in conflict with a condition of a national grant is held invalid under the supremacy clause, then Congress may effectively expand the powers of one of the branches of state government or the powers of state government beyond the limits established by the political community. Assume, for example, in *Shapp v. Sloan* and *Opinion of the Justices* that Congress had made the grants on the condition that the Governors would exercise exclusive control over the disbursement of the grant and the designation of the state agency to implement the spending program.[332] Preemption of state constitutional requirements that these actions be taken jointly by the Governor and the legislature would alter the states' political decisionmaking processes by allocating significant power to the executive with a corresponding elimination of legislative power. A holding that the state could not accept the grant or a refusal to make the grant would, of course, require the same reallocation of political power, but the change, if made, would be accomplished through the states' political decisionmaking process. Since there is no guarantee that the political communities in these states would amend the states' constitutions to expand the Governors' powers, preemption has a stark effect on the states' political processes.

Preemption of a state constitutional provision may not only alter the state's allocation of power between the legislative and executive branches of state government, but it also may have the effect of expanding the powers of both branches beyond the limits established by the political community of the state. In *North Carolina ex rel. Morrow v. Califano*, a condition of a national grant required the state to regulate private activity in a manner prohibited by the state constitution.[333] If the court had held that this condition preempted the state constitu-

if the Governor does have exclusive power under state law to accept a grant, preemption of a state statute that conflicts with a condition of a grant has the same effect of reducing the state law power of the legislature.

332. *See supra* text accompanying notes 282-84.

333. *See supra* text accompanying notes 306-12.

tional restriction and permitted the Governor and the legislature to disregard a state constitutional limit on their powers, Congress would have increased the political power of the state government and decreased the power reserved by the political community. Although the court's actual holding that the condition was valid required the same enlargement of state governmental powers in order to obtain the grant,[334] this change, if made, would have been accomplished through the state's procedures for amending its constitution. The difference here between preemption and withholding the grant is that preemption allows Congress to change the state's political decisionmaking process and to circumvent the usually complicated procedures for amending the state constitution.

A final example of the effect of preemption on a state's political decisionmaking process is afforded by national grants to states or their political subdivisions on a condition authorizing the political subdivisions to act in excess of or contrary to their state law powers.[335] If a court simply holds that the state or local government cannot accept the grant or, alternatively, that national aid must be withheld, the effect is to require the state, acting through the Governor and the legislature, to expand the powers of its political subdivisions. Preemption of a state statute, however, bypasses the state's political procedure for amending or repealing a statutory restriction on its political subdivisions' powers, and it allows Congress to restructure the state's relation with its political subdivisions and to determine which level of government decides whether to accept the grant.

In addition to altering a state's political decisionmaking process, preemption of state law in conflict with a condition of a national grant also substantially undermines the concept that a state's decision to accept a grant and to comply with its conditions is voluntary. Although preemption of a state statutory or constitutional provision prohibiting the state or its political subdivisions from complying with a condition of a grant does not force the state or local government to accept the grant and to participate in the spending program, it does redefine the state by bypassing part of the state's political decisionmaking process. If state law allocates power to make a particular decision to the political com-

334. The state legislature in fact avoided the necessity of a constitutional amendment by enacting a statute that it apparently interpreted to be within its constitutional powers. *See supra* note 312.

335. *See supra* text accompanying notes 257-63.

munity by a state constitutional amendment, then the state for the purposes of that decision is the political community. Preemption of a constitutional provision, as in the example built on *North Carolina ex rel. Morrow v. Califano*, in effect redefines the state as a matter of national law as the Governor and the legislature. If state law provides that an action must be taken jointly by the Governor and the legislature, then these two branches of state government acting in concert constitute the state for the purpose of that action. Preemption of the legislature's power to participate in that action, as in the examples drawn from *Gilbert v. New Jersey Department of Human Services*, *Shapp v. Sloan*, and *Opinion of the Justices*, redefines the state as the Governor. Preemption of the state government's power to control its political subdivisions redefines the state as its political subdivisions.

A decision by the state as redefined by national law hardly seems to be either a state decision or a voluntary decision. It is not a decision by the state because the decision is not made according to the political decisionmaking process prescribed by state law. Assuming that Congress has consciously bypassed part of the state political decisionmaking process in order to enhance the odds of compliance with the terms of its grant, then this manipulation of the state's political process sours the milk of voluntary participation.

E. State Autonomy and the Constitutional Source of Congress' Power—Enforcement of the Civil War Amendments

Congress can use its constitutional powers to enforce the Civil War Amendments,[336] just as it uses its article I powers to regulate the states and to require the affirmative exercise of state authority over individual conduct.[337] In the wake of *NLC*, litigants have focused on national regulation of state and local government and in particular on the ques-

336. U.S. CONST. amends. XIII, § 2; XIV, § 5; XV, § 2.

337. Congress has exercised its article I, section 8, powers to regulate private activity as well as to regulate the states and to require the affirmative exercise of state authority over private activity; but, given the "state action" requirement, Congress has rarely enforced the Civil War Amendments by regulating private activity. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Thus, in most instances of national regulation of the states enacted under the Civil War Amendment enforcement powers, any counterpart regulation of private activity has been enacted under one of the article I, section 8, powers. For example, the prohibition of age discrimination in employment by private employers was enacted under the commerce power, and it was extended to public employers by a statute enacted either under the power to enforce the fourteenth amendment or the commerce power. *See infra* notes 372-73 and accompanying text.

tion of Congress' power under section five of the fourteenth amendment to regulate state and local governments in their capacities as employers under Title VII of the Civil Rights Act of 1964,[338] the Equal Pay Act,[339] and the Age Discrimination in Employment Act (ADEA).[340] Perhaps because these Acts are administered by the national government[341] and because Congress has not asserted the power to employ the states as its agents in enforcing the antidiscrimination provisions of Title VII, the Equal Pay Act, and the ADEA against private employers, there has as yet been no occasion for the courts to explore the Supreme Court's recent hint that state sovereignty may limit Congress' power under section five of the fourteenth amendment to impose affirmative duties on the states.[342]

1. Federalism and the Framers' Intent to Expand National Power

The state sovereignty challenges brought against national regulation of state and local government under Congress' power to enforce the Civil War Amendments have been almost uniformly unsuccessful. In contrast to its failure to elaborate any reasons for its suggestions in *NLC* that federalism principles do not limit either the war power or the spending power,[343] the Court has elaborated a reason for its *NLC* sug-

338. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980).

339. 29 U.S.C. § 206(d) (1976).

340. *Id.* §§ 621-634 (1976 & Supp. IV 1980).

341. Title VII, the ADEA, and the Equal Pay Act are all administered by the national Equal Employment Opportunity Commission. 42 U.S.C. §§ 2000e-4(g), 2000e-5(a) (1976); Reorganization Plan No. 1 of 1978, 42 U.S.C. § 2000e-4 (Note) (Supp. IV 1980).

342. In Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981), a divided Court held that a requirement that the states provide particular services for developmentally disabled individuals was not stated with sufficient clarity to be a valid condition of a grant. *See supra* note 324. The whole Court also agreed that Congress had not exercised its power to enforce the fourteenth amendment in order to impose this requirement on the states. 451 U.S. at 15-17 (Rehnquist, J., Burger, C.J., Stewart, Powell, & Stevens, JJ.), 32 (Blackmun, J., concurring in part and concurring in the judgment), 35 (White, Brennan & Marshall, JJ., dissenting in part). The inference that *NLC* may impose some limits on Congress' powers to use the states as its agents in implementing national social welfare programs follows from the Court's unanimous opinion that congressional reliance on its power to enforce the fourteenth amendment should not lightly be assumed when a statute would place an affirmative obligation on the state to fund expensive social services for its citizens. *Id.* Since the Court had held previously that Congress' powers to enforce the Civil War Amendments are immune from the federalism limitations of *NLC*, *see infra* text accompanying notes 348-53, its reluctance to find that Congress invoked one of these powers suggests that these broad holdings may be narrowed and that the Court might recognize federalism limits on Congress' power to enforce the Civil War Amendments by requiring the states to act as the nation's agents.

343. *See supra* notes 121, 123 & 137 and accompanying text.

gestion[344] that neither the tenth amendment nor federalism principles limit Congress' power to enforce the Civil War Amendments. In *Fitzpatrick v. Bitzer*,[345] decided only four days after *NLC*, the Court held that the principle of state sovereignty embodied in the eleventh amendment[346] does not limit Congress' power to enforce the fourteenth amendment. The *Fitzpatrick* Court concluded that Congress has the power to enforce the fourteenth amendment by subjecting the states to suit in federal court, notwithstanding the prohibition of the eleventh amendment, because the purpose of the Civil War Amendments is to expand national power and to diminish state sovereignty.[347]

The Court subsequently extended this understanding of the special nature of Congress' power in enforcing the Civil War Amendments to alter the balance of national and state authority by holding that these powers override the tenth amendment principles of federalism recognized in *NLC* as well as the eleventh amendment. In *City of Rome v. United States*,[348] the Court held that federalism principles do not limit

344. *See supra* text accompanying note 122 & note 121.

345. 427 U.S. 445 (1976). The case is discussed *infra* at notes 358-59.

346. U.S. CONST. amend. XI.

347. In addition to *Fitzpatrick*, the Court also held in *Hutto v. Finney* that Congress' power to enforce the fourteenth amendment is not confined by the eleventh amendment. 437 U.S. 678 (1978) (Congress' power to authorize a federal court to award attorneys' fees against a state). Although both *Fitzpatrick* and *Hutto* purport to rest on the fundamental principle that Congress' powers to enforce the Civil War Amendments were intended to expand the authority of the nation over the states, these cases do not explain Congress' power to override the tenth amendment federalism principles of *NLC* because the courts have also held that Congress can exercise its article I, section 8, powers to override the eleventh amendment. *See, e.g.*, Parden v. Terminal Ry., 377 U.S. 184 (1964) (commerce power); Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979) (war power); Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979) (copyright and patent power). Cases like *Fitzpatrick v. Bitzer* are best understood, as several scholars argue, as examples of the broader principle that Congress has the authority under all of its legislative powers to subject the states to suit in federal courts notwithstanding the eleventh amendment's prohibition. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203, 1261-62 (1978); 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, 1441-45 (1975); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 693-99 (1976). Thus, although the principle that the Civil War Amendments altered the balance of national and state power supports Congress' powers in enforcing these amendments to disregard the tenth amendment federalism constraints recognized in *NLC*, the actual holdings in *Fitzpatrick* and *Hutto* that Congress has the power to override the eleventh amendment provide no support for the conclusion that Congress has greater power to disgregard *NLC* tenth amendment federalism constraints in exercising its powers to enforce the Civil War Amendments than in exercising its article I, section 8, powers.

348. 446 U.S. 156 (1980).

Congress' power to enforce the fifteenth amendment by regulating state and local voting practices.[349] In *Monell v. New York City Department of Social Services*,[350] the Court held that *NLC* does not limit Congress' power to enforce the fourteenth amendment by creating a cause of action and authorizing a remedy against a municipality for violation of an individual's constitutional rights.[351] Although the Court has long construed the Civil War Amendments to expand national power over

349. *Id.* at 178-80. In this case, the Court upheld national regulation under the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976), of electoral changes and annexations made by a local government that have a racially discriminatory effect.

350. 436 U.S. 658 (1978).

351. *Id.* at 690 n.54. *Accord* Chambers v. Marsh, 675 F.2d 228, 231 (8th Cir. 1982) (*NLC* does not limit judicial enforcement of individual constitutional rights in a section 1983 action). The principal issue in *Monell* was the construction of 42 U.S.C. § 1983 (Supp. IV 1980). This section, enacted as part of the 1871 Civil Rights Act to enforce the fourteenth amendment, creates a private cause of action for the deprivation of nationally protected rights against a "person" acting under the color of law, and it authorizes money damages and equitable relief. The *Monell* Court overruled Monroe v. Pope, 365 U.S. 167 (1961) and held, on the basis of a fresh reading of the legislative history, that a city is a "person" within the meaning of section 1983. 436 U.S. at 684-89. The principal effect of this decision is to make local governments directly liable for damages and injunctive relief for the deprivation of constitutional and national statutory rights under official policy or custom. *Id.* at 690-91.

The curt rejection in a footnote of *NLC* federalism limits on Congress' power to enforce the fourteenth amendment by creating a private cause of action against a municipality for the deprivation of constitutional rights is surprising because it belies the impact of section 1983 on the federal system. No single federal statute has had a greater impact. *See generally Developments in the Law—Section 1983 and Federalism,* 90 HARV. L. REV. 1133 (1977) [hereinafter cited as *Developments*]. At bottom, section 1983 is important because it provides a vehicle for judicial interpretations of the constitution that have greatly expanded individual rights. The delineation of the substantive and procedural constitutional rights of prisoners, students, and public employees; the declaration of abortion and other privacy rights; and for that matter most of the modern substantive due process revolution—all have in large part been the product of suits against state and local officers under section 1983. The enforcement of this broad panoply of constitutional rights has had a significant effect on the allocation of power between the nation and the states. The rights established in section 1983 actions create a constitutional standard for the conduct of state and local government because the courts are authorized to award damages and injunctive relief against state officers, local officials, and now under *Monell* municipalities that violate these constitutional rights. For example, the Court held that the political patronage practices of a local government, which arguably promoted effective policy implementation and served the partisan politics of our democratic system, violated the first amendment rights of public employees not to be discharged on the bases of their political beliefs. Elrod v. Burns, 427 U.S. 347 (1976). An action for money damages may also have the effect of displacing state tort law because most official misconduct that would constitute a tort can also be characterized as a constitutional violation. *Developments, supra*, at 1173. *E.g.,* Paul v. Davis, 424 U.S. 693 (1976). An injunction requiring a state or local officer to take affirmative steps to remedy a constitutional violation may have a more profound effect. To take only the most prominent examples, federal courts have ordered state and local school, prison, and mental hospital officials, often at overwhelming costs,

the states,[352] the post-*NLC* pronouncements in *City of Rome* and *Monell* strongly suggest for the first time that these powers are completely immune from any judicially imposed federalism constraints.[353]

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to restructure their institutions completely. Frug, *The Judicial Power of the Purse,* 126 U. PA. L. REV. 715 (1978).

Ironically, given the already substantial impact on the federal system of section 1983 actions against state and local officers, the *NLC* federalism question in *Monell* of Congress' power to enforce the fourteenth amendment by creating a private cause of action against a municipality for deprivation of constitutional rights under its official policy or custom may indeed have appeared trivial to the Court. It is true, as Justice Rehnquist complained in dissent, that *Monell* exposes municipal treasuries directly to damage awards; however, these treasuries were already exposed indirectly by virtue of orders enjoining local officials to correct constitutional violations. 436 U.S. at 714, 724 (Rehnquist, J., dissenting).

The impact of section 1983 on the federal system and the question of federalism limits on Congress' power under section 5 of the fourteenth amendment to create a cause of action for the deprivation of constitutional rights is assessed in greater detail *infra* at notes 399-422.

352. Fitzpatrick v. Bitzer, 427 U.S. 445, 453-56 (1976); Mitchum v. Foster, 407 U.S. 225, 239-43 (1972); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); *Ex parte* Virginia, 100 U.S. 339 (1879).

353. The Court employed broad language in both cases. In *City of Rome*, the Court stated that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'" 446 U.S. at 179. In *Monell*, the Court deemed *NLC* "irrelevant" to Congress' power under the enforcement clauses of the Civil War Amendments. 436 U.S. at 690 n.54. The Court has also stated in dictum that "the Tenth Amendment places no restrictions" on Congress' power under the enforcement clauses of the Civil War Amendments. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287 n.28 (1981). *See* Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980) (assumption by three justices that *NLC* does not limit Congress' power under the enforcement clause of the fourteenth amendment). *Cf.* Milliken v. Bradley, 433 U.S. 267, 291, 295 (1977) (unanimous agreement that tenth amendment and general principles of federalism are not implicated by federal court judgment enforcing fourteenth amendment). Although the Court has had an opportunity to hold only that Congress' powers to enforce the fourteenth and fifteenth amendments are not limited by federalism principles, there is no reason to believe that Congress does not enjoy the same freedom to enforce the thirteenth amendment. Indeed, one court of appeals has held that *NLC* is inapplicable to statutes enacted to enforce the thirteenth amendment because both the thirteenth and fourteenth amendments were intended to limit state authority. United States v. City of Parma, 661 F.2d 562, 573 (6th Cir. 1981) (application of the Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, §§ 801-819, 82 Stat. 81-89, 42 U.S.C. §§ 3601-3619 (1976 & Supp. IV 1980) to a municipality), *cert. denied,* 102 S. Ct. 1972 (1982).

The theory that state autonomy does not limit Congress' power to enforce the Civil War Amendments has been advanced without any direct dissent. In *Monell* the dissent complained about the impact of liability under section 1983 on local government treasuries, *see supra* note 351, but there was no suggestion that federalism principles limited Congress' power to create a cause of action for deprivation of constitutional rights. In *City of Rome*, six Justices joined in the broad statement of Congress' power. 446 U.S. at 187, 190. On the issue of the constitutionality of the Voting Rights Act, the three Justices argued in dissent that the statute was not within Congress' power under section 2 of the fifteenth amendment because it was not "appropriate" legislation to enforce the guarantees of that amendment. 446 U.S. at 200-05 (Powell, J., dissenting), 207-21 (Rehnquist & Stewart, JJ., dissenting). Although the dissenting Justices noted that national regu-

2. *Regulation of the States: Title VII, the Age Discrimination in Employment and Equal Pay Acts*

The lower courts were quick to seize the simple and hence appealing notion that *NLC* does not limit Congress' powers to enforce the Civil War Amendments as a basis for upholding national regulation of state and local government employment practices under Title VII, the ADEA, and the Equal Pay Act. In fact, this rationale that the Civil War Amendments were intended to expand national power and to diminish state sovereignty has proved so alluring that many courts have rather disingenuously found that Congress enacted a statute under its power to enforce the fourteenth amendment, instead of the more obvious reliance on the commerce power, in order to avoid completely the federalism restraints of *NLC*. This enticing rationale also has led these courts to expand its reach beyond the relatively narrow confines of racial discrimination[354] to sex and age discrimination. This same enticement led the courts to apply the rationale mechanically without any

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lation of state and local voting practices affected an important aspect of state autonomy, they did not argue that *NLC* or the tenth amendment limited Congress' power to enforce the fifteenth amendment. 446 U.S. at 201 n.12 (Powell, J., dissenting), 221 (Rehnquist & Stewart, JJ., dissenting).

The Court's theory that the tenth amendment and principles of federalism place no restrictions on Congress' powers under the enforcement clauses of the Civil War Amendments is new. In Oregon v. Mitchell, 400 U.S. 112, 117-18 (1970), the Court held that Congress did not have the power to establish the voting age in state elections. Justice Black expressly recognized that federalism principles limited Congress' power to enforce the fourteenth amendment. *Id.* at 124-30. Three Justices implicitly recognized the same restraint. *Id.* at 293-94. (Stewart, J., Burger, C.J., & Blackmun, J., concurring in part and dissenting in part). Only four members of the Court found that state sovereignty did not limit Congress' enforcement power. *Id.* at 135-44 (Douglas, J., separate opinion), 249-50 (Brennan, White & Marshall, JJ., dissenting in part and concurring in part). The deadlock was broken by Justice Harlan who found that Congress had no power to enforce the fourteenth amendment by regulating discriminatory voting practices because the amendment contemplated no restrictions on state authority to control voting practices. *Id.* at 154-209, 212-13.

354. The Supreme Court's two pronouncements that federalism principles do not limit Congress' power to enforce the Civil War Amendments are tied to the problem of racial discrimination. City of Rome v. United States, 446 U.S. 156, 178-80 (1980) (racial discrimination in voting); Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690 n.54 (1978) (sole support for cursory finding that the tenth amendment does not limit Congress' power to enforce fourteenth amendment was prior holding in Milliken v. Bradley, 433 U.S. 267, 291 (1977), that tenth amendment does not limit power of a federal court to remedy racial segregation in public schools). Even Justice Black, the most explicit proponent of federalism limits on Congress' powers under the enforcement clauses of the Civil War Amendments, *see supra* note 353, recognized that these limits were reduced when Congress acted to remedy racial discrimination. Oregon v. Mitchell, 400 U.S. 112, 129-30 (1970).

evaluation of the extent to which Congress' powers to enforce the Civil War Amendments were intended to alter the balance of national and state power.[355]

As amended in 1972, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the grounds of "race, color, religion, sex, or national origin"[356] either by private employers or by states and their political subdivisions.[357] Although the Supreme Court in *Fitzpatrick v. Bitzer* held that Congress had the power under section 5

355. There are two potential limits on Congress' powers in enforcing the Civil War Amendments to alter the allocation of power between the nation and the states. One limit—*NLC*, federalism principles, and the tenth amendment—has apparently been rejected. The other potential limit is the requirement that legislation enacted to enforce these amendments must be "appropriate." U.S. CONST. amends. XIII, § 2; XIV, § 5; XV, § 2. The scope of Congress' authority to enforce the Civil War Amendments by "appropriate legislation" is not settled. It is generally agreed that Congress is not limited in enforcing these amendments to prohibiting conduct that the Court has held unconstitutional. For example, although the Court has held that proof of discriminatory intent is necessary to establish a violation of the fourteenth amendment, Congress has the power to enforce the equal protection guarantee of this amendment by prohibiting practices that have a discriminatory impact. *See infra* note 363. However, as a comparison of the majority and dissenting opinions in *City of Rome v. United States* indicates, there is no clear consensus on the obviously related question of Congress' power under the enforcement clause of the fifteenth amendment to prohibit voting practices that have a discriminatory effect. 446 U.S. at 173-78, 192-93 (Stevens, J. concurring), 200-05 (Powell, J., dissenting), 207-21 (Rehnquist & Stewart, JJ., dissenting). On the broad question of "congressional power to extend constitutionally based protections beyond limits fixed by the Court," there is nothing approaching a consensus. Note, *Congressional Power to Enforce Due Process Rights*, 80 COLUM. L. REV. 1265, 1267 (1980) [hereinafter cited as *Congressional Power*]. *See generally id.*

A few members of the Court have argued that Congress' power to enforce the Civil War Amendments by "appropriate legislation" is constrained, if not directly by *NLC* or federalism principles, at least indirectly by the need to avoid expanding national power over the states to a greater extent than the framers of these amendments intended. City of Rome v. United States, 446 U.S. at 201-02 (Powell, J., dissenting), 221 (Rehnquist & Stewart, JJ., dissenting) ("[t]o permit congressional power to prohibit the conduct challenged in this case requires state and local governments to cede far more of their powers to the federal government than the Civil War Amendments ever envisioned"). *Cf.* Hutto v. Finney, 437 U.S. 678, 717-18 (1978) (Rehnquist, J., dissenting) (Congress' power to enforce the fourteenth amendment by overriding state eleventh amendment immunity to suit in federal court may depend on question whether Congress is enforcing a constitutional provision judicially incorporated into the fourteenth amendment or a provision placed in the amendment by its drafters).

356. 42 U.S.C. § 2000e-2(a)-(c) (1976).

357. *Id.* § 2000e(a), (b), (h) (1976 & Supp. IV 1980). The 1972 Amendments expanded the definition of the persons subject to the Act to include "governments, governmental agencies, [and] political subdivisions" and repealed the express exemption of "a State or a political subdivision thereof." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103. The prohibition of employment discrimination applies identically to public and private employees with the sole exception that elected officials and their high ranking advisors are exempt. 42 U.S.C. § 2000e(f) (1976).

of the fourteenth amendment to override the eleventh amendment and to subject the states to suit in federal court for damages and attorneys fees for violation of Title VII,[358] it left open the question of Congress' power to regulate state employment practices.[359] In light of the express holding in *Fitzpatrick* that Congress enacted the 1972 Amendments extending Title VII to public employers under its power to enforce the fourteenth amendment,[360] the lower courts have uniformly sustained Congress' power to prohibit employment discrimination by public employers.[361] In upholding the application of Title VII to state and local governments, these courts simply invoked the rationale that Congress' power to enforce the Civil War Amendments is unencumbered by federalism restraints, and they rejected arguments that *NLC* precludes national interference with employment decisions.[362] These courts also rejected claims that *NLC* requires proof of intentional discrimination in an action against a governmental employer as opposed to the lower standard of discriminatory impact applicable to private employers.[363]

358. *See supra* notes 345-47 and accompanying text.

359. 427 U.S. 445, 456 n.11 (1976).

360. *Id.* at 447, 453 n.9. The legislative history suggests, however, that Congress relied on the commerce power as well as its power to enforce the fourteenth amendment. Note, *Title VII and Public Employers: Did Congress Exceed Its Powers?,* 78 COLUM. L. REV. 372, 373 n.14, 377-79 (1978).

361. Norris v. Arizona Governing Comm. for Tax Deferred Annuity, 671 F.2d 330, 336 (9th Cir. 1982); Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 88 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981); United States v. Virginia, 620 F.2d 1018, 1022-24 (4th Cir. 1980); Shawer v. Indiana Univ. of Pa., 602 F.2d 1161, 1163-65 (3d Cir. 1979); Scott v. City of Anniston, 597 F.2d 897, 898-900 (5th Cir. 1979); Blake v. City of Los Angeles, 595 F.2d 1367, 1372-74 (9th Cir. 1979), *cert. denied,* 446 U.S. 928 (1980); United States v. City of Chicago, 573 F.2d 416, 422-24 (7th Cir. 1978); Love v. Waukesha Joint School Dist., 560 F.2d 285, 287 (7th Cir. 1977); United States v. New Hampshire, 539 F.2d 277, 281-82 (1st Cir.), *cert. denied,* 429 U.S. 1023 (1976); Pennsylvania v. Rizzo, 466 F. Supp. 1219, 1226-28 (E.D. Pa. 1979); Pennsylvania v. O'Neill, 465 F. Supp. 451, 462 (E.D. Pa. 1979); United States v. City of Milwaukee, 441 F. Supp. 1377, 1380-82 (E.D. Wis. 1977); Curran v. Portland Superintending School Comm., 435 F. Supp. 1063, 1076-77 (D.Me. 1977). *See* Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232, 242 n.17 (2d Cir. 1980), *cert. granted,* 102 S. Ct. 997 (1982); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 510 n.5 (8th Cir.), *cert. denied sub nom.* Banta v. United States, 434 U.S. 819 (1977). Only one district court decision finding that *NLC* limits Congress' power to apply Title VII to public employers has not been reversed, but that decision was subsequently disapproved. *Compare* Friend v. Leidinger, 446 F. Supp. 361, 385-86 (E.D. Va. 1977), *aff'd,* 588 F.2d 61 (4th Cir. 1978) *with* United States v. Virginia, 454 F. Supp. 1077, 1082-84 (E.D. Va. 1978), *aff'd in part and rev'd and remanded on other grounds,* 620 F.2d 1018, 1022-24 (4th Cir. 1980).

362. Shawer v. Indiana Univ. of Pa., 602 F.2d 1161, 1163-65 (3d Cir. 1979); Love v. Waukesha Joint School Dist., 560 F.2d 285, 287 (7th Cir. 1977); Curran v. Portland Superintending School Comm., 435 F. Supp. 1063, 1076-78 (D. Me. 1977).

363. A finding that an employment practice of a state or local government is a denial of equal

Title VII cases proved to be relatively easy for the lower federal

protection contrary to the fourteenth amendment requires proof of a discriminatory purpose or intent. Washington v. Davis, 426 U.S. 229 (1976). Prior to the extension of Title VII to state and local governments, the Court sustained Congress' power to enforce the fourteenth amendment by making a private employment practice that has a discriminatory impact a violation of Title VII. Griggs v. Duke Power Co., 401 U.S. 424 (1971). One issue in applying Title VII to public employers is whether Congress has the power to apply the discriminatory impact standard to public as well as private employers. *See generally* Note, *supra* note 360.

Most courts have concluded that Congress has the power to apply the same discriminatory impact standard to both private and public employers because *NLC* does not limit Congress' power to enforce the fourteenth amendment. Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 88 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981); United States v. Virginia, 620 F.2d 1018, 1022-24 (4th Cir. 1980); Blake v. City of Los Angeles, 595 F.2d 1367, 1372-74 (9th Cir. 1979), *cert. denied,* 446 U.S. 928 (1980); United States v. City of Chicago, 573 F.2d 416, 422-24 (7th Cir. 1978); Pennsylvania v. Rizzo, 466 F. Supp. 1219, 1226-28 (E.D. Pa. 1979); United States v. City of Milwaukee, 441 F. Supp. 1377, 1380-82 (E.D. Wis. 1977). *See* Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232, 242 n.17 (2d Cir. 1980), *cert. granted,* 102 S. Ct. 997 (1982); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 510 n.5 (8th Cir.), *cert. denied, sub nom.* Banta v. United States, 434 U.S. 819 (1977); United States v. South Carolina, 445 F. Supp. 1094, 1111-12 (D. S.C. 1977), *aff'd mem.,* 434 U.S. 1026 (1978). Two courts that upheld Congress' power to prohibit state and local government employment practices that have a discriminatory impact did not simply invoke the rationale that *NLC* is inapplicable when Congress acts to enforce the fourteenth amendment. These two courts, instead, applied a balancing test and concluded that the national interest outweighed any intrusion on state sovereignty. Scott v. City of Anniston, 597 F.2d 897, 898-900 (5th Cir. 1979); Pennsylvania v. O'Neill, 465 F. Supp. 451, 462 (E.D. Pa. 1979). The application of a balancing test by the Fifth Circuit raises the inference that it believes that *NLC*'s federalism principles may impose some restraint on Congress' powers to enforce the Civil War Amendments. However, the same inference cannot be drawn as readily from the other decision because the court failed to determine the power under which Congress enacted the 1972 Amendments to Title VII.

Although no court has ever held that *NLC* precludes Congress from enforcing the fourteenth amendment against state and local governments by prohibiting employment practices that have a discriminatory impact, three federal district courts did conclude that *NLC* indirectly precluded Congress from applying the discriminatory impact test to governmental employers. These courts found that Congress had the power under the commerce clause to prohibit employment practices of private employers that have a discriminatory impact, but they also found that *NLC* prohibited any national regulation of state and local government employment practices. Resort to Congress' power to enforce the fourteenth amendment was of no avail because Congress' power here was confined to prohibiting constitutional violations which require a discriminatory intent. All three of these decisions were reversed or repudiated. Blake v. City of Los Angeles, 435 F. Supp. 55, 63-64 (C.D. Cal. 1977), *rev'd,* 595 F.2d 1367 (9th Cir. 1979), *cert. denied,* 446 U.S. 928 (1980); Scott v. City of Anniston, 430 F. Supp. 508, 514-16 (N.D. Ala. 1977), *rev'd and aff'd in part on other grounds,* 597 F.2d 897 (5th Cir. 1979). *Compare* Friend v. Leidinger, 446 F. Supp. 361, 384-86 (E.D. Va. 1977), *aff'd,* 588 F.2d 61 (4th Cir. 1978) *with* United States v. Virginia, 454 F. Supp. 1077, 1082-84 (E.D. Va. 1978), *aff'd in part and rev'd and remanded on other grounds,* 620 F.2d 1018, 1022-24 (4th Cir. 1980).

The Supreme Court has noted, without resolution, this Title VII question whether Congress has the power in enforcing the fourteenth amendment simply to prohibit intentional discrimination or whether it also has the power to prohibit state and local government employment practices that

courts in light of the Supreme Court's explicit holding that Congress enacted the 1972 Amendments under section 5 of the fourteenth amendment. These courts, however, have had more trouble in applying the antidiscrimination requirements of the Age Discrimination in Employment Act and the Equal Pay Act to state and local governments in their capacities as employers. The Age Discrimination in Employment Act prohibits employment discrimination against individuals between the ages of forty and seventy,[364] and the Equal Pay Act requires employers to pay women and men the same wages for performing equal work.[365] Both statutes were originally enacted under the commerce power[366] and applied solely to private employers. The coverage of both statutes was subsequently extended to the states and their political subdivisions by the Fair Labor Standards Amendments of 1974,[367]

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have a discriminatory impact. New York City Transit Auth. v. Beazer, 440 U.S. 568, 583 n.23 (1979); Hazelwood School Dist. v. United States, 433 U.S. 299, 306 n.12 (1977). Nonetheless, the Court's decision in *City of Rome v. United States* suggests that it will not find that *NLC* federalism principles require different standards under Title VII for public and private employers. In *City of Rome* the Court concluded that Congress had the power in enforcing the fifteenth amendment to prohibit state voting practices that have a discriminatory effect even if the amendment itself prohibits only purposeful discrimination and that *NLC* did not limit Congress' power to enforce the fifteenth amendment. 446 U.S. at 173-80. Although the Court did not address the combined argument that *NLC*'s federalism principles limit Congress' power to enforce the fifteenth amendment to a prohibition of intentional discrimination, there can be little doubt that this argument would have been found as wanting as its components. *City of Rome*, then, would seem to settle the question of Congress' power in Title VII to enforce the fourteenth amendment by prohibiting state and local government employment practices that have a discriminatory effect because there is no reason why *NLC* should be understood to impose greater restraints on Congress' power to enforce the fourteenth than the fifteenth amendment.

364. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, *as amended* 29 U.S.C. §§ 621-634 (1976 & Supp. IV 1980). *See generally* Note, National League of Cities v. Usery: *Its Implications for the Equal Pay Act and the Age Discrimination in Employment Act,* 10 J.L. REFORM 239, 260 (1977).

365. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56. The Equal Pay Act is an amendment to the Fair Labor Standards Act. *Id.* § 3. It is codified with the minimum wage provisions of the Fair Labor Standards Act that were at issue in *NLC*. 29 U.S.C. § 206(d) (1976). See *supra* note 86. *See generally* Note, *supra* note 364, at 258-60.

366. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-602, § 2(a), 81 Stat. 602, 29 U.S.C. § 621(a) (1976); Equal Pay Act of 1963, Pub. L. No. 88-38, § 2, 77 Stat. 56.

367. The 1974 Amendments specifically amended the ADEA to apply to the states and their political subdivisions. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), (4), 88 Stat. 74 (current version at 29 U.S.C. § 630(b), (f) (1976)). Except for an exemption of elected officials and their high ranking advisors, the ADEA imposes exactly the same requirements on public and private employers. 29 U.S.C. § 630(f) (1976). The same exemption is provided in Title VII. *See supra* note 357. *Compare* 29 U.S.C. § 630(f) (1976) *with* 42 U.S.C. § 2000e(f) (1976).

No specific provision of the 1974 Amendments was required to apply the Equal Pay Act to state

which also extended to the state and local governments the minimum wage and overtime requirements of the FLSA that were held invalid in *NLC*.[368] Both Acts may have a significant effect on state and local government employment practices and the delivery of traditional governmental services if for no other reasons than that they increase the cost of government by requiring equal wages for men and women[369] and that they limit discretion in removing aging employees from the payroll by discharging them.[370] Notwithstanding the obvious analogy to the effect of the minimum wage and overtime provisions of the FLSA, the courts, often by dint of strained reasoning, have for the most part evaded the federalism limits of *NLC* and sustained the application of the ADEA and the Equal Pay Act to public employers.[371]

Although both the Age Discrimination in Employment Act of 1967

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and local government. Since the Equal Pay Act is part of the FLSA, *see supra* note 365, the same provisions of the 1974 Amendment which extended the minimum wage and overtime requirements of the FLSA to public employees also extended the equal pay requirements to state and local government. *See supra* note 86. The general limitations on the coverage of state and local government employees under the FLSA, *see supra* note 86, also apply to the Equal Pay Act.

368. *See supra* text accompanying notes 85-109.

369. Note, *Applying the Equal Pay Act to State and Local Governments: The Effect of* National League of Cities v. Usery, 125 U. PA. L. REV. 665, 671 (1977).

370. EEOC v. Wyoming, 514 F. Supp. 595, 600 (D. Wyo. 1981), *prob. juris. noted,* 102 S. Ct. 996 (1982) (No. 81-554).

371. Twelve courts in officially reported opinions have upheld the application of the ADEA to state and local governments: EEOC v. Elrod, 674 F.2d 601 (7th Cir. 1982); Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Bleakley v. Jekyll Island-State Park Auth., 536 F. Supp. 236, 238-40 (S.D. Ga. 1982); EEOC v. County of Los Angeles, 526 F. Supp. 1135, 1137-38 (C.D. Cal. 1981); Adams v. James, 526 F. Supp. 80, 84 (M.D. Ala. 1981); EEOC v. County of Calumet, 519 F. Supp. 195 (E.D. Wis. 1981); Johnson v. Mayor & City Council, 515 F. Supp. 1287, 1291-92 (D. Md. 1981), *cert. denied,* 102 S. Ct. 1440 (1982); Carpenter v. Pennsylvania Liquor Control Bd., 508 F. Supp. 148 (E.D. Pa. 1981); Marshall v. Delaware River & Bay Auth., 471 F. Supp. 886 (D. Del. 1979); Remmick v. Barnes County, 435 F. Supp. 914 (D. N.D. 1977); Aaron v. Davis, 424 F. Supp. 1238 (E.D. Ark. 1976); Usery v. Board of Educ., 421 F. Supp. 718 (D. Utah 1976). *See* EEOC v. City of St. Paul, 671 F.2d 1162, 1164 n.3 (8th Cir. 1982) (court did not address question of constitutionality of application of the ADEA to state and local governments when parties did not raise this issue); EEOC v. City of Janesville, 630 F.2d 1254, 1257 (7th Cir. 1980) (remand to consider constitutionality of the ADEA). Two courts have held that under *NLC* the ADEA is unconstitutional. Taylor v. Department of Fish & Game, 523 F. Supp. 514 (D. Mont. 1981); EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981), *prob. juris. noted,* 102 S. Ct. 996 (1982) (No. 81-554).

The application of the Equal Pay Act to state and local government has been upheld by the courts of appeals in five circuits and by several district courts in two other circuits. *See* cases cited *infra* at notes 377-82. There is only one reported decision holding that *NLC* precludes the application of the Equal Pay Act to a public employer. Howard v. Ward County, 418 F. Supp. 494 (D. N.D. 1976).

In its interpretation of the impact of *NLC* on the application of the minimum wage and overtime provisions of the FLSA to state and local governments, *see supra* note 112, the Department of

and the 1974 Amendment extending it to state and local governments were enacted under the commerce power,[372] most courts have upheld the application of the Act to public employers on the grounds that Congress either did or could have prohibited age discrimination under its power to enforce the fourteenth amendment and that consequently the federalism principles of *NLC* are inapplicable.[373] Only two courts

Labor has opined that *NLC* does not preclude regulation of public employees under the ADEA and the Equal Pay Act. 29 C.F.R. § 775.2(e)(1)(2) (1981).

372. There is no question that the constitutional basis of the Age Discrimination in Employment Act of 1967 is the commerce power, *see supra* text accompanying note 366, but Congress did not state the constitutional basis of the 1974 Amendments which extended the ADEA to state and local government. The legislative history strongly suggests that Congress relied solely on the commerce power, and not on its power to enforce the fourteenth amendment, to enact the Fair Labor Standards Amendments of 1974. *See* H.R. REP. No. 913, 93d Cong., 2d Sess. 2, 6-7, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811, 2812, 2816-17; S. REP. No. 690, 93d Cong., 2d. Sess. 24 (1974). *See also* Carpenter v. Pennsylvania Liquor Control Bd., 508 F. Supp. 148 (E.D. Pa. 1981).

373. The paths to the conclusion that Congress had acted under its power to enforce the fourteenth amendment were varied. Most courts drew an analogy between the ADEA and Title VII, which the Court in *Fitzpatrick v. Bitzer* had held was enacted under section 5 of the fourteenth amendment, to support the conclusion that the ADEA was also enacted under this power. EEOC v. Elrod, 674 F.2d 601, 603-09 (7th Cir. 1982); Arritt v. Grisell, 567 F.2d 1267, 1270-71 (4th Cir. 1977); EEOC v. County of Calumet, 519 F. Supp. 195, 197 (E.D. Wis. 1981); Johnson v. Mayor & City Council, 515 F. Supp. 1287, 1291-92 (D. Md. 1981), *cert. denied,* 102 S. Ct. 1440 (1982); Carpenter v. Pennsylvania Liquor Control Bd., 508 F. Supp. 148, 149-50 (E.D. Pa. 1981); Aaron v. Davis, 424 F. Supp. 1238, 1241 (E.D. Ark. 1976); Usery v. Board of Educ., 421 F. Supp. 718, 720-21 (D. Utah 1976). One court simply assumed that Congress had relied on its power to enforce the fourteenth amendment. Remmick v. Barnes County, 435 F. Supp. 914 (D.N.D. 1977). Two courts did not assess independently the source of Congress' power to apply the ADEA to state and local government and relied on prior decisions holding that Congress had exercised its power to enforce the fourteenth amendment. EEOC v. County of Los Angeles, 526 F. Supp. 1135, 1137-38 (C.D. Cal. 1981); Adams v. James, 526 F. Supp. 80, 84 (M.D. Ala. 1981). *See* Bleakley v. Jekyll Island-State Park Auth., 536 F. Supp. 236, 238-39 (S.D. Ga. 1982); EEOC v. County of Los Angeles, 531 F. Supp. 122, 124 (C.D. Cal. 1982). Another court reasoned that the correct question is Congress' actual power to enforce the fourteenth amendment and not the stated constitutional basis. Marshall v. Delaware River & Bay Auth., 471 F. Supp. 886, 891-92 & n.7 (D. Del. 1979). Seven of these courts, perhaps in recognition of Congress' apparent reliance on the commerce power, also found that *NLC* did not limit Congress' power under the commerce clause to prohibit age discrimination in employment by state and local governments. EEOC v. Elrod, 674 F.2d 601, 609-12 (7th Cir. 1982) (arbitrary discrimination not an essential state function and national interest in nondiscrimination outweighs state interest in unfettered employment policies); Bleakley v. Jekyll Island-State Park Auth., 536 F. Supp. 236, 239-40 (S.D. Ga. 1982) (national interest outweighs state interest because national policy against age discrimination is consistent with state policy and does not restrict state power to set terms of employment); EEOC v. County of Calumet, 519 F. Supp. 195, 201-02 (E.D. Wis. 1981) (no interference with state policy because the ADEA prohibition of age discrimination is consistent with state policy and age discrimination serves no sovereign state function); Marshall v. Delaware River & Bay Auth., 471 F. Supp. 886, 892 (D. Del. 1979) (no substantial interference); Remmick v. Barnes County, 435 F. Supp. 914, 916 n.3 (D. N.D. 1977) (national interest in employment outweighs state interest in age discrimination); Aaron

have held the application of the ADEA to state government unconstitutional, and these courts based their holdings on a determination that the ADEA was authorized by the commerce clause.[374] Perhaps because evidence that Congress enacted the Equal Pay Act under its commerce power is overwhelming,[375] judicial efforts to uphold this Act have been more convoluted. All but one court that have considered the question of Congress' power to prohibit sex-based wage discrimination by state and local governments have sustained Congress' power over *NLC* federalism objections.[376] These courts are about equally divided on the question whether the Equal Pay Act should be viewed as an exercise of the commerce power or the power to enforce the fourteenth amendment. The Courts of Appeals for the Third, Fourth, and Sixth Circuits have concluded that, regardless of any actual reliance on the commerce power, *NLC* is inapposite because Congress could have enacted the Equal Pay Act under its power to enforce the fourteenth amendment.[377] The Fifth and Seventh Circuits have upheld the Equal Pay Act as a valid exercise of the commerce power. In *Pearce v. Wich-*

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v. Davis, 424 F. Supp. 1238, 1241 (E.D. Ark. 1976) (no interference with allocation of local government financial resources); Usery v. Board of Educ., 421 F. Supp. 718, 719-20 (D. Utah 1976) (public education is an integral state government function, but national interest in protecting individual rights outweighs state interest in age discrimination and minimal burden of complying with prohibition against arbitrary use of age as an employment criterion).

374. Taylor v. Department of Fish & Game, 523 F. Supp. 514 (D. Mont. 1981); EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981), *prob. juris. noted,* 102 S. Ct. 996 (1982) (No. 81-554). The Wyoming district court held that the ADEA was unconstitutional as applied to prevent the mandatory retirement at the age of 55 of a state officer who enforced fish and game laws. The court held that management of wildlife is a traditional state function and that the ADEA interferes with state policy of law enforcement by young, vigorous officers. The interference with state functions was not outweighed by any legitimate national interest. There could be no legitimate national interest in prohibiting the mandatory retirement of state officers at the age of 55 because national law requires the mandatory retirement of certain national officers at the age of 55. In the other case, which also involved a state game warden, the Montana district court simply followed the holding in the Wyoming case that the ADEA was unconstitutional as applied to state officers.

375. Both the Equal Pay Act of 1963 and the 1974 Amendments extending coverage to state and local governments were enacted under the commerce power. *See supra* text accompanying notes 366-67 & note 367. Moreover, the Equal Pay Act is part of the FLSA, *see supra* note 365, and *NLC* limited the application of this very statute to the states.

376. *See supra* note 371 and cases cited *infra* notes 377-82.

377. Marshall v. Kent State Univ., 589 F.2d 255, 255 (6th Cir. 1978); Marshall v. Owensboro Daviess County Hosp., 581 F.2d 116, 118-20 (6th Cir. 1978); Usery v. Charleston County School Dist., 558 F.2d 1169, 1170 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 154-56 (3d Cir. 1976). A federal district court in the Sixth Circuit has followed the same line of analysis. EEOC v. Ferris State College, 493 F. Supp. 707, 711-12 (W.D. Mich. 1980).

ita County[378] the Fifth Circuit held that *NLC* was inapplicable because "[t]he ability to pay female employees wages less than those paid to male employees for equal work is not among the 'functions essential to [the] separate and independent existence' of the states."[379] In *Marshall v. City of Shebogan*,[380] the Seventh Circuit rejected *NLC* arguments on the same ground that sex discrimination is not an attribute of state sovereignty and the additional ground that the equal wage requirement would have a minor financial impact.[381] Other courts have upheld the Equal Pay Act as a valid exercise of both the commerce power and the power to enforce the fourteenth amendment.[382]

F. NLC *and the Constitutional Source of Congress' Power—Distinctions Without a Difference*

Congress can exercise its war powers, the spending power, and its powers to enforce the Civil War Amendments in essentially the same fashion. These powers can be used to regulate private activity, to regulate state and local government, or to require the affirmative exercise of state authority over individual conduct, and statutes enacted under all three of these powers have similar effects on the states. National regulation of private activity under any one of these powers displaces state substantive policy.[383] State and local governments in their capacities as

378. 590 F.2d 128 (5th Cir. 1979).

379. *Id.* at 132 (quoting National League of Cities v. Usery, 426 U.S. 833, 845 (1976)). *Pearce* has been consistently followed in the Fifth Circuit. *See* Marshall v. Dallas Indep. School Dist., 605 F.2d 191, 193 n.3 (5th Cir. 1979); Marshall v. A & M Consol. Indep. School Dist., 605 F.2d 186, 188 (5th Cir. 1979); Marshall v. Georgia S.W. College, 489 F. Supp. 1322, 1329 (M.D. Ga. 1980). Two district courts in Iowa have also upheld the Equal Pay Act as a valid exercise of the commerce power on the ground that sex discrimination is not an attribute of state sovereignty. Usery v. Bettendorf Community School Dist., 423 F. Supp. 637 (S.D. Iowa 1976); Christensen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976), *aff'd*, 563 F.2d 353 (8th Cir. 1977). Prior to the decision in *Pearce*, a district court in the Fifth Circuit had upheld the Equal Pay Act as a valid exercise of the commerce power. Usery v. Dallas Indep. School Dist., 421 F. Supp. 111 (N.D. Tex. 1976).

380. 577 F.2d 1 (7th Cir. 1978). This case is discussed in Note, *Equal Pay Act Upheld Under Commerce Clause:* Marshall v. City of Shebogan, 19 URB. L. ANN. 228 (1980).

381. 577 F.2d at 6.

382. *See* Schulte v. New York, 533 F. Supp. 31, 35-36 (E.D.N.Y. 1981); Nilsen v. Metropolitan Fair & Exposition Auth., 435 F. Supp. 1159 (N.D. Ill. 1977); Usery v. Edward J. Meyer Memorial Hosp., 428 F. Supp. 1368 (W.D.N.Y. 1977); Brown v. County of Santa Barbara, 427 F. Supp. 112 (C.D. Cal. 1977). The Ninth Circuit avoided determining the constitutionality of the Equal Pay Act under either the commerce power or the power to enforce the fourteenth amendment by finding no discrimination in violation of the Equal Pay Act. Ruffin v. County of Los Angeles, 607 F.2d 1276, 1282 n.3 (9th Cir. 1979).

383. *See supra* text accompanying notes 148-49 (war power) & 180-84 (spending power).

employers are required to reinstate former employees called to active military service by a statute enacted under the war power;[384] they are required to pay unemployment compensation to their employees by a condition of a national grant;[385] and employment discrimination by state and local governments on the grounds of race, sex, or age is prohibited by statutes enacted under Congress' power to enforce the fourteenth amendment.[386] These three powers can also be used to require the states to act as the nation's agents in regulating private activity.[387]

Congress can also exercise its power under the commerce clause to regulate private activity, to regulate state and local government, and to require the affirmative exercise of state authority. The effects of statutes enacted under the commerce power[388] are similar to the effects of statutes enacted under the war power, the spending power, and the power to enforce the Civil War Amendments. Given these similarities, the obvious question is whether there is any valid rationale for confining *NLC* to the commerce power. If there are no valid distinctions between these powers, then *NLC* is nothing more than an occasionally inconvenient requirement that Congress or the courts shop for an appropriate power to avoid its strictures.

1. The Defense Powers

The application of the Supreme Court's suggestion in *NLC* that federalism principles confine the commerce power and place no limits on certain other powers proves its poverty. The courts have not elaborated any reason why Congress' war powers are immunized from federalism restraints, and one is left to conclude that they are employing an implicit balancing test in which the national interest, subsumed in the talismanic phrase "national defense," automatically outweighs any countervailing state interests. If, in fact, we have a latent balancing test, it is difficult to understand any distinction between the war power and the commerce power. A distinction between these powers in terms of the importance of the national interest rests on the tacit assumption that the war power is exercised to vindicate only clear war and national

384. *See supra* text accompanying notes 150-59.

385. *See supra* text accompanying notes 198-216.

386. *See supra* text accompanying notes 356-82.

387. *See supra* text accompanying notes 161-75 (war power), 217-46 & 306-24 (spending power), and 342 (power to enforce the Civil War Amendments).

388. *See infra* text accompanying notes 458-713.

defense needs, but such an assumption flies in the face of reality. Congress has exercised the war power to regulate matters only tenuously related to the obvious object of this power and otherwise easily within the reach of the commerce power.[389] If, as seems so plausible, the national interests served by some statutes enacted under the commerce power are often similar to and as equally compelling as some interests promoted by statutes enacted under the war power, then any distinction between these two powers collapses.

2. The Spending Power

The distinction, propounded by the lower courts, between the spending and commerce powers fares no better. Most courts have concluded that *NLC* federalism principles do not apply to the spending power because there is no intrusion on state autonomy when a state voluntarily decides to comply with the conditions of a national grant. Although this theory may have had some merit when it was initially advanced, it is now at war with reality.[390] In the era of *Steward Machine Co.*, national grants were limited in number and amount, and it was probably true that a state could avoid complying with the conditions of a grant by the "simple expedient" of refusing it.[391] Such a notion is today, to say the least, antiquated. According to some estimates, national grants to state and local governments have grown from twenty-eight million dollars in 1902, to over one billion dollars in 1939 (two years after *Steward Machine Co.* was decided), and to almost eighty-three billion dollars in 1980.[392] These grants provide financial assistance for almost every function and service performed by the states and their political subdivisions, and they comprise approximately twenty-five percent of their budgets.[393] National tax revenues dwarf the tax revenues of any individual state and its political subdivisions,[394]

389. *E.g.,* Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948) (rent regulation).

390. Wiessert, *ACIR's Grant Law Conference Whys and Wherefores,* 3, 4 in ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, AWAKENING THE SLUMBERING GIANT: INTERGOVERNMENTAL RELATIONS AND FEDERAL GRANT LAW (1980) [hereinafter cited as SLUMBERING GIANT].

391. *See supra* text accompanying notes 186-97. The phrase "simple expedient" first appeared in Massachusetts v. Mellon, 262 U.S. 447, 482 (1923) and was popularized in Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947).

392. *See* 1 ACIR STUDY, *A Crisis of Confidence and Competence,* A-77, *supra* note 82, at 120 (Table A-13); *Categorical Grants, supra* note 317, at 22 (Table 1-5).

393. *See supra* note 178 and accompanying text.

394. In 1979 national tax revenues exceeded $318 billion, and state and local tax revenues

and the states are constrained from increasing taxes by interstate competition for economic development. In these circumstances, the only answer to the question "[c]an a state—or local government—afford to refuse a federal grant if it finds the rules and regulations accompanying that grant unreasonable?"[395] is no. Rare, usually well-publicized refusals to accept national grants simply confirm this analysis.[396] The notion that state participation in national spending programs is voluntary is nothing more than a legal fiction, albeit an important one that supports the primary means by which Congress controls the federal system.

3. Congress' Power to Enforce the Civil War Amendments

In contrast to the Court's failure to explain the purported distinctions between the war and spending powers and the commerce power, the Court has advanced a theory that *NLC*, federalism principles, and the tenth amendment do not limit Congress' power to enforce the Civil War Amendments because the drafters of these amendments intended to expand the power of the nation and to diminish state autonomy. Although the absolute nature of this "black letter" rule makes it appealing, it is simply too facile and proves too much. The drafters of the Civil War Amendments did intend to expand national power, but they did not intend that either the courts or Congress would have the power in enforcing them to obliterate the states as political decisionmaking units.[397]

The limits of the Court's rationale are inherent in its historical foundation. To the extent that a statute enacted under the enforcement clauses of the Civil War Amendments implements the framers' intent, the theory that these amendments authorized an expansion of national power at the expense of the states does justify an intrusion on state autonomy. To the extent, however, that congressional interpretations

totalled only $204 billion ($125 billion for state and $79 billion for local governments). *See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM, M-123, at 61 (Table 46) (1979-80 ed.).

395. The former Mayor of New York City, Abraham D. Beame, posed this question in a preface to a recent report of the ACIR on national grants. SLUMBERING GIANT, *supra* note 390, at iii.

396. *See supra* note 248 and accompanying text.

397. *See* Maltz, *Federalism and the Fourteenth Amendment: A Comment on* Democracy and Distrust, 42 OHIO ST. L.J. 209, 215-16 (1981); Note, *Toward Limits on Congressional Enforcement Power Under Civil War Amendments,* 34 STAN. L. REV. 453, 470-79 (1982).

of the constitutional rights protected by the Civil War Amendments exceed the framers' intent, the argument that history justifies national intrusion on state autonomy becomes attenuated. At some point of wide divorce between the framers' intent and Congress' interpretation of the rights protected by the Civil War Amendments, the historical warrant for rejecting federalism limits on the enforcement powers degenerates into a bald assertion that all intrusions on state sovereignty are warranted because the framers intended some intrusions.[398] The Court's theory that Congress' powers under the enforcement clauses of the Civil War Amendments are not constrained by federalism principles ignores the necessity of accommodating these powers with a role for the states in our federal system. If carried to its logical extreme, this theory would tolerate an unlimited expansion of national power over the states.

The poverty of the Court's theory that *NLC* and federalism principles are inapposite when Congress acts to enforce the Civil War Amendments may be illustrated by a hypothetical statute, enacted under section 5 of the fourteenth amendment, which requires a state legislature to afford its members a reasonable time to speak for or against pending legislation.[399] This statute could have a major impact

398. The question of the scope of rights that the framers of the Civil War Amendments intended to protect has been answered in many fashions. The point here is not that Congress' enforcement powers are necessarily limited by history, but that the historical justification for national intrusion on state autonomy is itself limited. For example, with few exceptions legal historians agree that the framers of the fourteenth amendment were concerned solely with the issue of race, and the area of dispute is confined to the question of what particular rights were to be protected against racial discrimination. *E.g.*, R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049 (1956); Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33. Although the original intent was probably confined to race, there is a substantial argument that the language of the fourteenth amendment is expansive and invites broader application. *E.g.*, A. BICKEL, *supra*, at 103; Van Alstyne, *supra*, at 63. Nonetheless, as judicial and congressional enforcement of the fourteenth amendment moves beyond racial matters, the argument that the framers intended to expand national power at the expense of the states becomes attenuated.

399. The Court has held that state legislators have rights protected by the first amendment. *E.g.*, Bond v. Floyd, 385 U.S. 116 (1966). In Parker v. Merlino, 646 F.2d 848 (3d Cir. 1981), the Third Circuit held that a rule of the New Jersey Senate permitting a question to be brought to a vote without further debate did not violate the first amendment because it is content neutral and the interest in a reasonable time for debate is not a right protected by the first amendment. Congress, however, may have the power to protect the interest in a reasonable time for debate under its power to enforce the due process clause of the fourteenth amendment, which incorporates the first amendment. *See Congressional Power*, *supra* note 355, at 1281-85. Congress could determine

on a state's political decisionmaking process by, for example, invalidating legislative rules governing debate and limiting filibusters, and it might in turn affect the substantive determination whether to enact a bill.[400] Even though it would seem clear that the framers of the fourteenth amendment never contemplated national control of state legislative procedures, under the Court's theory there would be no consideration of federalism limits, much less a bar, simply because Congress had invoked its power to enforce one of the Civil War Amendments.

This hypothetical statute may seem far-fetched because of doubts either that Congress would ever enact such a provision or that the courts would find it to be "appropriate legislation" to enforce the fourteenth amendment.[401] The same result of national control of state legislative processes might obtain, however, under an existing statute enacted under Congress' power to enforce the fourteenth amendment. The Civil Rights Act of 1871 (now section 1983)[402] creates a cause of action for the deprivation of constitutional rights by any person acting under the color of law. If the Court construed the first amendment[403] to guarantee state legislators a reasonable opportunity to debate pending legislation, that constitutional right would be enforceable under section 1983 against an officer of the state legislature,[404] and a court could prohibit this officer from enforcing any procedural rule of the state legislature in conflict with a right of debate guaranteed by the first amendment as interpreted by the Court.[405]

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that a reasonable time for debate is required by the first amendment and prohibit state laws that restricted debate.

400. *See* Parker v. Merlino, 646 F.2d 848, 852, 854 (3d Cir. 1981).

401. *See supra* note 355.

402. 42 U.S.C. § 1983 (Supp IV 1980).

403. U.S. CONST. amend. I.

404. Although the court in *Parker v. Merlino* rejected the argument that the first amendment protects a state legislator's interest in a reasonable time for debate, it entertained no doubts that a suit against state Senators who enforced the challenged rule limiting debate was authorized by section 1983. 646 F.2d at 852.

405. A federal court order prohibiting a state legislative leader from enforcing a rule limiting debate or requiring the state legislature to afford its members a constitutionally required minimum time for debate might be barred by federalism principles. In an analogous case, the Ninth Circuit held that there is no constitutional requirement that committee appointments to the state legislature must be in proportion to the strength of the major political parties, and it based this holding in part on its understanding that *NLC* would prohibit a federal court from determining the number of Republicans and Democrats to be appointed to state legislative committees. Davids v. Akers, 549 F.2d 120, 127 (9th Cir. 1977). The question whether the federalism restraints on

From the state's perspective, it makes no difference whether Congress enforces the fourteenth amendment by declaring a substantive rule that broadens constitutional rights as found by the Court or by providing a cause of action to enforce a constitutional right as established by judicial interpretation. The impact of compliance on the state is, of course, the same. Nevertheless, courts have devoted greater attention to the question of federalism limits on statutes that expand constitutional rights beyond the bounds set by the Court than to section 1983.[406] This focus is ironic because Congress has exercised its powers to enforce the Civil War Amendments sparingly,[407] and in terms of actual impact on state autonomy, constitutional rights declared by the Court and enforced under section 1983 are far more important than statutory rights established by Congress.[408]

The absence of any consideration of federalism limits on section 1983 apart from *Monell*[409] is perhaps best explained by the following tacit understandings: Congress can do at least as much as the courts to enforce the Civil War Amendments;[410] there is no legitimate state sovereignty interest in violating the constitution;[411] and state officers are

Congress' powers recognized in *NLC* also limit the equitable powers of federal courts is, however, completely unsettled. *See infra* note 416.

406. On the one hand, the courts have at least considered federalism limits on Congress' powers to enforce the fourteenth and fifteenth amendment prohibitions of intentional discrimination by prohibiting state and local government employment and voting practices that have a discriminatory impact. *See supra* notes 355 & 363. On the other hand, federalism limits on section 1983 were dismissed in a curt footnote. *See supra* note 351 and accompanying text. Statutes that expand constitutional rights beyond the limits set by the Court raise separation of powers questions as well as federalism issues, and greater judicial scrutiny of these statutes is at least in part explained by the presence of this additional issue. *See, e.g.,* City of Rome v. United States, 446 U.S. 156, 211 (Rehnquist, J., dissenting) (Congress' power to determine what conduct violates the Constitution is contrary to "well-established distinctions between the Judicial Branch and the Legislative or Executive Branches of the Federal Government."). Indeed, analysis of Congress' power to enforce the Civil War Amendments usually focuses more on the question of the comparative competency of the Court and Congress to interpret the constitution than on federalism issues. *See Congressional Power, supra* note 355.

407. *Congressional Power, supra* note 355, at 1265 n.5.

408. *See supra* note 351.

409. *See id.* and accompanying text.

410. Justice Rehnquist who is probably the principal proponent of a narrow construction of Congress' powers to enforce the Civil War Amendments, *see supra* note 355, has stated that "[i]t has never been seriously maintained . . . that Congress can do no more than the judiciary to enforce the [Civil War] Amendments' commands." City of Rome v. United States, 446 U.S. 156, 210 (1980) (Rehnquist, J., dissenting).

411. *Congressional Power, supra* note 355, at 1291. *See supra* text accompanying notes 379 & 381.

otherwise independently obligated under article VI to support the Constitution.[412] Moreover, the question of Congress' power to impose any duty on the states is easily pretermitted because the Court, not Congress, determines the constitutional rights for which section 1983 provides a remedy.[413] Thus, the curt rejection in *Monell* of federalism limits on Congress' power to create a cause of action against a municipality for the deprivation of constitutional rights probably rests as much on these tacit understandings as it does on the formal rule that Congress' power to enforce the Civil War Amendments is immune from federalism limits.

The theory that the framers of the Civil War Amendments intended to expand the power of the nation at the expense of the states is not adequate to the task of explaining all intrusions on state autonomy under statutes enacted to enforce these amendments. If the constitutional rights identified by the Court and enforced under section 1983 or the statutory rights elaborated by Congress to enforce these amendments exceed the rights for which the framers intended to provide national protection, the historical argument standing alone does not justify intrusions on state autonomy. Although the suggestion may be heresy, Congress' power to enforce the Civil War Amendments, as it does under section 1983, by providing a cause of action for constitutional rights found by the Court, should not be any more or less immune from federalism limits than statutes that expand constitutional rights beyond judicial interpretations. To treat section 1983 differently than other statutes enacted to enforce the Civil War Amendments permits the Court, acting in conjunction with Congress, to impose duties on the states that would otherwise be subject to some scrutiny if either Congress or the Court acted alone.[414]

412. U.S. CONST. art. VI, § 3.

413. The federalism issues raised by section 1983 are typically considered questions of limits on judicial, not congressional, power. *E.g., Developments*, *supra* note 351, at 1175-90. Even in *Monell*, when the Court formally addressed the question of Congress' power to create a cause of action for deprivation of constitutional rights, it upheld Congress' power on the basis of its prior holding in Milliken v. Bradley, 433 U.S. 267, 291 (1977) that the tenth amendment does not limit the equitable powers of a federal court in a section 1983 school desegregation case. 436 U.S. at 690 n.54.

414. There are four ways in which the Congress and the Court can enforce the Civil War Amendments by imposing a duty on the states to protect individual rights. First, Congress acting alone can determine that an individual interest is entitled to protection as a statutory right, provide a private cause of action to enforce that right, vest a court with jurisdiction to hear the action, and authorize the court to award a particular remedy. Title VII of the Civil Rights Act of 1964 as

The question of federalism limits on section 1983 would not be an

amended provides a good example of this alternative. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980). It prohibits employment discrimination by public and private employers on the basis of race, religion, sex or national origin; it authorizes a private cause of action if provisions for public enforcement are inadequate; it vests the courts with jurisdiction to hear actions arising under Title VII; and it authorizes the courts to enjoin unlawful practices, to order reinstatement, and to award back pay and attorneys' fees. *See* Note, *supra* note 360, at 372 & nn.1-5. Although the courts have dismissed rather easily the question of federalism limits on Congress' power to enforce the fourteenth amendment by enacting Title VII, the issue has at least been considered. *See supra* notes 356-63 and accompanying text.

A second means of enforcing the Civil War Amendments depends primarily on the courts instead of Congress. A federal court, assuming a general grant of statutory jurisdiction such as 28 U.S.C. § 1331 (Supp. IV 1980), can act alone by determining that an individual interest is protected as a constitutional right, recognizing an implied cause of action under the fourteenth amendment to enforce it against a state, and exercising traditional judicial remedial powers. This means of enforcing the rights protected by Civil War Amendments has received scant judicial exploration because Congress provided a cause of action and authorized a remedy for the violation of constitutional rights under color of law in the Civil Rights Act of 1871, 42 U.S.C. § 1983 (Supp. IV 1980), and an action could be maintained indirectly under this section against a state by a suit against a state officer. Nevertheless, the available evidence suggests that the courts do consider federalism principles as a potential restraint on their power to imply a cause of action under the fourteenth amendment. Before the 1978 decision in *Monell*, reversing a prior holding that section 1983 did not create a cause of action against a municipality, *see supra* note 351, many courts considered the question whether a cause of action could be implied under the fourteenth amendment against a municipality for the violation of constitutional rights. *See generally* Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 HARV. L. REV. 922 (1976). Some of these courts considered the question whether federalism principles limited judicial power to create an implied cause of action. *See, e.g.,* Turpin v. Mailet, 579 F.2d 152, 160 n.25 (2d Cir.), *vacated and remanded,* 439 U.S. 974 (1978) (for further consideration in light of Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978)), *modified on remand,* 591 F.2d 426 (2d Cir. 1979) (*NLC* and the tenth amendment do not bar judicial implication of a damages remedy under the fourteenth amendment against a municipality for violation of constitutional rights); Kostka v. Hogg, 560 F.2d 37, 44 n.6 (1st Cir. 1977) (tenth amendment suggests caution in exercising judicial power to create action to enforce the fourteenth amendment against a municipality for violation of constitutional rights). *Cf.* Rhodes v. Wichita, 516 F. Supp. 501 (D. Kan. 1981) (post-*Monell* determination that *NLC* does not bar an implied constitutional cause of action against a municipality under a theory of respondeat superior although *Monell* prohibited municipal liability under this theory in a section 1983 action). Notwithstanding significant differences between the tenth and eleventh amendments, *see supra* note 347, cases holding that an implied private right of action under the fourteenth amendment does not override the eleventh amendment suggest that the tenth amendment or general principles of federalism may impose a similar constraint. *E.g.,* Garrett v. Illinois, 612 F.2d 1038 (7th Cir.), *cert. denied,* 449 U.S. 821 (1980); Holley v. Lavine, 605 F.2d 638, 647-48 (2d Cir. 1979), *cert. denied,* 446 U.S. 913 (1980).

Although no case directly addressing the question of federalism limits on judicial power to imply a private cause of action against a state for violation of constitutional rights has been found, the Fourth Circuit has held that both federalism and separation of powers principles prohibit an implied public cause of action to enforce rights protected by the thirteenth and fourteenth amendments. United States v. Solomon, 563 F.2d 1121, 1129 (4th Cir. 1977) (suit by the United States Attorney General without specific statutory authorization against several state officers to enjoin

important issue if the Court interpreted constitutional rights narrowly. The corresponding restrictions on the exercise of state authority and the states' duty to remedy constitutional violations would in turn be limited. The truth is quite the opposite—the courts have interpreted constitutional rights broadly, and the enforcement of these rights under section 1983 has had a major impact on the states.[415] The absence of any federalism limits[416] on section 1983 must be justified by something

practices and policies that allegedly violated the constitutional rights of mentally retarded persons confined in a state institution), *aff'g* 419 F. Supp. 358, 366-68 (D. Md. 1976).

In addition to an implied cause of action to enforce constitutional rights, a third means of enforcing the Civil War Amendments is an implied private cause of action to enforce statutory rights. *See generally* Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View,* 87 YALE L.J. 1378 (1978). For example, Title IX of the Education Amendments of 1972 prohibits sex discrimination by private and public educational institutions that receive national financial assistance. 20 U.S.C. § 1681 (1976). It also establishes an administrative enforcement procedure to terminate assistance to institutions that violate the act. 20 U.S.C. § 1682 (1976). In Cannon v. University of Chicago, 441 U.S. 677 (1979), the Court held that there is an implied cause of action under Title IX against a private educational institution. On its face Title IX is a typical spending program, and the prohibition of sex discrimination is a condition of national aid. Although the *Cannon* court did not consider the source of Congress' power to prohibit sex discrimination and the sparse legislative history does not indicate the constitutional base of Congress' power, *see* Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX,* 88 YALE L.J. 1254, 1255 n.11 (1979), the decision in effect read the prohibition itself, apart from the funding sanction, as an exercise of Congress' power to enforce the fourteenth amendment. In the absence of any clear invocation of the commerce power as in the ADEA and the Equal Pay Act, *see supra* text accompanying notes 366, 372 & 375, section 5 of the fourteenth amendment would seem to be the most logical source of Congress' power to establish the statutory right and corresponding obligations of public and private educational institutions. Given the statutory right, the Court then implied a private cause of action to enforce it and dismissed the question of federalism limits on its power on the ground that the prohibition of invidious discrimination is the primary responsibility of the national government. 441 U.S. at 712.

A fourth means of enforcing the Civil War Amendments is that Congress can, as it did in the Civil Rights Act of 1871, provide a cause of action, vest a court with jurisdiction, and authorize remedies for violations of constitutional rights as determined by the courts. 28 U.S.C. § 1343(a)(3) (Supp. IV 1980); 42 U.S.C. § 1983 (Supp. IV 1980).

From the perspective of national and state relations, it makes no difference whether Congress establishes a statutory right and a cause of action, whether the Court establishes a right and implies the cause of action, whether Congress creates a right and the Court implies a cause of action, or whether the Court defines a right and Congress authorizes a cause of action. Given identical effects on the states, there would seem to be no reason why any one of these four means of enforcing the Civil War Amendments should be any more or less subject to federalism restraints. Moreover, the historical argument that the framers of these amendments intended to expand the nation's powers over the states would not seem to warrant any distinctions.

415. *See supra* note 351.

416. Federalism limits on the enforcement of the fourteenth amendment under section 1983 could be imposed at three points. First, Congress' power to create a cause of action to enforce the rights protected by the fourteenth amendment could be limited. *Monell, see supra* note 351, seems to foreclose the possibility of *NLC* or federalism limits on Congress' power, but it could still be

more than resort to the convenient, all-inclusive theory that the framers of the Civil War Amendments intended to expand national powers. That "something more" is not provided by the arguments that Congress can do as much as the Courts to enforce the Constitution, that there is no legitimate state sovereignty interest in violating the Constitution, and that state officers are found to obey the Constitution.[417] These arguments all beg the question of federalism limits on judicial power to expand the constitutional obligations of the states.

The Court's recent opinion in *Pennhurst State School and Hospital v. Halderman*[418] suggests that the Court may be forced to confront the problems inherent in its theory that federalism principles impose no limits on Congress' powers to enforce the Civil War Amendments as well as its view of the relationship of section 1983 to other statutes enacted under the enforcement powers conferred by these amendments. In this case, the Court suggested that *NLC* may limit Congress' power to enforce the fourteenth amendment by defining a minimum level of care for retarded persons and by requiring the states to meet these standards.[419] Even if, as the Court concluded, Congress did not exercise its power under section 5 of the fourteenth amendment to enact the statute or even if such a statute would not be within Congress' power as "ap-

argued that section 1983 is not "appropriate legislation" to enforce a particular constitutional right under the fourteenth amendment. *See supra* note 355. Second, the constitutional rights enforceable under section 1983 could be construed narrowly. For example, in *Elrod v. Burns*, Chief Justice Burger suggested that the first amendment rights of public employees not to be discharged on the basis of their political affiliation should be construed narrowly to avoid interference with the traditional political practice of patronage appointments. 427 U.S. 347, 375-76 (1976) (Burger, C.J., dissenting). Such judicial self-restraint in interpreting the Constitution is not, however, a characteristic of the modern Court, and it hardly provides any principle for limiting national interference.

A third alternative is to recognize federalism limits on the courts' remedial powers. Most commentators agree that an accommodation between federalism principles and the protection of individual rights under section 1983 should be achieved by limiting the courts' remedial powers. Frug, *supra* note 351, at 787-94; *Developments*, *supra* note 351, at 1175-90. The Supreme Court has not yet decided clearly whether *NLC*, federalism principles, or the tenth amendment limits the equitable powers of federal courts. On the one hand, it has held that the tenth amendment does not limit the powers of a federal court to enforce constitutional rights in a section 1983 school desegregation case. Milliken v. Bradley, 433 U.S. 267, 291 (1977). On the other hand, it has also suggested, in a case where it found no justiciable or established violation of constitutional rights, that federalism principles limit a federal court's equitable powers to control the administration of a municipal police department. Rizzo v. Goode, 423 U.S. 362, 377-80 (1976); Frug, *supra* note 351, at 747.

417. *See supra* text accompanying notes 410-12.

418. 451 U.S. 1 (1981). This case is also discussed *supra* at notes 324 & 342.

419. *See supra* note 342.

propriate legislation" to enforce the fourteenth amendment,[420] similar obligations could be imposed on the states if the Court recognized that retarded persons have a constitutional right to treatment.[421] In an action under section 1983, a court could enforce this constitutional right to treatment by an order enjoining state officials to provide, perhaps regardless of costs, the constitutionally required minimum level of care.[422] Whether a right to treatment is established by statute or by judicial interpretation, the corresponding duty imposed on the state is the same. Since such a statutory or constitutional right of retarded persons to a minimum level of care would appear to exceed the rights for which the framers of the Civil War Amendments intended national protection, the intrusion on state authority cannot be justified simply by invoking the platitude that the framers intended to expand the nation's powers.

4. Shopping for an Appropriate Power to Avoid NLC

In the absence of any persuasive distinction between the war power, the spending power, and the power to enforce the Civil War Amendments on the one hand and the commerce power on the other hand, the concept of state sovereignty announced in *NLC* has no content. The decision seems to be little more than an invitation to the courts and Congress to shop for an appropriate power to avoid federalism limits.

Chief Justice Burger's opinion in *Fullilove v. Klutznick*[423] is an apt example of power shopping by a court. The Public Works Employment Act of 1977 authorized national grants to state and local governments for the construction of public works projects. The principal issue in *Fullilove* was whether a condition of the grant that required ten percent of the national funds to be used to aid minority-owned business enterprises (MBE) violated the equal protection clause, but the Chief

420. The Court stated that Congress might lack the power to create the right of a retarded person to a minimum level of care and the corresponding duty of the state because the Court had not yet recognized a constitutional "right to treatment." 451 U.S. at 16 n.12.

421. The district court in this case found that retarded persons who are institutionalized have a constitutional right to treatment, but neither the court of appeals nor the Supreme Court decided the constitutional claim on the merits. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1313-20 (E.D. Pa. 1977), *aff'd in part and rev'd and remanded in part,* 612 F.2d 84, 94, 115 (3d Cir. 1979) (en banc), *rev'd and remanded,* 451 U.S. 1, 31 (1981).

422. For a thorough analysis of the equitable powers of the federal courts to enforce the constitutional rights of prisoners and inmates of institutions for the mentally retarded and mentally ill and of federalism limitations on these powers, see Frug, *supra* note 351.

423. 448 U.S. 448 (1980).

Justice also addressed the question of federalism limits on Congress' power to impose this requirement on state and local governments.[424] His analysis turned on the anachronistic notion that the spending power can only be used to achieve ends that Congress could obtain under its other enumerated powers.[425] He found first that Congress had the power under the commerce clause[426] to apply the MBE provision to private contractors, who received the national funds from the state and local grantees and were required to assist in achieving the ten percent goal, because their activities affect interstate commerce.[427] The commerce power, however, could not support the application of the MBE provision directly to the state and local government recipients of the grant because national regulation of state and local government procurement practices was barred by *NLC*.[428] The Chief Justice then found that the state sovereignty objection could be "avoided"[429] because Congress could have imposed the MBE requirement under its power to enforce the fourteenth amendment, which is not subject to the federalism restraints of *NLC*.[430] This search for the "correct" power to excuse national regulation of state and local government from federalism restraints is ironic because the Chief Justice could have resorted to the prevailing view that *NLC* is applicable to the spending power.

The question whether a court should judge a statute by the power Congress purports to exercise or by the powers Congress might have exercised[431] remains unsettled. The Chief Justice in *Fullilove* and many lower courts[432] have been willing to assume that Congress acted

424. *Id.* at 473-78. Chief Justice Burger wrote for himself and Justice White. Although Justice Powell wrote a separate concurrence, he joined the Chief Justice's opinion. *Id.* at 496.

425. The Chief Justice initially recognized that the spending power is "an independent grant of legislative authority, distinct from other broad congressional powers," but his analysis turned on the much narrower view that "[t]he reach of the spending power, within its sphere, is at least as broad as the regulatory powers of Congress." *Id.* at 474-75. The contest between these two contending interpretations of the spending power was resolved in favor of the former in United States v. Butler, 297 U.S. 1, 16-19 (1936), and the resurrection of the Madisonian view of the spending power at this late date is, to say the least, surprising. A recent district court decision also reverts to a narrow interpretation of the spending power. *See supra* note 314.

426. U.S. CONST. art. I, § 8, cl. 3.

427. 448 U.S. at 475-76.

428. *Id.* at 476.

429. *Id.* For purposes of demonstrating the Court's effort to supply Congress with the appropriate power to escape *NLC*, the Chief Justice's choice of words is serendipitous.

430. *Id.*

431. G. GUNTHER, *supra* note 56, at 223 n.*.

432. Although the Age Discrimination in Employment and Equal Pay Acts were enacted

under its power to enforce the fourteenth amendment in order to elude the federalism bar of *NLC*. Nevertheless, the Court has stated that where a national statute would impose affirmative obligations on the states to spend large sums of money to protect individual rights, Congress must state its intention to enforce the fourteenth amendment clearly because the Court will not assume an intention to intrude on state sovereignty.[433] The choice between requiring Congress to state clearly its reliance on a power that is immune from *NLC* and upholding a statute that is enacted under a power subject to federalism limits on the ground that Congress could have enacted it under another power is difficult because a court is torn by two conflicting principles of judicial deference to Congress. One principle teaches that Congress has the responsibility for altering the balance of national and state powers and that courts should construe statutes narrowly to avoid expanding national power.[434] The other principle teaches that courts should attempt to uphold statutes whenever possible by assuming that Congress has acted within its constitutional powers.[435]

As long as the courts adhere to the view that federalism limits vary with the constitutional basis of Congress' power, the question whether a court should judge a statute on Congress' "recitals of the power which it undertakes to exercise"[436] will remain. Even if the Court were to decide that Congress must invoke expressly its war power, spending

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under the commerce power, many lower courts have sustained the application of the requirements of these statutes to state and local governments over federalism objections on the theory that Congress could have enacted them under its power to enforce the fourteenth amendment. *See supra* notes 372-82 and accompanying text.

433. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 16-17 (1981). *See supra* notes 324 & 342 and accompanying text. The requirement that Congress state clearly its intention to rely on a particular power that is exempt from *NLC* is supported by several other recent cases in which the Court has held that Congress must state clearly its intention to override a state's eleventh amendment immunity. Hutto v. Finney, 437 U.S. 678, 694 (1978) (clear statement in the legislative history); Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976) (explicit statutory language). This clear-statement requirement apparently appeared for the first time in Justice Rutledge's concurring opinion in New York v. United States, 326 U.S. 572, 585 (1946).

434. *E.g.*, United States v. Enmons, 410 U.S. 396, 411-12 (1973); United States v. Bass, 404 U.S. 336, 349 (1971).

435. *E.g.*, Califano v. Yamasaki, 442 U.S. 682, 693 (1979); NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 30 (1937).

436. The phrase is taken from Justice Douglas' opinion in Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948). In *Woods*, Douglas argued that the constitutionality of a statute did not turn on Congress' recital of its power, but in a later case he stated that a statute must be judged on the basis of the power that Congress actually exercised. Minor v. United States, 396 U.S. 87, 101 (1969) (Douglas, J., dissenting). *See* G. GUNTHER, *supra* note 56, at 223 n.*.

power, or powers to enforce the Civil War Amendments in order to override *NLC*,[437] Congress would still be able to shop for the "right" power. Power shopping either by the Court or Congress is, however, not the problem; it is a symptom.

There would be nothing wrong with Congress shopping for a particular power that is exempt from judicially imposed federalism limits if, inherent in the exempted powers, there was either some guarantee of protection for state interests or a justification for national intervention that is not present in the powers subject to *NLC*. The courts, however, have not articulated any adequate basis for exempting three of Congress' powers, and the empty distinctions suggest that the *NLC* concept of state sovereignty has a hollow core. Congress can in large part achieve the same results under its exempted powers as it would otherwise accomplish under the powers limited by *NLC*. As we shall see, protection of state interests turns on the question whether Congress, in exercising any one of its powers, is politically accountable. The rule that some powers are and other powers are not subject to federalism limits denies Congress the flexibility of using all its powers and obfuscates the real question whether political accountability limits Congress' power to control the states or justifies national control and when, in the absence of political accountability, judicial protection of the states' role in the federal system is necessary.

G. State Autonomy: Immunity for Traditional or Integral Functions and Balancing Tests

During the period between the Court's 1976 *NLC* decision and its

437. If Congress invokes a power limited by *NLC* when it could have enacted the statute under a power not so limited, it is reasonable to conclude that Congress was politically incapable of a complete decision to override state sovereignty. At least for those who support national power over the states on the ground that state interests are represented in Congress, *see infra* text accompanying notes 794-808, the clear-statement rule, *see supra* note 433, would seem to be a necessary corollary of their theory, and the Court then should not uphold a statute on the basis of a power that Congress might have invoked. For an argument that the Court should uphold a statute on the basis of powers that Congress might have invoked, see Note, *supra* note 369, at 679-81. Given the conclusion below that power shopping is only a symptom of the problem caused by the courts' artificial distinctions between Congress' powers, judicial power shopping can aggravate the problem of congressional power shopping only if the courts have the discretion to decide when to uphold a statute on the basis of an unrestricted power. If the courts are free to hold Congress to the powers it purports to exercise on one occasion and yet free on another occasion to look to powers that Congress might have exercised, then the courts will have an unprincipled means of sustaining only those statutes deemed to be wise interventions in state and local affairs.

consideration of state autonomy limits on national political authority in 1981 in *Hodel v. Virginia Surface Mining and Reclamation Association*[438] and, in 1982, in *United Transportation Union v. Long Island Rail Road*[439] and *Federal Energy Regulatory Commission v. Mississippi*[440] (*FERC*), the lower courts held consistently that *NLC* applies to statutes enacted under all of Congress' powers except the war, spending, and Civil War Amendment enforcement powers. Since the chief source of Congress' regulatory powers is the commerce clause, most of the elaboration of federalism limits by the lower courts has been in this context.[441] These courts all followed *NLC* directly in refusing to find any

438. 452 U.S. 264 (1981); Hodel v. Indiana, 452 U.S. 314 (1981) (companion case).

439. 102 S. Ct. 1349 (1982).

440. 102 S. Ct. 2126 (1982).

441. In addition to the commerce power, statutes enacted under the other powers enumerated in article I, section 8, may also raise significant federalism issues. For example, Congress has exercised its power under article I, section 8, clause 4, "to establish . . . uniform laws on the subject of bankruptcies throughout the United States" to regulate municipal bankruptcy. 11 U.S.C. §§ 901-946 (Supp. IV 1980). The provisions governing municipal bankruptcy, which are for the most part similar to the rules for private bankruptcy, restrict the states' power to control their insolvent political subdivisions. Although the Supreme Court upheld an early version of the municipal bankruptcy provisions, *NLC* has revived arguments that national regulation of municipal bankruptcy is unconstitutional. United States v. Bekins, 304 U.S. 27; *Municipal Bankruptcy, supra* note 16. *See supra* note 22.

Most of the federalism questions that the courts have addressed are raised by statutes enacted under such enumerated powers of article I, section 8, as the spending, commerce and bankruptcy powers, and under Congress' power to enact all laws that are "necessary and proper" to implement these enumerated powers. The enumerated powers, however, do not exhaust Congress' legislative powers. Congress also has the power to enforce "all other powers" vested by the Constitution in the national government. U.S. CONST. art. I, § 8, cl. 18. Among these "other powers," the guarantee clause, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," is potentially the most important source of congressional authority. U.S. CONST. art. IV, § 4. This clause is generally considered a dead letter because the courts have held that claims that state or national actions deny the state a republican form of government are nonjusticiable and because Congress has rarely invoked its power to enforce it. Note, *A Niche for the Guarantee Clause,* 94 HARV. L. REV. 681 (1981). Nonetheless, absent any judicially imposed federalism limits, Congress could exercise its power to enforce the guarantee clause to control the structure of state government and the states' political processes. *Dispensability of Judicial Review, supra* note 10, at 1599 n.258 (power to control the qualifications of state officials and selection by appointment or election). *Cf.* Note, *A Niche for the Guarantee Clause, supra* (judicial power to reorganize state government to protect individual rights).

Although the courts have never considered a question of federalism limits on Congress' powers to enforce the guarantee clause, they have considered federalism limits on Congress' authority to enforce powers other than those enumerated in article I, section eight. In *Coyle v. Smith*, the Court held that Congress could not control the location of a state capitol under its article IV, section 3, clause 1, power to admit new states. 221 U.S. 559 (1911). *See also* State v. Lewis, 559 P.2d 630 (Alaska), *appeal dismissed and cert. denied,* 432 U.S. 901 (1977). In United States v. Simms, 508 F. Supp. 1179 (W.D. La. 1979), the court held that Congress could enforce its consti-

limits on national regulation of private activity,[442] but they had great difficulty in determining the appropriate test of national power to regulate the states. Some courts read *NLC* to hold that traditional state activity is absolutely immune from all national control[443] and attempted to distinguish traditional and nontraditional governmental activity. Most courts, however, read *NLC* to invite a balancing test.[444]

As applied by the lower courts, these two tests of Congress' power under the commerce clause to regulate the states had no content and very little bite. Although *NLC* limited the commerce power in theory, the result of its application to statutes enacted under the commerce power was much the same as if Congress had enacted them under its war, spending, or Civil War Amendment enforcement powers. The lower courts, with a few notable and aberrational exceptions, typically upheld statutes enacted under the commerce power on the grounds either that the affected state function was not traditional or integral or that the national interest outweighed the state interest. Much as the lower courts limited the reach of *NLC* as a check on national regulation of the states under the commerce power, they also refused, for the most part, to invoke *NLC* as a restriction on the means employed by Congress under the commerce clause to induce the states to act as its agents in implementing national regulatory programs and to exercise affirmative authority over private activity.

Hodel, *United Transportation Union*, and *FERC* will not produce any major changes in the evaluation and disposition of arguments that state autonomy limits Congress' power under the commerce clause to regulate private activity, to regulate the states, or to require the affirma-

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tutional power under article 1, section 4, clause 1, to regulate the time, place, and manner of national elections by prohibiting bribery in a state election conducted at the same time as an election for national office. The court found that the statute was a necessary and proper means of protecting the integrity of national elections and that *NLC* was inapplicable because there was no interference with state regulation of state elections. *See* United States v. Bowman, 636 F.2d 1003 (5th Cir. 1981); United States v. Sayre, 522 F. Supp. 973 (W.D. Mo. 1981).

442. *See supra* notes 97-98 and accompanying text.

443. *See supra* text accompanying notes 116-17.

444. *See supra* text accompanying notes 118-20. The commentators, for the most part, agreed with the courts that *NLC* is best read to establish a balancing test, and they also applauded balancing as the best means of determining the scope of Congress' power to regulate the states. *E.g.*, Kilberg & Fort, National League of Cities v. Usery*: Its Meaning and Impact,* 45 GEO. WASH. L. REV. 613 (1977); Matsumoto, National League of Cities—*From Footnote to Holding—State Immunity from Commerce Clause Regulation,* 1977 ARIZ. ST. L.J. 35; Ripple & Kenyon, *State Sovereignty—A Polished But Slippery Crown,* 54 NOTRE DAME LAW. 745 (1979); *Municipal Bankruptcy, supra* note 16, at 1884-91.

tive exercise of state authority over private activity. The lower courts will find encouragement to continue rejecting tenth amendment claims because the Court upheld national power in all three cases. Nonetheless, these courts will also still be forced to grapple with state autonomy arguments on an ad hoc basis because the Supreme Court failed to establish any clear principle or criterion for federalism limits on the commerce power.

Hodel is the most disappointing of the three decisions because a nearly unanimous Court[445] reviewed the "actual basis and import"[446] of its *NLC* decision and formulated a three-prong test for evaluating *NLC* claims. Drawing on the language of the *NLC* plurality opinion, *Hodel* held that legislation enacted under the commerce power is invalid if: (1) it "regulates the 'States as States,' " (2) it "address[es] matters that are 'indisputably attributes of state sovereignty,' " and (3) the "States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' "[447] Notwithstanding the superficial allure of an enumerated test, the *Hodel* three-prong test is an intellectual sham because it does not resolve the basic issues left unanswered in *NLC*.[448] It does not define the states' role in the federal system nor does it establish a principled basis for judicial intervention in the national political process. *Hodel* teaches only that the Court now believes that some particular language of the *NLC* plurality opinion is especially pertinent.

In addition to the mere invocation of talismanic words from *NLC* and the failure to resolve the basic issues raised by *NLC*, the *Hodel* test is marred by three other defects. First, prong number one rules out any state autonomy limit on national authority to regulate private activity. Although the Court expressly held that *NLC* does not limit Congress' power to regulate private activity,[449] it did not explain why the states' interests in regulating private activity are any less important than the interests protected under the test from national interference. Second,

445. Eight Justices joined in the opinion. 452 U.S. 264, 266 (1981). The Chief Justice and Justice Powell concurred specially in separate opinions, but they did not question the Court's interpretation of *NLC*. *Id.* at 305-07. Although Justice Rehnquist concurred only in the judgment, he did not challenge the Court's reading of his plurality opinion in *NLC*. *Id.* at 307-13.

446. *Id.* at 286.

447. *Id.* at 287-88 (quoting National League of Cities v. Usery, 426 U.S. 833, 854, 845, 852 (1976)).

448. *See supra* text accompanying notes 125-34.

449. *See infra* text accompanying notes 458-64.

the *Hodel* test does not settle the question whether *NLC* provides absolute immunity for certain, specific state activities or whether the validity of national regulations as applied to the states is to be determined by balancing national and state interests. The third prong of the test suggests that traditional state functions enjoy absolute immunity from regulations established under the commerce power, but *Hodel* also approved a balancing test by stating that some national interests may justify "state submission" even if the three-prong test for immunity is satisfied.[450] Since the Court concluded that the first prong was not satisfied because the statute regulated private activity,[451] it did not interpret or apply the language quoted from *NLC* and provided no guidelines for identifying either protected state functions or for balancing national and state interests. Finally, *Hodel* recognized Congress' power to employ the states as its agents by upholding one of the means by which Congress induces the states to enforce national standards governing private activity.[452] The Court, however, did not apply its new test to this question of Congress' power to require the affirmative exercise of state authority over private activity. The Court did not explain why its three-prong test of Congress' power to diminish state autonomy by regulating the states did not also apply to the question of Congress' power to employ the states as the nation's agents. Nor did it formulate any alternative, principled test of this power.

The Court's 1982 decisions in *United Transportation Union* and *FERC* do not cure the defects of the three-prong *Hodel* test. In *United Transportation Union* the Court upheld national regulation of a state-owned railroad under the three-prong *Hodel* test because operation of a railroad is not a traditional state function.[453] This decision will encourage lower courts to decide questions about Congress' power to regulate the states on the basis of a distinction between traditional and nontraditional governmental functions.[454] Apart from reference to his-

450. 452 U.S. at 288 n.29. Although the Court did not use the word "balancing", the citation of Fry v. United States, 421 U.S. 542 (1975), and Justice Blackmun's concurring opinion in *NLC* supports the conclusion that the Court approved a balancing test. *See supra* text accompanying notes 118-20.

451. *See infra* text accompanying notes 458-63.

452. *See infra* text accompanying notes 559-80.

453. 102 S. Ct. 1349, 1353-54 (1982).

454. Shortly after *United Transportation Union* was decided, the Third Circuit invoked this decision and held that application of the overtime pay regulations of the FLSA to a transit authority was not barred by the tenth amendment because operation of a mass transit system is not a traditional function of state and local governments. Kramer v. New Castle Area Transit Auth.,

tory, it does not establish any criteria for identifying traditional state functions.[455] *United Transportation Union* also leaves unresolved the question whether a traditional function or balancing test should be employed to determine state immunity because the Court quoted *Hodel*'s statement that national interests may justify "state submission" even if all three prongs of the test are satisfied.[456] The application of the *Hodel* three-prong test by a unanimous Court in *United Transportation Union* would have suggested that the Court had settled on a fixed framework for analysis of *NLC* claims but for its decision in *FERC* only ten weeks later. In this case, the Court upheld Congress' power to employ the states as its agents in regulating private activity without any reliance on the *Hodel* three-prong test.[457]

Although the Court has decided three cases in the last two terms that provided an opportunity to define the states' role in the federal system and to establish a principle for judicial intervention in the national political process to protect the states, it has left unanswered these two basic questions raised by *NLC*. There is still no explanation for the absence of any federalism limit on Congress' power to regulate private activity and to diminish state autonomy by displacing state policy choices. The lower courts remain at sea without navigational aids to determine the scope of Congress' power to regulate the states and to use the states as its agents in administering and enforcing national regulations.

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677 F.2d 308 (3d Cir. 1982). *But see* Dove v. Chattanooga Area Regional Transp. Auth., 539 F. Supp. 36 (E.D. Tenn. 1981) (post-*United Transportation Union* decision holding that a municipal transit system is immune from the FLSA). The Third Circuit is the only court that has upheld the application of the FLSA to the states or their political subdivisions. *See supra* note 115. The Third Circuit's reading of *United Transportation Union* is supported by a subsequent order of the Supreme Court vacating a district court judgment that *NLC* bars the application of the FLSA to a local transit authority. San Antonio Metropolitan Transit Auth. v. Donovan, 25 W. & H. Cases 274 (W.D. 1981), *vacated and remanded sub nom.* Garcia v. San Antonio Metropolitan Transit Auth., 102 S. Ct. 2897 (1982) (for further consideration in light of United Transp. Union v. Long Island R.R., 102 S. Ct. 1349 (1982)).

455. *See infra* text accompanying notes 505-11.

456. 102 S. Ct. 1349, 1353 n.9 (1982). *See* Hamilton v. Board of Supervisors, __ Cal. 3d __, __, __ P.2d __, __, 182 Cal. Rptr. 868, 875-78 (2d Dist. 1982) (post-*United Transportation Union* decision upholding application of Jones Act, 46 U.S.C. § 688 (1976), to county as an employer on the ground that national maritime law does not interfere directly with integral governmental operations and without deciding whether operation of a rescue boat is a traditional governmental function).

457. 102 S. Ct. 2126, 2148-49 (1982) (O'Connor, J., concurring in part and dissenting in part).

1. Regulation of Private Activity

In *Hodel v. Virginia Surface Mining and Reclamation Association*,[458] the Court flatly held that neither *NLC* nor the tenth amendment limits Congress' power under the commerce clause to regulate private activity.[459] Several lower courts had held that national regulation of private businesses and individuals engaged in strip mining was precluded by *NLC* because it interfered with the traditional state governmental function of controlling land use.[460] Although the Court recognized that national regulation of private activity "curtail[s] or prohibit[s] the

458. 452 U.S. 264 (1981).

459. *Id.* at 283-93; Hodel v. Indiana, 452 U.S. 314, 330 (1981) (companion case).

460. The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. IV 1980) establishes national environmental standards for surface coal mining which require miners to restore the lands after the coal is removed and prohibit surface mining in some areas. *See generally* Harvey, *Paradise Regained? Surface Mining Control and Reclamation Act of 1977,* 15 HOUS. L. REV. 1147 (1978). If the state legislature enacts laws implementing the standards, the state may regulate surface mining; otherwise, the Secretary of the Interior must establish a program for regulating surface mining. 30 U.S.C. §§ 1253-1254 (Supp. IV 1980). *See infra* text accompanying notes 560-63.

Two federal district courts held that the Act was unconstitutional under the tenth amendment because it interfered with state regulation of land use. Indiana v. Andrus, 501 F. Supp. 452, 461-68 (S.D. Ind. 1980), *rev'd and remanded sub nom.* Hodel v. Indiana, 452 U.S. 314 (1981); Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 431-35 (W.D. Va. 1980), *rev'd and aff'd in part on other grounds and remanded sub nom.* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981). In addition to the tenth amendment bar, the Indiana district court also found that various provisions of the Act exceeded Congress' power under the commerce clause because the regulated activities did not have a substantial, adverse effect on interstate commerce; that the Act violated the fifth amendment guarantee of equal protection because it had a disproportionate impact on mining in some states; that the Act constituted a taking of private property without just compensation contrary to the fifth amendment; and that some of the enforcement provisions of the Act violated the constitutional guarantee of procedural due process. 501 F. Supp. at 457-61, 468-72. The Virginia district court rejected the commerce clause and equal protection arguments, but it found taking and procedural due process violations of the fifth amendment. 483 F. Supp. at 430-31, 435-48. Three other federal district courts rejected arguments that the Act was unconstitutional. Andrus v. P-Burg Coal., 495 F. Supp. 82 (S.D. Ind. 1980) (statute is within Congress' power under the commerce clause), *aff'd,* 644 F.2d 1231 (7th Cir. 1981); Concerned Citizens v. Andrus, 494 F. Supp. 679 (E.D. Tenn. 1980) (no fifth or tenth amendment violation); Star Coal Co. v. Andrus, 14 Envt. Rep. Cas. (BNA) 1325 (S.D. Iowa 1980) (preliminary injunction on grounds that Act exceeds commerce power, violates tenth amendment, constitutes a taking, and violates equal protection guarantee of fifth amendment denied, but granted with respect to an enforcement provision denying procedural due process).

The Supreme Court held that the Act is a valid exercise of the commerce power and that the tenth amendment does not bar either national regulation of private activity or the provision for state enforcement of the national environmental standards, and it rejected the fifth amendment contentions on the merits or on the ground that they were not ripe. Hodel v. Indiana, 452 U.S. 314 (1981); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

States' prerogatives to make legislative choices respecting subjects the State may consider important,"[461] it did not specifically characterize these state policy choices as an aspect of state sovereignty.[462] Perhaps because the Court did not confront directly the argument that the substitution of national policy for state policy diminishes state autonomy, it reversed the lower courts and upheld Congress' power to regulate private activity on the rather simple ground that recognition of a federalism limit would be contrary to long settled precedent.[463] Even before *Hodel*, the lower courts all concluded that *NLC* did not limit Congress' power under the commerce clause to regulate private activity,[464] and,

461. 452 U.S. at 290.

462. A year later the Court expressly recognized that state power to make policy decisions about private activity is "perhaps the quintessential attribute of sovereignty." Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126, 2138 (1982).

463. 452 U.S. at 292. Prior to the Court's decision, several commentators argued that *NLC* should not be limited to a prohibition of direct national regulation of the states and that it should be read more broadly to prohibit some types of national regulation of private activity that diminish the states' power to determine substantive policy for their citizens. Note, *Tenth Amendment Challenges to the Surface Mining Control and Reclamation Act of 1977: The Implication of* National League of Cities *on Indirect Regulation of the States,* 49 FORDHAM L. REV. 589, 595-611 (1981) [hereinafter cited as *Indirect Regulation*]; Note, *The Constitutionality of the Federal Surface Mining Control and Reclamation Act of 1977,* 13 IND. L. REV. 923, 940-45 (1980). *Contra* Brion, *Federal Regulation of Surface Mining in Virginia,* 67 VA. L. REV. 329, 338-40 (1981) (*NLC* does not bar national regulation of private activity).

464. Most courts simply held that *NLC* and the tenth amendment did not bar national regulation of private activity, but a few courts upheld national regulation of private activity and preemption of conflicting state regulations on the ground that state control of a particular private activity was not a traditional function of state government. For cases in the former category, see Nance v. EPA, 645 F.2d 701, 716 (9th Cir.), *cert. denied sub nom.* Crow Tribe of Indians, 102 S. Ct. 635 (1981)); United States v. Helsley, 615 F.2d 784, 787-88 (9th Cir. 1979); Vehicle Equipment Safety Comm'n v. National Highway Traffic Safety Admin'n, 611 F.2d 53, 54-55 (4th Cir. 1979); United States v. Avarello, 592 F.2d 1339, 1345 (5th Cir.), *cert. denied,* 444 U.S. 844 (1979); Commercial Mortgage Ins., Inc. v. Citizens Nat'l Bank, 526 F. Supp. 510, 522-23 (N.D. Tex. 1981); Florida Bd. of Business Regulation v. NLRB, 497 F. Supp. 599, 603-04 (M.D. Fla. 1980); Hewlett-Packard Co. v. Barnes, 452 F. Supp. 1294, 1301 (N.D. Cal. 1977), *aff'd,* 571 F.2d 502, 504 (9th Cir.), *cert. denied,* 439 U.S. 831 (1978); McInnis v. Cooper Communities, 611 S.W.2d 767 (Ark.), *rev'g* 49 U.S.L.W. 2469-70 (1981) (on rehearing the Arkansas Supreme Court reversed its prior decision that national regulation of interest rates charged by private lenders was an invalid exercise of the commerce power and barred by the tenth amendment); International Trading Ltd. v. Bell, 556 S.W.2d 420, 426 (Ark. 1976); Northern States Power v. Hagen, 314 N.W.2d 32, 38 (N. Dak. 1981). For cases in the latter category, see Hughes Air Corp. v. Public Utilities Comm'n, 644 F.2d 1334, 1339-40 (9th Cir. 1981) (regulation of air transportation not a traditional state function); Oklahoma v. Federal Energy Regulatory Comm'n, 494 F. Supp. 636, 653-58 (W.D. Okla. 1980) (regulation of intrastate sale of natural gas not a traditional state government function), *aff'd,* 661 F.2d 832 (10th Cir. 1981), *cert. denied sub nom.* Texas v. Federal Energy Regulatory Comm'n, 102 S. Ct. 2902 (1982); Standard Oil Co. v. Agsalud, 442 F. Supp. 695, 710-11 (N.D. Cal. 1977) (regu-

unlike *Hodel*, they rarely paused even to note that national regulation of private activity displaces state power to determine substantive policy.

The significance of the Court's rather casual determination in *Hodel* that national regulation of private activity is completely immune from federalism limits may be illustrated by considering the potential impact of the national antitrust laws on the states. The Sherman Act[465] establishes a policy of free competition which applies broadly to private activity in interstate commerce. No one doubts that Congress has the power to regulate private anticompetitive conduct under the commerce power. It is possible that many conflicting state regulations which require private parties to act anticompetitively could have been preempted, but a wholesale displacement of state economic regulation of private activity by the national policy of competition was avoided by the Supreme Court's decision in *Parker v. Brown*.[466] The issue in *Parker* was whether a state agricultural program that restricted competition among raisin producers in order to maintain prices violated the

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lation of private health insurance plans is not an essential and traditional function of state government), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 102 S. Ct. 79 (1981).

There is limited support for the proposition that state-regulated private activity is exempt from national regulation by virtue of *NLC*. A few courts have read *NLC* to support the conclusion that national law should not be interpreted to preempt state control of private activity. New York Telephone Co. v. New York State Dep't of Labor, 566 F.2d 388, 393 (2d Cir. 1977), *aff'd*, 440 U.S. 519 (1979); Summey v. Ford Motor Credit Co., 449 F. Supp. 132, 139 (S.D. Cal. 1976), *aff'd mem.*, 573 F.2d 1306 (4th Cir. 1978); State v. Local 1115 Joint Bd., 56 A.D.2d 310, 314-15, 392 N.Y.S.2d 884, 887 (1977). One court has held that *NLC* immunizes state-funded private activity from the FLSA. *See supra* note 115.

Lower federal courts have also held that national regulation of private activity under powers other than the commerce clause is not prohibited by *NLC* or the tenth amendment. *E.g.*, National Ass'n of Property Owners v. United States, 499 F. Supp. 1223, 1259-62 (D. Minn. 1980), *aff'd sub nom.* Minnesota v. Block, 660 F.2d 1240, 1251-53 (8th Cir. 1981) (national regulation under the property clause, U.S. CONST. art. IV, § 3, cl.2, of lands adjacent to lands owned by the United States is not prohibited by the tenth amendment), *cert. denied*, 102 S. Ct. 1645 (1982); Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 848 (E.D. Va. 1980) (designation of an area as a National Historic Landmark which restricts private use of land does not violate tenth amendment by interfering with local zoning powers, but court did not consider whether the national statute was a valid exercise of any particular constitutional power).

Post-*Hodel* lower courts, of course, have had no doubts that national power to regulate private activity and to displace state regulation is not limited by *NLC*. City of New York v. United States Dep't of Transp., 539 F. Supp. 1237, 1253 (S.D.N.Y. 1982); SED, Inc. v. City of Dayton, 519 F. Supp. 979 (W.D. Ohio 1981); United States v. 0.16 of an Acre of Land, 517 F. Supp. 1115, 1122 (E.D.N.Y. 1981).

465. 15 U.S.C. §§ 1-7 (1976).

466. 317 U.S. 341 (1943).

Sherman Act. Although the Court assumed that a similar private agreement among growers would violate the Sherman Act and that Congress could prohibit such a state program because of its effect on commerce, it held that the state program did not violate the Sherman Act because Congress had not intended to limit state action.[467]

The extent to which the "state action" rule of *Parker* immunizes the states and private parties from antitrust liability is not settled,[468] but for our purposes, the crucial point is that *Parker* preserves some state regulation of private activity from being superseded by national antitrust regulation of private individuals and business.[469] The state action doctrine is, however, only a matter of statutory interpretation, and it has always been understood, at least prior to *NLC*, that Congress could preempt all state regulation that requires private parties to engage in anticompetitive conduct.[470] If Congress were to amend the Sherman Act to override *Parker*, a nationally determined free market policy would supplant a wide range of state regulation of private activity that has anticompetitive effects.[471] Although some have suggested that *NLC* could serve the same purpose as the *Parker* state action doctrine and limit Congress' power to supersede state economic regulation of private

467. *Id.* at 350-52. The Court's interpretation of the statute was influenced by the consideration that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351. This concern about interference with state officers administering the agricultural program misses the more fundamental federalism question of interference with the program itself and displacement of the state's economic and regulatory policies.

468. *See, e.g.,* Handler, *Antitrust-1978,* 78 COLUM. L. REV. 1363 (1978); Note, Parker v. Brown *Revisited: The State Action Doctrine After* Goldfarb, Cantor *and* Bates, 77 COLUM. L. REV. 898 (1977).

469. *Compare* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978) (state regulation of competition between new motor vehicle dealers exempt from antitrust liability under *Parker*) *with* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (state regulation of wine producers and wholesalers does not qualify for *Parker* immunity).

470. The Court in *Parker* recognized that Congress could preempt state regulation that requires private parties to engage in anticompetitive conduct. *See supra* text accompanying note 467. Professor Handler, the foremost student of the antitrust laws, has argued that "*Parker* is integral to our federalism" and that preemption of state economic regulation would be unwise, but he did not argue that Congress lacks this power. Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine,* 76 COLUM. L. REV. 1 (1976).

471. State anticompetitive laws that are arguably inconsistent with national antitrust policy include: restrictions on retail sales such as Sunday closing and blue laws, regulation of the size and design of signs advertising prices, bank branch restrictions, preferences for in-state purchases, and occupational licensing. For more complete lists, see Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation,* 39 ANTITRUST L.J. 950, 951 (1970); Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U.L. REV. 71, 75-77 (1974).

activity,[472] these hopes are probably misplaced. *Hodel* held flatly that federalism principles do not limit Congress' power to regulate private activity under the commerce power. Even though a congressional determination that the national free market policy should override state economic regulation of private activity would substantially expand the political authority of the nation at the expense of the states, *NLC* does not limit national control of private individuals and business. At most, *NLC* establishes some limits on Congress' power to apply the antitrust laws directly to state and local government activity.[473]

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472. Blumstein & Calvani, *State Action as a Shield and a Sword in a Medical Services Antitrust Context:* Parker v. Brown *in Constitutional Perspective,* 1978 DUKE L.J. 389, 400, 413; Rogers, *Municipal Antitrust Liability in a Federalist System,* 1980 ARIZ. ST. L.J. 305, 318-31; Note, *The Application of Antitrust Laws to Municipal Activities,* 79 COLUM. L. REV. 518, 535-37 (1979) [hereinafter cited as *Municipal Antitrust Liability*]; Note, *supra* note 468, at 899 n.6.

473. As long as the state action doctrine of *Parker* provides a sub-constitutional vehicle for reconciling national and state conflicts, the Court will not be forced to determine the extent to which *NLC* protects state and local governments from antitrust liability. In two significant respects, however, the Court has recently narrowed substantially the protection afforded to both government activity and government regulation of private activity under *Parker*, and these decisions may force a consideration of *NLC* or federalism limits on the application of the antitrust laws to state and local governments. With respect to the states, the Court has held that for state regulated private activity to be immunized from antitrust liability the anticompetitive "activity must be part of an articulated regulatory scheme," it must be compelled by the state acting as a sovereign, and the "state must continually supervise the anticompetitive conduct." *Municipal Antitrust Liability*, *supra* note 472, at 520-21 (synthesizing Bates v. State Bar, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)). Although the scope of the *Parker* exemption for state regulation of private activity has been narrowed and national power to displace anticompetitive state regulation has been expanded, the Court has not determined whether the new *Parker* standards also apply to state activity. With respect to local government, the Court has limited municipal antitrust immunity under *Parker* by holding that a municipality is subject to the antitrust laws for both its own activity and its regulation of private activity. The municipal antitrust liability decisions merit brief elaboration because they provide a vehicle for assessing the extent to which *NLC* may limit the application of the antitrust laws to state and local government.

In City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the Court held that a municipally owned and operated electric utility may be subject to the Sherman Act. The holding rested on sharply different interpretations of the state action doctrine. Writing for a plurality of four, Justice Brennan concluded that the *Parker* doctrine is not directly applicable to a municipality because Congress intended to reach municipalities under the Sherman Act and that a municipality, much like a private party, can qualify for the *Parker* exemption only if the state has authorized or directed its anticompetitive conduct when it empowered the municipality to act. *Id.* at 394-413. The Chief Justice concurred in the view that the Sherman Act applies to municipalities but he stated a different test for immunity under *Parker*. Drawing on *NLC*, he argued that traditional governmental functions are immune from the antitrust laws but that entrepreneurial activities of a municipality, like the operation of an electric utility, are protected by *Parker* only if they are, just like private activity, compelled by the state. *Id.* at 418-26. Justice Stewart argued in dissent that the Sherman Act applies only to private action and not to governmental activity and

Notwithstanding the Court's broad holding that *NLC* does not re-

that state and local governments are equally immune under *Parker* from antitrust liability. *Id.* at 426-41. For a thorough and perceptive analysis of these opinions, see *Municipal Antitrust Liability, supra* note 472, at 521-27. In Community Communications v. City of Boulder, 102 S. Ct. 835 (1982), the Court further limited municipal immunity from the antitrust laws under the *Parker* state action doctrine by holding that a municipality is subject to the antitrust laws for ordinances regulating private activity as well as for its own activity. A majority of five Justices applied the plurality standard of *City of Lafayette* to a municipal ordinance regulating the construction of cable television systems and held that the municipality was not within the *Parker* state action exemption because the local legislation was not "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy" to impose anticompetitive restraints. *Id.* at 841-43.

City of Lafayette and *City of Boulder* hold that a municipality may be liable for violations of the antitrust laws, but these cases do not settle the nature and scope of municipal antitrust liability. *See* Handler, *supra* note 468, at 1376-78 (questioning whether anyone can understand the *Parker* state action doctrine after *City of Lafayette*). Under the nebulous criteria of *City of Lafayette* and *City of Boulder*, a municipality may still come within the protection of the *Parker* state action exemption if its anticompetitive conduct is "directed or authorized" by the state, or if its action in enacting an ordinance with anticompetitive effects is "in furtherance or implementation of clearly articulated and affirmatively expressed state policy." 102 S. Ct. at 841; 435 U.S. at 416. Even if a municipality is not protected by *Parker*, the standards for establishing a violation of the antitrust laws by a municipality have not been established because in both *City of Lafayette* and *City of Boulder* questions about violation of the antitrust laws were left to the lower courts on remand. *See* 102 S. Ct. at 844-45 (Stevens, J., concurring). *See generally Antitrust Symposium: Municipal Antitrust Liability,* 1980 ARIZ. ST. L.J. 245-431 (debate after *City of Lafayette* about the extent of municipal immunity under *Parker* and the effects of the antitrust laws on municipal activity). Although the extent of municipal antitrust liability is unsettled, the holding in *City of Lafayette* that the Sherman Act applies to municipalities has generated arguments that the scope of municipal immunity provided under the *Parker* state action doctrine is constitutionally inadequate and that *NLC* may limit the application of national antitrust laws to municipal activity. *See* Rogers, *supra* note 472, at 318-31; *Municipal Antitrust Liability, supra* note 472, at 536-44. After *City of Boulder* it is reasonable to anticipate arguments that *NLC* also limits the application of the antitrust laws to municipal regulation of private activity.

Although the various opinions in *City of Lafayette* and *City of Boulder* all focus on the statutory question whether municipalities enjoy the *Parker* state action exemption as a matter of congressional intent, the decisions do settle, albeit indirectly, two questions about constitutionally based federalism limits on the application of the Sherman Act to state and local governments. First, the whole Court apparently agrees that *NLC* federalism principles restrict national interference with a state's control of its political subdivisions. The rule of these two cases that municipalities are immune from antitrust liability under the *Parker* state action doctrine if they are implementing a clearly articulated and affirmatively expressed state policy to displace competition rests on a recognition that the states are protected under *Parker* and that the states may use municipalities as their agents or instrumentalities. Application of the antitrust laws to a municipality that is implementing state policy would interfere with the states' authority over their political subdivisions, and such interference would be barred by *NLC*. The plurality's conclusion in *City of Lafayette* that *NLC* federalism issues are eliminated by holding that a municipality is immune from antitrust liability to the same extent as a state when it is acting pursuant to the state's directions is an acknowledgment that *NLC* limits national intrusions on a state's control over its political subdivisions. 435 U.S. at 412 n.42. Since the dissenting Justices in *City of Lafayette* and *City of Boulder*

strain Congress' power under the commerce clause to regulate private

found that the Court's interpretation of *Parker* would "impair the ability of a State to delegate governmental power broadly to its municipalities," they share the opinion that *NLC* provides some protection for a state's authority to control its political subdivisions. 102 S. Ct. at 850-51 (Rehnquist, J., dissenting); 435 U.S. at 438 (Stewart, J., dissenting).

A second point established by *City of Lafayette* and *City of Boulder* is that, apart from some agency relationship between the municipality and the state, neither municipal activity nor municipal regulation of private activity is independently entitled to protection from antitrust liability under *NLC*. Although a careful reading of *City of Lafayette* suggests that a majority might find *NLC* federalism limits on municipal antitrust liability, the Court in *City of Boulder* has apparently rejected this contention. In *City of Lafayette*, the plurality's finding that state political subdivisions are not sovereigns equivalent to the states indicates that a municipality is not as such independently entitled to protection from national control under *NLC*. *See* 435 U.S. at 412. Nevertheless, five members of the Court would have recognized federalism limits on municipal antitrust liability. Justice Stewart, writing for four members of the Court in dissent, argued that Congress did not intend to reach governments under the Sherman Act and that state and local governments are equally within the *Parker* state action exemption because *NLC* "held that the States and their political subdivisions must be given equal deference." *Id.* at 430 (Stewart, J., dissenting). The Chief Justice apparently concurred in this broad view of federalism limits on Congress' power over state political subdivisions because he stated that traditional governmental functions of a municipality, in contrast to the proprietary activity of operating an electric utility at issue in *City of Lafayette*, are brought within *Parker* by *NLC*. *Id.* at 422-24 (Burger, C.J., concurring). Notwithstanding these intimations of constitutionally based federalism limits on municipal antitrust liability in *City of Lafayette*, four years later a majority in *City of Boulder* adopted the *City of Lafayette* plurality's position that local governments are not sovereigns equivalent to the state and stated that the federalism principle underlying the *Parker* state action exemption "makes no accommodation for sovereign subdivisions of States." 102 S. Ct. at 840.

Even assuming that *City of Lafayette* and *City of Boulder* do not foreclose recognition of *NLC* federalism limits on the application of the national antitrust laws to a municipality, the opinions do not speak at all to the nature of these limits. To determine the limits that *NLC* may impose on the application of national antitrust laws to a municipality, or for that matter to a state, one must make a distinction that has not been important in the interpretation of the *Parker* state action doctrine. "State action" is generally understood to include both governmental regulation of private activity and state and local government activity. *See* Handler, *supra* note 470, at 8. Thus, for example, the state action doctrine does not distinguish state or local regulation of an electric utility and state or local operation of an electric utility. *Compare* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (state regulation of a private electric utility) *with* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (municipally owned electric utility). Since governmental regulation of an electric utility and government operation of an electric utility can serve the same purposes, recognition of both as "state action" for the purpose of determining immunity from the antitrust laws makes sense. *See* Note, *supra* note 468, at 912.

For the purposes of constitutionally based federalism limits under *NLC*, the Court has, however, established an artificial dichotomy between national regulation of private activity which displaces state regulation and national regulation of state and local governments themselves. Unfortunately, most analyses of federalism limits on the application of the national antitrust laws to state and local government have not been attentive to this dichotomy. *E.g.*, Rogers, *supra* note 472, at 318-37; *Municipal Antitrust Liability, supra* note 472, at 535-44.

Unless the Court abandons its recent pronouncement in *Hodel* that *NLC* does not limit national regulation of private activity, there is no federalism limit on the application of the antitrust laws to

activity, a conclusion that federalism principles impose no indirect limits would be rash. The modern Court has permitted national regulation of private activity that has only a tenuous connection with interstate commerce;[474] however, *Hodel* suggests that the Court may now be prepared to limit Congress' power under the commerce clause by requiring proof that the regulated local private activity affects interstate commerce.[475] Such a limit would not be imposed under the banner of fed-

private activity and neither state nor local regulation of private activity that is not protected by the *Parker* state action doctrine will be immunized by *NLC*. *But see* Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956, 961-69 (W.D. Mo. 1982) (municipal regulation of private ambulance services is immune from the national antitrust laws under the state action doctrine and the tenth amendment).

If, instead of state or local regulation of private activity, a state or local government activity like the operation of an electric utility is not protected from the national antitrust laws under *Parker*, *NLC* may impose some constitutionally based limits. Given the recent narrowing of the *Parker* state action exemption, two courts have already considered arguments that state and local activity not within *Parker* may be immunized from the antitrust laws by *NLC*. In Jordan v. Mills, 473 F. Supp. 13 (E.D. Mich. 1979), a district court held that even if the operation of a prison store was not within *Parker*, *NLC* precluded state antitrust liability. In *Hybud Equipment Corp. v. City of Akron*, the Sixth Circuit rejected the argument that municipal ordinances establishing a governmental monopoly in garbage collection and waste recycling violated the antitrust laws. 654 F.2d 1187 (6th Cir. 1981), *vacated and remanded,* 102 S. Ct. 1416 (1982) (for consideration in light of Community Communications v. City of Boulder, 102 S. Ct. 835 (1982)). The court did not determine whether this municipal activity was immunized under the *City of Lafayette* interpretation of the *Parker* state action doctrine. Instead, the court held that regardless of the ultimate rule for statutory municipal antitrust immunity, municipal operation of an incineration plant is a traditional activity of local government that is constitutionally immune from the antitrust laws under *NLC*. *Id.* at 1195-96. The scope of any constitutional immunity for governmental activity from the antitrust laws will turn at least in part on whether the Court applies a traditional function or balancing test to determine state immunity from national regulation. *See infra* text accompanying notes 489-513.

474. *E.g.,* Perez v. United States, 402 U.S. 146 (1971); Katzenback v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

475. Although the Court stated that the test of Congress' power under the commerce clause to regulate a local, private activity is whether Congress has a rational basis for its determination that the local activity affects interstate commerce, the opinions in both cases carefully scrutinized congressional findings that the particular, regulated aspects of surface mining affected interstate commerce. Hodel v. Indiana, 452 U.S. 314, 321-29 (1981); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 275-83 (1981). This careful review of congressional findings of the relationship between local activities and interstate commerce is contrary to the Court's deference in the past to unelaborated congressional assertions of its power to regulate private activity under the commerce clause. *E.g.*, Perez v. United States, 402 U.S. 146, 147 n.1 (1971). The Chief Justice and Justice Rehnquist argued separately that the long quiescent requirement of NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 37 (1937), that the local activity must have a substantial effect on interstate commerce was still a limit on Congress' power under the commerce clause. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 305 (Burger, C.J., concurring), 307-13 (Rehnquist, J., concurring in the judgment) (1981). *See also* McLain v. Real Estate Bd., 583 F.2d 1315, 1324 n.10 (5th Cir. 1978) (limits on the reach of the commerce power are

eralism, but it would have the same effect of limiting Congress' power to displace state regulation of private activity. Such an evasion of a principled explanation of federalism limits on Congress' power to regulate private activity under the commerce clause would aggravate the Court's failure to define the states' role in the federal system and would reduce the pressure to develop a comprehensive theory of Congress' power to control the allocation of political decisionmaking power.

Two aspects of Congress' power to regulate private activity under the commerce clause merit special note. First, although national regulation of private activity typically displaces state regulation, it may also affect state governmental activity. For example, national regulation of private individuals and businesses may prohibit or limit a state's exercise of its taxing powers. The power of a state to raise revenues through taxation is at the base of all state government activity, and no matter how narrowly traditional governmental functions are defined, it would seem to be the type of state function for which the Court attempted to provide some protection in *NLC*. Nevertheless, in two recent decisions upholding Congress' power under the commerce clause to prohibit certain state taxes as part of a scheme of national regulation of private businesses engaged in interstate commerce, the Court has not even noted the question whether *NLC* restricts Congress' power to limit state taxation.[476] If it is too much to conclude from these decisions

consistent with the principle of federalism reorganized in *NLC*), *vacated and remanded,* 444 U.S. 232 (1980); Engdahl, *Some Observations on State and Federal Control of Natural Resources,* 15 HOUS. L. REV. 1201, 1214-18 (1978) (argument that the Surface Mining Act is unconstitutional based on a narrow reading of the necessary and proper clause).

476. Maryland v. Louisiana, 451 U.S. 725 (1981); Arizona Pub. Serv. Co. v. Snead, 441 U.S. 141 (1979). *See also* Arizona v. Atchison, T. & S.F. R.R., 656 F.2d 398, 409 (9th Cir. 1981). Two lower federal courts have considered an argument that Congress' power to control state taxation is limited by the federalism principles of *NLC*. The Railroad Revitalization and Regulatory Reform Act of 1976 prohibits state and local taxes on railroad transportation property at a rate higher than that applicable to commercial or industrial property. 49 U.S.C. § 11503 (Supp. IV 1980). In Tennessee v. Louisville & N. R.R., 478 F. Supp. 199 (M.D. Tenn. 1979), *aff'd mem.,* 652 F.2d 59 (6th Cir.), *cert. denied,* 102 S. Ct. 135 (1981), a federal district court upheld national control of state taxation on the grounds that the national interest in revitalizing the railroads by eliminating discriminatory taxes outweighed the state's interest in a discriminatory tax classification and that the burden on the state was minor because it could collect the same amount of revenue by a nondiscriminatory tax. In Arizona v. Atchison, T. & S.F. R.R., 656 F.2d 398, 407-09 (9th Cir. 1981), the Ninth Circuit also upheld Congress' power under the commerce clause on similar grounds and on the additional ground that state regulation of railroads and state assessment of property taxes on instrumentalities of interstate commerce are not traditional or integral functions. *See also* Ogilvie v. State Bd. of Equalization, 657 F.2d 204 (8th Cir. 1981) (state tax that discriminates against railroads is invalid). In addition to national statutes limiting state taxation of private activity,

that Congress' power to restrict state taxation of interstate commerce is completely free from any federalism restraints,[477] it is not too much to conclude that they provide further evidence of the Court's failure to work out an intelligible principle of the states' role in the federal system.

United States v. Gillock[478] provides a second example of national regulation of private activity that affects state governmental functions. In this prosecution of a state legislator under three criminal statutes enacted under the commerce power, the Court held that the defendant's legislative acts could be introduced as evidence. Although the state constitution afforded the legislator an evidentiary privilege for legislative acts in a state court prosecution,[479] the Court found that

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state taxing power may also be limited by statutes that prohibit taxation of national instrumentalities and by international agreements prohibiting taxation of property owned by foreign governments. *E.g.*, United States v. Maryland, 488 F. Supp. 347 (D. Md.) (national statute prohibiting state and local taxes on the income of out-of-state congressmen residing in the state for the purpose of attending sessions of Congress), *aff'd*, 636 F.2d 73 (4th Cir. 1980); United States v. City of Arlington, 669 F.2d 925 (4th Cir. 1982) (real property of German Democratic Republic immune from a local real property tax); *see supra* note 56.

National statutes limiting state taxing power are rare, but the courts have frequently held that a state tax is invalid under the dormant commerce clause because it burdens or discriminates against interstate commerce. *Compare* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (state severance tax of up to 30% of the "contract sales price" of coal produced in the state held valid) *with* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977) (state tax that discriminated against out-of-state transactions held unconstitutional). In contrast to its failure to consider federalism limits on Congress' power to limit state taxation, the Court has considered the necessity of reconciling its power to invalidate state taxation of interstate business with the states' interest in exercising their taxing powers. *E.g.*, Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977).

477. Support for federalism limits on Congress' power to restrict state taxing powers is not hard to find. In Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1868), the Court found that there was no conflict between a state law requiring its political subdivisions to pay taxes in gold and silver coin and a national statute making United States notes legal tender. The Court construed the national statute to make United States notes legal tender only for private debts and not for state taxes, but there is language in the opinions which suggests that the statute was construed in this fashion because Congress lacks the power to control state taxation. Although this decision is hoary, modern support for federalism limits on Congress' power to control state taxation can be derived from the tax injunction act, 28 U.S.C. § 1341 (1976), which prohibits a federal court from restraining the collection of state taxes where a remedy is available in the state courts. *See* A Bonding Co. v. Sunnuck, 629 F.2d 1127 (5th Cir. 1980) (*NLC* counsels against federal court interference with state tax collection). For an analysis of national statutes limiting state taxation of interstate businesses and an argument that *NLC* limits Congress' power to control state taxing powers, see Parnell, *Constitutional Considerations of Federal Control Over the Sovereign Taxing Authority of the States*, 28 CATH. U.L. REV. 227 (1979).

478. 445 U.S. 360 (1980).

479. *Id.* at 368.

there was no impermissible national interference in the state legislative process because the criminal statutes regulated individual activity and did not directly control the state's legislative process.[480] Perhaps in recognition of the rather thin line between national regulation of individual activity and national control of the state government, the Court did not rely exclusively on its rule that *NLC* is inapplicable to national regulation of private activity. It also concluded that the national interest in enforcement of criminal statutes outweighs the "only speculative benefit to the state legislative process of its speech and debate privilege."[481] In balancing these interests, however, the Court did not con-

480. *Id.* at 371. The state legislator was charged with obtaining money under color of official right in violation of 18 U.S.C. § 1951 (1976), using an interstate facility to distribute a bribe in violation of 18 U.S.C. § 1952 (1976), and participating in an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962 (1976). Although these statutes apply directly to individual activity, the Court's implicit assumption that they regulate private individual activity, not the activity of an individual in his public, official capacity, is strained. Legislative acts are by definition only something that a public official can do and acting "under color of official right" is likewise not private, but public or governmental, activity.

481. 445 U.S. at 373. For an argument that the state interest in a speech or debate privilege for state legislators outweighs the national interest in enforcement of criminal laws, see Note, *Protection of State Legislative Activity from Federal Prosecution: Common-Law and Constitutional Immunity,* 58 B.U.L. REV. 469, 486-91 (1978).

The lower courts, albeit without reference to *Gillock*, have also rejected arguments that national criminal and bankruptcy statutes are invalid under *NLC* as applied to individuals because of their effects on state or local government. *Criminal statutes*: United States v. Angelilli, 660 F.2d 23 (2d Cir. 1981) (no *NLC* barrier to removal of local officer from municipal post for violation of national criminal statute); Hyland v. Fukuda, 580 F.2d 977 (9th Cir. 1978) (national statute prohibiting a felon from possessing a firearm does not interfere impermissibly with state employment decision to hire a felon and to permit the felon to possess a firearm because the national requirement is imposed on individuals and not directly on the state). *Cf.* United States v. Tonry, 605 F.2d 144 (5th Cir. 1979) (federal court order prohibiting a former congressman convicted of violations of national election laws from running for political office as a condition of probation does not interfere with the state power to control elections because it simply prohibits one individual from participating in politics); *In re* Special April 1977 Grand Jury, Appeal of Scott, 581 F.2d 589 (7th Cir.) (grand jury subpoena duces tecum to the staff of the state attorney general does not intrude impermissibly on state officers where the investigation concerns the personal affairs of the state attorney general), *cert. denied,* 439 U.S. 1046 (1978); *In re* Grand Jury Proceedings, 563 F.2d 577 (3rd Cir. 1977) (grand jury subpoena served on state senator does not interfere substantially with state functions); *In re* Grand Jury Empanelled Jan. 21, 1981, 535 F. Supp. 537 (D.N.J. 1982) (tenth amendment does not bar grand jury subpoena duces tecum for private firm's tax records protected by a state confidentiality statute). *Bankruptcy statutes*: *In re* Glidden, 653 F.2d 85 (2d Cir. 1981) (national bankruptcy regulation permitting discharge of debtor's child support obligations assigned to the state is valid although the effect is to reduce state revenue available to provide welfare assistance); *In re* Galbraith, 15 Bankr. 549, 555-58 (Bankr. E.D. Pa. 1981) (national bankruptcy regulation permitting discharge of state's judical lien on real property of welfare recipient is not barred by *NLC* notwithstanding some interference with the state's traditional function of providing welfare assistance); *In re* Holt, 11 Bankr. 797, 802-03 (Bankr. W.D. Pa. 1981) (na-

sider the state's interest in legislative independence and unfettered debate.

A second point to note about Congress' power to regulate private activity under the commerce clause is that the command may be addressed, as a formal matter, to the state and not to private individuals and businesses. In most cases, a national statute prescribes a rule for private activity directly, and state law regulating that activity is affected because it may be preempted.[482] In other cases, however, the national rule for private activity may be the consequence of a direct prohibition of state control of private activity.[483] Apart from the addressee of the

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tional bankruptcy regulation permitting discharge of debtor's child support obligations assigned to the state is valid although the effect is to reduce state revenue available to provide welfare assistance); *In re* Morris, 10 Bankr. 448, 451-55 (Bankr. N.D. Iowa 1981) (same and list of cases at 455); Minnesota *ex rel.* Daggett v. Barr, 315 N.W.2d 805, 806-07 (Iowa 1982) (same).

Although the courts have consistently rejected *NLC*-based arguments that national criminal and bankruptcy statutes are unconstitutional, one court has suggested that national power to regulate private activity may be limited because of its effects on the states. In *Jefferson County Pharmaceutical Association v. Abbott Laboratories,* the Fifth Circuit held, as a matter of statutory interpretation, that governmental purchases for traditional functions like hospitals are outside the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13 (1976). 656 F.2d 92 (5th Cir. 1981) (adopting the district court opinion at App. A, at 97-103), *cert. granted,* 102 S. Ct. 1629 (1982). The holding has the effect of exempting sales by private companies to state and local government from the antitrust price discrimination rules that apply to all other sales. Absent this exemption, the cost of government purchases would be increased because private companies would not be able to engage in price discrimination by charging lower prices to governmental bodies than are charged to private purchasers. The court bolstered its finding that governmental purchases are exempt from the Robinson-Patman Price Discrimination Act by drawing an analogy to *NLC*. The court reasoned that since a national statute setting the minimum price of labor purchased by the states and their political subdivisions was invalid, another statute in effect setting the minimum price for goods purchased by these entities would also be invalid. *Id.* at 102-03.

482. *See* cases cited *supra* note 464.

483. National statutes may also authorize state regulation of private activity that would otherwise be barred by the dormant commerce clause. *See supra* note 56. In Appeal of New England Power Co., 120 N.H. 866, 424 A.2d 807 (1980), *rev'd,* 102 S. Ct. 1096 (1982), the New Hampshire Supreme Court upheld such a national statute over a rather novel contention that *NLC* limits Congress' power to expand state authority over private activity. The court held that an order of the New Hampshire Public Utilities Commission prohibiting an electric utility from selling hydroelectric energy generated in New Hampshire via interstate commerce to consumers in other states was authorized by a national statute. According to the state court, Congress had expressly authorized certain states to reserve hydroelectric energy generated within the state for in-state uses if they had regulated the exportation of hydroelectricity prior to the enactment of the statute. Massachusetts, a neighboring state whose residents would be denied the comparatively inexpensive hydroelectric power, contended that the national statute construed in this fashion was unconstitutional because by favoring certain states it impaired the ability of other states to function effectively in the federal system contrary to *NLC*. *Id.* at 875, 424 A.2d at 813. The state court concluded that the tenth amendment imposed no limits on either Congress' power to expand the powers of some but not all states or Congress' power to regulate electric utilities since the regula-

command, there is no difference between national regulations directly applicable to private activity and a national prohibition of the exercise of state authority over private conduct because in either case the effect is to substitute national policy for state policy.[484] For example, Congress may prohibit certain state taxes on private businesses engaged in interstate commerce.[485] Although the command is directed to the state, Congress is in effect prescribing a rule that certain private activity shall not be taxed.

Another example is provided by *United States v. Ohio Department of Highway Safety*, in which the Sixth Circuit upheld Congress' power to prohibit a state from granting a motor vehicle registration to vehicles that fail to comply with nationally established air pollution standards.[486] The requirement that the states deny a motor vehicle registration is simply a limit on the exercise of state authority over private activity. If the national statute regulated private activity directly by prohibiting the operation of motor vehicles that fail to comply with pollution control requirements, it would have the same effect of prohibiting the states from granting a registration and authorizing operation of the vehicle in violation of national law. This requirement that the states deny motor vehicle registrations is part of a broader national regulatory program that requires the states to exercise affirmative authority over private activity.[487] Since Congress' power to compel the states to exercise affirmative authority over private activity raises important, unsettled questions, it is important to remember that the court did not

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tion of electric utilities is not an essential state governmental function. *Id.* The Supreme Court reversed the judgment of the state court on statutory construction grounds and did not address the tenth amendment argument. The Court found that Congress had not expressly authorized any state to restrict the sale of hydroelectric energy in interstate commerce, and the question of tenth amendment limitations on Congress' power to authorize state restrictions on interstate commerce was mooted. In the absence of such authorization, the Court held that under well-settled dormant commerce clause principles a state could not give its own residents a preference in the use of the state's natural resources and that the order of the New Hampshire Public Utilities Commission was invalid. 102 S. Ct. at 1100-03.

484. *See supra* note 73.

485. *See supra* note 476 and accompanying text.

486. 635 F.2d 1195 (6th Cir. 1980), *cert. denied,* 451 U.S. 949 (1981). The court could have upheld Congress' power on the ground that national regulation of private activity is not limited by *NLC*. *See supra* text accompanying notes 458-64. The court in fact applied a balancing test and concluded that the "federal interest in controlling air pollution far outweighs any state interest in permitting non-complying vehicles to use public streets and highways." 635 F.2d at 1205. For an explanation of the validity of this regulation, see *infra* text accompanying notes 862-63.

487. *See infra* text accompanying notes 581-606 & 693-703.

uphold any requirement that the state enforce a ban on driving a motor vehicle that fails to comply with the national requirement; it simply upheld a prohibition on the exercise of state authority over private activity.[488]

2. Regulation and Taxation of the States

a. The Commerce Power

The courts have recognized consistently that *NLC* limits Congress' power under the commerce clause to regulate the states, but the practical impact of *NLC* so far has been narrowly confined to decisions holding that the application of the minimum wage and maximum hour requirements of the FLSA to a wide variety of state and local government employees is unconstitutional.[489] Apart from the FLSA cases, the lower courts have rejected all but one challenge to national regulation of the states.[490] The sole exception was the Second Circuit's holding in *United Transportation Union v. Long Island Rail Road* that the Railway Labor Act was unconstitutional as applied to a state-owned commuter railroad because *NLC* prohibited national interference with the bargaining relationship between a state and its employees.[491] The Supreme Court, however, reversed this judgment and upheld Congress' power to regulate nontraditional state activities.[492]

The lower courts have employed traditional function tests, balancing

488. It is possible, however, to read the opinion more broadly. The court did not analyze the national requirement that the state deny a registration to motor vehicles which fail to comply with air pollution standards as national control of private activity, and its statement that the state must "deny the use of state-owned facilities [highways] to those whose use adds to the national problem of pollution," 635 F.2d at 1205, might be read as an approval of a requirement that the state must enforce the national rule prohibiting the operation of certain motor vehicles. Enforcement would entail the affirmative exercise of state authority over private activity and would go well beyond a prohibition of state power to authorize the operation of motor vehicles in violation of national law.

489. *See supra* note 115. One court has also suggested that *NLC* may bar the application of the national antitrust laws to a state prison store. *See supra* note 473.

490. The absence of judicial decisions holding that national regulation of state or local government is barred by *NLC* is at least in part explained by Congress' practice of exempting the states and their political subdivisions from regulations that apply to private industry. *E.g.*, 29 U.S.C. § 152(1), (2) (1976 & Supp. IV 1980) (regulation of labor relations); 29 U.S.C. § 652(4), (5) (1976) (occupational safety and health regulations); 29 U.S.C. §§ 1002(32), 1003(b)(1) (1976) (pension plans of state and local governments exempt from the Employee Retirement Income Security Program).

491. 634 F.2d 19 (2d Cir. 1980). *See infra* text accompanying notes 498-504.

492. United Transp. Union v. Long Island R.R., 102 S. Ct. 1349 (1982).

tests, and combinations of these two tests in sustaining Congress' power under the commerce clause to regulate the states. These courts have upheld the application to the states of requirements that a private royalty holder obtain national authorization to divert natural gas to intrastate commerce after it has been dedicated to interstate commerce,[493] that a private telephone company permit certain interconnections,[494] and that private employers file annual information reports on their pension plans.[495] One court has held that a local government agency, as well as private operators, must obtain a national permit under the Federal Water Pollution Control Act in order to dredge wetlands for the purpose of mosquito control.[496] Some lower courts have also upheld the application of antifraud provisions of the securities laws to securities issued by the states and their political subdivisions, notwithstanding claims of interference with the fundamental state and local governmental functions of borrowing money to fund essential governmental services.[497]

493. Public Serv. Co. v. Federal Energy Regulatory Comm'n, 587 F.2d 716 (5th Cir.), *cert. denied sub nom.* Louisiana v. Federal Energy Regulatory Comm'n, 444 U.S. 879 (1979). Although the state used its natural gas royalties for public education and it would have received greater royalties by selling the natural gas in intrastate commerce, the court found that the oil and natural gas business is not a traditional governmental function, the reduction of state revenues does not "directly displace" the state's traditional educational functions, and the national interest in a continuous supply of natural gas in interstate commerce outweighs the incidental effects on public education. In Oklahoma v. Federal Energy Regulatory Comm'n, 494 F. Supp. 636, 657 (W.D. Okla. 1980), *aff'd,* 661 F.2d 832 (10th Cir. 1981), *cert denied sub nom.* Texas v. Federal Energy Regulatory Comm'n, 102 S. Ct. 2902 (1982), the court upheld national regulation of the price of natural gas produced on state-owned lands.

494. Puerto Rico Tel. Co. v. FCC, 553 F.2d 694 (1st Cir. 1977). The court, apparently equating Puerto Rico with a state for the purposes of the tenth amendment, found that operation of a telephone company is not an integral governmental activity.

495. California *ex rel.* Younger v. Blumenthal, 457 F. Supp. 1309 (E.D. Cal. 1978), *rev'd on other grounds sub nom.* California *ex rel.* Deukmejian v. Regan, 641 F.2d 721 (9th Cir. 1981). The district court found that a requirement that the state, like private employers, must file an annual information report on its pension plans was not barred by *NLC.* Even though it increased to some extent the cost of state operations, the state's ability to structure its relationship with its employees was not affected and the burden of compliance was minimal where the information required was readily available. *Id.* at 1317-18.

496. United States v. Plaquemines Mosquito Control Dist., 16 Env't Rep. Cas. (BNA) 1649 (5th Cir. 1981), *cert. denied,* 102 S. Ct. 1972 (1982).

497. Securities issued by the states and their political subdivisions are generally denominated "municipal securities." *See* 15 U.S.C. § 78c(a)(29) (1976). Municipal securities are exempt from the reporting and registration requirements of the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1976 & Supp. IV 1980) (the 1933 Act) and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78jj (1976 & Supp. IV 1980) (the 1934 Act). Comment, *Federal Regulation of Municipal Securities: A Constitutional and Statutory Analysis,* 1976 DUKE L.J. 1261, 1264-65 [hereinafter cited as *Duke*

Although the Supreme Court reversed the Second Circuit's judgment

Comment]. These exemptions apparently rest on policy considerations and not on doubts about Congress' power to regulate municipal securities. Note, *The Constitutionality of Federal Regulation of Municipal Securities Issuers: Applying the Test of* National League of Cities v. Usery, 51 N.Y.U. L. REV. 982, 984 (1976) [hereinafter cited as *NYU Note*]; Note, *Disclosure by Issuers of Municipal Securities: An Analysis of Recent Proposals and a Suggested Approach,* 29 VAND. L. REV. 1017, 1020-22 (1976).

Two general antifraud provisions of the securities laws are, however, applicable to the states and their political subdivisions. Section 17(a) of the 1933 Act, 15 U.S.C. § 77q(a) (1976), and rule 10b-5, 17 C.F.R. § 240.10b-5 (1981), promulgated to enforce section 10b of the 1934 Act, 15 U.S.C. § 78j(b) (1976), generally impose a duty on the issuer of a security not to be misleading if it releases information to the public. Although section 17(a) has always been read to apply to governmental issuers, rule 10b-5 did not apply clearly to governmental issuers until it was amended in 1975. The Securities and Exchange Commission (SEC) has the power to enforce these antifraud provisions against governmental issuers and officials and municipal securities professionals by investigations, by suing for injunctions, and by recommending criminal prosecutions. A private right of action has been implied under rule 10b-5 and perhaps under section 17(a). Note, *Federal Securities Fraud Liability and Municipal Issuers: Implications of* National League of Cities v. Usery, 77 COLUM. L. REV. 1064, 1065 & n.2, 1070 & n.30, 1071, 1076-77 (1977) [hereinafter cited as *Columbia Note*].

The courts have considered tenth amendment challenges to the enforcement of the antifraud provisions of the securities laws against municipal issuers in the context of two SEC investigations and in two private actions for damages. In City of Philadelphia v. SEC, 434 F. Supp. 281 (E.D. Pa. 1977), *appeal dismissed for want of jurisdiction,* 434 U.S. 1003 (1978), the court held that a preliminary investigation of the sale of securities by Philadelphia was not barred by *NLC*. The city argued that the investigation would have an adverse impact on municipal services because it would undermine investors' confidence and force the city to pay higher interest rates. Although the court recognized the "financing and distribution of municipal services" as traditional governmental functions, it concluded that *NLC* did not bar an investigation because "the city has not been ordered to adopt any measure as to the financing and distribution of its services." *Id.* at 287-88. The City of New York also resisted an SEC investigation of its finances on *NLC* grounds, but its action for a declaratory judgment that an investigation of the issuance and sale of municipal securities was unconstitutional was dismissed and the investigation was completed. City of New York v. SEC, [1976-1977 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,667 (S.D.N.Y. 1976). *See also* COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, 96TH CONG., 1ST SESS., SECURITY AND EXCHANGE COMMISSION'S FINAL REPORT IN THE MATTER OF TRANSACTIONS OF THE CITY OF NEW YORK (Comm. Print 1979); Schwarz, *Municipal Bonds and the Securities Laws: Do Investors Have an Implied Remedy?,* 7 SEC. REG. L.J. 119, 120 n.2 (1979).

"No municipal securities issuer or issuer official has ever been held liable under the antifraud provisions," and private actions for damages against these issuers and officials have been rare. Doty & Peterson, *The Federal Securities Laws and Transactions in Municipal Securities,* 71 NW. U.L. REV. 283, 373 (1976). Only two courts have addressed the question of federalism limits on the application of the antifraud provisions to municipal issuers, and both avoided any resolution. With respect to rule 10b-5, these courts concluded that at least prior to the 1975 amendment it did not apply to municipal issuers and dismissed complaints against a municipal issuer based on the sale of securities before 1975. With respect to section 17(a), both courts concluded that there was no implied cause of action. *In re* New York City Mun. Sec. Litig., 507 F. Supp. 169, 180-87

in *United Transportation Union v. Long Island Rail Road*,[498] the lower

(S.D.N.Y. 1980); Woods v. Homes & Structures of Pittsburgh, Kansas, Inc., 489 F. Supp. 1270, 1280-82, 1284-88 (D. Kan. 1980).

Although both decisions avoided resolution of the constitutional issue, they support conflicting inferences about Congress' power to impose financial liability on municipal issuers for fraudulent conduct. One court suggested in dictum that if the 1975 amendment of rule 10b-5 made it applicable to a municipal issuer it would be unconstitutional to the extent that, for example, a mayor could be held liable for remarks to his constituents about the city's financial condition. 507 F. Supp. at 185-86, 187 n.40. The other court held that a municipal issuer could be liable for fraud in the issuance of an industrial development bond (IDB) under section 12(2) of the 1933 Act (15 U.S.C. § 77*l*(2) (1976)). 489 F. Supp. at 1288-97. The IDB was issued by the municipality to finance the construction of a manufacturing facility, and the revenue from the lease of the land and plant was to finance the payment of interest and principal to bondholders. *Id.* at 1276. The court reasoned that there is no tenth amendment bar to private liability for fraud because issuance of an IDB is not a traditional governmental function. The court found that there was no traditional governmental function because the primary benefits of an IDB are private—the low rent paid by the manufacturer who in effect borrows funds at a low interest rate and the tax exempt interest received by bondholders—and the public benefits of community economic development are only secondary. *Id.* at 1296-97. Given the implicit distinction between IDB's and other municipal securities in terms of public benefit, it is not clear whether this court would hurdle the *NLC* bar to antifraud liability with respect to other types of municipal securities.

Although the courts have not yet resolved the question of the liability of the states and their political subdivisions under the securities laws, most commentators, with a few caveats, agree that *NLC* should not be read to preclude application of the antifraud provisions governing corporate securities to municipal issuers. *E.g.,* Doty & Petersen, *supra*, at 363-67. *See generally NYU Note, supra*; *Columbia Note, supra*. Proposals to subject municipal securities to the reporting and registration requirements of the securities laws have also generated arguments that the burden of compliance with these disclosure requirements is an impermissible intrusion on the traditional governmental function of borrowing money. *E.g.,* Comment, *Municipal Bonds: Is There a Need for Mandatory Disclosure,* 58 J. URB. L. 221 (1981); Note, *Federal Regulation of Municipal Securities: Disclosure Requirements and Dual Sovereignty,* 86 YALE L.J. 919 (1977); *Duke Comment, supra*; *NYU Note, supra*.

498. 634 F.2d 19 (2d Cir. 1980), *rev'd,* 102 S. Ct. 1349 (1982). The Second Circuit's decision is rehearsed and supported in Note, *The Commerce Clause and the Balancing Approach: The Delineation of Federal and State Interests:* United Transportation Union v. Long Island Rail Road, 1981 B.Y.U. L. REV. 189; Note, *The Essential Governmental Function After* National League of Cities: *Impact of an Essentiality Test on Commuter Rail Transportation,* 9 FORDHAM URB. L.J. 149 (1980). The decision of the Second Circuit is criticized in Comment, *Railroad Regulation After* National League of Cities: United Transportation Union v. Long Island Railroad, 56 N.Y.U. L. REV. 809 (1981).

Before the Second Circuit's decision in *United Transportation Union*, two courts had considered the application of the RLA to the employees of the Staten Island Rapid Transit Operating Authority (SIRTOA) which, like the Long Island Rail Road, is a state-owned railroad primarily engaged in providing commuter rail service. A state court held that a strike by SIRTOA employees could be enjoined even though SIRTOA was covered by the RLA. Although this court recognized that *NLC* approved national regulation of state-owned railroads, *see supra* note 114, it applied a balancing test and concluded that the state interest in prohibiting strikes by public employees outweighed the national interest in promoting interstate commerce under the policies of the RLA because SIRTOA's only connection with interstate commerce was one freight run per

court's opinion illustrates the problems of evaluating *NLC* challenges to Congress' power to regulate the states that will survive the Court's unanimous opinion. The issue in this case was whether the employees of the Long Island Rail Road (LIRR), a wholly owned subsidiary of a state agency, were subject to the National Railway Labor Act[499] (RLA), which permits strikes after exhaustion of dispute resolution procedures, or to a New York law prohibiting strikes by public employ-

day. Staten Island Rapid Transit Operating Auth. v. Local 922, IBEW, 57 App. Div. 2d 614, 393 N.Y.S.2d 773 (2d Dept.), *appeal denied,* 42 N.Y.2d 804, *cert. denied,* 434 U.S. 934 (1977). In a subsequent case involving SIRTOA, a federal district court rejected the state court's argument that the tenuous relationship between the railroad and interstate commerce justified the application of the state law prohibition of strikes. The court held, primarily on the basis of the suggestion in *NLC* that the operation of a railroad in interstate commerce is not a traditional governmental function, *see supra* note 114, that the RLA authorization of peaceful strikes preempted the state law prohibition. Brotherhood of Locomotive Eng'rs v. Staten Island Rapid Transit Operating Auth., 100 L.R.R.M. (BNA) 3154, 3160-61 (E.D.N.Y. 1979). *See* Amalgamated Transit Union, Div. 819 v. Byrne, 568 F.2d 1025, 1030 (3d Cir. 1977) (avoids question whether national regulation of employees of state-subsidized transit company would be precluded by *NLC*); *In re* Valuation Proceedings Under §§ 303(c) & 306 of the Regional Rail Reorganization Act, 439 F. Supp. 1351, 1373 n.37 (Special Court, Regional Rail Reorganization Act, 1977) (assumption that *NLC* approved national regulation of state-operated railroad).

499. 45 U.S.C. §§ 151-188 (1976), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit XI, subtit. E, pt. 6, § 1157, 95 Stat. 681. The Railway Labor Act (RLA) applies to "carrier[s] by railroad" that are involved in transportation outside a single state, and it permits resort to self-help once dispute resolution procedures have been exhausted. United Transp. Union v. Long Island R.R., 634 F.2d at 20 n.2, 22-23. *See* Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380-85 (1969); 45 U.S.C. § 151 (1976); 49 U.S.C. § 10501 (a) (1976 & Supp. IV 1980). *See generally* THE RAILWAY LABOR ACT AT FIFTY: COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES (C. Rehmus ed. 1976). Although the state argued that LIRR was not covered by the RLA because it was essentially a "local commuter transportation system" with a minimal connection to interstate commerce through a declining freight business, the court held that the LIRR is subject to the RLA. 634 F.2d at 22-23.

In contrast to the RLA, New York's Taylor Law (Public Employees' Fair Employment Act, N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1973 & Supp. 1981)) prohibits strikes by public employees. *Id.* § 210. Many other rules governing labor relations under the RLA and the Taylor Law are different, but the case did not raise any question of Congress' power to control, for example, the definition of bargaining units or the subjects of collective bargaining. *See* Brief for Respondents at 28-30, United Transp. Union v. Long Island R.R., 102 S. Ct. 1349 (1982).

When the Second Circuit held in 1980 that the application of the RLA to a state-owned commuter railroad was unconstitutional, the Act made no distinction between public and private railroads, and both were subject to the same dispute resolution procedures. Congress amended the RLA in 1981 and provided special procedures for publicly owned commuter rail services. These amendments permit the Governor or the parties to a dispute to delay a strike for 240 days longer than a strike on other railroads. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XI, subtit. E, pt. 6, § 1157, 95 Stat. 681. To the extent that the national rules governing labor relations on publicly and privately owned railroads are different, these rules are less onerous for public than private employers.

ees. The Second Circuit combined a traditional or integral functions test derived from the plurality opinion in *NLC* with a balancing test derived from Justice Blackmun's concurring opinion.[500]

The court first found that the national policy permitting strikes "directly displaces [the] State's ability to structure its employee-employer relationships and to make essential decisions" because strikes can lead to higher wages and the state had made the essential decision that a prohibition of strikes was necessary "to provide its citizens with continuous public transportation."[501] The court then found that the "operation of a passenger rail service" is an "integral governmental function" because it is an important public service which perhaps can be provided only by the government given the "economic elimination of private suppliers."[502] Having determined that the RLA affected essential state decisions about the operation of an integral governmental function, the court concluded that the RLA could not be applied to the LIRR because "the federal interest in preserving the right of LIRR employees [to strike] is not 'demonstrably greater' than New York State's interest in preventing LIRR strikes in order to ensure continuous passenger service for so many daily commuters."[503] The national interest was not "demonstrably greater" than the state's interest because both the RLA labor dispute settlement procedures and state law prohibition of strikes serve the same policy of preventing the disruption of commerce, and the state as a practical matter is more concerned about transportation on the LIRR between New York City and its suburbs than the national government.[504]

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500. 634 F.2d at 24.

501. *Id.* at 25.

502. *Id.* at 27. The court distinguished prior Supreme Court decisions upholding national regulation of state-owned railroads that were apparently approved in *NLC*, *see supra* note 114, on the ground that these cases involved freight service which is a less important state interest than passenger service. *Id.* at 26-27.

503. *Id.* at 30. The requirement that the national interest must be "demonstrably greater" than the state interest was drawn directly from Justice Blackmun's concurring opinion in *NLC*. *See supra* text accompanying note 118.

504. *Id.* at 29-30. The Second Circuit recognized that "the determination of whether state or federal interests are paramount may be difficult to resolve in future cases." *Id.* at 30. Given the flexibility inherent in balancing tests, *NLC* may be nothing more than a vehicle for judicial assessment of the comparative worth of state and national legislative policies. Indeed, it is hard to avoid the suspicion that the court simply believed that the state's "no strike" policy was a better means of assuring continuous service than the RLA's dispute resolution procedures which ultimately permit a strike. The court's choice of New York State's policy for labor disputes over the national policy of the RLA suggests that the general rule that courts should not sit as a "super-legislature"

The Supreme Court found the case far less troubling than the Second Circuit. Chief Justice Burger, in a short unanimous opinion, upheld the application of the RLA to the state-owned railroad on the grounds that *NLC* had approved such national regulations[505] and that under the third prong of the *Hodel* test[506] the operation of a railroad was not a traditional function of state government.[507] Notwithstanding the Chief Justice's contention that the Court "was not merely following the dicta of [*NLC*] or looking only to the past to determine what is 'traditional,' "[508] there is little, if anything, more to the opinion.[509]

The lower courts will continue to face the problems illustrated by the Second Circuit's opinion. In addressing *NLC* challenges to Congress' power under the commerce clause to regulate state functions other than the operation of a railroad, these courts will still have problems in defining traditional state functions when history is an inadequate guide, and they must still address the question whether national regulation of

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to review the wisdom of legislative policy has a practical foundation in addition to being a rule of democratic theory. New York's Taylor Law prohibition of strikes by public employees has been remarkably ineffective in achieving its end of preventing the disruption of public services by strikes. N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1973 & Supp. 1981). *See, e.g.*, Schender v. Triborough Bridge & Tunnel Auth., 93 Misc. 2d 1099, 403 N.Y.S.2d 1002 (Sup. Ct. 1978) (strike of bridge and tunnel employees disrupting commuter traffic); Dowling v. Bowen, 53 A.D.2d 862, 385 N.Y.S.2d 355 (1976) (police strike disrupting traffic).

505. *See supra* note 114. The Court said that there was no basis for the Second Circuit's distinction between state-owned freight and passenger railroads, *see supra* note 502, because the operation of both types of railroads "has traditionally been a function of private industry, not state or local governments." 102 S. Ct. at 1354 (footnote omitted).

506. *See supra* text accompanying note 447.

507. 102 S. Ct. at 1354. Shortly before the decision in *United Transportation Union*, the Special Court, Regional Rail Reorganization Act, upheld national regulation of initial hiring decisions by a state agency operating a commuter railroad and the imposition of a duty to engage in collective bargaining. Railway Labor Executives' Ass'n v. Southeastern Pa. Transp. Auth., 534 F. Supp. 832 (Special Court, Regional Rail Reorganization Act), *cert. denied,* 102 S. Ct. 2271 (1982). This court held that *NLC* did not bar national regulation of state employment decisions because the national interest outweighed state interests. 534 F. Supp. at 849-51.

508. 102 S. Ct. at 1354.

509. The principal ground for the Court's decision was "the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments." *Id.* (emphasis in original). The Chief Justice did, however, note several other arguments in support of Congress' power to apply national labor relations policies to a state-owned railroad: recognition of state immunity would permit the states to erode national authority by "acquiring functions previously performed by the private sector" and would frustrate the national interest in uniform regulation; the long history of national regulation of railroads was not matched by an equivalent history of state regulation; and the state had acquired the Long Island Rail Road with knowledge of national railway labor regulations and operated the railroad under those regulations for thirteen years without protest. *Id.* at 1355-56.

traditional state functions is valid because national interests outweigh state interests. The Court did hold clearly that historical state functions are traditional state functions immune from national regulation under the third prong of the *Hodel* test, but it also denied that history was the sole criterion of immunity.[510] Moreover, the Court left open the application of a balancing test by reiterating the reservation in *Hodel* that traditional state functions may be subject to national regulation if the national interest is "so great as to 'justif[y] State submission.' "[511]

After the Supreme Court's judgment upholding the RLA, the FLSA is the only statute enacted under the commerce power that has been held unconstitutional as applied to the states on the ground of impermissible interference with state autonomy. The results seem anomalous: Congress can regulate a state in its capacity as an employer by authorizing the employees of a state-owned railroad to strike, but Congress cannot regulate a state in its capacity as an employer by setting minimum wage and maximum hour standards for most of their employees. Indeed, no matter where one turns to make a comparison, the FLSA cases stand in stark, and seemingly inexplicable, contrast with the results in other cases.[512] Nonetheless, the Court has not attempted to reconcile the results of its cases either by the simple expedient of

510. The Court argued that its focus on traditional governmental functions did not "impose a static historical view of state functions generally immune from federal regulation" and that *NLC* immunized "basic State prerogatives." *Id.* at 1354-55. For an assessment of the problems with using history as a guide to the definition of important state functions, see *infra* note 874.

511. *Id.* at 1353 n.9 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 n.29 (1981)).

512. The courts have upheld substantial requirements imposed upon the states in their capacities as employers under powers other than the commerce clause: the states must reinstate former employees who are called to active service in the armed forces, *see supra* text accompanying notes 150-59; the states must provide unemployment compensation benefits for their employees, *see supra* text accompanying notes 198-216; the states must engage in collective bargaining with some of their employees, *see supra* note 256 and accompanying text; the states are prohibited from discriminating in employment on the grounds of race, sex, or age, *see supra* text accompanying notes 356-82. If one looks beyond national regulation of the states as employers, the contrast is even more stark. Congress can effectively require states to regulate private activity under national standards, *see supra* text accompanying notes 160-75 (war power), 217-46 & 306-24 (spending power); *see infra* text accompanying notes 542-713 (commerce power), and to reallocate political power within the branches of state government, between the states and their political subdivisions, and even to private groups, *see supra* text accompanying notes 257-305. Even if the comparison is confined to statutes enacted under the commerce power, the results seem anomalous. The courts grant Congress plenary power to displace state policy for private activity, *see supra* text accompanying note 458-75, and recognize Congress' power to override a state's speech and debate privilege for its legislators, *see supra* text accompanying notes 478-81, and to limit the states' taxing powers, *see supra* text accompanying notes 476-77.

confining *NLC* to its facts or by starting a principled theory of federalism limits on national political authority. Instead, the Court has simply maintained that the federalism principle recognized in *NLC* is a broadly applicable restraint on Congress' power under the commerce clause to regulate the states.[513]

b. The Tax Power

The taxing power[514] of the national government is broad,[515] but with the exception of Chief Justice Marshall's early dictum that state instrumentalities are not immune from national taxation,[516] the courts have long recognized that there are some federalism limits on Congress' power to tax the states.[517] Since the doctrine of state immunity from national taxation was well-established before *NLC* was decided, there is some question about the relation of the rules for regulatory and tax immunity.

The modern Court's last major assessment of state immunity from national taxation was *New York v. United States*.[518] The Court upheld

513. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126, 2142 n.32 (1982); United Transp. Union v. Long Island R.R., 102 S. Ct. 1349, 1353-55 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 283-93 (1981).

514. U.S. Const. art. I, § 8, cl. 1, provides that "Congress shall have the power to lay and collect taxes . . . ."

515. New York v. United States, 326 U.S. 572, 575 (1946) (Frankfurter, J.) (apart from limitations on the methods of taxation, national tax power reaches every subject except exports from a state); Dam, *supra* note 42, at 287-90. A tax may be beyond Congress' power if its regulatory purpose is too clear or if it contains provisions "extraneous to any tax need." United States v. Kahriger, 345 U.S. 22, 31 (1953); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

516. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435-36 (1819). After holding that a state tax on bank notes issued by a branch of the Bank of the United States was unconstitutional, the Chief Justice stated that a similar national tax on the operations of state government would be valid. His distinction here between "the action of the whole on a part, and the action of a part on the whole" suggests that he saw a political check on Congress' power to tax the states.

517. State immunity from national taxation was first recognized in Collector v. Day, 78 U.S. (11 Wall.) 113 (1871) where the Court held that the salary of a state judge, who performs a state function, was immune from a national income tax. The courts subsequently expanded state immunity to encompass the claims of private taxpayers that their relation to state government warranted immunity from national taxes, but the Supreme Court repudiated "derivative immunity" in Helvering v. Gerhardt, 304 U.S. 405 (1938). During the period of over sixty years in which derivative immunity flourished, the immunity of state and local governments themselves from national taxes turned on a distinction between governmental activity, which was entitled to immunity, and proprietary activity, which was subject to taxation. *See* Massachusetts v. United States, 435 U.S. 444, 454-60 (1978) (plurality opinion of Justice Brennan tracing the history of state immunity from national taxation); Dam, *supra* note 42, at 290-91.

518. 326 U.S. 572 (1946).

a national tax on the sale of mineral water produced by the State of New York at a state-owned mineral spring, but the decision rested on two similar, but slightly different theories. Justice Frankfurter, in an opinion joined only by Justice Rutledge, held that the national tax was valid because it was nondiscriminatory—that is—it applied equally to all mineral water vendors, state or private.[519] He also added a significant example of his general rule that a state is not immune from a nondiscriminatory tax: the national government cannot tax "State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations," such as a statehouse or state tax revenues.[520] Chief Justice Stone, writing for three other members of the Court, conceded that a discriminatory tax against a state would be invalid,[521] but he argued that even if a tax was nondiscriminatory, it would still be invalid if it "interfere[d] unduly with the State's performance of its sovereign functions of government."[522] Although he recognized greater immunity in theory than Justice Frankfurter, he then decided the case essentially on the narrow ground of Justice Frankfurter's opinion. He held that the national tax on mineral waters was valid because its nondiscriminatory nature ensured that it did not "curtail the business of state government more than it does the like business of the citizen" and because immunity would withdraw from the national taxing power "a subject of taxation . . . traditionally within that power."[523]

519. *Id.* at 582, 584.

520. *Id.* at 582. Justice Frankfurter believed that this example was inherent in his general rule, and not an exception to it. Although he recognized that an "abstract category of taxpayers" such as all real estate owners might include both private property owners and the state as owner of the statehouse, a general (apportioned) national real estate tax would be discriminatory and thus invalid as applied to the statehouse because a statehouse is unique in the sense of having no private counterpart. *See id.* Justice Frankfurter supplied only one example of state-owned property (statehouse) and one example of a state activity (taxation) that he believed had no private analogue. To the extent that there are in fact private counterparts to state property and activities that he would immunize, he created an exception to his general rule that a nondiscriminatory tax is valid. *See* Note, *Federal Immunity from State Taxation: A Reassessment,* 45 U. CHI. L. REV. 695, 709 n.83 (1978). Regardless of the consistency of his example with his theory, immunity for "unique" state activity seems to be, as Justice Douglas suggested, governmental immunity "poured into a new container." 326 U.S. at 592. Justice Frankfurter, however, had expressly repudiated a distinction between "governmental" and "proprietary" activity as the test of state immunity. *Id.* at 580.

521. 326 U.S. at 586.

522. *Id.* at 587.

523. *Id.* at 588-89.

The differences between these two tests of state immunity from national taxation are rather small. Both Justice Frankfurter and the Chief Justice believed that a discriminatory tax was invalid, and both recognized similar types of state activity or property as absolutely immune from national taxation.[524] The principal difference is that Justice Frankfurter would have held that a nondiscriminatory tax is valid unless it was exacted from "State as a State,"[525] but the Chief Justice would have balanced the intrusion on state sovereignty against the reduction of the national taxing power to determine the validity of most nondiscriminatory taxes.[526]

Although the doctrine of state immunity from national taxation was fully developed when *New York v. United States* was decided in 1946, there was no counterpart doctrine of regulatory immunity until the *NLC* decision thirty years later in 1976. The two decisions merge in a common statement that there is a core of state sovereignty immune from national regulation or taxation, but the effect of *NLC* on the prior rule of state immunity from national taxation is not clear.[527] Justice Rehnquist's conclusion in his plurality opinion in *NLC* that federalism principles prohibit national regulations that "directly displace" or "impermissibly interfere" with "traditional" or "integral" state governmental functions[528] certainly echoes Chief Justice Stone's prohibition of

524. The Chief Justice said that a nondiscriminatory tax could not be applied to "the State's capitol, its State-house, its public school houses, public parks, or revenues from its taxes or school lands." *Id.* at 587-88. Justice Frankfurter thought that his test would exempt the statehouse and state tax revenues from national taxation. *See supra* text accompanying note 520.

Justice Douglas, in an opinion joined by Justice Black, dissented on the ground that all state activity, which is by definition for the benefit of the state's citizens, should be immune from national taxation. *Id.* at 590-98.

525. *Id.* at 582.

526. Although Chief Justice Stone never stated explicitly that the validity of a nondiscriminatory tax turns on a balancing of national and state interests, the conclusion that he intended a balancing test is inescapable. First, his concern that a nondiscriminatory tax could "interfere unduly" with sovereign state functions, *id.* at 587-88, and conversely that the national taxing power might be "unduly curtailed" by recognition of tax immunity, *id.* at 589, suggests a test balancing the impairment of a state's sovereign functions of government against the effects of immunity on the national taxing power. Second, he applied such a test in the case at hand. The national tax on mineral waters was valid because the effect on the national taxing power of state immunity, which he measured by its tendency to withdraw a general class of activity or property from national taxation, *id.* at 590, outweighed the minimal burden on the state. Third, he had applied a balancing test in a contemporaneous opinion addressing an analogous question of national and state relations. *See* Southern Pacific v. Arizona, 325 U.S. 761 (1945).

527. *See supra* Note, note 520, at 708-813.

528. *See supra* text accompanying notes 104-07.

national taxes that "interfere unduly with the State's performance of its sovereign functions of government,"[529] and Justice Rehnquist also suggested that state sovereignty imposed the same restraints on the commerce and tax powers.[530] Nevertheless, the Court's failure to determine any precise test of regulatory immunity in *NLC*, coupled with the absence of any direct consideration of the issue of tax immunity, makes hazardous any prediction whether *NLC* modifies or preserves the nondiscrimination, sovereign functions, or balancing tests of the mineral waters tax case.

Subsequent decisions have not answered the question whether *NLC* or the tests of *New York v. United States* determine the scope of state immunity from national taxation. In *Massachusetts v. United States*,[531] the Court upheld the application of an annual registration tax on civil aircraft to a state-owned helicopter used exclusively for police functions. The Court construed the tax as a "user fee", that is, a charge for airport facilities and navigational services provided by the national government, and it analogized payment of this tax to the payment for stamps on letters carried by the United States Postal Service.[532] The Court upheld the user fee on the basis of a three-part test which served the dual purposes of identifying a user fee and of explaining why the state was not immune.[533] First, the tax was nondiscriminatory, and application of the tax to private and state civil aircraft minimized or elim-

529. *See supra* text accompanying note 522.

530. National League of Cities v. Usery, 426 U.S. 833, 843 n.14 (1976). Justice Rehnquist's equation of regulatory and tax immunity was a response to Justice Brennan's argument that the doctrine of tax immunity recognized in New York v. United States, 326 U.S. 572 (1946), should not be extended to limit regulation under the commerce clause. *Compare* 426 U.S. at 843 *with* 426 U.S. at 863-64, 869. He apparently believes, however, that state sovereignty imposes less restraint on national taxation than on national regulation. In his dissent in *Fry v. United States*, *see supra* text accompanying notes 119-20, he argued that it is less burdensome for a state "to pay a nondiscriminatory tax . . . than to comply with a nondiscriminatory regulation" because payment of a tax only forces a state to raise additional revenue or to reduce expenditures and a regulation alters state policy choices. 421 U.S. 542, 554 (1975) (Rehnquist, J., dissenting).

531. 435 U.S. 444 (1978). Prior to the decision in *Massachusetts v. United States*, a federal district court held the tax unconstitutional as applied to a state-owned airplane used for police purposes on the ground that except in special circumstances *NLC* denies Congress the power to tax the means by which a state performs its traditional functions. State Dep't of Transp. v. United States, 430 F. Supp. 823 (N.D. Ga. 1976).

532. 435 U.S. at 453-54, 453 n.11.

533. Justice Brennan's opinion, stating and applying the user fee test, was joined by five other Justices. Justice Rehnquist, in an opinion joined by the Chief Justice, dissented because the state had not been given an opportunity to prove that the tax was not a user fee, but he argued that there would be no constitutional bar to a "charge . . . reasonably related to the services rendered"

inated the danger of an abusive exercise of the taxing power.[534] Second, the "tax was a fair approximation of the benefits civil aircraft receive from federal activities" which apparently assured that the state received its quid pro quo.[535] Third, the tax was "structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits supplied," and this ceiling on the total amount of the tax, like its nondiscrimination, ensured that the states would not be unduly burdened.[536]

Since the Court specifically disclaimed any decision on the general question of state immunity from national taxation,[537] it is difficult to estimate how far the rationale of the decision transcends the narrow confines of a "user fee." The quid pro quo of national services for the states' payment of the tax is a distinction, but the Court did not explain why this distinction is one of constitutional dimension requiring a different test of state immunity. There are at least two reasons why the test applied in *Massachusetts v. United States* may have a broader reach than its facts. First, a "user fee" is like any tax—it increases the costs of state government, and these costs may in turn effect state policy decisions.[538] Second, the Court's identification of the tax as nondiscriminatory, and its conclusion that the tax would not "unduly burden"[539] the states' activities, are consistent with Chief Justice Stone's analysis of the national tax on mineral waters in *New York v. United States*.[540] Nevertheless, given the narrow context of the decision and the absence of any elaboration of either *New York v. United States* or *NLC*, the relation of the doctrines of tax and regulatory immunity remains unsettled.[541]

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by the national government to a state. *Id.* at 472. Justice Blackmun did not participate in the decision.

534. *Id.* at 466-67.

535. *Id.* at 466-68.

536. *Id.* at 466-67, 469-70.

537. *Id.* at 454.

538. The Court recognized that the "user fee" imposed costs on state government, but it found that an economic burden alone did not warrant immunity. *Id.* at 461. A federal district court, which held this tax unconstitutional before the decision in *Massachusetts v. United States*, *see supra* note 531, found that the increased cost of operating a state police airplane might affect state policy by forcing "the use of fewer air patrols and more ground level reconaissance in detecting and combating forest fires." State Dep't of Transp. v. United States, 430 F. Supp. 823, 826 (N.D. Ga. 1976).

539. 435 U.S. at 467.

540. *See supra* text accompanying notes 522-23.

541. Justice Brennan, writing only for himself and the three other members of the Court who dissented in *NLC*, did review the doctrine of tax immunity and explained its relationship with the

3. Regulations Requiring the Affirmative Exercise of State Authority Over Private Activity

Much as Congress uses the spending power to obtain state cooperation in implementing national regulatory and social welfare programs,[542] it also uses the commerce power extensively to employ the states as its agents in regulating private activity. At the risk of some oversimplification, one can identify, in statutes enacted under the commerce power, three distinct means of providing for state administration and enforcement of national substantive policy for private activity.[543]

First, Congress often delegates national authority to state officers, agencies, and political subdivisions and supplements their power under state law to regulate private activity.[544] This means of providing for

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regulatory immunity recognized in *NLC*. 435 U.S. at 454-60. He argued that political checks should be considered in determining the scope of state immunity from national taxation even though *NLC* had rejected this argument with respect to regulatory immunity. *Id.* at 456 n.13. Since he found that prior decisions had identified political checks in the nondiscriminatory application of a tax to state and private activity, he stated a very limited test of tax immunity that drew heavily on Chief Justice Stone's opinion in *New York v. United States*.

NLC so far has had little impact either in the courts or in Congress on state immunity from national taxation. In addition to the tax at issue in *Massachusetts v. United States*, the courts have considered the constitutionality of only one other tax applied to state government after *NLC*. In California *ex rel.* California Dep't of Justice v. United States, 441 F. Supp. 21 (E.D. Cal. 1977), a federal district court upheld an eight percent excise tax upon air travel as applied to state employees. The court found that the tax was valid under *New York v. United States* because it was nondiscriminatory and did not interfere unduly with the state's performance of its sovereign functions and that it was valid under *NLC* because any effect on traditional governmental functions was minor in comparison with the effects of the FLSA. *Id.* at 23-26.

Although Congress has read *NLC* to limit some of its powers, *see supra* notes 22-23 and accompanying text, Congress has apparently concluded that its power to tax the states and their political subdivisions is not so limited. Congress has reduced the scope of the basic tax exemption for interest on municipal bonds, 26 U.S.C. §§ 103, 103A (1976 & Supp. IV 1980), on several occasions after *NLC* was decided. *See, e.g.,* Mortgage Subsidy Bond Tax Act of 1980, Pub. L. No. 96-499, tit. XI, §§ 1101-1104, 94 Stat. 2660-2681, *adding* 26 U.S.C. § 103A (Supp. IV 1980) *and amending* 26 U.S.C. § 103(b) (1976). *But see* Keohane, *The Mortgage Subsidy Bond Tax Act of 1979: An Unwarranted Attack on State Sovereignty,* 8 FORDHAM URB. L.J. 483 (1980) (tax on interest of municipal bonds issued to finance housing construction is an unconstitutional intrusion on traditional governmental function of borrowing money to provide for housing). On the question of Congress' power to tax the obligations of state and local government, see generally Doty & Petersen, *supra* note 497, at 349 n.256. There is some evidence, however, that Congress doubts its power to tax the states after *NLC*. *See supra* note 202.

542. *See supra* text accompanying notes 186-97, 217-46 & 306-24.

543. Congress has employed the states as its agents to regulate private activity since 1789. The history of this practice and the full range of mechanisms used by Congress to induce or require the states to implement national regulatory programs are assessed *infra* at notes 920-1032.

544. *See infra* text accompanying notes 705-13.

state enforcement of national law is weak because the delegate may choose not to exercise the authority or may exercise it in a fashion contrary to Congress' intention. It also raises the question of Congress' power to authorize a state officer, agency, or political subdivision to act in excess of or contrary to its state law powers.

A second means of employing the states as the nation's agents rests on the threat of national assumption of the regulation of private activity. Congress may establish rules for private activity and hold direct national regulation in abeyance on the condition that the states adopt and enforce national standards under state law.[545] This mechanism avoids the problem of supplementing state law because the states regulate private activity under the authority of state statutes. It ensures that the national standards will govern private activity because if the states fail to implement the national standards, direct national regulation is imposed. The threat that the national government will take over the regulation of private activity and supplant state regulation provides some incentive for the states to conform the affirmative exercise of their authority to national requirements. Congress often enhances this incentive by grants to states that enforce national standards. Congress also may orchestrate political pressure on the states by establishing a scheme of regulations for state implementation that is less onerous than a set of alternative regulations to be enforced directly by the national government.[546] Regardless whether one labels such incentives "inducement" or "coercion," Congress has been remarkably successful in using such means to employ the states as its agents.

There is a third means of providing for state administration and enforcement of national regulatory programs if a state is able to resist Congress' blandishments. In a few instances Congress has enacted statutes that either require the states to enact and enforce state laws regulating private activity[547] or supplement state law and require the states to exercise authority conferred by national law over private activity.[548]

All three of these means of using the commerce power lead to the same result—state regulation of private activity under national standards. Together they raise a common question of federalism limits on Congress' power to employ the states as its agents to regulate private

545. *See infra* text accompanying notes 559-80.
546. *See infra* note 982.
547. *See infra* text accompanying notes 581-609.
548. *See infra* text accompanying notes 610-91.

activity. Separately they raise questions whether concerns about protecting state autonomy limit Congress' choice of means. The Court has been presented with three cases in the last six terms that raised the question of Congress' power under the commerce clause to use the states as its agents, but it has never considered the full range of means available to Congress under both the commerce and spending powers.

In *EPA v. Brown*,[549] the Court avoided a review on the merits of several courts of appeals decisions finding that a statute would be unconstitutional if it was construed to compel state regulation. In *Hodel v. Virginia Surface Mining and Reclamation Association*,[550] the Court approved, in general terms and on the basis of a rather preemptory analysis, Congress' power to provide for state regulation of private activity under national standards by threatening to impose direct national regulation. *Federal Energy Regulatory Commission v. Mississippi*,[551] decided near the end of the October 1981 term, is the Court's latest word on the question of Congress' power to employ the states as its agents. The statute at issue in this case appeared to raise the question left open in *EPA v. Brown*: Do *NLC* federalism principles deny Congress the power to compel state implementation of national regulations governing private activity? The Court, however, again avoided this question. It read the statute to provide for state administration of certain national regulations for private electric utilities under the threat that a national prohibition of all state regulation of electric utilities would be imposed if the state failed to act.[552] Having construed the statute disingenuously,[553] the Court then sustained Congress' power to use the states as its agents.

On both occasions that it reached the merits, the Court has upheld Congress' power to use the states as the nation's agents, but *Hodel* and *FERC* failed to assess accurately the actual impact of the statutes at issue on the states and to establish a principled justification of Congress' power. In both cases the Court failed to recognize that state implementation of national regulations requires the states to allocate their

549. 431 U.S. 99 (1977), *vacating and remanding,* Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975); Arizona v. EPA, 521 F.2d 825 (9th Cir. 1975); *see infra* text accompanying notes 592-602.

550. 452 U.S. 264 (1981). *See infra* text accompanying notes 559-80.

551. 102 S. Ct. 2126 (1982). *See infra* text accompanying notes 610-91.

552. *See infra* text accompanying notes 654-59.

553. *See infra* text accompanying notes 660-64.

legislative, executive, judicial and financial resources to satisfy national political demands at the expense of implementing state policies and fulfilling the demands of its own political community.[554] Since the Court in effect denied that state implementation of national regulations governing private activity has any significant impact on state autonomy, it did not provide any justification of Congress' power to employ the states as its agents.[555] In short, neither *Hodel* nor *FERC* answered the question whether *NLC* federalism principles restrict Congress' power under the commerce clause to employ the states as its agents as well as Congress' power to regulate the states.

Even on their own terms, which sidestep federalism issues, *Hodel* and *FERC* establish an inadequate framework for resolving questions of Congress' power to require the affirmative exercise of state authority over private activity. In *Hodel* the Court approved Congress' power to induce state implementation of national environmental standards under the threat of imposing direct national regulation. The Court disapproved Congress' power to mandate state enforcement of national regulations, but it did not provide any criteria for distinguishing between the means approved and impermissible compulsion.[556] In *FERC*, the Court blurred the already vague distinction between state implementation under a threat of alternative national rules governing private activity and mandatory state implementation.[557] The majority strained to construe provisions for mandatory state implementation as analogous to the means previously approved in *Hodel*, and they suggested that state agencies may have a "duty" to enforce national law. The legacy of *Hodel* and *FERC*—unresolved federalism issues and a malleable prohibition of mandatory state implementation of national regulations—will plague principled analysis in pending challenges[558] to statutes providing for state administration and enforcement of national regulations.

a. *Hodel v. Virginia Surface Mining and Reclamation Association*

In *Hodel* the Court upheld both Congress' power under the com-

554. *See infra* text accompanying notes 566-68 & 668-72.

555. *See infra* text accompanying notes 569-80, 632-53 & 665-72.

556. *See infra* text accompanying notes 607-09.

557. *See infra* text accompanying notes 673-91.

558. *See infra* text accompanying notes 693-713.

merce clause to regulate surface mining[559] and a provision in the Surface Mining Control and Reclamation Act (SMCRA) for state enforcement of the national environmental standards for this private activity. This Act provides that the states can regulate surface mining if they adopt a program which applies national environmental standards to surface mining operations.[560] The Act also establishes procedural requirements for state administration and enforcement of the environmental standards.[561] The state regulatory program must be approved by the Secretary of the Interior, and it "must demonstrate that the state legislature has enacted laws implementing the environmental protection standards established by the Act and accompanying regulations, and that the State has the administrative and technical ability to enforce these standards."[562] If a state's program is not approved, or if a state fails to submit or to enforce its program, then national regulation is exclusive and the Secretary must promulgate and enforce a national program for the regulation of surface mining in that state.[563] In short, the SMCRA requires the states to exercise affirmatively their authority over private activity by adopting and enforcing national environmental standards in order to avoid a national takeover of the regulation of surface mining.

Congress has used the mechanism of the SMCRA, or similar means, in many energy and environmental programs to obtain state cooperation in the regulation of private activity, and prior to *Hodel* the lower courts consistently approved state implementation of national programs.[564] Nevertheless, *Hodel*'s general approval of state participation

559. *See supra* notes 458-63 & 475 and accompanying text.

560. 30 U.S.C. § 1253 (Supp. IV 1980).

561. *E.g., id.* §§ 1263-1264, 1270 (administrative standards for issuance of surface mining permits and citizen suits to compel implementation of state programs).

562. 452 U.S. at 271.

563. 30 U.S.C. § 1254 (Supp. IV 1980). The environmental standards of the SMCRA are imposed in two phases, and the provision for state enforcement applies only to the second phase. In the first phase, the "interim regulatory program," only eight of the Act's 25 standards are imposed on surface mining, and the Secretary has the responsibility to enforce them. The second phase is the "permanent regulatory program," and all 25 standards are to be enforced by either the states or the national government. 452 U.S. at 271; *Indirect Regulation, supra* note 463, at 592-93.

564. Although two courts approved state participation in national regulatory programs, the approval was simply stated in passing without any analysis either of the means employed to obtain state cooperation or of the broader question of Congress' power to employ the states as its agents in regulating private activity. Shell Oil Co. v. Train, 585 F.2d 408, 411 (9th Cir. 1978); Sierra Club v. EPA, 540 F.2d 1114, 1140 (D.C. Cir. 1976). *See* Maryland v. EPA, 530 F.2d 215,

in the regulation of surface mining should be read narrowly because the Court did not address directly the question of Congress' power to employ the states as its agents in regulating private activity.[565]

The Court described the SMCRA as a "program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."[566] This

228 (4th Cir. 1975) (dictum approving threat of national regulation as a means of inducing states to implement national programs), *vacated and remanded,* 431 U.S. 99 (1977) .

One court has considered more carefully Congress' power to use the states to administer national regulations. In *Oklahoma v. Federal Energy Regulatory Commission,* the court rejected the state's argument that it had been coerced into administering national price regulations for the intrastate sale of natural gas. 494 F. Supp. 636 (W.D. Okla. 1980), *aff'd,* 661 F.2d 832 (10th Cir. 1981), *cert. denied,* 102 S. Ct. 2902; *see* Tenneco v. Sutton, 530 F. Supp. 411, 432 (M.D. La. 1981) (decision on tenth amendment issue is binding on defendants under doctrine of res judicata). The Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp. IV 1980), provides for national regulation of the price of natural gas sold in intrastate and interstate commerce. 15 U.S.C. §§ 3311-3333 (Supp. IV 1980). The Federal Energy Regulatory Commission is charged with the responsibility of administering and enforcing these regulations, but it may delegate certain regulatory functions to state agencies with their consent. *Id.* §§ 3411, 3413(c). Oklahoma complained that this provision for delegation of regulatory responsibility was barred by *NLC* because the state was coerced into enacting legislation, assigning state employees, and expending state funds to implement national policy. 494 F. Supp. at 664, 658-61. The mechanism for obtaining state regulation of the price of natural gas sold in intrastate commerce is identical to the means employed in the SMCRA to obtain enforcement of national environmental standards for surface mining: if the state agrees to enforce national standards for the sale of natural gas, then the national government will not regulate this activity directly. The court held that this quid pro quo is not unconstitutional coercion and that the provision for state enforcement of national regulations of natural gas is valid because there is no mandatory requirement that the states regulate private activity. *Id.* at 659-61. The court left unanswered the question of Congress' power to regulate the procedures employed by the state in enforcing national price rules. *Id.* at 659.

565. The Court's failure to explore carefully the question of Congress' power to use the states to regulate surface mining is in part explained by the fact that the challenges to the Act did not focus on this issue. The provision for state enforcement applies only to the permanent regulatory program, which is the second phase of implementation, *supra* note 563, and the principal attacks were on the interim regulatory program, which is enforced by the Secretary of Interior. 452 U.S. at 273. Nevertheless, most of the lower courts, like the Supreme Court, also considered the provision for state enforcement. *See supra* note 460. The Virginia district court suggested that the state was coerced into enforcing the national law, but it decided the case on the ground that national regulation of surface mining was barred by *NLC* because it interfered with the traditional state function of controlling land use. 483 F. Supp. at 432 & n.6. The Indiana district court did not reach the question of Congress' power to require the states to regulate surface mining because it held that national regulation of this private activity was unconstitutional. 501 F. Supp. at 464. Two of the three other federal district courts that considered the constitutionality of the SMCRA held that the provision for state regulation is valid because the states are not compelled to regulate or to expend state funds. 494 F. Supp. at 682; 14 ENV'T REP. CAS. (BNA) at 1329.

566. 452 U.S. at 289.

description is disingenuous, and it begs the basic question of Congress' power to induce or to require the affirmative exercise of state authority over private activity. Although most of the states subject to the SMCRA had previously regulated surface mining, the national statute was enacted because state regulation had proved inadequate.[567] The SMCRA and accompanying regulations substitute comprehensive, detailed national standards for the states' regulations, and the states' discretion to modify these standards is limited.[568] Thus, contrary to the Court's assertion, the states do not enforce their "own" regulatory programs and administer state policy; they enforce policies set at the national level by Congress.

The Court's conclusion that the SMCRA "allows" the states to regulate surface mining also is flawed. Even though the Act falls short of a mandatory requirement that the states enforce the national standards, there is something more than permission inherent in the threat of direct national regulation of surface mining if the states fail to act. The threat of national regulation plays on the desire of state bureaucrats to be the administrators. It also plays on state legislators' fears of being charged with ceding authority to the national government and their hopes of establishing a less restrictive program than one enforced by the national government.[569] The Act also provides two additional incentives that the Court ignored. First, the Act authorizes grants to the states to

567. Harvey, *supra* note 460, at 1149.

568. Note, *Surface Mining Control and Reclamation Act of 1977: Regulatory Controversies and Constitutional Challenges,* 8 ECOLOGY L.Q. 762, 768-70 (1980) [hereinafter cited as *Regulatory Controversies*]; *Indirect Regulation, supra* note 463, at 593 n.20, 605-06. State arguments that the national environmental standards are too rigid and thwart the regulatory flexibility intended by Congress have been, for the most part, unsuccessful. *In re* Permanent Surface Mining Regulation Litig., 653 F.2d 514 (D.C. Cir.) (en banc), *cert. denied sub nom.* Peabody Coal Co. v. Watt, 102 S. Ct. 106 (1981); *In re* Permanent Surfacing Mining Regulation Litig., 3 POLLUTION CONT. GUIDE (CCH) ¶ 40,307 (D.D.C. No. 79-1144) (May 6, 1980); *In re* Permanent Surface Mining Regulation Litig., 3 POLLUTION CONT. GUIDE (CCH) ¶ 40,282 (D.D.C. No. 80-05613) (February 26, 1980), *rev'd in part, In re* Permanent Surface Mining Regulation Litig., Peabody Coal, Appellant, 3 POLLUTION CONT. GUIDE (CCH) ¶ 40,323 (D.C. Cir. No. 80-1308) (July 26, 1980); *see In re* Permanent Surface Mining Regulation Litig., 627 F.2d 1346 (D.C. Cir. 1980) (interim regulatory program), *aff'g in part, rev'g in part, and remanding,* 452 F. Supp. 327, 456 F. Supp. 1301 (D.D.C. 1978). Congress has considered amendments that would give the states greater discretion in implementing the national environmental standards. Shostak, *The Pit and the Pendulum: The Senate and S. 1403,* 81 W. VA. L. REV. 1221 (1980).

569. Haggard, *Federalism and Environmental Law,* 54 DEN. L.J. 611, 614 (1977). The Virginia legislature objected to the pressure to enact a law conforming to national standards and stated that one purpose of its surface mining program was to "minimize the adverse effects of federal regulation" and to retain as much state regulation as possible. Brion, *supra* note 463, at 332.

develop, administer and enforce the surface mining regulations,[570] and it makes fifty percent of the national funds allocated for reclamation of abandoned mines within a state available on the condition that the state agrees to regulate surface mining.[571] These conditional grants are probably as important in obtaining state participation in the regulation of surface mining as the threat of direct national regulation. The second incentive that the Court ignored is a difference between the state and national regulatory programs.[572] If a national program is established, no lands may be designated as unsuitable for surface mining during the first year of direct national regulation, but the states may begin immediately to prohibit surface mining on certain lands.[573]

Congress consciously combined all of these incentives to ensure that the states would assume "primary governmental responsibility"[574] for surface mining regulation and that direct national regulation would be a last resort.[575] The Court's statement that "the full regulatory burden" would be borne by national government if the states decided not to participate[576] ignores the crucial point that Congress designed the Act to avoid this result. In the SMCRA, as in most national environmental programs, state administration and enforcement is essential because Congress did not authorize and appropriate sufficient funds for direct national administration and enforcement of surface mining programs in every state.[577] State regulation is also essential in a second, more

570. 30 U.S.C. §§ 1295(a), 1302(c) (Supp. IV 1980). The states may receive grants for up to 80% of their total costs in the first year, 60% in the second year, and 50% thereafter. Rochow, *The Far Side of Paradox: State Regulation of the Environmental Effects of Coal Mining,* 81 W. VA. L. REV. 559, 578-80 (1979).

571. In addition to the regulation of surface mining, the Act establishes a fund for the reclamation of abandoned mine lands. 30 U.S.C. §§ 1231-1243 (Supp. IV 1980). The fund is supported by a tax on coal mining operations. *Id.* § 1232. Fifty percent of the funds collected on mining operations in each state are allocated to that state if it establishes both an approved program for the administration of these funds and an approved program for the regulation of surface mining. *Id.* §§ 1232(g)(2), 1235(c)(d)(h). Since the balance of the funds may be expended directly by the Secretary of Interior in his discretion in any state, *id.* § 1232(g)(3), a state may obtain its minimum allotment of fifty percent of the tax assessed on its mining operations only if it agrees to implement the national standards for surface mining. *See* 30 C.F.R. §§ 872.11(b), 884.1, 884.11, 886.11 (1981); Rochow, *supra* note 570, at 580-81.

572. Harvey, *supra* note 460, at 1156.

573. 30 U.S.C. §§ 1254(a), 1272(a)(c)(d) (Supp. IV 1980).

574. *Id.* § 1201(f).

575. Harvey, *supra* note 460, at 1156.

576. 452 U.S. at 288.

577. Congress authorized payment of only a portion of the states' costs of administering and enforcing the surface mining regulations. *See supra* note 570. The delay of the Office of Surface

fundamental sense. If Congress had believed that the national government would bear the full regulatory burden, the political calculus leading to the enactment of the SMCRA probably would have been different.

Notwithstanding noble motives of providing for state and national cooperation and of preventing interstate competition in the establishment of weak environmental regulations in order to promote coal sales,[578] Congress intended to employ the states as its agents in regulating private activity, and it succeeded.[579] The Court's failure to confront this purpose and to analyze carefully the means used to achieve Congress' ends is intellectually dishonest.[580] Its dismissal of the SMCRA as "a program of cooperative federalism" simply compounds the problem of distinguishing between the constitutionally valid means of this Act and a second means of obtaining state enforcement of national regulations that *Hodel* suggests is invalid.

Mining in issuing regulations establishing the environmental standards to be enforced by the states and the guidelines for submission of state programs suggests that the national government's resources would not have been adequate to fulfill the additional responsibility of promulgating individual plans for each state. *See Regulatory Controversies, supra* note 568, at 763-64. State and local government administration and enforcement of national environmental programs is generally regarded as essential because of "the nation's size and geographic diversity, the close interrelation between environmental controls and local land use decisions, and federal officials' limited implementation and enforcement resources." Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 YALE L.J. 1196, 1196-98 (1977); *see also* Luneburg, *The National Quest for Clean Air 1970-1978: Intergovernmental Problems and Some Proposed Solutions,* 73 NW. U. L. REV. 397, 404-06 (1978).

578. 30 U.S.C. §§ 1201(g),(k), 1202(g) (Supp. IV 1980).

579. 452 U.S. at 272 n.7 (all but three states in which there are surface mining operations submitted state programs).

580. This judgment is harsh, but it is fully warranted by the Court's use of precedent to support the argument that the lower courts had approved other statutes, like the SMCRA, which provide a state role in the enforcement of national law. The Court cited three lower court decisions. *Id.* at 289 n.30. In the first case, a court upheld Congress' power to regulate airborne hunting under the commerce clause, but it did not consider the statutory provision for state enforcement of the restrictions on airborne hunting. United States v. Helsley, 615 F.2d 784 (9th Cir. 1979); 16 U.S.C. § 742j-1(d) (1976). In the second case, a court upheld Congress' power to use the states to enforce transportation controls. This case, however, conflicts with decisions in three other circuits holding that Congress cannot compel such state action, and the Supreme Court did not explain the basis for distinguishing this case. Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir.), *cert. denied,* 434 U.S. 902 (1977). *See infra* text accompanying notes 599-606. In the third case, another court upheld Congress' power to delegate authority to the states to implement national regulations. Sierra Club v. EPA, 540 F.2d 1114 (D.C. Cir. 1976), *cert. denied,* 430 U.S. 959 (1977). This court's consideration of the issues was confined, however, to a single, brief paragraph, and the act at issue was the Clean Air Act and not the Clean Water Act cited by the Supreme Court.

b. The Transportation Control Plan Cases

This second means of employing the states as the nation's agents was before the Court in *EPA v. Brown*.[581] The broad issue in this case was the authority of the Environmental Protection Agency (EPA) under the Clean Air Amendments of 1970 (1970 Amendments)[582] to compel state enforcement of national regulations designed to control motor vehicle air pollution. The 1970 Amendments employed the same mechanism as the SMCRA to obtain state administration and enforcement of national air pollution standards: the EPA was authorized to promulgate an air pollution control plan for each state and to regulate air pollution sources directly unless the state adopted and enforced a "state implementation plan" that would achieve national ambient air quality standards.[583]

In 1973 the EPA determined that state implementation plans must include a variety of measures, known collectively as Transportation Control Plans (TCPs), for the reduction of motor vehicle air pollution. When several states failed to submit a TCP or submitted an inadequate plan, the EPA promulgated transportation control plans for those states.[584] Although the TCPs drafted by the EPA varied from state to state, most included both some measures to limit the use of automobiles and provisions to reduce air pollution emissions.[585] The states were required to limit automobile use by restricting parking and gasoline supply, establishing car pool programs, creating special high-

581. 431 U.S. 99 (1977).

582. Pub. L. No. 91-604, 84 Stat. 1676, 42 U.S.C. §§ 1857-1858a (1976). The current legislation, referred to herein as the Clean Air Act (CAA), is a combination of the 1970 Amendments and the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 42 U.S.C. §§ 7401-7626 (Supp. IV 1980). Although both the 1970 Amendments and the CAA embody the same general scheme of regulation, the discussion of the transportation control plan regulations is limited to the 1970 Amendments unless otherwise noted. The CAA raises several distinct federalism issues, which are discussed *infra* at notes 693-704.

583. 42 U.S.C. § 1857c-5(a), (c) (1976). La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 IOWA L. REV. 771, 777-78 & n.35 (1977); Note, *The Clean Air Act Amendments of 1970: A Threat to Federalism*, 76 COLUM. L. REV. 990, 993-96 (1976). In contrast to the SMCRA, *see supra* note 568 and accompanying text, the states have broad discretion in designing pollution control measures and strategies that will reduce air pollution emissions. La Pierre, *supra*, at 778.

584. *See generally* 38 Fed. Reg. 30,626 (1973) (general preamble to all transportation control plans promulgated by EPA); Battle, *Transportation Controls Under the Clean Air Act—An Experience in (Un)Cooperative Federalism*, 15 LAND & WATER L. REV. 1, 4-16 (1980).

585. *E.g.*, 38 Fed. Reg. 31,233 (1973) (California transportation control plan). The description of the TCP's is drawn from the sources cited *supra* note 584.

way lanes for car pools and buses, purchasing buses, constructing bicycle routes, imposing time restrictions on truck operations, and prohibiting the use of vehicles in certain "traffic free zones." The EPA's plans included two principal provisions for reducing the level of air pollution emissions. First, the states were required to enforce rules requiring some automobiles, manufactured before the establishment of new car air pollution standards, to be "retrofitted" with expensive pollution control devices. Second, the states were required to establish "inspection and maintenance" (I/M) programs. The I/M programs required the states to test automobiles for compliance with applicable emission limitations, to order any necessary repairs, to refuse to register vehicles that failed the inspection, and to prohibit the operation of such vehicles.[586]

The EPA insisted that the states had a duty to enforce the TCPs because Congress so intended and because national enforcement would be expensive and inefficient.[587] The EPA reasoned that it had the power to impose this duty on the states because they are "the owners and operators of pollution sources through their ownership and operation of highway transportation facilities."[588] Assuming that a state power plant, which is a direct source of pollution, would be subject to national regulation, the EPA argued that an indirect source, like a highway which creates pollution by promoting automobile use, should also be subject to national pollution controls. In short, the EPA argued that a state-owned highway, like a state-owned railroad, is subject to national regulation.[589]

Although the EPA was certain of the states' duty, it was ambivalent about the source of the states' authority to enforce the TCPs. On the one hand, the EPA claimed that the 1970 Amendments and its regulations supplemented state law and provided the authority for state enforcement.[590] On the other hand, some of the TCP regulations

586. *E.g.*, 40 C.F.R. § 52.242(d) (1974) (California TCP) ("the State shall not register or allow to operate on its streets and highways any light-duty vehicle that does not comply with applicable standards"). Owners of noncomplying vehicles were also prohibited from operating them. *E.g., id.* § 52.242(e).

587. 38 Fed. Reg. 30,626, 30,633 (1973). The EPA has consistently maintained that the courts can enforce by injunctions the states' duty to implement the TCPs, but it has disclaimed any intention to seek criminal penalties. *Id.*; 42 Fed. Reg. 30,504, 30,505 n.15 (1977).

588. 38 Fed. Reg. 30,626, 30,632 (1973).

589. *Id.*

590. *Id.* at 30,633.

required the states to submit "a detailed compliance schedule" including "the text of needed statutory proposals and needed regulations that it will propose for adoption," "the date by which [it] will recommend any needed legislation to the state legislature," and "[a] signed statement from the Governor and State Treasurer identifying the sources and amount of funds for the program."[591]

Courts of appeals in five circuits considered the validity of the transportation control plans, but the decisions do not support any neat, clear conclusions about the scope of Congress' power to use the states as its agents because the courts analyzed the statutory and constitutional issues in distinctly different fashions.[592] All these courts apparently agreed that the EPA had both the statutory and constitutional power to regulate state activities that are a direct source of pollution;[593] however, they divided on the question whether the TCPs regulated the states as polluters or required the states to regulate private pollution-causing activity. Of the three courts that considered the EPA's argument that state operation of its highways is subject to national regulation, two concluded that it had some merit. The Third Circuit accepted the EPA's argument completely and upheld the agency's power to compel Pennsylvania to establish a program requiring all pre-1968 motor vehicles in two parts of the state to be equipped with pollution control devices.[594] Although the Court of Appeals for the District of Columbia

591. 38 Fed. Reg. 31, 232 (1973) (regulations governing the California inspection and maintenance program). *See* 42 U.S.C. § 1857c-5(a)(2)(F) (1976) (EPA approval of state implementation plans required "necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan").

592. These courts divided rather evenly on the ultimate question of the validity of the TCPs. Two courts upheld the TCPs. Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir.), *cert. denied,* 434 U.S. 902 (1977); Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974). Two courts held that most of TCP regulations promulgated by EPA were invalid. Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded,* 431 U.S. 99 (1977); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975) (Brown I), *vacated and remanded,* 431 U.S. 99 (1977), *on remand,* 566 F.2d 665 (9th Cir. 1977) (Brown II). The Ninth Circuit also decided two other cases on the basis of its decision in *Brown I.* Alaska v. EPA, 521 F.2d 842 (9th Cir. 1975); Arizona v. EPA, 521 F.2d 825 (9th Cir. 1975), *vacated and remanded,* 431 U.S. 99 (1977). The Court of Appeals for District of Columbia upheld some provisions of the TCPs for Maryland, Virginia, and the District of Columbia. District of Columbia v. Train, 530 F.2d 971 (D.C. Cir. 1975) (DCI), *vacated and remanded,* 431 U.S. 99 (1977), *on remand,* 567 F.2d 1091 (D.C. Cir. 1977) (DC II). *See* Texas v. EPA, 499 F.2d 289, 320 (5th Cir. 1974) (court declined to decide constitutional issue).

593. Only two of the five courts stated this proposition expressly. District of Columbia v. Train, 530 F.2d 971, 983, 989 (D.C. Cir. 1975); Brown v. EPA, 521 F.2d 827, 832 (9th Cir. 1975).

594. Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974). The court accepted the EPA's analogy between a state-owned railroad and state highway operation. The court's specific reliance on

disapproved requirements that two states and the District of Columbia must establish inspection and maintenance programs and retrofit programs,[595] it upheld requirements that these jurisdictions must purchase an additional 475 buses for a public transit system and must establish exclusive bus lanes.[596] The court apparently agreed with the EPA that the operation of the highways and of a public mass transit system was analogous to state operation of a railroad, and it rejected arguments that the increased financial burden invalidated these requirements.[597] The Ninth Circuit rejected the analogy between state operation of highways and a state-owned railroad system. Although Congress could regulate an economic activity like the operation of a railroad, it could not regulate the states' governance of private activity like the use of highways.[598]

With respect to the components of the TCPs that were read to require the states to regulate private activity, the District of Columbia, Fourth, and Ninth Circuits all uniformly held that the EPA had no such statutory authority.[599] These three courts also concluded that there is a constitutional bar to Congress' power to compel the states to regulate private activity, but they identified different constitutional problems. The District of Columbia and the Ninth Circuit concluded that the states cannot be compelled to implement nationally imposed regulations.[600] The Fourth Circuit concluded that the TCP regulations

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Maryland v. Wirtz for the proposition that state and private activities are equally subject to national regulation to the extent that they affect interstate commerce is, of course, no longer valid because *NLC* overruled that case and rejected the equation of state and private activity. *See supra* text accompanying notes 98 & 109.

A district court in the Third Circuit has now found, contrary to *Pennsylvania v. EPA*, that Congress cannot "constitutionally require the states to pass legislation establishing a regulatory program to enforce the Clean Air Act." Delaware Valley Citizens' Council v. Pennsylvania, 533 F. Supp. 869, 879 (E.D. Pa.), *aff'd on other grounds,* 678 F.2d 470 (3rd Cir. 1982). For a brief analysis of this case, see *infra* note 704.

595. *See infra* note 600 and accompanying text.

596. DC I, 530 F.2d at 989-90. The Court also suggested that it would have upheld a requirement that the states construct a system of bicycle lanes if the record had provided adequate support. *Id.*

597. *Id.*

598. Brown I, 521 F.2d at 838-39. On remand, this court adhered to the view that state regulation of its highways did not make the state the "indirect" source of pollution caused by vehicles operated by private parties. Brown II, 566 F.2d at 672.

599. DC I, 530 F.2d at 983-88; Maryland v. EPA, 530 F.2d at 227; Brown I, 521 F.2d at 832-37.

600. The Court of Appeals for the District of Columbia concluded that recognition of the EPA's power "to commandeer the regulatory powers of the states, along with their personnel and

were invalid because they compelled the states to legislate.[601] Although the Supreme Court vacated and remanded these three judgments,[602] they would seem to establish a limit on Congress' power to require the states to enforce national law but for a subsequent decision of the Second Circuit.

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resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles" would be an unprecedented, "drastic" intrusion on state sovereignty. DC I, 530 F.2d at 992, 994. The Ninth Circuit reasoned that such national power is unconstitutional because the severance of state control over spending from the obligation to raise the revenues required to implement the national program might violate the guarantee clause and because national control of state spending would impair the state's ability to function effectively in the federal system contrary to the tenth amendment. Brown I, 521 F.2d at 840, 842. The District of Columbia Circuit did uphold, however, the validity of the EPA regulation prohibiting the states from registering or allowing to operate vehicles that fail emission tests. Its approval was confined to requiring the states to deny a registration and apparently did not include any requirement that the states enforce the prohibition on operation. *See* DC I, 530 F.2d at 991-92. The Ninth Circuit adopted a similar position on remand. Brown II, 566 F.2d at 673. The Sixth Circuit also has upheld Congress' power to prohibit the states from granting a motor vehicle registration to vehicles that fail emission tests. *See supra* text accompanying notes 486-88.

601. Maryland v. EPA, 530 F.2d 215, 224-25 (4th Cir. 1975).

602. 431 U.S. 99 (1977). Since all these lower court decisions were before *NLC*, there was a widespread expectation that the Supreme Court's decision would be a watershed, and there is an extensive literature on the constitutional issues raised by the EPA's TCP regulations. Luneburg, *supra* note 577, at 466 n.297 (list of articles).

The Supreme Court vacated the judgments because the EPA conceded that its regulations had to be amended to remove "all requirements that the States submit legally adopted regulations," and the Court refused to pass on regulations "in need of certain essential modifications." 431 U.S. at 103. The basis for the Court's decision hardly seems a dispositive point for it is difficult to understand how a state can act other than through juridically valid means. It is possible, however, that the decision to vacate reflects a tacit conclusion either that it is needlessly intrusive to superintend the state legislative process by requiring the state to submit its proposed laws and regulations or that review of the end product is sufficient. It is also possible that the Court's action reflects a tacit understanding that there is a constitutional difference between requiring a state to enact and enforce state laws regulating private activity under national standards and supplementing state law and requiring the states to exercise authority conferred by national law.

The EPA, for one, found these tacit distinctions important, and it amended its regulations to remove all references to state legislative activity and all requirements that the states adopt regulations. 42 Fed. Reg. 30,504 (1977). Although the EPA concluded that it lacked the power to specify "the governmental processes and the details of implementation," it insisted on its power to specify "the ultimate acts that states must perform to comply." *Id.* at 30,505. Nonetheless, the Ninth Circuit was not impressed. On remand, it adhered to its conclusion that the California TCP was unconstitutional. Since the same duty was imposed on the state, it viewed the changes made by the EPA as "merely cosmetic." Brown II, 566 F.2d at 668-69. In the only other decision on remand, the TCP was in turn remanded to the EPA. DC II, 567 F.2d 1091 (D.C. Cir. 1977). The controversy over the 1973 TCP regulations subsided because EPA decided to focus its efforts on the changes required by the 1977 Clean Air Act Amendments. 44 Fed. Reg. 20,372, 20,374 n.15 (1979). *See infra* text accompanying notes 693-704.

In *Friends of the Earth, Inc. v. Carey* (*FOE*),[603] which unlike the other TCP cases was decided after *NLC*, the Second Circuit held that a TCP promulgated by the New York State and the City of New York was valid and that the city was required to regulate parking in the business district, to control taxicab cruising, to impose tolls on two bridges, and to implement a night time freight movement program. Although the court rested its judgment in part on a procedural ground, it also found that there was no constitutional bar to enforcement of the TCP.[604] The Second Circuit distinguished the other TCP cases on the grounds that they involved a state duty to enforce nationally promulgated regulations and that because the TCP had been drafted by the state, even under the threat of imposition of an EPA-drafted plan, there was no interference with state policy.[605] The court also concluded that there was no impermissible interference with integral government functions contrary to *NLC* because the policies of the TCP were adopted locally and the city could use its existing institutions and personnel to enforce it. Given this description of minimal interference with state and local policymaking and of a minimal burden on the resources of local government, the court concluded that the national interest in health and safety outweighed any intrusion on local governmental affairs.[606]

Hodel and the transportation control plan cases, read together, do not establish an adequate framework to evaluate Congress' power under the commerce clause to employ the states as its agents in regulating private activity. *Hodel* implicitly approved the conclusion of three courts of appeals that Congress cannot compel the states to administer and enforce national regulations of private conduct.[607] Compulsion,

603. 552 F.2d 25 (2d Cir.), *cert. denied,* 434 U.S. 902 (1977). For a more thorough discussion of this case, see Battle, *supra* note 584, at 21-24.

604. 552 F.2d at 34-36.

605. *Id.* at 36-37.

606. *Id.* at 37-39.

607. 452 U.S. 264, 288-89 (1981) (contrasts the SMCRA with the national regulations at issue in *Maryland v. EPA*, *Brown I* & *DC I* which "[commandeer] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.").

One might reasonably ask whether the approval of these cases extends to the holding of the Court of Appeals for the District of Columbia that the EPA can compel the states to purchase additional buses and to establish express bus lanes. *See supra* text accompanying note 596. The line between national regulation of the states as polluters and national control of state regulation of private activity is very thin. For example, state operation of a mass transit system and state regulation of private transit companies may easily be considered alternative means to the same end of providing for adequate public transportation. *See supra* note 473. If the EPA can compel

however, is little more than a label. *Hodel* also expressly approved *FOE* as an example of state participation in a national regulatory program,[608] and in that case the Second Circuit required the City of New York to regulate private activity under a TCP that it had adopted under the threat of EPA promulgation of a substitute plan and that it no longer, if it ever, wished to enforce. Moreover, the Court in *Hodel* ignored several provisions of the SMCRA that are designed to obtain state cooperation in regulating surface mining.[609] Although *Hodel* and the TCP cases are most easily read as establishing "compulsion" as the limit on Congress' power to employ the states as its agents, the approval of *FOE* also leaves the door open to a balancing test derived from *NLC*.

c. *Federal Energy Regulatory Commission v. Mississippi*

Far from curing the problems inherent in the analytical framework derived from *Hodel* and the TCP cases, *Federal Energy Regulatory Commission v. Mississippi*[610] aggravates them. In this case the Court considered the constitutionality of provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA)[611] that require state agencies to implement national regulatory programs. Under Title I of this Act, state agencies that regulate electric utilities under state law must conduct administrative proceedings to consider and determine whether twelve national rate design policies and service standards should be adopted and enforced with respect to each regulated electric utility.[612] Under Title III, similar obligations with respect to two standards are

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the states as owners of transportation systems to purchase buses, can it also compel the states to regulate private transit companies and require them to purchase additional vehicles? Put simply, restrictions on Congress' power to require the states to regulate private activity may be avoided by characterizing the regulation as controlling the state itself.

608. *See supra* note 580. Although *FOE* can be read to rest entirely on procedural grounds, *see* text accompanying note 604, *Hodel* cited *FOE* expressly for its holding that there was no constitutional bar to compelling the state to implement the TCP.

609. *See supra* text accompanying notes 570-73.

610. 102 S. Ct. 2126 (1982), *rev'g*, No. J79-0212(C) (S.D. Miss. Feb. 27, 1981).

611. Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 15, 16, 42 and 43 U.S.C. (Supp. IV 1980).

612. Pub. L. No. 95-617, tit. I, §§ 101-134, 92 Stat. 3120-34, 16 U.S.C. §§ 2611-2644 (Supp. IV 1980). State regulatory authorities must consider the adoption of six rate design policies, five standards setting the terms and conditions of electricity service, and a special "lifeline rate" for the essential needs of residential electric consumers. 16 U.S.C. §§ 2621(a),(d), 2623(a),(b), 2624(a),(b). If an electric utility is not subject to state regulation, the obligation to consider adoption of these twelve standards is imposed directly on the electric utility. *Id.*

imposed on state agencies that regulate natural gas utilities.[613] A duty is also imposed on the states under section 210 of Title II to enforce national regulations that require electric utilities to purchase electric energy from cogeneration and small power production facilities and to sell energy to such facilities.[614]

In light of the Court's surprising and unwarranted conclusions[615] that the requirements of Titles I and III are not mandatory and hence have an insignificant impact on the states, two points bear special emphasis. First, PURPA's requirements are mandatory: Congress intended to impose a duty on state agencies to enforce national policies for electric and natural gas utilities. In Titles I and III and in section 210, the duty is imposed directly on state regulatory authorities (SRAs), which are defined as the state agencies with ratemaking authority under state law over the sale of electric energy and natural gas.[616] In Title I Congress provided that SRAs "shall" conduct administrative proceedings to consider and determine whether to adopt and implement the twelve national rate design policies and service standards for

613. Pub. L. No. 95-617, tit. III, §§ 301-311, 92 Stat. 3149-54, 15 U.S.C. §§ 3201-3211 (Supp. IV 1980). State regulatory authorities and nonregulated gas utilities must consider adoption of standards governing termination of service and the allocation of costs of promotional and political advertising. 15 U.S.C. §§ 3203(a),(b).

614. Pub. L. No. 95-617, tit. II, § 210, 92 Stat. 3144-47, 16 U.S.C. § 824a-3 (Supp. IV 1980). A "cogeneration facility" produces both heat and electricity for use in industrial processes. Unless this facility is interconnected with the power distribution system of an electric utility, excess electric power or electric power generated from excess heat cannot be used. A "small power production facility" uses biomass, waste, wind, solar energy, or water to generate electric power and must have a production capacity of 80 megawatts or less. *Id.* § 796(17), (18); American Elec. Power v. Federal Energy Regulatory Comm'n, 675 F.2d 1226, 1229-30 (D.C. Cir. 1982). The PURPA authorizes the Federal Energy Regulatory Commission (FERC) to adopt rules that promote conservation through interconnection between cogeneration and small power production facilities and electric utility companies. In particular, the Act directs the FERC to promulgate rules requiring electric utilities to sell electric energy to small power production and cogeneration facilities and to purchase electric energy from these facilities. 16 U.S.C. § 824a-3(a). *See* 675 F.2d at 1233-46 (approving and disapproving certain cogeneration and small power production facilities rules). State regulatory authorities must enforce these rules. 16 U.S.C. § 824a-3(f)(1) ("each State regulatory authority shall . . . implement such rule . . . for each electric utility for which it has ratemaking authority"). Electric utilities that are not subject to state rate regulation also must implement FERC's rules. *Id.* § 824a-3(f)(2).

The FERC is also empowered to adopt rules exempting cogeneration and small power production facilities from certain national and state laws governing electric utilities. *Id.* § 824a-3(e).

615. *See infra* text accompanying notes 654-64.

616. Title I, § 3(17), 16 U.S.C. § 2602(17) (Supp. IV 1980); Title II, § 201, 16 U.S.C. § 796(21) (Supp. IV 1980); Title III, § 302(8), 15 U.S.C. § 3202(8) (Supp. IV 1980).

electric utilities.[617] In Title III Congress provided that SRAs "shall" hold hearings on the question whether to adopt two national standards for natural gas utilities.[618] In section 210 Congress provided that SRAs "shall . . . implement" FERC's rules governing cogeneration and small power production facilities.[619] It is true that the Act does not impose any penalty on SRAs for failure either to complete consideration of the national standards in a timely fashion or to enforce FERC's cogeneration and small power production facility rules,[620] but the absence of a penalty does not negate the mandate. All the obligations imposed on state regulatory authorities under Title I,[621] Title III,[622] and section 210[623] are enforceable by court order.

Second, as illustrated by a brief consideration of the Title I provisions governing state regulation of electric utilities, the PURPA does in fact have a significant impact on the states. If one considers only the effect on state substantive policy, PURPA's impact is quite limited. In contrast to the EPA's transportation control plans, there is no direct displacement of state regulatory policies because the states are free, provided they consider adoption of the national standards, to reject them.[624] Nonetheless, the PURPA may have at least three major ef-

617. 16 U.S.C. §§ 2621(a), 2623(a), 2624(b) (Supp. IV 1980). In addition to these directions that SRAs "shall" consider the twelve national standards, Title I provides that SRAs "shall" take many other actions. *E.g., id.* §§ 2612(c), 2626(a).

618. 15 U.S.C. § 3203(a) (Supp. IV 1980).

619. 16 U.S.C. § 824a-3(f) (Supp. IV 1980).

620. The PURPA contains only one provision addressing the question of a SRA's failure to comply. If a SRA fails to conduct administrative proceedings for consideration of six national rate design policies in a timely fashion, then the Act provides that the SRA "shall" consider and determine whether to adopt the national standards in its next rate proceeding. 16 U.S.C. § 2622(c) (Supp. IV 1980). No penalty is imposed for continued noncompliance.

621. *Id.* § 2633(c)(1) ("[a]ny person . . . may bring an action to enforce the requirements of [Title I] in the appropriate State court. . . ."). In the Conference Report, Congress stated that it contemplated "enforcement (including by writ of mandamus) of obligations of State regulatory authorities . . . to hold hearings, to make determinations, and to comply with all the other requirements of [all the sections of Title I applicable to SRAs]." H.R. REP. No. 1750, 95th Cong. 2d Sess. 63, 84 *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7797, 7818 [hereinafter cited as *Conference Report*].

622. 15 U.S.C. § 3207(b)(1) (Supp. IV 1980) ("[a]ny person may bring an action to enforce the requirements of [Title III] in the appropriate State court.").

623. 16 U.S.C. § 824a-3(h)(2)(A) (Supp. IV 1980) (the FERC "may enforce the requirements of subsection (f) of this section [which requires states to implement FERC's cogeneration and small power production facility rules, *see supra* note 614 and accompanying text] against any State regulatory authority. . . .").

624. *E.g.*, 16 U.S.C. §§ 2621(a), (c)(1)(B), (c)(2), 2623(a), (c)(2), 2627(b) (Supp. IV 1980). Under Title III SRAs have identical policy discretion with respect to the national standards for

fects on the states. First, it purports to enlarge the authority of state regulatory agencies. If a state agency lacks state law authority to comply with PURPA's requirements, then the Act provides that its purposes "supplement otherwise applicable state law."[625] Second, the requirements that state agencies conduct hearings on the national standards,[626] compile information necessary to review these standards,[627] and report information about regulated utilities to the national government[628] impose regulatory and financial burdens[629] and reduce the resources available for implementation of state policies. Finally, the state regulatory agency may have to change its decisionmaking processes to conform with procedural requirements for hearings on the national standards.[630]

Notwithstanding the duty imposed on SRAs and the impact on the states of implementing national regulatory policies, the Court upheld both section 210 and Titles I and III.[631] The Court unanimously[632]

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natural gas utilities. 15 U.S.C. § 3203(a) (Supp. IV 1980). The states' policy discretion is limited, however, under Title II because they are required to enforce national rules governing the relationship between electric utilities and cogenerators or small power producers. *See supra* note 614 and accompanying text.

625. 16 U.S.C. §§ 2621(a), 2623(a)(2) (Supp. IV 1980).

626. *Id.* §§ 2622, 2623(a), 2624(b).

627. *E.g., id.* §§ 2621(d)(1), 2625(a) (determination of costs of service to particular classes of consumers under prescribed methods).

628. *Id.* § 2626.

629. The PURPA does authorize grants to offset some of the costs of compliance with its requirements. Title I, §§ 141-142, 42 U.S.C. §§ 6807-6808 (Supp. IV 1980).

630. The PURPA imposes many procedural requirements including: public notice and hearing, 16 U.S.C. §§ 2621(b)(1), 2623(a) (Supp. IV 1980), intervention and participation by a national agency, affected electric utilities, and electricity consumers, *id.* § 2631(a), discovery rules, *id.* § 2631(b), written statements of findings and reasons, *e.g., id.* § 2621(b)(1), and procedures governing compensation for the costs of intervention and participation, *id.* § 2632.

631. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126 (1982), *rev'g,* No. J79-0212(C) (S.D. Miss. Feb. 27, 1981). The district court held that the PURPA was unconstitutional because Congress did not have the power under the commerce clause to regulate electric utilities and because the Act directly intruded on the "integral and traditional functions of the State of Mississippi" contrary to the tenth amendment. No. J79-0212(C), slip. op. at 3-4; No. J79-0212(C), Final Judgment at 1. This court's reliance on Carter v. Carter Coal Co., 298 U.S. 238 (1936), and Hammer v. Dagenhart (The Child Labor Case), 247 U.S. 251 (1918), indicates the quality of its commerce clause analysis. The Supreme Court easily concluded that the district court's analysis and commerce clause contention were "without merit." 102 S. Ct. at 2134-36.

Although the district court simply asserted that "three standards under PURPA," which it did not identify, were unconstitutional, No. J79-0212(C), slip. op. at 6, and then held summarily that Titles I and III and section 210 of Title II were unconstitutional, No. J79-0212(C), slip. op. at 6, the Supreme Court analyzed the statute and rejected the tenth amendment challenges. 102 S. Ct. at 2137-43. The district court did not explain its assertions that the PURPA also violated the

upheld the mandatory[633] requirement of section 210 that SRAs implement national cogeneration and small power production facility rules,[634] and it based its holding on a regulation promulgated by the FERC. This regulation authorizes SRAs to implement FERC rules by "issuance of regulations, an undertaking to resolve disputes between [cogeneration and small power production] facilities and electric utilities arising under [section 210 and FERC regulations], or any other action reasonably designed to implement [section 210 and FERC regulations]."[635] The Court noted that this regulation gives SRAs "latitude in determining the manner in which the regulations are to be implemented"[636] and read the regulatory provision for implementation by dispute resolution as requiring SRAs to adjudicate disputes arising under the PURPA between cogeneration and small power production facilities and electric utilities.[637]

Having construed section 210 to impose a duty on SRAs to adjudicate claims arising under a national statute, the Court concluded that *Testa v. Katt*[638] was controlling.[639] Under this case, state courts have a duty to adjudicate claims arising under national law if they have adequate state law jurisdiction to hear analogous state law claims.[640] Since

guarantee clause, U.S. CONST., art. IV, § 4, and the supremacy clause, U.S. CONST., art. VI, cl. 2, and the Supreme Court did not consider arguments based on these two constitutional provisions. 102 S. Ct. at 2134.

632. Justice Blackmun, joined by Justices Brennan, White, Marshall and Stevens, delivered the opinion of the Court, which upheld section 210. 102 S. Ct. at 2137-38. Justice Powell concurred in this part of the Court's judgment except to the extent that section 210 imposes procedural rules on state agencies. *Id.* at 2143-45, 2144 n.2. Justice O'Connor, joined by the Chief Justice and Justice Rehnquist, concurred in the Court's decision to sustain section 210, but she noted a few reservations. 102 S. Ct. at 2146 n.1.

633. In contrast to the majority's conclusion that Titles I and III are not mandatory, *see infra* text at notes 654-59, the Court explicitly recognized that section 210's requirements are mandatory. *Id.* at 2133, 2137.

634. The Court also unanimously upheld FERC's power under section 210(c) to adopt rules exempting cogeneration and small power production facilities from state laws governing electric utilities, *see supra* note 614, and to preempt conflicting state regulations because *NLC* does not limit Congress' power to regulate private activity. 102 S. Ct. at 2137, 2146 n.1 (O'Connor, J., concurring in part in the judgment and dissenting in part).

635. 18 C.F.R. § 292.401(a) (1981).

636. 102 S. Ct. at 2133.

637. *Id.* at 2137.

638. 330 U.S. 386 (1947).

639. 102 S. Ct. at 2137.

640. *Id.* at 2137-38. It is well-settled that state courts have the power to hear a federal cause of action unless Congress limits jurisdiction exclusively to the federal courts and that, at least in some circumstances, Congress may impose a duty on state courts to adjudicate a federal cause of

the Court found that "[t]he Mississippi Commission has jurisdiction to entertain claims analogous to those granted by PURPA"[641] and that the combination of administrative duties with the state agencies' judicial duties "is of no significance,"[642] it upheld section 210.[643]

Apart from a rather selective reading of the FERC regulation to limit the duty imposed on SRAs under section 210 to adjudication of disputes arising under the PURPA, there are two serious problems with the Court's insistence that *Testa v. Katt* controls. First, *Testa* begs the question of federalism limits on Congress' power to compel state enforcement of national law. The Court held in *Testa* that under the supremacy clause[644] a state court had a duty to adjudicate a claim arising under a national statute.[645] Reliance on the supremacy clause begs the question of federalism limits on national power because if Congress had no power to impose a duty on a state court, then the national law imposing the duty is not valid and the supremacy clause has no effect.[646] The Court's invocation of *Testa* and its reference to "the preeminent position held by federal law throughout the Nation"[647] simply repeat the original error of *Testa* and beg the question whether a national statute imposing a duty on a state agency is a valid exercise of Congress' power or is limited by federalism principles.

The second problem with the Court's reliance on *Testa* to uphold section 210 is the extrapolation of a duty of state administrative agencies to enforce national regulations by adjudicating claims from the duty of state courts to perform the same function. History provides a solid warrant for Congress' power to impose a duty on state courts to

action. There are several generally recognized limits, subsumed under the rubric "valid excuse," on Congress' power to compel state courts to entertain a federal cause of action. State courts can decline jurisdiction if the suit is brought in a state court of limited jurisdiction, if the doctrine of forum non conveniens applies, or if the state courts do not enforce an analogous forum or sister state created rights. The question whether there are other limits on Congress' power to compel state court adjudication of national statutory and constitutional rights is not settled. *See generally* Redish & Muench, *Adjudication of Federal Causes of Action in State Court,* 75 MICH. L. REV. 311, 340-59 (1976).

641. 102 S. Ct. at 2138.

642. *Id.*

643. *Id.*

644. *See supra* note 45.

645. 330 U.S. at 389-91. The supremacy clause was the sole basis of the Court's holding although there are other arguments that support Congress' power to impose duties on state courts. *See infra* note 995 and accompanying text.

646. *See supra* note 45.

647. 102 S. Ct. at 2138.

entertain claims arising under national law,[648] but there is no similar support for national power to impose duties on state administrative agencies. The Court explained its extrapolation of a state administrative agency's duty from a state court duty only by recognizing that modern agencies have functions similar to those of courts.[649] Even Professor Stewart, the foremost proponent of the states' duty to implement national regulations,[650] has questioned this argument for extending *Testa* to administrative agencies.[651] More importantly, the implicit resort to history by analogizing the functions of state agencies to the functions of state courts does not support Congress' power to impose a duty on state administrative agencies to enforce section 210. Even if FERC's regulations can be implemented through adjudication by SRAs, the implementation of these regulations is essentially an executive function. Our constitutional history does support Congress' power to impose a duty on state courts to hear claims arising under national law.[652] It also shows, however, that when Congress has sought enforcement of national law through the performance of quasi-judicial or executive functions by state judicial and executive officers, it has delegated national authority and not imposed a duty to enforce national law.[653]

Although the entire Court was content to uphold Congress' power under section 210 to impose a duty on SRAs to enforce national law by adjudication, the question of the validity of Titles I and III divided the Court.[654] Statutory interpretation was the key to the Court's decision

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648. *See infra* note 995 and accompanying text.

649. 102 S. Ct. at 2138 n.24. The Court also invoked *Testa* to support Congress' power under Titles I and III to regulate the procedures employed by SRAs in hearings to consider the adoption of rate design and service standards governing electric and natural gas utilities. *Id.* at 2142. Since the conduct of hearings and enforcement of the national standards are not adjudicatory functions, the Court may read *Testa* broadly to support Congress' power to impose a duty on state agencies to administer national regulations as well as to compel adjudication of claims arising under national law.

650. *See infra* text accompanying notes 1033-55.

651. Stewart, *supra* note 577, at 1246-47.

652. *See infra* note 995 and accompanying text.

653. *See infra* text accompanying notes 996-1032.

654. Justices Brennan, White, Marshall, and Stevens joined Justice Blackmun's opinion upholding Titles I and III. 102 S. Ct. at 2138-43. Justice Powell wrote a separate opinion. He agreed that these titles were valid to the extent that SRAs are required to consider and determine whether to adopt national standards, but he dissented from the Court's determination that the procedural requirements governing state administrative proceedings are valid. *Id.* at 2143-45. Justice O'Connor, joined by the Chief Justice and Justice Rehnquist, dissented. *Id.* at 2145-57.

to uphold Titles I and III. The majority concluded that these titles are not mandatory because if a state abandons utility regulation or abolishes its SRA, then it does not have to comply with the requirements to consider the national standards for electric and gas utilities.[655] The majority did not explain the basis for this interpretation of the PURPA, but its logic would seem to be as follows: (1) the duty to implement the PURPA is imposed directly on SRAs[656] and not on the states; (2) states are free to abolish their SRAs and abandon utility rate regulation; (3) if a state has no SRA, then Titles I and III do not impose any duty on that state. Since Congress has power under the commerce clause to regulate electric and natural gas utilities and the states are free to abandon regulation of such utilities, the Court concluded that "Titles I and III simply establish requirements for continued state activity in an otherwise pre-emptible field."[657] The Court found that the states have a choice between two alternatives: they can continue to regulate electric and natural gas utilities if they agree to implement the PURPA, or they can abandon utility regulation.[658] The Court left unstated a third alternative and its consequence: if the states refuse to implement the PURPA and continue to regulate utilities, their regulations are preempted.[659]

If the search for congressional intent is arbitrarily confined solely to the language of Titles I and III providing that SRAs "shall" take certain actions,[660] then the Court's interpretation of these two titles is perhaps plausible. It is, however, totally inconsistent with any fair, complete reading of the PURPA and its legislative history. Congress specifically imposed duties on SRAs.[661] It provided for enforcement of

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Thus, the provisions of Titles I and III requiring SRAs to conduct administrative proceedings to consider the adoption of national standards were upheld on a six-to-three vote, and Congress' power to regulate the procedures governing these state proceedings was sustained by a narrow five-to-four majority.

655. *Id.* at 2138-41.

656. *See supra* text accompanying note 616.

657. 102 S. Ct. at 2142. In a footnote to this statement, the Court said that "[w]e hold only that Congress may impose conditions on the State's regulation of private conduct in a pre-emptible area." *Id.* at 2142 n.32.

658. *Id.* at 2140-41 & 2141 n.30.

659. State regulation of electric and natural gas utilities that did not include implementation of Titles I and III would conflict with the statute as interpreted by the Court. Under the supremacy clause, state law in conflict with national law is invalid. *See supra* note 55.

660. *See supra* text accompanying note 616.

661. *See supra* text accompanying notes 617 & 618.

these duties by court order.[662] There is simply no evidence that Congress intended to prohibit all state regulation of electric and natural gas utilities if SRAs refused to fulfill their obligations under the PURPA, and the Court cited no support for its interpretation of the statute. Moreover, a statutory provision preserving state regulation of rate of return and overall utility revenues[663] is directly contrary to the Court's conclusion that if the states fail to implement Titles I and III then they must abandon the field of utility regulation or suffer preemption of their power to regulate utilities. In finding that Titles I and III are not mandatory and that implementation of these Titles by SRAs is a condition of continued state regulation in a preemptible field, the Court rewrote the statute.[664]

Given its construction of Titles I and III, the Court easily rejected *NLC* and tenth amendment objections to Congress' power "to use state

662. *See supra* notes 620-23 and accompanying text.

663. In section 117 of the PURPA, Congress provided that nothing in the Act would affect the rate of return or amount of revenues permitted under other laws, and the Conferees explained that "determinations with respect to rate of return and overall revenues permitted to utilities is exclusively a matter of state law, and the principal federal concern is with the structure of rates to different classes of consumers as specified in the rate structure." *Conference Report*, *supra* note 621, at 81.

Since Congress stated that the PURPA would have no effect on state regulation of rates of return and overall utility revenues, it expressly saved such state regulations from preemption. *See* Murphy & La Pierre, *supra* note 55, at 440-45, 441 n.261. Preemption of state regulations governing rates of return and overall revenues under the Court's interpretation of the statute would be directly contrary to the well-settled rule that the courts defer to congressional determinations about the preemptive scope of national laws and in particular to statutory provisions preserving state law from preemption. *Id.* Even in the absence of an express provision saving the rate of return and overall revenue regulation, preemption of such regulations would be inappropriate. Since Congress stated that the national interest is confined to the rate structure, there would be no conflict warranting preemption. *See supra* note 55.

In addition to this strong evidence that Congress did not intend to preempt all state regulation of electric and natural gas utilities if SRAs refused to implement Titles I and III, preemption as a sanction would lead to an improbable result. Electric and gas utilities would still be subject to Titles I and III because the provisions of these titles apply directly to nonregulated utilities as well as SRAs. *See supra* note 612. These utilities would, however, be freed from all state rate regulation, and the PURPA does not provide for national rate regulation to fill the regulatory void. 102 S. Ct. at 2141. If a utility objected to the order of a SRA denying a rate increase and that SRA had refused to implement the PURPA, the Court would have to uphold the utility's claim that state rate regulation conflicted with the PURPA and was invalid. If such a case arises, the Court will not be able to find any support for a claim that Congress intended to sanction state failure to implement the PURPA with a void in utility rate regulation.

664. Notwithstanding the Court's strained reading of Titles I and III, the partial dissent accepted the Court's construction of the statute. *See* 102 S. Ct. at 2145-57 (O'Connor, J., concurring in part in the judgment and dissenting in part).

regulatory machinery to advance federal goals."[665] The Court found that the provisions for state implementation of Titles I and III were similar to the provisions for state enforcement of national regulations approved in *Hodel*.[666] As the Court construed Titles I and III, the argument has some force. In *Hodel* the Court approved Congress' power to obtain state regulation of private surface mining companies under a threat that direct national regulation would be imposed if the states failed to implement national environmental standards.[667] In *FERC* the Court in effect approved state administration of national regulatory policies governing utilities under a threat that all state regulation of electric and natural gas utilities would be prohibited if the states failed to act.

In addition to the analogy between the statutes at issue in *Hodel* and *FERC*, the Court also upheld Titles I and III on the ground that they do not interfere with the "quintessential attribute of sovereignty"—the states' "power to make decisions and to set policy" for private activity.[668] Since the PURPA requires only "consideration" of national standards, the Court found no interference with the states' power to regulate private activity.[669] The absence of any interference with the states' power to set policies also was supported by the argument that Congress could have imposed the national standards directly on electric and natural gas utilities and preempted state regulation and by the finding that Congress had in fact chosen a less intrusive alternative by requiring merely consideration of the national standards.[670] The Court's finding that there is no intrusion on the states' power to set regulatory policies is correct because the states are free under Titles I and III to refuse to adopt the national rate design policies and service standards.[671] The Court, however, failed to consider the administrative and financial costs borne by the states in conducting hearings to consider the adoption of the national standards and the diversion of state government resources from the implementation of state policies to the

665. *Id.* at 2137.

666. *Id.* at 2141.

667. See *supra* text accompanying notes 559-80.

668. 102 S. Ct. at 2138.

669. The Court emphasized the point that Titles I and III require only "consideration" of national standards by italicizing this word. *Id.* at 2140.

670. *Id.*

671. *See supra* text accompanying note 624.

implementation of national regulatory policies.[672]

FERC, unfortunately, does not establish any clear test of Congress' power to employ the states as its agents to administer and enforce national regulatory policies for private activity. It leaves unresolved the questions raised by the TCP cases and *Hodel*: Is Congress' power to be judged under some test derived from *NLC*? Does Congress have the power to induce, but not to compel, state implementation of national regulations?[673]

The possibility that the Court may limit Congress' power to employ the states as the nation's agents under some test derived from *NLC* remains open because the majority in *FERC*, as the dissent contended,[674] basically ignored the question of *NLC* limits. The Court ignored this question because it found that Titles I and III of the PURPA have no significant impact on the states.[675] Absent some impact on state autonomy, there is, of course, no reason to consider whether *NLC* applies and limits Congress' power to interfere with the states. The Court's conclusion, however, is wrong: the PURPA does have a significant impact on the states.[676] If, in another case, the Court assesses more accurately than it did in either *Hodel*[677] or *FERC* the effect on the states of implementing national regulations, then it may well conclude that *NLC* limits Congress' power to use the states as its agents as well as Congress' power to regulate the states.[678]

In addition to leaving open the possibility of some test derived from

672. *See supra* text accompanying notes 625-30. The Court did note that Congress had authorized grants, *see supra* note 629, to assist SRAs in implementing Titles I and III. 102 S. Ct. at 2133 n.14. Since the Court did not recognize that implementation of national regulatory policies has a significant impact on the states, it was baffled by the dissent's argument that states might prefer preemption and direct national regulation in order to be able to devote state governmental and financial resources to the implementation of state, as opposed to national, policies. *Compare id.* at 2140 n.32 *with id.* at 2151-52.

673. *See supra* text accompanying notes 607-09.

674. 102 S. Ct. at 2148-49 (O'Connor, J., concurring in part in the judgment and dissenting in part).

675. *See supra* text accompanying notes 668-71.

676. *See supra* text accompanying notes 625-30.

677. *See supra* text accompanying notes 566-80.

678. In *FERC*, for example, the Solicitor General recognized that Titles I and III of the PURPA have an impact on state autonomy and that *NLC* applied to the question of Congress' power to use the states to implement national regulatory policies for utilities. Nonetheless, he argued that the PURPA was valid under either the three-prong *Hodel* test, *see supra* text accompanying note 447, or under a balancing test derived from *NLC*. Brief for the Appellants at 27-41, Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126 (1982). The dissent in *FERC* agreed with the Solicitor General that Titles I and III have an impact on the states and would

NLC, the Court in *FERC* also muddled the question whether some indeterminate distinction between inducement and coercion is the test of Congress' power to use the states to enforce national law. It muddled the question by inconsistent analysis of the coercive effects of Titles I and III and compounded the confusion with contradictory dicta about the general scope of national power to impose a duty on the states to enforce national law.

In analyzing Titles I and III of the PURPA, the Court managed to suggest that coercion as a test of Congress' power was both irrelevant and relevant. On the one hand, the Court's description of the states' choice between abandoning utility regulation and considering the national standards suggests that coercion is irrelevant.[679] The Court recognized that this choice is "difficult," especially "when Congress . . . has failed to provide an alternative regulatory mechanism to police the area in the event of state default."[680] The Court also assumed that "it may be unlikely that the States will or easily can abandon regulation of public utilities to avoid PURPA's requirements."[681] On the other hand, two points suggest that coercion is relevant. The Court expressly refused to decide the question of "federal power to compel state regulatory activity,"[682] and it construed Titles I and III disingenously[683] in order to avoid the question of Congress' power to impose a duty on SRAs to implement national regulations. Moreover, by virtue of its strained statutory analysis the Court was able to draw an analogy between the provision for state implementation of Titles I and III and the means of obtaining state enforcement of national environmental surface mining standards approved in *Hodel*[684] and to label both as "programs of cooperative federalism."[685]

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have held them invalid under the three-prong *Hodel* test. 102 S. Ct. 2126, 2147-49 (1982) (O'Connor, J., concurring in part in the judgment and dissenting in part).

679. The Court also stated that

> it cannot be constitutionally determinative that the federal regulation is likely to move the States to act in a given way, or even to "coerc[e] the States" into assuming a regulatory role by affecting their "freedom to make decisions in areas of 'traditional governmental functions.' "

102 S. Ct. at 2141 (quoting Hodel v. Virginia Surface Mining & Reclamation Auth., 452 U.S. 264, 289 (1981)).

680. 102 S. Ct. at 2140-41.

681. *Id.*

682. *Id.* at 2140.

683. *See supra* text accompanying notes 660-64.

684. *See supra* text accompanying notes 666-67.

685. 102 S. Ct. at 2141.

The confusion inherent in the Court's inconsistent assessment of the significance of the coercive effects of Titles I and III is exacerbated by contradictory dicta on the broad question of Congress' power to impose a duty on the states to enforce national law. The Court prefaced its analysis of Titles I and III by noting a famous statement from *Kentucky v. Dennison*[686] that Congress "has no power to impose upon a State officer, as such, any duty whatever, and compel him to perform it."[687] The Court's characterization of this statement as "rigid," "isolated," and "not representative of the law today"[688] gives rise to the inference that Congress does have the power to impose duties on state officers and administrative agencies.[689] Nevertheless, this inference must be tempered by the Court's immediate qualification that it has "never . . . sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations."[690] More importantly, any inference of Congress' power to impose a duty on the states seems to be counterbalanced by the Court's statement that the holding in *FERC* "does not purport to authorize the imposition of general affirmative obligations on the States."[691]

d. *Pending Challenges to Statutes Providing for State Implementation of National Regulations*

The Court may soon have an opportunity to consider two statutes that provide for state implementation of national regulatory programs.[692] First, the Clean Air Act Amendments of 1977[693] have revived the controversy over the EPA's power to compel the states to administer and enforce transportation control plans. The 1977 Amendments extend the deadline for achievement of the National Ambient Air Quality Standards (NAAQS) from December 31, 1977, to December 31, 1982, and in the case of two pollutants (ozone and carbon monoxide) the deadline may be postponed until December 31, 1987.[694] The

686. 65 U.S. (24 How.) 55 (1861). For a brief assessment of this case, see *infra* notes 1026-32 and accompanying text.

687. 102 S. Ct. at 2138 (quoting Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861)).

688. 102 S. Ct. at 2138 (footnote omitted).

689. Congress' power to impose duties on state officers and agencies to enforce national law is discussed *infra* at notes 979-1055.

690. 102 S. Ct. at 2138.

691. *Id.* at 2142 n.32.

692. *See supra* text accompanying notes 542-48.

693. *See supra* note 582.

694. This brief description of the 1977 Clean Air Act Amendments is drawn from Connecticut

new amendments employ the same basic mechanism as the 1970 Act to obtain state administration and enforcement of the national air pollution standards.[695] If the states fail to submit a revised "state implementation plan" by July 31, 1979, that will achieve the NAAQS by the end of 1982 for all areas that did not meet these standards in 1977, the EPA is authorized to promulgate an air pollution control plan and to regulate directly private sources of air pollution. The implementation plan of any state that seeks an extension of the deadline for achieving the ozone and carbon monoxide standards must "provide for the implementation of a vehicle emission control inspection and maintenance program" and other measures necessary to achieve the NAAQS by 1987.[696]

To ensure state submission of revised implementation plans and state administration and enforcement of the controversial motor vehicle emission control inspection and maintenance programs, Congress adopted two new sanctions over and beyond the threat of substituting direct national regulation for state regulation of private pollution causing activity. If a state fails to adopt an approved implementation plan, the EPA may withhold national grants for state clean air programs, for highway construction, and for sewage treatment facilities.[697] The EPA also may impose a moratorium on the construction of new industrial plants that would be major sources of air pollution.[698]

These sanctions are very effective means of inducing the states to submit revised implementation plans and to enforce national air pollution standards because severe restrictions on residential and industrial growth are the price of refusal. The courts have not yet reached the question of *NLC* federalism limits on Congress' power to combine the following means of inducing the states to act as the nation's agents in regulating private pollution-causing activity: the threat of direct national regulation as a substitute for state regulation, a direct national moratorium on construction of major pollution sources as an alternative to state regulations restricting air pollution from new industrial plants, and the denial of national grants.[699]

Fund for the Env't, Inc. v. EPA, 672 F.2d 998, 1000-02 (2d Cir. 1982) and Citizens for a Better Env't v. Costle, 515 F. Supp. 264, 266-68 (N.D. Ill. 1981).

695. *See supra* text at note 583.

696. *See* Connecticut Fund for the Env't, Inc. v. EPA, 672 F.2d 998, 1001 (2d Cir. 1982).

697. 42 U.S.C. §§ 7506(a),(b), 7616(b)(2) (Supp. IV 1980).

698. *Id.* §§ 7410(a)(2)(I), 7502(a)(1) (Supp. IV 1980).

699. In the Clean Air Act Amendments of 1977, Congress has employed two basic means of

A few courts, without addressing any federalism issues, have either required the EPA to impose a construction moratorium if a state submits an inadequate implementation plan[700] or assumed that the EPA would impose a construction moratorium if a state implementation plan is not fully approved.[701] When the EPA has imposed the funding and construction moratorium sanction on states that failed to make an adequate provision for the administration and enforcement of motor vehicle emission control inspection and maintenance programs,[702] litigants have raised *NLC* as a limit on Congress' power to compel state implementation of national standards for private activity. The two challenges to the EPA's power of requiring the states to regulate motor vehicle air pollution by withholding grants and restricting new industrial construction have foundered so far on procedural grounds.[703] Although the withholding of national grants and a moratorium on

obtaining state implementation of national air pollution standards. First, Congress has threatened to substitute direct national regulation of private activity and to supplant state regulation if the states fail to enforce national air pollution standards. Direct national regulation of private sources of air pollution under a pollution control plan promulgated by the EPA and a nationally imposed moratorium on construction of new industrial facilities are both imposed only if the states fail to adopt and enforce an implementation plan that will ensure achievement of the NAAQS. Second, Congress has made grants on the condition that the states regulate private activity. Both of these means of employing the states as the nation's agent are constitutionally valid. *See infra* text accompanying notes 927-40. For a comprehensive overview of federalism issues raised by these amendments, see generally Luneburg, *supra* note 577.

700. Connecticut Fund for the Env't, Inc. v. EPA, 672 F.2d 998 (2d Cir. 1982) (EPA must impose construction moratorium if the state implementation plan is given only "conditional approval"). *Cf.,* City of Seabrook v. EPA, 659 F.2d 1349 (5th Cir. 1981) (conditional approval of state implementation plan upheld without consideration of construction moratorium).

701. See cases cited in Connecticut Fund for the Env't, Inc. v. EPA, 672 F.2d 998, 1008 n.20 (2d Cir. 1982).

702. The EPA has withheld grants and imposed a moratorium on the construction of new industrial facilities as sanctions against at least three states that did not adopt adequate vehicle emission control inspection and maintenance programs when they revised their state implementation plans to comply with the 1977 Amendments. 45 Fed. Reg. 16,486 (1980) (Colorado); 45 Fed. Reg. 81,752 (1980) (Kentucky); 45 Fed. Reg. 81,746 (California). The EPA has threatened to impose the funding and construction moratorium sanctions on many states. *E.g.,* 45 Fed. Reg. 43,794, 43,807 (1980) (New York). Although the EPA has chosen to rely on funding and construction moratorium sanctions, it still claims the authority under the Clean Air Act to mandate state enforcement of inspection and maintenance programs. 44 Fed. Reg. 20,372, 20,374 n.15 (1979).

703. Mountain States Legal Found. v. Costle, 630 F.2d 754 (10th Cir. 1980) (standing and mootness), *cert. denied,* 450 U.S. 1050 (1981); Pacific Legal Found. v. Costle, 627 F.2d 917 (9th Cir. 1980) (preliminary injunction denied), *cert. denied,* 450 U.S. 914 (1981). In *Pacific Legal Foundation*, the district court denied the preliminary injunction in part because it found that there was little chance that the plaintiffs would succeed on the merits of their claim that the withholding of national funds for a state's failure to regulate private motor vehicle air pollution is unconstitutional. This court thought that the state sovereignty argument was weak because it believed that

industrial growth are effective sanctions that may overwhelm state resistance and preclude any further litigation,[704] the Clean Air Amendments of 1977 afford an instructive example of the means employed by

NLC does not limit the spending power. Pacific Legal Found. v. Costle, Civil No. S-79-925 LKK (E.D. Cal. March 10, 1980).

704. A district court has ordered a cut-off of all national highway grants for two urban areas in Pennsylvania because the state failed to establish a motor vehicle emission control inspection and maintenance program, but the court imposed this sanction under its equitable powers to enforce a consent decree by civil contempt and not as a remedy for the state's failure to comply with the Clean Air Act Amendments of 1977. Delaware Valley Citizens' Council v. Pennsylvania, 533 F. Supp. 869 (E.D. Pa. 1982), *aff'd,* 678 F.2d 470 (3d Cir. 1982); *see* Delaware Valley Citizens' Council v. Pennsylvania, 17 ENV'T REP. CAS. (BNA) 1423 (E.D. Pa. 1982). The origin of this case is a decision of the Third Circuit upholding EPA's power to compel the states to establish inspection and maintenance programs. *See supra* note 594 and accompanying text. After this decision, Pennsylvania agreed to implement an inspection and maintenance program, and the district court entered an appropriate consent decree. 533 F. Supp. at 872-74. The state subsequently failed to establish an inspection and maintenance program and argued that it could not comply with the consent decree because the state legislature, over the Governor's veto, had enacted a statute prohibiting the expenditure of state funds for implementation of an inspection and maintenance program. *Id.* at 875-76.

Although this statute was challenged on the ground that it conflicted with both the consent decree and the Clean Air Act Amendments of 1977, the court held that it was valid. The court rejected the argument that the Pennsylvania statute was invalid under the supremacy clause because it conflicted with the consent decree on the ground that *NLC* bars a federal court from "countermand[ing] the decision of a state legislature not to expend state funds on the establishment of an I/M program". *Id.* at 878 (footnote omitted). The court also rejected a second argument that the Pennsylvania statute was unconstitutional because it conflicted with the Clean Air Act Amendments of 1977 on the dual grounds that there was no conflict because Congress had not mandated state implementation of inspection and maintenance programs and that such a mandate, even if imposed by Congress, was barred by *NLC*. *Id.* at 879. Notwithstanding its conclusion that the Pennsylvania statute prohibiting expenditure of state funds for inspection and maintenance programs was valid, the court concluded that the statute did not excuse compliance with the consent decree, held the state in civil contempt, and enjoined certain national highway grants to the state as a sanction. *Id.* at 880-84. The Third Circuit upheld the district court's civil contempt order. Delaware Valley Citizens' Council v. Pennsylvania, 678 F.2d 470 (3d Cir. 1982).

Even though the district court borrowed the civil contempt sanction of enjoining national highway grants from the Clean Air Act Amendments of 1977, the case does not raise any question of federalism limits on Congress' power to employ the states as its agents in regulating private activity. 533 F. Supp. at 882-83. It raises separate, distinct questions about federalism limits on the equitable powers of the federal courts. *See supra* notes 28 & 416. If the EPA disapproves the Pennsylvania implementation plan because the state's provision for a motor vehicle emission control inspection and maintenance program is inadequate and either withholds national grants or imposes a construction moratorium, then the courts may have an opportunity to consider *NLC* federalism limits on Congress' power to use the states to administer and enforce national regulations governing private activity. *See* 46 Fed. Reg. 58,593 (1981) (notice that the Pennsylvania state implementation plan is inadequate and that EPA may withhold grants or impose a construction moratorium).

Congress to obtain state implementation of national regulatory programs.

Section 402 of the Powerplant and Industrial Fuel Use Act of 1978[705] is the second statute that has been challenged on the ground that the means employed by Congress to obtain state enforcement of national regulations are an unconstitutional intrusion on state autonomy. This statute prohibits the installation of outdoor lighting fixtures using natural gas and authorizes the Secretary of the Department of Energy (the Secretary) to promulgate a rule prohibiting the sale of natural gas for use in outdoor lighting and other rules granting exemptions from the general prohibition.[706] The Secretary promulgated a rule prohibiting the use of natural gas in outdoor lighting,[707] and, as authorized by the statute,[708] delegated the authority to enforce the prohibition and to grant exemptions to appropriate state regulatory authorities.[709]

Several natural gas companies challenged this delegation of national authority to state agencies on the grounds that the Secretary has in fact made state administration and enforcement of the national regulations mandatory and that such an appropriation of state regulatory resources is contrary to the tenth amendment.[710] The Eleventh Circuit rejected the argument that the delegation is mandatory because, under its construction of the statute and regulations, the states can refuse the delegation and the Secretary's only recourse in this event is to rescind the delegation.[711] The court easily concluded that, absent coercion, the mere delegation of national authority did not violate the tenth amendment because Congress had established a program of "cooperative federalism"[712] similar to the provision for state enforcement of national surface mining regulation approved in *Hodel*.[713]

705. 42 U.S.C. § 8372 (Supp. IV 1980), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. X, § 1024, 95 Stat. 617-18.

706. *Id.* § 8372(a)-(c) (Supp. IV 1980), *amended by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. X, § 1024, 95 Stat. 617-18.

707. 10 C.F.R. §§ 516.21-.22 (1982).

708. 42 U.S.C. § 8372(e).

709. 10 C.F.R. § 516.30 (1982).

710. Atlanta Gas Light Co. v. Department of Energy, 666 F.2d 1359 (11th Cir. 1982).

711. *Id.* at 1369.

712. *Id.*

713. *See supra* text accompanying notes 559-80.

4. Necessity of a Principled Theory of State Autonomy

In practice *NLC* has proved to be an insignificant restraint on Congress' power under the commerce clause. In addition to the FLSA, the courts have held that only one other statute is an unconstitutional transgression on state autonomy.[714] It is, then, tempting to dismiss *NLC* itself as an aberration[715]—the attempted revival of federalism limits on Congress avoided for the most part by the lower courts as a limit on the commerce power and neutered with respect to the defense powers, the spending power, and the power to enforce the Civil War Amendments. Nonetheless, this temptation should be eschewed both because it is possible to provide principled, consistent answers to the questions of state autonomy raised by *NLC* and its progeny and because failure to do so entails three risks.

The first risk is a consequence of the Court's flat rule that national regulation of private activity is not limited by *NLC*.[716] State authority to set substantive rules for individual conduct is certainly an aspect of state autonomy. In the absence of some explanation why national power to regulate private activity and to displace state law is plenary, or why state authority to determine the wages and hours of public employment is a more important aspect of state autonomy deserving greater protection from national intereference than state control of private activity,[717] there inevitably will be pressure to confine the nation's powers over private activity. Indeed, there already are indications that some of the Justices want to narrow the scope of the commerce power, although they accept the formal proposition that *NLC* does not limit national power over private activity.[718]

The second risk is a function of the vague and indeterminate tests of state regulatory immunity that the lower courts have derived from

714. *See supra* note 21.

715. *See* Bobbitt, *Constitutional Fate,* 58 TEX. L. REV. 695, 757-59 (1980) (*NLC* only a "cue" to Congress to "renew its traditional role as protector of the states"); Cox, *supra* note 16, at 22 (*NLC* will probably be "an unprincipled exception to the general rule of federal supremacy"); Monaghan, *The Burger Court and "Our Federalism",* 43 LAW & CONTEMP. PROBS. 39, 42 (1980) (*NLC* "has, as yet, shown no generative power").

716. *See supra* text accompanying note 459.

717. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-22, at 312 (1978) ("it seems anomalous to hold that Congress retains its preemptory power to displace state regulation of private conduct but is restrained when it attempts to control decisions effecting the state's own service-providing employees") (footnote omitted).

718. *See supra* text accompanying notes 474-75 & note 475.

NLC. The traditional or integral functions and balancing tests are an open invitation to continued litigation of state autonomy claims and to the substitution of judicial social policy for congressional policy.[719] Both tests at bottom call for an ad hoc judicial determination of the comparative importance of particular state and national interests.[720] Although these tests have been applied consistently by the lower courts to uphold national regulation of the states, they could easily be manipulated to impose significant restraints on national power.

The courts rarely address the question of state immunity from national regulation solely in terms of the issue whether the particular state activity is integral or traditional,[721] and they usually couple this inquiry with a balancing test. It is perhaps fortunate that the courts do not rely solely on the identification of state interests as integral or traditional as the test of regulatory immunity because there is no clear definition of these terms.[722] There is substantial evidence that these tests simply replicate the old distinction between governmental and proprietary functions: integral or traditional functions are equated with governmental functions and are immune; nontraditional or nonintegral functions are defined as proprietary activities and are subject to national regulation.[723] If the test of protected state activities is a distinction between governmental and proprietary functions, then *NLC* has reincarnated a

719. *See supra* note 504.

720. Only one court has attempted to formulate specific criteria for state immunity from national regulation. In Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979), the Sixth Circuit stated that a four-part test for the identification of integral or traditional state functions, but its test is designed merely to distinguish governmental and proprietary functions.

721. For examples of cases relying exclusively on a distinction between integral or traditional functions and nonintegral or nontraditional functions as the test of immunity, see cases discussed *supra* notes 115 & 494.

722. The courts have held that a state's exercise of its power of escheat and the provision of relief for the needy are not integral or traditional functions and that management of wildlife resources is such a protected state function. *Compare In re* Levy, 574 F.2d 128 (2d Cir.), *aff'd sub nom.* New York v. United States, 439 U.S. 920 (1978) *and* Gilbert v. New Jersey, Dep't of Human Servs., 167 N.J. Super. 217, 400 A.2d 803 (1979) *with* EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981), *prob. juris. noted,* 102 S. Ct. 996 (1982) (No. 81-554). Although the lower courts have consistently held that state regulation of a variety of private activities is not an integral or traditional state function, the Supreme Court has assumed without deciding that state regulation of land use is an integral governmental function. *Compare* cases cited *supra* note 464 *with* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 293 n.34 (1981).

723. The best evidence that the integral or traditional functions test is the old distinction between governmental and proprietary functions in a new verbal guise is the Department of Labor's statement of state activities that are subject to the FLSA. *See supra* note 112. The cases cited *supra* at notes 493-95 also support this conclusion.

long discredited test of state immunity from national regulation.[724]

Even if it is possible for the Court to define integral and traditional functions clearly, the whole inquiry seems to be fundamentally mistaken if the goal is to protect important state interests from national interference. Any judicial determination that a particular state activity is not integral or traditional clashes with the best possible evidence of the importance of that interest to the state—the state's determination that a particular good or service should be provided directly by the state and not left to the private sector, regulated or unregulated. If a state decides that a service, like mass transit, is not provided adequately by the private sector or that an activity, say off-track gambling, is too important a source of revenue to be left to private interests, any determination that these activities are subject to national regulation[725] because they are nonintegral or nontraditional begs the purpose of the test—to protect important state interests.

Balancing tests seem, at least superficially, to be an improvement over rigid categories of integral or traditional functions because they permit consideration of both the effect of national regulations on state activities like public transit and off-track gambling and the importance of the national interests underlying the regulation. A balancing test, however, is responsive to the problem of ad hoc judicial evaluations of competing state and national legislative policies only if it is possible to state criteria for assessing these interests. Since the courts have not, as yet, identified any criteria for their balancing tests, their determinations of the scope of state autonomy are necessarily ad hoc subjective judgments. It is, for example, hard to reconcile the application of balancing tests in two decisions of the Second Circuit on any ground other than judicial policy preferences. In *United Transportation Union* the court held that national law could not authorize strikes on a state-owned commuter railroad engaged in interstate commerce,[726] but in *FOE* the court held that a city could be compelled to expend its funds and to employ its personnel to enforce national policies for the reduction of

724. *See generally* Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law,* 66 VA. L. REV. 1073 (1980). The problem of identifying protected state interests on the basis of the governmental-proprietary distinction is further complicated by a recent Supreme Court decision which suggests that traditional or integral functions may include some proprietary activities. *See* Reeves v. State, 447 U.S. 429 (1980).

725. The Department of Labor has ruled that both of these state activities are subject to national regulation under the FLSA. *See supra* note 112.

726. *See supra* text accompanying notes 498-504.

motor vehicle air pollution.[727]

As these two cases suggest, a balancing test is an inherently subjective and unmanageable solution to questions of state autonomy and of the scope of national power. Balancing tests are inherently subjective because any statement of principled criteria for assessing the importance of national interests and the actual effects of national regulations on the states, and for comparing the two, is impossible.[728] Even if criteria for a balancing test could be formulated, it would be unmanageable. An assessment of the actual impact of national regulations on the states is precisely the type of factual inquiry that the Court abhors.[729]

A third, final reason why *NLC* should not be dismissed lightly as an aberration is the risk that it will be used as a basis for establishing limits on Congress' power to employ the states as its agents in implementing national regulatory programs.[730] All three risks, which are aggravated by popular and judicial fears that the national government is crushing the states, can be avoided under the theory of political accountability developed below. Political accountability can justify broad national power to regulate private activity and prevent an unwarranted narrow construction of the commerce power. It provides principled limits on the nation's power to regulate the states and to use them as its agents, and it also protects the states' role in the federal system.

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727. *See supra* text accompanying notes 603-06.

728. For example, what are the criteria for assessing the relative importance of the national interests in preventing the disruption of interstate rail transportation by labor disputes and in promoting public health by reducing motor vehicle air pollution? What are the criteria for comparing the actual effects on a state of preempting its prohibition of strikes by public employees and the actual effects of commandeering its resources and employees to enforce national pollution control policies? What are the common criteria for balancing diverse national regulatory interests against the actual effects of the regulations on the states?

For attempts to state criteria for balancing tests, see sources cited *supra* note 444.

729. In *NLC* the Court did not consider either the nature of the national interest or the actual effects of the FLSA on the states. *See supra* text accompanying notes 116-17. The Court has often stated its reluctance to decide constitutional issues on the basis of detailed factual inquiries. *E.g.,* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 627 (1981) (not undertake "a factual inquiry into the relationship between the revenues generated by a tax and the costs incurred on account of the taxed activity" as a test of the validity of state taxes under the dormant commerce clause.) For an unwitting example of the problems inherent in a balancing test that requires a detailed factual inquiry into the effects of national regulations on the states, see Note, *Practical Federalism After* National League of Cities: *A Proposal,* 69 GEO. L.J. 773 (1981). For a careful critique of a balancing test, see Comment, *supra* note 284, at 423-25.

730. *See supra* text accompanying notes 673-91.

H. Alternative Theories of State Autonomy: The Commentators and NLC

If the courts have not succeeded in devising a workable theory of state autonomy, the commentators have fared no better with the seemingly intractable problems of state regulatory immunity and of Congress' power to employ the states as its agents. Although most academic observers simply advocate various balancing tests to determine the proper relation of national and state authority, some have advanced more thoughtful theories for limiting national power. Others have elaborated careful justifications of broad national power over the states. Among the proponents of limits on national power, Professors Tribe and Michelman are the most celebrated. They urge that *NLC* should be interpreted as an individual rights decision and that the states' role in providing constitutionally guaranteed social services to their citizens should be protected from national interference.[731] Professor Kaden, another proponent of state autonomy, argues that the states' role as a source of political liberty provides the basis for determining limits on national authority.[732] Professor Stewart is the principal proponent of broad national power over the states,[733] but Professor Choper's proposal that federalism questions should be nonjusticiable[734] would also recognize extensive congressional power over the states.

All these analyses of state autonomy and national power, however, are marred by two fundamental defects. First, they do not consider the full array of national legislative powers and Congress' authority under each of these powers to regulate private activity, to regulate state and local governments, and to employ the states as the nation's agents. Since they fail to consider the full range of national power to control the allocation of political authority between the states and the nation, these analyses do not establish a comprehensive theory of national and state relations. Second, they fail to establish principled and judicially manageable standards for resolving conflicts between the political communities of the states and the nation that will both permit effective implementation of national policy and preserve the states' role in the

731. L. TRIBE, *supra* note 717, §§ 5-21 & -22, at 307-18; *Permutations of Sovereignty*, *supra* note 35; *Unraveling NLC*, *supra* note 32.

732. Kaden, *supra* note 22.

733. Stewart, *supra* note 577.

734. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-259 (1980); *Dispensability of Judicial Review*, *supra* note 10.

federal system. The proponents of state autonomy limits on national authority all rely in the end on ad hoc balancing tests to resolve conflicts of national and state power, and the theories of the proponents of broad national power provide either insufficient protection for state interests or inadequate justification for national intrusions on state autonomy.

The Tribe-Michelman thesis that the states' function of providing basic social services, like fire protection, education, and hospital care, is the essence of the concept of state sovereignty recognized in *NLC* is one plausible interpretation of that case.[735] Their argument that this concept of state sovereignty rests on the constitutional rights of state citizens to a minimum level of basic social services, as they admit, goes far beyond the plurality's intention to protect state autonomy.[736] The argument does, however, have the virtue of providing a coherent explanation for the plurality's conclusion that the states' function in providing traditional or integral governmental services is protected from national control.[737] In their view, the invalidation of the FLSA in *NLC*

735. *See supra* text accompanying notes 108-09 & 127-30.

736. *Permutations of Sovereignty, supra* note 35, at 1172-80; *Unraveling NLC, supra* note 32, at 1066, 1075-78. Both Tribe and Michelman argue that the internal logic of the plurality opinion, divorced from its intent, supports the conclusion that state sovereignty is derived from individual rights against government to the satisfaction of "basic human needs." *Unraveling NLC, supra* note 32, at 1066. First, they note the plurality's distinction between the states' function of regulating private activity and the states' function of providing traditional or integral services to their citizens. Since both of these functions are important state interests, the recognition of national power to displace state regulation of private activity and the imposition of limits on national power to regulate the states as service providers can be explained as a limit on Congress' power to interfere with the individual right against state government to obtain basic social services. *Permutations of Sovereignty, supra* note 35, at 1168-69, 1175; *Unraveling NLC, supra* note 32, at 1075. Second, protection of local government, as well as the states, from national regulation can be explained by the duty of both the states and local government to provide basic social services to their citizens. *Permutations of Sovereignty, supra* note 35, at 1169-71. Third, Professor Tribe argues that the plurality's distinction between Congress' authority to regulate the states under the commerce power and under the spending power and power to enforce the Civil War Amendments, *see supra* text accompanying notes 121-22, also supports the conclusion that *NLC*'s concept of state sovereignty is premised on individual rights to basic services. In his view, Congress has greater power over the states' service provision functions under the spending power than under the commerce power because national grants that cover the additional costs imposed on states do not jeopardize the states' ability to furnish basic services. *Unraveling NLC, supra* note 32, at 1091. Similarly, Congress' power in enforcing the Civil War Amendments may override individual rights to basic state social services because the national legislation also vindicates individual rights. *See id.* at 1077, 1077-99. Professor Tribe does not explain the plurality's suggestion, *see supra* note 123 and accompanying text, that Congress has greater power over the states under its war power than under its commerce power.

737. The *NLC* plurality's conclusion that the states' function of providing traditional or inte-

is correct, not because it affects the "states as states" in their capacities as employers, but because the increased costs occasioned by compliance with national wage standards would increase the costs of the basic social services provided by state and local governments. These increased costs would in turn threaten a reduction of the services to which the states' citizens have a constitutional right. The protected social service function of the states is thus a corollary of individual rights against government to a minimum level of public services. It includes all the services that the public expects the states and local government, not the national government, to provide and that are provided collectively out of general tax revenues without assessment of any special charge.[738]

Although individual constitutional rights are the core of their concept of state sovereignty, both Michelman and Tribe recognize that the states' social service function is not absolutely immune from national control. Professor Michelman would permit national interference with the provision of public services by the states if there is "a compelling need for congressional action."[739] Professor Tribe analyzes the nation's power to regulate the states as providers of basic social services more carefully and thoroughly. State challenges would be appropriate only if national regulation is "directed to, and directly increas[es] the costs of, essential service provision functions performed by a state or municipality,"[740] and he notes three justifications for such a national

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gral services is protected from national interference is poorly reasoned, and several propositions in the opinion seem to be inconsistent with the result. *See supra* text accompanying notes 127-30. Tribe and Michelman address the problems inherent in the plurality opinion, and their essays, read together, provide an explanation for the plurality's conclusion. *Compare* text accompanying notes 127-30 *with* note 736 *supra*. Nevertheless, they fail completely to resolve the broad questions of national power and state autonomy. *See infra* text accompanying notes 751-64.

738. Michelman contends that the states have a duty to provide the basic social services which the public has historically held them responsible for providing. *Permutations of Sovereignty, supra* note 35, at 1179. Tribe argues that state and local governments have a duty to provide all essential services that are not provided by the national government. *Unraveling NLC, supra* note 32, at 1076 n.42. Although neither defines the states' service function precisely, this function apparently includes services like police and fire protection, sanitation, public health, parks and recreation, and education that the *NLC* plurality describes as integral or traditional. *See supra* text accompanying notes 108-09. Essential or basic services that are not provided by the states or local government presumably become the duty of the national government.

739. *Permutations of Sovereignty, supra* note 35, at 1180 n.47. Michelman also states the national government has the authority to interfere with state social service programs if the national interest is "compelling (or substantial, or whatever)." *Id.* at 1191 n.86.

740. *Unraveling NLC, supra* note 32 at 1094.

regulation.[741]

First, a national regulation is valid if it "clearly does not jeopardize state provision of essential services."[742] This justification supports the Court's decision in *Fry v. United States* upholding Congress' power to freeze the wages of state employees[743] because such a regulation does not increase state costs in providing public services.[744] It also supports Congress' authority under the spending power to regulate state provision of essential services because national grants covering the additional costs of compliance with the conditions of a grant do not portend any reduction of services.[745] Second, Congress may have the power to regulate the states' social service functions if it is "acting to effectuate other individual rights."[746] This justification creates a conflict between two individual rights—the individual right protected by national legislation and the individual right to basic social services provided by the state. For example, Professor Tribe states that Congress may have the authority to impose the Equal Pay Act's prohibition of sex-based wage differentials[747] and the minimum wage requirements of the FLSA on the states and local government. Although these requirements might increase government costs and threaten a reduction of the services to which the public is constitutionally entitled, he suggests, without stating any test, that they may be valid if they were enacted for the specific purpose of protecting the individual right to a decent living wage.[748] Finally, he provides a catch-all justification for national regulations that are "the least restrictive means of dealing with an overriding na-

741. L. TRIBE, *supra* note 717, § 5-22, at 316-18; *Unraveling NLC, supra* note 32, at 1096-99.

742. *Unraveling NLC, supra* note 32, at 1096.

743. *See supra* notes 119-20 and accompanying text.

744. *Unraveling NLC, supra* note 32, at 1096-97.

745. *Id.* at 1091. Professor Tribe would hold that "enhanced scrutiny" should be applied to national statutes enacted under the spending power "[o]nly where Congress uses its spending power disproportionately—providing payments for only a small part of the increased cost of service provision—or as a lever over unrelated areas—paying for part of the costs of one service, while effectively controlling, and increasing the costs of providing, another." *Id.* This test of the spending power is impractical: it does not state how much "enhanced scrutiny" is appropriate for any particular degree of disproportionality between a national grant and the costs to a state of complying with the conditions of the grant, and it would require a detailed factual examination of the actual costs imposed on a state. The problems inherent in Professor Tribe's analysis of the spending power are considered *infra* at notes 759-64.

746. *Unraveling NLC, supra* note 32, at 1097-99.

747. *See supra* text accompanying notes 365-71 & 375-82.

748. L. TRIBE, *supra* note 717, § 5-22, at 318 n.46; *Unraveling NLC, supra* note 32, at 1098 n. 123, 1103.

tional problem."[749]

Professors Tribe and Michelman clearly are more interested in establishing their novel theory of affirmative constitutional rights to basic social services than in analyzing questions of state autonomy and national power.[750] It is, nonetheless, important to note the limits of their analyses of *NLC* because their essays have found favor with many courts.[751] The most striking deficiency of their argument is the isolation of the states' function of providing services to their citizens as the core of state sovereignty. State decisions about the goods and services to be provided collectively are certainly one aspect of the states' role as political communities in the federal system, but other political decisions about the rules for private activity, the structure and organization of public decisionmaking processes, and the allocation of legislative, executive, and judicial resources are equally important state functions.[752] Apart from the assumption that state autonomy is derived entirely from individual rights, Tribe and Michelman provide no explanation why state political decisions about public services are entitled to greater respect than state political decisions about the rules for private activity or about the structure of state government.[753] More-

749. *Unraveling NLC, supra* note 32, at 1099.

750. Professor Michelman has long been a proponent of individual constitutional rights to basic government services. *E.g.,* Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7 (1969). Both Tribe and Michelman admit that their purpose is to demonstrate that the *NLC* plurality's opinion is an unwitting case in support of their theory of government's constitutional duty to provide for basic human needs, and they devote a large portion of their essays to establishing their theory of individual constitutional rights. *Permutations of Sovereignty, supra* note 35, at 1166, 1181-91; *Unraveling NLC, supra* note 32, at 1066, 1078-90. Since the Court has never accepted their theory of individual constitutional rights, it seems improbable that the Court would use it to erect a superstructure of state autonomy.

751. The Tribe and Michelman *NLC* essays are the most frequently cited academic analyses of that case. Although many courts have accepted their interpretation of *NLC* as limiting Congress' power to interfere with the states' function of providing basic social services, these courts have not accepted their theory that state autonomy is derived from individual constitutional rights to these services. *E.g.,* United Trans. Union v. Long Island R.R., 634 F.2d 19, 25 n.15 (2d Cir. 1980), *rev'd,* 102 S. Ct. 1349 (1982); Amersbach v. City of Cleveland, 598 F.2d 1033, 1036 (6th Cir. 1979).

752. *See supra* text accompanying notes 32-35.

753. Professor Michelman does entertain the possibility that the states' role in the federal system may be broader than the function of providing social services, and he notes that state power to make and enforce laws governing private activity and to control the processes of political choice might be considered a part of state sovereignty. *Permutations of Sovereignty, supra* note 35, at 1167-73. Such an analysis of state functions is in large part consistent with the argument that the framers intended the states to be political communities. *See supra* text accompanying notes 29-53.

over, the proposition that provision of basic public services, like fire and police protection and welfare assistance, is a special function of the states and local government has a very weak empirical foundation. The national government supports through grants many of the basic services that Tribe and Michelman describe as state functions,[754] and in many social welfare programs, the states and local government are merely administrative units employed by Congress to distribute goods and services authorized by the nation.[755] Tribe and Michelman are correct that one aspect of the states' role in the federal system is to provide services for their citizens, but the definition of the states' role exclusively in terms of this one function is anomalous because it is often the national political community, not the states, that funds basic social services, establishes the level of benefits, and sets eligibility standards.[756]

This exclusive focus on the states' social service function precludes the development of any comprehensive theory of Congress' power to control the allocation of political authority between the nation and the states. Neither Tribe nor Michelman addresses the question of limits on or justifications for Congress' power to diminish state autonomy by regulating private activity and by requiring the affirmative exercise of state authority over private activity.[757] Even with respect to the narrow

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He rejects this broad interpretation of the states' role as inconsistent with the *NLC* plurality opinion. *Id.* at 1167-73. He does not elaborate any reasons why a determination of the states' role in the federal system should be based solely on one opinion of four members of the Court.

754. *See supra* text accompanying notes 392 & 393.

755. *See supra* text accompanying notes 316-21 & notes 319-20.

756. At least two courts have noted that national funding of the services provided by states undermines the concept of the states' function as a service provider. *In re* Glidden, 653 F.2d 85, 88 (2d Cir. 1981); Gilbert v. New Jersey Dep't of Human Servs., 167 N.J. Super. 217, 226-27, 400 A.2d 803, 808 (1979), discussed *supra* note 303. *Contra* United Transp. Union v. Long Island R.R., 634 F.2d 19, 28 n.26 (2d Cir. 1980), *rev'd,* 102 S. Ct. 1349 (1981). Professor Tribe's account of the relation between the national spending power and the states' social service function, *see supra* note 745 and accompanying text, does not come to grips with the fundamental point that the provision of basic social services is often more a national than a state function.

757. Although Professor Michelman does not consider the possibility that state interests other than the states' social service function merit some protection from national control, Professor Tribe does address this issue. According to Tribe, special scrutiny of national statutes that affect the states' service provision function is necessary because of the effects on individual rights. Other state interests, which do not implicate individual rights, are adequately protected in most instances by the national political process. *Unraveling NLC, supra* note 32, at 1070-72. The national political process provides adequate protection for most state interests through the political safeguards of federalism—the representation of state interests in Congress and the accountability of Congress to the citizens of every state. *Id.* at 1070 n.22, 1071. Judicial intervention to protect state interests

question of national power to regulate state and local government, their tests of state autonomy as a service provider are unprincipled and unworkable because they require at bottom an ad hoc balancing of national and state interests.[758]

The problems inherent in the theory of state autonomy derived from *NLC* by Tribe and Michelman may be illustrated by Tribe's analysis of *North Carolina ex rel. Morrow v. Califano*.[759] In this case, the district court held that Congress could withhold over fifty million dollars in forty-two health care assistance programs on the ground that the state failed to comply with a condition of one of these grants requiring regulation of private health care facilities in a fashion prohibited by the state constitution. Professor Tribe argues that the Court's summary affirmance is consistent with his thesis that *NLC* protects only a "citizen's claim to services."[760] Since state reliance on national aid precludes any choice to decline a grant in order to avoid compliance with its conditions, he views the condition as in effect a mandatory regulation. He then concludes that judicial approval of a condition requiring an amendment of the state constitution and state enforcement of national rules for private activity demonstrates that the state interests affected by these requirements are not part of the concept of state autonomy protected by *NLC*. It then follows, on the tacit assumption that the condition requiring state regulation of private health care facilities does not affect the delivery of state services, that *NLC* protects only the state's social service function. Even if the result in *North Carolina ex rel. Morrow v. Califano* can be reconciled with the Tribe-Michelman interpretation of *NLC*,[761] this claim of consistency obscures a fundamental defect in the analysis—there is no explanation why state

is necessary only if the political safeguards of federalism fail, and Congress "takes action that would effectively eviscerate a state's government and leave it an empty vessel." *Id.* at 1072. This analysis of national power to control the allocation of political authority between the nation and the states is rather thin. Tribe does not describe the state interests that deserve protection other than to give two examples of state choices between unicameral and bicameral legislatures and between elected and appointed officials.

758. *See supra* text accompanying notes 739-49.

759. This case, discussed *supra* at notes 306-12, is the only post-*NLC* decision that either Tribe or Michelman has attempted to reconcile with their theory of state autonomy derived from individual rights. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 18-19 (Supp. 1979).

760. *Id.* at 18.

761. The district court did not apply Professor Tribe's theory, and it held that there was no constitutional intrusion on state autonomy because the state could refuse the grant and avoid compliance with its conditions. *See supra* text accompanying notes 310-12.

interests other than the provision of basic social services are not protected. In his analysis of *North Carolina ex rel. Morrow v. Califano*, Tribe never explains the justification for national power to compel the amendment of a state constitution and to compel a state to enforce national regulations governing private health care facilities.

Tribe's tacit assumption that the requirement of state implementation of national regulations for private health care facilities has no effect on the state's service provision functions raises an additional problem because the assumption is at odds with reality. Given limited resources, a state might well reduce some existing social services in order to muster the administrative resources necessary to implement and enforce the national standards for private health care facilities. In an apparent recognition of this possibility, he also contends that *North Carolina ex rel. Morrow v. Califano* is consistent with his argument that Congress has the authority under the spending power to regulate the states' social service function because national grants that pay the additional costs of compliance with conditions do not threaten any reduction of services.[762] His test of the spending power would require a court to measure the costs to a state of complying with the conditions of national grants and to determine whether these costs are disproportionate to the amount of national aid.[763] In this case, it would impose on a court the formidable and impractical task of assessing the full costs to a state of compliance with the conditions of forty-two national health assistance programs. Consideration of this one case suggests the basic flaws of the Tribe-Michelman theory of state autonomy and national power; it does not, of course, reveal the more fundamental problem that their theory, derived solely from an exploration of the latent, internal logic of *NLC*, does not address the rich, complex pattern of national and state relations.[764]

Professor Kaden also is a proponent of judicial enforcement or fed-

762. *See supra* note 745 and accompanying text. Tribe argues that in *North Carolina ex rel. Morrow v. Califano* "[t]he Court seems to have accepted the principle that when Congress pays the piper as well as calls the tune, there is no real threat to the autonomy either of states or individuals." L. TRIBE, *supra* note 759, at 18 (footnote omitted).

763. *See supra* note 745.

764. To take but two examples, there is no explanation of either Congress' authority under the spending power to make grants to private recipients on conditions directly applicable to the states or of Congress' authority under the commerce power to employ the states as the nation's agents in regulating private activity. *See supra* text accompanying notes 186-246 & 542-713. Since costs to state government may be increased when a grant is made to a private recipient or when a state undertakes administration and enforcement of comprehensive national standards for an activity

eralism limits on Congress' powers. He has, however, a much broader view of the states' role in the federal system than Tribe and Michelman, and he also provides a more thorough overview of the means by which Congress controls the allocation of political authority between the nation and the states. In contrast to the Tribe-Michelman thesis that the states' primary function is to provide basic services, Kaden recognizes that the states are political communities with powers to make political choices about the rules for private activity, public services, and the structure of government.[765] State autonomy in these political choices is important because the states foster "political liberty," which he defines as "the freedom to participate in the community's political life."[766] States foster political liberty because decisionmaking in small units enhances participation; the proximity of the governed to their officials enhances accountability;[767] and state discretion to make political choices serves the values of diversity and experimentation.[768] In addition to this broad conception of the states' role, Kaden also provides a reasonably comprehensive assessment of the means by which national legislation diminishes state autonomy. He explains that the area of state political choice is reduced by national legislation regulating private activity,[769] by statutes enacted under the commerce power that require state implementation of national regulatory programs,[770] and by conditional grants that impose national policies for social service programs and control the organization of state government.[771]

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like surface mining, one is left to assume that such exercises of national power are constitutionally suspect.

765. Kaden, *supra* note 22, at 849-53.

766. *Id.* at 856 (footnote omitted). Protection of state autonomy thus serves the goal of individual liberty. *Id.* at 857.

767. *Id.* at 853-54.

768. *Id.* at 854-55.

769. *Id.* at 890.

770. *Id.* at 869-70.

771. *Id.* at 874-81. There are many significant omissions in Kaden's analysis of the effects of national legislation on state autonomy. His catalogue of national powers that may be exercised to diminish state autonomy does not include either the war power, *see supra* text accompanying notes 148-75, or the power to enforce the Civil War Amendments, *see supra* text accompanying notes 336-82. He also fails to consider the wide variety of conditions attached to national grants, *see supra* text accompanying notes 180-324, and he blurs a significant distinction between national statutes that apply directly to the states and national statutes that require the affirmative exercise of state authority over private activity by characterizing both types of statutes as "direct commands to the states." Kaden, *supra* note 22, at 869-70, 890-93. Moreover, by characterizing all national statutes enacted under the commerce power that require the affirmative exercise of state authority over private activity as "direct commands to the states," he glosses over significant dis-

The exercise of these national legislative powers threatens the capacity of the states to realize the advantages of political liberty, and Professor Kaden believes that the Court's general concern in *NLC* to protect state autonomy, as opposed to its reasoning, is well-placed.[772] Since the representation of state interests in Congress is no longer adequate to protect state interests,[773] judicial intervention to protect a minimum set of state powers against national interference is necessary so that the states can serve the functions of participation, accountability, diversity, and experimentation.[774] Judicially imposed limits on Congress' powers also are important because many national statutes that diminish state autonomy are themselves contrary to principles of political accountability—principles which are a crucial component of political liberty. Kaden argues that national statutes enacted under the commerce and spending powers that require the states to administer regulatory programs and to distribute benefits according to national standards may be inconsistent with principles of political accountability because voters "are left without a clear sense of the persons they may call to account—the national legislators who conceived and ordered a program or the state's officials charged with its implementation."[775] Thus, Kaden appears to contend that by limiting Congress' power to employ the states as the nation's agents, a court can promote political liberty in two ways. First, an area of state political choice is protected from national control, and state political decisions are consistent with the goal of promoting political liberty. Second, Congress' power to legislate in a fashion that distorts political accountability is checked.

Kaden's analysis of state autonomy and congressional powers is the most comprehensive and thoughtful response yet to *NLC*, but it has

tinctions between the means by which Congress exercises its authority under the commerce power to obtain state administration and enforcement of national regulations. For example, he characterizes both the provision for state enforcement of the EPA's 1973 transportation control plan regulations and the provision for state enforcement of price regulations under the Natural Gas Policy Act as "direct commands to the states." *Id.* The means employed by Congress to obtain state enforcement of these national regulations are, however, significantly different. *See supra* text accompanying notes 543-48, 581-606 & note 564.

772. Kaden, *supra* note 22, at 849, 857, 868.

773. *Id.* at 857-68. Kaden's analysis of the traditional concept of the political safeguards of federalism is discussed *infra* at note 811.

774. Kaden, *supra* note 22, at 851 ("To function as a state, the body politic must have at least a minimum of its powers protected against outside interference, including control over the structure of government, the distribution of administrative responsibility, the process of electing popular agents, and the capacity to tax and spend.").

775. *Id.* at 868. *See id.* at 857.

several significant flaws that follow from his exclusive focus on the states as political communities. The framers intended that both the nation and the states would have broad powers to make political decisions about the rules for private activity, public services, and the structure and organization of the public decisionmaking process.[776] In focusing solely on the states as political communities, Kaden assumes that the values of participation in government and accountability are best, and perhaps only, served by the process of political choice in subnational governments. This assumption sounds a persistent theme of federalism: the states are more democratic than the national government because they are smaller and closer to the people.[777] Nevertheless, there is no proof that either participation or accountability is greater in the states and local government than in the national government. Many studies show just the opposite: the process of political choice in the states and local government is farther from the democratic ideal than the national political process.[778]

776. *See supra* text accompanying notes 32-39.

777. The argument that state and local governments are more democratic than the national government is often coupled with arguments that the states are a barrier to tyranny at the national level, that the states provide for diversity and social experimentation, and that subnational government facilitates local administration sensitive to special local needs. *E.g.,* Chandler v. Florida, 449 U.S. 560, 579-80 (1981); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (states are a "laboratory" of federalism); Benson, *Values of Decentralized Government,* in ESSAYS IN FEDERALISM 1-17 (1961); Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's,* 21 B.C.L. REV. 763, 765-66 (1980); Stewart, *supra* note 577, at 1210-11, 1231. Nonetheless, the federalist proponents of the Constitution did not place much weight on any of these arguments about the states' special role in the federal system. In particular, the arguments that the states provide for popular control of government and for a check on central authority were in fact simply alternative statements of the proposition stated above, *see supra* text accompanying notes 51-53, that the electorate would determine whether the national or state governments would be predominate. *See* Diamond, *supra* note 30, at 53-56.

778. Kaden cites no empirical evidence that participation and accountability are better served by the states and local government than by the national government and notes only that political philosophers have long propounded "the notion that localism enhances participation and liberty." Kaden, *supra* note 22, at 890 n.281. Most modern studies of state and local government demonstrate that voter participation in state and local elections is even lower than in national elections and that these subnational governments are more likely to be controlled by one political party and responsive to the demands of special interest groups. *E.g.,* T. DYE, POLITICS IN STATES AND COMMUNITIES 65 (1977); N. HENRY, GOVERNING AT THE GRASSROOTS 54, 73-76 (1980); G. WASHNIS, PRODUCTIVITY IMPROVEMENT HANDBOOK FOR STATE AND LOCAL GOVERNMENT 7-15 (1980). Thus, it is generally agreed that the national government is more democratically responsible than subnational governments. W. RIKER, DEMOCRACY IN THE UNITED STATES 294 (2d ed. 1965).

Even if it is true that the states and local government are more conducive to political liberty in

The thesis that state autonomy promotes the values of participation and accountability could justify drastic limits on congressional power in order to carve out a large area of the political choice for the state and local government, but Kaden avoids this consequence by finding that it is necessary to protect only the minimum set of powers that allow the states to function as political communities.[779] He assigns the courts a significant role in protecting state autonomy because he finds that the representation of state interests in Congress is inadequate. He does not see, however, that there are other more practical and efficacious means of limiting national power and protecting state autonomy than the articulation of vague, indeterminate state interests by legislators and lobbyists. Kaden fails to see that there is an alternative to judicial protection of state autonomy because in arguing that national legislation diminishes state autonomy and the capacity of the states to promote political liberty, he completely neglects any consideration of political accountability in the national political process.[780] Congress can legislate in a politically accountable fashion, and its accountability both establishes limits on the exercise of national political power and justifies interference with state autonomy.[781] In neglecting consideration of Congress' political accountability, Professor Kaden fails in his self-imposed task of explaining "the extraordinary intervention of the

terms of participation and accountability than the national government, this advantage is counterbalanced by the fact that these subnational governments have often been hostile to another aspect of political liberty—protection of individual rights from majority rule. As a historical matter, it is the national government that has provided the greatest protection for individual rights. J. CHOPER, *supra* note 734, at 250-54.

779. *See supra* note 774 and accompanying text.

780. Kaden's discussion of the accountability of the national political process is limited to the assertion that Congress' power to employ the states as the nation's agents in administering national programs is contrary to principles of accountability because the voters do not know whom to hold responsible. *See supra* text accompanying note 775. Given the imperfect knowledge and general apathy of most of the electorate, it is, for example, probably true that most voters do not know whether state or national officials are responsible for any particular environmental protection standard enforced under the Surface Mining Control and Reclamation Act. *See supra* text accompanying notes 559-63. Nonetheless, the regulated industry knows the extent of state and national responsibility and can invoke the appropriate political process, state or national, to protect its interests. Kaden's claim of voter confusion over whom to blame neglects the fact that those who are directly and immediately affected know where to lobby, and it would ultimately discredit most provisions for state administration of national programs. The political accountability of Congress for the various means it employs to obtain state administration and enforcement of national regulations is discussed *infra* at notes 920-92.

781. The concept of political accountability is developed *infra* at notes 829-49.

courts against the judgments of the political branches"[782] of the national government, and he states an unnecessarily broad role for judicial superintendence of the federal system.

In addition to an inadequate justification for judicial intervention in the political process, Kaden's proposed "standard[s] for judicial review of federal actions affecting the states"[783] are nothing more than ad hoc balancing tests. Kaden argues first that the courts should not restrict Congress' power to regulate private activity. Although such national regulation diminishes state autonomy by displacing state political choices about the rules for individual conduct, there is no need for judicial intervention because the states retain the capacity to make political choices in "residual areas" unaffected by national legislation.[784] Since he does not specify how large a "residual area" of state regulation of private activity is constitutionally required, his justification of national power provides no answer to the Court's recent suggestion in *Hodel* that Congress' power to regulate private activity under the commerce clause may be narrowed.[785]

With respect to Congress' power to regulate the states and to require the states to administer and enforce national regulatory and social benefit programs, Kaden advances balancing tests. A statute enacted under the commerce power is valid unless it "coopts the state's political processes by interfering with legislative and executive direction [discretion][786] in a significant way."[787] This impermissible effect of national legislation on state autonomy is to be measured by "fiscal impact" and "the effect on organizational structure and the allocation of nonfiscal resources."[788] Given the broad gauge of these criteria, his standard for judicial review is an invitation for an ad hoc judicial assessment of the effects of national statutes on the states.

His standard for judicial review of conditions of national grants that affect the organization of state government or require the states to regulate private activity compounds the problems inherent in his test of Congress' power under the commerce clause by adding a second layer

782. Kaden, *supra* note 22, at 849.

783. *Id.*

784. *Id.* at 890.

785. *See supra* note 475 and accompanying text.

786. The word "direction" probably should read "discretion" because the core value to be protected is the states' "political discretion." Kaden, *supra* note 22, at 891.

787. *Id.* at 890.

788. *Id.*

of balancing analysis. Kaden proposes a two-part test for conditions of national grants. Conditions should first be evaluated under the balancing test he proposes for commerce power regulations. If the condition would be an invalid intrusion on state autonomy as a regulation directly imposed under the commerce power, a court may still uphold it if Congress can "demonstrate that the requirement is related to the achievement of an important governmental objective."[789]

Both the Tribe-Michelman thesis of the states' role as providers of basic services and the Kaden thesis of the states' role as sources of political liberty are superimposed on the framers' understanding that the states, like the nation, are political communities with broad powers to make political decisions. The framers did not intend that any particular state power, like the power to provide public services identified by Tribe and Michelman, or any particular minimum constellation of political powers, as Kaden suggests, would be immune from interference by the political authority of the nation. The qualitative approach to the states' share of political authority advocated by Tribe and Michelman and the quantitative[790] approach to the states' share of political authority advocated by Kaden are modern reincarnations of dual federalism.[791] However workable the concept of discrete areas of state and national authority may have been in the nineteenth century, it is no longer serviceable in a modern integrated economy where almost every subject of local concern is also a matter of national concern.[792] The ultimate reliance of Tribe, Michelman, and Kaden on balancing tests to resolve conflicts of state and national political authority is perhaps best understood as a tacit acknowledgement that their qualitative and quantative definitions of state political authority are unworkable. These balancing tests, once divorced from any theory of state autonomy, portend completely standardless judicial superintendence of the allocation of political authority within the federal system.

789. *Id.* at 896. To the extent that he tests the validity of conditions of national grants in terms of the extent of Congress' power under the commerce clause, Kaden apparently adopts the previously discredited argument that the spending power is not a separate enumerated power and that it can be exercised to accomplish only the ends obtainable under Congress' other legislative powers. *See supra* notes 314 & 425.

790. These characterizations of the Tribe, Michelman and Kaden analyses are drawn from R. LEACH, *supra* note 10, at 35 ("the states have a right to a share of the power exerted in the federal system, but not any particular share, either quantitative or qualitative").

791. *See supra* note 78.

792. S. DAVIS, *supra* note 30, at 146-48.

Two other commentators have attempted to avoid the problems of devising a workable theory of the states' role in the federal system. Professor Choper argues that *NLC* should be overruled and that questions about the authority of the national government over the states should be nonjusticiable and relegated entirely to the political branches of the national government.[793] His proposal rests on the argument that "[n]umerous structural aspects of the national political system serve to assure that states' rights will not be trampled, and the lesson of history is that they have not been."[794] Since Professor Choper never defines "states rights" or state interests or the states' role in the federal system, it is not clear what exactly is protected by the national political process. Nonetheless, he seems to contend only that the national political process protects the policy preferences of each state's citizens as perceived by their congressmen, senators, and lobbyists.[795] Since he does not address explicitly the interest of the state as a political community in its powers to make political decisions about the rules for private activity, the goods and services to be provided collectively, the structure and organization of its public decisionmaking process, and the allocation of governmental resources, his analysis of the national political process provides no justification for national authority over these state interests.[796]

793. J. CHOPER, *supra* note 734, at 175; *Dispensability of Judicial Review, supra* note 10, at 1552.

794. J. CHOPER, *supra* note 734, at 176.

795. *See id.* at 176-93.

796. Indeed, these interests of the state political community as a whole are precisely the interests most likely to be sacrificed in a battle over substantive policy matters. For example, the debate in Congress on the Public Utility Regulatory Policies Act of 1978, *see supra* text accompanying notes 611-91, focused on the question of the proper standards for electric utility rates and on preserving the authority of state regulators to determine these standards. *See* Note, *The Legislative Evolution of Title I of the Public Utility Regulatory Policies Act of 1978: The Study in Compromise,* 5 J. CORP. LAW 105, 105-37 (1979). There was little or no direct consideration of the effect on the states of imposing the requirement that state agencies administer and enforce this national program. The bill originally introduced and passed by the House established national rate standards for electric utilities and provided for direct national enforcement if the states declined to enforce them. *Id.* at 106-15. Electric utilities and state regulatory agencies strongly favored state power to set rate policies and state administration of utility regulations. *Id.* at 105, 116. These two groups persuaded the Senate to modify the bill so as to give the Secretary of Energy only limited power to intervene in state rate proceedings for the purpose of advocating national rate policies. *Id.* at 115-35. In a compromise, the conferees agreed to retain state authority to determine substantive policy by making the national standards hortatory, but they imposed a duty on state agencies to conduct administrative proceedings to consider adoption of the national standards. *Id.* at 135-37. State public utility regulators and electric utilities succeeded in their efforts

An answer to this charge that Choper's analysis of the national political process does not explain national authority to diminish the states' autonomy as political communities may perhaps be found in his arguments that the states and local governments have retained their vitality and that historically there have been and will be in the future few, if any, serious national encroachments on the states.[797] Both of these arguments, however, provide inadequate answers. On the premise that state budgets and employment have increased substantially in recent years he argues that "state and local governments are currently more engaged than at any stage in our history" and that the states have not been overwhelmed by the national government.[798] This argument, nonetheless, does not establish the vitality of the states as political communities exercising their political decisionmaking powers because many state employees are engaged in the administration of national programs and state budgets have been increased, at least in part, to meet spending priorities imposed by the nation through conditional grants. His second argument is that Congress historically has been solicitous of states' rights and that egregious intrusions on the states, like a "national prohibition of all state taxes or . . . federal confirmation of all state officials," are completely improbable.[799] This contention will, in many cases, fall on deaf ears because there already has been a significant transfer of political authority from the states to the nation. Proponents of state autonomy demand a justification of Congress' power to diminish state autonomy, and the claim that the policy preferences of state citizens are heard in Congress does not in itself justify the expansion of national political authority at the expense of the states. Absent a full explanation of the inherent limits on national power and a comprehensive justification of national political power to diminish state autonomy through statutes that regulate private and state activity

to have both national standards and national administration of utility regulations rejected. They successfully protected the states' interests in controlling substantive rate policies. However, they did not represent the political community's broad interest in controlling the use of its administrative resource, the state agency responsible for enforcing the national program. *See Conference Report, supra* note 621 (no consideration of the impact on the states of the duty to administer the regulatory program).

For another argument that Choper has not advanced an adequate justification for his proposal that federalism issues should be nonjusticiable, see Sager, Book Review, 81 COLUM. L. REV. 707 (1981).

797. J. CHOPER, *supra* note 734, at 184-90, 215-23.

798. *Id.* at 188-90.

799. *Id.* at 221.

and that require the states to act as the nation's agents in administering national programs, Choper's claim that the national political process provides adequate protection for state interests will, in all probability, have no persuasive force.

Professor Stewart, like Choper, would permit the national political process to determine the allocation of political authority between the states and the nation. In contrast to Choper's argument that questions of national authority over the states should be nonjusticiable because structural aspects of the national political process provide adequate protection of state interests, Stewart advances a strong, elaborate argument to justify national power to regulate the states and to compel the states to implement national regulatory programs.[800] His justifications of national authority appear most clearly in his argument that Congress has the power to compel the states to administer and enforce national standards for pollution control. National authority is justified primarily on the ground of necessity. If Congress was required to shoulder the full financial and political costs of establishing a national bureaucracy to implement national environmental programs, the goals of environmental protection would not be achieved because the political obstacles created by national accountability for these costs would be insurmountable. Thus, Stewart contends that the nation must have the power to compel state implementation in order to achieve these goals. He also argues that because pollution cannot be confined within a state's boundaries and has a "spillover effect" on other states, national authority to compel state implementation of environmental standards is justified to protect the autonomy of neighboring states and to resolve potential interstate conflicts.[801] Although the political process will apparently prevent Congress in most cases from enacting statutes that cannot be justified on the grounds of necessity and spillover effects, Stewart holds judicial review in reserve for "extreme cases" to protect the states.[802]

The reliance by both Choper and Stewart on the national political process to determine the scope of national authority over the states is consistent with the framers' intention that popular support would determine whether the nation or the states would be the predominate

800. Stewart, *supra* note 577.

801. *Id.* at 1199-1202, 1226-30. Stewart's arguments are analyzed *infra* at note 905 and notes 1033-55 and accompanying text.

802. Stewart, *supra* note 577, at 1224, 1264, 1271-72.

political decisionmaking unit. Choper's complete and Stewart's all-but-complete deference to the national political process would, however, permit the nation to swallow the states. Deference to the political choices of the nation and rejection of the political choices of state political communities is warranted only to the extent that Congress is politically accountable. Political accountability can provide a justification of national power that is otherwise absent from Professor Choper's argument that state policy preferences are represented in Congress; it also imposes some limits on Professor Stewart's justifications of national power that sacrifice Congress' accountability on the altar of expediency.

III. THE COURT, CONGRESS, AND THE ALLOCATION OF POLITICAL AUTHORITY IN THE FEDERAL SYSTEM

A. The Political Safeguards of Federalism

Herbert Wechsler's analysis of the national political process is the classic justification for judicial deference to Congress' determinations about the allocation of political authority in the federal system.[803] Professor Wechsler argues that "[f]ederal intervention as against the states is . . . primarily a matter for congressional determination" because "the national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states."[804] In other words, there are political safeguards of federalism inherent in the national political process. The first safeguard is Congress' traditional reluctance to supplant state law and the common understanding that national action is a special, not ordinary, case.[805] The second, and more basic, safeguard is that the selection of congressmen from the states and through state political procedures assures sensitivity to local interests.[806] Indeed, the national political process is so responsive to insular

803. Wechsler, *supra* note 27.

804. *Id.* at 558, 559.

805. *Id.* at 544-46.

806. Professor Wechsler argues that "the Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control." *Id.* at 548. The House, albeit to a lesser extent, serves the same function because of the states' control of voter qualifications and congressional districting. *Id.* at 548-52. Although Wechsler recognizes that the President has a national constituency, the electoral college system ensures some responsiveness to "local values that have large support within the states." *Id.* at 552-58, 558.

state interests that the problem is more one of frustration of the will of a national majority than it is one of national intrusion on the states.[807]

Professor Wechsler's theory justifies national power to regulate private activity and in turn to diminish state autonomy by displacing state policies on the ground that the policy preferences of a majority of each state's citizens, or at least the policy choices of the most powerful interests in each state, are represented in the national political process by each state's senators and congressmen.[808] There are two significant omissions, however, in this analysis of the capacity of the national political process to protect the states. First, Wechsler does not consider the states' interests in making political decisions about the structure and organization of government, the goods and services to be provided collectively, and the allocation of governmental resources. Each of these political decisions is an aspect of state autonomy as important as political choices about the rules for private activity.[809] Second, Wechsler does not recognize that national regulation of private activity is only one of the ways in which Congress controls the allocation of political authority in the federal system, and he does not address Congress' power to regulate the states or to employ the states as the nation's agents in implementing national regulations.[810] In the absence of a full overview of state interests in political decisionmaking which are affected by national statutes regulating the states and requiring the affirmative exercise of state authority over private activity, his theory of the political safeguards of federalism is incomplete. It addresses only the states' interests in prescribing rules for private activity and justifies national power to supplant this one discrete kind of state political choice. Wechsler's thesis has found both supporters and critics. None of these commentators, however, has moved beyond the narrow con-

807. *Id.* at 547.

808. It is, perhaps, an overstatement to say that Wechsler justifies national power to regulate private activity. His conclusion that "the Court is on the weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states" apparently admits that the national political process does not always protect the states adequately because it leaves the door open to some role for the Court in protecting the States. *Id.* at 559. Professor Wechsler does not, however, state any standard for judicial review of national statutes that affect state interests.

809. *See supra* text accompanying notes 30-35.

810. The omission of any analysis of Congress' power to require the states to exercise affirmative state authority over private activity in implementing national programs may be a consequence of the scarcity of such statutes at the time that Professor Wechsler wrote. *See* Hart, *supra* note 54, at 515-16.

fines of Wechsler's original thesis and advanced a comprehensive analysis of the capacity of the national political process to justify Congress' power to control the allocation of political authority between the nation and the states.[811]

Although Professor Wechsler's theory of the political safeguards of federalism has had little direct influence on the courts,[812] deference to the political process is a persistent—albeit episodical—theme of judicial review of federalism issues.[813] The idea that the national political

811. Most commentators accept Wechsler's thesis that the representation of state interests in Congress makes it a more appropriate body than the Court for resolution of questions of national authority over the states. Professor Choper's argument that these federalism questions should be nonjusticiable makes him the most extreme proponent of the political safeguards of federalism as an adequate source of protection for the states; but, like Wechsler, his analysis is limited to the representation of the policy preferences of each state's citizens, and he does not explain how state interests other than the regulation of private activity are protected. *See supra* text accompanying notes 793-96. Professor Stewart's argument for broad national power to mandate state implementation of national environmental standards also rests in part on the assumption that state interests are protected by the national political process, but he does not explain how these political safeguards operate in a context that Wechsler's theory never addresses. *See supra* text accompanying note 802. Ironically, given his argument that state autonomy limits national power as a means of protecting individual rights to basic state social services, Professor Tribe has provided the most careful elaboration of Wechsler's political safeguards. *See* L. TRIBE, *supra* note 717, §§ 5-7, -8, -20, at 239-44, 304-06; *supra* note 757.

Professor Kaden is the primary critic of Wechsler's theory. Kaden argues that judicial protection of state autonomy is necessary because the representation of state interests in Congress is no longer as adequate as when Wechsler first advanced his thesis in 1954. Specifically, he argues that the states' influence upon the central government has declined because Supreme Court decisions have reduced state control over voter qualifications and congressional districting, that state party organizations have become less powerful, and that the role of national, state, and local bureaucrats and special interest groups in determining public policy has increased. Kaden, *supra* note 22, at 857-68. Nevertheless, like those who find political safeguards in the national political process, his analysis is confined to the question of representation of the policy choices of state citizens and at most it raises some doubt about the adequacy of Wechsler's justification of national power to displace state regulation of private activity. Although Kaden defines state interests in political decisionmaking broadly and recognizes many means by which national legislation diminishes state autonomy, he never considers the possibility that the national political process may provide an adequate justification for intrusion by the central government on the states entirely apart from the extent to which Congressmen represent the policy preferences of their constituents about the rules for private conduct. *See supra* text accompanying notes 779-80.

812. Although the political safeguards of federalism thesis has long been standard fare in the leading casebook on constitutional law, G. GUNTHER, *supra* note 56, at 109-12, a review of Shepherd's Citations indicates that Wechsler's article has been cited only once by the Supreme Court (Justice Brennan's dissent in *NLC*, 426 U.S. at 877) and only five times by lower federal courts.

813. Judicial deference to the political process is also a theme in review of individual rights issues. *E.g.,* Vance v. Bradley, 440 U.S. 93, 113-14 n.1 (1979) (Marshall, J., dissenting); Railway Express v. New York, 336 U.S. 106, 112-13 (1948) (Jackson, J., concurring); United States v. Caroline Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). *See generally* J. ELY, DEMOCRACY AND DIS-

process, not the courts, constitutes the principal check on national authority both to regulate private activity and to regulate the states held special appeal for two of our greatest Chief Justices. For Chief Justice Marshall, the representation of all the people of the nation in Congress counseled a limited role for the Court in restricting national authority to regulate private activity. In *McCulloch v. Maryland*,[814] he approved Congress' power to charter a national bank in part on the ground that considerable weight should be given to the determination of the political branches of the national government.[815] In *Gibbons v. Ogden*,[816] the Chief Justice stated more explicitly his theory that the political process checks national authority to regulate private activity and reduces the need for judicial intervention.[817] Chief Justice Marshall believed that the national political process limits congressional power to tax the states as well as congressional power to regulate private activity. In *McCulloch* he suggested in dictum that a national tax on a state-chartered bank would be valid because the people of all the states, and the states themselves, are represented in Congress[818] and they can prevent their representatives from imposing an oppressive tax.[819] Some one hundred years later, Chief Justice Stone returned to Marshall's the-

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TRUST (1980); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories,* 89 YALE L.J. 1063 (1980).

814. 17 U.S. (4 Wheat.) 316 (1819).

815. In *McCulloch*, the Court upheld Congress' power to create a second Bank of the United States, and Chief Justice Marshall found that the previous establishment of such a bank supported the second exercise of national political authority:

> But it is conceived that a doubtful question, on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.

Id. at 401.

816. 22 U.S. (9 Wheat.) 1 (1824).

817. In upholding Congress' power under the commerce clause to license vessels and to displace state regulation of steamboats, Chief Justice Marshall noted that the principal limit on Congress' authority is the influence of the people on their representatives:

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

Id. at 197. The Court has frequently quoted or cited Chief Justice Marshall's statement that the principal check on the commerce power is political, not judicial. *E.g.*, Wickard v. Filburn, 317 U.S. 111, 120 (1942); Champion v. Ames (The Lottery Cases), 188 U.S. 321, 363 (1903).

818. 17 U.S. (4 Wheat.) at 435.

819. *Id.* at 428 ("The only security against the abuse of this [taxing] power, is found in the

ory of the national political process as a check on congressional power.[820] Like his predecessor, Stone saw the political process as a check on Congress' power to regulate private activity[821] and to tax state instrumentalities.[822]

Scrutiny of state political processes as a source of protection for interests affected by state legislation and as an alternative to judicially imposed limits on state powers is a counterpart of the Marshall-Stone thesis that political checks inherent in the national political process justify national authority to diminish state autonomy by regulating private activity and by taxing state activity. As might be expected, Marshall and Stone are the leading proponents of scrutiny of political checks in the states' political processes as the key to judicial restraints on state legislation. Beginning again with *McCulloch*, Chief Justice Marshall laid the groundwork. In that case, he held that a state tax that applied only to a national bank was unconstitutional, but he also suggested in dictum that if a state tax applied equally to state-chartered financial institutions and national banks it would be valid.[823] The thesis implicit

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structure of government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation").

Although the Chief Justice recognized that the national political process restrained Congress' power to regulate private activity and to tax the states, his suggestion that the operation of state political processes may provide adequate protection for national interests is better known. *See infra* text at notes 823-24.

820. Chief Justice Stone saw some basis for judicial deference to the determinations of the political process in three distinct contexts—national authority to regulate private activity and to tax the states, *see infra* notes 821-22 and accompanying text; dormant commerce clause scrutiny of state legislation, *see infra* notes 827-28 and accompanying text; and judicial review of individual rights claims as in part a function of the extent to which these rights are protected by the political process, *see* Caroline Prods. Co. v. United States, 304 U.S. 144, 152-53 n.4 (1938).

821. In *United States v. Butler*, Justice Stone dissented from the Court's holding that a grant to farmers on the condition that they reduce crop acreage was unconstitutional. He argued that the three constitutional restraints on the spending power are requirements that the purpose of expenditure must be "truly national," that the expenditure "may not be used to coerce action left to state control," and "the conscience and patriotism of Congress and the Executive." 297 U.S. 1, 87 (1936) (Stone, J., dissenting).

822. In his opinion for the Court in *Helvering v. Gerhardt*, Justice Stone upheld the imposition of a national income tax on the salaries of employees of an agency created by two states. Drawing on Chief Justice Marshall's opinion in *McCulloch*, *see supra* notes 817-19 and accompanying text, he concluded that the representation of all the people of the nation in Congress constituted a political check on the exercise of the national taxing power and that the political process "provides a readier and more adaptable means than any which the courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other." 304 U.S. 405, 412, 416 (1938). *See also* Massachusetts v. United States, 435 U.S. 444, 456 (1978) (Brennan, J.).

823. 17 U.S. (4 Wheat.) at 436.

in this dictum is that the state political process would check the imposition of any disabling state tax on a national bank if the tax also applied equally to the constituents of the state's legislators.[824] Although Marshall's dictum was long neglected, it was revived as the basis for the Court's holding in *United States v. County of Fresno*[825] that a nondiscriminatory local tax on the possessory interest of national employees in housing supplied by the national government is valid. Since the tax applied equally to national employees and to similarly situated state voters, there was no danger that the state tax would be levied at a rate that would interfere with the duties of the national employees.[826]

In contrast to its limited reliance on political checks as a justification of state power to affect national interests, the Court has frequently considered the presence or absence of political checks as a key to judicial review of state legislation affecting citizens of other states. This aspect of the political checks doctrine was first advanced by Chief Justice Stone in reviewing dormant commerce clause challenges to state regulations and taxes. If the burden of a state regulation or tax falls equally on in-state and out-of-state interests, he argued that the state's political process provides adequate protection for both interests[827] and that judicially imposed limits on state regulation are not necessary to protect interstate commerce.[828]

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824. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?,* 75 MICH. L. REV. 1426, 1449 (1977).

825. 429 U.S. 452 (1977). *See* Hellerstein, *supra* note 824, at 1434-41.

826. 429 U.S. at 462-63 n.11. The key to the political check is the equal application of the state tax on state and national interests. Justice Stevens dissented on the ground that the tax in fact applied only to employees of the national government. *Id.* at 468-76; Hellerstein, *supra* note 824, at 1449 n.144. For another example of scrutiny of a state tax to determine if its application to both state and national interests provides a political check, see Montana v. United States, 440 U.S. 147, 167-72 (1979) (White, J., dissenting).

827. In these circumstances, the accountability of the legislators of the state imposing the regulation or tax on in-state interests checks the extent of the burden on out-of-state interests and on the free flow of commerce.

828. Southern Pacific Co. v. Arizona, 325 U.S. 761, 767-68 n.2 (1945) (state regulation); McGoldrick v. Berwind-White Co., 309 U.S. 33, 45-46 n.2 (1940) (state tax); South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184-85 n.2 (1938) (state regulation).

Stone's doctrine of political checks has subsequently found favor in other modern dormant commerce clause cases. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981); Raymond Motor Transp. v. Rice, 434 U.S. 429, 444 n.18, 447 (1978). *See* Commonwealth Edison v. Montana, 453 U.S. 609, 628 (1981) (questions about the appropriate level of state taxes must be resolved through the political process); Reeves, Inc. v. Stake, 447 U.S. 429, 439 (1980) (adjustment of state interests in a proprietary activity and national interest in unobstructed interstate commerce is "a task better suited for Congress than this Court"); Note, *State Environmental Protection*

B. Political Accountability and Congress' Power to Control the Allocation of Political Authority in the Federal System

Questions of national power to intervene against the states involve conflicts between the political choices or decisions of two different political communities—the nation and the states. Professor Michelman, for one, despairs of any rule for preference between national and state political determinations. In his view "the category of state sovereignty is precisely matched by an opposed category of national sovereignty,"[829] and there is "no judicially cognizable answer" to the question whether the nation or states shall "prevail when the people speak, simultaneously but discordantly, through their state governments and through Congress."[830] Contrary to this argument that there

Legislation and the Commerce Clause, 87 HARV. L. REV. 1762, 1774-75 (1974). Given the similarity of the policies underlying the dormant commerce clause and the privileges and immunities clause of article IV, it is not surprising that the political checks doctrine has also been employed in this second context. *E.g.*, Austin v. New Hampshire, 420 U.S. 656, 662 (1975); Allied Stores v. Bowers, 358 U.S. 522, 532-33 (1959) (Brennan, J., concurring).

The absence of a political check if all interests affected by state legislation are not adequately represented in the state's political process has also been invoked by the Court in several other contexts as a ground for refusing to defer to state political decisions. In *Nevada v. Hall*, the Court held that Nevada's limit on governmental tort liability did not bind the courts of sister states under the full faith and credit clause in part because citizens of these sister states whose injuries are caused by the negligence of Nevada's agents had no voice in Nevada's decision about the waiver of sovereign immunity and the establishment of a limit on liability. 440 U.S. 410, 426 (1979). *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 406 (1978) (plurality opinion of Brennan, J.) (no merit to argument that consumers dissatisfied with the service provided by a municipally owned electric utility may seek relief through the political process because some consumers live outside the municipality and are excluded from participation in the local political process). The Court also justified in part its decisions requiring the reapportionment of state legislatures on the ground that state political procedures did not afford any effective remedy for malapportionment. Reynolds v. Simms, 377 U.S. 533, 553-54 (1964); Baker v. Carr, 369 U.S. 186, 258-59 (1962) (Clark, J., concurring); *see* Ball v. James, 451 U.S. 355, 373 (1981) (Powell, J., concurring).

829. *Permutations of Sovereignty*, *supra* note 35, at 1194. According to Michelman:

> the rightful dominance of the states within their realm is precisely matched by that of Congress within the national realm; the location of responsibility for social services within the states' realm is precisely matched by the responsibility for national economic welfare within the congressional realm; the institutional error of allowing a putatively insensitive Congress to alter the economic equations that determine local-government service levels is precisely matched by that of allowing narrowly self-interested local voter majorities to disregard national social costs in construction those equations.

Id. at 1194-95.

830. Michelman's answer to this dilemma is to posit a special social service role for the states that requires the courts to give preference to state and local policies on the provision of basic social services and to limit national action that would threaten a reduction in these services. *Id.* at 1194; *see supra* text accompanying notes 735-39. His argument that apart from state and local

is no basis for preference between the political choices of two different organizations of the electorate, there is a rule of preference for national political decisions that is consistent with the states' role as political communities in the federal system. The explanation of Congress' power to intervene against the states rests, not simply on the representation of the national electorate in Congress as urged by Marshall, Stone, and Wechsler, but on a concept of political checks derived from Marshall's and Stone's justification of state power to affect the interests of the nation and other states. Political checks on Congress' power over the states are inherent in the national political process. These checks make Congress politically accountable for legislation that diminishes state autonomy. Congress' political accountability in turn provides the warrant for its authority to control the allocation of political authority between the nation and the states.

Political accountability is a concept that is uniformly applauded by political scientists,[831] legal scholars,[832] and the Court,[833] but it is rarely discussed in the context of federalism.[834] Political accountability is defined as the "answerability" of representatives to the represented.[835]

governments' special social service function there is no rule for preference between the political choices of the nation and the states is marred by a significant internal contradiction. He argues that the states can intervene in local government determinations about public services because there is an "accountability defect" in local political processes: parochial interests at the local level may prevail at the expense of the general social obligation to provide adequate public services. *Id.* at 1190. The argument that the state, which is the larger political unit, should prevail over local government because it is more broadly accountable would, of course, also support a conclusion that the nation should prevail over the states. Thus, his argument suggests the basis for a rule of preference that he denies.

831. *E.g.,* R. DAHL, A PREFACE TO DEMOCRATIC THEORY 3, 131 (1956); W. RIKER, *supra* note 778, at 25, 28-30; Benson, *supra* note 777, at 17; Pennock, *Responsiveness, Responsibility and Majority Rule,* 56 AM. POL. SCI. REV. 790, 797-98, 803, 807 (1962). *Cf.* Livingston, *Britain and America: The Institutionalization of Accountability,* 38 J. POL. 879 (1976) (division of power more important than accountability).

832. J. CHOPER, *supra* note 734, at 10; *Permutations of Sovereignty, supra* note 35, at 1174, 1189-90; Stewart, *supra* note 577, at 1240-41; *Unraveling NLC, supra* note 32, at 1093 n.109. For Kaden's emphasis on the importance of accountability, see *supra* text accompanying note 775.

833. *E.g.,* Branti v. Finkel, 445 U.S. 507, 531, 534 (1980) (Powell, J., dissenting); Elrod v. Burns, 427 U.S. 347, 385 (1976) (Powell, J., dissenting) (decisions holding political patronage practices contrary to first amendment interfere with political parties as a mechanism of accountability).

834. Assessments of political accountability in our federal system are limited for the most part to lamentations that complicated intergovernmental relations confuse the electorate. 1 ACIR STUDY, *A Crisis of Confidence and Competence* A-77, *supra* note 82, at 19-25; Gilbert, *The Shaping of Public Policy,* 426 ANNALS AM. ACAD. POL. & SOC. 116, 122, 137 (1976); *see supra* text accompanying note 775.

835. Pennock, *supra* note 831, at 797. There is political accountability if there is a "workable

The purpose of political accountability is to enable the electorate to control policy and to provide for majority rule,[836] and it is generally agreed that accountability is the core of democratic government.[837] No representative system of government is perfectly representative,[838] and the national, state, and local governments in our federal system are not exceptions to this rule. There are significant antimajoritarian aspects in the selection, organization, and processes of Congress[839] and state and local governments.[840] Although antimajoritarian aspects of the political process may prevent the translation of the wishes of a simple numerical majority into public policy, it does not necessarily follow that the mechanisms of political accountability are ineffective or that majority rule is frustrated. Majority rule in a democracy must be understood as something more than a simple numerical majority. This limited definition must be tempered by taking into consideration the relative intensity of interest of various groups in particular social policies, avoidance of automatic responses to ephemeral demands, the necessity to devise rational responses to public demands, and maintenance of a popular consensus about the fairness of representative government by respecting important minority interests.[841] The mechanisms of political accountability adequate for majority rule, understood in this sympathetic and realistic fashion, may be quite diffuse and indirect. A specific mechanism of accountability to guarantee that a simple numerical majority approves each and every decision of its representatives or, conversely, can correct these decisions is not required as long as the electorate retains control over policy in the aggregate.[842] Nevertheless,

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way for the voters to express . . . disapproval and bring about a change" when "something is done which the electorate disapproves." *Id.* at 802.

836. *Id.* at 802, 807.

837. *Id.* at 797; J. CHOPER, *supra* note 734, at 10; R. DAHL, *supra* note 831, at 3.

838. Pennock, *supra* note 831, at 794.

839. For a succinct review of the antimajoritarian aspects of the national political process and a conclusion that legislation enacted by Congress is still the product of a national majority, see J. CHOPER, *supra* note 734, at 12-47.

840. *See supra* note 778.

841. For a thorough development of this concept of majority rule, see Pennock, *supra* note 831.

842. The standard analysis of political accountability is that competition between two political parties allows the electorate to hold its representatives to account, at least in general and with respect to major political issues. Given the lack of party discipline, many political scientists question the effectiveness of this mechanism of accountability. 1 ACIR STUDY, *A Crisis of Confidence and Competence* A-77, *supra* note 82, at 20-21; Pennock, *supra* note 831, at 797-806. One political scientist has concluded that there may be political accountability notwithstanding weak political

some measure of accountability is crucial to any determination that national or state legislation is the product of national or state majorities.

This summary of the concept of majority rule and political accountability is entirely conventional, but the application of these two concepts to the resolution of federalism issues is novel, and perhaps controversial. A conflict between state and national political decisions involves a confrontation between two different organizations of the electorate. Even if we assume that the state and national political processes are equally accountable and, consequently, that state and national political decisions are each supported by a majority, the political accountability of Congress provides a basis for preference of the political choice of the national majority over the political choice of a subnational majority. The nation is the larger and more comprehensive political unit, and national political choices have a broader base than state or local political decisions. Preference for the decision of the national political majority is, then, consistent with Madison's argument that the national political process would provide an escape from the parochial political decisions of state governments.[843] Reliance on the national political process to determine the extent of national authority over the states is also consistent with the framers' general intention that the actual allocation of political authority in the federal system would be determined by the electorate.[844] Moreover, even if there is some parity between state and national political decisions because both are products of political majorities, the supremacy clause dictates preference for the political choice of the national majority.[845]

The argument that a national political majority should prevail over a state political majority when national and state political decisions conflict rests on the political accountability of Congress. Absent political

parties. Pennock, *supra* note 831, at 801 ("By permitting representatives to regroup themselves from issue to issue, with relatively little regard for party affiliation, the very looseness of the American system fosters the maximum response to majority will.").

843. Scheiber, *supra* note 48, at 92-93; Diamond, *supra* note 30, at 56-62. Madison believed that state political decisions would be parochial because the states are more subject to control by factions than the national government and because each state would tend to disregard the interests of citizens of the other states. *Id.*

844. *See supra* text accompanying notes 51 & 53.

845. U.S. CONST. art. VI, cl. 2. Resort to the supremacy clause does not, of course, establish the contention that the political accountability of Congress determines the scope of national political authority, but it does undermine Professor Michelman's argument, *see supra* text accompanying notes 829-30, that there is no basis for preference between state and national political decisions.

accountability, national legislation is not the product of a political majority and the basis for preference evaporates. The political accountability of Congress turns on political checks inherent in the national political process. To the extent that political checks in the national political process make Congress politically accountable, statutes that diminish state autonomy are the product of a national political majority, and there is no basis for judicial intervention in the political process.

In postulating this broad justification of national political authority over the states, there is some risk that two equally fundamental points may be lost. First, the political checks in the national political process limit the extent of national intrusions on the states and provide in practice a significant degree of protection for state interests in political decisionmaking. Second, in the absence of a political check on a particular exercise of national legislative authority, there is no warrant for Congress' power to intrude on the states. Judicially imposed restrictions on Congress' powers then may be necessary to protect the states' role as political communities in the federal system.

The inquiries crucial to this rule of preference for the political decisions of a national majority over state political decisions are: (1) the identification of the political checks in the national political process and the manner in which they provide for political accountability and majority rule; (2) a demonstration of the capacity of these political checks to protect the interests of states as political communities making political decisions about the rules for private activity, the structure and processes of government, the mix of public goods and services, and the allocation of executive, legislative, and judicial resources; and (3) a determination of the extent to which these political checks operate to provide for majority rule and to protect state interests when Congress exercises national authority to regulate private activity, to regulate the states, or to require the affirmative exercise of state authority over private activity in the implementation of national regulatory programs. On the basis of this final inquiry, we can determine when to invoke the rule that the decisions of a national political majority should prevail over state political decisions and when there may be some justification for judicial protection of state interests in political decisionmaking.

The political checks that both limit and justify Congress' power to intrude on state interests in political decisionmaking are quite elementary and remarkably simple. Viewed from the perspective of the na-

tional electorate, political checks are the burdens imposed on them by congressional political decisions. Viewed from Congress' perspective, political checks are the burdens imposed on its constituents—the "costs" of policy decisions. The first political check is the application of nationally determined substantive policy to private activity. Individuals, groups, associations, and corporations directly affected by particular national policies assign the credit or blame to their representatives in Congress. The second political check is the requirement of financial and executive resources to administer and enforce national policy. To provide for the implementation of national policy, Congress must levy taxes and establish a bureaucracy. Voters are aware of national policies that directly affect interests they deem important, and they are indirectly aware of national policies that affect less important interests or the interests of others because the costs, in terms of the expenditure of funds and the establishment of a bureaucracy, are assessed against them in the form of taxes.

In our pluralistic society the composition of the majority shifts with the issues. By approving or disapproving their representatives, the voters retain control over social policy according to their overall level of satisfaction or dissatisfaction with policies that affect them directly and with the level of government spending and regulation. Although the effects on the voters of any particular national policy decision seen in isolation may be de minimus, regulation of private activity, the expenditure of funds, and the creation of a bureaucracy to administer these policies add to the total burden on the national electorate. Since these burdens of nationally established policies are traceable in the aggregate to Congress, the voters can hold their representatives in Congress answerable in broad terms for national policies. It is fair to conclude, then, that where these political checks are present, congressional policies are the product of a national majority.

Given our democratic theory, we tend both to assume that congressional policy decisions are made in accordance with the principle of majority rule and to overlook any explanation of the means of providing for majority rule. Political checks are, nonetheless, the essential means of creating political accountability and majority rule, and their crucial function is highlighted by considering congressional action taken in the absence of political checks. For example, if someone other than Congress has the responsibility for raising revenues or for administering and enforcing regulations, a congressional decision to

spend or to regulate a private activity is one made in the absence of some of the political checks that are normally part of the national political process. There is a limited political check on such a decision because some individuals and groups are directly affected by spending and regulatory programs; however, the political check inherent in the requirement of financial and executive resources to implement national policy is missing. The absence of this political check may have a significant impact on the political calculus: the decision to spend or to regulate might not be made if Congress' action added to the total burden on the national electorate of funding and enforcing national policy. Those who would be affected by the necessity for tax revenues and for administrative resources might well object, if not to the particular decision, at least to a general increase in the level of expenditures and regulation.

More importantly, in the absence of the political check inherent in the requirement to provide financial and administrative resources to enforce national policies, a congressional determination to spend or to regulate is not the product of a national political majority. If no burden is placed on the national electorate to provide financial and administrative resources to implement congressional policies, the national electorate is deprived of a significant means of holding Congress answerable for national policies—it cannot check national policies by resisting or approving the levy of taxes or the establishment of a bureaucracy. Conversely, Congress' freedom to act in ways not approved by the electorate is increased because some of the "costs" of its political decisions are eliminated. Those who would be burdened, at least indirectly, by the costs of enforcing national policies are in effect excluded from the political process. In short, to the extent that the burdens of congressional policies—the application of regulations to private activity and the requirement of financial and administrative resources to implement these policies—are not imposed on the national electorate, the political checks of the national political process are frustrated.

As these political checks are reduced or eliminated, the basis for a conclusion that congressional policies are the product of majority rule is undermined because the electorate might well prefer a different decision if it had to bear the full burdens of its representatives' decisions. The difference between the operation of political checks and their absence is the difference between Congress acting responsibly by imposing the burdens of its policy decisions on the national electorate and Congress acting irresponsibly by evading some or all of the costs of its

political decisions. When the political checks are present, congressional political decisions are consistent with the fundamental principle that those with the power to make a decision should bear to the fullest extent possible the costs and benefits and the credit and blame for their decisions.[846]

Having identified the political checks in the national political process and their function of providing for political accountability and majority rule, two crucial inquiries remain: a demonstration of the capacity of the political checks to protect state interests in political decisionmaking and a determination of the extent to which these checks operate when Congress exercises its powers to regulate private activity, to regulate the states, and to employ the states as the nation's agents. Before turning to a detailed analysis of the operation of these political checks, it should be noted that since the political checks inherent in the national political process are more effective as a limit in the aggregate on the exercise of Congress' powers than as limits on discrete exercises of national authority, the theory advanced here admits, in Professor Tribe's apt phrase, a "tyranny of small decisions"[847] that diminish state autonomy. Nonetheless, consistent with the framers' intention that the electorate would determine the actual allocation of political power between the states and the nation, the theory leaves to the national political process, not to the subjective judgments of the courts, the responsibility of determining which particular exercises of national authority, among many that have similar effects on state autonomy, should be rejected.

It is also perhaps helpful as a preliminary matter to consider the Fair Labor Standards Act (FLSA), which was used to demonstrate the effects of national legislation on state autonomy,[848] as an illustration of how the political checks of the national political process both limit and justify Congress' powers over the states. The application of the minimum wage and maximum hour requirements of the FLSA to private employers has one significant impact on the states' interest in political decisionmaking—it displaces the states' power to determine the substantive policies governing the employer-employee relationship. The political checks on this exercise of national authority over private activ-

846. *See* Brown v. EPA, 521 F.2d 827, 840-42 (9th Cir. 1975), *vacated,* 431 U.S. 99 (1977) (decisions to spend and to tax should not be separated).

847. L. TRIBE, *supra* note 717, § 5-20, at 302.

848. *See supra* text accompanying notes 66, 70-71 & 75.

ity are the application of the wage and hour requirements to employers and the requirement of financial and administrative resources to enforce the FLSA which are imposed on the national electorate. Since both of these political checks are present, Congress is politically accountable and the FLSA is consistent with the principle of majority rule. Although these same political checks could make any state-determined policy that is displaced by the FLSA a majority rule, the decision of the national political majority should prevail over the decision of a subnational majority for the reasons advanced above.[849]

If the wage and hour provisions of the FLSA are applied to state and local governments in their capacities as employers, there is an additional effect on the states: the costs of providing public goods and services are increased. Nonetheless, the same political checks operate and Congress is politically accountable because the regulations also apply to private employers, and state interests are vicariously protected by the impact of the FLSA on private employers. Since national intrusion on the states is limited by the application of the FLSA standards to both private and public employers, judicial protection for the states in *NLC* was not warranted. If the FLSA applied solely to state and local government, then the political check inherent in the application of a national regulation to private activity would not be present.

Similarly, if a national regulation provided for state administration and enforcement of national wage and hour standards for private employers, the mere application of these standards to private activity would not constitute an adequate political check with respect to the burdens of implementation assumed by the states. Although private interests subject to the FLSA would act to protect their own interests, they would not provide vicarious protection for the states' interests in determining the use of their own governmental resources. In fact, private employers might well prefer arguably more sympathetic state administration to national administration. When a national regulation applies solely to the states or requires the states to act as the nation's agents in enforcing national regulations, another political check is required to support the conclusions that Congress has acted in a politically accountable fashion and that the determination of a national majority should prevail over state interests. This political check—as will be developed below—is that Congress has imposed on the national

849. *See supra* text accompanying notes 843-45.

electorate the full financial and administrative costs of its policy decision.

1. Political Accountability and Congress' Power to Regulate Private Activity

The explanation of Congress' power to regulate private activity and to diminish state autonomy by displacing state power to prescribe substantive rules is very simple. There are two political checks on the exercise of national authority to regulate private activity that guarantee Congress' political accountability and that protect the states' interests in determining the rules governing private activity. The first political check is the application of the regulation to private activity—those who are directly affected will assign the blame or credit to Congress.[850] For Professor Wechsler, the basic political safeguard of federalism is that all interests affected by national regulations are represented in Congress.[851] Nevertheless, the application of national regulations to private activity, while certainly a check, is not always an adequate check to make Congress accountable for the effects on the amorphous interest of the state as a political community in retaining authority to control private activity.

There are many situations in which the private interests affected by national regulations may hold their representatives in Congress accountable for the particular substantive policy adopted, but these private interests will not protect the states' general interest in retaining authority to prescribe the rules for private activity. Consider national statutes proscribing crimes like loansharking[852] and firearms possession,[853] which are generally recognized as examples of a very broad

850. One possible objection to the effectiveness of this political check in the national political process is that if a national regulation affects directly an entity like an electric utility, it will pass the costs of complying with a pollution control standard (for example) on to its consumers. The general voters who are affected by the increased costs of electricity may not have sufficient knowledge to assign the blame or credit to Congress. The mediation of the electric utility in this example may lead to some voter confusion, but the same voter confusion would exist if a state imposed pollution control requirements. The objection then goes to the general adequacy of political checks in both the national and the state political processes to provide for political accountability. Given the concession that political accountability in representative government is by no means perfect, *see supra* text accompanying notes 838-42, the objection does not effect the thesis here that preference should be given to the political decisions of a national majority over state majorities.

851. *See supra* text accompanying note 806.

852. *See* Perez v. United States, 402 U.S. 146 (1971).

853. *See, e.g.,* Scarborough v. United States, 431 U.S. 563 (1977).

exercise of the commerce power to regulate local activity with a tenuous connection to interstate commerce.[854] In the case of these two criminal statutes, the private interests affected (potential criminals) are unlikely to have any effective voice in the national political process, and the general public (as well as state and local government officials) is unlikely to perceive an assault on state autonomy that is wrapped in the promise of controlling crime. Moreover, private interests operating on a national scale often seek national regulation as an alternative to state regulation in order to avoid the problems of complying with different, perhaps conflicting, regulations in fifty states and thousands of local jurisdictions.[855]

A second political check is the requirement for financial and administrative resources to enforce national regulations and the imposition of the burdens of providing these resources on the national electorate by Congress. This second political check remedies the deficiencies inherent in the limit of applying a national regulation to a private activity, makes Congress politically accountable, and affords some measure of protection to the states' interest in determining the rules for private activity.

To continue the example of national criminal statutes, enforcement requires a prosecutor, courts, and prisons. The costs of enforcement are imposed on the national electorate in the form of taxes and allocation of these resources to one social goal among many competing goals.[856] Since each national regulation of private activity adds to the total financial and administrative burden imposed on the national electorate, there is some limit on the extent of national regulation of private activity in general even if there is no definite limit on the nationalization of intrastate crime. It is not surprising then that national regula-

854. *See* Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime,* 15 ARIZ. L. REV. 271 (1973).

855. The cable television industry, for example, has long sought national regulation by the Federal Communications Commission as an alternative to state and local controls. *See* La Pierre, *Cable Television and the Promise of Programming Diversity,* 42 FORDHAM L. REV. 25, 73 & n.282 (1973); Holsendolph, *Cable Bill Would Cut Cities Role,* N.Y. Times, July 26, 1982, at 17, col. 1 (national ed.) (bill reported by the Senate Commerce Committee and supported by the cable television industry would limit municipal power to regulate cable television franchises).

856. Consider for example the proposals to eliminate the diversity jurisdiction of federal courts as an effort, at least in part, to reduce the workload of the national judiciary and to permit judicial resources to be reallocated to other matters. *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 140-42 (1973); Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms,* 92 HARV. L. REV. 963, 966 (1979).

tion of private activity is extensive when it is understood that the two political checks work most effectively as a limit on national authority in the aggregate. Notwithstanding the extensive displacement of state control of private activity by national regulations, the operation of the two political checks inherent in the national political process ensures that Congress is politically accountable and that national statutes controlling private activity are the product of a national majority. It is appropriate, then, for the courts to defer to the political decision of a national majority.

When Congress regulates private activity,[857] both political checks are usually present and the only effect on the states is to displace their power to control private actions. There are, however, three special types of national regulation of private activity that require separate analysis under the theory of political accountability.

The first type is a national rule for private activity that is established by prohibiting certain state regulations of private activity.[858] National legislation typically is addressed directly to the private activity regulated. It establishes a rule to be enforced by the national government, and it either displaces existing state regulations or fills a void in state regulatory schemes.[859] Both the first political check inherent in prescribing a rule for private activity and the second political check inherent in the resources required to enforce national rules are present. In a few situations, national legislation establishes a rule for private activity by addressing a command to the state and prohibiting certain state regulations of private activity. The national rule is simply that private activity shall not be subject to state regulation. Under the theory of political accountability, a statute prohibiting state regulation of private activity is a special example of national authority over private activity because no national controls are imposed to fill the void created by the prohibition of state regulation. In the absence of any national regulation imposed as a substitute for state regulation, the second political check is weak; there are no financial or administrative enforcement costs to be borne by the national electorate when there is no national regulation to be enforced.

857. *See supra* text accompanying notes 460-63 and cases cited in note 464.

858. *See supra* text accompanying notes 482-88.

859. For an argument that Congress' power to regulate private activity is greater when the national regulation fills a void in a state regulatory scheme than when it preempts an existing state regulation, see Hughes Air Corp. v. Public Utilities Comm'n, 644 F.2d 1334, 1339 (9th Cir. 1981).

Consider for example a national statute that prohibits the state from enforcing a "no right turn on red" policy.[860] This statute substitutes a national policy (energy conservation) for a state policy (safety), and the first political check applies because the contending private interests favoring these two competing policies can assign the credit or blame to Congress. Although the second political check is weak because no financial or administrative costs are imposed on the national electorate in establishing this national rule for private activity, there is some force remaining in this check because there is a potential burden on the national electorate—enforcement of a rule that motorists must turn right at a red light would require a national police force.[861]

The concept here of a potential cost to the national electorate by ousting a state regulation of private activity without imposing a national regulation as a substitute may be clearer if we consider as a second example a national regulation that prohibits the states from registering motor vehicles that fail national pollutant emission standards.[862] A national policy requiring motor vehicle emission controls displaces a state policy that such controls are not required, but the national rule for the private activity of motor vehicle operation does not impose any financial or administrative burdens on the national electorate. There are no enforcement costs in a national regulation that merely prohibits the states from granting a motor vehicle registration to certain vehicles and that ousts a state rule permiting registration without reference to pollutant emissions. Nonetheless, there are two potential burdens on the national electorate that make effective the political check of imposing on the national electorate the financial and administrative costs of national policies. First, if the rule that vehicles failing to comply with national environmental standards cannot be operated is to be enforced, a national police force would be required to apprehend individuals who operate vehicles without a valid registration. Second, individuals who cannot obtain a state registration without complying with the national environmental standards would probably demand the

860. There is no national regulation requiring drivers to turn right at a red light, but a condition of a national grant requires the states to permit such turns. 42 U.S.C. § 6322(c)(5) (1976).

861. State and local police could, of course, choose to enforce a national regulation requiring drivers to turn right on a red light, but a requirement that these officers enforce the national law would raise an additional and distinct issue of Congress' power to employ the states as the nation's agents in enforcing national regulations.

862. Such a regulation has been upheld by the Sixth Circuit. *See supra* text accompanying notes 486-88.

establishment of a testing and inspection program that would permit them to obtain motor vehicle registrations. The costs of such a program would be imposed on the national electorate. There is then a potential check because the national regulation that displaces the state rule creates political pressure for substitute national regulations that entail the imposition of financial and administrative burdens on the national electorate.[863]

A second special example of national authority to regulate private activity is regulations that not only displace state control of individual conduct but also affect other political decisionmaking powers of the states. Two examples of such national regulations are regulations of private activity that limit the states' power to tax the regulated private activity, thus impairing the states' revenue raising functions,[864] and the application of national criminal statutes to state legislators, which may interfere with the states' control over their legislative processes.[865] These exercises of national authority are valid notwithstanding the additional effects on the states. Congress is politically accountable because both political checks are in effect. Those who are affected by these national regulations can remonstrate with Congress, and the financial and administrative resources to enforce these national regulations are extracted by Congress from the national electorate. Since Congress' determination of the policy for the regulated private activity is the product of majority rule, the courts should not interpose their judgments to protect contrary political decisions of subnational majorities.

The use of conditions attached to national grants is a third and final special example of Congress' power to regulate private activity.[866] Here the political check on Congress' power to displace state regulation of private activity is quite obvious. Congress must appropriate funds to achieve its regulatory goals, and the imposition of national taxes on the electorate permits control in the aggregate over such uses of the spend-

863. There would be no financial or administrative burdens on the national electorate if the states enforced a ban on the operation of motor vehicles failing to comply with national pollution standards and conducted tests to determine compliance. A national requirement imposing those obligations on states would, however, raise a separate and distinct question of Congress' power to compel the states to exercise affirmative authority over private activity.

864. *See supra* text accompanying notes 148-49 & note 476.

865. *See supra* text accompanying notes 478-81.

866. The conditions of national grants to private recipients often establish rules governing the recipient's activity. *See supra* text accompanying notes 180-84.

ing power.[867]

The Supreme Court and the lower courts have all uniformly held that national authority to regulate private activity, at least under the commerce power, is not constrained by *NLC* or the tenth amendment.[868] This holding is correct because there are political checks on Congress' power to regulate private activity and Congress is politically accountable for its decisions to regulate private activity. Since national statutes regulating private activity are the product of a national majority, there is no basis for judicial intervention to protect the political choice of subnational majorities.[869] Although the scope of national authority over private activity has expanded tremendously since 1937, the growth of national authority is the choice of the national electorate. Since the national political process is at least as potentially accountable as state political processes, deference to the national majority is warranted.

The political checks that justify the expansive exercise of national authority over private activity also impose some limits on Congress' power to displace state regulation. Admittedly, the political checks impose a limit on national regulations primarily in the aggregate, but the determination that a particular national regulation goes too far, or that the total amount of national control over private activity goes too far, is left to correction by the political process, much as the framers intended. The operation of the political checks of the national political process,

867. Collier, *Judicial Bootstraps and the General Welfare Clause,* 4 GEO. WASH. L. REV. 211, 230-31, 236 (1936) (conditions of grants regulating private activity are "checked in large part by the consideration of expense" and "regulation by the method of purchase . . . constitutes a financial burden on taxpayers which presents an automatic political correction"); Corwin, *The Spending Power of Congress—Apropos the Maternity Act,* 36 HARV. L. REV. 548, 577 (1923) (Congress' power to stipulate conditions on grants is nearly unlimited save the political check); Ribble, *National and State Cooperation Under the Commerce Clause,* 37 COLUM. L. REV. 43, 45 (1937) ("The warrant to spend has obvious practical limitations even though it should escape constitutional objections. A compelling one lies in the fact that the public purse is not bottomless and the task of refilling it is likely to be disagreeable to those who must seek the voters' good will."). *Cf.* Buckley v. Valeo, 424 U.S. 1, 90 (1976) (determination whether an expenditure is for the "general welfare" is a political decision for Congress). Some evidence that the national purse is not without limits is provided by the massive spending and tax cuts made by Congress at the end of the first year of the Reagan Administration. The Omnibus Budget Reconciliation Act of 1981 reduced expenditures for various national programs by $35 billion. Pub. L. No. 97-35, 95 Stat. 357. *See Budget Conferees Near Approval of Big Spending Cuts, Giving Reagan a Major Victory in Economic Program,* Wall St. J., July 29, 1981, p. 3, col. 1 (facsimile ed.). Substantial tax reductions were provided by the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172.

868. *See supra* text accompanying notes 458-59 & note 464.

869. Cowen, *What is Left of the Tenth Amendment?,* 39 N.C.L. REV. 154, 183 (1961).

even as a limit solely in the aggregate, is an adequate response to fears that expansion of national authority over private activity will destroy state autonomy by emasculating the states' authority to make political choices about the rules for private activity. The fear, for example, that Congress might amend the Sherman Act and preempt all state regulations that require private parties to engage in anticompetitive conduct is probably unrealistic.[870] Such a wholesale displacement of state regulation of private activity would in all likelihood be prevented by the groups that benefit from the state rules. Moreover, even if Congress were to amend the Sherman Act, the political checks of the national political process would ensure that its decision would be the product of majority rule. Judicial intervention, albeit in the name of preservation of state autonomy, would be nothing more than a judgment that Congress' economic policy was misguided.[871]

Although the Court has held flatly that neither *NLC* nor the tenth amendment limits Congress' power under the commerce clause to regulate private activity, there is some risk, in the absence of any judicial theory to support this holding, that the Court will impose federalism restraints on national authority over private activity in an indirect fashion by construing Congress' powers narrowly. *Hodel* directly raises this specter.[872] A narrow reading of Congress' powers to protect state autonomy is not only disingenuous, it is completely without warrant. The political checks of the national political process provide an adequate justification of national authority to regulate private activity. As Chief Justice Marshall counseled at the beginning in *Gibbons v. Ogden*, restraints on Congress' powers to regulate private activity are political.[873]

2. *Political Accountability and Congress' Power to Regulate the States*

In contrast to national regulation of private activity that displaces the states' substantive policies, national regulation of state government and activity affects a different state interest—the delivery of a particular package of public goods and services that the state as a political community has chosen to provide and to finance through taxes. In almost

870. *See supra* text accompanying note 465-73.
871. *See supra* note 470.
872. *See supra* notes 474-75 and accompanying text.
873. *See supra* text accompanying notes 816-17 & note 817.

all cases, these regulations also apply to similar private activity. The political checks on national authority to regulate private activity make Congress politically accountable for the effects on the states and limit the extent of national intrusion on the states' function of providing public goods and services to their residents. There are, however, some national regulations that apply solely to state government and activity. The principal examples are a few statutes enacted under Congress' power to enforce the Civil War Amendments and conditions of national grants that control either the structure, organization, and processes of state government or the allocation of political authority within a state. In all cases that the courts have considered so far, Congress is politically accountable for regulations that apply solely to the states even though the political check inherent in the application of a similar regulation to analogous private activity is absent. Nonetheless, some statutes that apply solely to the states may exceed the bounds of political accountability and may require judicial intervention to protect the states' role as political communities in the federal system.

Reliance on the political checks of the national political process to justify and to limit Congress' power to regulate state government and activity avoids the pitfalls of tests of state autonomy derived from *NLC*. There is no need to determine whether a state activity is integral or traditional and no corresponding risk that protection of state interests will turn on history[874] or on amorphous distinctions between gov-

874. Any historical approach to the definition of state functions is difficult because many activities that were once the exclusive province of the private sector have now been assumed by state and local government. For example, education and the construction and operation of highways, now two major governmental functions, were once provided primarily by the private sector. *See* Brown v. Board of Educ., 347 U.S. 483, 489-90 n.4 (1954) (public education began to develop in the North after 1830 and in the South after 1850); Brief for Petitioners—Intervenors, Washington Area Bicyclist Association at 21-22, District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated and remanded sub. nom* EPA v. Brown, 431 U.S. 99 (1977) (most roads privately owned and operated in early history of the United States). Indeed, any a priori judgments about the importance of particular state functions and activities are inconsistent with the dynamic nature of state political processes. *See* New York v. United States, 326 U.S. 572, 596 (1946) (Douglas, J., dissenting) (expansion of state activity to matters previously conducted by private sector for a profit). The history of state-operated lotteries provides an example of changing concepts about appropriate governmental activity. State lotteries were a prominent feature in our early history and survived up through the 1890's. In 1965 New Hampshire revived the state-operated lottery, and as of January 1980, fourteen states operate lotteries. *See* THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1980-81, at 35 (1980); Blakey & Kurland, *The Development of the Federal Law of Gambling,* 63 CORNELL L. REV. 923, 927-43 (1978); Note, *The Lot is Cast into the Lap: Federal Communications Mistreatment of State Lottery Broadcasts,* 6 LOY. U. CHI. L.J. 407, 409-10 (1975). Although this state activity may now seem novel, it is an important source of

ernmental and proprietary functions.[875] There is also no need to assess the significance to a state of any particular function or activity or to determine the extent of national authority by balancing the importance of state and national political decisions. Thus, there is no risk that ad hoc judicial assessments of the comparative merit of state and national policies will determine the scope of state autonomy.[876]

Under the theory of political accountability, all state functions and activities are deemed important on the basis of the best possible evidence—the actual choice of a state political community to undertake certain activities and to organize and conduct government in a particular fashion. There is no need to label as "integral", "traditional", or "governmental" or to assess the importance of state political decisions about such diverse matters as the conditions of public employment, the organization of administrative agencies, the allocation of political authority among the states, their political subdivisions, and private groups, the provision of health, fire, police, recreational, medical, and educational services, or the operation of mass transit systems, airports, and sewage treatment plants. The appropriate inquiry in any case in which a national regulation affects state government or activity is simply whether the political accountability of Congress provides a basis for deference to the political decisions of a national majority.

a. Regulations that Apply Both to Private Activity and the States

Deference to national political decisions to regulate state government and activity is most clearly appropriate in the typical situation where the rule applied to the states also applies to private activity. When a regulation applies both to state and private activity, the political checks on Congress' power to regulate private activity provide vicarious pro-

state revenues and should be regarded as a significant state political choice. By simply taking the states' political decisions to operate lotteries as evidence of the importance of this activity to the states, the problems of defining state interests that are sufficiently important to require a justification for national intrusion are eliminated.

875. *See supra* notes 723-24 and accompanying text.

876. For an example of a decision about state autonomy that turns on a judicial assessment of the comparative merits of state and national policies, see *supra* note 504. The problems of judicial determinations about the importance of particular state political choices and the effects of national regulations are suggested by disagreements among the states and state officials about these issues. In *NLC*, for example, the states did not all agree that the application of the FLSA to state and local governments in their capacities as employers was ill-advised or unconstitutional. *See supra* notes 88 & 207.

tection for state interests and make Congress politically accountable. Consider, for example, a hypothetical amendment to the FLSA establishing a minimum wage of fifty dollars per hour. If such a requirement was established for state and local governments as employers, they would argue that it imposed a destructive burden on their function of providing public services and that judicial intervention was required to protect state autonomy. Nevertheless, there would be no need for judicial action in these circumstances; the political process is entirely adequate to deal with this threat to state interests.[877] No statute establishing a fifty dollars per hour minimum wage would be enacted because the FLSA also applies to private employers, and the affected private interests would prevent the establishment of a minimum wage that would destroy both private enterprise and state government.

The interests of state government are not protected because congressmen are concerned about the abstract state interest in retaining political authority to control the conditions of public employment or about the more concrete matters of increased costs of employment and of providing governmental services. Instead, these state interests are protected because they are included in the representation of private interests. There is simply no practical danger that the minimum wage will ever be set at a level high enough to impair significantly the conduct of state and local government as long as the same requirements apply to private activity.[878] Since national authority is limited and Congress is politically accountable by virtue of the application of the minimum wage to private employers, the application of the minimum wage to state and local government employers is the decision of a national majority. There is then no need or justification for judicial intervention to protect state autonomy. On this analysis, *NLC* is an unwarranted interference

877. In the course of the first argument in *NLC*, Solicitor General Bork conceded that a $50 per hour minimum wage would make the operation of state government impossible and that the Court should hold it "unconstitutional as a destruction of Federalism." On reargument of the case, however, he contended that the political process would check the imposition of most destructive minimum wage requirements because they would apply both to public and private employers. 86 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 860-61, 903-04 (P. Kurland & G. Caspar eds. 1977).

878. Ely, *Toward a Representation-Reinforcing Mode of Judicial Review,* 37 MD. L. REV. 451, 468 n.67 (1978). *See* L. TRIBE, *supra* note 717, § 5-7, at 240 n.2; Stewart, *supra* note 577, at 1237 ("federal controls on state-owned industrial facilities that are identical to those imposed on similar privately owned facilities will not create the sort of incursions on state autonomy that trigger federalism limitations on national power and the corresponding need for special justifications for federal authority").

with the national political process, and it should be overruled.[879]

The initial inquiry, then, in each case of a national regulation that applies to the states is whether the same rule applies to analogous private activity.[880] If a regulation that formally applies to both the states and private activity does in fact apply to a substantial body of private activity and does not in fact apply primarily or exclusively to the states, then the political checks on national authority to regulate private activity are sufficient to ensure that Congress is politically accountable. The determination whether a national regulation applies to both a substantial body of private activity and the states may require a careful, empirical assessment of its actual impact.[881] Even if no fixed criteria for this

879. In addition to the minimum wage standards, the 1974 Amendments to the FLSA also imposed maximum hour or overtime requirements on state and local governments as employers. *See supra* text accompanying notes 85-86. The overtime requirements are valid for the same reason that the minimum wage requirements are valid: they apply equally to public and private employers. It is worth noting that to the extent the requirements imposed on public and private employers are different, Congress acted to make the application of the FLSA less onerous for public, than for private, employers. *See supra* note 86.

880. At first blush the inquiry whether a national regulation applies both to state and private activity may seem to be a reincarnation of the problematical categorization of state activity as governmental or proprietary. *See supra* note 724. The distinction between the inquiry here and the governmental-proprietary test is the difference between an empirical determination of the actual incidence of a national regulation and the question whether a particular state activity should be labelled governmental or proprietary on the basis of the absence or presence of a counterpart in the private sector. This distinction may be illustrated by the court's decision in Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979). *See supra* note 115. Following, albeit without specifically invoking, a distinction between governmental and proprietary activity bottomed in part on the fact that all but two of 475 airports are publicly owned, the court held that the application of the FLSA minimum wage to employees of a municipal airport is unconstitutional under *NLC*. 598 F.2d at 1037, 1038 n.7. In contrast, the inquiry proposed here is whether the FLSA minimum wage in fact applies to employees in the private sector who perform work analogous to that performed by municipal airport employees. This inquiry would be satisfied if, for example, clerks at the airport and clerks in the private trucking industry are both subject to the FLSA. The *Amersbach* court did not consider this issue. *See id.* at 1034 n.1. In short, the inquiry proposed here is a determination whether the FLSA applies to state and private activity (the payment of wages to employees) and not a determination whether the state employees are engaged in a governmental or private activity in operating an airport.

881. For example, the Court in South Carolina v. United States, 199 U.S. 437 (1905), upheld the application of a national tax on liquor to a state-owned liquor sales monopoly. Although the tax as applied in South Carolina applied only to a state activity, on a national level it applied to both state and private activity. For modern examples of judicial scrutiny to determine if the incidence of a state tax ensures a political check, see *supra* note 826.

Any determination in a particular case that a national regulation applies exclusively or primarily to the states or, alternatively, that it applies to a substantial body of private activity as well as to the states turns first on the extent to which an activity is performed by both the states and the private sector and second on the breadth of the analogy that is drawn between public and private

determination can be stated and it is difficult to draw a line between regulations that fall on both state and private activity and that fall primarily or exclusively on the states, most national regulations fall rather clearly on one side of the line or the other. The FLSA, for example, applies to a very large group of private employers as well as to public employers.[882]

Similarly, in most of the post-*NLC* challenges to national regulations that apply formally to both private activity and the states, the regulations apply in fact to a substantial body of private activity and Congress is politically accountable.[883] The courts have sustained all regulations that apply to both state and private activity, but they have approved the regulation of state activity on a wide variety of unpersuasive rationales including: the nature of the particular power invoked by Congress; a determination whether the affected state activity is protected because it is either traditional or integral; and the balancing of amorphous national and state interests.[884] The theory of political accountability substitutes a comprehensive explanation and justification of national authority. Since there are political checks on Congress'

activity. For example, if only two of 475 airports are privately owned, requirements that airports install expensive safety equipment fall primarily on the states and their political subdivisions. The question becomes more clouded if the number of privately owned airports is increased from 2 to 10, 50, or 100. One might also conclude that regulations requiring safety equipment at airports do not apply primarily to publicly owned airports if similar requirements are imposed on marine and bus terminals that are predominately operated by the private sector and that are deemed analogous to airports.

882. The FLSA applies to a very large percentage of private enterprises whose employees are engaged in commerce or in the production of goods for commerce. *See supra* note 66 and accompanying text. As of September 1980, over 60 million nonsupervisory employees in the private sector were covered by the minimum wage provisions of the FLSA. U.S. DEPT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, MINIMUM WAGE AND MAXIMUM HOUR STANDARDS UNDER F.L.S.A. 40 (1981).

883. National regulations that apply both to the states and a substantial body of private activity include: (1) the requirement of the Veterans' Reemployment Rights Act enacted under the war power that employers must reinstate former employees called to active military service, *see supra* text accompanying notes 150-59; (2) conditions of national grants requiring employers to provide unemployment compensation coverage, *see supra* text accompanying notes 186-216; (3) the prohibitions of employment discrimination under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Equal Pay Act that were enacted under the commerce power and the power to enforce the Civil War Amendments, *see supra* text accompanying notes 356-82; (4) the regulation of natural gas royalty holders, telephone companies, employers' pension plans, and securities fraud under the commerce power, *see supra* text accompanying notes 493-95 & note 497; and (5) the assessment of an annual registration tax on civil aircraft, *see supra* text accompanying notes 531-41.

884. *See* sources cited *supra* note 883.

power to regulate private activity that make Congress politically accountable and limit in the aggregate national incursions on the states, the courts should defer to the political choices of a national majority.

b. Regulations that Apply Primarily or Exclusively to the States

The chief practical significance of the theory of political accountability is that it explains national authority to regulate the states in the typical situation where the regulation also applies to a substantial body of private activity. There are, however, some national regulations that apply exclusively to the states and other regulations that apply primarily to the states although as a formal matter they reach both state and private activity. If a national regulation applies exclusively or primarily to the states, then the political checks on national authority to regulate private activity obviously cannot make Congress politically accountable or provide vicarious protection for the states. In these circumstances either another political check is required to ensure accountability or there must be an alternative justification of national authority.

The principal example of national regulations that apply exclusively to the states are conditions of national grants. These conditions may regulate the organization and structure of state and local governments[885] and the allocation of political authority either among the states, their political subdivisions, and private groups or between the Governor and the legislature.[886] Although these conditions require the states to make substantial changes in the structure of their government and in their public decisionmaking processes, there is a political check on Congress' authority under the spending power—the revenues required for national grants must be raised by taxes levied on the national electorate.[887] Thus, even if a condition of a national grant applies exclusively to the states, Congress is politically accountable because the national electorate can hold its representatives answerable for the general level of national taxes and expenditures.[888] By approving

885. *See supra* note 255 and accompanying text.

886. *See supra* text accompanying notes 257-305.

887. *See supra* note 867 and accompanying text.

888. This justification of national authority under the spending power is the converse of the justification advanced by Professor Tribe. He argues that as long as Congress pays the full costs of regulations imposed on state government, there is no interference with the states' special role in providing public services. *See supra* note 745 and accompanying text. The argument here is that

or resisting taxes, the national electorate can limit the extent to which conditions of national grants are used to control the organization of state government and its decisionmaking process and to establish spending priorities under matching grants.[889] In sum, the political check in the imposition of the costs of national grants on the electorate in the form of taxes both limits the extent to which conditions of national grants can be used to control the states and justifies, as a decision of a national majority, Congress' power to regulate the states through conditional expenditures.

Since the impact of taxes on the national electorate permits control only in the aggregate of the use of conditional grants to regulate the states and the deep national pocketbook provides extensive funds for conditional grants, it is undoubtedly true that recognition of Congress' power to attach conditions that apply exclusively to the states may result in a substantial diminution of state autonomy. Nonetheless, confidence in the national political process is not misplaced; on two occasions in the last ten years Congress restricted or reduced the conditions attached to national grants. First, during the Nixon Administration Congress established the Revenue Sharing Program,[890] which provides grants to the states on substantially fewer conditions than are normally imposed in categorical grants.[891] Second, near the end of the first year of the Reagan Administration, Congress converted some categorical grants to block grants and thereby reduced the conditions applied to the states.[892] Moreover, since it is not possible to state criteria

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to the extent the costs of national regulations are imposed by Congress on the national electorate, Congress is politically accountable, and the decision to spend under certain conditions is the product of a national majority.

889. Since national revenues increase automatically as the economy grows, national spending can increase without any increase in the level of taxation. *See* M. REAGAN, *supra* note 320, at 39. Nevertheless, those who are dissatisfied with conditional expenditures can still seek a tax reduction.

890. State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (current version at 31 U.S.C. §§ 1221-1265 (1976 & Supp. IV 1980)). *See generally* Brown, *supra* note 318; Stolz, *Revenue Sharing—New American Revolution or Trojan Horse?,* 58 MINN. L. REV. 1 (1973).

891. For an explanation of categorical grants, block grants, and revenue sharing, *see supra* note 319.

892. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357; *see generally* Herbers, *Some States Lagging on Plans to Assume Block Grant Powers,* N.Y. Times, September 29, 1981, at 1, col. 1 (national ed.); Herbers, *Shift to Block Grant Raising Issue of States' Competence,* N.Y. Times, September 27, 1981, at 1, col. 3 (national ed.). One example of the conversion of categorical grants to block grants and of the reduction of the conditions attached to national expenditures is the Alcohol and Drug Abuse and Mental Health Services Block Grant.

for permissible and impermissible conditions that apply exclusively to the states,[893] it is entirely appropriate to leave to a national majority the inevitably ad hoc determination about the extent and nature of conditions that apply exclusively to the states.

This justification of Congress' power to attach to national grants conditions that apply exclusively to the states does not support, however, national authority to invalidate or preempt state law provisions that prohibit compliance with these conditions. Conditions that apply exclusively to the states have one effect on state autonomy. To obtain a grant, the state may be required to change either the structure and organization of government or the allocation of political authority among the state and its political subdivisions and private groups and between the Governor and the legislature. Preemption of state law provisions that conflict with such conditions has a second, separate effect on the states—interference with the procedures established under state law for making the political decision whether to accept or reject a conditional grant.

Pub. L. No. 97-35, tit. IX, subtit. A, Part B, §§ 1911-1920, 95 Stat. 543-52. This new block grant does not eliminate all conditions on the use of national funds. The grant must be used by the state for alcohol and drug abuse programs, application plans on which public hearings have been held must be submitted, certain facilities and treatments must be provided, annual reports are required, and discrimination among recipients of the nationally funded services is prohibited. *Id.* §§ 1914(a), 1915(a), (b), (c), 1916(a), 1918. The conditions imposed on the states under the previous categorical grant were much more extensive however. To obtain a grant, the states were required to submit a plan for alcohol and drug abuse prevention meeting 13 separate conditions, including the designation of a particular agency to prepare and administer the plan, a demonstration of this agency's authority to implement the plan, establishment of an advisory council composed of representatives of private groups and political subdivisions, and provision for consideration of recommendations by the states' political subdivisions. 21 U.S.C. § 1176(e)(1)-(13) (1976), *repealed,* Pub. L. No. 97-35, tit. IX, subtit. H, § 969(a), 95 Stat. 595.

893. Some commentators have suggested as a criterion a judicially enforceable requirement that conditions of a grant must be reasonably related to the purpose of the expenditure. *E.g.,* Stewart, *supra* note 577, at 1252; Comment, *The Federal Conditional Spending Power: A Search for Limits,* 70 NW. U. L. REV. 293, 303-09 (1975). With regard to conditions that apply exclusively to the states, the criterion has two major flaws. First, it would not in itself provide any protection for the states' interests in controlling the structure and organization of government or the allocation of political authority within the state. For example, requirements governing the structure and processes of state agencies may be reasonably related to the efficient expenditure of a grant, and a condition requiring a role for private groups in state political decisions may be reasonably related to a purpose of ensuring that the grant is spent to satisfy the needs of those whom Congress intended to benefit. *See supra* notes 255 & 264-81 and accompanying text. The second flaw in a requirement that conditions must be reasonably related to the purpose of an expenditure is the danger of standardless, ad hoc judicial intervention in the political process. For an example of the inherent flexibility of a requirement that conditions must be reasonably related to the purposes of a grant, see Oklahoma v. Schweiker, 655 F.2d 401, 406-11 (D.C. Cir. 1981).

To recall a previous example,[894] a condition providing that the Governor must exercise exclusive control over the disbursement of a grant and the designation of the state agency to implement the spending program may have one distinct impact on the state. If the state constitution or a state statute requires that such determinations be made by joint action of the executive and the legislature, then in order to obtain the grant, the political community of the state by a constitutional amendment or the legislature and the executive by statutory amendment must expand the Governor's authority to act independently of the legislature. If the condition also preempts the state constitutional or statutory provisions requiring joint legislative and executive action and provides independent gubernatorial authority to make the disbursement and designation decisions, then there is a second effect on the states. Congress has interfered with the state's political decisionmaking process by circumventing the state's procedures for a constitutional or statutory amendment necessary to expand the governor's authority.

Although there is a political check on Congress' power to make conditional expenditures, there is no political check on the invalidation of state law provisions in conflict with grant conditions that apply exclusively to the states. There is a political check on Congress' power to attach these conditions to grants because the expenditure is financed by taxes levied on the national electorate. Even if the necessity of obtaining grants leaves the states with no practical choice except to change state law to comply with grant conditions,[895] the political check means that Congress is politically accountable and that there is some limit, at least in the aggregate, on conditions that apply exclusively to the states. This political check, however, only goes as far as the use of funds levied by national taxes to create pressure on the states to change state law to comply with the conditions of a grant. If a provision of state law is invalidated simply because it conflicts with a grant condition, the invalidation is completely independent of the pressure to obtain the grant and the limitation on Congress' ability to raise the revenues to create this pressure. In short, the political check on the use of national tax revenues does not apply to preemption of state law provisions in conflict with the condition of a grant to a state.

In the example above, there is no political check on invalidation of a

894. *See supra* text accompanying note 332.
895. *See supra* text accompanying notes 390-96.

state constitutional or statutory provision requiring disbursement and designation decisions to be made by joint legislative and executive action. Congress then is not politically accountable for interference with state political decisionmaking procedures that require a constitutional or statutory amendment to expand gubernatorial powers. When Congress is not politically accountable, there is no basis for judicial deference to exercises of national authority that intrude on state autonomy. Thus, the rule followed by most courts that conditions of grants to the states do not preempt conflicting provisions of state law is correct, and the only sanction for a state's failure to change its law to permit compliance with a grant condition that applies solely to the state is to withhold or to cut off the grant.[896]

Apart from national grant conditions that apply exclusively to the states, the only other regulations applicable to the states for which there are no counterparts applicable to private activity are statutes, like the Voting Rights Act (VRA), enacted under Congress' powers to enforce the Civil War Amendments.[897] The justification for national authority to regulate state and local voting practices with respect to racial discrimination cannot be supplied by the theory of political accountability because the financial and administrative burden imposed on the national electorate to enforce the requirements of the VRA are miniscule in comparison with the impact on the states' interests in controlling

896. *See supra* note 326 and accompanying text. If a condition of a grant applies to a private recipient instead of to a state, it is appropriate to give preemptive effect to the condition. Preemption of a state law provision in conflict with a condition applicable to a private recipient has only one effect on the states. Preemption displaces the states' rule for private activity with a national rule, but there is no second effect on the states' political decisionmaking process because the states do not have to decide whether to accept the grant and to comply with the conditions. Congress is politically accountable for a condition of a grant that regulates private activity and displaces state law because there is a political check on the use of national tax revenues to make conditional expenditures. Thus, in *City of Boston v. Harris*, discussed *supra* at notes 183-84 & 326, a condition of a grant to a private recipient establishing certain rent levels was correctly held to preempt conflicting local rent control regulations. The only effect of the condition and preemption of conflicting local law is to displace local rent control policy, and there is no additional effect on the local decisionmaking process. *Contra* D. ENGDAHL, CONSTITUTIONAL POWER IN A NUTSHELL § 4.03, at 75-76 (1974) (condition of grant to private person does not preempt state law prohibiting compliance with the conditions).

897. *See supra* note 349 and accompanying text. Most statutes enacted under Congress' power to enforce the Civil War Amendments apply to both the states and private activity and not solely to the states. *See supra* text accompanying notes 356-82. In addition to regulations enacted under the Civil War Amendments, other regulations that would probably apply exclusively to the states could be enacted to enforce the guarantee clause or to control national elections. *See supra* note 441.

their political processes. The justification is found, as the Court has concluded, in the framers' intent to expand national authority over the states in regard to racial matters.[898] Although the VRA falls easily within the historical warrant, there is some risk that other statutes enacted to enforce the Civil War Amendments may exceed the historical justification for national intrusions on state autonomy.[899] When history fails to justify national authority, questions of state autonomy limitations on Congress' powers to enforce the Civil War Amendments must turn on some theory of individual rights. An individual rights theory that justifies national authority to intrude on state autonomy is beyond the scope of this Article, but *Pennhurst State School and Hospital v. Halderman* suggests that the Court may have to reconsider its seductive "black letter" rule that there are no federalism limits on the Civil War Amendment powers.[900]

Although there are some grant conditions and a few statutes enacted under Congress' powers to enforce the Civil War Amendments that apply exclusively to the states, post-*NLC* courts have not had an occasion to consider Congress' authority under other national powers, like the war, commerce, and tax powers, to impose regulations that apply exclusively or primarily to the states. Identification of such regulations is not easy because in most cases the rule applied to the states also applies to private activity.[901] For example, even though the operation of sewage treatment plants is a function performed almost exclusively by subnational public entities,[902] the application of the FLSA minimum wage and overtime standards to the states and their political subdivisions as employers in this function is not an example of regulations that apply exclusively or primarily to the states because these regulations also apply to a wide range of private employment.[903] Other regulations ap-

898. *See supra* text accompanying notes 343-53.

899. *See supra* text accompanying notes 397-400 & 418-22.

900. *See supra* text accompanying notes 418-22.

901. *See supra* text accompanying notes 883-84 & note 883.

902. There are approximately 15,000 publicly owned treatment works and only a relative handful of privately financed sewage treatment facilities which serve chiefly small communities and subdivisions. Telephone interview with James A. Chamblee, Chief of the Priority and Needs Assessment Branch, Office of Water Program Operations, United States Environmental Protection Agency (July 9, 1982); *see* ENVIRONMENTAL PROTECTION AGENCY, 1980 NEEDS SURVEY: COST ESTIMATES FOR CONSTRUCTION OF PUBLICLY-OWNED WASTEWATER TREATMENT FACILITIES 19-27 (FRD-19, 1981) (operations and maintenance costs for publicly owned sewage treatment plants were $2.8 billion in 1978 and only $48 million for privately owned facilities.)

903. *See supra* note 880.

plied to sewage treatment plants, however, might provide examples of national requirements imposed exclusively or primarily on the states. A regulation requiring sewage treatment plants to make extensive and expensive capital improvements in order to control water pollution is a good hypothetical example of a national rule that applies exclusively or primarily to the states and their political subdivisions.[904]

Congress would not be politically accountable if it enacted a statute under the commerce power and established a regulation requiring sewage treatment plants to install pollution control devices. There are no political checks because the regulation has little or no impact on private activity and because the costs imposed on the states or their political subdivisions to comply with the regulation are entirely disproportionate to the minor financial and administrative burdens imposed on the national electorate to enforce it. Since there are no political checks, Congress is not politically accountable, and the decision to regulate sewage treatment plants is not the product of a national political majority. An alternative, politically accountable means for Congress to achieve its regulatory goal of pollution control illustrates the reasons why a regulation requiring sewage treatment authorities to undertake expensive capital projects is not a decision of a national political majority. Congress could appropriate funds and award grants to cover a high percentage or the full costs of pollution controls. There would be a political check on this spending decision because the revenues would come from taxes levied on the national electorate. If, however, the full costs of the decision to regulate sewage treatment plant pollution were imposed on the national electorate, Congress might well reach a different decision about the benefits of pollution control.

Since Congress is not politically accountable for this hypothetical regulation, there is no reason to give a preference to national political choices over state political choices, and judicial protection of the states' role as political communities in the federal system is warranted. In a contest between state and national political choices where the political checks on Congress are not adequate to guarantee that national policies are the product of a national majority, there is simply no justification for national interference with the states' political choices. There is no

904. This hypothetical regulation applies almost exclusively or primarily to the states because there are very few privately owned sewage treatment plants and because there does not seem to be any obviously analogous private activity to which the regulation would apply. *See supra* note 881 and accompanying text.

reason to prefer national policy for clean water and to permit interference with the states' political decisions about the provision of sewage treatment plants adequate in their judgment to protect public health and to accommodate the demands of residential growth.[905]

905. Professor Stewart argues that Congress' power to require sewage treatment plants, which are almost exclusively owned and operated by municipalities, to abate water pollution is justified because water pollution from one state spills over into and affects other states. He finds precedent for this congressional authority in federal court orders requiring the states and their political subdivisions to control interstate pollution created by inadequate sewage treatment facilities. In short, he argues that it is unfair for state *X* to impose the costs of its pollution on a sister state *Y* and that because federal courts have exercised the authority to compel state *X* to abate pollution, Congress has similar authority. Stewart, *supra* note 577, at 1226-30, 1237-38.

Stewart's spillover theory as a justification of Congress' power to impose regulations that fall primarily on the states and their political subdivisions is at bottom an argument that Congress can legislate in a politically nonaccountable fashion because the courts have acted in this fashion. In a suit brought by state *Y* seeking relief under a judicially created federal common law rule of nuisance for the costs of pollution attributable to the operation of sewage treatment plants in state *X*, a federal court could, at least in the absence of an applicable national statute, require state *X* and its political subdivisions to make expensive improvements in their sewage treatment facilities in order to abate the pollution of interstate waters. Milwaukee v. Illinois, 451 U.S. 304 (1981) (federal common law cause of action for interstate pollution created by sewage treatment facilities is displaced by comprehensive national regulation under the Federal Water Pollution Control Act amendments of 1972). *See, e.g.,* Illinois v. City of Milwaukee, 406 U.S. 91 (1972); New Jersey v. City of New York, 283 U.S. 473 (1931); Sanitary Dist. v. United States, 266 U.S. 405 (1925); Missouri v. Illinois, 180 U.S. 208 (1901). The courts, of course, can reach similar results in a suit by state *X* against *Y* or in a suit by state *Z* against *X* and *Y*. The courts, however, are not politically accountable for the determination to impose the costs of pollution abatement on the states and their political subdivisions as owners of sewage treatment plants. *See* Monaghan, *Foreword: Constitutional Common Law,* 89 HARV. L. REV. 1, 11 (1975) ("when a federal court announces a federal rule of decision in an area of plenary congressional competence, it exercises an initiative normally left to Congress, ousts state law, and yet acts without the political checks created by state representation in Congress"). In the absence of political accountability, the net result of a series of lawsuits seeking relief from the pollution of interstate waters may be at odds with the results that would obtain under majority rule. Although the citizens of state *Y* would probably applaud the results of a case imposing liability for pollution on *X*, they are less likely to be pleased with the result of subsequent suits imposing on them the costs of abating interstate water pollution caused by sewage treatment plants in state *Y*. Thus, it might well be true that no political majority in states *X*, *Y*, or *Z* would favor restrictions on pollution causing activities in neighboring states if they were also forced to bear the costs of the spillover caused by sewage treatment plants in their states.

Although Stewart recognizes that Congress is a more appropriate institution for the resolution of interstate pollution issues than the courts because it provides a national forum for comprehensive consideration of multistate problems, he fails to recognize that Congress has a second institutional advantage over the courts. Congress, unlike the courts, can act in a politically accountable fashion. Congress is politically accountable for a decision requiring sewage treatment plants to abate water pollution if it appropriates the funds for the necessary capital improvements. There is a political check on this policy decision because the revenues to support the expenditure are obtained from taxes levied on the national electorate, and it is, then, fair to say that the decision to reduce the pollutants emitted by sewage treatment plants is the product of a national majority.

The states' political decisions about the operation of sewage treatment plants do not merit protection from national authority because the impact of national controls is particularly devastating, or because the states' functions are traditional or integral, or because the states' interests are more important than national interests in controlling water pollution. It is not any particular state political decision that merits protection; rather it is the states' role as political communities with the capacity to make political decisions that merits protection. Recognition of national authority to displace state political choices in the absence of political accountability would threaten unlimited national control of the states' capacity to make political decisions.

As important as it may be to recognize that the theory of political accountability restricts Congress' authority under the commerce power[906] to impose regulations that apply exclusively or primarily to the states, it is even more important that Congress has, on the whole, acted in a politically accountable fashion rather than imposing such

Congress would not be politically accountable for the same decision if it simply enacted a statute under the commerce power requiring sewage treatment plants, which are predominately publicly owned, to meet national clean water standards. In this instance there are no political checks on the exercise of national authority because the regulation has little impact on private activity and because the national electorate does not bear the financial burdens of pollution abatement. Nevertheless, because such a statute would be analogous to a court order under the federal common law of nuisance requiring the states or their political subdivisions to abate pollution, Stewart argues that it is a valid exercise of national authority.

His argument stands the theory of democratic political decisionmaking on its head. It invokes the authority of one branch of government—the judiciary—that is not and cannot be politically accountable to justify nonaccountable actions by another branch—the legislature—that can act in a politically accountable fashion. It is one thing to tolerate federal court power to fashion federal common law as a "necessary expedient" in the absence of congressional action and as an exception to the legislature's fundamental responsibility to determine social policy; it is quite another thing to invoke this expedient as a general warrant for Congress to legislate in a politically nonaccountable fashion. *See* Milwaukee v. Illinois, 451 U.S. 304, 314 (1981) ("Federal common law is a 'necessary expedient,' . . . and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.").

906. The theory of political accountability also limits Congress' power to levy taxes. Since there are no political checks on Congress' power to levy taxes applying exclusively or primarily to the states, such taxes are not valid exercises of national authority. Consider, for example, a national tax on the operation of sewage treatment plants. Neither of the two political checks on national authority applies to this tax. There is no impact on a substantial body of private activity because almost all sewage treatment plants are owned by the states and their political subdivisions; thus, the effects of the tax on private activity cannot provide any vicarious protection for the states' interests. The second political check, the imposition on the national electorate of the financial and administrative costs of enforcing national political decisions, is also ineffective. Whatever financial and administrative burdens are imposed on the national electorate to enforce

controls on the states. For example, under the Federal Water Pollution Control Act Amendments of 1972,[907] Congress established a program to control water pollution created by sewage treatment plants.[908] Instead of requiring the public authorities that own these facilities to make expensive improvements in order to comply with national clean water standards, Congress made grants to cover up to seventy-five per-

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these taxes, they are more than offset by the revenue generated and the incentive to raise revenue without imposing any tax directly on the national electorate.

Although taxes that apply exclusively or primarily to the states are not valid, no examples of such taxes have been discovered. Most national taxes that apply to the states also apply to private activity. Since the imposition of a tax on the national electorate is a political check on national authority that makes Congress politically accountable, national taxes that apply both to a substantial body of private activity and to the states are valid. For example, an annual registration tax on civil aircraft is valid as applied to a state-owned helicopter used for police functions because the tax also applies to privately owned civil aircraft. *See supra* text accompanying notes 531-41.

This justification of national authority to levy taxes that apply to the states is broader than the nondiscrimination principle advanced by both Justice Frankfurter and Chief Justice Stone in their opinions in *New York v. United States* upholding a national tax on the sale of mineral water. *See supra* text accompanying notes 518-27. Both Justices generally agreed that a national tax applying alike to state and private activity is valid because it is nondiscriminatory, but they each added significant qualifications. Justice Frankfurter said that a national tax could not be levied on a statehouse or a state tax revenue, and Chief Justice Stone stated that a national tax could not be applied to "the State's capitol, its State-house, its public school houses, public parks, or revenues from its taxes or school lands." *See supra* text accompanying note 520 & note 524. Under the theory of political accountability, all of these hypothetical national taxes, except a tax on state tax revenues, might be valid even if symbolically ill-advised. Apart from administrative difficulties, *see supra* note 42, a national property tax would be valid as applied to a statehouse so long as it also applied to private property with the same assessed valuation. There is simply no practical danger that this tax would interfere with the operation of state government because the application to private property would limit the tax rate. *Cf.* Mohegan Tribe v. Connecticut, 528 F. Supp. 1359, 1368 (D. Conn. 1982) (requirement that Indian land grants be made with consent of national government applies to state "only in its capacity as a landowner, not as a sovereign government"). In contrast, a national tax levied on state tax revenues would be invalid under the theory of political accountability because there are no political checks on taxes that apply exclusively to the states, and only governments can levy taxes.

It perhaps bears emphasis that national power to tax state revenues is limited not because the national tax affects the states' revenue raising function but because Congress is not politically accountable for taxes that apply exclusively to the states. Thus, some national taxes on state revenue raising functions may be valid. About one-quarter of the states operate lotteries to raise revenues, and apparently there are no longer any lotteries operated by private enterprise. See *supra* note 874. A national tax on the profits of state-run lotteries would nonetheless be valid, even if set at a destructive rate, if it also applied to other forms of legalized gambling like horse and dog race tracks, casinos, jai alai, and sports betting operated predominately by the private sector. The application of the tax to state-run gambling and to private gambling operations would ensure that the decision to destroy gambling activity is a decision of a national political majority.

907. 33 U.S.C. §§ 1251-1378 (1976 & Supp. IV 1980).

908. *Id.* §§ 1281-1297 (1976 & Supp. IV 1980), *amended by* Municipal Wastewater Treatment Construction Grant Amendments of 1981, Pub. L. No. 97-117, 95 Stat. 1623-30.

cent of the costs of compliance.[909] National regulations that fall exclusively or primarily on the states are as yet hypothetical, and the need for judicial protection of the states in these circumstances is also hypothetical as long as Congress continues to act in a politically accountable fashion.[910]

c. *United Transportation Union v. Long Island Rail Road*

United Transportation Union[911] provided the Supreme Court with an opportunity to undo the confusion sown by its decision in *NLC* and to begin an elaboration of a principled theory of state autonomy limitations on national political authority. The issue in this case was whether the authorization in the national Railway Labor Act (RLA) of strikes by employees of a state-owned commuter railroad after the exhaustion of dispute resolution procedures was an unconstitutional intrusion on

909. *Id.* § 1282(a) (Supp. IV 1980); *see* Stewart, *supra* note 577, at 1238. The amount of national grants will be reduced to 55% of the costs of construction after Oct. 1, 1984. Municipal Wastewater Treatment Construction Grants Amendments of 1981, Pub. L. No. 97-117, §§ 7, 8(a), (b), 95 Stat. 1625. One court has held that municipalities can be compelled, regardless whether they receive national financial assistance, to comply with the national water pollution standards for sewage treatment plants established under the Federal Water Pollution Control Act Amendments of 1972. State Water Pollution Control Bd. v. Train, 559 F.2d 921 (4th Cir. 1977). This court, however, did not consider the question of Congress' power to impose a regulation that applies primarily to the state or local governments, and in practice the EPA has not required municipally owned sewage treatment plants to comply with national water pollution standards except as a consequence of receipt of national funds. *See* Hunciker, *The Clean Water Act of 1977—Modifications of the Municipal Program,* 2 HARV. ENVTL. L. REV. 127, 129-30 (1977); James, *The Municipal Program of the Clean Water Act: 1978 Administrative Implementation,* 3 HARV. ENVTL. L. REV. 326, 327-28 (1979).

910. All but two of the 475 airports in this country are publicly owned. *See supra* note 880. If Congress wanted to improve airport safety and traffic capacity, it could achieve these goals in either a politically nonaccountable or a politically accountable fashion. On the one hand, Congress would be acting in a politically nonaccountable fashion if it imposed requirements on airports to install safety devices and to expand runway capacity. There are no political checks on such requirements because they apply to only two privately owned airports and because the costs of making the required improvements is entirely disproportionate to the minor costs imposed on the national elecorate of enforcing the requirements. On the other hand, Congress would be acting in a politically accountable fashion if it were to appropriate funds to cover the costs of airport improvements. The national electorate would then bear the costs in the form of taxes. As in the case of regulation of sewage treatment plant pollution, *see supra* text accompanying note 909, Congress has in fact acted in a politically accountable fashion. Congress has appropriated funds to cover most of the costs of capital improvements at airports necessary to achieve national safety and traffic capacity goals. Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 2, 84 Stat. 219 (current version at 49 U.S.C. §§ 1701-1743 (1976 & Supp. IV 1980)). The national share of project costs ranges from 75% to 90%. *Id.* § 1717(a).

911. 102 S.Ct. 1349 (1982). This case is discussed *supra* at notes 498-511.

state autonomy because it interfered with state policy prohibiting strikes by public employees. Under the theory of political accountability, this issue is easily resolved.

As in any case of a national regulation that applies to the states, the initial inquiry is whether the regulation applies both to the states and a substantial body of private activity or whether it applies exclusively or primarily to the states. Here, the RLA applies to a substantial body of private activity, and the states as employers are not singled out for special treatment. There is a political check on Congress' power to prescribe rules governing the states' bargaining relationships with their railroad employees because the RLA applies to forty major and several hundred small, private interstate railroads with approximately 450,000 employees.[912]

Given this broad application of the RLA to the private railroads, Congress is politically accountable for its labor policies, and the states' interests in operating railroads are vicariously protected by the impact of the national rules on private activity.[913] There is no practical danger that the states' ability to operate railroads and to provide the benefits of

912. *See* ASSOCIATION OF AMERICAN RAILROADS, YEARBOOK OF RAILROAD FACTS 2, 57-58 (1981). The RLA also applies to the airline industry and an additional 300,000 employees. 45 U.S.C. §§ 181-188 (1976). *See* NATIONAL MEDIATION BOARD, FORTY-SIXTH ANN. REP. 6 (1980). For a similar argument that the RLA is constitutionally valid as applied to a state-owned railroad because Congress is politically accountable, see Comment, *Redefining the* National League of Cities *State Sovereignty Doctrine,* 129 U. PA. L. REV. 1460, 1475-83 (1981).

It might be objected that the political check on Congress' power to control a state's bargaining relationship with its railroad employees founds on an inapt analogy between freight and passenger railroads. *See supra* note 881. If the operation of a passenger rail service and a freight rail system are distinct activities, then the mere application of the RLA to a large number of private railroad employees would not provide any vicarious protection for a state's interest in operating a passenger rail service because most rail carriers subject to the RLA are freight railroads. *See* YEARBOOK OF RAILROAD FACTS, *supra,* at 29, 31. Indeed, if the relevant analogy to the LIRR is either passenger transit systems generally or perhaps only other commuter railroads, then there is little or no political check in the application of the RLA and other national labor laws to private activity. As of 1980, 94% of all transit systems (motor bus, heavy or light rail, and trolley coach) were publicly owned, and "all commuter railroads are . . . either publicly owned or receive financial support from public agencies." AMERICAN PUBLIC TRANSIT ASS'N, TRANSIT FACT BOOK 13, 18, 43 (Table 3) (1981 ed.).

913. The argument here that Congress has the authority to regulate the states' bargaining relationship with its railroad employees because the same regulations apply to private employers would also support Congress' power to provide collective bargaining rights for most state government employees similar to the collective bargaining rights of private employees under the National Labor Relations Act. *See supra* note 22. *But cf.* United Steelworkers v. University of Alabama, 430 F. Supp. 996, 998 n.3 (N.D. Ala. 1977) (*NLC* would preclude application of NLRA to state employees).

rail service will be frustrated by the RLA. At bottom, the case required the Court to choose between two different social policies designed to achieve the same end of uninterrupted rail service. The state's political decision is that the appropriate policy is a prohibition of strikes; the national political decision is that self-help after dispute resolution procedures is the appropriate policy. Since Congress is politically accountable and the RLA is the product of a national majority, the Court held correctly that the RLA is valid as applied to a state-owned railroad whose operations affect interstate commerce.

In *United Transportation Union* the Court reached the right result for the wrong reason. The Court held that a state-owned railroad was subject to national regulation because the operation of a railroad is not a traditional state function.[914] This holding reaffirms the basic point of *NLC* that Congress' power to regulate the states is limited by federalism principles, but it also perpetuates the problems created by *NLC*. The Court has not provided any principled criteria for identifying state functions immune from national control, and it has left open the possibility that national authority to regulate the states will be determined by an, as yet, indeterminate balancing of state and national interests.[915] In short, the Court has neither provided any justification for its holding in *NLC* that Congress cannot regulate a state in its capacity as an employer by setting minimum wage and maximum hour standards for most of their employees nor stated any principled basis for reconciling this holding with its holding in *United Transportation Union* that Congress can regulate a state in its capacity as an employer by authorizing the employees of a state-owned railroad to strike.

Although the Court has not justified the power asserted in *NLC* to set aside national political decisions affecting the states and has not stated any reasoned criteria for the exercise of this power, the theory of political accountability provides a principled, comprehensive, and judicially manageable standard for resolving questions of national authority to regulate the states. In the case of most national regulations applicable to the states, Congress has applied the same rule both to the states and to a substantial body of private activity. Since there is a political check in the regulation of private activity and Congress is politically accountable, such exercises of national authority are valid, and

914. *See supra* text accompanying notes 505-07 & 510.
915. *See supra* text accompanying notes 510-11.

claims of interference with state autonomy should be rejected.[916] There are also some national regulations—the conditions of national grants and statutes enacted to enforce the Civil War Amendments—that apply exclusively or primarily to the states. With respect to grant conditions, Congress is politically accountable because the expenditure is supported by taxes levied on the national electorate,[917] and history provides a warrant for national authority under the Civil War Amendments over the states at least with respect to racial matters.[918]

The only potential difficulty in the application of the theory of political accountability to national regulation or taxation of the states is the determination whether the regulation applies exclusively or primarily to the states or whether it applies both to the states and a substantial body of private activity.[919] The absence of any fixed criteria for determining whether the impact of a national regulation on private activity is sufficient to constitute a political check on national authority and to provide vicarious protection for the states is not an important problem in practice because most national regulations apply clearly either to state and private activity or exclusively to the states. Although a court may err on occasion in determining the actual incidence of a national regulation, the important point is to insist on some mechanism of political accountability, whether it be the effect of a national regulation on private activity or the financial check inherent in the national electorate's assumption of the costs of a state's compliance. Reliance on the political accountability of Congress as the justification of national authority and on the absence of political accountability as the justification for judicial protection of the states' role as political communities will ensure that decisions about the allocation of political authority between the nation and the states in our federal system are made by the electorate as the framers intended.

916. *See supra* text accompanying notes 877-84. If a regulation established under the commerce power applied exclusively or primarily to the states, the political checks of the national political process would not make Congress politically accountable. Judicial intervention to protect the states would then be warranted. *See supra* text accompanying notes 901-10.

917. *See supra* text accompanying notes 885-96.

918. *See supra* text accompanying notes 897-900.

919. *See supra* note 881 and accompanying text.

3. Political Accountability and Congress' Power to Require the Affirmative Exercise of State Authority Over Private Activity

The theory of political accountability explains and limits Congress' power to employ the states as the nation's agents as well as Congress' power to regulate private activity and to regulate the states. Congress uses a variety of mechanisms to provide for state administration and enforcement of national policies for private activity. Under the spending power, Congress makes grants both to private recipients[920] and to the states[921] on conditions requiring the states to enforce national regulatory standards and to administer national social welfare programs. Under the commerce power, Congress often delegates national authority to state officers, agencies, and political subdivisions and supplements their state law authority to regulate private activity.[922] Congress may also threaten to regulate private activity directly unless the states agree to implement national regulatory programs.[923] To ensure state cooperation, Congress frequently combines these mechanisms,[924] and on a few occasions Congress has mandated state enforcement of national regulatory policies.[925] Since the administration and enforcement of national policy requires the affirmative exercise of state authority over private activity, Congress' use of the states as its agents to implement national policy has a significant, distinct effect on state autonomy. The states must allocate legislative, executive, judicial, and financial resources to the effectuation of national policies and to the satisfaction of national political demands at the expense of the implementation of state policies and the fulfillment of the demands of the political community in each state.

Notwithstanding this impact on state autonomy, Congress has the power to employ the states as its agents to the extent that the political

920. *See supra* text accompanying notes 186-97 & 217-46.

921. *See supra* text accompanying notes 306-22.

922. *See supra* text accompanying notes 544 & 705-13.

923. *See supra* text accompanying notes 545 & 559-80.

924. *See supra* text accompanying notes 570-75 & 693-704.

925. Most of the provisions mandating state enforcement of national regulations have been enacted under the commerce power. *See supra* text accompanying notes 547-48 & 581-691. Congress may also have exercised its defense powers to mandate state enforcement of national regulations. *See supra* text accompanying notes 160-75. The Court has noted the possibility that Congress might exercise its power to enforce the fourteenth amendment by requiring the states to enforce national social welfare policies. *See supra* note 324 and text accompanying note 342.

checks of the national political process guarantee political accountability and protect the states' interests in controlling the allocation of their governmental and financial resources. These political checks are the application of national policy to private activity and the assumption by the national electorate of the financial and administrative costs of enforcing national policies. The application of a nationally determined substantive policy to private activity does make Congress accountable for the policy itself and justifies national authority to diminish state autonomy by displacing state rules for the same activity. This political check, however, does not apply to the separate national political decision to employ the states to administer and enforce the substantive policy. Consider, for example, the provision for state administration of the national environmental standards of the Surface Mining Control and Reclamation Act.[926] The application of these standards to the surface mining industry makes Congress accountable for the particular regulations, but the mere application of the SMCRA regulations to private activity does not check Congress' power to provide for state administration and enforcement. In fact, the affected private interests, far from providing vicarious protection for the states' interests in controlling the allocation of state governmental and financial resources, may prefer state administration over national administration on the entirely plausible ground that state officials would be more sympathetic to the problems of local industry. Since the impact on private interests does not check national political decisions to employ the states as the nation's agents, accountability must be a function of the second political check—the imposition on the national electorate of the financial and administrative costs of enforcing national policies.

a. Congress' Power to Employ the States as the Nation's Agents: Grant Conditions and the Threat of Direct National Regulation of Private Activity

The political check in the imposition on the national electorate of the financial and administrative costs of enforcing national policies makes Congress politically accountable for two of the mechanisms that it uses to provide for state administration and enforcement of national policy. When a grant, either to a private recipient or a state, is made on a condition that the state exercise affirmative authority by regulating pri-

926. The SMCRA is discussed *supra* at notes 559-63.

vate activity under national standards or by distributing social welfare benefits, Congress is politically accountable because the expenditure of national tax revenues limits the extent to which the states can be employed as the nation's agents. If Congress appropriates insufficient funds to cover the states' financial and administrative costs, the states will refuse to implement the national program.[927] Thus, conditions of national grants to private recipients requiring the states to administer unemployment compensation programs[928] and to regulate land use under national flood prevention and control standards,[929] and conditions of national grants to the states requiring both state matching funds and distribution of welfare benefits under national standards,[930] are valid exercises of national authority. It may, of course, be argued that the deep national pocketbook permits extensive national control over the use of state governmental and financial resources to implement national policies. The answer is simply that the assumption about the proper allocation of power in the federal system underlying the argument is not the choice of the national political majority. By reducing national taxes and expenditures or by changing categorical grants to block grants or revenue sharing, the extent to which grant conditions are used to employ the states as the nation's agents can be reduced.[931]

Congress is also politically accountable when it provides for state regulation of private activity under national standards by threatening to impose direct national regulation if the states fail to implement the national regulatory program. Although no financial or administrative costs are imposed on the national electorate if the states enforce the national policies, a political check exists because the full costs of enforcement of the national standards governing private activity are potentially imposed on the national electorate. If the threat of a national takeover of the regulation of private activity is ineffective, the national government must enforce directly its own regulatory program. Thus, the Court reached the correct result in *Hodel* in approving the provision in the SMCRA for state administration and enforcement of na-

927. For example, in *Pennhurst State School and Hospital v. Halderman*, the Court insisted that a condition of a grant requiring the states to make substantial expenditures must be stated clearly so that the state can make a rational decision whether the costs of compliance with grant conditions outweigh the benefits of national financial aid. 451 U.S. 1, 17 (1981).

928. *See supra* text accompanying notes 186-97.

929. *See supra* text accompanying notes 217-46.

930. *See supra* text accompanying notes 306-22.

931. *See supra* notes 890-92 and accompanying text.

tional environmental standards for surface mining under the threat of direct national regulation if the states fail to implement the national regulatory program.[932] The result, however, is not correct on the basis of the Court's reasoning that the SMCRA establishes a program of cooperative federalism that allows the states to implement their own surface mining regulations.[933] Congress intended that the states would serve as the nation's agents in enforcing national environmental standards; Congress designed the SMCRA to require the states to exercise affirmative authority over private activity.[934] Congress' power to employ the states as its agents under the threat of direct national regulation is valid because there is a political check in the potential assumption by the national electorate of the full financial and administrative costs of enforcing nationally determined regulatory policies.[935] This political check makes Congress politically accountable for the decision to employ the states as national agents and limits the extent to which national authority can be exercised to require the states to allocate their governmental and financial resources to the satisfaction of national political priorities.

If one assumes that the Court's interpretation of Titles I and III of the Public Utility Regulatory Policies Act is correct and that Congress did not impose a duty on state agencies to implement national policies,[936] then the Court in *FERC* was correct in drawing an analogy[937] to *Hodel* and in upholding the provision for state implementation of national regulatory policies for electric and natural gas utilities. In terms of Congress' political accountability, there is only one significant difference between the provisions for state implementation of national regulations upheld in *Hodel* and the means employed by Congress in Titles I and III of the PURPA to use the states as the nation's agents. Under the SMCRA, if the states fail to administer and enforce national environmental standards for surface mining, direct national regulation

932. *See supra* text accompanying notes 559-80.

933. *See supra* text accompanying notes 566-69.

934. *See supra* text accompanying notes 574-77.

935. In addition to the threat of direct national regulation, Congress also makes grants to the states on the condition that they administer and enforce the SMCRA. *See supra* text accompanying notes 570-71. This mechanism of obtaining state cooperation in enforcing national regulatory programs is also valid. *See supra* text accompanying notes 927-31.

936. *See supra* text accompanying notes 615-23 & 655-64. The statute is best interpreted as imposing a duty on state agencies to implement national law. *Id.* For an argument that the PURPA so interpreted is invalid, see *infra* text accompanying notes 989-92.

937. *See supra* text accompanying notes 666-67.

is imposed. Congress is politically accountable because the national electorate will bear the financial and administrative costs of enforcing the national regulations if the states refuse to act. As the Court construed Titles I and III, if the states fail to consider the adoption of twelve national standards for electric utilities or two national standards for natural gas utilities, all state regulation of one type of private activity—the operation of utilities—is prohibited.[938] Since the means employed by Congress to obtain state implementation of national regulations is a threat of prohibiting all state regulation of a particular private activity rather than a threat of displacing state regulation with direct national regulation, the political check on Congress' power to use the states as its agents is not as strong.

If Congress prohibits state regulation of private activity and does not provide for a national regulation to fill the regulatory void, then no administrative and financial costs are imposed on the national electorate because there is no national rule directly applicable to private activity that must be enforced. Nonetheless, just as Congress is politically accountable for statutes establishing rules for private activity by prohibiting state regulation,[939] it is also politically accountable when it provides for state enforcement of national policies under a threat of prohibiting all state control of private activity. Congress is politically accountable for statutes prohibiting states from enforcing "no right turn on red" laws and for statutes prohibiting the states from issuing motor vehicle registrations for vehicles that have not complied with national air pollution control requirements. In both cases there is a potential cost to the national electorate of ousting state regulation of private activity without providing for the administration and enforcement of national law as a substitute.[940] Similarly, in the PURPA, as construed by the Court, Congress is politically accountable for its rule prohibiting all state utility regulation as a means of providing for state implementation of national regulatory policies. Individuals who are subject to unbridled rate increases by utilities freed from all state regulatory constraints would probably demand the establishment of a program to regulate electric and natural gas utilities. The costs of such a program would fall on the national electorate. Thus, there is a potential check on Congress' power because a national prohibition of state

938. *See supra* text accompanying notes 655-59.
939. *See supra* text accompanying notes 482-88 & 858-63.
940. *See supra* text accompanying notes 858-63.

regulation creates political pressure for substitute national regulations that entail the imposition of financial and administrative burdens on the national electorate.

Grant conditions and the threat of direct national regulation of private activity are the principal mechanisms employed by Congress to provide for state administration and enforcement of national regulatory and social welfare programs. Since there is a political check on these exercises of national authority in the actual or potential imposition on the national electorate of the costs of administering and enforcing national policies, Congress is politically accountable and these two means of employing the states as the nation's agents are valid. Two other mechanisms of obtaining state cooperation in the enforcement of national law are not valid, however, because Congress is not politically accountable. There are no political checks on Congress' power to provide for state implementation of national policies either (1) by delegating national authority to state officers, agencies, or political subdivisions and supplementing their authority to act in excess of or contrary to state law or (2) by mandating state enforcement of national law.

b. Congress' Power to Delegate National Authority and to Supplement State Law

From the earliest days of our Republic, Congress has provided for state cooperation in the administration and enforcement of national law by delegating national authority to the states.[941] Today, provisions authorizing state enforcement of national laws are legion, and the national government relies heavily on state officers to implement national regulations.[942] National statutes, for example, provide for the delegation of authority to the states to regulate the use of certain low-level

941. *See infra* text accompanying notes 993-1032.

942. Delegation of national authority to the states is very similar to provision for state administration and enforcement of national regulations by threat of direct national enforcement if the states fail to implement a national regulatory program. Indeed, no clear distinction between these two means of employing the states as the nation's agents can be made. In both cases, the states undertake enforcement of national regulations of private activity with the understanding that otherwise the national government itself will regulate private activity directly. Nonetheless, there is a significant, subtle distinction. On the one hand, Congress may establish a complete national regulatory apparatus and also provide that the authority to regulate may be delegated to the states. On the other hand, Congress may carefully structure the incentives for the states to assume the responsibility for enforcing national regulation with a stated intent to avoid national enforcement.

radioactive materials that would otherwise be controlled by the Nuclear Regulatory Commission,[943] to issue permits for the discharge of pollutants into the nation's waters that would otherwise be issued by the Environmental Protection Agency,[944] and to enforce treaty provisions governing salmon fishing.[945] The mere delegation of national authority to the states normally does not raise any question of national interference with state autonomy because Congress is, in effect, preserving state authority to regulate private activity that it could otherwise preempt. Indeed, delegation of authority to the states to enforce national law is so well-accepted as a means of providing for state cooperation that it is little noted and rarely challenged.

The delegation of national authority may, nevertheless, raise a significant question of national intrusion on state autonomy if Congress purports to authorize its delegate to act in excess of or contrary to its state law powers by supplementing the state law authority of state officers,

943. Section 274 of the Atomic Energy Act of 1954, as amended, provides that the Nuclear Regulatory Commission (NRC) may enter cooperative agreements with the states and authorize state regulation of certain radioactive materials for the purpose of protecting public health and safety. 42 U.S.C. § 2021 (1976 & Supp. IV 1980); 10 C.F.R. § 150 (1982); *see* Murphy & La Pierre, *supra* note 55, at 398-400. As of September 1981, the NRC had delegated regulatory authority to 26 states. NUCLEAR REG. REP. (CCH) ¶ 19,001.

944. Under the Federal Water Pollution Control Act Amendments of 1972, the EPA has the authority to establish effluent limitations on pollutant discharges into the nation's waters and to issue permits for the discharge of any pollutant. 33 U.S.C. §§ 1311, 1342(a) (1976 & Supp. IV 1980), *amended by* Municipal Wastewater Treatment Construction Grant Amendments of 1981, Pub. L. No. 97-117, §§ 21-22, 95 Stat. 1631. The EPA may authorize the states to issue these permits, and as of 1980, 31 states had assumed this responsibility. 33 U.S.C. § 1342(b) (1976 & Supp. IV 1980); COMPTROLLER GENERAL, FEDERAL-STATE ENVIRONMENTAL PROGRAMS—THE STATE PERSPECTIVE 5 (1980).

945. The Sockeye or Pink Salmon Fishing Act of 1947, which was enacted to enforce a convention between the United States and Canada, provides for the preservation of certain salmon fisheries. 16 U.S.C. §§ 776-776f (1976). The Act provides that officers and employees of the State of Washington may be authorized to enforce the convention, the Act, and regulations promulgated by an international commission and that these state officers and employees may function as national law enforcement officers with national authority to make arrests and to conduct searches and seizures. 16 U.S.C. § 776d(b), (d) (1976). The State of Washington initially enacted a statute authorizing its Department of Fisheries to accept the delegated national authority and to enforce the regulations of the international commission. When the state supreme court subsequently held that the state agency did not have state law authority to enforce a regulation of the international commission that had been modified by a federal district court order, the national government assumed responsibility for enforcement and did not attempt to compel continued state enforcement. Purse Seine Vessel Owners' Ass'n. v. Moos, 88 Wash. 2d 799, 567 P.2d 205 (1977) (en banc). *See* United States v. Washington, Dep't of Fisheries, 573 F.2d 1118 (9th Cir. 1978), *aff'd sub nom.* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 689-92 (1979).

agencies, or political subdivisions.[946] In this circumstance, the delegation of national authority alters the state's political decision about the limits of the authority of its officers, agencies, or political subdivisions, and it may also interfere with the state's control over its governmental and financial resources. If the delegate exercises the supplemental authority conferred by national law, the state's resources embodied in its officers, agencies, and political subdivisions will be diverted from the implementation of state policies to the administration and enforcement of national regulations. This reallocation of state governmental resources from the satisfaction of state policy to the fulfillment of national policy may be contrary to the decision that the state political community would make if it had the opportunity to determine whether the state law authority of its officers, agencies, or political subdivisions should be expanded or altered.

Delegations of national authority that supplement state law and purport to empower state officers, agencies, or political subdivisions to act solely on the basis of the delegated national power and in excess of or contrary to their state law authority are rare. In almost all cases in which Congress provides for the delegation of national authority to the states, an explicit condition of the delegation is a demonstration that the delegate has adequate authority under state law to carry out the delegated national regulatory powers. For example, the delegations of national authority to the states to regulate radioactive materials and to issue pollution discharge permits both require the states to demonstrate adequate authority under state law to execute the national regulatory powers.[947] Similarly, the state of Washington accepted the delegation

946. If Congress delegates authority to enforce national regulations to a state as opposed to a particular state officer, agency, or political subdivision, questions of national authority to supplement state law will not normally arise because the states have broad, inherent regulatory powers. Nevertheless, a problem of supplementing state law would arise if the delegated national authority purported to empower state government to act in excess of or contrary to a state constitutional restriction. Consider an example derived from the conditional grant at issue in *North Carolina ex. rel. Morrow v. Califano* that required the states to regulate the construction of privately owned hospitals under a certificate of need (CON) program. *See supra* text accompanying notes 306-12. Since the state constitution as interpreted by the state's supreme court prohibited this type of regulation, delegation of national authority to the state to administer and enforce a CON program would expand the state's powers beyond the limits set by the state political community in its constitution.

947. In the case of delegation of national authority to regulate certain radioactive materials, the statute requires that the Governor must certify that the state has an adequate regulatory program, and agreements between the NRC and the states recite the Governor's state law authority to assume responsibility for enforcing the national regulations. 42 U.S.C. § 2021(d)(1) (1976); NU-

of national authority to enforce treaty provisions governing salmon fishing by enacting a statute empowering a state agency to exercise these delegated enforcement powers.[948]

The distinction between a simple delegation of national authority and a delegation of national authority that supplements state law may be illustrated by section 402 of the Power Plant and Industrial Fuel Use Act of 1978.[949] This statute empowers the Secretary of the Department of Energy to delegate authority to state agencies to regulate the sale of natural gas by natural gas companies for use in outdoor lighting fixtures. If the state agency has existing authority under state law to regulate natural gas companies in this fashion, then the delegation of national authority has no effect on the allocation of political authority by a state to its agencies. It preserves the authority of the state agency to regulate natural gas companies, and at most the effect of the delegation is to direct the state agency's regulatory resources to control the use of natural gas in outdoor lights at the expense of other state law policies. If the state prohibits its agency from exercising the delegated authority after the agency has decided to regulate the use of natural gas in outdoor lights, or if existing state law either does not authorize or specifically prohibits the state agency from controlling the use of natural gas in outdoor lights, then the delegation of national authority supplements and expands the political power of the state agency. Recognition of Congress' power to supplement an agency's powers would permit Congress to alter the state's political decision about the extent of its agency's powers and to divert the state's administrative and financial resources (the agency) from implementation of state regulatory policies to the enforcement of national regulatory policies.[950]

CLEAR REG. REP. (CCH) ¶ 19,001. Delegation of national authority to issue pollution discharge permits requires a demonstration that state law provides adequate authority to carry out the national regulations for issuance of permits. 33 U.S.C. § 1342(b) (1976 & Supp. IV 1980).

948. WASH. REV. CODE ANN. § 75.40.060 (1962).

949. *See supra* text accompanying notes 705-09. For a brief discussion of Congress' power under the Clean Air Act to delegate national authority to a state agency and to supplement the agency's state law authority, see Luneburg, *supra* note 577, at 421-25 & n.150.

950. Congress' power to delegate national authority to state agencies to regulate the sale of natural gas by private utilities for use in outdoor lights has been challenged. *See supra* text accompanying notes 710-13. Unfortunately, the petitioners in this case missed the crucial question of Congress' power to supplement the state law authority of state agencies and argued simply that Congress cannot delegate national authority to state agencies. The petitioners asserted that the state agencies were acting solely on the basis of national authority, but there was no demonstration that any state agency otherwise lacked the power under state law to regulate the use of natural gas in outdoor lights. Reply Brief of Joint Petitioners Atlanta Gas Light Company, Laclede Gas

There are no political checks on Congress' power to delegate national authority and to supplement state law. The delegation of national authority alone has no impact on private activity, and there are no administrative or financial costs imposed on the national electorate. In fact, national authority is delegated to the states precisely for the purpose of avoiding the costs of enforcing national policies; to the extent that the states exercise the delegated authority, the nation is spared administrative and enforcement costs. The absence of a political check on the mere delegation of national authority raises no problem because there is no interference with state autonomy. The absence of any political check, however, does mean that Congress is not politically accountable for the decision to augment the state law authority of state officers, agencies, or political subdivisions. In the absence of accountability, Congress' power to supplement state law is not valid.[951] This conclusion that national authority is limited will not work any serious embarrassment to state cooperation in the administration and enforcement of national regulations because a state is always free to amend its law to

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Company, and American Gas Association at 4-11, 19, Atlanta Gas Light Co. v. Department of Energy, 666 F.2d 1359 (11th Cir. 1982). In the absence of proof that the delegated national authority supplements state law, there is no interference with state autonomy, and such proof in this case seems improbable. The absence of any complaint by any state, apart from suggesting a problem of the standing of the natural gas company petitioners, strongly indicates that the delegated national authority has not expanded the state law authority of the state agencies or diverted state administrative resources to regulatory tasks in excess of the state law authority of these state agencies. Moreover, since the regulations of the Department of Energy (DOE) require, albeit indirectly, a demonstration that the state agencies to which national authority is delegated must have state law authority to regulate the use of natural gas in outdoor lights, there seems to be no attempt to authorize the state agencies to act solely on the basis of the delegated national authority and in excess of or contrary to their state law powers. *See* 10 C.F.R. § 516.31(c)(2)(iii) (1982). To reach a proper resolution of the delegation issue, the court would have to go beyond the briefs and determine whether the delegated national authority supplements state law or merely provides the state agencies with an opportunity to exercise their existing state law authority to regulate the use of natural gas in outdoor lights in conformity with national policies. The Eleventh Circuit did not address this question whether the delegated national authority supplements state law. Instead, it decided the case on the basis of the petitioners' second argument that the DOE's regulations mandate state administration and enforcement of the national rules for the use of natural gas. *See supra* text accompanying notes 710-13. This separate, distinct question of Congress' power to mandate state enforcement of national regulations is addressed below. *See infra* text accompanying notes 979-1055.

951. A condition of a national grant that requires a state officer or political subdivision to act contrary to state law limitations could have the same effect as a delegation of national authority that supplements state law. Under the theory of political accountability, Congress' power to augment state law by either means is treated consistently because such conditions do not preempt state law restrictions on the authority of state officers and political subdivisions. *See supra* text notes accompanying 894-96.

provide the delegate of national authority with adequate state law power to implement national regulations.

Under the theory of political accountability, the rule that Congress has the power to delegate national authority but not to supplement state law is consistent with the established understanding that national law respects the states' allocation of political authority. Commentators, for example, have long recognized that national authority cannot be delegated to state officers if acceptance of the delegated authority would violate either state constitutional limitations on the holding of dual offices or common-law restrictions on the holding of incompatible offices.[952] Congress has respected the states' control over the allocation of political authority to its political subdivisions by providing, for example, that the states are liable for a judgment against a municipality under the Federal Water Pollution Control Act Amendments of 1972 if state law prevents the municipality from raising the revenues necessary to comply with the judgment.[953]

952. For example, President Coolidge issued an executive order authorizing the appointment of state and local officers as prohibition officers of the Department of Treasury to enforce the National Prohibition Act "except in those states having constitutional or statutory provision against state officers holding office under the federal government." Exec. Order No. 4439, May 2, 1926, *quoted in* Note, *The President, the Senate, the Constitution, and the Executive Order of May 8, 1926,* 21 ILL. L. REV. 142, 143 (1926). *See* Beard, *Government by Special Consent,* 25 AM. POL. SCI. REV. 61, 65 (1931); Hart, *Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement,* 13 VA. L. REV. 86, 99-107 (1926); Kauper, *Utilization of State Commissioners in the Administration of the Federal Motor Carrier Act,* 34 MICH. L. REV. 37, 81-82 (1935).

953. 33 U.S.C. § 1319(e) (1976). *See also* United States v. Duracell Int'l, 510 F. Supp. 154 (M.D. Tenn. 1981). The rejection of the Sherman Amendment to the bill that became the Civil Rights Act of 1871, the precursor of 42 U.S.C. § 1983, also illustrates congressional concern about national interference with the states' power over their political subdivisions. The rejection of this amendment was based in part on concern about imposing a duty on local governments to prevent violence if they lacked the state law authority to perform the acts necessary to fulfill this duty. The Sherman Amendment "would have made each citizen of every municipality, as well as the municipality itself, strictly liable for violence perpetrated by other citizens regardless of whether or not they acted under color of state law." *Developments, supra* note 351, at 1192. The Sherman Amendment was attacked on the ground that since Congress has no power to impose a duty on the states under Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) and Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861), it had no power to impose a duty on a municipality. It was also attacked on the narrower ground that Congress had no power to impose a duty on local governments that lacked the authority under state law to meet the duty of controlling violence, and the opponents of the Sherman Amendment who invoked this narrow ground conceded that if state law authorized a municipality to keep the peace, Congress could impose and federal courts could enforce the duty. *See, e.g.,* CONG. GLOBE, 42d Cong., 1st Sess. 754 (Sen. Edwards), 791 (Rep. Willard), 795 (Rep. Burchard) (1871). In Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 664-83 (1978), the Court read the rejection of the Sherman Amendment to establish only that Congress

The Court also has construed narrowly a statute delegating authority to state court clerks to naturalize persons as citizens of the United States to avoid national interference with a state's control over its officers. Since 1802 Congress has delegated authority to the clerks of the state courts to naturalize aliens,[954] and it also has provided, beginning in 1906, that one-half of naturalization fees would be retained by the clerk and the other half would be paid over to the national government.[955] State courts were divided over the questions whether Congress intended that the fees retained by the clerk were for his personal use or were to be paid over to the state and whether Congress had the power to provide that the fees were to be retained by the clerk personally if state law required that the fees be paid over to the public treasury.[956] In *Mulcrevy v. San Francisco*,[957] the Court resolved these issues by interpreting the statute to provide that state law governed the disposition of fees retained by the clerk. It based this interpretation in part on the ground that national authority to confer power on a state officer to act contrary to state law would raise a serious constitutional issue.[958]

The only authority that might be read to support Congress' power to supplement the state law powers of state officers, agencies, or political subdivisions is a series of cases that comprise the Cowlitz River dam litigation.[959] The first case was a direct challenge to the issuance of a

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did not intend to impose strict liability on a municipality for acts of private citizens and concluded that the rejection of the Sherman Amendment did not preclude holding a municipality liable for its own constitutional violations. The Court also cast some doubt on the continued vitality of the principle that Congress has no power to impose a duty on state governments. *Id.* at 676-81. *See infra* note 1030.

954. The question of Congress' power to delegate authority to naturalize and to compel the states to exercise this authority is addressed *infra* at notes 1006-07.

955. Act of June 19, 1906, ch. 3592, § 13, 34 Stat. 600-01. The current provision governing the disposition of naturalization fees provides simply that one-half of the fees up to $40,000 and all fees in excess of that figure must be paid over to the national government, and it does not provide for the disposition of the remainder of the naturalization fees collected by state court clerks. 8 U.S.C. § 1455(c) (1976), *amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 16, 95 Stat 1619.

956. For a summary of the split in state court authority, see Hennepin County v. Ryberg, 168 Minn. 385, 210 N.W. 105 (1926).

957. 231 U.S. 669 (1914).

958. *Id.* at 674.

959. As part of his testimony in support of Congress' power to mandate state enforcement of national no-fault motor vehicle insurance standards, *see infra* note 982, Dean Griswold submitted a written statement in which he contended that these cases hold that Congress has "the authority to confer power on state officials not given in state law." *Hearings on S. 354 Before the Senate Comm. on the Judiciary,* 93d Cong. 2d Sess. 743, 819-23 (1974) [hereinafter cited as *Hearings on*

license by the Federal Power Commission (FPC) to the City of Tacoma, Washington, to construct two hydroelectric power dams on the Cowlitz River. The challenge was based on the grounds that the city had not obtained state approval of its plans for water diversion and fish protection and that the dams would exceed a height limitation established by state law. On the basis of the Supreme Court's decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*[960] that a private association licensee did not have to comply with state law requirements that would prevent construction of a dam, the Ninth Circuit held in *Washington Department of Game v. Federal Power Commission*[961] that the city licensee did not have to comply with similar state law restrictions. The contention that "Tacoma, as a creature of the State of Washington, cannot act in opposition to the policy of the State or in derogation of its laws"[962] was also answered by *First Iowa*. The private association in *First Iowa* was also a creature of the state, and state laws could not prohibit a licensee from constructing a dam on the navigable waters of the United States.[963] The Ninth Circuit did not hold that Congress has the authority to augment the state law powers of the city; it did not, for example, hold that Congress could authorize a state's political subdivision to operate a public utility if state law prohibited municipalities from engaging in this activity. The court held simply that when a political subdivision has the authority under state law to build dams, to operate an electric utility, and to be an FPC licensee, state laws that conflict with national law and prevent the construction of a dam by a private or a public utility are invalid.

Subsequent cases in the tortured history of the Cowlitz River dams do not extend the narrow holding of the Ninth Circuit. In a bond validation action brought by the city to establish its right to sell bonds to finance construction of the dams, the Washington Supreme Court, notwithstanding claims that dam construction was illegal under state law, initially reversed a trial court judgment dismissing the city's complaint.[964] The court held that the city's complaint stated a cause of

S.354]. For a narrower reading of these cases consistent with the interpretation below, see Brown, *supra* note 282, at 300-02.

960. 328 U.S. 152 (1946).

961. 207 F.2d 391 (9th Cir. 1953) (en banc), *cert. denied,* 347 U.S. 936 (1954).

962. *Id.* at 396.

963. *Id.*

964. City of Tacoma v. Taxpayers of Tacoma, 43 Wash. 2d 468, 262 P.2d 214 (1953).

action, that its FPC license was valid, and that the bonds were valid.[965] Since the state supreme court expressly found that the city had state law authority "to engage in the business of developing, transmitting and distributing power" and that the city as a licensee was "in the same position as any other licensee" of the FPC,[966] its decision, like that of the Ninth Circuit, establishes only a limited proposition: state law restrictions on an activity that conflict with national law are invalid regardless whether the activity is performed by a private or a public entity.

Although the state supreme court majority never suggested that the case raised any question of Congress' power to delegate national authority to a state's political subdivision and to augment its powers,[967] a majority addressed this issue when the bond validation case returned after remand.[968] In its second decision in the bond validation case, the state supreme court found that state law prohibited the condemnation of state-owned lands, which were required for the construction of the dams, and that the city had no express state law power to condemn state-owned lands.[969] Over the vigorous objection of the dissenters that consideration of the validity of the bonds and of state law limitations on the city's power to construct the dam were barred by the law of the case and res judicata,[970] the Washington Supreme Court then held that Congress could not confer power on the city to condemn state-owned lands because the city did not have adequate state law authority and that the Federal Power Act did not purport to confer this power.[971] Since the state-owned lands were necessary to the construction of the dam and the city lacked the authority to condemn them, construction of the dam was enjoined.

Although this second opinion of the state supreme court clearly states that Congress cannot confer power on a municipality to act in

965. *Id.* at 493-94, 262 P.2d at 225.

966. *Id.* at 492, 262 P.2d at 224.

967. In noting that the state legislature could curtail or abolish the city's state law authority to engage in the production and distribution of electric energy, the court directly recognized that Congress lacks the authority to supplement the state law power of a municipality to apply for an FPC license and to operate a hydroelectric plant if state law prohibits the municipality from engaging in this activity. *Id.*

968. City of Tacoma v. Taxpayers of Tacoma, 49 Wash. 2d 781, 307 P.2d 567 (1957) (en banc), *rev'd and remanded,* 357 U.S. 320 (1958).

969. 49 Wash. 2d at 796-98, 307 P.2d at 575-76.

970. *Id.* at 802-14, 307 P.2d at 578-85.

971. *Id.* at 800, 307 P.2d at 577.

excess of its state law authority, the Supreme Court's reversal of this judgment does not establish the contrary proposition that Congress can supplement the state law authority of state political subdivisions.[972] The Supreme Court's judgment rested entirely on procedural grounds. It held only that consideration of the question whether the FPC license delegated to the city "federal eminent domain power" to take the state-owned lands was foreclosed by the final judgment of the Ninth Circuit and that the arguments in the bond validation case were an impermissible collateral attack.[973] The result of the Supreme Court's decision is that the city could exercise a national eminent domain power over state-owned lands, but this result is entirely consistent with the original narrow holding of the Ninth Circuit. The state law prohibition on condemnation of state-owned lands applied equally to public and private FPC licensees,[974] and the courts in effect recognized only that state law restrictions on private licensees of the FPC, which are invalid because they conflict with national law, are also invalid as applied to a municipal licensee of the FPC when the municipality has the authority under state law to construct hydroelectric dams.[975]

The Cowlitz litigation is, thus, best interpreted as confined to the question of the validity of state law restrictions that apply equally to public and private licensees of the FPC and national authority to preempt these restrictions. Contrary to the unwarranted expansive readings of some commentators,[976] these cases do not address, much less answer, the question of Congress' power to delegate national authority that augments the state law power of state officers, agencies, or political subdivisions.[977] The only FPC case that reaches this issue supports the

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972. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958).

973. *Id.* at 333, 339-41. After the Supreme Court's decision, the voters enacted an initiative establishing the same height limitation on dams that the Ninth Circuit had held invalid in its original decision on Tacoma's license. The Washington Supreme Court held that this initiative had no effect on Tacoma's authority to construct the dam because the Ninth Circuit's judgment was res judicata. City of Tacoma v. Taxpayers of Tacoma, 60 Wash. 2d 66, 371 P.2d 938 (1962) (en banc).

974. *See* 49 Wash. 2d at 797-98, 307 P.2d at 575-76.

975. The Supreme Court expressly recognized that Tacoma had state law authority to construct and operate public utilities. 357 U.S. at 323 n.4.

976. *See supra* note 959.

977. Ironically, the Washington state courts' insistence that the issuance of a FPC license to a municipality raises the question of Congress' power to augment the state law powers of the state's political subdivisions is partly responsible for the broad reading of the FPC license cases as holding that Congress does have this power. After the completion of the Cowlitz litigation, federal and state courts again addressed questions about the power of a municipal licensee to disregard state

principle established by the theory of political accountability that Congress can delegate national authority but that Congress cannot expand the political authority of a state's officers, agencies or political subdivisions. In *Washington Public Power Supply System v. Pacific Northwest Power Co.*, a federal district court held that where state law did not authorize a municipal corporation to construct hydroelectric facilities outside of the state, an FPC license could not confer such authority.[978]

c. Congress' Power to Mandate State Enforcement of National Regulations

In addition to grant conditions, threats of national regulation, and delegation of national authority, Congress has also employed the states as its agents to regulate private activity by mandating state enforcement of national regulations. Congress has mandated state enforcement both by augmenting state law and ordering state enforcement and by requiring the states to enact and enforce state laws that meet national standards.[979] Such exercises of national political power are rare. The only modern examples are the EPA's attempt to compel state enforcement of transportation control plans,[980] the Public Utility Regulatory Policies Act of 1978,[981] and a proposal for national no-fault motor ve-

law restrictions. The question in this second round of cases was the power of a municipal licensee of the FPC to condemn lands owned by a state Public Utility District (PUD) where state law expressly denied municipalities the power of eminent domain over PUD lands. The federal court treated the state law restriction as analogous to a state prohibition on condemnation of PUD lands by a private licensee of the FPC; that is, it viewed the state law restriction as providing substantive protection for PUD's and not as a limit on municipal political powers. Since the state law restriction would have prevented construction of a dam, it conflicted with national law and was preempted, and the same result would have been reached regardless whether the FPC licensee was a public or private entity. *See* Public Utility District No. 1 v. FPC, 308 F.2d 318 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 908 (1963). The state courts, nonetheless, insisted that the case involved a delegation of federal eminent domain power that was invalid because it expanded the political authority of the municipality. Beezer v. City of Seattle, 62 Wash. 2d 569, 383 P.2d 895 (1963) (en banc), *rev'd,* 376 U.S. 224 (1964); Beezer v. City of Seattle, 60 Wash. 2d 652, 375 P.2d 256 (1962); Beezer v. City of Seattle, 60 Wash. 2d 239, 373 P.2d 796 (1962). At most, however, the federal court held only that where state law authorizes a municipality to construct hydroelectric dams and to be an FPC licensee, national authority can be delegated to the same extent to public and private entities.

978. 217 F. Supp. 481 (D. Or. 1963), *vacated,* 332 F.2d 87 (9th Cir. 1964). *Accord* Latinette v. City of St. Louis, 201 F. 676 (7th Cir. 1912) (city with state law authority to build a bridge and to buy lands in a neighboring state delegated national eminent domain power over lands in the neighboring state).

979. *See supra* text accompanying notes 547-48 & 581-691.

980. *See supra* text accompanying notes 581-609.

981. *See supra* text accompanying notes 610-91.

hicle insurance.[982] Under the theory of political accountability, Congress has no power to mandate state enforcement of national regulations. This limitation on national power is consistent with the lessons of history. The only argument in support of Congress' power to impose an enforceable duty on the states to administer national regulatory programs is extravagant, unfounded, impractical, and unnecessary for effective implementation of national policies.

Statutes that mandate state enforcement of national standards for private activity are not a valid exercise of national political power because Congress is not politically accountable, and judicial protection of state autonomy is warranted. Congress is not politically accountable because there are no political checks on its power to impose a duty on the states to regulate private activity. Although the application of the national standards to a particular private activity checks Congress' power with respect to the substantive policy governing private activity, it does not check Congress' power to use the states as its administrative agents. Moreover, since the states bear the administrative and financial costs of enforcing the national regulations, there are no costs imposed on the national electorate to limit the extent to which Congress can use the states.

In the absence of a political check, decisions to regulate private activity are not the product of a national majority. Judicial deference to national decisions to mandate state enforcement of national policies would permit Congress to achieve a result (the administration and enforcement of national policy) that a majority of the national electorate might well disapprove if it was required to bear the costs of implement-

982. As originally introduced in 1973 and 1974, the proposed national no-fault legislation would have mandated state enforcement of national standards governing private insurance companies and state administration of a no-fault insurance benefits plan, and it made no provision for national administration or enforcement. As amended, the bills introduced in 1975 and 1977 eliminated the mandate and provided for state enforcement by threatening direct national regulation if the states failed to adopt and enforce the national standards. This threat of national enforcement probably would have been very effective because the national standards to be enforced by the states were less onerous than an alternative set of national standards to be enforced by the national government if a state refused to implement the national regulatory program. *See generally* AMERICAN ENTERPRISE INSTITUTE, FEDERAL NO-FAULT INSURANCE LEGISLATION (1978); Dorsen, *The National No-Fault Motor Vehicle Insurance Act: A Problem in Federalism,* 49 N.Y.U. L. REV. 45 (1974); Note, *The National Standards for No-Fault Insurance Act: Good Intentions and Bad Federalism,* 25 BUFFALO L. REV. 575 (1976); Note, *Is Federalism Dead? A Constitutional Analysis of the Federal No-Fault Automobile Insurance Bill: S. 354,* 12 HARV. J. ON LEGIS. 668 (1975).

ing national policy. Another result of judicial deference to mandatory state enforcement of national regulations would be unlimited national power to divert state administrative and financial resources to the implementation of nationally determined policies at the expense of enforcement of state policies. The application of the theory of political accountability to statutes that impose a duty on the states to regulate private activity and the justification for judicial protection of the states may be illustrated by consideration of the EPA's transportation control plan regulations, which required the states to enact and enforce state laws governing private activity in conformity with national standards,[983] and the PURPA requirement that the states enforce state law as augmented by a delegation of national authority.[984]

In considering the EPA regulations mandating state enforcement of transportation control plans, the courts of appeals focused almost exclusively on the effects of these regulations on the states. The requirement that the states enact legislation and adopt regulations in conformity with national standards for the reduction of motor vehicle air pollution was held to interfere impermissibly with the sovereign state function of legislating. Similarly, the requirement that the states enforce these laws and regulations governing private use of automobiles was characterized as commandeering state administrative agencies.[985] Although the EPA regulations did have these effects, the impact on the states is not in itself a reason for holding this exercise of national political authority invalid. Other, valid means of employing the states as the nation's agents have exactly the same effect on the states. The states may be required to enact legislation, to adopt regulations, and to enforce them as a condition of a national grant,[986] as an alternative to threatened direct national regulation of private activity,[987] or as a prerequisite to the delegation of national authority.[988]

The focus in these cases, which distinguishes other means of employing the states as national agents, should have been the absence of any political checks and the consequent lack of political accountability. Although the transportation control plans affected private activity by re-

983. *See supra* text accompanying notes 581-609.
984. *See supra* text accompanying notes 610-30.
985. *See supra* note 600 and text accompanying notes 600-01.
986. *See supra* text accompanying notes 217-36.
987. *See supra* text accompanying notes 559-62.
988. *See supra* text accompanying notes 947-48.

stricting the use of automobiles, the effect on private activity and resistance to these unpopular controls did not provide any check on Congress' power to employ the states to enforce them. In fact, the imposition of a duty on the states to administer and enforce transportation control plans was all the more attractive to the EPA and Congress to the extent that it confused the line of responsibility for the political decision to restrict automobile use. The ineffectiveness of the impact on private activity as a political check on Congress' power to employ the states as its agents is matched by the complete inapplicability of the second potential political check on national authority. The costs to the national electorate of administering and enforcing national policies for private activity are completely avoided if state implementation is mandated. If the full administrative and enforcement costs of the transportation control plans had been imposed on the national electorate, and the blame for restrictions on automobile use more easily assigned to Congress through the presence of national enforcement officers, Congress might well have decided either to impose no controls or to impose less stringent ones. There is simply no basis for judicial deference to congressional political decisions when there are no political checks to guarantee that the decision is the product of a national majority. Judicial protection of the states' interests in controlling their state governmental resources is warranted where there are no political checks on the diversion of the states' administrative resources to the satisfaction of national political demands.

In contrast to the mandate of the transportation control plan regulations that the states must enact and enforce national standards as state law to control automobile air pollution, the PURPA mandates state enforcement of existing state law as augmented by national authority to regulate electric utilities.[989] This second, alternative means of imposing

989. In *FERC* the Court concluded that the PURPA was, for the most part, not mandatory. Contrary to Congress' intention, the Court found that the provisions of Titles I and III for consideration of national utility standards by state agencies were not mandatory. *See supra* text accompanying notes 654-64. The Court did recognize the duty imposed on the states under section 210 to enforce national rules for cogeneration and small power production facilities, but it upheld section 210 on the narrow ground that state agencies, like state courts, have a duty to adjudicate claims arising under national law. *See supra* text accompanying notes 632-53. Given the Court's interpretation of the PURPA, evaluation of the statute as drafted to impose a duty on state agencies to enforce national law may seem superfluous. Nevertheless, evaluation of the PURPA on its actual terms is important for several reasons. First, because Congress intended in the PURPA to impose a duty on state agencies, it may do so again and in a way that cannot be avoided even by artful statutory construction. Second, the Court suggested that the states have a duty to enforce

a duty on the states to enforce national policies for private activity is as invalid under the theory of political accountability as the first. There are no political checks on the PURPA requirement that the states must consider and determine whether to adopt national rate design and service standards for electric utilities.

The PURPA has two effects on the states. First, national rate design and service standards may displace state regulatory policies for electric utilities. This effect, however, may not be substantial because the states are free to refuse to adopt the national standards. The second, more substantial, effect is interference with the states' control over their administrative and financial resources. State administrative agencies must conduct proceedings to determine whether national rate design and service standards should be adopted and enforced, and these proceedings will be conducted at the expense of the implementation of state law policies. Although the political checks of the national political process limit Congress' power to displace state policies for utility regulation, they do not check Congress' control over the allocation of state governmental resources. The first political check is the application of national regulations to private activity. Since the national rate design and service standards are to be applied to private electric utilities, Congress is politically accountable for these substantive rules. The impact of the national standards on private activity does not check, however, Congress' power to compel state agencies to conduct administrative proceedings in order to consider and determine whether to adopt these standards. Electric utilities may in fact prefer state to national administration on the ground that state agencies will be more sympathetic to an important local interest, and state administrative officials, acting in their self-interest, will probably prefer state to national enforcement. The other political check in the national political process is the imposition on the national electorate of the costs of administering and enforcing national policies. This check also is completely, and perhaps intentionally, avoided when a duty is imposed on the states to act at the nation's agents.

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national law. *See supra* text accompanying notes 686-91. Finally, the Court's rationale upholding the duty imposed on the states under section 210 is not convincing. *See supra* text accompanying notes 644-53. Contrary to the Court's conclusion that section 210 involved solely a duty of adjudication, this section in fact imposed a broader duty to enforce national rules for private activity. Nevertheless, in upholding section 210, the Court did not address the fundamental question of federalism limits on Congress' power to mandate state enforcement of national law.

In the absence of any political check on Congress' power to mandate state administrative proceedings to consider the adoption of national rate design and service standards for electric utilities, Congress is not politically accountable. There is no basis for judicial deference to this congressional decision because there is no reason to believe that it is a product of a national majority. Congress might well have been reluctant to impose the rate design and service standards if it had to fund and staff a regulatory agency to administer and enforce these policies for utility regulation.[990] The costs of applying national policies to every electric utility in the nation are substantial, and these costs would then have been part of the aggregate burden of enforcing national regulations imposed on the national electorate.

Not only is there no basis for judicial deference to the congressional determination, there is a justification for judicial intervention in the national political process to protect the states. Recognition in principle of Congress' power to mandate state enforcement of national policies for private activity would permit unlimited diversion of state governmental resources from satisfaction of the demands of the political community in each state to fulfillment of national policy.

Although the Court in *FERC* avoided the question of Congress' power to impose a duty on the states by an artful construction of Titles I and III and by construing the duty imposed under section 210 as a limited duty to adjudicate claims arising under national law,[991] the PURPA provided the Court with the occasion to set a principled limit on Congress' power to employ the states as the nation's agents. The Court should have recognized Congress' intention in both Titles I and III and section 210 to impose a duty on the states, and the Court should have held that mandatory state enforcement of national regulations governing private activity is an unconstitutional intrusion on state autonomy because Congress is not politically accountable. Instead, the Court left open the possibility that Congress may act in a politically nonaccountable fashion by suggesting that the states have a duty to enforce national law.[992]

990. *See* Dorsen, *supra* note 982, at 61 (Congress is more likely to pass a no-fault motor vehicle insurance law if it can rely on state enforcement at state expense than if it must rely on national enforcement).

991. *See supra* text accompanying notes 632-64.

992. *See supra* text accompanying notes 686-91. There is one possible explanation of the Court's conflicting statements on the states' duty to enforce national law. Congress has attempted to impose a duty on the states to enforce national regulations of private activity in two ways. *See*

The argument that mandatory state enforcement of national regulatory programs is unconstitutional is completely consistent with the lessons of history. Although the framers intended that the national government would be able to act directly through its own officers and that it would not have to rely on the states for the execution of national policies, they also anticipated state cooperation.[993] From the first administration of President Washington to today, Congress has relied on state assistance in the implementation of national law.[994]

For the most part, early statutes were limited to delegation of national authority to state judicial officers, usually to perform quasi-judicial functions, but also occasionally to perform functions that were clearly executive in nature. This practice of delegating national authority chiefly to state judicial officers to perform quasi-judicial functions is in part explained by the famous Madisonian Compromise and the expectation that state courts would exercise jurisdiction over cases within the article III judicial power of the nation.[995] Given this expectation, it was an easy step to delegating national authority to state judicial of-

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supra text accompanying notes 547-48. First, as in the transportation control plan cases, Congress may require the states to enact and enforce state laws that establish national standards for private activity. *See supra* text accompanying notes 581-609 & 985-88. Second, as in the case of the PURPA, Congress may supplement state law and require the states to enforce national regulations. *See supra* text accompanying notes 611-23 & 625 and text following note 989. The Court's statement that it has "never . . . sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations" was supported by a reference to its inconclusive resolution of the transportation control plan cases in *EPA v. Brown*. Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126, 2138 (1982). It may be possible to reconcile this statement with other statements suggesting the states' have a duty to enforce national law, *see supra* text at notes 686-89, if one sees a distinction between requiring the states to enact laws providing for enforcement of national regulations and requiring the states to enforce national regulations. The distinction, if any, is not one of constitutional dimension. *See supra* note 602.

993. United States v. Jones, 109 U.S. 513, 519 (1883); THE FEDERALIST No. 45, at 312-13 (J. Madison) (J. Cooke ed. 1961) (collection of national tax by state or national officers).

994. For a consideration of state cooperation in the administration of national law in the early years of the republic, see L. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 387-405 (1948). Modern practice of delegation of national authority is discussed *supra* at notes 943-48.

995. At the Constitutional Convention the question whether the trial of article III cases should be by inferior federal courts or by state courts subject to Supreme Court review was settled by giving Congress the power to create inferior federal courts. It was understood that state courts would be the primary forum for vindication of claims within article III. C. WARREN, THE MAKING OF THE CONSTITUTION 325-36, 531-48 (1928); Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 10 (1948). *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 844 (2d ed. 1973) (Judiciary Act of 1789 confirmed understanding the state courts would hear article III cases).

ficers to perform quasi-judicial functions related to the trial of an article III case in a federal court.[996] This use of state judicial officers to perform quasi-judicial functions laid the foundation for delegation of authority to perform executive functions and, somewhat later, for the delegation of national authority to state executive officers. With few exceptions, the early statutes merely authorized state judicial and executive officers to enforce national law and did not impose any duty to act. The courts, in reviewing these statutes, almost invariably maintained that the delegation of national authority could not expand the powers of the delegate and that the delegate must have adequate authority under state law to exercise the delegated authority. The courts also held uniformly that Congress could not impose a duty on state officers to enforce national law.

The practice of delegating national authority to state judicial officers to perform quasi-judicial functions related to the trial of an article III case in a federal court began with the Judiciary Act of 1789. Congress authorized state justices of the peace and magistrates at the expense of the United States to arrest, imprison, and to admit to bail offenders of the criminal laws of the United States.[997] Congress also authorized *depositions de bene esse* to be taken by state court judges and mayors.[998] Although the courts never considered the validity of the latter delegation, they consistently upheld Congress' power to delegate authority to arrest, imprison, and bail offenders of national law.[999] Congress subsequently delegated similar authority to state judicial officers to arrest deserting seamen[1000] and fishermen,[1001] to grant bail to persons ar-

996. Questions about Congress' power to delegate authority to or impose a duty on state judicial officers are intertwined with questions about Congress' power to use state courts to hear article III cases. A distinction between these two questions is important because the historical justification for Congress' power to use state courts to try article III cases is stronger than the justification for using state judicial officers to perform quasi-judicial tasks.

997. Act of September 24, 1789, ch. 20, § 33, 1 Stat. 91-92. This provision remains in force, and the power of state officers to arrest federal offenders is generally accepted. 18 U.S.C. § 3041 (1976). *See, e.g.,* United States v. Bowdach, 561 F.2d 1160, 1167-68 (5th Cir. 1977).

998. Act of September 24, 1789, ch. 20, § 30, 1 Stat. 88-90.

999. *Ex parte* Gist, 26 Ala. 156 (1855); Harris v. Superior Court, 51 Cal. App. 15, 196 P. 895 (1921); Goulis v. Stone, 246 Mass. 1, 140 N.E. 294 (1923); Commonwealth v. Holloway, 5 Binn. 512 (Pa. 1813); *Ex parte* Rhodes, 12 Niles' Weekly Register 264 (S. C. 1817). *Contra* Maryland v. Rutter (Almeida's Case), 12 Nile's Weekly Register 115, 231 (Baltimore County Court 1817); *Ex parte* Pool, 4 Va. 276, 284-91 (2 Va. Cas. 1821) (Semple, J., dissenting) (dictum).

1000. Act of June 7, 1872, ch. 322, § 53, 17 Stat. 274 (REV. STAT. § 4599 (1878)); Act of July 20, 1790, ch. 29, §§ 3, 7, 1 Stat. 132, 134 (REV. STAT. § 4598 (1878)). *See* Robertson v. Baldwin, 165 U.S. 275 (1897) (upholding Congress' power to authorize state justices of the peace to arrest de-

rested for violating national laws regulating trade with the Indians,[1002] to issue search warrants,[1003] to take depositions in claims against the United States,[1004] and to take testimony in cases of disputed congressional elections for submission to the clerk of the House of Representatives.[1005]

In addition to these statutes delegating authority to perform quasi-judicial functions, other statutes delegated authority to state judicial officers to perform functions that seem to be more executive or administrative in nature, like the naturalization of aliens as citizens of the United States.[1006] All the courts that considered the question of Congress' power to delegate authority to state courts to naturalize aliens upheld this power, but the opinions usually noted that the state courts had authority under state law to perform this function for the national government and frequently added that Congress could not compel performance of this task.[1007]

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serting seamen); *Ex parte* Pool, 4 Va. 276 (2 Va. Cas. 1821) (same). *See also* Dallemagne v. Moisan, 197 U.S. 169 (1905) (treaty conferred power on local officers to arrest deserting seamen but statute implementing treaty provided for arrest solely by national officers).

1001. Act of June 19, 1813, ch. 2, § 1, 3 Stat. 2.

1002. Act of March 30, 1802, ch. 13, § 16, 2 Stat. 144-45; *see* Act of March 3, 1815, ch. 100, § 20, 3 Stat. 243-44.

1003. Espionage Act of June 15, 1917, ch. 30, tit. XI, § 1, 40 Stat. 228; Act of March 3, 1815, ch. 100, § 10, 3 Stat. 241; Act of March 2, 1799, ch. 22, § 68, 1 Stat. 677-78.

1004. *See* United States v. Bailey, 34 U.S. (9 Pet.) 238, 254 (1835) (collection of statutes).

1005. Act of January 23, 1798, ch. 7, §§ 5, 6, 1 Stat. 538. Subsequent acts authorized state judges and certain local officials to issue subpoenas for attendance at depositions. 2 U.S.C. § 388(a)(2),(3) (1976); *see* Act of February 19, 1851, ch. 11, 9 Stat. 568, *as amended*, 2 U.S.C. §§ 201-226 (1964), *repealed by* Federal Contested Election Act of 1969, Pub. L. No. 91-138, § 18, 83 Stat. 290.

1006. Congress has authorized state courts to admit persons to citizenship continuously from 1795. *Compare* Act of January 29, 1795, ch. 20, 1 Stat. 414 *with* 8 U.S.C. § 1421(a),(b) (1976). In addition to naturalization, there are at least two other examples of delegation of national authority to state judicial officers to perform administrative functions for the national government. State court judges were authorized to take proof of the circumstances that would entitle refugees from Canada and Nova Scotia to a bounty paid by the Department of War. Act of April 7, 1798, ch. 26, § 3, 1 Stat. 548. Congress also authorized judges of "a county court of the State of Oklahoma" to supervise land conveyances by Indians, and the Oklahoma Supreme Court approved this delegation of power where the state legislature had authorized the county courts to act in the capacity provided by national law. Marcy v. Board of Commissioners, 45 Okla. 1, 144 P. 611 (1914). *See* Parker v. Richard, 250 U.S. 235, 239 (1919) (state court acts as an agency of national government in approving conveyances of Indian lands); Armstrong v. Maple Leaf Apartments, 622 F.2d 466 (10th Cir. 1980) (use of state courts to approve conveyances of Indian lands not questioned).

1007. Holmgren v. United States, 217 U.S. 509 (1910); Levin v. United States, 128 F. 826 (8th Cir. 1904); State v. Penney, 10 Ark. 621 (1850); *In re* Martin Conner, 39 Cal. 98 (1870); Morgan v. Dudley, 57 Ky. (18 B. Mon.) 693 (1857); *In re* Ramsden, 13 How. Pr. 429 (Spec. Term 1857); State

In contrast to those statutes that delegated authority to state judicial officers, a few statutes imposed a duty on these officers to perform quasi-judicial or executive functions.[1008] The most celebrated provision imposing a duty on state judicial officers was section 3 of the Fugitives from Justice and Fugitive Slave Act of 1793,[1009] which required federal judges and state magistrates to grant a warrant for the removal of recaptured fugitive slaves. Although the Court addressed the question of Congress' power to impose this duty in *Prigg v. Pennsylvania*,[1010] the actual holding of the case is quite narrow. The case was specifically designed to test the constitutionality of a Pennsylvania statute governing the return of fugitive slaves,[1011] and the Court, albeit in six separate opinions, held only that this state statute was invalid under the supremacy clause.[1012] Nonetheless, three Justices—Justice Story, Chief

v. Libby, 47 Wash. 481, 92 P. 350 (1907). A few state courts denied applications for citizenship on the ground that the court in which the petition for naturalization was filed either lacked state law authority or was prohibited by state law from admitting persons to citizenship, but in each case other courts in the state were open to administer oaths of citizenship because they had the requisite state law authority. *Ex parte* Knowles, 5 Cal. 301 (1855); Stephens, Petitioner, 70 Mass. (4 Gray) 559 (1855); *Ex parte* McKenzie, 51 S. C. 244, 28 S.E. 468 (1897). *See* State *ex rel.* Rushworth v. Judges of Inferior Court, 58 N.J.L. 97, 32 A. 743, 30 L.R.A. 761 (Sup. Ct. 1895) (upholding New Jersey statute prohibiting state courts from admitting aliens to citizenship within a 30 day period preceding an election). These decisions support the conclusion that the delegation of national authority to admit aliens to citizenship is valid only if the delegate has state law authority to exercise the delegated power.

1008. Beginning in 1790, Congress required justices of the peace to determine the fitness of a ship bound on a voyage to a foreign port upon a complaint that the vessel was not seaworthy. Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132; Act of December 21, 1898, ch. 28, §§ 7, 8, 30 Stat. 757. For many years, state court clerks had a duty to forward the record of a case removed to a federal court and were subject to fine and imprisonment for failure to perform this duty. Act of February 28, 1871, ch. 99, § 17, 16 Stat. 439-40; Act of March 3, 1875, ch. 137, § 7, 18 Stat. 472. National law no longer imposes this duty. *See* 28 U.S.C. §§ 1447, 1449 (1976). Apart from these two statutes, the only other example of a statute imposing a duty on state judicial officers that has been discovered is an 1829 provision imposing a duty on courts and judges to arrest deserting foreign seamen, but this provision by its terms did not directly apply to state judicial officers. Act of March 2, 1829, ch. 41, 4 Stat. 359.

1009. Act of February 12, 1793, ch. 7, § 3, 1 Stat. 302-05. Section 1 of the Act imposed a duty on state executives to extradite fugitives from justice, and the Court considered Congress' power to impose this duty in Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861). *See infra* text accompanying notes 1026-31. Sections 2 and 4 of the Act prohibited interference with persons returning fugitives from justice and fugitive slaves.

1010. 41 U.S. (16 Pet.) 539 (1842). *See generally* 5 C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64, 535-547 (1974).

1011. 5 C. SWISHER, *supra* note 1010, at 537-38.

1012. Justice Story, who wrote for a plurality of three, argued that Congress' power to control fugitive slaves was exclusive. 41 U.S. (16 Pet.) at 622-25. Justices Wayne and McLean concurred specially and agreed that Congress' power was exclusive. *Id.* at 638-44 (Wayne, J., concurring),

Justice Taney, and Justice McLean—commented extensively on the question of Congress' power to impose a duty on state magistrates and on the question whether article IV, section 2, of the Constitution,[1013] which by its terms established a duty to deliver up fugitive slaves, supported Congress' power to compel state magistrates to enforce national law.

Justice Story, together with Justices Catron and McKinley, concluded that the constitutional duty to provide for the delivery of fugitive slaves applied solely to the national government and not to the states.[1014] He then sidestepped the question whether Congress could impose a duty on state magistrates to assist in the rendition of fugitive slaves and found that state magistrates could exercise national authority unless prohibited by state law.[1015] Although Chief Justice Taney disagreed with Story about the effect of article IV, section 2, he ultimately reached the same conclusion about Congress' power to impose a duty on state magistrates. The Chief Justice argued that the constitutional duty to provide for the delivery of fugitive slaves applied to the states as well as the nation, but the state's duty was to be met by state, not national, legislation.[1016] In Taney's view, the state's duty was crucial to the protection of the property interests of slaveowners because there were too few federal judges to grant the warrants for removal of fugitive slaves and because Congress could not compel state magistrates to execute the duties imposed by the 1793 Act if state law prohibited them from acting.[1017] Thus, four, and possibly five,[1018] justices

861 (McLean, J., concurring). Justice Wayne also explained that the brief notation of Justice Baldwin's concurrence rested on a similar ground. *Id.* at 637. Chief Justice Taney, Justice Thompson, and Justice Daniel argued that the states had concurrent legislative power, but they concluded that the Pennsylvania statute was invalid because it conflicted with the 1793 Act. *Id.* at 632-33 (Taney, C.J., concurring), 633-35 (Thompson, J., concurring), 651-57 (Daniel, J., concurring).

1013. No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulations therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the party to whom such Service or labour may be due.

U.S. CONST. art. IV, § 2, cl. 3.

1014. 41 U.S. (16 Pet.) at 615-16.

1015. *Id.* at 622.

1016. *Id.* at 627-28.

1017. *Id.* at 630-31.

1018. In his concurring opinion, Justice Wayne argued that national legislation was exclusive, and he did not discuss directly the question of Congress' power to impose a duty on state officers. Nevertheless, his approval of state legislation authorizing state magistrates to execute national

expressly took the view that Congress could not compel state magistrates to issue warrants for the rendition of fugitive slaves contrary to a state law prohibition.[1019] Only Justice McLean took a broader view of Congress' power to impose a duty on state judicial officers. He argued that article IV, section 2, gave Congress power over state officers notwithstanding the general rule that Congress has no power to impose duties on state officers. Since the Constitution imposed a duty on the states to surrender fugitive slaves, Congress could enforce this duty by statute. He then admitted, however, that the states could resist and that there was no means to enforce the duty.[1020]

Thus, as the Court noted in *United States v. Jones*, Congress' practice of using state judicial officers and courts as the nation's agents to perform both quasi-judicial and administrative functions began with the establishment of our federal system.[1021] This practice was commonplace in 1883 when the *Jones* Court approved delegation of authority to state officers to determine the compensation due for private property taken for the use of the national government.[1022] Although the Court occasionally noted that state court officers could exercise powers conferred by Congress unless prohibited by state law, a narrower statement of Congress' power to delegate national authority is more accurate.[1023] The courts recognized Congress' power to delegate authority to state judicial officers to the extent that those officers had existing state law power to exercise the delegated national authority.[1024] They almost in-

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laws governing fugitive slaves may support the inference that Congress has no power to impose a duty on state judicial officers. *Id.* at 644.

1019. The Pennsylvania statute at issue in *Prigg* expressly prohibited state magistrates from complying with the 1793 Act. *Id.* at 554-555.

1020. *Id.* at 664-66. In 1850, Congress enacted a more stringent fugitive slave law. Act of September 18, 1850, ch. 60, 9 Stat. 462. This Act abandoned the effort to use state officers and provided for enforcement exclusively by national officers. Holcombe, *supra* note 5, at 314.

1021. 109 U.S. 513, 519-20 (1883). The Court did not specifically confine its summary of the states' role as national agents to state judicial officers and courts, but this qualification is implicit in the Court's examples.

1022. *Id.* at 520-21.

1023. For example, in *Holmgren v. United States* the Court upheld Congress' power to delegate authority to state courts to naturalize aliens and stated that "[u]nless prohibited by state legislation, state courts and magistrates may exercise the power conferred by Congress . . . ." 217 U.S. 509, 517 (1910). This statement that delegation was valid unless barred by state law goes farther than the facts of the case. A narrow reading of Congress' power to delegate naturalization authority is proper because state law in fact expressly authorized state courts to conduct naturalization proceedings. *Id.*

1024. This rule governing the delegation of national authority appears clearly in the naturalization cases. *See supra* note 1007.

variably cautioned in dictum that Congress could not compel state judicial officers to act.[1025]

This general rule governing Congress' power to use state judicial officers as the nation's agents applies with equal force to Congress' power over state executive officers. In the leading case of *Kentucky v. Dennison*,[1026] the Court considered the effect of section 1 of the Fugitives from Justice and Fugitive Slave Act of 1793, which imposed a duty on the executive authority of each state to arrest and deliver fugitives from justice in other states.[1027] Notwithstanding the constitutional provision requiring the extradition of fugitives from justice,[1028] the Court held that Congress could only "authorize a particular State officer to per-

1025. The Supreme Court usually assumed that the delegation of national authority and the use of state judicial officers as the nation's agents was done "with the consent of the States" and that state magistrates could not be compelled to exercise the delegated authority. United States v. Jones, 109 U.S. 513, 519 (1883); United States v. Bailey, 34 U.S. (9 Pet.) 238, 253 (1835). *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 39-40 (1825).

1026. 65 U.S. (24 How.) 66 (1861).

1027. Act of Feburary 12, 1793, ch. 7, § 1, 1 Stat. 302. Although the current provision governing extradition omits the word "duty," it still appears to be mandatory because it states that the executive authority "shall cause" the fugitive to be arrested and delivered for rendition. 18 U.S.C. § 3182 (1976).

1028. A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2, cl. 2. Although the court never expressly stated that article IV, section 2, clause 2, imposed a duty on the national government as opposed to the states, it subsequently took this position. *Ex parte* Siebold, 100 U.S. 371, 391 (1880). In *Prigg v. Pennsylvania*, Justice McLean argued that article IV, section 2, clause 2, gave Congress the power to impose a duty on state governors to extradite fugitives from justice just as article IV, section 2, clause 3, gave Congress the power to impose a duty on state magistrates to assist in the rendition of fugitive slaves. 41 U.S. (16 Pet.) 539, 664-66 (1842) (McLean, J., concurring). See *supra* text preceding note 1020.

In addition to the article IV provisions governing fugitives, there is at least one other constitutional provision that could be construed as imposing a duty on the states. Article I, section 4, clause 1, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." In *Ex parte* Siebold, 100 U.S. 371, 388 (1880), the Court suggested that this provision might be interpreted to impose a duty on the states to elect representatives to Congress. Nonetheless, the Court stopped short of stating that Congress has the power to compel the states to conduct elections, and the case holds only that when a state has decided to conduct elections for Congress, state officers who supervise elections to national office must conform to national law and can be punished for violations of both state and national laws governing elections. *See Ex parte* Clarke, 100 U.S. 399 (1880) (companion case).

Reading *Prigg*, *Dennison*, and *Siebold* together, it appears that even where the Constitution could be interpreted to impose a duty directly on state officers, the Court has never approved Congress' power to implement these constitutional provisions by imposing a statutory duty.

form a particular duty"[1029] and that Congress "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it."[1030] The duty to extradite fugitives from justice imposed by the 1793 Act was at most a "moral duty" because recognition of Congress' power to impose duties on state officers would impair their ability to perform the obligations imposed on them by state law.[1031] Although other statutes and regulations have occasionally imposed a duty on state executive officers, actual practice has been consistent with the rule announced in *Dennison*; that is, the national government has sought voluntary state cooperation instead of attempting to enforce the states' duties.[1032]

In light of this history, any argument that Congress has the power to require the affirmative exercise of state authority over private activity would seem to be extravagant. So far, only Professor Stewart has ventured such an argument.[1033] His contention that Congress has the power to mandate state enforcement of national environmental policies rests on two propositions. First, since the courts have the power to require states to regulate private pollution-causing activity that spills pollution over into neighboring states, Congress should have the same power to resolve interstate disputes by mandating state restrictions on private activity that generate pollution spillovers. Second, mandatory

1029. 65 U.S. (24 How.) at 108.

1030. *Id.* at 107. The continued validity of the broad proposition that Congress has no power to impose a duty on state officers is subject to question. In *Federal Energy Regulatory Commission v. Mississippi*, the Court quoted and criticized this statement. *See supra* text accompanying notes 686-89. Although the criticism may give rise to an inference that Congress has the power to impose duties on state officers, the *FERC* Court also reinforced *Dennison* by several statements denying Congress' power to impose a duty on the states to enforce national law. *See supra* text accompanying notes 690-91. In two other recent decisions the Court has suggested that in enforcing the fourteenth amendment Congress may be able to impose a duty on state officers. *See* Quern v. Jordan, 440 U.S. 332, 342 n.14, 358 n.15 (1979) (Brennan, J., concurring in the judgment); Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 676 & 682 n.44 (1978). On the question of Congress' power in enacting legislation to enforce the Civil War Amendments to use the states as agents of the nation, see *supra* note 342.

1031. 65 U.S. (24 How.) at 107-08.

1032. For example, during World War I, Congress authorized the President to use the services of any state officer in raising military forces and required these officers to perform any duty directed by the President. Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80-81. The President did not actually exercise this power to give orders to state officers; instead, the governors agreed to cooperate and the President's orders were in fact issued by the governors. CLARK, *supra* note 65, at 90-92; Note, *supra* note 952, at 144. *See* Koenig, *supra* note 57, at 780-81.

1033. Stewart, *supra* note 577. *See Hearings on S.354*, *supra* note 959, at 819-23 (statement of Dean Griswold).

state enforcement of national environmental regulations is necessary because there are no other means to achieve important environmental goals. His argument is not only extravagant when measured against the lessons of history; it is also unfounded. Moreover, national power to impose a duty on state officers to enforce national pollution standards is not, contrary to his assertion, necessary to achieve national goals, and in any event, mandatory state enforcement of national regulations is quite impractical.

Stewart's first proposition rests on an as yet unproven assertion about federal court power and an invalid analogy between the powers of federal courts and congressional powers. He begins by noting that the Court has held that a state as parens patriae may sue for a remedy for damages caused by pollution from neighboring states.[1034] In *Georgia v. Tennessee Copper Co.*,[1035] Georgia, as parens patriae, brought an ac-

1034. Stewart cites two cases, Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) and Missouri v. Illinois, 180 U.S. 208 (1901), in support of the states' power as parens patriae to bring suit for damages from spillover pollution and as a basis for his argument that federal courts may require the states to regulate private activity that generates spillover pollution. Stewart, *supra* note 577, at 1248 n.188. The first case provides a basis for an argument about judicial power to compel a state to regulate private activity because the polluter in that case was a corporation. The second case does not speak to his argument about judicial power to compel a state to regulate private activity because the sources of pollution in that case were sewage treatment systems owned and operated by a state and its political subdivisions. Stewart advances a separate, but related, argument for congressional power to regulate activities, like sewage treatment, that are performed exclusively by the states or their political subdivisions, and this argument is stated and criticized *supra* at note 905.

Given Stewart's distinct arguments for congressional power to regulate activities like sewage treatment plants that are almost exclusively a state function and for congressional power to compel state regulation of private activity, his analysis of the EPA's power to compel the states to implement the controversial transportation control plan regulations should be noted. Contrary to the argument above that the EPA transportation control plan regulations are an example of mandatory state regulation of private activity, *see supra* text accompanying notes 581-609, Stewart argues that these regulations are an example of national regulation of an activity that is performed exclusively by the states; that is, he sees an analogy between municipally owned and operated sewage treatment plants and state owned and operated highways. *See supra* text accompanying notes 588-89. He then argues that his justification of Congress' power to regulate municipal sewage treatment plants supports Congress' power to regulate state-owned highways under the transportation control plan regulations. Stewart, *supra* note 577, at 1234-43. If one accepts the dubious proposition that the EPA's transportation control plans regulated state activity, the explanation of the reasons why Congress lacks the power to regulate state operation of its highways is set forth in *supra* note 905. If one characterizes the EPA transportation control plan regulations as imposing a duty on the states to regulate the use of automobiles by private citizens, the explanation of the reasons why Congress lacks the power to impose a duty on the states to regulate private activity is set forth in the text *supra* following note 988.

1035. 206 U.S. 230 (1907).

tion against a corporation whose activity in Tennessee generated pollution that spilled over into Georgia, and the Court held that Georgia was entitled to an order enjoining the corporation from discharging noxious gases into the atmosphere. Although the states' action as parens patriae was brought against a corporation, Stewart argues that this case also justifies imposition of liability on Tennessee, the state in which the private pollution-causing activities were conducted. Liability of a state defendant is warranted, in his view, because if a state is entitled to a remedy for damages suffered by its own citizens, it should in turn be liable for damages to citizens in other states from spillover pollution created by the activities of its own citizens.[1036] Thus, because Georgia can seek a remedy for spillover pollution generated in Tennessee, Georgia should be liable for spillover pollution generated by its own citizens. If Georgia is liable for spillover pollution, then Tennessee and all other states are also liable, and the action in *Georgia v. Tennessee Copper Co.* could have been maintained against both the corporation and Tennessee. On this theory of the states' liability for spillover pollution, the remedy would be a court order enjoining the state in which the spillover pollution originates to regulate and restrict the pollution-causing activities of its citizens.[1037]

Stewart's argument is, in short, that in an action by a state as parens patriae for damages caused by spillover pollution generated in another state, a federal court can order the private source of pollution to reduce its air pollutant emissions, and it can also order the state in which the pollution originated to regulate the private pollution-causing activity. It is one thing for a court to order a private party to restrict its pollution-causing activities—the effect on the state is at most to displace its substantive policy that tolerates the emission of air pollutants. It is quite another thing for a court to order a state to regulate private pollution-causing activity because the effect of such an order is to require the state to allocate its governmental resources to satisfy a national pollution control policy established by the court. Stewart never identifies this impact on state autonomy of a court order requiring a state to regulate private activity, and no case has ever held that states must regulate private activity that generates spillover pollution.

Even if we were to accept Stewart's assumption that a court could

1036. Stewart, *supra* note 577, at 1248.
1037. *Id.*

order a state to regulate private pollution-causing activity, it does not follow, as he argues,[1038] that Congress has the same power as a court to mandate state enforcement of national environmental policy. Any mandate that the states must regulate private activity is an order made without political accountability,[1039] regardless whether the mandate is a court order or a national statute. In our democratic system, we tolerate court orders even though the court is not politically accountable. It stands democratic theory on its head, however, to argue as Stewart does that because a court may act in a politically nonaccountable fashion, Congress can also act in a politically nonaccountable fashion. Stewart's first proposition fails. The courts have never ordered the states to regulate private activity that generates spillover pollution, and even if courts did impose a duty on the states to regulate this type of private activity, judicial power does not provide a warrant for Congress to act in a politically nonaccountable fashion.

Stewart's second proposition that congressional power to mandate state enforcement of national environmental regulations is necessary to achieve important environmental goals[1040] is at bottom simply an argument that the ends justify the means. This proposition rests on his conclusion that neither grants made on a condition that the states enforce national environmental policies[1041] nor direct national enforcement,[1042] is a satisfactory alternative to mandatory state enforcement as a means of achieving national environmental goals. The conditional spending power is not a satisfactory alternative because there are both "practical and constitutional limitations" on its use as a means of requiring state administration and enforcement of national environmental regulations.[1043] The primary practical limitation is the risk that a state might refuse a national grant to avoid complying with a condition requiring state enforcement of unpopular environmental standards.[1044] State recalcitrance cannot be overborne simply by increasing the number of grants subject to the condition of state enforcement of na-

1038. *Id.*

1039. *See supra* text accompanying notes 982-84.

1040. Stewart, *supra* note 577, at 1263 ("effective implementation of national environmental policies will depend to a material degree on Congress' authority to requisition the enforcement resources of state and local governments").

1041. *Id.* at 1250-62.

1042. *Id.* at 1240-41.

1043. *Id.* at 1251.

1044. *Id.*

tional environmental regulations. *NLC* teaches that there is a constitutional limitation on the spending power: conditions "must be quite closely related" to the purpose of the expenditure.[1045]

Regardless whether Stewart's reading of the *NLC*-based constitutional limitation on the spending power is correct, or whether such a judicial restraint on the spending power is warranted,[1046] his invocation of a *NLC* limitation on the spending power is, to say the very least, selective. Grant conditions that require state enforcement of national environment regulations have exactly the same effect on the states as a statute that mandates state enforcement. Nonetheless, Stewart never considers *NLC* or state autonomy as a limitation on Congress' authority to mandate state enforcement under the commerce power or the power to resolve interstate conflicts derived from federal courts' power over interstate pollution spillovers. His recognition of a judicially enforceable *NLC* or state autonomy limitation on Congress' authority to require state enforcement of national regulations as a grant condition but not on Congress' authority to impose the same requirement under a power to resolve interstate disputes is not only selective, it is anomalous. There is a political check on Congress' authority under the spending power because the revenues to support a conditional expenditure are obtained from taxes levied on the national electorate, but there is no political check on a mandate that states regulate private activity.[1047] The constitutional limitation on the spending power that Stewart asserts, at least in the absence of any consideration of a state autonomy restriction on mandatory state enforcement, is a contrivance designed to support the conclusion that the spending power is not an adequate means for Congress to accomplish its environmental goals.

In addition to rejecting conditional grants that require state enforcement of national environmental policies, Stewart also rejects direct national administration and enforcement as a means of achieving important environmental goals. Direct national implementation of environmental standards is not, in many cases, a feasible alternative be-

1045. *Id.* at 1261-62.

1046. Under the theory of political accountability, no judicial check on Congress' power to condition a grant on state enforcement of national regulations is necessary. *See supra* text accompanying notes 927-31. A judicial requirement that the condition must be reasonably related to the purpose of a grant is, in any event, an unprincipled and an unworkable standard. *See supra* note 893 and accompanying text.

1047. *See supra* text accompanying notes 927-31 & 982-84.

cause there are "political obstacles."[1048] Congress, in Stewart's view, would be unlikely to vote in favor of rigorous environmental standards if it had to establish and fund a bureaucracy large enough to administer and enforce the standards in all fifty states.[1049] By imposing these costs on the states, however, Congress is free to establish environmental standards that otherwise it could not enact.[1050]

Having rejected two means of enforcing national environmental policy, Stewart then claims that there is only one alternative: mandatory state enforcement of national environmental regulations. In claiming that mandatory state enforcement is the only means to ensure achievement of national environmental goals, Stewart completely overlooks the principal means that Congress has employed to obtain state assistance in the administration and enforcement of national regulatory programs. Congress provides for state implementation of environmental regulations both by delegating authority to the states[1051] and by threatening direct national regulation of private activity.[1052] Given these two additional alternatives, Stewart is far from establishing his proposition that mandatory state enforcement is necessary to accomplish national environmental goals. Ironcially, mandatory state enforcement of national environmental regulations is impractical. As Stewart himself notes, state officers will resist enforcing politically unpopular environmental regulations regardless whether they have a duty to enforce them,[1053] and judicial efforts to compel these officers to enforce national policy are likely to be unavailing.[1054]

Stewart's second proposition that mandatory state enforcement of national regulations is necessary is based on his conclusion that Congress will not be able to achieve either important environmental goals or "national moral ideals"[1055] if it is restricted to obtaining state implementation as a grant condition and to direct national enforcement. If Congress provides for state enforcement of national policy as a grant

1048. Stewart, *supra* note 577, at 1200-01.

1049. *Id.* at 1241.

1050. *See id.*

1051. *See supra* text accompanying notes 941-51.

1052. *See supra* text accompanying notes 932-35.

1053. Stewart, *supra* note 577, at 1198, 1204.

1054. *See* Washingtion v. Washingtion State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 689-92 (1979) (state officers' refusals to comply with federal court orders requiring them to protect Indians' rights under a treaty to a share of salmon fisheries).

1055. Stewart, *supra* note 577, at 1263-66.

condition or for direct national enforcement, Congress is politically accountable because the costs of the policy are borne by the national electorate. Nonetheless, Stewart deems these two means of enforcing national policy inadequate, and their inadequacy follows from the political accountability of Congress. A national political majority might not support a congressional decision to restrict motor vehicle air pollution if it had to bear the financial and administrative costs of this national policy. To overcome these political checks and to permit Congress to accomplish ends that it could not obtain if it was politically accountable, Stewart champions Congress' power to impose a duty on the states to enforce national regulations. If Congress can avoid imposing the costs of its policy decisions directly on the national electorate, it is more likely to enact legislation protecting important enviromental goals and promoting national moral ideals. For Stewart, these ends justify the means regardless of the impact on state autonomy and regardless whether a national political majority in fact supports the goals and ideals that it is the states' duty to implement.

CONCLUSION

Questions of national power to intervene against the states involve conflicts between the political decisions of two different political communities—the nation and the states. A rule of preference for the political choices of the nation that is consistent with the states' role in the federal system as political decisionmaking units can be found in the operation of the national political process. When national political decisions are the product of a national majority, preference for the political choice of the nation over the political choices of subnational majorities serves the framers' intentions that the national political process would be an alternative to parochial state political processes and that the actual allocation of political authority in the federal system would be determined by the electorate. National political decisions are the product of a national majority when Congress is politically accountable or answerable to the national electorate, and the political accountability of Congress turns on political checks inherent in the national political process. These political checks are simply the impact of national policy on private activity and the imposition on the national electorate of the administrative and financial costs of enforcing national policies.

To the extent that these political checks make Congress politically

accountable, they ensure that national political decisions to regulate private activity, to regulate the states and their political subdivisions, or to require the affirmative exercise of state authority over private activity in the implementation of national programs are the product of a national majority. These political checks also limit, at least in the aggregate, national interference with state autonomy in making political decisions about the rules for private activity, the structure and processes of government, the mix of public goods and services, and the allocation of executive, legislative, and judicial resources. Thus, the political checks and Congress' political accountability both justify judicial deference to the decisions of the national political process and protect the states' role as political communities in the federal system. When these political checks make Congress politically accountable, intrusion on the independence of state political decisionmaking is permissible; that is, the political safeguards of federalism are sufficient. Conversely, when Congress is not politically accountable, the courts should protect state interests in political decisionmaking.

In most cases, the political checks of the national political process make Congress politically accountable for statutes that diminish state autonomy, and there is no basis for judicial intervention in the political process. National regulation of private activity diminishes state autonomy by displacing the states' power to set substantive policy, but Congress is politically accountable because the private parties subject to the national rules will assign the blame or credit to their national representatives and because the national electorate must bear the actual and potential costs of enforcing the national policy. Since Congress is politically accountable for national regulation of private activity, there is no warrant for judicially imposed federalism restraints, and the Court should not honor its suggestion[1056] in *Hodel* that national political powers will be read narrowly to protect the states' interests in prescribing substantive rules for private activity.

National regulations that apply to the states affect the choice and delivery of public goods and services that the political community of each state chooses to provide and to finance through taxes. Since these regulations usually apply to analogous private activity, the political checks on national authority to regulate private activity make Congress politically accountable and state interests are vicariously protected by

1056. *See supra* text accompanying notes 474-75 & note 475.

the impact of the regulations on private activity. Thus, in *NLC* judicial protection of the states as employers was not necessary because the FLSA applies to both public and private employers. *NLC* should be overruled. Unfortunately, the Court in *United Transportation Union* reaffirmed *NLC*'s amorphous concept of federalism limits on Congress' power to regulate the states. The Court did reach the correct result in this case by upholding Congress' power to apply the Railway Labor Act (RLA) to a state-owned commuter railroad. This result, however, rests on an unworkable distinction between traditional and nontraditional state functions, and the decision leaves open the door to ad hoc judicial restraints on national political authority. The Court should have upheld the RLA on a different ground. Congress is politically accountable for the national rules governing the resolution of labor disputes in the railroad industry because the Act applies to both privately and publicly owned railroads, and the state's interests in operating a commuter rail service are protected by the application of the RLA to private railroads.[1057]

Although most national regulations that apply to the states also apply to private activity, there are a few national regulations that apply exclusively or primarily to the states. Conditions of national grants that control either the structure, organization, and processes of state government or the allocation of political authority within a state are examples of national regulations that apply exclusively to the states, but there is a political check and Congress is politically accountable because the revenues for these conditional grants must be raised by taxes levied on the national electorate.[1058]

When Congress employs the states as its agents in administering and enforcing national regulations, state autonomy is affected because the states must allocate legislative, executive, judicial, and financial resources to effect national policies and to satisfy national political demands at the expense of implementing state policies and fulfilling the demands of the political community in each state. If Congress delegates authority to regulate private activity, threatens direct national regulation of private activity unless the states administer and enforce national standards, or makes a grant to the states or private recipients on the condition that the states regulate private activity, these provi-

1057. *See supra* text accompanying notes 911-15.
1058. *See supra* text accompanying notes 885-93.

sions for state enforcement of national regulations are valid because the national electorate bears, at least potentially, the full financial and administrative costs of the national policy decision and Congress is thus politically accountable.[1059] In *FERC*, on the basis of strained statutory interpretation, and in *Hodel*, the Court reached the correct result in upholding Congress' power to use the states as the nation's agents. The Court did not justify Congress' power to provide for the affirmative exercise of state authority over private activity. The results, however, in these two cases are correct because Congress is politically accountable for its decisions to employ the states in implementing national policies and standards.[1060]

Although the theory of political accountability justifies broad national authority over the states, it also protects the states' role as political communities in the federal system. First, the political checks that justify national authority to intervene against the states also protect the states' interests in political decisionmaking. Congress' political responsibility for regulations that apply to private activity and for raising the revenues necessary to administer and enforce national regulations limits, at least in the aggregate, the exercise of national political authority. Second, in the absence of a political check on a particular exercise of national political authority, there is no justification for Congress' power to intrude on the states, and judicially imposed restrictions on Congress' powers are necessary to protect the states. If Congress were to enact regulations or to impose a tax that applies exclusively or primarily to the states, there would be no political check, and the regulation or tax should be held invalid.[1061] Statutes that delegate national authority to the states and supplement the state law authority of state officers, agencies or political subdivisions to act in excess of or contrary to their state law authority, and statutes that mandate state enforcement of national regulations, are also invalid because there are no political checks and Congress is not politically accountable.[1062] If the Court in *FERC* had recognized Congress' intention in the Public Utility Regulatory Policies Act of 1978 to impose a duty on the states to administer national regulations for private electric utilities, then it should have held this Act unconstitutional.

1059. *See supra* text accompanying notes 927-45.

1060. *See supra* text accompanying notes 932-40.

1061. *See supra* text accompanying notes 901-10 & note 906.

1062. *See supra* text accompanying notes 946-51 & 979-92.

The theory of political accountability provides a comprehensive, principled explanation of Congress' power to diminish state autonomy by regulating private activity, by regulating the states and their political subdivisions, and by requiring the affirmative exercise of state authority over private activity in the administration and enforcement of national regulatory and benefit programs. It also answers the immediate questions raised by *Hodel*, *United Transportation Union*, and *FERC* of Congress' authority under the commerce power to regulate private activity, to establish labor dispute settlement procedures for employees of a state-owned commuter railroad, and to mandate state consideration of national rate design and service standards for electric utilities. If the Court is conservative, in terms of the judicial role and not solely in terms of social policy, the theory of political accountability should be appealing because it establishes a principled basis for deference to the political branches of the national government and a narrow basis for judicial intervention. Under the theory of political accountability, there are no federalism restraints on Congress' power to regulate private activity. Judicial restraints on Congress' power to regulate the states are warranted only if a national regulation or tax applies exclusively or primarily to the states, and the courts should refuse to hold that provisions of state law are preempted when in conflict with conditions of national grants. Congress has broad power to employ the states as the nation's agents, but there are two limits. Congress cannot supplement state law, and Congress cannot mandate state enforcement of national regulations.

It may, of course, be argued that these judicially enforceable federalism restraints are inadequate and that greater judicial protection of state interests in political decisionmaking are required. Those who advocate states' rights limitations on national political authority, however, must shoulder two difficult burdens. In conflicts between two political communities, judicial intervention is extraordinary, and the inadequacy of the national political process to resolve these conflicts and to protect the states' interests must be demonstrated and not simply assumed. If the courts are to intervene in the national political process to protect the states, limitations on national political authority must be principled. As yet, neither the courts nor the commentators have met these burdens.[1063]

1063. In the October 1982 Term, the Court will have one opportunity to formulate a principled theory of state autonomy limitations on national political authority. EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981), *prob. juris. noted,* 102 S.Ct. 996 (1982) (No. 81-554). *See supra* text at notes 372-74 & note 374.

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