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Constitutional Law - Commerce Clause - Tenth Amendment - State Immunity - Labor Relations

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Recent Decisions

CONSTITUTIONAL LAW—COMMERCE CLAUSE—TENTH AMENDMENT—STATE IMMUNITY—LABOR RELATIONS—The United States Court of Appeals for the Third Circuit has held that the operation of a mass transit system is not among those functions traditionally performed by state and local governments so as to prevent application of the Fair Labor Standards Act to bus operators employed by a publicly operated transit system.

Kramer v. New Castle Area Transit Authority, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983).

Twenty-one bus operators employed by the New Castle Area Transit Authority appealed from a summary judgment of the United States District Court for the Western District of Pennsylvania in favor of the transit authority in their suit for overtime pay under the Fair Labor Standards Act (FLSA).[1] The district court relied on *National League of Cities v. Usery*[2] in denying the claims of the bus drivers.[3] A three judge panel of the United States Court of Appeals for the Third Circuit[4] reversed and held that the operation of mass transit systems is not among the functions traditionally performed by state and local governments.[5]

Judge Gibbons began his analysis by recognizing that the *National League of Cities* decision stands for the proposition that the tenth amendment[6] immunizes states and their political subdivisions engaged in traditional governmental functions from the ap-

1. Kramer v. New Castle Area Transit Auth., 677 F.2d 308, 308-09 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 786 (1983). *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976).

2. 426 U.S. 833 (1976). *See infra* notes 63-73 and accompanying text.

3. 677 F.2d at 309.

4. Circuit Judge Gibbons wrote the majority opinion and was joined by Circuit Judge Weis. Circuit Judge Garth concurred in a separate opinion.

5. 677 F.2d at 310.

6. U.S. CONST. amend. X. The tenth amendment to the Constitution reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

plication of federal overtime pay standards.[7] The court observed that police protection, schools, parks and recreation, public health, sanitation and hospitals were given as examples of "traditional" government functions in *National League of Cities* but that no clear standard was established for identifying exactly what constitutes a traditional function.[8] Judge Gibbons explained, however, that this was clarified in *Hodel v. Virginia Surface Mining Reclamation Ass'n,*[9] where the Supreme Court proclaimed a three part test for deciding when the tenth amendment affords the state and its political subdivisions immunity from federal commerce clause regulations.[10] Under *Hodel,* the court observed, congressional commerce power legislation is invalid only if each of the three following requirements is satisfied.[11] First, the regulations must be shown to regulate the states as states. Second, matters that are indisputably attributes of state sovereignty must be addressed by the federal regulation. And third, the states' compliance with the federal regulation must directly impair their ability to structure integral operations in areas of traditional governmental functions.[12]

The court agreed with the lower court that the first two requirements of the test were satisfied.[13] The court, however, did not agree that the third requirement was satisfied under the facts before it.[14] The court was guided by the reasoning in *United Transportation Union v. Long Island R.R.,*[15] where the Supreme Court explained that, in developing the concepts of traditional governmental functions and traditional state sovereignty, a strict historical analysis should not be imposed; but, on the other hand, the historical reality of the activity in question cannot be ignored in determining which state functions are immune to federal regulation.[16] According to the court, activities which have historically been performed by the private sector and which have subsequently been assumed by the state cannot be insulated from federal regulation of interstate commerce.[17] Applying that rationale, the court

7. 677 F.2d at 309.
8. *Id. See National League of Cities,* 426 U.S. at 851.
9. 452 U.S. 264 (1981).
10. 677 F.2d at 309. *See Hodel,* 452 U.S. at 287-88.
11. 677 F.2d at 309. *See Hodel,* 452 U.S. at 287-88.
12. *Hodel,* 452 U.S. at 287-88.
13. 677 F.2d at 309.
14. *Id.*
15. 455 U.S. 678 (1982).
16. 677 F.2d at 309. *See* 455 U.S. at 686.
17. 677 F.2d at 309.

observed that private companies have historically owned and operated local mass transit systems and that the state, therefore, could not be excepted from the federal regulation.[18] Judge Gibbons stated that Congress passed the Urban Mass Transit Act of 1964 (UMTA)[19] in recognition of various problems which existed in the private mass transit industry.[20] The primary purpose of the UMTA, he explained, was to provide federal aid to the states and their subdivisions by supplying financial assistance to local transportation systems, whether operated by public or private mass transportation companies.[21] The resulting impact of the UMTA was to significantly increase state involvement with and control over local transit systems.[22] Judge Gibbons added, however, that the Act also provides for substantial federal involvement in the local transportation area.[23]

In the final analysis, the court held that the increased state involvement with and control over local transit systems does not change the fact that the operation of mass transit systems is not a traditional function of state and local governments.[24] The court found that it was the federal government which provided the impetus for the change-over from private transit systems to public systems by supplying financial and technical assistance.[25]

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18. *Id.* The court conceded that some public operation of local transit systems started in the first part of the twentieth century (Seattle-1911, San Francisco-1912, Detroit-1921, and New York-1932) but explained that 95% of transit systems nationwide were still privately owned and operated as late as 1960. *See* H.R. REP. No. 204, 88th Cong. 2d Sess. 21-22, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2569, 2590-91.

19. Urban Mass Transit Act of 1964, Pub. L. No. 88-365, 78 Stat. 302 (codified at 49 U.S.C. §§ 1601-69 (1976 & Supp. V 1981)).

20. 677 F.2d at 309.

21. *Id. See* 49 U.S.C. § 1609(b)(3).

22. 677 F.2d at 309. In 1978, 90% of revenues from all transit operations were received by local publicly owned systems; 91% of total vehicle miles and 91% of linked passenger trips were provided by publicly owned systems; and 87% of all transit vehicles were owned by the public sector. The private sector, however, still owned between 45% and 52% of all transit operations when counted as units without regard to size. *Id.* at 309-10. *See* U.S. DEPARTMENT OF TRANSPORTATION, URBAN MASS TRANSPORTATION ADMINISTRATION, A DIRECTORY OF REGULARLY SCHEDULED, FIXED ROUTE, LOCAL RURAL PUBLIC TRANSPORTATION SERVICE, 6 (1980); U.S. DEPARTMENT OF TRANSPORTATION, URBAN MASS TRANSPORTATION ADMINISTRATION, A DIRECTORY OF REGULARLY SCHEDULED, FIXED ROUTE, LOCAL PUBLIC TRANSPORTATION SERVICE, 17 (1979). SCHEUER AFFIDAVIT (APP 20a).

23. 677 F.2d at 310. *See* 49 U.S.C. §§ 1603(a), 1604(e) (1976 & Supp. V 1981). The federal government provides capital grants based on an "80% federal/20% local" matching funds scheme, operating grants on a 50%/50% matching scheme, and supplies up to 80% of needed technical assistance to the state and local planning agencies. 677 F.2d at 310.

24. 677 F.2d at 310

25. *Id.*

Furthermore, Judge Gibbons submitted, the matching funds program has assured continuing federal involvement in the functioning of these public systems.[26] What has resulted is a system of joint involvement whereby the federal government and the states must cooperate with one another in order for the transit systems to operate productively.[27] Thus, Judge Gibbons stated, the "tradition" that has developed includes both an important state role and an important federal role in building and maintaining local mass transportation systems.[28]

Having recognized the respective roles assumed by the states and the federal government in the development of public transportation, the court rejected the defendant's argument that it was the state which had taken over the transit business and that the federal government had only subsequently supplied financial aid.[29] Indeed, the court concluded that the states' substantial involvement with the transit business was created by the federal government and, as such, the states may not claim that the operation of transit systems is a function which the states have traditionally provided.[30] The court stated that the determination of tradition must be based on historical reality and that the situation before the court involved a federally conceived program of local mass transit service in which the states have participated as "late comer junior partners."[31] Referring to *United Transportation Union v. Long Island R.R.*,[32] the court asserted that it is widely recognized that the federal government possesses the authority to establish employment relations in the mass transit field, and that there is no justification for eroding that federal authority by granting the states immunity from federal regulations simply because they have assumed functions previously performed by the private sector.[33]

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* The defendant argued that state provision of transit services is the "new reality" since private local transit companies are becoming extinct, making state involvement essential. The court rejected this and explained that while the defendant's argument was relevant to a determination of the *public versus private* nature of local mass transit, it did not pertain to the *traditional state function* question. The court indicated that the issue is not whether state governments must take over transit systems, but whether the operation of transit systems is a traditional state function immunized from federal regulation by the tenth amendment. *Id.* n.1.
32. 455 U.S. 678 (1982). *See infra* notes 76-82 and accompanying text.
33. 677 F.2d at 310.

Finally, the majority stated that the concurring opinion of Judge Garth was persuasive in suggesting that *National League of Cities*[34] may have been effectively overruled by the language employed by the Supreme Court in *United Transportation Union*.[35] The majority preferred, however, to decide the case on the narrower grounds of the *Hodel* test,[36] leaving to another time a determination of the full impact of the *United Transportation Union* decision.[37] Accordingly, the majority reversed and remanded the case to the district court for further proceedings.[38]

Judge Garth began his concurring opinion by agreeing with the other members of the panel that the general reasoning of *United Transportation Union*[39] and the *Hodel* test[40] compelled the conclusion that the New Castle Transportation Authority was not providing a service that has traditionally been provided by state government.[41] According to Judge Garth, however, the court's decision should have been based solely on the *United Transportation Union* test,[42] a test he perceived as being more definitive.[43] Under that standard, Judge Garth maintained that the Authority, as a state subsidiary, would be immune to the regulations of the FLSA[44] only if that legislation would "affect basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the union and endanger its separate and independent existence."[45] In his view, that standard had the practical effect of limiting the holding of *National League of Cities* to the narrow circumstances involved in that case.[46] He envisioned very few fact situations in which the separate and independent existence of the state would be endangered by federal reg-

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34. 426 U.S. 833 (1976). *See infra* notes 63-73 and accompanying text.

35. 677 F.2d at 310-11. *See* 455 U.S. at 687-88.

36. 677 F.2d at 309. *See* 452 U.S. at 287-88; *see also supra* text accompanying notes 9-12.

37. 677 F.2d at 310.

38. *Id.* at 311.

39. 455 U.S. 678 (1982).

40. *See* 452 U.S. at 287-88. *See also supra* text accompanying notes 9-12.

41. 677 F.2d at 311 (Garth, J., concurring). Judge Garth repeatedly referred to the Supreme Court's decision in *United Transportation Union v. Long Island R.R.*, 455 U.S. 678 (1982), as *L.I.R.R.* He was, of course, speaking of the same decision that the majority preferred to call *United Transportation Union.*

42. *See* 455 U.S. at 686. *See also infra* notes 76-80 and accompanying text.

43. 677 F.2d at 311 (Garth, J., concurring).

44. 29 U.S.C. §§ 201-219.

45. 677 F.2d at 311 (Garth, J., concurring) (quoting *United Transportation Union*, 455 U.S. 676, 686 (1982)).

46. 677 F.2d at 311 (Garth, J., concurring).

ulation.[47] He further contended that a determination of what constitutes a traditional function tends to be vague and confusing, whereas a test which decides whether a state's separate and independent existence is endangered can be applied with much greater certainty, thereby effectively reducing the number of disputes arising out of the federal regulation of activities in which the state has some involvement.[48] Judge Garth concluded that the FLSA regulations did not endanger the state's separate and independent existence and agreed with Judge Gibbons that the grant of summary judgment in favor of the Authority was error and must be reversed.[49]

The Fair Labor Standards Act was enacted by Congress in 1938.[50] It requires employers who are covered by the Act to pay employees minimum wages plus overtime pay at increased rates for time in excess of the maximum 40-hour work week.[51] The United States Supreme Court unanimously upheld the Fair Labor Standards Act as as valid exercise of congressional authority under the commerce clause in *United States v. Darby*.[52] There the Court noted that regardless of motive or purpose, unless the regulation of commerce offends some constitutional prohibition, it is within the plenary power granted to Congress by the commerce clause.[53]

The original version of the FLSA specifically excluded the states and their political subdivisions from its coverage.[54] Congress began to expand the scope of the Act in 1961 when coverage was gener-

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47. *Id.* Judge Garth quoted from the concurring opinion of Chief Justice Stone in *New York v. United States*, 326 U.S. 572 (1945), to indicate those rare circumstances in which federal regulations might endanger the separate and independent existence of a state. According to Chief Justice Stone, a federal tax could not likely be constitutionally applied to a state capitol, its state-house, its public school houses, public pools, or its revenues from taxes or school lands. *Id. See* 677 F.2d at 311 n.1 (Garth, J., concurring).

48. *Id.* at 311-12 (Garth, J., concurring).

49. *Id.* at 312 (Garth, J., concurring).

50. *See* Fair Labor Standards Act of 1938, ch. 676, § 1, 52 Stat. 1060 (1938) (current version at 29 U.S.C. §§ 201-219 (1976 & Supp. V 1981)).

51. *Id.*

52. 312 U.S. 100 (1941).

53. *Id.* at 115. *Darby* involved employees who were engaged in producing goods for commerce. The employer argued that manufacturing by itself is an intrastate activity and, as such, Congress had no power to regulate the hours and wages of its employees or to prohibit the shipment in interstate commerce of its goods. The Court disagreed and held that while manufacture is not of itself interstate commerce, the production and shipment of goods is such commerce and is within the power of Congress under the commerce clause. *Id.* at 113, 122.

54. Fair Labor Standards Act of 1938, 29 U.S.C. § 203(d) (amended 1974). *See National League of Cities*, 426 U.S. at 836.

ally extended to include those who were employed in enterprises engaged in interstate commerce or in the production of foods for interstate commerce.[55] A 1966 amendment to the Act further broadened the definition of covered employers to include the states and their political subdivisions, but only insofar as certain specified employees were concerned.[56] The exemption which had previously been granted to the states was removed for employees involved with state hospitals, institutions, and schools and for certain employees of railway, trolley and motorbus systems.[57] However, the 1966 amendments still exempted the operators, drivers, and conductors of such railways and carriers.[58] The amendments survived a constitutional challenge in *Maryland v. Wirtz*[59] where the United States Supreme Court upheld the validity of the 1966 amendments' coverage of employees of state-operated schools and hospitals.

In 1974, Congress again amended the Act and extended its reach to public agencies.[60] A public agency is defined in the 1974 amendments as "a state or political subdivision thereof."[61] The 1974 amendments also repealed the special overtime exemption for drivers, operators, and conductors of railways and carriers in broadening its scope to include almost all public employees.[62]

The constitutionality of the 1974 amendments was attacked by a group of individual states, cities and organizations in *National*

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55. 426 U.S. at 837. *See* 29 U.S.C. §§ 203(s), 206(b), 207(a)(2). *See also* S. REP. No. 145, 87th Cong., 1st Sess. 2, *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 1620-24 (explaining how expansively Congress and the courts viewed the term "interstate commerce").

56. *See* 29 U.S.C. § 203(d) (1966), *amended by* 29 U.S.C. § 203(d) (1974) and 29 U.S.C. § 203(r) (1966) (amending 29 U.S.C. § 203(r) (1961)).

57. *See* 29 U.S.C. § 203(d) (1966), *amended by* 29 U.S.C. § 203(d) (1974) and 29 U.S.C. § 203(r) (1966) (amending 29 U.S.C. § 203(r) (1961)).

58. 29 U.S.C. § 213(b)(7) (1966), *repealed by* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259 § 21(b)(3), 88 Stat. 68.

59. 392 U.S. 183 (1968). In *Wirtz*, the Court rejected the argument by the State of Maryland that the "enterprise concept" of coverage under the Fair Labor Standards Act amendments of 1961 and 1966 was beyond the scope of Congress' power under the commerce clause. The Court held that Congress had the necessary rational basis for extending the reach of the Act to enterprises engaged in commerce including state-operated hospitals and schools, and that such an extension did not unduly interfere with sovereign state functions. *Id.* at 193, 198-99.

60. *See* 29 U.S.C. § 203(d) (1974), *amending* 29 U.S.C. § 203(d) (1966). *See also* 29 U.S.C. § 203(s)(5) and § 203(x) (1974) which constituted additions to 29 U.S.C. § 203.

61. 29 U.S.C. § 203(x) (1974). This subsection defines public agency as including: "The Government of the United States or political subdivision thereof, any agency of the United States . . . a State, or a political subdivision of a State; or any interstate governmental agency." *Id.*

62. *See supra* note 58.

League of Cities v. Usery.[63] There the Supreme Court determined that the tenth amendment imposes an affirmative limitation on Congress' exercise of the commerce power.[64] The Court held that Congress cannot validly enact legislation which would have the effect of depriving the states of those attributes which are essential to their separate and independent existence. The Court acknowledged, however, that governmental activities which touch interstate commerce would be within the commerce powers of Congress if the activities were being performed by private enterprises.[65] The *National League of Cities* Court went on to hold that Congress' plenary power under the commerce clause is restricted where the regulations operate to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions in a manner which impairs the states' ability to function effectively in a federal system.[66]

The terms "traditional" and "integral" were not defined, but fire prevention, police protection, sanitation, public health, and parks and recreation were listed by the *National League of Cities* Court as examples of traditional areas in which Congress possesses no authority to restrict the freedom of local governments to perform the basic and essential functions necessary to maintain such operations.[67] The Court included public schools and hospitals as traditional operations of state and local governments by explicitly overruling *Maryland v. Wirtz*.[68] The scope of the holding, however, was narrowed by the Court's refusal to overrule *Fry v. United States*,[69] *Parden v. Terminal R. Co.*,[70] *California v. Taylor*[71] and *United*

63. 426 U.S. 833 (1976).

64. *Id.* at 847, 852, 855.

65. *Id.* at 847.

66. *Id.* at 852.

67. *Id.* at 851.

68. *Id.* at 855. *See* 392 U.S. 183 (1968); *see also supra* note 59.

69. 421 U.S. 542 (1975). In *Fry*, the Court upheld Congress' power under the commerce clause to limit wage increases for all state employees, along with all others, in an effort to slow inflation. The Court explained that the Economic Stabilization Act, 12 U.S.C. § 1904 (1982), was an emergency measure to counter severe inflation that threatened the national economy, and rejected the argument that it unduly interfered with sovereign state functions. 421 U.S. at 548.

70. 377 U.S. 184 (1964). In *Parden*, the Court held that state-owned railroads were subject to suit in the federal courts under the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1976), and explained that "when a state leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation. . . ." 377 U.S. at 196.

71. 353 U.S. 553 (1957). In *Taylor*, the State of California contended that the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976), could not be applied to the state-owned and oper-

States v. California,[72] all of which upheld federal legislation which substantially decreased the authority of the states to develop independent economic policies.[73]

The Supreme Court clarified *National League of Cities* in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*[74] where it proclaimed a three pronged test for determining whether commerce clause legislation is invalid under the tenth amendment.[75] That test was followed in *United Transportation Union v. Long Island R.R.*,[76] where the Court focused its discussion on the third inquiry: whether the states' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental function."[77] Perhaps the most significant aspect of the *United Transportation Union* decision is the light it has shed on the factors which should be relied upon in determining whether a governmental function is traditional or non-traditional. Chief Justice Burger, writing for a unanimous Court, explained that the inquiry is not limited to a static historical view of state functions but instead must be directed to an examination of

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ated Belt Railroad and that the wages and working conditions of the Railroad's employees were governed by state law rather than federal law. The Court rejected that argument and held that California, by engaging in interstate commerce by rail, subjected itself to the federal commerce legislation regulating employment relationships. 353 U.S. at 568.

72. 297 U.S. 175 (1936). In United States v. California, the state owned and operated a railroad which engaged in interstate commerce. Federal authorities conducted an inspection and found that the coupling mechanisms on the railroad cars violated certain provisions of the Safety Appliance Act, 45 U.S.C. §§ 2 and 6 (1976). 297 U.S. at 180. Holding that the federal legislation was permissible under Congress' commerce powers, the Court stated that a state subjects itself to the commerce power when it engages in interstate commerce. *Id.* at 185-86.

73. *See* 426 U.S. at 855 n.18.

74. 452 U.S. 264 (1981). The *Hodel* Court rejected a pre-enforcement claim that the federally imposed performance standards for surface coal mining contained in the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201, 1202, 1211, 1251-79 (1976 & Supp. III 1979) violated the tenth amendment. The State of Virginia contended that the regulations interfered with the state's traditional governmental function of regulating land use. The Court held, however, that the tenth amendment does not limit congressional power to displace state regulation of private activities affecting interstate commerce. 452 U.S. at 290-93.

75. 452 U.S. at 287-88. *See supra* notes 9-14 and accompanying text.

76. 455 U.S. 678 (1982). In *United Transportation Union*, a unanimous Court rejected a challenge to the application of the Railway Labor Act's mediation and cooling off procedures to the New York State-owned and operated Long Island Railroad. The Court concluded that a state-owned and operated commuter railroad system is not a traditional governmental function because the historical reality is that such systems have primarily been operated by the private sector. 455 U.S. at 686. *See* Railway Labor Act, 45 U.S.C. §§ 151-188 (1976).

77. 455 U.S. at 686-87.

whether the federal regulation infringes upon "basic state prerogatives in such a way as to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.' "[78] The historical reality of the activity is, however, an important factor in this determination.[79] Thus, the fact that passenger railroad systems have historically been operated by the private sector weighed heavily in Chief Justice Burger's conclusion that a publicly operated commuter railroad is not a traditional governmental function.[80]

When the states expand their operations into an area that is new to them, but not new to private enterprise, and that area has long been subjected to federal regulation, they cannot erode the federal authority by claiming an immunity from the traditional power of Congress over that activity.[81] The purpose behind the doctrine announced in *National League of Cities* was to assure that the balance in the federal system would be maintained, and not to sanction future state and local government attacks on established federal authority.[82] A rule which would permit state immunity from federal regulation because of the mere acquisition of a formerly private enterprise would unfairly tip the balance in favor of the state just as allowing the federal government to unduly interfere with traditional state functions would unfairly tip the balance in favor of the federal government.[83]It is against this background that the Court of Appeals for the Third Circuit concluded that a local mass transit system does not constitute an integral operation in an area of traditional governmental function.[84] Judge Gibbons pointed out that the provision of transit services has historically been the domain of private companies.[85] Only since the enactment of the Urban Mass Transit Act[86] have state and local governments assumed significant roles in the operations of transit systems.[87] The relatively sudden transformation of many local mass transit systems from private to public control seems to be a direct result

78. *Id.*
79. *Id.* at 686. *See* 677 F.2d at 309.
80. 455 U.S. at 686.
81. *Id.* at 687.
82. *Id.*
83. *Id.*
84. 677 F.2d at 310.
85. *Id.* at 309.
86. 49 U.S.C. §§ 1601-1609 (1976 & Supp. V 1981). *See supra* notes 22-23.
87. 677 F.2d at 309-10.

of congressional planning and substantial federal funding.[88] Recognition that the federal government not only supplied the initiative for the transformation but also maintains a close relationship with the operation of public transit systems led Judge Gibbons to conclude that the tradition which has evolved is one of cooperative federalism with both state and federal involvement being important to the development of public transit systems.[89]

Possibly the most significant and far reaching aspect of the *Kramer* decision is that Judge Gibbons and Judge Weis apparently agreed with Judge Garth that *National League of Cities* may have, in effect, been overruled by the broader test enunciated in *United Transportation Union.*[90] It appears that if this panel of judges is presented with a broader set of circumstances which raises a tenth amendment immunity question, but which does not lend itself neatly to a *Hodel* type analysis,[91] it will reexamine *National League of Cities* in light of *United Transportation Union.*[92] Furthermore, while the discussion of Judge Garth's conclusion by Judge Gibbons is clearly dictum, it does suggest that both he and Judge Weis could ultimately be persuaded by such an argument given the proper factual situation.[93]

Two Supreme Court cases decided after *United Transportation Union* tend to support Judge Garth's conclusions to the extent that the impact of *National League of Cities* seems to be gradually diminishing. The affirmative limitation on the exercise of congressional commerce power which was drawn from the tenth amendment by the *National League of Cities* Court reflects a concern that, if left unchecked, certain federal regulations when applied to state governments might allow the national government to devour the essentials of state sovereignty.[94] In both *Federal Energy Regulatory Commission v. Mississippi*[95] and *EEOC v. Wyoming*[96] the

88. *Id.* at 310.
89. *Id.*
90. *See* 677 F.2d at 310.
91. *See supra* notes 9-12 and accompanying text.
92. 677 F.2d at 310.
93. *Id.*
94. 426 U.S. at 841, 855.
95. 456 U.S. 742 (1982). There, the Court upheld the validity of the Public Utility Regulatory Policy Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117, which was enacted by Congress pursuant to the commerce clause. The Court held that the Act did not unduly trench on state sovereignty by requiring the states to consider and/or implement certain federal regulations in the utilities field because that field was otherwise preemptible. 456 U.S. at 758, 760, 769-70.
96. 103 S. Ct. 1054 (1983). The Court in *EEOC* was presented with the question of

Supreme Court explained that the ultimate purpose of the tenth amendment immunity doctrine is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the states enjoy a "separate and independent existence"[97] are not sacrificed by excessive or unnecessary federal interference.[98] In *EEOC v. Wyoming*, a supervisor for the game and fish department was involuntarily retired at age 55 by the state of Wyoming.[99] The Court recognized that the management of state parks is a traditional state function but explained that an otherwise valid federal regulation will not be invalidated unless it intrudes to such a substantial degree as to threaten the state's "separate and independent existence."[100] The federal intrusion into a state's integral operations must be so substantial as to cause a shift in the balance of the federal system before Congress will be restricted by the tenth amendment.[101] The majority in *EEOC* explained that in *National League of Cities* the federal legislation directly threatened the ability of the states to allocate their own financial resources[102] while also affecting the states' ability to use their employment relationship with their citizens as a means of pursuing economic policies beyond immediate managerial goals.[103] In the absence of any similar wide-ranging and profound threats to state decision-making functions, the Court has consistently found federal legislation to be within the valid exercise of Congress' commerce power.[104] Indeed, not since *National League of Cities* has

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whether Congress acted constitutionally when, in 1974, it extended the definition of "employer" under § 11(b) of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981), to include state and local governments. The Court held that the degree of federal intrusion into the states' ability to structure their integral operations was not sufficient to override Congress' choice to extend its regulatory authority to the states. 103 S. Ct. at 1062.

97. *See* 426 U.S. at 845 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).

98. *See* 103 S. Ct. at 1060. *See also* 456 U.S. at 765-66.

99. 103 S. Ct. at 1059.

100. *Id.* at 1062.

101. *Id. See* 456 U.S. at 769-71.

102. 103 S. Ct. at 1062-63. The *National League of Cities* Court explained that forcing the states to pay their workers a minimum wage and an overtime rate would leave the states with fewer funds to spend for other vital state programs. *Id. See* 426 U.S. at 849-52.

103. 103 S. Ct. at 1063-64. The *National League of Cities* Court recognized that the federal minimum wage requirements would interfere with any proposed state program which would offer jobs at lesser wages for those who do not possess minimum employment qualifications. *Id. See* 426 U.S. at 848.

104. *See generally Hodel*, 452 U.S. 264 (1981), *United Transportation Union*, 455 U.S. 678 (1982), *Federal Energy Regulatory Comm'n*, 456 U.S. 742 (1982), and *EEOC*, 103 S. Ct. 1054 (1983), all of which questioned the validity of federal legislation under the com-

the Supreme Court applied the tenth amendment immunity doctrine to invalidate federal commerce legislation. While *National League of Cities* has not been overruled, it has become apparent that there are very few conceivable areas federal legislation could reach which would be subject to the tenth amendment immunity doctrine.

The *Kramer* court has followed the lead of the Supreme Court in giving the tenth amendment state immunity doctrine a very narrow construction. The general agreement by Judge Gibbons and Judge Weis with the language employed by Judge Garth that a federal regulation which would endanger a state's separate and independent existence is almost inconceivable[105] suggests that in the third circuit[106] the arguments raised in *United Transportation Union* will be broadly interpreted to preclude virtually any tenth amendment immunity claim by a state or political subdivision.

Edward J. Mills

merce clause as applied to the states. The Supreme Court distinguished *National League of Cities* and upheld the federal legislation in each of these cases.

105. 677 F.2d at 311 (Garth, J., concurring).

106. *See also* Allewine v. City Council of Augusta, Ga., 699 F.2d 1060 (5th Cir. 1983) and Francis v. City of Tallahassee, 424 So. 2d 61 (Fla. App. 1983), both directly citing and supporting the rational of *Kramer*.