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NATIONAL LEAGUE OF CITIES v. USERY: A NEW FEDERALISM?

The authority delegated to Congress by the United States Constitution to "regualte commerce . . . among the several states"[1] has frequently been a source of conflict between the states and the federal government. This conflict, often cast in terms of state sovereignty versus federal supremacy, has played a prominent role in commerce clause litigation before the Supreme Court.[2] In such cases the Supreme Court has frequently utilized a balancing test that weighs respective state and federal interests.[3] Implicit in this test is the recognition that certain state interests demand local enforcement, while other matters require the extension of national jurisdiction over state law in order to effectuate national goals and policies. In *National League of Cities v. Usery*,[4] however, the Supreme Court seemingly departed from the balancing approach and recognized that the Constitution prohibits the exercise of the legislative authority under the commerce clause in a manner which impairs the states' freedom to structure integral operations in areas of traditional state governmental functions.[5]

Appellants, individual cities and states, sought declaratory and injunctive relief, claiming that the 1974 amendments to the Fair Labor Standards Act[6] were unconstitutional because Congress had exercised

1. U.S. CONST. art. I, § 8, cl. 3.

2. "Federal legislation of this character must be construed with due regard to accommodation between the assertions of new federal authority and the functions of the individual States, as reflecting the historic and persistent concerns of our dual system of government." Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947). *See, e.g.*, Fry v. United States, 421 U.S. 542 (1975) (upheld application of the Economic Stabilization Act to wages and salaries of state employees); California v. Taylor, 353 U.S. 553 (1957) (Railway Labor Act held applicable to a common carrier owned and operated by the state of California); Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383, 399 (1951) (state law superseded by federal legislation).

3. *See, e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938); Wabash, St. L. & P. Ry. v. Illinois, 118 U.S. 557 (1886); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

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

5. *Id.* at 845.

6. 29 U.S.C. §§ 201-219 (Supp. IV 1974). Appellants were the National League of Cities, the National Governor's Conference, the states of Indiana, Iowa, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington and the metropolitan government of Nashville and Davidson County, Tenn., the cities of Cape Girardeau, Mo., Lampos, Cal., and Salt Lake City, Utah. 426 U.S. 836-37 n.7.

its commerce clause power in derogation of the rights of the states. The 1974 amendments extended the Act's minimum hour provisions to all nonsupervisory employees of the states and their political subdivisions.[7] The United States Supreme Court reversed the decision of a three-judge district court[8] and invalidated the amendments. The Court held that the minimum wage and maximum hour provisions "impermissibly" interfered[9] with the states' sovereign authority[10] to determine the appropriate wages and hours for those whom they employ to carry out their governmental functions.[11] Such exercise of congressional authority, the Court concluded, "does not comport with the federal system of government embodied in the Constitution."[12]

The scope of congressional authority to regulate interstate commerce under the commerce clause[13] has been recurrently disputed.

7. Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 203, 88 Stat. 62 (amending 29 U.S.C. § 203 (1970)). The original Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (current version at 29 U.S.C. §§ 201-219 (Supp. IV 1974)), required every employee engaged in interstate commerce, to be paid a certain minimum hourly wage and overtime pay. The act defined "employer" to exclude any state or political subdivision from its coverage, Fair Labor Standards Act of 1938, ch. 676, § 203, 52 Stat. 1060. In 1961 Congress extended the Act's coverage to include each employee in an "enterprise" engaged in interstate commerce or in the production of goods for interstate commerce, Pub. L. No. 87-30, 75 Stat. 65 (codified in 29 U.S.C. § 203 (1970)). In 1966 the Act was once again amended and for the first time coverage extended to public employees in hospitals, schools and other related institutions, Pub. L. No. 89-691, 80 Stat. 831 (codified in 29 U.S.C. § 203(d) (1970)). The effect of the 1974 amendments was to extend the Act's coverage to approximately five million employees of the states and their municipalities who were not previously covered by the Act. H.R. REP. NO. 913, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS, 2811-31.

8. National League of Cities v. Brennan, 406 F. Supp. 826 (D.D.C. 1974), *rev'd sub nom.* National League of Cities v. Usery, 426 U.S. 833 (1976). The district court dismissed the complaint, concluding "since it is uncontested that employees of state and municipal institutions . . . do make substantial purchases in interstate commerce," the 1974 amendments are constitutional. *Id.* at 827.

9. 426 U.S. at 851.

10. *Id.* at 849.

11. In delineating "governmental functions" the court referred to employer-employee relationships in such areas as fire prevention, police protection, public health, and parks and recreation. *Id.* at 851.

12. *Id.* at 852.

13. U.S. CONST. art. I, § 8, cl. 3. The commerce clause was the product of a compromise between the Federalists, who wanted one centralized government, and the Anti-Federalists, who advocated independent sovereignty for each of the states. According to Madison, the commerce power was "intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the general government." *Quoted in* Hirsch, *Federal Regulation of Local Activity: Demise of "Rational Basis" Test*, 1972 L. & SOC. ORD. 683, 686.

Past challenges have often focused upon the interrelationship between the national government's regulatory power and the ability of the states to regulate activities within their territorial boundaries.[14] For several decades the Supreme Court consistently invalidated federal legislation that regulated local, intrastate activities on the ground that such enactments represented unconstitutional intrusions upon state autonomy.[15] This recognition of, and deference to, state governmental independence stemmed from the notion that the tenth amendment[16] reserved to the states a residue of power that imposed an independent limitation upon the extension of national authority over local, intrastate activites.[17]

Beginning in the mid-1930's, however, the Supreme Court shifted its focus and began to uphold federal legislation that regulated state activities affecting interstate commerce. The Court's landmark decisions in *NLRB v. Jones & Laughlin Steel Corp.*[18] and *United States v.*

14. *See, e.g.*, Fry v. United States, 421 U.S. 542 (1975); NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1958); Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947); Case v. Bowles, 327 U.S. 92 (1946); Polish Nat'l Alliance of the United States v. NLRB, 322 U.S. 643 (1944); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Wrightwood Dairy Corp., 315 U.S. 110 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. California, 297 U.S. 175 (1936); Board of Trustees v. United States, 289 U.S. 48 (1932).

15. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 295 (1936) ("[T]he general government . . . possesses no *inherent* power in respect of the internal affairs of the states."); United States v. Butler, 297 U.S. 1, 68 (1936) (regulation and control of agricultural production held beyond the power delegated to the federal government); Schecter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (federal government cannot regulate wages and hours of persons employed in the internal commerce of the state); Hammer v. Dagenhart, 247 U.S. 251, 273 (1918) ("There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition."); United States v. E.C. Knight Co., 156 U.S. 1, 11 (1895) ("The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade was left with the states to deal with . . . .").

16. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

17. This concept is often referred to as "dual federalism". Proponents of this idea viewed the tenth amendment as a built-in check on the national power over state matters, national and state legislative domains being mutually exclusive. Under this theory, the commerce power was not plenary and was to be exercised only insofar as it did not encroach on an equal state power to regulate purely domestic commerce. *See* Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1956); Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946).

18. 301 U.S. 1 (1937). The Court stated that in regard to those intrastate activities having such a "close and substantial relation" to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied power to exercise the control. *Id.* at 37.

Darby[19] marked the beginning of the application of new constitutional standards that substantially expanded the breadth of federal commerce clause power over intrastate matters.[20] The Supreme Court abandoned its previous adherence to notions of state government autonomy and rejected the view that the tenth amendment operated as an independent constraint upon otherwise valid federal regulatory enactments.[21]

The Supreme Court applied this expansive interpretation of the commerce power to uphold the Fair Labor Standards Act,[22] which Congress enacted in 1938. The Act required every employer to pay each of his employees "engaged in commerce or in the production of goods for commerce" a certain minimum hourly wage and overtime pay.[23] In *United States v. Darby*[24] a unanimous Supreme Court af-

19. 312 U.S. 100 (1941). *Darby* involved a challenge to the 1938 Fair Labor Standards Act which established standard minimum wages and maximum hours for employees engaged in the production of goods for interstate commerce. The Court held that the power of Congress over interstate commerce extends to those intrastate activities which so affect interstate commerce as to make their regulation an appropriate means to the attainment of a legitimate end—the exercise of the granted power of Congress to regulate interstate commerce. *Id.* at 118. *Darby* expressly overruled Hammer v. Dagenhart, 247 U.S. 251 (1918) and Carter v. Carter Coal Co., 298 U.S. 238 (1936). *Id.* at 123; *see* note 15 *supra*. *See generally* Corwin, *Congress' Power to Prohibit Commerce—A Crucial Constitutional Issue*, 18 CORNELL L.Q. 477 (1933).

20. Since the 1937 *Jones & Laughlin* decision, the Court has not struck down a single piece of federal economic legislation as beyond the scope of the commerce clause power. Furthermore, prior to 1964 not one of the 20 Justices appointed to the Court between 1936 and 1964 had ever dissented from a decision expanding the scope of the commerce clause. More recently, this trend has begun to weaken. *See* Fry v. United States, 421 U.S. 542 (1975) (Rehnquist, J., dissenting); Perez United States, 402 U.S. 146 (1971) (Stewart, J., dissenting); Daniel v. Paul, 395 U.S. 298 (1969) (Black, J., dissenting); Maryland v. Wirtz, 392 U.S. 183 (1968) (Douglas & Stewart, J.J., dissenting). *See generally* Stern, *The Commerce Clause Revisited—The Federalization of Interstate Crime*, 15 ARIZ. L. REV. 271 (1973).

21. Chief Justice Stone asserted that "[t]he [tenth] amendment states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941). *Cf.* Case v. Bowles, 327 U.S. 92, 102 (1946)(tenth amendment does not operate as a limitation on the power delegated to the national government); Oklahoma v. Atkinson Co., 313 U.S. 508, 534, (1941)(tenth amendment does not deprive the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end).

22. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified in 29 U.S.C. §§201-219 (1970)). The Fair Labor Standards Act was enacted to help alleviate the effects of the Depression. The minimum wage provisions were included so as to insure a basic standard of living for employees. *See* Note, *The Scope of Coverage Under the Fair Labor Standards Act of 1938*, 30 WASH. & LEE L. REV. 149 (1973). *See generally* Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. MIAMI L. REV. 607 (1972).

23. Fair Labor Standards Act of 1938, ch. 676, §202, 52 Stat. 1060 (codified in 29 U.S.C. § 202(a) (1970)).

24. 312 U.S. 100 (1941).

firmed the constitutionality of the Act, finding a valid exercise of Congress' commerce clause power. The *Darby* court reasoned that the means adopted by the minimum wage and hour provisions were reasonably and plainly adapted toward the permitted end of protecting interstate commerce.[25] The Supreme Court decisions in both *Darby* and *Jones* established the principle that even though activities may be intrastate in nature, if they are intimately related to and substantially affect interstate commerce they may be subject to federal regulation under the commerce power.[26]

Congress amended the Fair Labor Standards Act in 1966 to extend its coverage to employees of state-operated schools, hospitals and other related institutions.[27] In *Maryland v. Wirtz*,[28] the Supreme Court upheld the constitutionality of the amendments. The Court asserted that the amendments fell within the scope of Congress' commerce clause authority since there was a "rational basis" for the legislative determination that labor conditions in schools, hospitals and other related institutions affect interstate commerce.[29] Although the majority did not address itself to the tenth amendment issue, the decision implied that state sovereignty was not a limitation upon congressional power to regulate interstate commerce.[30]

In *National League of Cities*, appellants successfully argued that when Congress directly regulates the activities of the states in their capacity as public employers, it transgresses the tenth amendment's

25. *Id.* at 124. *See* 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end . . . are constitutional.").

26. *See* notes 18 & 19 *supra*.

27. Pub. L. No. 89-691, 80 Stat. 831, 29 U.S.C. § 203(d) (1970).

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

29. 392 U.S. at 193-99. In *Wirtz* the Court held that the amendments adopting the "enterprise concept," which expanded the protection of employees but did not enlarge the class of employers subject to the Act, were constitutionally valid since there was a rational basis for the legislative finding that the statutes were necessary for the protection of commerce. The Court gave credence to both the "competition theory," that a company's competition in interstate commerce was affected by all its labor conditions, and the "labor dispute theory," that substandard labor conditions among employees could lead to strife that would disrupt interstate commerce. The Court also held that the commerce power provides a constitutional basis for extension of the Act to state-operated schools and hospitals, and that Congress had interfered with state functions only to the extent that it subjected a state to the same wage and hour limitations as other employers whose activites affect commerce.

30. *See* 392 U.S. at 201 (Douglas, J., dissenting). Justice Douglas addressed himself to the issue of the tenth amendment. He argued: "[W]hat is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism." *Id.*

affirmative limitation upon the commerce clause power.[31] Relying on the *Wirtz* rationale, the Secretary of Labor argued that the 1974 amendments to the Fair Labor Standards Act constituted a valid exercise of the commerce clause power since employees of state and municipal institutions who were affected by the 1974 amendments made substantial purchases in interstate commerce of equipment and goods.[32]

The majority in *National League of Cities* held that Congress had exceeded the authority delegated to it under the commerce clause because the 1974 amendments to the Fair Labor Standards Act interfered with the independence and autonomy of the states in their capacities as sovereign governmental units.[33] The Court reasoned that the application of the Fair Labor Standards Act amendments to state and municipal employees interfered with "integral governmental activities" to such an extent that the amendments were deemed to exceed the scope of the commerce power.[34]

The Court's analysis of the constitutionality of the 1974 amendments to the Fair Labor Standards Act in *National League of Cities* represents a radical departure from the Court's usual posture regarding the issue of congressional authority to regulate intrastate activities under the commerce clause.[35] Generally, when the Court has reviewed commerce clause legislation, the constitutional inquiry has been confined to a determination of whether the means chosen by Congress are

31. 426 U.S. at 845. Appellants also argued that the national government lacked the power to control essential state and city government services by increasing the cost of providing some services so greatly that they must be altered or curtailed. The Court sustained this contention. *Id.* at 845-49. *But cf.* Briggs v. Sagers, 424 F.2d 130, 134 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970)("[T]he overall purpose of the [Fair Labor Standards Act] tacitly suggests that the imposition of such [financial] strain is outweighed by the underlying policy of the Act.").

32. "The basic thrust of the appellee's case is that Congress can regulate State-local employees wages, hours and overtime matters to ward off dangers of labor disputes which would diminish state and local use of interstate goods, and dangers of unfair competition to induce industry to come in and to spread the work." Brief for National Institute of Municipal Law Officers as Amicus Curiae at 34 n.15, National League of Cities v. Usery, 426 U.S. 833 (1976). The appellants argued that the *Wirtz* rationale was not applicable in *National League of Cities* because the state activities covered in *Wirtz* were in competition with private hospitals and schools, while the state activities covered in *National League of Cities* were not in competition with private industry. *See* National League of Cities v. Brennan, 406 F. Supp. 826, 827 (D.D.C. 1974).

33. 426 U.S. at 851.

34. *Id.*

35. *See* cases cited in note 2 *supra*.

reasonably adapted to a legitimate end.[36] The Court in *National League of Cities*, however, dealt only perfunctorily with the issue of whether the 1974 amendments to the Fair Labor Standards Act constituted a valid exercise of the commerce power.[37] Instead, the majority focused upon the tenth amendment and the necessity of maintaining state autonomy.[38]

The Court's holding in *National League of Cities* rests on the proposition that the states stand on a "different footing"[39] from individuals and are therefore not subject to the same principles that ordinarily control the determination of the constitutionality of commerce clause legislation. The Court asserted that the "dispositive factor" in *National League of Cities* was that the 1974 amendments were directed at the "states qua states."[40] The Court's preoccupation with the purpose of the amendments, direct regulation of the states, is a deviation from years of constitutional precedents which established the principle that state sovereign interests per se do not impose a limitation on commerce clause legislation.[41] In prior cases the Supreme Court expressly refused

36. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964); Katzenbach v. McClung, 379 U.S. 294, 304 (1964).

37. "[T]he 1974 amendments to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a . . . constitutional barrier because they are to be applied directly to the States and subdivisions of States as employers." 426 U.S. at 841. *See* Brief for National Institute of Municipal Law Officers as Amicus Curiae at 30, National League of Cities v. Usery, 426 U.S. 833 (1976) ("An analysis based on the commerce clause alone prejudges the answer. Explicit consideration must be given to federalism in developing viable lines between national legislative power and state governmental autonomy.").

38. "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." 426 U.S. at 845.

39. *Id.* at 854.

40. *Id.* at 847. The Court emphasized the fact that the 1974 amendments were distinguishable from other congressional legislation regulating intrastate activites. Past federal regulations affected only individuals and private business as opposed to the state governments as a whole.

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the Government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed not to private citizens but to the States as States.

Id. at 845. *See* Fry v. United States, 421 U.S. 542, 549 (1975)(Rehnquist, J., dissenting).

41. *See, e.g.*, Fry v. United States, 421 U.S. 542 (1975)(states are not immune from all federal regulations under the commerce clause merely because of their sovereign status); Parden v. Terminal Ry., 377 U.S. 184, 196 (1964) ("[W]hen a State leaves the sphere that is exclusively its own and enters into activities subject to congressional

to determine the validity of commerce clause legislation on the basis of whether the interest at stake was "governmental" or "proprietary."[42]

In holding that "functions essential to the separate and independent existence" of the states could not be abrogated by the federal government,[43] the Court, in effect, resurrected previously moribund tenth amendment considerations.[44] Although the Court recognized that the 1974 amendments, in isolation, represented a valid exercise of the commerce clause power,[45] the Court apparently relied on the inviolability of state autonomy as a barrier to federal regulations.[46] This approach contravenes the well-established principle that the commerce power may not be impeded or qualified by state regulatory measures.[47]

The 1974 amendments to the Fair Labor Standards Act would have subjected all state and local governments, with respect to all of their non-supervisory employees, to the jurisdiction of the Federal Department of Labor regarding wages, hours and overtime pay provisions.[48]

regulation, it subjects itself to the regulation as fully as if it were a private person or corporation."); United States v. California, 297 U.S. 175, 184 (1936)(If a state is engaging in economic activities that are validly regulated by the federal government when engaged in by private persons, the state may be forced to conform its activities to federal regulations.).

42. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183 (1968); United States v. California, 297 U.S. 175 (1936); Sanitary Dist. v. United States, 266 U.S. 405 (1925).

43. 426 U.S. 845.

44. *See* notes 16 & 17 and accompanying text *supra*.

45. 426 U.S. 851-52. *See* note 38 *supra*.

46. *See* Brief for National Institute of Municipal Law Officers as Amicus Curiae at 14, National League of Cities v. Usery, 426 U.S. 833 (1976). *But see* Parden v. Terminal Ry., 377 U.S. 184, 191 (1964). The Court in *Parden* articulated the idea that the states, through their representatives, surrendered a portion of their state sovereignty when they granted Congress the power to regulate commerce.

47. Board of Trustees v. United States, 289 U.S. 48, 56-57 (1933) (exercise of the commerce power "may not be limited, qualified, or impeded to any extent by state action"); *cf.* Maryland v. Wirtz, 392 U.S. 183, 195 (1968) ("[I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests . . . ."); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947) ("Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause . . . ."); Case v. Bowles, 327 U.S. 92, 102 (1946) (". . . the Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the National Government.' "); United States v. California, 297 U.S. 175, 184 (1936) ("The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.").

48. Under the 1974 amendments, minimum wage coverage was extended to the following employees: federal employees, state and local governmental employees, domestic service employees, retail and service employees, conglomerate agricultural employees, telegraph agency employees, motion picture theatre employees, logging employees. Overtime compensation pay coverage would reach federal employees, state

In its narrowest terms, the decision in *National League of Cities* overruled *Wirtz*[49] and invalidated the 1974 Fair Labor Standards Act Amendments in their application to state employees in areas that have traditionally been regarded as integral parts of state governmental activities.[50]

The rationale of the Court's decision, however, is much broader. It is clear that the majority's primary concern in *National League of Cities* centered upon the direct impact of the Fair Labor Standards Act Amendments upon the internal functions of the state governments.[51] The Court's decision was predicated upon the belief that the autonomy and independence of the states should be preserved[52] and that the ability of the federal governemnt to intervene in local matters must be checked.[53] In essence, the majority introduced a novel constitutional approach regarding the balance between the national government's regulatory powers and the sovereignty of the states.[54] The Court's holding recognized an inherent, affirmative constitutional limitation upon the power of the federal government to regulate the states,[55] unless the intrusion on state sovereignty constitutes an emergency measure which is limited and temporary.[56] Therefore, according to the

and local government employees, domestic service employees, retail and service employees, seasonal agricultural processing employees, hotel, motel and restaurant employees, food service employees, nursing home employees and local transit employees. H.R. REP. NO. 913, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811-31.

49. 426 U.S. 854: "[W]e do not believe the reasoning in *Wirtz* may any longer be regarded as authoritative."

50. *Id.* at 852.

51. *Id.* at 846.

52. *Id.* at 851-52.

53. *Id.* at 855. "[W]e agree that such assertions of power, if unchecked, would . . . allow the National Government to devour the essentials of state sovereignty."

54. The majority was not concerned with the legitimacy of the national policy of the amendments. Rather, the majority was primarily concerned with the effect the amendments would have had upon the states' abilities to govern themselves. *See* Brief for National Institute of Municipal Law Officers as Amicus Curiae at 41-42, National League of Cities v. Usery, 426 U.S. 833 (1976).

55. *See* Fry v. United States, 421 U.S. 542, 557 (1975)(Rehnquist, J., dissenting). The tenth amendment is an example of

> [T]he understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a state as if it were just another individual or business subject to regulation.

Id.

56. *Id.* at 548.

rationale offered in *National League of Cities*, a congressional act may be within the scope of the commerce power, but nonetheless invalidated because it collides with state sovereignty.[57]

Although the Court states that its holding does not undercut other decisions on the issue of congressional power to regulate intrastate activities under the commerce clause,[58] the decision may have far-reaching implications. Perhaps it is possible to view the holding as an isolated and politically expedient decision prompted by the current fiscal crisis threatening many metropolitan and state governments.[59] On the other hand, the opinion may indicate that future congressional legislation affecting the states' internal activities may be subjected to a very strict standard of review.[60] In any event, the decision demonstrates an emerging concern for the governmental independence of the states.

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57. The majority stated: "If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.' " 426 U.S. at 851.

58. *Id.* at 852-55.

59. The majority spent a great deal of time addressing itself to the additional costs that would be imposed on the cities and states if they complied with the amendments. *Id.* at 846. *See* National League of Cities v. Brennan, 406 F. Supp. 826, 827 (D.D.C. 1974), *rev'd sub nom.*, National League of Cities v. Usery 426 U.S. 833 (1976).

> There is evidence that the impact of the 1974 Amendments, in terms of confusing and complex regulations and an enormous fiscal burden on the states, is so extensive that it may seriously affect the structuring of state and municipal governmental activities by reducing flexibility to adapt to local and special circumstances, as through compensatory time-off arrangements . . . .

See also Brief for National Institute of Municipal Law Officers as Amicus Curiae at 34, National League of Cities v. Usery, 426 U.S. 833 (1976) ("The monetary impact [of the amendments] is real and not de minimis.").

60. *See generally* Brief for National Institute of Municipal Law Officers as Amicus Curiae, National League of Cities v. Usery, 426 U.S. 833 (1976).