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IN THE WAKE OF *NATIONAL LEAGUE OF CITIES V. USERY*: A "DERELICT" MAKES WAVES

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I. INTRODUCTION

The division of power between the federal and state governments has been a major issue in American Constitutional law since the beginning of the republic. The early nationalist position conceded that powers of Congress were limited to a few general areas like national defense, foreign commerce, and domestic interstate commerce. But, said the nationalists, when Congress exercises a power granted by the Constitution,[1] it need not respect the powers and prerogatives of the states. The states' rights theorists, however, contended that Congress normally could not exercise its powers in ways that conflicted with state prerogatives.[2] The nationalist theory has prevailed for most of American history, especially since the years immediately preceding World War II. But in 1976, the Nixon appointees to the Supreme Court enlisted an additional vote to reach a decision which threatened to carve a major states' rights exception to the long-prevailing view of congressional power. The case was *National League of Cities v. Usery*.[3] The potential of *League of Cities* for disrupting federal powers over states' rights in areas from environmental protection to civil rights provoked much scholarly comment. But, for the most part, the interests and values served by the national government have proved too strong to be qualified by the interests of the states, and the states' rights potential of *League of Cities* has not materialized. Developments in the case law since 1976 show that instead of permitting the doctrinal growth of *League of Cities*, the federal courts have developed several strategies for sidestepping the case or confin-

1. *See* McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819).
2. *See generally* 1 H. STORING, THE COMPLETE ANTI-FEDERALIST (1981).
3. 426 U.S. 833 (1976).

ing it to its narrowest implications. This article reviews these strategies, analyzes them, and assesses their significance for the future of this controversial decision.

II. Historical Background

In 1938, a New Deal Congress enacted the Fair Labor Standards Act (FLSA), setting wage and hour regulations for much of the nation's labor force.[4] The Supreme Court unanimously upheld the FLSA in *United States v. Darby*.[5] The Act specifically excluded states and their political subdivisions from coverage.[6] Beginning in 1961, however, a series of amendments gradually extended to public employees the minimum wage and maximum hour provisions of the FLSA.[7] In 1966, Congress removed the exemption of the states and their political subdivisions with respect to employees of state hospitals, schools, and institutions for the sick, aged, or mentally ill;[8] The Supreme Court upheld this extension of the Act in *Maryland v. Wirtz*.[9] In 1974, Congress completely removed the prior exemption of employees of state and local governments.[10] The effect of the 1974 amendments was to apply the minimum wage and maximum hour requirements of the FLSA to eleven million state and city government employees[11] and to impose requirements upon the states which were almost identical to those on employers in the private sector.

In opposition to the 1974 amendments, the National League of Cities, the National Governor's Conference, and several states

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4. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938)(current version at 29 U.S.C. §§ 201-219 (1976)). Originally, the Act applied only to employees actually engaged in commerce or in the production of goods for commerce.

5. 312 U.S. 100, 125-26 (1941).

6. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (amended 1974).

7. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 2(c), 75 Stat. 65 (codified at 29 U.S.C. § 203(r), (s)(1964)). The 1961 amendments expanded coverage to include not only employees engaged in commerce, but also employees of an "enterprise" having any employees engaged in commerce or the production of goods for commerce.

8. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 831 (codified at 29 U.S.C. § 203(r), (s)(1970)).

9. 329 U.S. 183, 193-99 (1968).

10. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1), 84 Stat. 55 (codified at 29 U.S.C. § 203(d), (e), (r), (s), (x)(1976)).

11. *See* Brief for Appellant at 10, National League of Cities v. Usery, 426 U.S. 833 (1976)(citing U.S. Department of Commerce, Public Employment In 1973 (1973)).

brought suit against the Secretary of Labor, William J. Usery. These plaintiffs did not deny Congress' long-acknowledged power to regulate hours and wages in the private sector. They claimed instead that state governments enjoyed certain immunities from federal regulation and that the hours and wages of state employees were within those immunities, regardless of whether Congress believed that the hours and wages of state employees exerted an effect on the nation's economy. A three-judge district court invoked the authority of *Maryland v. Wirtz* and dismissed the suit,[12] but observed that the challenge to the Act raised substantial questions about the reach of the power of Congress under the commerce clause: "[I]t may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of [*Maryland v. Wirtz*]; but that is a decision that only the Supreme Court can make, and as a Federal district court we feel obliged to apply the *Wirtz* opinion as it stands."[13]

In the following year, the Supreme Court decided *Fry v. United States*,[14] a case which was to be of considerable importance to the outcome of the suit against the 1974 amendments. In *Fry*, a seven to two majority upheld the constitutionality of the Economic Stabilization Act of 1970.[15] The Act authorized the President to extend emergency wage and price controls to state employees. Writing for the majority, Justice Marshall rested the decision on the broad powers of Congress under the commerce clause and the importance of not allowing major exceptions to a national wage and price policy.[16] He rejected the states' claim, based on the tenth amendment, that the Act exceeded the power of Congress. But in response to a strong dissent from Justice Rehnquist, Marshall added the following footnote:

> Petitioners have stated their argument not in terms of the Commerce Power, but in terms of the limitations on that

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12. National League of Cities v. Brennan, 406 F. Supp. 826 (D.D.C. 1974)(three-judge court), *rev'd sub nom.* National League of Cities v. Usery, 426 U.S. 833 (1976).

13. *Id.* at 828.

14. 421 U.S. 542 (1975).

15. Title II of Pub. L. No. 91-379, 84 Stat. 799 (expired April 30, 1974)(*reprinted in* 12 U.S.C. § 1904 (1976)).

16. 421 U.S. at 547-48.

> power imposed by the Tenth Amendment. While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. Despite the extravagant claims on this score made by some *amici*, we are convinced that the wage restriction regulation constituted no such drastic invasion of state sovereignty.[17]

Justice Rehnquist conceded in dissent that in emergency circumstances, Congress would be empowered to regulate activities of the states in the national interest. He also claimed, however, that Congress could not do so under the commerce power alone.[18] He argued further that the economic circumstances producing the wage-price freeze in 1970 did not rise to the kind of emergency in which other powers (such as the war powers) might augment the power of Congress under the commerce clause.[19] He urged the Court to overrule *Maryland v. Wirtz*.[20]

League of Cities was decided the following year. The Court rejected the 1974 amendments to the FLSA by a five to four vote, ruling that Congress had intruded too greatly on the rights of the states by imposing federal labor standards on state employees.[21] *Wirtz*, a clear barrier to this result, was undermined by a plurality opinion written by Justice Rehnquist.[22]

The decision astonished the legal community: for the first time in forty years the Court had struck down, on grounds of state sovereignty, an exercise of the commerce power. Although recognizing that the establishment of wage and hour regulations was within the scope of the commerce clause, Justice Rehnquist contended that insofar as the regulations "operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions,"[23] they were unconstitutional. In reaching this conclusion, Rehnquist explained

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17. *Id.* at 547 n.7.
18. *Id.* at 558-59.
19. *Id.* at 559.
20. *Id.*
21. 426 U.S. at 845-52.
22. *Id.* at 855.
23. *Id.* at 852.

that the tenth amendment contained an "affirmative limitation"[24] on the commerce power "akin to"[25] limitations in the Bill of Rights—a limitation running in favor of "the States as States"[26] that prohibits congressional enactments threatening the "separate and independent existence"[27] of the states as "sovereign political entit[ies]."[28] The existence of this state-sovereignty limitation, wrote Rehnquist, has been "repeatedly recognized" in the doctrine of intergovernmental tax immunity.[29] Without the right to determine the hours and wages of public employees performing "integral governmental functions" in such areas as "fire prevention, police protection, sanitation, public health, and parks and recreation," Rehnquist concluded, "there would be little left of the States' 'separate and independent existence.' "[30] Rehnquist then went on to overrule *Wirtz* while affirming the continued validity of *Fry* as a case which upheld an exercise of national power in an economic emergency.[31]

In an acrimonious dissent joined by Justices White and Marshall, Justice Brennan attacked the majority for ignoring decades of precedent and for seeking to substitute its own policy judgment for that of the legislature.[32] Characterizing the Court's reasoning as a "manufactured . . . abstraction without substance,"[33] Brennan predicted the opinion would "astound scholars of the Constitution"[34] because it ignored the decision of the Court in *McCulloch v. Maryland*[35] that (as Brennan described it) "nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress."[36] Elsewhere in the dissent Brennan called the decision an "exercise of raw judicial power,"[37] "absurd,"[38] an

24. *Id.* at 841.
25. *Id.*
26. *Id.* at 845.
27. *Id.*
28. *Id.* at 842.
29. *Id.* at 845.
30. *Id.* at 851.
31. *Id.* at 852-55.
32. *Id.* at 857-81.
33. *Id.* at 860.
34. *Id.* at 862.
35. 17 U.S. (4 Wheat.) 316 (1819).
36. 426 U.S. at 862.
37. *Id.* at 879.
38. *Id.* at 872.

ipse dixit,[39] "pernicious,"[40] "unworkable,"[41] "mischievous"[42] and "catastrophic."[43] Finally, he also reminded the majority that a similar insistence on states' rights at the expense of national power had "provoked a constitutional crisis for the Court in the 1930's."[44]

Justice Stevens, the fourth member of the minority, wrote a separate dissent, although he raised no points not contained in the Brennan opinion.[45] Commentators have speculated as to why Stevens elected to file a separate dissent. One student of the decision has remarked that Stevens "simply did not want to join an opinion with Brennan's tone."[46] Stevens agreed with the majority that it was unwise for Congress to regulate the states in the manner of the FLSA amendments, but he nevertheless found himself unable to identify a clear basis for the majority's constitutional decision.[47] Stevens could not find a limitation on the power of the national government over the wages and hours of state employees that also would not invalidate other federal laws, which he considered "unquestionably permissible,"[48] such as those requiring state compliance with federal standards in environmental protection, highway safety, and civil rights.

Justice Blackmun's qualified concurrence was of special significance to the future of *League of Cities*.[49] Although Blackmun joined the majority opinion, it appears that Brennan's dissent partially persuaded him. Blackmun therefore refused to endorse Rehnquist's theory, preferring to reach the same result through what he called a "balancing approach." This approach, according to Blackmun, would not "outlaw federal power in areas such as environmental protection in which the federal interest is demonstrably greater and in which state facility compliance with

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39. *Id.*
40. *Id.* at 860.
41. *Id.* at 880.
42. *Id.*
43. *Id.*
44. *Id.* at 868.
45. *Id.* at 880.
46. Barber, National League of Cities v. Usery: *New Meaning for the Tenth Amendment?*, 1976 Sup. Ct. Rev. 161, 163 (1977) [hereinafter cited as Barber].
47. 426 U.S. at 880-81.
48. *Id.* at 881.
49. *Id.* at 855.

imposed federal standards would be essential."[50] Blackmun's concurrence limited the plurality's opinion by allowing critics of Rehnquist's theory to claim that a majority of the Court (Blackmun and the four dissenters) had reservations about future extensions of states' rights limitations on the commerce power and on federal power in general. If, as Brennan feared, "ominous implications"[51] of the decision ever materialized, critics could say that a majority actually opposed a strong across-the-board affirmation of states' rights in *League of Cities*. Blackmun's concurrence would create pressure on courts to ignore Brennan's pessimistic forebodings when applying *League of Cities*.

After six years of application, it is appropriate to ask how *League of Cities* has fared as an instrument for restricting the federal government's sphere of authority. For all the attention it has attracted in the cases and commentaries, *League of Cities* has proved to be a rather limited departure from the nationalism that has dominated commerce-clause litigation for the past forty years. The case nevertheless has influenced the way the federal courts approach several different kinds of state challenges to federal authority.

III. The Aftermath of *National League of Cities v. Usery*

In his dissenting opinion in *League of Cities*, Justice Brennan argued: (1) that if the tenth amendment limits the commerce clause it limits all other powers of the national government to the same extent, but (2) since it would be unthinkable to find tenth amendment limitations on congressional policies in areas such as civil rights and the environment, (3) saying that the tenth amendment limits the commerce power is mere *ipse dixit*. This argument helps explain the way courts have applied *League of Cities*. In cases decided since *League of Cities*, the Court has neither admitted that its holding was mere *ipse dixit* nor extended *League of Cities* into other areas, as doctrinal consistency would seem to require. Recent developments indicate that *League of Cities* is no more than a shotgun in the closet for use on special occasions when the Court believes Congress has gone too far under the commerce clause. Nor is *League of Cities*

50. *Id.*
51. *Id.* at 876.

any less than that, although it is doubtful that the case will have an impact in areas beyond commerce.

A. The Fourteenth Amendment

Of the several issues left untouched by *League of Cities*, the most important was the extent of congressional power under the fourteenth amendment. The *League of Cities* majority specifically declined to express an opinion on whether Congress could achieve "different results . . . [in] affect[ing] integral operations of state governments by exercising authority granted to it under other sections of the Constitution such as . . . section 5 of the Fourteenth Amendment."[52] This language left open the possibility that Congress' fourteenth amendment powers could be limited by the rationale of *League of Cities*. The Court, however, foreclosed this possibility swiftly and decisively four days later in *Fitzpatrick v. Bitzer*.[53]

In *Fitzpatrick*, an employee of the State of Connecticut brought a class action on behalf of current and retired male employees against several state officials, alleging that certain provisions of Connecticut's retirement plan discriminated against male employees in violation of Title VII of the Civil Rights Act of 1964.[54] As amended in 1972 by the Equal Employment Opportunities Act,[55] Title VII of the 1964 Act applied to the states as employers.[56] Fitzpatrick claimed that Connecticut allowed

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52. *Id.* at 852 n.17.

53. 427 U.S. 445 (1976).

54. 42 U.S.C. § 2000(e)(1970 & Supp. V 1975). Title VII of the Civil Rights Act of 1964 provides:

> [i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000(e)-2(a).

55. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103 (amending 42 U.S.C. § 2000(e) (1970)).

56. In the 1972 amendments to Title VII of the Civil Rights Act of 1964, Congress, acting under section 5 of the fourteenth amendment, authorized federal courts to award monetary damages in favor of a private individual against a state government found to

women with twenty-five years of service to retire with pension benefits five years earlier than men, and that women retiring with less than twenty-five years of service received higher benefits than their male counterparts. Fitzpatrick asked the State to pay retired males the difference between the female benefits and the male benefits computed from the date of their eligibility.

In its response, Connecticut claimed that the shield of sovereign immunity in the eleventh amendment limited Congressional power to authorize private damage actions against the state as a means of enforcing the fourteenth amendment.[57] But Justice Rehnquist, writing for a unanimous Court, held that the eleventh amendment did not bar an award of backpay pension benefits under a Title VII claim.[58] Rehnquist said that, unlike the power of Congress under the commerce clause, the power of Congress under section 5 of the fourteenth amendment is not limited by any of the states' reserved powers. Rehnquist explained that the substantive provisions of the fourteenth amendment are directed at the states in express terms and, therefore, unlike the terms of the commerce power, they "clearly contemplate limitations on [the states'] authority."[59] He observed also that section 5 gave Congress power to "enforce" the substantive guarantees of the amendment "by appropriate legislation."[60] Of the power of Congress to enforce the amendment, he said:

> [w]hen Congress acts pursuant to section 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority. . . . Congress may, in determining what is "appropriate" legislation for the purpose of enforcing the . . . Fourteenth

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have subjected that person to employment discrimination on the basis of race, color, religion, sex, or national origin. *Id.*

57. 427 U.S. at 451. Relying on Edelman v. Jordan, 415 U.S. 651 (1974), the state argued that the eleventh amendment barred any order prescribing retroactive damages against the state. *Edelman* had held that a suit by welfare clients for past benefits wrongfully withheld could not be maintained against the state. Justice Rehnquist's opinion for the court in *Fitzpatrick* distinguished *Edelman* on the ground that neither of the federal statutes underlying the welfare program in issue in *Edelman* had authorized suits against a state. 427 U.S. at 451-52.

58. *Id.* at 456.

59. *Id.* at 453.

60. *Id.*

> Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.[61]

Strictly speaking, *League of Cities* and *Fitzpatrick* decided two different issues: *League of Cities* considered a tenth amendment limitation upon the commerce clause; *Fitzpatrick* decided whether there was an eleventh amendment limitation upon the fourteenth amendment. But since both addressed a conflict between congressional power and state sovereignty, the result in *Fitzpatrick* indicates that *League of Cities* was not designed as the foundation of a new and general constitutional principle requiring Congress to respect all claims to state sovereignty over state employees. One can surely say that if such a general principle had been the intended promise of *League of Cities*, the Court reneged on that promise quickly and definitely in *Fitzpatrick*.

Although Justice Rehnquist attempted a meaningful distinction between the decisions in *Fitzpatrick* and *League of Cities*, the distinction is more apparent than real. Rehnquist claimed that the fourteenth amendment was an explicit limitation on the power of the states. He saw the commerce power as weaker, visa-vis state power, because the commerce power is not an explicit limitation on the states. But in making this argument, Rehnquist ignored the fact that when a clash occurs between the commerce power and "anything in the Constitution or Laws of any State,"[62] the supremacy clause reinforces the commerce clause and explicitly limits the powers of the states. Therefore, despite rhetoric about the uniqueness of the fourteenth amendment compared to the commerce clause, *Fitzpatrick* simply contradicts *League of Cities*.

Furthermore, comparison of the tenth and eleventh amendments reinforces the significance of *Fitzpatrick*. Unlike the tenth amendment, the eleventh amendment is an explicit assertion of states' rights, proposed and ratified because the states insisted upon a reaffirmation of their sovereignty in the face of what they believed was an act of usurpation by the federal judi-

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61. *Id.* at 456.
62. U.S. CONST. art. VI, § 2.

ciary.[63] In light of its history, one can view the eleventh amendment as a stronger expression of the principle of state sovereignty than the tenth amendment. Indeed, prior to *League of Cities*, the conventional view was that the tenth amendment was less an assertion of state sovereignty than a reminder that Congress could exercise only those powers which it had been granted, without any implications concerning states' rights limitations upon those powers.[64] This was the view of Justice Story who in 1883 formulated what has proved to be the most authoritative interpretation of the tenth amendment:

> This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. . . . It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect as an abridgement of any of the powers granted under the Constitution, whether they are express of implied, direct or incidental. Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted. . . . The attempts then which have been made from time to time to force upon this language an unabridging or restrictive influence are utterly unfounded.[65]

One need not commit oneself to Story's influential interpretation of the tenth amendment in order to recognize that from both its language and history, the eleventh amendment is clearly a stronger assertion of state sovereignty than the tenth amend-

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63. In the late 1700s the scope of authority of the federal courts with respect to the states was a subject of bitter controversy. The controversy reached its peak when, in 1793, citizens of South Carolina brought in the Supreme Court, a suit against the State of Georgia to collect a debt owed an estate. Georgia stood on the proposition that, since a state is sovereign, it cannot be sued in any court without its consent. When the Supreme Court, in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), decided for the citizens of South Carolina, the resentment of a number of states at the affront to state sovereignty involved in permitting suits against states by mere citizens was sufficient to bring about the adoption of the eleventh amendment in 1798. The eleventh amendment withdrew from the federal courts jurisdiction in suits against states brought by citizens of other states or foreign countries. The ruling in *Chisholm* was overturned with the adoption of the eleventh amendment.

64. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (2d ed. 1851) [hereinafter cited as STORY]; *see also* United States v. Darby, 312 U.S. 100, 124 (1941); Berns, *The Meaning of the Tenth Amendment*, in A NATION OF STATES 145 (R. Goldwin ed. 1961); Castro, *The Doctrinal Development of the Tenth Amendment*, 51 W. VA. L. REV. 227 (1949).

65. STORY, *supra* note 64, at §§ 1906-08.

ment. For, unlike the tenth amendment, one cannot read the eleventh amendment as anything other than a limitation on national power.

In sum, within a week of Justice Rehnquist's announcement of the state sovereignty doctrine in *League of Cities*, he led the Court to affirm that, relative to states rights, congressional power under the fourteenth amendment was without limits. Clearly, *Fitzpatrick* signaled that *League of Cities* was not to be taken as an instance of a new constitutional principle concerning the relative scope of state and federal powers.[66]

B. Civil Rights Legislation

The civil rights legislation most obviously vulnerable to challenge after *League of Cities* were two other amendments to the Fair Labor Standards Act: the Equal Pay Act of 1963 (EPA),[67] and the Age Discrimination in Employment Act of 1967 (ADEA).[68] These acts prohibit sex discrimination in the payment of wages and age discrimination in the hiring of employees. Enacted under the commerce clause,[69] the EPA and ADEA were based upon congressional findings that sex and age discrimination have a substantial adverse impact on interstate commerce. Congress chose to remedy this situation by requiring that employers award equal pay for equal work and hire according to individual merit, rather than on presumptions about the

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66. *See also* City of Rome v. United States, 446 U.S. 156, 179 (1980)(court held that the tenth amendment places no restrictions on congressional power "to enforce the Civil War Amendments 'by appropriate legislation' ").

67. 29 U.S.C. § 206(d) (1970). The Act bars an employer from discriminating:

> between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

Id. at § 206(d)(1).

68. 29 U.S.C. §§ 621-34 (Supp. IV 1974). The ADEA makes it unlawful for "an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation terms, conditions, or privileges of employment because of such individual's age." *Id.* at § 623(a).

69. Although the EPA and the ADEA are primarily anti-discrimination measures, they were enacted under the commerce clause and not under the fourteenth amendment. The commerce clause was used because the FLSA originally applied only to private employers who are beyond the reach of the fourteenth amendment.

effects of age on ability.[70]

When enacted in 1963, the EPA, as part of the FLSA, covered only employees in the private sector; states and their politi-

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70. A confusing characteristic of much modern civil rights legislation is its complex constitutional foundations in both the fourteenth amendment and the commerce clause. In the decade following the Civil War, the radical Reconstruction Congress passed a number of civil rights laws which evinced its view that the Civil War had effectively transferred the power to define and protect the civil rights of individuals from the states to the national government. An example of such legislation was the Civil Rights Act of 1875 making it a federal offense for proprietors of inns, theaters, transportation facilities, and other "public accommodations" to discriminate against any potential customer on the grounds of race. The Supreme Court opposed much of this legislation either through restrictive interpretation or outright invalidation. In the Civil Rights Cases, 109 U.S. 3 (1883), the Court moved to restore some of the states' powers by holding that Congress could outlaw only discriminatory state laws and other state activities, not private action. The Court thus declared unconstitutional the public accommodations provisions of the Civil Rights Act of 1875 as aimed not at correcting deliberate acts of official discrimination but at acts of "private" discrimination beyond the scope of the fourteenth amendment. With this decision, the fourteenth amendment ceased to be an effective basis for *congressional* action and became a set of *judicial* criteria for invalidating state laws and practices found to be deliberately discriminatory. In theory, "corrective legislation" was held to be authorized by the fourteenth amendment. All that could be corrected, however, was state action, not private discrimination. The best corrective for state action was simple invalidation by the federal courts.

This transfer of power from Congress to the courts went unopposed as the Reconstruction zeal dissipated in the 1880's; indeed, in 1894, Congress itself repealed the most important of the Reconstruction civil rights laws that the courts had not voided or weakened. Following the assassination of President Kennedy, however, there was a resurgence of congressional concern for protecting civil rights, and Congress once again enacted civil rights laws aimed at preventing racial discrimination in public accommodations. Title II of the Civil Rights Act of 1964. This Act was similar to the Act of 1875 that the Court struck down in the *Civil Rights Cases*. Thus, Congress faced the problem of locating a constitutional basis for a new assault on discrimination in public accommodations. That foundation proved to be the commerce clause, on the argument that discrimination in public accommodations had a sufficient effect on interstate commerce to warrant an exercise of the commerce power.

While Congress took pains to rationalize the 1964 Civil Rights Act as an exercise of the commerce power, the statute also cited the enforcement provisions of the fourteenth amendment, thereby inviting the Warren Court to overrule the *Civil Rights Cases*. But the Court declined that invitation in Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and upheld the Act under the commerce clause without deciding its constitutionality under the fourteenth amendment. In basing this Act partly on the commerce power, Congress provided a way to avoid a conflict with the *Civil Rights Cases* because Congress does have the power to reach private activity under the commerce power. Much modern civil rights legislation follows the precedent of the Civil Rights Act of 1964 by grounding its action both in the fourteenth amendment and the commerce clause. However, some of the legislation in the cases that follow in this article are civil rights laws enacted solely under the commerce power. This did not stop the courts from upholding them. *See infra* notes 74-84 and accompanying text.

cal subdivisions were specifically excluded from its coverage.[71] In 1966, however, Congress expanded the definition of the term "employer" in the FLSA to include state and local governmental workers employed in state hospitals, schools, and institutions for the sick, aged, or mentally ill.[72] In 1974 Congress further expanded coverage to employees of any "public agency," defined broadly as "the government of a State or political subdivision thereof; any agency . . . [of] a State, or political subdivision of a State; or any interstate governmental agency."[73] Thus, the 1974 amendments extended the application of the FLSA, including the EPA and the ADEA, to nearly all state and local governments.

In *League of Cities*, the Court found the minimum wage and maximum hour provisions of the FLSA unconstitutional as applied to state and local governmental employees. Although *League of Cities* did not discuss the EPA and the ADEA, they were enacted by Congress under the commerce power and thus were open to the same constitutional objections that brought down the hour and wage standards that applied to the states. Inevitably, the states challenged the applicability of the EPA and the ADEA on the authority of *League of Cities*.

A federal district court in Iowa was the first to confront the question of whether Congress had the power under the commerce clause to extend the Equal Pay Act to the states.[74] Female employees of a state university charged that they had been discriminated against in violation of the Act. The State contended that by striking down the 1974 amendments that had extended the minimum wage and maximum hour provisions of the FSLA, the Court, in *League of Cities*, had struck down all the 1974 amendments that applied to the states—including the EPA. But the district court rejected this argument, and held instead that applying the EPA to the states pursuant to the commerce clause was constitutional. The court reached this conclusion by reasoning that discrimination in pay cannot validly be considered a "fundamental employment decision" essential to the separate

71. 29 U.S.C. § 203(d) (1970).
72. 29 U.S.C. § 203(r), (s) (1970); *See supra* notes 4-11 and accompanying text.
73. 29 U.S.C. § 203(x) (Supp. V 1975).
74. Christensen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976).

and independent existence of the state.[75] The court also noted that sex discrimination was not an attribute of state sovereignty within the purview of the tenth amendment.[76] The court narrowly interpreted the *League of Cities* holding, stating that the decision "should be confined strictly to its factual context."[77]

A Texas district court employed a similar argument in rejecting a challenge by a school district against application of the EPA.[78] In the Texas case, as in the Iowa case, the court ruled that *League of Cities* should be applied "very conservatively" because, while effecting "a modest resurrection of state sovereignty," the decision was not intended "to generally and fundamentally alter the balance of state and federal power."[79] With respect to the EPA and other provisions of the FLSA not at issue in *League of Cities*, the court stated that "[n]owhere in *National League of Cities* does the Court indicate that the entire Fair Labor Standards Act is now a nullity as applied to states and municipalities."[80] Finally, the court added that any tenth amendment limitation on the commerce power was subject to three conditions: the state functions protected must be of an "internal, administrative, management, or housekeeping" character; the exercise of the commerce power must substantially disrupt state operations; and the state interests must outweigh countervailing national policy.[81] Following the lead of *Fitzpatrick*, the court held that the EPA could be upheld under the fourteenth amendment,[82] that there was no essential state func-

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75. *Id.* at 425.

76. *Id.*

77. *Id.* at 424.

78. Usery v. Dallas Indep. School Dist., 421 F. Supp. 111 (N.D. Texas 1976).

79. *Id.* at 114.

80. *Id.* at 113. The constitutional defects of the minimum wage and maximum hour provisions did not invalidate the entire FLSA because Congress regularly inserts a separability clause in legislation to prevent judicial invalidation of one section from voiding the statute as a whole. *See* 29 U.S.C. § 219 (1970).

81. 421 F. Supp. at 115-16.

82. *Id.* at 114. With respect to the fourteenth amendment, the court stated: "[i]f the Equal Pay Act could also be plausibly sustained by any other Congressional power, such as the Fourteenth Amendment, courts would be bound to sustain it on the latter basis." *Id.* The court also noted that "[i]t does not matter that Congress relied specifically on the Commerce Clause. The maxim of judicial review is well-established that enactments by Congress are presumptively constitutional. If a court can sustain legislation on the basis of any power in the Constitution, it will do so. One attacking a Congressional enactment must demonstrate either that it lacks any plausible basis in the Constitution or

tion involving sex discrmination,[83] and that even if Congress were viewed as having acted under the commerce clause, the federal interest outweighed that of the states.[84]

Most lower courts have adopted the same strategy in cases involving the ADEA. In the face of challenges invoking *League of Cities* most courts have taken one of two approaches: they have assumed (1) that the Act was passed under the commerce power and held that the federal interest outweighs the state interest, or (2) that the statute was passed under the fourteenth

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that it violates a specific limitation in the Constitution." *Id.* at 114 n.3.

83. *Id.* at 116.

84. *Id.* at 116 & n.7. In addition to the *Christensen* and *Dallas* decisions, the following cases have upheld the applicability of the Equal Pay Act to a state or a political subdivision of a state against a *League of Cities* challenge: Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979); Marshall v. Kent State Univ., 589 F.2d 255 (6th Cir. 1978); Marshall v. City of Sheboygan, 577 F.2d 1 (7th Cir. 1978); Usery v. Charleston County School Dist., 558 F.2d 1169 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); Nilsen v. Metropolitan Fair and Exposition Authority, 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); Usery v. Bettendorf Community School Dist., 423 F. Supp. 637 (S.D. Iowa 1976). In Howard v. Ward County, 418 F. Supp. 494 (D.N.D. 1976) and Usery v. Owensboro-Daviess County Hosp., 423 F. Supp. 843 (W.D. Ky. 1976), the district courts held for the states on this issue. The two contrary holdings are of interest. In *Howard*, a female deputy sheriff complained of salary discrimination based on sex and claimed jurisdiction under and violations of both Title VII and the Equal Pay Act. The court held that the latter was not applicable to defendant on the basis of *League of Cities*: "Since the Equal Pay Act is part of the FLSA and takes its definition of 'employer' therefrom, it follows that the Defendants are not 'employers' within the coverage of the Equal Pay Act." 418 F. Supp. at 500. As to Howard's Title VII claim, the court declared that the county and the sheriff were "employers" for Title VII purposes and held that "the coverage of state and local governments under Title VII is within Congressional power under the Fourteenth Amendment, the basis upon which Congress extended coverage to these entities." *Id.* at 501. The district court found that there had been a sex-based salary discrimination in violation of Title VII, and Deputy Howard was awarded monetary and injunctive relief. No appeal was taken from the adverse decision in this case. Howard obviously would not appeal and the Secretary of Labor, not being a party, could not. In *Owensboro-Daviess*, the district court relied on an overly simplistic line of reasoning: the FLSA embodied a single definition of "employer" which *League of Cities* had ruled to be inapplicable to states insofar as standards of minimum pay and maximum hours were concerned and that the FLSA's separability clause could not practically be applied to accord one definition to employer in that type of case and another in an equal pay case. In this case, the judge refused to "reach out for the Fourteenth Amendment" as an aid in construing amendments to the Act. 423 F. Supp. at 846. This decision was overruled in Marshall v. Owensboro-Daviess County Hosp., 581 F.2d 116 (6th Cir. 1978). Here the court found in section 5 of the fourteenth amendment a constitutional basis for applying the Equal Pay Act to state and local governments as employers.

amendment, in which no states' rights limitation exists. An example of the first approach is the opinion in a Utah case construing *League of Cities* "to require balancing of state and federal interests . . . even where integral state governmental functions may be affected."[85] In that case a federal district court held that the commerce clause permitted Congress to regulate state employment practices because "the national interest in employment significantly outweigh[ed] the state's interest in discriminatory employment policies and practices."[86] An example of the second approach is a North Dakota case in which a district court found it "unnecessary to engage in a balancing of . . . state and federal interests" because the ADEA was authorized by the fourteenth amendment.[87]

Contrary to this pattern, a Wyoming district court ruled that Congress violated the tenth amendment when it made the ADEA applicable to state and local government employees.[88] The court refused to reach out for the fourteenth amendment in this case, finding "not a word or even a smidgen"[89] in the 1974 amendments to suggest that Congress, in extending the ADEA to the states, was acting under section 5 of the fourteenth amendment and not under the commerce power.[90] To support this position, the court relied on language from the Supreme Court's opinion in *Pennhurst State School and Hospital v. Halderman*,[91] in which Justice Rehnquist stated that courts "should not quickly attribute to Congress an unstated intent to

85. Usery v. Salt Lake City Board of Educ., 421 F. Supp. 718, 720 (D. Utah 1976).

86. *Id.* at 720.

87. Remmick v. Barnes County, 435 F. Supp. 914, 916 (D.N. Dak. 1977). The following cases have also upheld the applicability of the ADEA to a state or a political subdivision of a state: Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Equal Employment Opportunities Comm'n v. County of Los Angeles, 526 F. Supp. 1135 (C.D. Cal. 1981); Adams v. James, 526 F. Supp. 80 (M.D. Ala. 1981); United States Equal Employment Opportunity Comm'n v. County of Calumet, 519 F. Supp. 195 (E.D. Wis. 1981); Marshall v. Delaware River and Bay Authority, 471 F. Supp. 886 (D. Del. 1979); Aaron v. Davis, 424 F. Supp. 1238 (E.D. Ark. 1976).

88. Equal Employment Opportunity Comm'n. v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981); *See also* Taylor v. Dep't of Fish and Game, 523 F. Supp. 514 (D. Mont. 1981).

89. 514 F. Supp. at 599.

90. Having concluded that the ADEA was passed only under the commerce clause, the court found that, on balance, the state's interest in fit law officers outweighs the EEOC's claim of a larger national interest. 514 F. Supp. at 600.

91. 451 U.S. 1 (1981).

act under its authority to enforce the Fourteenth Amendment."[92] Notwithstanding the Wyoming court's use of the *Pennhurst* dictum, Rehnquist's statement may have limited application because the statute under review in *Pennhurst* imposed what Rehnquist called "massive financial obligations on the States"[93] and because Rehnquist did review the legislative history in reaching the decision despite an absence of an explicit statutory intent to act under the fourteenth amendment.[94] By reviewing the legislative history, Rehnquist effectively acknowledged that the absence of explicit statutory language is in itself insufficient to determine questions of legislative intent. In the case of the ADEA, moreover, it appears that evidence of congressional intent is in the eyes of the beholder. Less than a month after the Wyoming district court found "nothing in the 1974 FLSA Amendments or their legislative history to suggest that Congress acted pursuant to any other power than the Commerce Clause,"[95] a Wisconsin district court concluded that the ADEA's legislative history was "rife with indications that Congress did indeed intend to exercise its Fourteenth Amendment enforcement power."[96] The question of the ADEA's application to the states will be settled by the Supreme Court in the 1982-83 term when the Court hears the federal government's appeal in the Wyoming case.[97] The case may provide the occasion for a clash between two conservative inclinations: (1) diminishing federal power over the states—an objective that would favor a commerce-power interpretation of the ADEA, and (2) practicing judicial self restraint—an objective that would obligate the Court to give the Act a fourteenth amendment construction that would save it.[98]

Just as civil rights acts of Congress have survived *League of Cities* challenges, so have the school desegregation policies of the

92. *Id.* at 16.

93. *Id.* at 17.

94. *Id.* at 18-22.

95. 514 F. Supp. at 600.

96. United States Equal Employment Opportunity Comm'n v. County of Calumet, 519 F. Supp. 195, 198 (E.D. Wis. 1981).

97. Equal Employment Opportunity Comm'n v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981), *prob. juris. noted*, 454 U.S. 1140 (1982).

98. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936)(Brandeis, J. concurring).

federal courts pursuant to the historic policy announced in *Brown v. Board of Education*.[99] In *Milliken v. Bradley*,[100] the governor of Michigan opposed a federal district court order requiring Michigan to provide funds for remedial education programs in order to remedy past acts of official school discrimination. The State argued that both the tenth and eleventh amendments prevented federal courts from mandating that states spend money for remedial programs.[101] The Supreme Court dismissed the State's argument, holding that, since there had been a finding of unconstitutional state action, the federal district court could order an expenditure of state funds to remedy the unconstitutional action.[102] In rejecting the argument that a state sovereignty limitation existed on the equity powers of federal courts, the Court followed the lead of *Fitzpatrick* by affirming that there is no states' rights limitation on federal power to enforce the fourteenth amendment.[103]

C. *The Taxing Power*

After *League of Cities*, one might have expected the Court to expand the scope of state immunity to federal taxation directly affecting essential state functions. The Court, in *Massachusetts v. United States*,[104] however, retreated from this opportunity, rejecting a states' rights limitation on the taxing power. This case arose from a conflict between two lower court decisions concerning the Airport and Airway Revenue Act of 1970.[105] As part of a comprehensive program to recoup the costs of federal aviation services from those who use the national air system, Congress passed an act which imposed an annual registration tax on all civil aircraft—including those owned by the states and the federal government. The states of Massachusetts and Georgia protested the tax and instituted refund actions contending, on the authority of *League of Cities*, that the United States could not constitutionally impose a tax on state-owned helicop-

99. 347 U.S. 483 (1954).
100. 433 U.S. 267 (1977).
101. *Id.* 288-91.
102. *Id.*
103. *See id.* at 291.
104. 435 U.S. 444 (1978).
105. 26 U.S.C. § 4491 (1970).

ters used for police work. A Massachusetts district court dismissed Massachusetts' complaint, and the Court of Appeals for the First Circuit affirmed, holding that the registration tax was an airport user charge which did not raise the constitutional issue of implied constitutional immunity of the states from the federal taxation.[106] A federal district court in Georgia, on the other hand, held the aircraft registration tax unconstitutional as applied to state aircraft for the purpose of carrying out essential police functions.[107]

The Supreme Court granted certiorari in *Massachusetts v. United States* to resolve the conflict between these two decisions.[108] Writing for the Court, Justice Brennan upheld the tax and rejected the State's *League of Cities* argument with essentially the same argument he propounded in his *League of Cities* dissent: that some federal-state conflicts are best adjusted by the political process, which is well-adapted to the protection of state interests. He argued that although *League of Cities* had rejected a judgment of the political process in a case involving the commerce power, that did not determine the proper scope of the taxing power.[109] In support of this position, he quoted from *Helvering v. Gerhardt*:[110] "The Congress, composed as it is of members chosen by state constituencies, constitutes an inherent check against the possibility of abusive taxing of the states by the National Government."[111] Brennan dismissed the view that the aircraft registration tax would seriously affect the performance of essential functions of the states. He said:

> So long as the charges do not discriminate against state functions, are based on a fair approximation of [the States'] use of the system, and are structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits to be supplied, there can be no substantial basis for a claim that the National Government will be using its taxing powers to control, unduly interfere with, or destroy a State's ability to perform essential services.[112]

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106. 548 F.2d 33, 35 (1st Cir. 1977), *cert. granted*, 432 U.S. 905 (1977).
107. Georgia Dep't of Transp. v. United States, 430 F. Supp. 823 (N.D. Ga. 1976).
108. 435 U.S. at 453.
109. *Id.* at 456 n.13.
110. 304 U.S. 405 (1938).
111. 435 U.S. at 456.
112. *Id.* at 466-67. The decisive votes in *Massachusetts v. United States* were those

Thus, despite what may initially have appeared as a revival of the doctrine of intergovernmental tax immunity in *League of Cities*, the immunity argument has not been successful in subsequent cases.

D. The Spending Power

We turn now to the question of how *League of Cities* has affected the long-standing congressional practice of conditioning federal aid to the states on their compliance with federal regulations. The spending power has proven to be "an effective tool for eroding the concept of federalism inherent in the tenth amendment."[113] Although in *League of Cities*, the Court expressly refrained from deciding whether Congress could achieve a minimum wage for state employees through the spending power,[114] the spending power would appear particularly vulnerable to a *League of Cities* attack. So far, however, *League of Cities* has not moved the federal courts to limit the spending power.

In *Dupler v. City of Portland*,[115] a federal district court in Maine was the first after *League of Cities* to reject a tenth amendment challenge to an exercise of the spending power. In *Dupler*, officials of two Maine municipalities reduced Marlene Dupler's welfare benefits because she had received federal food stamps. The district court held the officials in violation of the Federal Food Stamp Act,[116] the purpose of which was to raise, not merely to maintain, preexisting levels of nutrition. Portland contended that this construction of the Act infringed upon an exclusive state domain—welfare eligibility—contrary to *League of Cities*. The court held *League of Cities* inapplicable since it found that "[f]ederally-imposed restrictions on state and local government activities which accompany federal grants administered by the states have long been regarded as unobjectionable

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of Justices Stewart and Powell, who had joined the majority in *League of Cities*. The Justices concurred in Justice Brennan's opinion only insofar as it held that "a nondiscriminatory user fee may constitutionally be imposed upon a State . . . ." *Id.* at 470. Justice Rehnquist, joined by Chief Justice Burger, dissented. *Id.* at 471. Justice Blackmun took no part in the case. *Id.* at 470.

113. *See* Comment, *The Federal Conditional Spending Power: A Search for Limits*, 70 NW. U. L. REV. 293, 297 (1975).

114. 426 U.S. at 852 n.17.

115. 421 F. Supp. 1314 (D. Me. 1976).

116. 7 U.S.C. §§ 2011-26 (Supp. 1976).

exercises of the Spending Power."[117] The court found that, unlike the FLSA amendments, the requirements of the Federal Food Stamp Act were not mandatory, but were imposed on state and local governments only as a condition of participaion in the food stamp program. Because the decision whether to participate was voluntary and there was no requirement that a state participate, the court concluded that there was no coercion and, therefore, no possible interference with state sovereignty.[118]

More recently, in *North Carolina v. Califano*,[119] the Supreme Court summarily affirmed a district court decision upholding federal conditions imposed upon state health-care facilities, even though the North Carolina Supreme Court had found those conditions in violation of the state constitution.[120] As a result, the State had to choose between amending its constitution or forgoing federal aid under forty-two federal health assistance programs.[121] The pattern of the decisions in these two cases makes it most unlikely that *League of Cities* will have an impact on the spending power. The logic of this situation is not easy to discern, however, since the argument that conditional grants in aid do not coerce the states into accepting federal policies is clearly a legal fiction.[122]

E. The First Amendment

The Supreme Court cited *League of Cities*, though only incidentally, in one first amendment case. In *Elrod v. Burns*,[123] the Court held that the first amendment restricted the right of a newly-elected Sheriff of Cook County, Illinois, to discharge non-civil service employees of the Sheriff's Office simply because they were members of the political party that was defeated in

117. 421 F. Supp. at 1320.

118. *Id.* at 1320 n.8.

119. 435 U.S. 962 (1978).

120. 445 F. Supp. 532, 533 (E.D.N.C. 1977), *aff'd* 435 U.S. 962 (1978).

121. *Id.* at 535.

122. The Court held in United States v. Butler, 297 U.S. 1 (1936), that Congress cannot regulate activities by coercive use of the spending power. But in Steward Machine Co. v. Davis, 301 U.S. 548, 589-91 (1937), the Court held that whenever a conditional grant-in-aid is related to a legitimate national purpose, inducement or temptation to conform did not go beyond the bounds of the federal government's legitimate spending power and was not coercion in any constitutional sense.

123. 427 U.S. 347 (1976).

the last election. Chief Justice Burger dissented because he believed that regulations on systems of political patronage were reserved to the states by the tenth amendment. Burger pointed out that "[o]nly last week, in *National League of Cities v. Usery* . . . we took steps to arrest the downgrading of States to a role comparable to the departments of France, governed entirely out of the national capital."[124] Burger thus suggested that federal courts should consider state-sovereignty when defining the scope of first amendment rights. None of the other justices joined the Chief Justice in this suggestion, although Justices Powell and Rehnquist found other grounds for dissent.

F. The Commerce Power

The Supreme Court has considered and rejected *League of Cities* challenges to exercises of the commerce power in three areas: environmental protection, energy, and what might be called federal regulation of state proprietary activities. The Court's decisions in these cases are obviously important in assessing the general fate of *League of Cities* because *League of Cities* was itself a case arising under the commerce clause. In cases like *Fitzpatrick* and *Massachusetts v. United States*, the Court stated that a states' rights doctrine developed under the commerce clause was not intended to apply to other areas, such as civil rights and taxation. No such rationale is available for bypassing *League of Cities* in commerce clause litigation, and it is in this area that the Court has shown most clearly its policy of confining *League of Cities* to the narrowest possible compass.

1. Environmental Protection

In his *League of Cities* concurrence, Justice Blackmun indicated that he would have reached a different result in a balancing of state and federal interests in an area like environmental protection "where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[125] The Court has accepted Blackmun's assessment thus far.

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124. *Id.* at 375.
125. 426 U.S. at 856.

The federal environmental regulations that have attracted the principal *League of Cities* challenges are the Clean Air Act Amendments of 1970,[126] and the Surface Mining Control and Reclamation Act of 1977.[127] The Clean Air Amendments were the product of fifteen years of congressional efforts to strike a proper balance between national and state participation in an anti-pollution program. The initial policy of Congress was to offer the states aid to speed compliance with air quality standards, while minimizing direct federal intervention.[128] As national concern with environmental problems mounted and the inadequacy of state and local efforts became apparent, however, Congress became more involved.[129] With the passage of the 1970 Clean Air Amendments, the federal government assumed a dominant role in the area of environmental protection by openly threatening federal regulation and preemption where states failed to enact air pollution controls of their own.[130] The 1970 Amendments empowered the Environmental Protection Agency (EPA) to establish the maximum levels for specific air pollutants and to require each state to submit a plan for "implementation, maintenance, and enforcement" of the standards.[131] If a state failed to submit a plan to the EPA or if a state plan filed to meet the standards, the EPA was authorized to prepare and enforce a substitute plan.[132] Notwithstanding this clear assertion of federal dominance, a section of the statute disingenuously declared that state and local governments were left with "primary responsibility" for establishing and implementing their own air quality programs.[133]

In *Friends of the Earth v. Carey*,[134] the Second Circuit

126. 42 U.S.C. §§ 7409-10 (Supp. 1981).

127. 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

128. *See* 69 Stat. 322 (1955).

129. *See* The Clean Air Act of 1963, 77 Stat. 392 (1963), which, for the first time, gave the federal government a limited role in the enforcement of anti-pollution regulations. *See also* 79 Stat. 992 (1965); 80 Stat. 954 (1966); 81 Stat. 485 (1967); Kramer, *The 1970 Clean Air Amendments: Federalism in Action or Inaction?*, 6 TEX. TECH. L. REV. 47, 49-58 (1974).

130. *See* Train v. National Resources Defense Counsel Inc., 421 U.S. 60, 64-65 (1975).

131. 42 U.S.C. § 7410(a)(1)(Supp. 1981).

132. *Id.* § 7410(c)(1).

133. *Id.* § 7407(a).

134. 552 F.2d 25 (2d Cir. 1977), *cert. denied*, 434 U.S. 902 (1977).

Court of Appeals considered a suit under the Clean Air Act to compel New York City to enforce an automobile pollution control plan submitted by New York State to the EPA pursuant to the 1970 Amendments. As did the plaintiffs in *League of Cities*, the City accepted the proposition that Congress was regulating an area well within the federal government's commerce power.[135] The City conceded that Congress undeniably had the power to enact federal pollution standards to protect the public health since pollution is "interstate in character and effect."[136] The City nevertheless claimed that this admittedly valid exercise of the commerce power impermissibly interfered with integral governmental functions of the state and its local governments. The City contended that enforcement of the pollution control plan violated its tenth amendment rights by interfering with its governmental interests in "allocating funds, police resources, and in making policy decisions."[137] In an opinion that was less than candid about the obvious impact of the Act on state policies, the court of appeals rejected the City's defense and held that the pollution control plan did not displace the City's policy choices because the EPA only approved a plan which was made by the City itself.[138] The court stated the City "entered into a pact based on cooperative federalism under which it made the essential policy choices and determined the procedures that should be adopted by it . . . to comply with federal pollution standards which Congress undisputably had the power to enact under the Commerce Clause."[139] In return, said the court, the City received the assurance that the federal government would not substitute or enforce its own plan.[140] The court found that this scheme did not "impermissibly interfere with the governmental functions of the State or its subordinate arm, the City."[141] In a more responsible part of its opinion, the court employed Justice Blackmun's balacing approach in *League of Cities* by describing the Clean Air Act as a measure directed toward "a significant national

135. *Id.* at 37.
136. *Id.*
137. *Id.* at 33.
138. *Id.* at 37-38.
139. *Id.* at 37.
140. *Id.*
141. *Id.*

health and safety problem."[142] This would have been enough to uphold the Act without the pretense that what is federal control in reality is not federal control in law.[143]

The Supreme Court considered the Surface Mining Control and Reclamation Act in *Hodel v. Virginia Surface Mining and Reclamation Association.*[144] The Act required the Secretary of the Interior to establish a regulatory program for surface mining of coal in each state, either by accepting state programs meeting minimum federal standards or by adopting a federal program for states not submitting qualified programs.[145] A federal district judge in Virginia, relying on *League of Cities*, held that portions of the Act interfered with state autonomy.[146] The Supreme Court reversed. In a statement summarizing the Court's current approach to tenth amendment challenges to enactments under the commerce clause, Justice Marshall stated:

> in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States. . . ." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty. . . ." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."[147]

In an important footnote Marshall added: "[d]emonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed; there are situations in which the nature of the federal interest advanced may be such that it justifies

142. *Id.* at 39.

143. Other courts have employed the same strategy of asserting that state participation in federal regulatory programs which threaten usurpation of regulatory roles if the state does not comply with mandatory minimum standards is voluntary. *See, e.g.*, Sierra Club v. EPA, 540 F.2d 1114, 1140 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); United States v. Helsley, 615 F.2d 784 (9th Cir. 1979).

144. 452 U.S. 264 (1981).

145. 30 U.S.C. §§ 1253, 1254 (Supp. I. 1977).

146. 483 F. Supp. 425 (W.D. Va. 1980).

147. 452 U.S. at 287-88 (citations omitted).

state submission."[148] This footnote supports Justice Blackmun's balancing test by indicating that even state decisions of the most integral variety must yield to dominant national interests.

The heart of the plaintiff's tenth amendment argument in *Hodel* was that the federal reclamation program displaced state land use policies, a traditional area of state control.[149] Justice Marshall argued that this challenge failed to satisfy the first of his four-part test—a showing that the federal government was regulating the state as a state.[150] Marshall observed that the reclamatation program affected private mining companies.[151] He then argued that, unlike the situation in *League of Cities*, Congress did not compel action by the states in the reclamation program because the Act provided for direct federal control of land reclamation in cases in which the states elected not to act in accordance with federal standards.[152] Congress' displacement of the states in a traditional area of state control was not sufficient for a *League of Cities* challenge. Whenever any one of the four conditions was not met, Congress was free to displace state authority over private activity if the activity were found to affect interstate commerce.[153] Justice Marshall added: "[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."[154] By this reasoning Justice Marshall removed all doubts about the narrow compass of *League of Cities*.

One can be excused for taking Justice Rehnquist's concurrence in *Hodel* as an expression of frustrated expectations for the future of states' rights after *League of Cities*.[155] In his dissent in *League of Cities*, Justice Brennan argued that state's control over the wages of its employees was no more integral to its sovereignty than the state's control over the wages of any other workers in its jurisdiction.[156] Brennan made this point to show the broader threat to national authority in *League of Cit-*

148. *Id.* at 288. n.29 (citations omitted).
149. *Id.* at 284-85.
150. *Id.* at 287-88.
151. *Id.* at 288.
152. *Id.* at 288-89.
153. *Id.* at 276-93.
154. *Id.* at 276 (citations omitted).
155. *Id.* at 307-13.
156. 426 U.S. at 873-75.

ies: if Congress is not free to control the wages of state employees that affect commerce, then there is no reason to permit Congress to control the wages of private-sector employees that affect commerce. Countering this point, Rehnquist insisted that *League of Cities* had no implications for Congressional power over private activity and that only federal regulation of the state as state was objectionable.[157] Thus, in *Hodel*, Marshall quoted extensively from Rehnquist's opinion in *League of Cities*.[158]

Although he concurred in *Hodel*, Justice Rehnquist's opinion portends future battles for the cause of states' rights. His concurrence began with the sardonic remark that:

> [i]t is illuminating for purposes of reflection, if not for argument, to note that one of the greatest "fictions" of our federal system is that Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. The manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction. Although it is clear that the people, through the States, *delegated* authority to Congress to "regulate Commerce . . . among the several States," . . . one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress.[159]

He then sketched a series of cases illustrating what he considered the expansion of the commerce power from the power to regulate "interstate commerce itself"[160] to the power to exclude goods from commerce on moral grounds and regulate intrastate activities with a cumulative effect upon commerce.[161] But he insisted that despite these cases ("and the broad dicta often contained therein,")[162] interstate activity must have a *substantial* effect on interstate commerce, not just any effect,[163] as the majority's opinion in *Hodel* may have suggested. Rehnquist indicated that while he may have "read too much into the Court's choice of language,"[164] it was necessary to remind the Court of

157. *Id.* at 840-41, 844-45.
158. 452 U.S. at 286-87, 291-92.
159. *Id.* at 307-08.
160. *Id.* at 308.
161. *Id.*
162. *Id.* at 309.
163. *Id.* at 310-12.
164. *Id.* at 312.

the need for a substantial effect upon interstate commerce lest there be nothing left of the states' reserved powers over private activity within its boundaries. Chief Justice Burger was the only one to join in the suggestion that the Court should return to the pre-1937 practice of reviewing congressional judgments on the impact of local activity on interstate commerce.[165] Rehnquist's opinion reminded the Court that it can protect the states' reserved powers not only by erecting a states' rights barrier to an otherwise valid exercise of federal power, but also by finding inherent limitations of Congressional power. The first method was used in *League of Cities*; it has not greatly advanced the overall cause of states' rights. The second method may fare better.

2. *Energy Policy*

League of Cities was qualified further in *Federal Energy Regulatory Commission v. Mississippi*,[166] a case that demonstrates the complicating influence of *League of Cities* in what was once a much simpler area of constitutional law. In this case, the Court reversed the holding of a Mississippi federal district court which struck down sections of the Public Utilities Regulatory Policies Act of 1978 (PURPA).[167] PURPA's most controversial sections contained substantive federal standards for setting the rates of electricity and gas consumption and the terms and conditions of gas and electric service.[168] These standards eliminated declining rates for larger consumers and prohibited utility companies from recovering advertising costs from consumers.[169] While the substantive standards of the Act are not imposed upon the state utility commissions, the Act does require the commissions to "consider" the standards and follow certain procedures (notice, public hearing, written reasons for nonadoption) when considering them.[170] Unlike the federal strip-mining standards at issue in *Hodel*, there was no provision in PURPA for a federal agency to regulate private companies in cases of state

165. *Id.* at 305.

166. 102 S. Ct. 2126 (1982).

167. Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified at 16 U.S.C. § 2611 (Supp. IV 1976)), 15 U.S.C. § 3120 (Supp. IV 1976).

168. 16 U.S.C. §§ 2621(d), 2623 (Supp. V. 1976).

169. 16 U.S.C. §§ 2621(d)(2), 2623(b)(5)(Supp. V 1976).

170. *Id.* 16 U.S.C. §§ 2621(b), (c)(2), 2623(a), (c); 15 U.S.C. § 3203(a), (c).

noncompliance.[171]

In his opinion for the Court, Justice Blackmun defused Mississippi's attempt to apply Justice Rehnquist's *Hodel* argument that a regulated intrastate activity must have "a substantial effect" upon commerce to be brought within the commerce power.[172] Blackmun said that this argument disregarded both "the specific congressional finding"[173] that the requisite effect existed and the practice of limiting judicial review to the question of whether such findings were "irrational."[174] A brief review of the legislative history of the Act satisfied him that "Congress was not irrational in concluding that [the PURPA provisions were] . . . essential to protect interstate commerce," and, he concluded, "[t]hat is enough to place the challenged portions of PURPA within Congress' power under the Commerce Clause."[175] This argument is a straightforward application of the principles that had governed commerce-clause adjudication during the forty years prior to *League of Cities*, and it is unremarkable to that extent. What may be surprising is that this argument was made by Justice Blackmun, for it conflicts, at least in tone, with his concurrence in *League of Cities*, which employed a balancing approach to condemn a congressional policy.[176]

On the other hand, one can say in Justice Blackmun's behalf that, after *Hodel*, balancing will not occur in these cases unless a court has determined the existence of three other conditions—including whether Congress has regulated "a State as a State."[177] Justice Blackmun did not have to mention balancing because he effectively decided that Congress had not imposed the utilities regulation upon the states as states. Blackmun reasoned that PURPA did not force the states to regulate the utilities industry in any particular manner because the states could avoid congressional impositions simply by getting out of the business of regulating utilities.[178] Under this argument, the PURPA

171. 102 S. Ct. at 2140.

172. *Id.* at 2135. *See supra* notes 155-64 and accompanying text.

173. 102 S. Ct. at 2135.

174. *Id.*

175. *Id.* at 2136.

176. *See supra* notes 49-51 and accompanying text.

177. *See* Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. at 287-88 & n.29.

178. Justice O'Connor disagreed, condemning what she termed Congress' decision to

provisions are analogous to the strip-mining standards in *Hodel*, notwithstanding the absence in PURPA of a backup federal agency in case of state default.[179] Central to Blackmun's view is the proposition that the commerce power is broad enough to authorize congressional preemption of the entire field of utilities regulation.[180] This enabled him to characterize PURPA as Congress' way of conditioning state activity in a field which Congress is free to preempt altogether.[181]

Blackmun thus announced a new and general doctrine of constitutional law that Congress can condition state governmental participation in a preemptible field. This doctrine is analogous to the governing theory of the general welfare clause which holds that Congress is free to condition state receipt of federal funds.[182] The latter is apparently acceptable to the conservative members of the Burger Court,[183] although the former is not. In separate partial dissents, Justices Powell and O'Connor argued that Blackmun's approach suggests that Congress, in Powell's words, "could reduce the States to federal provinces."[184] O'Connor contended that Blackmun's new preemption doctrine could have saved the FLSA amendments in *League of Cities* because the states could have avoided the amendment simply by firing state employees and closing state offices.[185] Blackmun rejected these remarks as unduly "apocalyptic" because the states perform many functions in fields that are not preemptible.[186] But much remains of the point made by Powell and O'Connor. Considering the twentieth century expansion of the commerce power, the powers of national defense, and the enforcement provisions of the Civil War Amendments, coupled with the modern view of the necessary and proper clause as authorizing national

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"conscript state utility commissions into the national bureaucratic army." 102 S. Ct. at 2140-41.

179. *Id.*

180. *Id.*

181. *Id.*

182. Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947); Stewart Machine Co. v. Davis, 301 U.S. 548 (1937).

183. *See* National League of Cities v. Usery, 426 U.S. at 852 n.17. For a conservative argument against unlimited power to condition the receipt of federal funds, *see* Bailey v. Drexel, 259 U.S. 20, 36-40 (1922)(Taft C.J.).

184. 102 S. Ct. at 2144.

185. *Id.* at 2149.

186. *Id.* at 2142 n.32.

authority over virtually any problem that might become a "national problem."[187] the range of "preemptible powers" appears very large and perhaps unlimited in principle. Nevertheless, pointing this out, as Powell and O'Connor did, is not enough to settle the issue because the premises of Blackmun's view may be sound, despite the extreme erosion of states' rights implicit in his conclusion. The Powell-O'Connor observations serve merely to dramatize a new plateau in the old and continuing dilemma of dual sovereignty in America. The conflict in *Federal Energy Regulatory Commission v. Mississippi* also shows that instead of ameliorating the problem of dual sovereignty, *League of Cities* has fallen victim to it, for the Court has not maintained a workable distinction between governmental institutions and their powers.[188] The case suggests that if one concedes that the powers of one entity can displace the powers of the other, then one must eventually compromise the institutional integrity of the subordinate government; this seems to be the broader lesson of the case. Powell and O'Connor want national supremacy over private activity *and* equal or inviolable state and federal governmental structures; these may be incompatible desires. *Federal Energy Regulatory Commission v. Mississippi* exhibits, in any event, a striking new qualification of *League of Cities.*

3. State Proprietary Activities

The Court has had an easier time with tenth amendment challenges to congressional regulation of the so-called proprietary activities of state governments. In his *League of Cities* opinion, Justice Rehnquist made it clear that the tenth amendment did not protect state sovereignty in all state functions, but only in a class of functions called "traditional governmental functions."[189] The Court applies the term traditional governmental functions to state activities such as education, police and fire protection, taxation, health and sanitation.[190] The Court defines the meaning of "traditional governmental functions" fur-

187. *See generally* Barber, *supra* note 48, at 162-63, 166-74.

188. *See* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

189. 426 U.S. 833, 852.

190. *See* National League of Cities v. Usery, 426 U.S. at 851; New York v. United States, 326 U.S. 572, 582 (1946).

ther by distinguishing them from nontraditional or "proprietary" functions. This latter class of functions is one in which the state enters fields hitherto occupied by private business. Among recognized proprietary functions are state-owned liquor stores,[191] a mineral water bottling operation,[192] and state-owned railroads.[193]

The distinction between proprietary and governmental functions evolved as part of the Court's attempt to set limits on the power of both the state and national governments to tax each other.[194] The distinction was reaffirmed and extended to the commerce power in *League of Cities* partly because cases upholding state governmental immunities from federal taxation were the only surviving precedents for Rehnquist's general proposition that the tenth amendment could be the source of affirmative limitations on federal power.[195] In *League of Cities* Rehnquist simply reasoned that if the tenth amendment could prevent federal taxation of possessions, institutions, and activities integral to a state's sovereignty, the tenth amendment could also limit the commerce power.[196] But in reaching this result he also reaffirmed cases which had permitted federal taxation of proprietary state activities which were not within the traditional scope of state sovereignty.[197]

In *United Transportation Union v. Long Island Rail Road*,[198] the Court quickly and unanimously disposed of a New York claim of exemption from the Federal Railway Labor Act[199] in a collective bargaining dispute with workers on the state-owned Long Island Rail Road (LIRR). New York was attempting to prevent a strike to which the union had a right under the Railway Labor Act. A federal district court rejected this attempt, citing language in *League of Cities* that affirmed the application of federal law to state-owned railroads on the grounds

191. South Carolina v. United States, 199 U.S. 437 (1905).

192. New York v. United States, 326 U.S. 572 (1946).

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

194. *See generally* Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633 (1945).

195. 426 U.S. at 841-45.

196. *Id.* at 843 & n.14.

197. *Id.* at 854 n.18.

198. 102 S. Ct. 1349 (1982).

199. Railway Labor Act of 1926, 44 Stat. 577, 45 U.S.C. § 151.

that operating a railroad was not an integral part of state governmental activity.[200] The Court of Appeals for the Second Circuit reversed, reasoning first, that precedent had applied to freight operations, not passenger operations like the LIRR; second, that passenger operations were essential state functions; and finally, that the state interest in passenger service outweighed the federal interest in collective bargaining.[201]

Chief Justice Burger, writing for the Court, reversed, finding no relevant difference between freight and passenger services, and denying, therefore, that a railroad operation fell within what the third test in *Hodel* had referred to as "integral operations in areas of traditional functions."[202] Burger need not have gone further because, after *Hodel*, balancing cannot commence before a court applies three tests, which include a finding of federal impairment of operations that are integral and traditional.[203] Nevertheless, Burger did explain what is now almost a century-old federal concern with the nation's railroad industry.[204] In light of the comprehensive regulatory scheme that resulted from this concern, Burger found "no justification for a rule which would allow the States, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation."[205]

IV. Conclusion

For forty years prior to *National League of Cities v. Usery* the Supreme Court refused to use the tenth amdnement as a barrier to federal power under the commerce clause. Since 1937, the interests of the states have been of no consequence in deciding challenges to the exercise of the commerce power; the federal government, though limited in its powers, was supreme within its constitutional sphere. Throughout this period the tenth amendment was considered not a limitation on the authority of

200. United Transp. Union v. Long Island R.R., 509 F. Supp. 1300 (E.D.N.Y. 1980).

201. United Transp. Union v. Long Island R.R., 634 F.2d 19, 26-27, 29-30 (1980), *cert. granted*, 452 U.S. 960 (1980).

202. 102 S. Ct. at 1353.

203. *See* Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. at 287-88 & n.29.

204. 102 S. Ct. at 1355.

205. *Id.*

Congress but merely a "truism" that the powers not granted to the national government were reserved to the states.[206] *League of Cities* revived the tenth amendment with the doctrine that state sovereignty sets some limits on the commerce power. No longer just a truism, the tenth amendment, like the first, fifth, and sixth amendments, now seems to represent an affirmative right that a state, when acting in a sovereign capacity, can invoke against the exercise of the commerce power.

The decision in *League of Cities*, as Justice Brennan predicted, has "astound[ed] scholars of the Constitution."[207] It departs from the mainstream of judicial doctrine beginning with John Marshall's opinion in *McCulloch v. Maryland* and including the constitutional theories of Joseph Story,[208] Oliver Wendell Holmes, Jr.,[209] and Harlan Fiske Stone.[210] Scholars and jurists have charged the *League of Cities* majority with usurpation of the political process, disregard for precedent, and failure to observe settled constitutional principle.[211] There seems to be more than a little truth to Justice Brennan's charge that the decision is an "ill conceived abstraction [which can] only be regarded as a transparent cover for invalidating a congressional judgment with which [the justices] disagree."[212] Perhaps the case simply manifests a feeling that Congress went too far in 1974 amendments to the FLSA.

Because the practice of second guessing the economic policies of Congress has all but disappeared from the Court's decisions since the late 1930s, one cannot expect the typical federal

206. *See* United States v. Darby, 312 U.S. 100 (1941).

207. 426 U.S. at 862 (Brennan, J. dissenting).

208. *See* STORY, *supra* note 64, at §§ 1906-08.

209. *See* Missouri v. Holland, 252 U.S. 416, 433-35 (1920).

210. *See* United States v. Darby, 312 U.S. at 123-24.

211. *See* Barber, *supra* note 46, at 164, 176, 179-81; Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1600 (1977); Gibbons, *Keynote Address—Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U.L. REV. 260, 268-70 (1981); Michelman, *States' Rights and States' Roles: The Permutations of State "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1192-93 (1977). Judge Gibbons goes so far as to say: "I know, as well as I know my name, that the tenth amendment does not mean what, in *National League of Cities*, Justice Rehnquist said it means. Indeed I would be willing to make a small wager that if a poll were taken among courts of appeals judges, all federal judges, all state supreme court judges, or all judges, *National League of Cities* would lose in each category." *Id.* at 269.

212. 426 U.S. at 867 (Brennan, J. dissenting).

judge to be comfortable with the proposition that courts can now decide when Congress has gone too far in economic regulations of any kind, even those affecting the states. Thus, judges of the lower federal courts, and even a majority of the Supreme Court, have insisted on confining *League of Cities* to its narrowest implications. This practice, however, does not contribute to coherent principles of law; it simply isolates a decision and makes it an exception to a general pattern of cases. *League of Cities* is thus merely an exception to the general rule that states' rights do not limit federal power. Commitment to principled decision would require that the Court overrule *League of Cities* or apply it to all cases falling within its purview. Because he believes it would be difficult to treat *League of Cities* as a precedent for other cases, at least one scholar has all but predicted that it will be overruled.[213] Whatever its future, *League of Cities* has not yet stood for a new constitutional principle of federal deference to states' rights.

If no legal principle exists to account for what has happened to *League of Cities*, there is at least a sociological explanation. A well-known study by political scientist Robert Dahl, conducted in 1957, reviewed 150 years of Supreme Court decisions in an attempt to see how successfully the Court had opposed the preferences of persistent lawmaking majorities in Congress.[214] Dahl found that these lawmaking majorities "generally have had their way" as new appointees to the Court limit and reverse old decisions inconsistent with national trends.[215] While the Court has held out "in a very small number of important cases . . . up to as much as twenty-five years,"[216] Dahl found that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[217] This last proposition plausibly accounts for the limited impact of *League of Cities*. Despite the recent "Reagan Revolution," the nation still seems relatively uninterested in the rather old fashioned cause of states' rights. For a

213. Barber, *supra* note 46, at 164.

214. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279 (1957).

215. *Id.* at 291.

216. *Id.*

217. *Id.* at 285.

general picture of what the nation perceives as its needs, one can consult the last decade of Gallup polls on the issues most troubling to Americans. Here one sees a much greater public concern for the energy crisis, jobs, wages and prices, the environment, crime, race relations, and other national problems than for anything associated with the sovereignty of state governments.[218] Constitutional conservatives have yet to succeed in adding states' rights to this list.

As for why the nation's problems are viewed as national problems and not as problems for the governments of the several states, one can cite a recent observation that, the principle of federalism notwithstanding, "the American states have become ever more similar. The causes of this increasing uniformity have been many: population migration, improvements in transportation systems, and the development of nationwide electronic news media."[219] Because the states have grown more alike both socially and economically, there is less need to emphasize separate solutions to their problems—and, therefore, less need to emphasize states' rights than there might have been two generations ago.

If we can appreciate the scholarly criticisms of *League of Cities* and if we can explain why it has not been followed in other cases, there remains a question of what the *League of Cities* majority plausibly sought to accomplish. No hard answer is available, of course, for we have little to go on besides the words of the Justices themselves. It is unlikely that the *League of Cities* majority intended to generally revive states' rights over the entire range of state-federal relations. Surely the Court's rejection of the states' rights claims after *League of Cities* in *Fitzpatrick v. Bitzer, Hodel v. Virginia Surface Mining and Reclamation Association, Massachusetts v. United States*, and *Federal Energy Regulatory Commission v. Mississippi* negates such a conclusion.

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218. *See* G. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1972-1977, at 48, 101-02, 186, 230-31, 291, 353-54, 365-66, 443, 534, 655-56, 760-61, 1040, 1169, 1219-20 (1977); G. GALLUP, THE GALLUP OPINION INDEX, REP. No. 157, 8 (Aug. 1978); G. GALLUP, THE GALLUP OPINION INDEX, REP. No. 167, 7 (June 1979); G. GALLUP, THE GALLUP OPINION INDEX, REP. No. 181, 10 (Sept. 1980); G. GALLUP, THE GALLUP REPORT, REP. No. 185, 12 (Feb. 1981); G. GALLUP, THE GALLUP REPORT, REP. No. 198, 26 (Mar. 1982).

219. R. FUNSTON, A VITAL NATIONAL SEMINAR: THE SUPREME COURT IN AMERICAN POLITICAL LIFE 167 (1978).

What, then, did motivate the *League of Cities* majority? Perhaps as good an answer as any can be found in the words of Chief Justice Burger's dissent in *Elrod v. Burns*. He remarked that "[o]nly last week, in *National League of Cities v. Usery* . . . we took steps to arrest the downgrading of States to a role comparable to the department of France, governed entirely out of the national capital."[220] We note that Burger spoke of *arresting* the downgrading of states, *not* of reversing the movement or of restoring lost prerogatives; perhaps this was the majority's purpose. If so, *League of Cities* can be understood as a shotgun in the closet for use on those special occasions when the Court believes Congress has gone too far in exercising its power over the states. But we can also view the decision in more positive terms, for it serves to remind Congress—indeed, it reminds us all—that state and local governments are not to be treated as private businesses subject to any regulation Congress may deem desirable. *League of Cities* reminds us that the states retain a residuum of sovereignty, and that in some areas Congress may substitute its judgment for theirs only when there is an important national need.

220. 427 U.S. at 375 (Burger, J. dissenting).