
Kim Buckley
In 1974 Congress enacted amendments to the Fair Labor Standards Act\(^1\) (FLSA) extending coverage of the minimum wage and maximum hour provisions to almost all employees of state governments and their instrumentalities.\(^2\) The constitutionality of these amendments was challenged by intergovernmental organizations and numerous cities and states\(^3\) in an action for declaratory and injunctive relief brought against the Secretary of Labor.\(^4\) Plaintiffs contended that the 1974 amendments were beyond the authority delegated to Congress through the commerce clause\(^5\) because they directly displaced state policies concerning performance of essential state functions. The three-judge district court, with some suggestion of reluctance,\(^6\) held the 1974 amendments not unconstitutional upon the controlling authority of *Maryland v. Wirtz*.\(^7\)

The United States Supreme Court, in an opinion by Justice Rehnquist,\(^8\) acknowledged that the commerce clause is a delegation of plenary authority to Congress, but also noted that exercise of this power is subject to any affirmative limitations contained in the Consti-

---

2. This extension of coverage was accomplished by extending the definition of "employer" to include "public agency," 29 U.S.C. § 203(d) (Supp. V 1975); by defining "public agency" to include states, 29 U.S.C. § 203(x) (Supp. V 1975); and by defining "enterprise" to include "activity of a public agency," 29 U.S.C. § 203(s) (Supp. V 1975).
3. Plaintiffs were the National League of Cities, the National Governors' Conference and the governments of 19 states, 1 metropolitan area and 3 cities.
5. U.S. Const. art. 1, § 8, cl. 3 provides, "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
6. 406 F. Supp. at 828. The memorandum opinion indicated disagreement with the reasoning in *Maryland v. Wirtz*, 392 U.S. 183 (1968), but concluded that it is not proper for a district court to disregard a controlling Supreme Court precedent.
7. 392 U.S. 183 (1968). In a 6–2 decision, the Court in *Wirtz* held that the commerce power provided a constitutional basis for extending the minimum wage and maximum hour provisions of the FLSA to the employees of state-operated schools and hospitals.
Although the 1974 amendments would otherwise represent a valid exercise of Congress’ power to regulate intrastate matters which “substantially affect” interstate commerce, the Court was persuaded that the effect of the amendments would be an unwarranted congressional interference with integral sovereign functions of state governments. The Court concluded that such an exercise of congressional power does not comport with the federal system established by the Constitution. Held: Insofar as the challenged amendments operate to directly displace the states’ freedom to structure operations which are integral to the delivery of traditional governmental services, they are beyond the commerce power. National League of Cities v. Usery, 426 U.S. 833 (1976).

National League is notable for two reasons: (1) it is the first Supreme Court decision to impose a state sovereignty limitation upon the commerce power; and (2) the Court expressly overruled Maryland v. Wirtz, a 1968 case that had rejected a state sovereignty challenge to similar legislation.11

This note has four main objectives: (1) to evaluate the Court’s reliance upon the structures and relationships established by the Constitution to support an implied limitation upon congressional power; (2) to consider whether the rationale behind intergovernmental tax immunities should be extended to commerce clause legislation; (3) to ascertain when a state sovereignty limitation is not appropriate; and (4) to identify some theoretical and practical implications National League may have for the future of the federal system. The primary conclusion reached is that the continued existence of the federal system requires the imposition of a state sovereignty limitation on all exercises of con-

9. As examples of such affirmative limitations, the Court observed that commerce clause legislation had been held invalid if found to offend the right to trial by jury. United States v. Jackson, 390 U.S. 570 (1968) (death penalty provision of the Federal Kidnapping Act, permitting imposition only if recommended by jury, held unconstitutional because it discourages exercise of right to trial by jury), or the due process clause of the fifth amendment, Leary v. United States, 395 U.S. 6 (1969) (irrebuttable presumption in transfer tax statute deeming possession of marijuana conclusive evidence that possessor knew of its illegal importation held unconstitutional).


11. Although it could be argued that the services provided by state-operated schools and hospitals are not within a state’s sovereign functions, the Court concluded that these schools and hospitals provide “an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens.” 426 U.S. at 855.
Intergovernmental Immunities

gressional power which unnecessarily interfere with the states’ constitutionally guaranteed autonomy. It is further concluded, however, that in certain cases it is consistent with the structure of the federal system that the states’ implied immunity from congressional control yield to the exigencies of the Union. When the national interest clearly compels state compliance with federal standards, and when the burden imposed is not excessive, then a state sovereignty limitation is not appropriate.

I. BACKGROUND

A. The Commerce Power

Gibbons v. Ogden,12 decided in 1824, laid the foundation for all future adjudication concerning Congress’ power to regulate interstate commerce.13 Chief Justice Marshall noted three restrictions upon the scope of this power. First, Congress has authority under the commerce clause to regulate only interstate commerce; it may not reach commerce that is “completely internal” to any one state.14 Second, although Congress’ commerce power is plenary, it is limited by such restrictions as are “prescribed in the constitution.”15 These first two limitations are judicially enforceable16 safeguards to prevent Congress from exceeding its constitutional authority. The third, however, is derived directly from the electorate and the political process. Once the judicial branch has determined that Congress acted within constitutional limits, only political safeguards can protect the people from Congress’ abuse of its legal power.17

15. Id. See note 9 supra.
16. A restraint on Congress’ authority is “judicially enforceable” only when a specific case raises the question of whether Congress exceeded its constitutional power when it enacted certain legislation. For a general discussion of the doctrine of judicial review, see Chief Justice Marshall’s opinion in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–78 (1803).
17. It was Marshall’s view that those political safeguards inherent in our representative government are the only restraints against Congress’ misuse of its enumerated powers:
If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely
Although the commerce power is restricted to matters in interstate commerce, it is settled that the doctrine of implied powers, reinforced by the necessary and proper clause,\textsuperscript{18} extends to Congress the authority to regulate \textit{private} intrastate activity when such regulation could be an appropriate means of fostering interstate commerce.\textsuperscript{19} But whether Congress can control a state's governmental affairs in the interest of promoting interstate commerce was not decided\textsuperscript{20} until \textit{Maryland v. Wirtz}.\textsuperscript{21} In that case, the Court sustained the 1966 amend-

\textsuperscript{18} U.S. \textit{Const.} art. I, § 8, cl. 18 provides: "Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

\textsuperscript{19} See \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316 (1819). Note Chief Justice Marshall's famous proclamation concerning the scope of authority granted by the necessary and proper clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." \textit{Id.} at 421. Thus, when regulation of intrastate commerce would be "appropriate" or "plainly adapted" to the "legitimate end" of fostering and protecting interstate commercial intercourse, then such regulation is a valid exercise of congressional authority.

This principle was affirmed with respect to the commerce power in a series of cases beginning with \textit{NLRB v. Jones & Laughlin Steel Corp.}, 301 U.S. 1 (1937), where the National Labor Relations Act of 1935 was upheld against the argument that unfair labor practices are intrastate activities. The Court declared that if admitted intrastate activities "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions," then Congress has authority to regulate such activities. \textit{Id.} at 37. Indeed, in \textit{Wickard v. Filburn}, 317 U.S. 111 (1942), where the quantity of wheat grown for on-farm consumption was found subject to federal control, the Court held that an isolated intrastate activity with negligible impact on interstate commerce is not beyond federal power if that activity can be rationally included in a class of similar activities which when taken together have a substantial effect upon interstate commerce.

\textsuperscript{20} In \textit{United States v. California}, 297 U.S. 175 (1936), which held the Federal Safety Appliance Act applicable to a state-owned railroad, the Court decided that California, "by engaging in \textit{interstate commerce by rail}, . . . subjected itself to the commerce power." \textit{Id.} at 185 (emphasis added). The question of whether state activities which are completely internal to the state, such as traditional governmental activities, are amenable to congressional control was not before the Court. See C. Black, \textit{supra} note 13, at 41.

Intergovernmental Immunities

ments to the FLSA which extended the minimum wage and maximum hour provisions of the FLSA to employees of state-owned and -operated schools and hospitals.\textsuperscript{22} The Court expressly rejected the argument that a judicially enforceable state sovereignty restraint upon the commerce power is inherent in the Constitution's federal system.\textsuperscript{23} The Court partly justified the challenged legislation, however, as entailing only a small intrusion into state functions.\textsuperscript{24}

In \textit{Fry v. United States},\textsuperscript{25} the Court was faced with much the same issue but with significant factual variations. Responding to a national economic crisis, Congress passed the Economic Stabilization Act of 1970\textsuperscript{26} which empowered the President to temporarily stabilize wages at certain levels.\textsuperscript{27} Pursuant to the Act, the state of Ohio was enjoined by the Temporary Emergency Court of Appeals from paying state statutory wage increases to state employees.\textsuperscript{28} The Supreme Court relied upon \textit{Wirtz} to uphold the injunction, thus sustaining federal regulation of Ohio's sovereign function. Again, the Court justified the legislation as involving only a slight invasion of state sovereignty,\textsuperscript{29} but further observed that without the injunction, "the effectiveness of federal action would have been drastically impaired."\textsuperscript{30}

B. \textbf{Intergovernmental Immunities: An Implied Constitutional Restraint on Congressional Power}

Justice Rehnquist dissented in \textit{Fry} on the ground that the Court's

\begin{itemize}
\item \textsuperscript{22} The 1966 amendments at issue in \textit{Wirtz} were 29 U.S.C. § 203(d), (r), & (s) (1970).
\item \textsuperscript{23} 392 U.S. at 195.
\item \textsuperscript{24} \textit{Id.}, at 193–94.
\item \textsuperscript{25} 421 U.S. 542 (1975).
\item \textsuperscript{27} The ESA was extended five times before it expired on April 30, 1974. 421 U.S. at 543 n.1.
\item \textsuperscript{28} United States v. Ohio, 487 F.2d 936 (Emer. Ct. App. 1973).
\item \textsuperscript{29} The Court observed that although the 10th amendment may describe certain limits to Congress' authority, those limits were not exceeded by enactment of the ESA:
\begin{quote}
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 \textit{amici}, we are convinced that the wage restriction regulations constituted no such drastic invasion of state sovereignty.
\end{quote}
\textsuperscript{421 U.S. at 547 n.7.}
\item \textsuperscript{30} 421 U.S. at 548.
\end{itemize}
holding was a threat to the continued existence of the federal system.\textsuperscript{31} He would have had the Court recognize "an affirmative constitutional right, inherent in [Ohio's] capacity as a State, to be free from such congressionally asserted authority."\textsuperscript{32} He posited the basis for this affirmative limitation in the structure of the federal system and, by analogy, in the doctrine of intergovernmental tax immunities: "[T]he [states'] immunity from [federal] taxation has no explicit constitutional source and appears to rest solely on a concept of constitutional federalism which should likewise limit federal power under the Commerce Clause."\textsuperscript{33}

The doctrine of intergovernmental tax immunities was used initially to protect legitimate federal activities from interference by state taxation.\textsuperscript{34} The Court later expanded the doctrine in order to shield certain state activities from federal tax interference.\textsuperscript{35} The Court reasoned that the states were due a reciprocal immunity from federal taxes because the unimpaired existence of the states is essential to the preservation of the Constitution's federal system.\textsuperscript{36} Exactly which state activities are immune remains the subject of some dispute, al-

\textsuperscript{31} Generally, the Court has rejected state autonomy challenges to federal commerce clause legislation. In United States v. California, 297 U.S. 175 (1936), the Court conceded that the doctrine of intergovernmental tax immunities represents a restriction of Congress' taxing power inferred from the nature of the federal system. Nevertheless, the Court expressly rejected the argument that a similar restriction should be imposed upon the commerce power. \textit{Id.} at 184 (dictum). This remark has been criticized as unpersuasive because the federal system can be as easily disrupted by the commerce power as by the taxing power. Salmon, \textit{The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act}, \textit{2 Col. J. Envir. L.} 290, 349 (1976); see C. Black, \textit{supra} note 13, at 29: notes 73 & 74 and accompanying text infra. An example of commerce clause legislation which is prima facie disruptive of the federal system's balance of power is the Clean Air Act, 42 U.S.C. § 1857a-1 (1970 & Supp IV 1974), which requires the states to enact, fund, administer and enforce programs that Congress has detailed. See \textit{Comment, The Clean Air Act Amendments of 1970: A Threat to Federalism?}, 76 \textit{Colum. L. Rev.} 990 (1976).

\textsuperscript{32} 421 U.S. at 553.

\textsuperscript{33} \textit{Id.} at 554.

\textsuperscript{34} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

\textsuperscript{35} In Collector v. Day, 78 U.S. (11 Wall.) 113 (1870), where the salary of a state judge was held not subject to the federal taxing power, the Court observed that federal taxes could not be levied so as to interfere with state functions despite Marshall's assertion in \textit{McCulloch} of federal supremacy. \textit{See} \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 428-31 (1819).

\textsuperscript{36} Collector v. Day, 78 U.S. (11 Wall.) 113 (1870). Two years earlier, in Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868), the Court had declared: Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National govern-
though the Justices are in apparent agreement that a state's sovereign or governmental activities are beyond Congress' taxing power.37

>New York v. United States38 was the Court's most recent attempt to define the extent of state immunity from federal taxation. Unfortunately, there were three opinions written, none of which spoke for a majority.39 Justice Frankfurter's lead opinion proposed the "uniquely capable" test, whereby Congress has authority to tax non-discriminatory any "source of revenue by whomsoever earned and not uniquely capable of being earned by a State. . . ."40 But both Chief Justice Stone41 and Justice Douglas,42 in separate opinions, criticized the
“uniquely capable” test as being insufficiently protective of state sovereignty. In any case, controversy among the Justices focused not on whether a state sovereignty limitation follows from the structure of the federal system, but rather on the extent to which state activities are protected.

II. THE COURT’S REASONING IN NATIONAL LEAGUE

The question presented in National League of Cities v. Usery, as in Wirtz, was whether Congress’ commerce power is subject to a judicially enforceable state sovereignty limitation. The Court reasoned that a state sovereignty limitation is implied by the doctrine of intergovernmental tax immunities and by the structures and relationships created by the Constitution in its entirety. The Court further observed that the tenth amendment was recognized in Fry as providing an express constitutional basis for a state sovereignty limitation on congressional authority. The Court’s holding, however, was based principally upon inferences drawn from the nature of the federal system rather than upon any “express limitation” on congressional power which might be identified in the tenth amendment.

To support his argument, Justice Rehnquist cited decisions that discussed the relationship between the states and the national government as parts of the federal system. The Constitution was recognized in these cases as the foundation for “an indestructible Union, composed of indestructible States.” The Court cited with approval a corollary to this proposition that “neither government may destroy the other nor curtail in any substantial manner the exercise of its powers.” Because commerce clause legislation can weaken the states’ sovereignty just as effectively as a federal tax on a state’s governmental activities and because the existence of a state sovereignty restraint

43. 426 U.S. at 842–43; Fry v. United States, 421 U.S. 542, 547 n.7 (1975); see note 29 supra.
44. Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926); Coyle v. Smith, 221 U.S. 559 (1911); Texas v. White, 74 U.S. (7 Wall.) 700 (1868); Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1868). All of these cases decided issues different from that presented in National League. Thus, although they are of little precedential value, they are useful for their discussions of the federal system.
47. The Court observed that application of the minimum wage and maximum hour provisions of the FLSA would have a significant impact on the states either through substantially increased costs, forced relinquishment of important governmen-
Intergovernmental Immunities

on the federal taxing power is settled,\(^4^8\) the Court concluded that there is no reason why the commerce power should not be similarly restricted.\(^4^9\)

In his dissenting opinion, Justice Brennan took issue with the majority in three respects. First, citing *Gibbons v. Ogden*,\(^5^0\) he maintained that any state sovereignty limitation on the commerce power has traditionally been protected only by the political process and not by the judicial branch.\(^5^1\) Second, he argued that the Court's position is contrary to precedent, especially *United States v. California*\(^5^2\) and *Case v. Bowles*.\(^5^3\) Finally, in the context of intergovernmental immunities, Justice Brennan asserted that the federal taxing power and the commerce power are distinguishable, and that there should be no state sovereignty limitation upon the latter.\(^5^4\)

Justice Stevens' separate dissenting opinion asserted that there are several existing federal laws which directly displace state policies concerning the integral operations of the states *qua* states.\(^5^5\) He concluded that to subscribe to the Court's position would be to embrace a prin-

---

\(^4^8\) New York v. United States, 326 U.S. 572 (1946); see notes 38–42 and accompanying text *supra*.

\(^4^9\) Justice Blackmun joined the Court's opinion upon his expressed understanding that the Court was adopting a balancing test that would not preclude the enforcement of state compliance with federal guidelines where a compelling national interest was clearly involved. 426 U.S. at 856; see notes 73–79 and accompanying text *infra*.

\(^5^0\) 22 U.S. (9 Wheat.) 1 (1824).

\(^5^1\) *But see* notes 64–72 and accompanying text *infra*.

\(^5^2\) 297 U.S. 175 (1936) (state-owned railroad held subject to Federal Safety Appliance Act). This case is discussed in note 72 *infra* and referred to in notes 20 and 31 *supra* and note 54 *infra*.

\(^5^3\) 327 U.S. 92 (1946) (sale of timber by state, proceeds to benefit public education, held subject to Emergency Price Control Act). This case is discussed in note 74 *infra*.

\(^5^4\) Apparently, Justice Brennan supported his conclusion by the Court's earlier rejection of state autonomy challenges to congressional exercises of the war power in *Case v. Bowles*, 327 U.S. 92 (1946), and the commerce power in *United States v. California*, 297 U.S. 175 (1936). Justice Brennan failed to acknowledge, however, that both of these cases involved a state acting in the capacity of a private person. *See* notes 72 & 74 *infra*.

\(^5^5\) Justice Stevens asserted:

The Federal Government may, I believe, require the State to act impartially when it hires or fires [a] janitor, to withhold taxes from his pay check, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capital furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck or from driving either the truck or the governor's limousine over 55 miles an hour. 426 U.S. at 880.
principle which could be the basis for the invalidation of many federal laws which he saw as unquestionably enacted within Congress' authority.

III. THE COMMERCE CLAUSE AND THE FEDERAL SYSTEM IN CONFLICT: A BALANCED RESOLUTION

I cannot conceive that a nation can live and prosper without a powerful centralization of government. But I am of the opinion that a centralized administration is fit only to enervate the nations in which it exists, by incessantly diminishing their local spirit. Although such an administration can bring together at a given moment, on a given point, all the disposable resources of a people, it injures the renewal of those resources. It may insode a victory in the hour of strife, but it gradually relaxes the sinews of strength. It may help admirably the transient greatness of a man, but not the durable prosperity of a nation.

Alesde Tocqueville

A. The Federal System and the Commerce Power

The Constitution contemplates a federal system of government that will prevent an enervating centralization of all governmental power, yet will also concentrate enough authority in the national government to resolve issues of general concern.57 To accomplish these two goals, the states delegated certain of their sovereign powers to the central government in order to secure the benefit of a single and supreme authority over specified matters of national interest.58 All other powers


57. See G. Gunther, Cases and Materials on Constitutional Law 81 (9th ed. 1975). One commentator has defined federalism as a compromise adjustment of power:

[There are] twin poles of federalism: sufficient national supremacy to preserve unity, and adequate autonomy to prevent centralization. From these standards, other constitutional guideposts follow: an inviolable sovereignty of the states serving to check national aggrandizement; supreme plenary enumerated powers dominating local concerns to serve the general interest; the insulation of "indispensable" state functions from "drastic invasions" by federal power; a national supremacy overcoming state activities burdening by their effect national areas of power.

Salmon, supra note 31, at 359–60.

58. In this connection, note James Madison's position:

[T]he operation of the Government on the people in their individual capacities, in its ordinary and most essential proceedings, may on the whole designate it in this relation a national Government.

But if the Government be national with regard to the operation of its powers.
Intergovernmental Immunities

not explicitly delegated\textsuperscript{59} were reserved, thus preserving the states' sovereign power over essentially local affairs. The fundamental constitutional question in National League is the extent to which the states relinquished control over their essential governmental operations when they entrusted Congress with the commerce power.\textsuperscript{60}

There are three possible ways the Court could have answered this question: (1) state sovereignty can never be a limitation upon the commerce power because the states surrendered all sovereignty over any activities which are in or substantially affect interstate commerce (including essential state governmental activities);\textsuperscript{61} (2) state sovereignty is always a limitation upon the commerce power because a state's essential governmental operations are among the "completely

\begin{quote}
\end{quote}

\begin{quote}
\textsuperscript{59}. In \textit{McCulloch v. Maryland}, Chief Justice Marshall declared: "This government is acknowledged by all to be one of enumerated powers… It can exercise only the powers granted to it…" \textit{17 U.S. (4 Wheat.)} 316, 406 (1819).
\end{quote}

\begin{quote}
The Articles of Confederation provided that the states were to retain all powers not expressly delegated to Congress. \textit{ARTS. OF CONFED.} art. II. The 10th amendment, however, does not use the word "expressly" and speaks only in terms of "powers not delegated," presumptively to protect the exercise of Congress' implied powers from state interference. But Chief Justice Marshall warned that the extent of Congress' implied powers must be determined only by reference to the entire Constitution:

Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only, that the powers "not delegated [. . .] are reserved to the states or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, \textit{to depend on a fair construction of the whole instrument.}

\textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 406 (1819) (emphasis added). Because the truistic language of the 10th amendment does not really call for a state sovereignty limitation upon congressional authority, the better view is that the constitutional basis for any such limitation must be rooted, if at all, in the structures and relationships created by the entire Constitution.

\begin{quote}
\textsuperscript{60}. In his dissenting opinion in \textit{Fry}, Justice Rehnquist observed: "Surely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments." \textit{Fry v. United States}, 421 U.S. 542, 559 (1975).
\end{quote}

\begin{quote}
\textsuperscript{61}. Essentially, this is Justice Brennan's dissenting argument. This interpretation of the Constitution supports the conclusion that state autonomy vis-à-vis the commerce power is a political value to be protected by the political process rather than a constitutional value to be protected by the judiciary. For critical analysis of these ideas, see notes 64–72 and accompanying text \textit{infra}. For background on how political safeguards operate to protect the federal system at the congressional level, see Wechsler, \textit{supra} note 17.
\end{quote}
internal commerce of a state"\textsuperscript{62} and are therefore never a proper subject for commerce clause legislation;\textsuperscript{68} or (3) state sovereignty is sometimes an appropriate limitation upon the commerce power. That is, a state's activities which are critical to its separate existence in the federal system are immune from federal regulation except when a compelling national interest bids state compliance with congressional guidelines. This compromise approach is preferable. Its flexibility, which serves both national and state interests, is more in harmony with the dynamic tension between the states and the national government inherent in a federal system.

The Court cannot impose a flexible state sovereignty limitation upon the commerce power, however, unless it is warranted by the Constitution. In determining whether such constitutional authority exists, the Court should consider not only the text and history of the relevant constitutional provisions, but also those inferences which must be drawn from the Constitution in its entirety.

B. \textit{The State Sovereignty Limitation: A Structural Implication}

It has been proposed that the dominant method of constitutional interpretation, which relies upon "exegesis of the particular textual passage as a directive of [official] action,"\textsuperscript{64} be supplemented when appropriate by inferences drawn from the structures and relationships created by the Constitution.\textsuperscript{65} This approach suggests that judicial imposition of a state sovereignty limitation, which has no express con-

\textsuperscript{62} In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1. 195 (1824), Chief Justice Marshall observed that the commerce power is limited to certain subjects:

The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

\textsuperscript{63} This approach was considered by the ninth circuit while resolving the question of whether the Clean Air Act authorizes a federal administrator to require the states to enact congressionally specified legislation. The court of appeals observed in dictum that a state's governing powers are not subject to commerce clause regulation because they are not "commerce." To hold otherwise, the court concluded, "would reduce the states to puppets of a ventriloquist Congress." Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975).

\textsuperscript{64} C. Black, \textit{Structure and Relationship in Constitutional Law} 7 (1969).

\textsuperscript{65} See C. Black, \textit{Structure and Relationship in Constitutional Law} (1969); G. Gunther, \textit{supra} note 57, at 24, 114, 256, 386-87. Charles L. Black, Jr., the leading proponent of the structural approach, has observed that the source of the struc-
In order to effect and sustain the values of federalism, the Constitution established a balance of power between the states and the central government. Clearly, some measure of judicially enforceable state autonomy is essential to the continued and undisturbed existence of this constitutionally created dynamic tension. Without a judicially enforceable restraint upon congressional power, this measure of state autonomy would be subject to diminution by a legislative majority; there would be nothing to protect the Constitution’s balance of power except the will of Congress.

The Court has approved this line of reasoning and has recognized a judicially enforceable state sovereignty restraint in the intergovern-
mental tax immunities cases. The state sovereignty limitation upon the federal taxing power has no express constitutional source; rather it is implied by the structures and relationships created by the Constitution. Because the federal system's balance of power can be as effectively disrupted by commerce clause regulation as by federal taxes, a judicially enforceable state sovereignty limitation should be imposed upon the commerce power in all but exceptional situations of national interest.

The notional that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. . . . The Constitution was designed to keep the balance [of power] between the States and the Nation outside the field of legislative controversy.


In his dissenting opinion in National League Justice Brennan asserted that the Court's position is contrary to "Chief Justice Marshall's postulate that the Constitution contemplates that restraint upon exercise by Congress of its plenary power lie in the political process and not in the judicial process." 426 U.S. 833, 857 (1976). A close reading, however, of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), from which Justice Brennan quotes to support his argument, compels the conclusion that Chief Justice Marshall viewed the role of political safeguards as a restraint on Congress' abuse of its constitutionally defined powers. See note 17 supra. It remains for the judiciary, in an appropriate case, to prevent Congress from exceeding its constitutional authority by enforcing the limitations prescribed in the Constitution through judicial review.

The heart of Justice Brennan's argument is that there is no express state sovereignty limitation anywhere in the Constitution including the 10th amendment. State autonomy is, therefore, a political value to be protected by the political process, rather than a constitutional value to be protected by the judiciary. Thus, it appears Justice Brennan and Justice Rehnquist disagree not so much as to the proper role of political safeguards, but as to whether a constitutional value is really involved in National League.

70. See notes 34–42 and accompanying text supra.

71. In his dissenting opinion in Fry, Justice Rehnquist argued that federal regulation of state governmental operations imposes a greater burden upon the states than federal taxation because regulation adversely affects not only state revenues but also state policy choices. 421 U.S. 542, 554 (1975). See note 31 supra.

72. Justice Stone reached the opposite conclusion in dictum in United States v. California, 297 U.S. 175, 184 (1936). That case involved the question of whether a small state-owned belt line railroad used to facilitate unloading and loading of ships at San Francisco could escape application of the Federal Safety Appliance Act (FSAA). Writing for a unanimous Court. Justice Stone reasoned that because the states surrendered all sovereignty over interstate commercial matters, state sovereignty could not be a limitation upon the commerce power. Therefore, California's railroad was required to comply with the FSAA. The Court sustained the application of the FSAA to this railroad because it found that California had engaged in interstate commerce by rail. This holding is consistent with the doctrine that when a state

760
Intergovernmental Immunities

C. The Flexible Limitation

Unlike the state autonomy restriction upon the federal taxing power,73 the immunity of essential state governmental operations from commerce clause regulation can and should be flexible in order to accomplish the goals of federalism. Although there must be sufficient state autonomy to prevent centralization of all governmental power, there must be enough power concentrated in the national government to deal effectively with issues of general concern. Thus, the Court's decision to distinguish rather than overrule Fry74 comports with the

voluntarily undertakes activities in the nature of a private business, it divests itself of any attributes of sovereignty as to those transactions and becomes like a private person. See Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 907 (1824); cf. Parden v. Terminal Ry., 377 U.S. 184 (1964). It does not follow from United States v. California, however, that a state's sovereign functions are also subject to congressional control, as Justice Stone suggested in dictum. Because California did not hold that there is no state sovereignty limitation upon the commerce power, Justice Brennan's reliance upon the case in his National League dissent is misplaced.

73. The ultimate justification for the absolute immunity of state governmental activities from federal taxes is probably that alternative sources of tax revenue are always available to Congress to satisfy national needs. Thus, any uncertainty concerning the extent of the states' tax immunity cannot be resolved by weighing the national interest in acquiring tax revenue against the states' interest in operating their governments free from federal interference. Instead, the Court has defined the scope of the states' tax immunity to be correlative with those activities which are purely governmental. New York v. United States, 326 U.S. 572 (1946). The problem has been to articulate an acceptable definition of "purely governmental activities."

Justice Frankfurter asserted that the Constitution simply does not permit federal taxes on revenue "uniquely capable of being earned only by a State." Id. at 582. Justice Douglas would have held all state activities to be governmental and therefore immune. Id. at 591. Although Justice Stone essentially agreed with Justice Frankfurter, he would have further protected the states from all other taxes which so affect state governmental costs as to "unduly impair" the performance of the states' sovereign functions of government. Id. at 587-88. The words "unduly impair" suggest that Justice Stone had in mind an additional sphere of conditional immunity based on a balancing of state and national interests which would supplement Justice Frankfurter's core of absolute immunity. See notes 40-42 supra.

74. The Court's decision to distinguish Fry makes National League consistent with Case v. Bowles, 327 U.S. 92 (1946), despite Justice Brennan's argument to the contrary. That case presented the issue of whether the Emergency Price Control Act (EPCA), an exercise of Congress' war power, was applicable to a sale of timber by a state from lands granted to the state by Congress specifically for the benefit of the state's public school system. The proceeds of the sale were to be used only for school purposes. Despite the state's arguments for a state sovereignty limitation on Congress' war power, the Court upheld the application of the EPCA's maximum price provisions to the sale.

This result is consistent with National League for at least two reasons not expressly considered therein. First, Fry was distinguished in National League because the ESA was only a temporary measure enacted to combat a national emergency. The same is true of the Emergency Price Control Act of World War II. Second, the intergovernmental tax immunities cases, e.g., New York v. United States, 326 U.S. 572 (1946); Allen v. Regents, 304 U.S. 439 (1938); South Carolina v. United
structure of the federal system. The Court's decision suggests that each state's immunity must bow to the needs of the union when national interests clearly outweigh those of the individual states,75 the degree of congressional intrusion into the states' affairs is relatively slight,76 and state non-compliance would drastically impair federal action.77

It must be emphasized, however, that the judicial imposition of a state sovereignty limitation is not appropriate when there is no con-

---

75. In Fry, the Court sustained the Economic Stabilization Act partly because it was "an emergency measure to counter severe inflation that threatened the national economy." 421 U.S. 542, 548 (1975). In National League, the Court described the ESA as having been "occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall." 426 U.S. 833, 853 (1976). The Court concluded that the state sovereignty limitation on the commerce power must itself be limited, i.e., that it is "not so inflexible as to preclude temporary enactments tailored to combat a national emergency." Id. at 853. Whether something less than a national emergency would be cause for overriding the state autonomy limitation was not considered. Justice Blackmun joined the Court's opinion, however, with the understanding that the holding did not preclude the exercise of federal power "in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." Id. at 856.

One point not expressed by the Court and not recognized in Justice Stevens' dissent, see note 55 and accompanying text supra, is that while a state's interest in structuring the disposition of its revenue is high, its interest in some matters (e.g., how fast the governor's limousine may be driven) is relatively low. None of the examples of "unquestionably permissible" federal regulation of the state qua state given in Justice Stevens' dissenting opinion interferes with a critical governmental function as directly and seriously as would the 1974 amendments to the FLSA. When balancing the national and state interests, the Court should consider the significance of the state governmental function threatened as well as the magnitude of the national interest. See Comment, An Affirmative Constitutional Right: The Tenth Amendment and the Resolution of Federalism Conflicts, 13 SAN DIEGO L. REV. 876, 896-898 (1976).

76. In distinguishing Fry, the Court was impressed by the relatively slight intrusion upon the protected area of state sovereignty worked by the ESA as compared with the 1974 amendments to the FLSA. The ESA was a temporary measure: the 1974 amendments were intended to be permanent. The effect of the ESA was to reduce the pressures upon state budgets; the 1974 amendments would have substantially increased them. 426 U.S. at 846-850.

77. Whether state noncompliance with federally imposed standards would drastically impair federal policy is a factor apparently to be considered separately from whether the federal interest clearly outweighs the state's. See id. at 833-56; Fry v. United States. 421 U.S. 542, 548 (1975).
Intergovernmental Immunities

gressional interference with a state's sovereign functions. Thus, when a state voluntarily engages in business activities of a private nature, thereby divesting itself of its sovereignty as to those transactions,\textsuperscript{78} the state has no basis for challenging federal regulation of those transactions on state autonomy grounds.\textsuperscript{79}

\textbf{D. The Implications of National League}

Whether Congress can affect the essential governmental activities of the states through exercise of its power to enforce the fourteenth amendment or the spending power are questions the Court left expressly unanswered.\textsuperscript{80} Because these two powers raise different problems vis-à-vis the states, they will be treated separately.

1. \textit{Section 5 of the Fourteenth Amendment}

Shortly after \textit{National League} was decided, the Court confronted the question of whether, under section 5 of the fourteenth amendment,\textsuperscript{81} Congress has the power to authorize suit in federal court by state employees against a state for violations of the Civil Rights Act despite the eleventh amendment's shield of sovereign immunity.\textsuperscript{82} The Court upheld Congress' authority upon the reasoning that there can be no state immunity to the power of Congress under section 5 because the states surrendered all sovereignty in this area when they ratified the fourteenth amendment.\textsuperscript{83} This result is consistent with the proposition that judicial imposition of a state sovereignty limitation is

\textsuperscript{78} See note 72 supra.

\textsuperscript{79} For example, the states that have entered the liquor store business have no immunity to general federal regulation of that business. \textit{Cf.} South Carolina v. United States, 199 U.S. 437 (1905) (revenue from state-operated liquor business held subject to federal income taxation despite state autonomy challenge). See note 37 supra.

\textsuperscript{80} The Court declared:

We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the Spending Power, \textit{Art. I, § 8, cl. 1,} or \textit{§ 5 of the Fourteenth Amendment.} 426 U.S. at 852 n.17.

\textsuperscript{81} Section 5 contains the following language which allows Congress to implement the 14th amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." \textit{U.S. Const. amend. XIV, § 5.}

\textsuperscript{82} Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). \textit{U.S. Const. amend. XI} provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

\textsuperscript{83} 427 U.S. at 456. \textit{See also} Ex Parte Virginia, 100 U.S. 339, 345 (1880).
not appropriate where there is no state sovereignty involved. Several district courts have adopted this rationale in sustaining the application of the Equal Pay Act\textsuperscript{84} and the Age Discrimination in Employment Act\textsuperscript{85} to state employees.\textsuperscript{86}

2. \textit{The Spending Power}

Unless the state sovereignty limitation announced in \textit{National League} applies to Congress' spending power, Congress could effectively control the minimum wages and maximum hours of most state employees simply by conditioning grants of federal funds to the states upon compliance with these FLSA provisions. The Court's express reservation of judgment on this issue\textsuperscript{87} suggests that it might be willing to reconsider the doctrine, firmly established in \textit{Oklahoma v. United States Civil Service Commission},\textsuperscript{88} that there is no state autonomy restraint upon the kinds of conditions Congress may attach to categorical grants to the states.\textsuperscript{89}

---

\textsuperscript{84} E.g., Usery v. Dallas Independent School Dist., 421 F. Supp. 111 (N.D. Tex. 1976). The court concluded that the Equal Pay Act as applied to state employees could be sustained on the basis of the commerce clause or \$ 5 of the 14th amendment. The court observed: "Whatever powers are reserved to the States, the power to discriminately oppress its own citizens on the basis of social criteria is not among them." \textit{Id.} at 115. The court further noted that the Equal Pay Act does not substantially disrupt state operations and that the national interest in preventing wage discrimination clearly outweighs the state's interest in penalizing its employees for their sex.

\textsuperscript{85} Usery v. Board of Educ., 421 F. Supp. 718 (1976). The court upheld the Age Discrimination in Employment Act (ADEA) because (1) the national interest in preventing arbitrary discrimination outweighs the state's interest in continuing such discrimination; (2) the degree of federal intrusion into state affairs is minimal; (3) the ADEA does not "directly" displace state employment policies as it leaves the employment structure essentially intact; and (4) \$ 5 of the 14th amendment provides a constitutional basis in addition to the commerce clause for the ADEA because arbitrary discrimination practices by state employers deny equal protection of the law.

\textsuperscript{86} For the time being, \textit{National League} has seriously frustrated attempts to extend federal collective bargaining rights to state employees. Aaron, \textit{Labor Law Decisions of the Supreme Court, 1975-76 Term}, 92 LAB. REL. REP. (BNA) 311, 314, 345 n.30 (Aug. 16, 1976).

\textsuperscript{87} 426 U.S. at 852 n.17; see note 80 supra.

\textsuperscript{88} 330 U.S. 127, 142-44 (1947). In that case, the Court rejected a state sovereignty challenge to the attachment of a condition to federal highway grants. The condition was that no state official primarily employed in activities financed in whole or in part by federal funds could actively engage in political activities.

\textsuperscript{89} The Court has already recognized a limited state sovereignty restraint upon conditional federal spending programs. In Edelman v. Jordan, 415 U.S. 651 (1974), the Court held that the 11th amendment barred federal courts from compelling the retroactive payment of funds from the state treasury which were wrongfully withheld from the plaintiff-beneficiaries of a federal-state welfare program. Prospective injunctive relief against state officials who act unlawfully, however, is available in federal courts. Ex \textit{Parte Young}, 209 U.S. 123 (1908).
Intergovernmental Immunities

The Oklahoma v. Civil Service doctrine derives from the premise that Congress has exclusive authority over the expenditures of federal revenue—it may choose who will directly benefit from federal monies and whether the recipient must comply with any conditions. In theory, conditional federal aid can be refused whenever the intended recipient declines to comply with the conditions. Thus, federal grants-in-aid to the states, which are conditioned upon the conformance of state governmental activities to federal standards, have been held not coercive and therefore not in conflict with the restrictions implicit in the federal system.

The Court should reject this line of reasoning because it fails to recognize that the states simply are not at liberty to refuse conditions which unnecessarily interfere with essential sovereign functions, when those conditions are attached to money they need to support essential social welfare programs, highway projects and other important federally funded activities. Instead, the Court should impose a flexible state sovereignty limitation upon conditions to federal grants-in-aid similar to that imposed in National League upon commerce clause legislation. Because of increasing fiscal centralization, judicial intervention is essential to the preservation of the constitutional values rooted in the federal form of government.


91. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947); cf. Steward Mach. Co. v. Davis, 301 U.S. 548, 585 (1937) (unemployment compensation provisions of Social Security Act designed to induce enactment of state unemployment laws through a tax and credit scheme held not coercive "in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government").

92. The Advisory Commission on Intergovernmental Relations (ACIR) has concluded that the fiscal independence of the states is necessary to any substantial improvement in the balance of power in the federal system. ACIR recommends that the use of categorical grants to state and local governments be restricted to situations involving very specific national objectives. Otherwise, block grants and "no-strings" grants should be used in order to secure the advantages inherent in decentralized authority. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, IMPROVING URBAN AMERICA: A CHALLENGE TO FEDERALISM 16 (1976). ACIR's approach to spending programs is similar to the Court's approach to the commerce power in National League.

93. In his dissenting opinion in United States v. Butler, 297 U.S. 1, 87 (1936), where the Agricultural Adjustment Act of 1933 (authorizing payments to farmers for a reduction of their productive acreage) was held unconstitutional, Justice Stone observed: "The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control." See also note 57 supra.
IV. CONCLUSION

The Constitution contemplates a federal distribution of power to secure the effective governance of national affairs and to preserve the liberty, diversity, creativity and vitality of the states and the people. The national government must have authority to control local activities when required by the general interest, but the states must enjoy sufficient autonomy to prevent centralization of all governmental power.

To ensure the continued existence of the federal system as established by the Constitution, there must be a judicially enforceable state sovereignty restriction upon Congress’ taxing, commerce, and spending powers to protect the states’ sovereign functions from unnecessary interference. When the national interest clearly compels state compliance with federal standards, it is consistent with the structure of the federal system that the states’ immunity defer to the exigencies of the Union. There is no state sovereignty limitation, however, upon Congress’ control over transactions where no sovereignty exists. Thus, there is no state sovereignty restraint upon Congress’ power to enforce the fourteenth amendment. Similarly, a state cannot assert a state autonomy challenge to federal regulation when it sheds its sovereignty by voluntarily engaging in economic activities of a private nature.

The state sovereignty limitation on the taxing and commerce powers should be extended to the spending power in order to protect the federal system’s balance of power from disruption by an increasing fiscal centralization. The concentration of authority where it is most effective, responsive, and creative can be accomplished only by securing fiscal as well as political autonomy to the states.

Kim Buckley