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Justice Rehnquist's efforts during recent years to breathe new life into the concept of constitutional federalism culminated in the June 1976 decision of *National League of Cities v. Usery*.[1] The Court applied the tenth amendment as an affirmative limitation on Congress' commerce power and overturned the application of the minimum wage and maximum hour provisions of the Fair Labor Standards Act (FLSA)[2] to state employees. This decision reinforced Justice Rehnquist's 1973 majority opinion in *Edelman v. Jordan*,[3] where the eleventh amendment was held to present a similar bar to individual suits against states for retroactive welfare payments withheld in violation of federal law. Such awards, the Court reasoned, would be paid out of state funds and could bankrupt the state and ruin its financial planning. A close relationship between the tenth and eleventh amendments as precepts of constitutional federalism was articulated in the 1974 decision of *Fry v. United States*,[4] where Justice Rehnquist in dissent found the amendments to be conceptually connected as

> examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act Congress was nonetheless not free to deal with a state as if it were just another individual or business enterprise subject to regulation.[5]

This past Term Justice Rehnquist seemingly succeeded in postu-

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[1] 96 S. Ct. 2465 (1976). National League of Cities v. Usery was decided on June 24, 1976.

[2] 29 U.S.C. §§ 201-17, 255, 260, 630 and 634 (1970 & Supp. IV 1974).

[3] 415 U.S. 651 (1974).

[4] 421 U.S. 542 (1975).

[5] *Id.* at 557 (Rehnquist, J., dissenting).

lating affirmative state rights to bar an exercise of Congress' commerce power which, directly by regulation or indirectly through enforcement of federal regulation, would disrupt the setting of state policies in certain areas of traditional state sovereignty in the budgeting (and draining) of state funds. Otherwise valid exercises of congressional power even under certain granted powers were limited when applied to "States as States."[6] The application of this new principle was clouded, however, by Justice Rehnquist's subsequent 1976 majority opinion in *Fitzpatrick v. Bitzer*,[7] in which the Court allowed an individual suit against Connecticut for damages under Title VII of the 1964 Civil Rights Act[8] in the face of an eleventh amendment affirmative defense. Phrased as a statutory construction argument which recognized the grant of plenary congressional power over the states in section 5 of the fourteenth amendment, Justice Rehnquist limited the use of the eleventh amendment defense despite the crippling fiscal impact that could result from a sizeable damages award.

This Article seeks to explore the developing principles of state sovereignty limitations on Congress' exercise of its granted powers and the potential conflicts in reconciling the enforcement of strong federal policy interests with the allowance to the states of primary control over certain governmental functions. Since both tenth and eleventh amendment questions were raised by the application of the FLSA's ever broadening coverage to state employees and its grant of federal court jurisdiction over enforcement suits, and since the Act precipitated the *League of Cities* decision, the Court's treatment of the Act will serve as the primary vehicle for considering the developing theme. The authors wish to suggest that the Court will eventually turn explicitly to a balancing test which will allow an ad hoc weighing of the federal and state interests at stake, a test often employed when the constitutional rights of two individuals or entities clash—here the "right" of Congress to regulate commerce is to be balanced against the right of the States to be sovereign in the exercise of certain powers.

This Article will first consider the most recent constructions of the tenth and eleventh amendments, then analyze the *National League*

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[6] Plaintiffs asserted that the FLSA amendments of 1974 infringed upon a constitutional prohibition "running in favor of States as States." 96 S. Ct. at 2467.

[7] 96 S. Ct. 2666 (1976). *Bitzer* was decided only four days after the Court's decision in *League of Cities*.

[8] 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. IV 1974).

of Cities and *Fitzpatrick* decisions, and finally suggest the balancing test as a better means for reconciling federal interests and state rights.

I. The Commerce Power And The Tenth Amendment Before *League of Cities*

In its treatment of the Fair Labor Standards Act, the Court has always at least acknowledged the tenth amendment defense raised first by individual and later by state defendants as a bar to enforcement of the Act's various provisions. As amendments to the Act have increased its coverage to include various classes of state employees, thereby rendering the state a defendant, the plea has strengthened, and the Court has treated the amendment in more than summary fashion. One might argue that the Court has moved implicitly toward a balancing of federal labor policy against state freedom of decisionmaking, although the majority opinions prior to *League of Cities* tended to rest their decisions upholding the Act on findings that the Act did not cross the tenth amendment threshold of infringing state sovereign governmental functions.

A. *The FLSA and Individual Defendants*

The Fair Labor Standards Act was enacted in 1938. It prescribed minimum wage, overtime, and child labor standards[9] for employees not specifically exempted[10] who were engaged in commerce, in the production of goods for commerce, or in closely related processes or occupations directly essential to production.[11] Congress based these prescriptions on findings that maintenance of labor conditions preventing a minimum living standard (1) spread and perpetuated such conditions, (2) burdened commerce and the free flow of goods,

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[9] The current provisions, as amended, may be found in 29 U.S.C. §§ 206 (minimum wage), 207 (maximum hours), and 212 (child labor provisions) (1970 & Supp. IV 1974).

[10] The original act specifically excluded states and their political subdivisions:

> "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any state or political subdivision of a state. . . .

Fair Labor Standards Act of 1938, ch. 676, § 203(d), 52 Stat. 1060 (1938) (current version at 29 U.S.C. § 203(d) (Supp. IV 1974)).

[11] Section 3(j) of the Fair Labor Standards Act of 1938, ch. 676, § 203(j), 52 Stat. 1060 (1938) (current version at 29 U.S.C. § 203(j) (1970), provided that

> for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any . . . process or occupation directly essential to the production thereof, in any State.

See A.B. Kirschbaum Co. v. Walling, 316 U.S. 517, 524 (1942).

(3) constituted an unfair method of competition, (4) led to labor disputes which could obstruct commerce, and (5) interfered with the orderly and fair marketing of goods.[12] These findings established both an articulation of federal policy and a basis for the exercise of power under the commerce clause.

The Court first tested and upheld the constitutionality of the FLSA in 1941 in *United States v. Darby.*[13] The defendant lumber manufacturer asserted that the power to regulate wages was a police power reserved to the states by the tenth amendment and that Georgia's policy choice not to regulate wages precluded a federal policy overriding the state decision. Calling the amendment a "mere truism,"[14] the Court explicitly dismissed this defense, deciding that the tenth amendment did not prevent congressional "resort to all means for the exercise of a granted power which are appropriate and plainly adopted to the permitted end."[15] Removing any such bar to congressional action, the Court upheld the FLSA by reasoning that Congress could regulate local activities which affected interstate commerce and could prohibit the shipment of locally produced goods in commerce if the prohibition was reasonably adopted to the goal.[16] The Court found that permission to produce and ship the "substandard" goods would give the defendant producer an unfair advantage over producers using the better labor practices

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[12] The current version of these congressional findings is codified in 29 U.S.C. § 202(a) (Supp. IV 1974).

[13] 312 U.S. 100 (1941).

[14] The Court reasoned:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

Id. at 124 (citations omitted).

[15] *Id.*

[16] Justice Stone wrote for the Court:

> Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government.

Id. at 121.

which the Act sought to encourage.[17] The Court thus recognized certain undefined limitations on the exercise of the commerce power but allowed it to reach largely intrastate private activities.

B. *The FLSA and State Defendants*

Two amendments to the FLSA invoked the second major challenge to the constitutionality of the Act. In 1961 the Act's coverage was expanded to all employees of an "enterprise" which has any employees who are engaged in interstate commerce or who work on goods that have been moved or produced in commerce.[18] In the 1966 amendments Congress carved out certain employees of public schools, hospitals, and other institutions from the public employee exception to coverage to extend the Act's benefits to some 3.5 million nonsupervisory government employees.[19] The primary effect of the 1961 amendments was to make the Act applicable to some new private enterprises who handled goods after the completion of interstate shipping.[20] The 1966 amendments, on the other hand, directly affected some state and local government employees in that a state claiming to retain the power to control its own employees could invoke the tenth amendment in a more powerful way than had been true in earlier cases where the state's interest was that of regulating (or not) local private businesses arguably engaged in commerce.

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[17] This theory was stated by the Court as follows:

> We think also that § 15(a)(2), now under consideration, is sustainable independently of § 15(a)(1), which prohibits shipment or transportation of the proscribed goods. As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair,' as the Clayton Act has condemned other 'unfair methods of competititon' made effective through interstate commerce.

Id. at 122.

[18] Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65 (1961) (current version at 29 U.S.C. § 203(s)(2) (Supp. IV. 1974).

[19] Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (1966) (current version at 29 U.S.C. §§ 203(d), 203(r)(1), and 203(s)(4) (Supp. IV 1974).

[20] *See* Player, *Enterprise Coverage Under the Fair Labor Standards Act: An Assessment of the First Generation*, 28 VAND. L. REV. 283, 334-37 (1975). The definition of employee was changed to add employees "handling . . . goods that have been moved in or produced for commerce . . ." which included some businesses previously not covered. Justice Harlan somewhat mistated this change in *Maryland v. Wirtz* by asserting that no new class of employers was covered by the 1961 amendments. 392 U.S. 183, 188 (1968).

The Court upheld both the 1961 and 1966 amendments in *Maryland v. Wirtz*,[21] where the State of Maryland tried unsuccessfully to enjoin the Secretary of Labor from enforcing the Act against state-operated schools and hospitals.[22] The Court found the 1961 enactment of the "enterprise concept" to be a valid exercise of power because of the "unfair advantage" effect on commerce of substandard employers, as recognized in *Darby*, and, second, because the amendment would help to prevent inhibitions to the flow of commerce from strikes that could result from substandard conditions.[23] The former conclusion was easily reasoned from acceptance of the notion that substandard conditions were an unfair advantage, for the advantage flowed from all of an enterprise's lower labor costs

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[21] 392 U.S. 183 (1968).

[22] The 1966 amendment extended coverage of the act to certain hospitals, institutions, and schools, and modified the definition of employer to remove the exemption of the states and then subdivisions with respect to the employees of hospitals, institutions, and schools. *Id.* at 186-87.

[23] The Court said:

> The "enterprise concept" is also supported by a wholly different line of analysis. In the original Act, Congress stated its finding that substandard labor conditions tended to lead to labor disputes and strikes, and that when such strife disrupted businesses involved in interstate commerce, the flow of goods in commerce was itself affected. Congress therefore chose to promote labor peace by regulation of subject matter, wages, and hours, out of which disputes frequently arise. This objective is particularly relevant where, as here, the enterprises in question are significant importers of goods from other States.
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> Although the Court did not examine this second objective in *Darby*, other cases have found a 'rational basis' for statutes regulating labor conditions in order to protect interstate commerce from labor strife. The National Labor Relations Act had been passed because "[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. . . ." In *Labor Board v. Jones & Laughlin*, 301 U.S. 1, this Court held that the National Labor Relations Act (NLRA) was within the commerce power. The essence of the decision was contained in two propositions: "the stoppage of those [respondent's] operations by industrial strife would have a most serious effect upon interstate commerce," *id.*, at 41; and "[e]xperience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace." *Id.*, at 42.
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> The Fair Labor Standards Act, including the present 'enterprise' definition of coverage, may also be supported by two propositions. One is identical with the first proposition supporting the NLRA: strife disrupting an enterprise involved in commerce may disrupt commerce. The other is parallel to the second proposition supporting the NLRA: there is a basis in logic and experience for the conclusion that substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise.

Id. at 191-92.

as much as from the costs of only those employees engaged directly in commerce;[24] the latter reason had already been articulated in *Labor Board v. Jones & Laughlin*[25] and was easily reiterated.

Rather than attacking factually the classification of schools and hospitals as enterprises[26] in commerce or challenging the alleged effect on commerce of the labor conditions of such institutions,[27] the

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[24] The Court said:

> *Darby* involved employees who were engaged in producing goods for commerce. Their employer contended that since manufacturing is itself an intrastate activity, Congress had no power to regulate the wages and hours of manufacturing employees. The first step in the Court's answer was clear: "[Congress may] by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce."
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> The next step was to discover whether such a "substantial effect" existed. Congress had found that substandard wages and excessive hours, when imposed on employees of a company shipping goods into other States, gave the exporting company an advantage over companies in the importing States. Having so found, Congress decided as a matter of policy that such an advantage in interstate competition was an "unfair" one, and one that had the additional undesirable effect of driving down labor conditions in the importing States. This Court was of course concerned only with the finding of a substantial effect on interstate competition, and not with the consequent policy decisions. In accepting the congressional finding, the Court followed principles of judicial review only recently rearticulated in *Katzenback v. McClung*, 379 U.S. 294, 303-304:
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> > "Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."
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> There was obviously a "rational basis" for the logical inference that the pay and hours of production employees affect a company's competitive position.
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> The logical inference does not stop with production employees. When a company does an interstate business, its competition with companies elsewhere is affected by all its significant labor costs, not merely by the wages and hours of those employees who have physical contact with the goods in question.

Id. at 189-90.

[25] 301 U.S. 1 (1936).

[26] The Act defines enterprise:

> "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . but shall not include the related activities performed for such enterprise by an independent contractor . . . .

29 U.S.C. § 203(r) (1970). The Court said:

> We uphold the enterprise concept on the explicit premise that an "enterprise" is a set of operations whose activities in commerce would all be expected to be affected by the wages and hours of any group of employees, which is what Congress obviously intended.

Maryland v. Wirtz, 392 U.S. 196 n.27. This definition allowed the Court "ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.'" *Id.* at 196. Apparently the Court would not view the state government in toto as an enterprise under this definition.

[27] *Id.* at 195.

Wirtz plaintiffs attacked the 1966 amendments directly as an unconstitutional exercise of the commerce power over a state governmental entity.[28] The Court refused to analogize the commerce power to the taxing power,[29] a state immunity from which had already been developed and upheld for functions operated uniquely by a state.[30] Instead, the Court relied on *United States v. California,*[31] in which the Court upheld the congressional exercise of its commerce power in the Federal Safety Appliance Act[32] to cover California's state owned and operated railroad. The *Wirtz* Court quoted from *United States v. California*:

> '[W]e think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.
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> [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restrictions

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[28] *Id.* The Court said:

> Indeed, appellants do not contend that labor conditions in all schools and hospitals are without the reach of the commerce power, but only that the Act may not be constitutionally applied to state-operated institutions because that power must yield to state sovereignty in the performance of governmental functions.

[29] Since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), the Court has recognized an immunity in both federal and state governments from taxation by the other. *See, e.g.*, Helvering v. Gerhart, 304 U.S. 405 (1938).

[30] In New York v. United States, 326 U.S. 572 (1946), a federal tax on mineral waters was held valid although the state of New York was the bottler of the mineral waters. Mr. Justice Frankfurter in the opinion for the Court found that the Constitution would not prevent the United States from taxing a source of revenue without regard to who earned it, so long as it was not uniquely capable of being earned by a state:

> There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. . . . These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State.

Id. at 582.

[31] 297 U.S. 175 (1936).

[32] 45 U.S.C. §§ 1-16 (1970).

> upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.[33]

In so applying *United States v. California,* in *Wirtz*, the Court rejected contentions that the required minimum wage for hospitals, to take one example, necessarily affected state policy functions and, in turn, that the requirement would lead to a state's "destruction as a sovereign political entity."[34] It restated the *California* rule that "the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character,"[35] and even implied that there should exist no balancing test, claiming that it had already put to rest the contention that state concerns might constitutionally "outweigh the importance of an otherwise valid federal statute regulating commerce."[36] The only commerce power limitation was a finding that commerce was not affected.

Justices Douglas and Stewart argued a strong dissent from this position. Basing their opinion on the tenth amendment and "constitutional federalism," they concluded that some distinction between activities promoted by a state in its sovereign and its nonsovereign capacity, as was made in *New York v. United States*,[37] should control the constitutionality of congressional regulation under the commerce power of a state's functions.[38] They raised themes that later recurred in Justice Rehnquist's position that application of the FLSA to the states would "disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education."[39] The tenth amendment must raise some barrier to the com-

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[33] 392 U.S. at 197-98, (quoting United States v. California, 297 U.S. 175, 183-85 (1936)).

[34] 392 U.S. at 196.

[35] *Id.* at 195.

[36] The court cited Sanitary District v. United States, 266 U.S. 405 (1925), for the proposition that "the Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce." 392 U.S. at 195-96.

[37] 326 U.S. 572 (1946).

[38] The Court said:

> It is one thing to force a State to purchase safety equipment for its railroad and another to force it either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas. The commerce power cases the Court relies on are simply not apropos.

392 U.S. at 203-04 (Douglas, J., dissenting).

[39] *Id.* at 203.

merce power, or the national government "could devour the essentials of state sovereignty."[40] Justices Douglas and Stewart notwithstanding, *Wirtz* upheld a very broad commerce power; if the tenth amendment was ever to give bite to intergovernmental immunities, it had not yet begun to do so. The treatment of the tenth amendment in the Court's opinions, however, was lengthening.

C. *Emergency Exercises of the Commerce Power*

The *Wirtz* conclusion that there is no intergovernmental immunity with respect to commerce power regulation was reinforced in *Fry v. United States,*[41] decided in 1975. At issue in *Fry* was the constitutionality of the application to state employees of the Economic Stabilization Act of 1970[42] which authorized the President to stabilize wages and salaries at certain levels and created the Pay Board to oversee controls. Two Ohio state employees brought a state court action to compel the payment of wage increases provided in the State Pay Bill Act[43] which exceeded the permissible level authorized by the Pay Board. The Ohio supreme court granted the writ of mandamus and ordered the increases to be paid.[44] The United States then sought to enjoin Ohio and its officials from paying the wage and salary increases above the amount authorized by the Pay Board and the injunction was granted by the Temporary Emergency Court of Appeals.[45]

In the Supreme Court, petitioners contended that the application of the Economic Stabilization Act to state employees would interfere with sovereign state functions in violation of the tenth amendment and therefore that the Congress could not constitutionally regulate all state and local governmental employees' wages and salaries. Holding that *Maryland v. Wirtz* foreclosed this argument, Justice Marshall answered in a short opinion that "*Wirtz* reiterated the principle that states are not immune from all federal regulation under the Commerce Clause merely because of their sovereign status."[46] In an arguable retreat from *Wirtz*, however, Justice Marshall

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[40] *Id.* at 205.

[41] 421 U.S. 542 (1975).

[42] Pub. L. 91-379, tit. II, 84 Stat. 799 (1970).

[43] OHIO REV. CODE ANN. § 143.10(A) (Supp. 1972). The Act provided for salary increases for employees of the state government, state universities, and county welfare departments, but excluded elected state officials. 421 U.S. at 544 n.3.

[44] State *ex rel.* Fry v. Fergeson, 34 Ohio St. 2d 252, 298 N.E.2d 129 (1973).

[45] United States v. Ohio, 487 F.2d 936 (1973).

[46] 421 U.S. at 548, (citing Maryland v. Wirtz, 392 U.S. 183, 196-97 (1968)).

emphasized that the 1966 FLSA amendments upheld in *Wirtz* were quite limited in their application to the states and that ". . . federal regulation in this case [*Fry*] is even less intrusive."[47] In addition, he viewed the Economic Stabilization Act as "an emergency measure to counter severe inflation"[48] and reasoned that the state statutory wage increases must yield to the Pay Board Rules under the supremacy clause, saying that "the effectiveness of federal action would have been drastically impaired if wage increases to this sizeable group of employees were left outside the reach of these emergency federal wage controls."[49] Justice Marshall did note that petitioners' tenth amendment contentions should be afforded more attention than the characterization of the amendment as a "mere truism" in *Darby,* but ruled that the wage restrictions in question were not the "drastic invasion of state sovereignty"[50] that the tenth amendment prevented. Justice Marshall thus seems to have turned the broad *Wirtz* acceptance of only minimal constitutional limits on the granted commerce power (consisting chiefly in factual proof that the state activity in question did not affect commerce) into a different test in *Fry* by accepting as a possible constitutional limitation a factual demonstration that the federal intrusion into State affairs was too substantial. Thus Justice Marshall offered some opportunity to move the discussion from that of unlimited congressional freedom to exercise the commerce power to one of factual issues of the effect such an exercise would have on the state, which could put a state's defense on far stronger ground, absent some supervening national emergency.

Justice Rehnquist, in a strong, lengthy dissent, dismissed the implied premise that the showing of a national economic emergency was enough to allow Congress to regulate a state's pay scale under the commerce power and disagreed that the intrusion in state policy was too small to invoke the tenth amendment.[51] He argued that,

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[47] 421 U.S. at 548.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 547-48 n.7.

[51] Justice Rehnquist stated:

> . . . I do not believe that the Commerce Clause alone is sufficient to sustain the broad and sweeping federal regulation of the maximum salaries which Ohio may pay its employees, nor do I believe that the showing of natural emergency made here is suffi-

absent some national *war* emergency, the tenth amendment in its guarantee of state sovereignty took precedence over the commerce power and prevented federal regulation of state salaries. He distinguished, both historically and constitutionally, the regulation of individuals or enterprises from the regulation of a state under the commerce power by accenting the purpose and effect of such decisions as *Darby* and *Jones & Laughlin Steel Corp.* to free "both Congress and the States from the anachronistic and doctrinally unsound constructions of the Commerce Clause. . . . used to deny . . . Congress authority to regulate economic affairs."[52] This orientation and the source of earlier claims to "states' rights" may have led the Court to dismiss the state's tenth amendment claim when the Court sought to expand federal power to regulate the economy, but it should no longer be a primary consideration when the federal policy affected state finances and consequently state policy decisions.[53]

Justice Rehnquist also observed a similarity between individuals and the states vis-a-vis the commerce power: Just as an individual may assert an infringement of his rights under, for example, the first or fifth amendment as an affirmative defense to the enforcement of an exercise of regulatory power expressly delegated to Congress by the commerce clause, so may a state assert the tenth amendment in affirmative defense of its sovereignty.[54] A state possesses "an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority,"[55] which right must be weighed when considering the Congress' exercise of commerce clause power over a state. This right should be afforded the same recognition as the state immunity from some federal taxes

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> cient to make this case one in which Congressional authority may be derived from sources other than the Commerce Clause.

Id. at 559 (Rehnquist, J., dissenting).

[52] *Id.* at 551.

[53] *Id.* Justice Rehnquist subsequently highlighted the effect on state policy decisions of requiring certain wage minimums:

> Where the Federal Government seeks only revenue from the State, the State may provide the revenue and make up the difference where it chooses among its sources of revenue or demands for expenditure. But where the Federal Government seeks not merely to collect revenue as such, but to require the State to pay out its moneys to individuals at particular rates, not merely state revenues but also state policy choices suffer.

Id. at 554.

[54] *Id.* at 553.

[55] *Id.*

which potentially could "destroy" a state.[56] Looking to *New York* v. *United States*[57] and *United States v. California*,[58] Justice Rehnquist extracted a kind of test for state immunity from federal commerce power regulation which would preserve the *California* result: Whether a state activity was "so unlike the traditional governmental activities of a state" that Congress could regulate it or "sufficiently closely allied" with traditional state functions that Congress could not constitutionally regulate it.[59] This test resembles the proprietary/governmental functions test but perhaps affords a state some justification for immunity from regulation of longstanding activities. Justice Rehnquist called for a case-by-case analysis to produce a balancing of state interests against federal commerce power objectives.[60] These ideas, written in dissent in *Fry*, became one year later substantially the majority opinion in *National League of Cities*.

The call for a constitutional immunity for states from federal regulation under the commerce clause in the dissents of Justices Douglas and Stewart in *Wirtz* and of Justice Rehnquist in *Fry* raised the possibility that the Court's stance in *Wirtz* would eventually be reconsidered. This reconsideration became more likely in light of the articulated values of the Burger Court in such cases as *Younger v. Harris*,[61] *Lloyd Corp. v. Tanner*,[62] *Oregon v. Mitchell*,[63] and *Dandridge v. Williams*,[64] which, dealing with such diverse subjects as federal court injunction of pending state court criminal proceedings and distribution of handbills within a shopping mall, indicated clearly a trend toward a new wave of federalism—structural federalism that recognizes the states as vital entities in the constitutional system and seeks to enhance their autonomy. As the FLSA and wage regulation cases described above demonstrate, the nature

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[56] *Id.* at 552.

[57] 326 U.S. 572 (1946).

[58] 297 U.S. 175 (1936).

[59] 421 U.S. at 558.

[60] *Id.*

[61] 401 U.S. 37 (1971) (federal courts will not enjoin pending state criminal prosecutions except in extraordinary circumstances).

[62] 407 U.S. 551 (1972) (distribution of handbills in an interior mall area may be prohibited without violating first amendment rights where the handbilling was unrelated to any activity within the mall and where there was adequate alternative means of communication).

[63] 400 U.S. 112 (1970) (1970 Voting Rights Amendment not valid for state and local elections).

[64] 397 U.S. 471 (1970) (state imposed limit on maximum monthly grant under AFDC does not violate equal protection).

of the state interest affected changed materially and became more substantial as the FLSA coverage was extended; consequently, the Court gave increased attention to the tenth amendment defense. Rather obviously the theory that had been employed to allow commerce power regulation of national economic affairs through control of individual and corporate business activities was becoming outmoded or inadequate in the face of new claims of the right of the states to protect their sovereignty against federal intrusion. The Court used its previous decisions to push the federal commerce power forward as long as the regulation fell short of invading state sovereignty over its own affairs. The tenth amendment thus rose like a Phoenix in the Court's opinions from relegation to the status of a "mere truism" to a position of dominance to serve as an important protection of the states against destruction from too much federal interference.

II. The Evolving Eleventh Amendment Protection of State Sovereignty

The eleventh amendment protects states against federal "interference" by denying federal courts jurisdiction to hear suits by individuals against the states. It apparently assured the states of their sovereign immunity from suits to which they did not consent, recognized at common law and at the inception of the Constitution.[65] As federal general labor and welfare statutes have created causes of action in federal court to enforce their policies and then later extended coverage of the acts to states as employers (or otherwise as possible defendants) the states' eleventh amendment immunity has been challenged anew in terms of congressional ability both to force waiver by the states and to abrogate its effect altogether. As individuals entitled to federal benefits have banded together in class actions against states, the potential damages recovery, should the eleventh amendment bar fall, is substantial, and the purpose of the amendment to protect state coffers is threatened. The Court has moved generally toward a protection of the state's fiscal integrity in its recent eleventh amendment decisions.

A. *The FLSA and the Eleventh Amendment*

The 1966 FLSA amendments raised such an eleventh amendment

[65] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which interpreted Article IV, Section 2 of the Constitution as extending the federal judicial power to controversies between a state and citizens of another state. This decision led to the enactment of the eleventh amendment, and its expansion in Hans v. Louisiana, 134 U.S. 1 (1890).

issue in addition to the tenth amendment questions treated above. Section 16(b) of the Act authorized an underpaid employee to sue his employer in federal court for wage underpayments plus an additional equal amount as liquidated damages.[66] The allowance of this particular remedy to employees of a state was challenged in *Maryland v. Wirtz* on the basis of conflict with the eleventh amendment removal of federal court jurisdiction over citizen claims against states, but the Court reserved the question for an appropriate future case.[67] In *Employees v. Department of Public Health and Welfare,*[68] the Court refused to allow a suit by an individual against a state agency under section 16(b), but its decision to bar enforcement of the FLSA by individuals was based on the Court's finding of a lack of clear congressional intent to abrogate the eleventh amendment immunity. In 1974 Congress amended section 16(b) to correct the ambiguity and to specify that suits may be maintained against an employer who is a public agency.[69] The congressional intent now made manifest, the next question became whether the amended section would overcome an eleventh amendment frontal challenge.

The background for the *Employees* decision should begin with an earlier decision on the eleventh amendment bar to federally created causes of action against states, *Parden v. Terminal Railway.*[70] An employee of Alabama's state owned and operated railroad brought a personal injury action against the railroad in federal court under the Federal Employers' Liability Act (FELA).[71] The Court addressed two basic questions: (1) did Congress, in enacting the FELA, intend to subject the state to suit in these circumstances; and (2) did it have the power to do so against the state's claim of immunity? With respect to the first question, the Court found that Congress, in making the FELA applicable in broad terms to *every* common carrier by railroad in interstate commerce, intended to cover states as common carrier owners.[72] It noted that the Court had

[66] Pub. L. No. 89-601, § 16(b), 80 Stat. 830 (1966) (current version at 29 U.S.C. § 216(b) (Supp. IV 1974)).

[67] The plaintiffs/appellants in *Maryland v. Wirtz* sought to enjoin enforcement of the FLSA, thus no question of enforcement was presented to the Court. 392 U.S. at 200.

[68] 411 U.S. 279 (1973).

[69] 29 U.S.C. § 203(d) (Supp. IV 1974) deletes the exclusion of the United States, the States, and their political subdivisions from the definition of "employer" and specifically includes public agencies within the definition.

[70] 377 U.S. 184 (1964).

[71] 45 U.S.C. §§ 51-60 (1970).

[72] "We think that Congress, in making the FELA applicable to 'every' common carrier by railroad in interstate commerce, meant what it said." 377 U.S. at 187 (footnote omitted).

earlier rendered the same result with respect to the federal Safety Appliance Act[73] and the Railway Labor Act.[74] Therefore, the Court found that Congress intended the FELA to authorize suit in a federal district court against state owned, as well as privately owned, common carriers by railroad in interstate commerce.

The Court hedged somewhat in its answer to the second question. Recognizing that the eleventh amendment applied to suits by citizens of a state against their own state of residence despite the amendment's language, as had been held in *Hans v. Louisiana,*[75] the Court admitted that it must directly face the question of the eleventh amendment bar.[76] It seemed at first to conclude that Congress *could* abrogate the provisions of the amendment in an exercise of power under the commerce clause because the states had granted the commerce power to Congress and thereby forfeited state control of activities touching interstate commerce. The Court relied on *United States v. California* to demonstrate this surrender of that portion of state sovereignty, the exercise of which could inhibit commerce power regulation. Rather than concluding that the eleventh amendment was therefore inapplicable, however, the Court merely concluded that the amendment did not preclude Congress from legislating in the commerce power area and asked whether the State of Alabama had waived or been forced to waive its immunity:

> Recognition of the Congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect

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[73] United States v. California, 297 U.S. 175 (1936).

[74] California v. Taylor, 353 U.S. 553 (1957).

[75] 134 U.S. 1 (1890). Hans, a citizen of Louisiana, sued the state to recover the amount of certain coupons annexed to bonds of the state. Louisiana asserted that a state could not be sued without its consent and that the federal court lacked jurisdiction over the action. The Supreme Court affirmed the dismissal of the suit on the basis that, although not specifically forbidden by the language of the eleventh amendment, federal court jurisdiction did not extend to suits against a state by one of its citizens.

> It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? . . . The supposition that it would is almost an absurdity on its face.

Id. at 15. The eleventh amendment states:

> 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.

[76] 297 U.S. 175 (1936).

> to citizens of other States and as extended to the State's own citizens by the *Hans* case, is here being overriden. It remains the law that a State may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act.[77]

The Court held that the question of waiver was one of federal law and that "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation."[78] Thus Congress, it appears, holds the power to force the states to waive their immunity but not necessarily the power to abrogate outright the immunity itself. The Court went some distance to recognize a kind of implicit waiver which might allow Congress to abrogate the eleventh amendment *de facto*, but the Court retained some force in the eleventh amendment bar, if congressional action should fall short factually of the conditioned waiver.

Justices White, Douglas, Stewart, and Harlan, in a vigorous dissent, upheld the power of Congress to condition a State's operation of a railroad upon waiver of its immunity from suit but felt that such a condition should not be inferred where Congress had not made express provision for it.[79] Both sides of the *Parden* Court, therefore, agreed that the eleventh amendment immunity from federal jurisdiction could be waived but differed on whether the waiver might be implied. Even if the question of congressional power was not clearly answered, exercise of that power was at least circumscribed by a particular procedure or sequence Congress must follow in effecting a waiver of state immunity.

The failure of Congress to follow the proper procedure to bring about a waiver of state immunity formed the basis for a challenge to section 16(b) of the FLSA as amended in 1966 in *Employees v. Department of Public Health and Welfare.*[80] Employees of Missouri health facilities brought an action for overtime pay and damages,

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[77] 377 U.S. at 192.

[78] *Id.* at 196 (citations omitted).

[79] The dissenters said, "It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another." *Id.* at 198 (White, J., dissenting).

[80] 411 U.S. 279 (1973).

which the district court dismissed as barred by the eleventh amendment. The Eighth Circuit affirmed,[81] overturning a panel decision which would have allowed the action under *Parden v. Terminal Railway*. The Supreme Court affirmed, in an opinion by Mr. Justice Douglas joined by Chief Justice Burger and Justices White, Blackmun, Powell and Rehnquist. Justice Douglas' analysis started with the proposition that the eleventh amendment precludes a state from being sued by an individual in a federal court *without its consent*. He noted that the *Parden* case turned on the question of waiver of immunity from the consequences of an act not "wholly within its own sphere of authority,"[82] but in an area of clearly established commerce regulation since Alabama had begun operation of the railroad twenty years after the passage of the FELA. Unlike *Parden*, *Employees* did not concern a business where "private persons and corporations normally run the enterprise" and which would otherwise be clearly subject to federal regulation. The health and welfare institutions[83] involved in this case were not proprietary. But Justice Douglas did not necessarily label these functions "governmental," which might prohibit Congress the power to act. He stopped short of any explicit proprietary/governmental function distinction and instead emphasized the potentially great cost of application of the FLSA to state employees.

> Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States. Congress acting responsibly, would not be presumed to take such action silently. . . . We deal here with problems that may well implicate [support employees] in every office building in a State's governmental hierarchy.

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[81] 452 F.2d 820 (1971).

[82] 411 U.S. at 282.

[83] With regard to the institutions covered by the amendment, the Court said:

> The 1966 Amendment had included the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of said institution, a school for mentally handicapped or gifted children, an elementary or secondary school, or an institution of higher eduction (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit) . . . .

Id. at 283.

> Those who follow the teachings of *Kirschbaum v. Walling*[84] . . . and see its manifold applications will appreciate how pervasive such a new federal scheme of regulations would be.[85]

Thus demonstrating an awareness of the great impact a waiver of the eleventh amendment would have on the state, Justice Douglas nonetheless actually decided the case on a question of congressional intent rather than a lack of federal power to impinge on the state coffers.[86] Since nothing in the history of the 1966 amendments indicated a purpose of Congress to make it possible for a citizen of a state to sue his state of residence in federal court, the Court was simply unable to conclude "that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum."[87] This minimization of the force of the eleventh amendment as a protection of state sovereignty was emphasized by Justice Douglas' final point: The result did not make the extension of FLSA coverage to state employees meaningless, he said, because the Secretary of Labor could sue a state in federal court under section 16(c) and section 17 without the Constitution's article III and eleventh amendment bar.[88] Although this provision might make the enforcement of the FLSA more susceptible to state control, Justice Douglas' statement refused to recognize the eleventh amendment as providing more than a technical protection of state sovereignty through foreclosure of a particular individual remedy.

Justices Marshall and Stewart concurred in the result on the basis of a different analysis, one more intriguing for the theme here treated. Justice Marshall stated his belief that Congress intended to extend the full benefits of the FLSA to state employees and thus precluded the state from relying on the protection of the ancient doctrine of sovereign immunity. Moreover, he said that the states had surrendered their common law sovereignty to congressional control to the extent of congressional exercise of the commerce power. Nevertheless, Justice Marshall argued that article III implicitly

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[84] A. B. Kirschbaum Co. v. Walling, 316 U.S. 517 (1942) (the Fair Labor Standards Act of 1938 held applicable to employees engaged in the operation and maintenance of a building whose tenants were principally engaged in the production of goods for interstate commerce).

[85] 411 U.S. at 284-85.

[86] It is questionable whether Justice Rehnquist, in light of his later decisions in *League of Cities* and *Fitzpatrick*, would completely agree with this conclusion, although he did join in the majority opinion here.

[87] 411 U.S. at 285.

[88] Justice Douglas also recognized that arguably section 16(b) permits suits in state courts, but declined to reach the question. *Id.* at 287.

barred federal courts from entertaining suits brought by individuals against nonconsenting states, *prior* to the adoption of the eleventh amendment and *independently* of the ancient doctrine of sovereign immunity.[89] The eleventh amendment, he argued, reaffirmed the limitation on federal judicial power which though implicit in article III had been set aside by the Court in *Chisholm v. Georgia.*[90]

> This limitation upon the judicial power is, without question, a reflection of concern for the sovereignty of the States, but in a particularly limited context. The issue is not the general immunity of the States from private suit—a question of the common law—but merely the susceptibility of the States to suit before federal tribunals. Because of the problems of federalism inherent in making one sovereign appear against its will in the court of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this.[91]

He concluded that the present suit was beyond the judicial power of the federal courts, unless the State of Missouri could be found to have consented, which he did not think it had done:

> For me at least, the concept of implied consent or waiver relied upon in *Parden* approaches, on the facts of that case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver. [Citations omitted.] Certainly, the concept cannot be stretched sufficiently further to encompass this case. Here the State was fully engaged in the operatation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the state has the choice of either ceasing operation of these vital public services or "consenting" to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case. [citation omitted] In *Parden,* Alabama entered the interstate railroad business with at least legal notice of an operator's responsibilities and liability under the FELA to suit in federal court, and it could have chosen not to enter at all if it considered that liability too

[89] *Id.* at 288 (Marshall, J., concurring).
[90] 2 U.S. (2 Dall.) 419 (1793).
[91] 411 U.S. at 293-94 (Marshall, J., concurring).

> onerous or offensive. It obviously is a far different thing to say that a State must give up established facilities, services, and programs or else consent to federal suit. Thus, I conclude that the State has not voluntarily consented to the exercise of federal judicial power over it in the context of this case.[92]

Absent such consent by the state, article III formed a constitutional bar to congressional power to extend FLSA enforcement against the states in the federal courts. This result did not leave the employees without a forum in which to seek redress against the state, said Justice Marshall, because Congress *had* lifted the state's *common law* immunity and thus state courts had a constitutional obligation to enforce the federal rights. He concluded,

> [I]t may seem hypertechnical to say that those petitioners are entitled personally to enforce their federal rights against the State in a state forum rather than in a federal forum. If that be so, I think it is a hypertechnicality that has long been understood to be a part of the tension inherent in our system of federalism.[93]

Justice Marshall thus increased the force of the eleventh amendment beyond a mere recognition of common law state sovereignty to an independent constitutional assurance of the states' freedom from federal jurisdiction.

Mr. Justice Brennan, in a lengthy dissent, took the view that the eleventh amendment was inapplicable by its own terms because the suit was brought by citizens of the defendant state.[94] He also rejected the existence of common law sovereign immunity, finding it to have been surrendered by the states to the extent Congress was delegated power to legislate.[95]

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[92] *Id.* at 296-97.

[93] *Id.* at 298.

[94] Justice Brennan wrote:

> But all that the Amendment provides in terms is that "[t]he 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."

Id. at 310.

[95] Justice Brennan explained his position as follows:

> In other words, the *Parden* holding, although perhaps not unambiguously phrased, was that when Congress conditions engagement in a regulated interstate enterprise upon amenability to suit, States that engage in such enterprise do not have the protection of sovereign immunity in suits in federal court arising from their engagement, because by surrendering their immunity to that extent when they granted Congress

Thus, although implicitly recognizing some form of congressional power to overcome the states' eleventh amendment immunity or cause it to be waived, the Court found a failure in fact and intent to effect that waiver and held that FLSA section 16(b) did not grant federal courts jurisdiction to hear suits by state employees against the state. The eleventh amendment granted the states a kind of "conditioned right" which *might* in some circumstances be subject to the supremacy clause, but the Court recognized clearly the burden the FLSA legislation would place on the states and refused to allow the individual remedy prescribed. The majority did, however, suggest an alternative route by which Congress might clarify its intent to subject the states to individual suits to enforce the FLSA. In the 1974 amendments,[96] Congress took the suggestion.

B. *The Eleventh Amendment as Substantive Protection of State Fiscal Integrity*

Although the Court seemed in the *Employees* case to rest its treatment of the abrogation of the eleventh amendment on determinations of congressional intent and implicit waiver, Justice Rehnquist's 1974 decision in *Edelman v. Jordan*[97] elevated the amendment somewhat to an affirmative protection of state fiscal solvency that required express waiver. In fact, Justice Rehnquist discussed the standard for waiver only after he had established the eleventh amendment as a shield against invasion of the state coffers.

Plaintiffs brought a class action alleging that Illinois officials were administering the federal-state programs of Aid to the Aged, Blind and Disabled (AABD)[98] in a manner inconsistent with federal regulations[99] and with the fourteenth amendment to the Constitution and sought declaratory and injunctive relief against the continued withholding of AABD benefits and a mandatory injunction to award the wrongfully withheld payments. The district court and the

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> the commerce power, the States in effect agreed that Congress might subject them to suits in federal court arising out of their engagement in enterprises regulated by Congress in statutes such as the FELA and the FLSA.

Id. at 301.

[96] Pub. L. No. 93-259, 88 Stat. 55, codified at 29 U.S.C. §§ 202-204, 206-208, 210, 212-214, 216, 255, 260, 630 and 634 (Supp. IV 1974).

[97] 415 U.S. 651 (1974).

[98] AABD was administered by the Illinois Department of Public Aid pursuant to the Illinois Public Aid Code, ILL. REV. STAT., C.23, §§ 3-1 through 3-12 (1973), funded by the state and federal governments, 42 U.S.C. §§ 1381-85 (1970), and replaced by a similar program on January 1, 1974. *See* 42 U.S.C. §§ 801-05 (Supp. IV 1974). 415 U.S. at 653 n.2.

[99] 45 C.F.R. § 206.10(a)(3) (1973) sets the criteria for state programs.

Seventh Circuit[100] granted the requested relief, but the Illinois officials claimed that the eleventh amendment barred the award of retroactive benefits. The Supreme Court reversed the court of appeals; Chief Justice Burger and Justices Stewart, White, and Powell joined Justice Rehnquist.

Justice Rehnquist first reviewed the "legislative history"[101] of the concept of the eleventh amendment at the time of the writing of the Constitution and traced the amendment's adoption and subsequent court treatment. He extracted from this history the rule that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[102] He then rejected the court of appeals argument that the *Ex parte Young*[103] allowance of equitable relief even in the face of the amendment's bar would sanction the retroactive payment award here as a remedy in the nature of an equitable restitution. The payments were effectively damages awards to be paid out of state coffers and thus *Young* did not control. The telling line seemed to rest between prospective and retroactive awards.

> The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues. . . . But the fiscal consequences to state treasuries in these cases [allowing remedies against states] were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra*.

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[100] Jordan v. Weaver, 472 F.2d 985 (1973).

[101] The Court quoted 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91 (rev. ed. 1937):

> The right of the Federal Judiciary to summon a state as defendant and to adjuciate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted.

415 U.S. at 660.

[102] 415 U.S. at 663.

[103] 209 U.S. 123 (1908). This landmark cause held that the eleventh amendment did not bar an action in federal court to enjoin a state official from enforcing an allegedly unconstitutional statute.

> . . . [The decree here] requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court imposed obligation to conform to a different standard. . . . [The damages award would be] measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.[104]

In a footnote Justice Rehnquist put more substance behind his somewhat vague line-drawing:

> This argument [that prospective and retroactive awards do not differ] neglects the fact that where the State has a definable allocation to be used in the payment of public aid benefits and pursues a certain course of action such as the processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will inevitably mean there is less money available for payments for the continuing obligations of the public aid system.[105]

Justice Rehnquist thus seemed to argue that the retroactive payments awarded by the lower court would disrupt preexisting policies and obligations of Illinois, the decisions on which reside constitutionally with the state, whereas a prospective award would allow the state to *choose* which reallocations to make. This principle appeared later in Justice Rehnquist's *Fry* dissent and his *National League of Cities* opinion discussing the tenth amendment; *Edelman* was thus a foreshadowing of his views of state sovereignty.

The majority opinion also treated the question of waiver and distinguished *Parden* and *Employees* because there was no congressionally created cause of action in the federal welfare legislation at stake in *Edelman.* The threshold of congressional intent to condition receipt of benefits on the states' waiver of immunity was therefore not present. Although this finding on the intent question was sufficient for reversal, the Court also discussed the form in which the waiver condition must be met:

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[104] 415 U.S. at 667-68.

[105] *Id.* at 666 n.11.

> In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction. . . .
>
> > "[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."
>
> The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts.[106]

Edelman thus provided a far more demanding standard for waiver than did *Employees.*

Justice Brennan's dissent reiiterrated his *Employees* position that the *Hans* case did not extend the eleventh amendment immunity to suits against a state by its own citizens.[107] Despite his authorship of *Employees,* Justice Douglas also dissented and found waiver.[108] He noted the language from *Parden* to the effect that "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation."[109] He then concluded that "Illinois by entering into the joint federal-state welfare plan just as surely '[left] the sphere that is exclusively its own.' "[110] Justices Marshall and Blackmun, in dissent, found waiver by virtue of the State's knowing and voluntary decision to participate in the program.[111] This dissent distinguished *Parden* and *Employees* as follows:

> [T]he Social Security Act does not impose federal standards and liability upon all who engage in certain regulated activi-

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[106] *Id.* at 673.
[107] *Id.* at 687 (Brennan, J., dissenting).
[108] *Id.* at 678 (Douglas, J., dissenting).
[109] *Id.* at 686 (Douglas, J., dissenting) (quoting 377 U.S. at 196).
[110] *Id.* (Douglas, J., dissenting) (quoting 377 U.S. at 196).
[111] 415 U.S. at 688 (Marshall, J., dissenting).

> ties, including often-unwilling state agencies. Instead, the Act seeks to *induce* state participation in the federal welfare programs by offering federal matching funds in exchange for the State's voluntary assumption of the Act's requirements. I find this basic distinction crucial: It leads me to conclude that by participation in the programs, the States waive whatever immunity they might otherwise have from federal court orders requiring retroactive payment of welfare benefits.[112]

Except for Justice Brennan, then, the dissenters did not wish to adopt the tougher waiver standard.

The *Edelman* decision presented an opportunity to enhance the meaning of the eleventh amendment from a mere subtraction of federal court jurisdiction over individual suits against states, and Justice Rehnquist seized it. He asserted that a state's fiscal solvency could be at issue and that a state must unequivocally consent to suit in federal court before a retroactive damages award for breach of a federal obligation imposed on the states could be won. Although the FLSA explicitly created a federal cause of action, as the AABD did not, and the Court seemed merely to invite Congress to state more clearly its intent to force a waiver of sovereign immunity, *Edelman* loomed larger as a kind of *substantive* bar to congressional action. The eleventh amendment might stand closely equal in strength to the tenth as a guarantee of state sovereignty and freedom in certain fiscal policy areas. At least *past* policy decisions could not be disrupted by damages award depletion of state funds, even if a state

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[112] *Id.* at 688-89 (emphasis added). Justices Marshall and Blackmun further explained their waiver position as follows:

> A finding of waiver here is also consistent with the reasoning of the majority of *Employees,* which relied on a distinction between "governmental" and "proprietary" functions of state government. . . . This distinction apparently recognizes that if sovereign immunity is to be at all meaningful, the Court must be reluctant to hold a State to have waived its immunity simply by acting in its sovereign capacity — i.e., by merely performing its "governmental" functions. On the other hand, in launching a profitmaking enterprise, "a State leaves the sphere that is exclusively its own." Parden v. Terminal R. Co., 377 U.S. at 196, and a voluntary waiver of sovereign immunity can more easily be found. While conducting an assistance program for the needy is surely a "governmental" function, the State here has done far more than operate its own program in its sovereign capacity. It has voluntarily subordinated its sovereignty in this matter to that of the Federal Government, and agreed to comply with the conditions imposed by Congress upon the expenditure of federal funds. In entering this federal-state cooperative program, the State again "leaves the sphere that is exclusively its own, and similarly may more readily be found to have voluntarily waived its immunity.

Id. at 695-96.

might presumably not refuse to participate in federal welfare assistance programs. By requiring the waiver condition to be explicit, the Court moved to force Congress to consider more carefully the financial impact its programs would have on the states.

III. *National League of Cities v. Usery*—LIMITING THE COMMERCE CLAUSE

In his *Fry* dissent, Justice Rehnquist had joined the tenth and eleventh amendments together as "examples" of the framers' intent that the states be integral, viable units of the federal system. In *Edelman*, he had demonstrated his vision of such a construction of the eleventh amendment as a protection of state fiscal solvency as well as a recognition of common law state sovereignty. Justice Marshall in *Fry* had moved toward a greater recognition of state sovereignty and seemed to rest his decision on the national economic emergency as much as on an assertion of unlimited federal power in regulation of commerce. In *National League of Cities v. Usery*,[112.1] Justice Rehnquist was able to convert his *Fry* dissent into a five-justice majority opinion[113] recognizing an affirmative state right to its sovereign existence.

The 1974 FLSA amendments[114] established a minimum wage of $1.90 for state and local government employees and extended the coverage of the Act to include eleven million workers[115] in nearly all areas of state and local government.[116] The National League of Cities (NLC) and numerous others[117] sought to enjoin the Secretary of

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[112.1] 96 S. Ct. 2465 (1976).

[113] Justice Rehnquist wrote the opinion for the court in which Chief Justice Burger and Justices Stewart and Powell joined. Justice Blackmun wrote a brief concurring opinion.

[114] 29 U.S.C. §§ 202-204, 206-208, 210, 212-214, 216, 255, 260, 630 and 634 (Supp. IV 1974).

[115] In October, 1973, state and local governments employed 11.4 million persons. Public Employment in 1973 (U.S. Department of Commerce, 1973).

[116] The definition of employee in § 203(e)(2) was amended to include:

> (C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual . . . (ii) who—(I) holds a public elective office of that State, political subdivision, or agency, (II) is selected by the holder of such an office to be a member of his personal staff, (III) is appointed by such an office holder to serve on a policymaking level, or (IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal power of his office.

[117] Appellants were the National League of Cities, the National Governors' Conference, the States of Arizona, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, the Metropolitan Government of Nashville and Davidson County, Tenn., and the cities of Cape Girardeau, Mo., Lompoc, Cal., Salt Lake City, Utah, and the State of California. 96 S. Ct. at 2467 n.7.

Labor or any other person from enforcing the amendments or any of the regulations promulgated thereunder. A three-judge district court recognized that "a difficult and substantial question of law" was presented but concluded that the Supreme Court's decision in *Maryland v. Wirtz* bound the court to dismiss the action.[118] Chief Justice Burger, sitting as an individual Circuit Justice, noted the "novelty" of the legal questions and their "persuasive impact" and granted an injunction until the full Court could review the issues.[119]

Justice Rehnquist set carefully to work to overturn *Maryland v. Wirtz* and to establish the tenth amendment as an affirmative constitutional limitation on the federal use of the commerce power to regulate a state in the exercise of its traditional functions.[120] Just as an exercise of the commerce power could not abrogate individual rights,[121] and as Congress could not infringe certain areas of executive authority,[122] the plenary power could not be used to destroy the ability of the states to survive as states. The use of the commerce power to regulate the states as states is fundamentally different from its use to regulate individual or corporate activities because of the federal system's assurance of a state's survival.

This assertion of states' rights followed familiarly from *Fry*; the difficult problem was to ferret out when a states tenth amendment defense could be invoked. Justice Rehnquist offered several phrases as his tests for reaching the tenth amendment threshold. His broad statement of principle was the protection of "functions essential to separate and independent existence"[123] of a state, extracted from *Coyle v. Smith*.[124] These functions were those "undoubted

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[118] National League of Cities v. Brennan, 406 F. Supp. 826 (1974).

[119] National League of Cities v. Brennan, No. A-553 (D.C. Cir. Dec. 31, 1974) (Burger, Circuit Justice).

[120] Justice Rehnquist said:

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

96 S. Ct. at 2471.

[121] *See, e.g.*, United States v. Jackson, 390 U.S. 570 (1968) (federal legislation invalid because found to offend sixth amendment right to trial by jury); Leary v. United States, 395 U.S. 6 (1969) (due process clause of fifth amendment).

[122] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (Congress could not remove exclusive power of President to appoint members of Federal Elections Commission); Myers v. United States, 272 U.S. 52 (1926) (Congress prohibited from limiting authority of President to remove at will an officer of the executive branch appointed by him).

[123] 96 S. Ct. at 2471.

[124] 221 U.S. 559 (1911) (Congress may not dictate the location of Oklahoma's seat of government).

attribute[s] of state sovereignty"[125] the "congressionally imposed displacement [of which] may substantially restructure traditional ways in which the local governments have arranged their affairs."[126] He recited a series of examples of the functions or policy decisions which he found reserved to the states under this test and the kind of impact on states which he found impermissible. The plaintiffs' allegations of substantially increased costs of providing extant services was the first adverse effect cited.[127] He seemed more impressed, however, with the argument that compliance with the FLSA would force a reduction or curtailment of such activities as police training or affirmative action programs.[128] Finally, the Act would prohibit certain policy choices of elected officials such that governmental discretion would be reduced to a decision between hiring a certain number of employees and raising revenues.[129] On recitation of those adverse effects, Justice Rehnquist concluded that "both the minimum wage and the maximum hours provisions [of the Act] will impermissibly interfere with the integral governmental functions of these bodies."[130] He denied that the degree of interference was crucial, however, and concluded that "the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments."[131]

Finally, recognizing that these precepts somewhat contradicted the earlier decisions of the Court on the exercise of the commerce power, Justice Rehnquist stated explicitly that the *United States v. California* dictum disclaiming any limitation on the commerce power was "simply wrong"[132] and overturned the *Wirtz* decision in its allowance of FLSA coverage of schools and hospitals.[133] This decision may have marked a shift by the Court from the *Wirtz* and *Fry* tests of too much intrusion in state activities by the federal act in question to a threshold test of whether the federal interference

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[125] 96 S. Ct. at 2471.

[126] *Id.* at 2473.

[127] For example, Cape Girardeau, Mo., estimated that its annual budget for fire protection would be increased from $250,000 to $400,000 over its current figure of $350,000, while the State of California estimated an increase in its budget of between $8 million and $16 million. *Id.* at 2471.

[128] *Id.* at 2472.

[129] *Id.*

[130] *Id.* at 2473.

[131] *Id.* at 2474.

[132] *Id.* at 2475.

[133] *Id.* at 2476.

concerned a traditional state function. This latter test seems more rigid and may offer less flexibility than a factual intrusion test such as might be inferred from Justice Marshall's opinion in *Fry*.[134]

The swing vote in *National League of Cities* was cast by Justice Blackmun, who rested his short concurrence on a more flexible test: "It seems to me that [the Court] adopts a balancing approach, and does not outlaw 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."[135] He thus offered a standard for the tenth amendment bar which would not overturn earlier decisions in other subject areas. Interestingly, it was this potential inconsistency which led Justice Stevens to dissent. He reiterated the numerous restrictions on state activity which the federal government has already constitutionally required[136] and concluded that no limitation on the federal government's power to regulate the state employees labor market would not also invalidate other forms of permissible regulation. He rested his dissent finally on the argument that the adversely affected states were not without political power to reverse the congressional decision.[137]

Justice Brennan, joined by Justices White and Marshall, dissented more fervently on the grounds that the "traditional" interpretation of the commerce clause recognizes no restraint based on

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[134] Justice Marshall's opinion in Fry v. United States, 421 U.S. 542 (1975), seems to turn on the actual impact of the federal regulation of the states. His characterization of the 1961 and 1966 FLSA amendments at issue in *Wirtz* as "quite limited" implies a test based upon the factual intrusion present in each case, since he easily dismisses the objections to the Economic Stabilization Act on the ground that it is "even less intrusive." *Id.* at 548.

[135] 96 S. Ct. at 2476 (Blackmun, J., concurring).

[136] Justice Stevens wrote:

> The Federal Government may, I believe, require the State to act impartially when it hires or fires the 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 capitol furnance, 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. Even though these and many other activities of the capitol janitor are activities of the state *qua* state, I have no doubt that they are subject to federal regulation.

Id. at 2488 (Stevens, J., dissenting).

[137] Justice Stevens wrote:

> [A]s far as the complexities of adjusting police and fire departments to this sort of federal control are concerned, I presume that appropriate tailor-made regulations would soon solve their most pressing problems. After all, the interests adversely affected by this legislation are not without political power.

Id.

state sovereignty. The Court's opinion was seen as no more than a "transparent cover"[138] for invalidating a disfavored congressional judgment. Such judgments, if the states or the people disagree, could be reversed politically, as the Court had argued long before in *Gibbons v. Ogden*.[139] This dissent argued that the federal government must be supreme in the exercise of its granted powers and that the tenth amendment has never been interpreted to contradict this principle. The Court, said the dissenters, inappropriately reversed this rule and decided a question that should not lend itself to judicial solution.[140]

League of Cities was undoubtedly an important case in the renewed recognition of structural federalism constraints on congressional action. The tenth amendment offers a broader protection of state sovereignty over policy decisions than does the eleventh amendment because of the eleventh's limitation to financial questions.[141] By joining the two amendments, however, Justice Rehnquist has effected a protection of the states as solvent units with exclusive power to make those policy decisions traditionally confined to the states. His test for the raising of the tenth amendment bar was unclear even so. He seemed to erect a tenth amendment threshold test but refused to overturn *Fry* and distinguished the valid congressional exercise of the commerce power there by the existence of the national economic emergency and the absence of increased pressure

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[138] *Id.* at 2481 (Brennan, J., dissenting).

[139] The dissent cited Justice Marshall's classic statement from Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824):

> "[T]he power over commerce . . . is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. *The wisdom and the discretion of Congress, their identify with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.*"

Id. at 2476 (emphasis added by the dissenters).

[140] Justice Brennan wrote:

> My Brethren do more than turn aside longstanding constitutional jurisprudence that emphatically rejects today's conclusion. More alarming is the startling restructuring of our federal system, and the role they create therein for the federal judiciary. This Court is simply not at liberty to erect a mirror of its own conception of a desirable governmental structure.

Id. at 2485.

[141] As discussed in Edelman v. Jordan, 415 U.S. 651, 662-63 (1974), the general rule is that a suit by private parties seeking to impose liability which must be paid out of public funds in the state treasury is barred by the eleventh amendment. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

on the state budget.[142] *Some* strong federal interest, therefore, might make congressional regulation of state governmental functions permissible, at least temporarily. Conversely, taking *Edelman* and the *Fry* dissent together, one might guess that Justice Rehnquist would find a large, crippling budgetary impact on the states too great to support federal intrusion. Either of these latter possibilities implies the use of a balancing test, as Justice Blackmun inferred, different from the threshold test Justice Rehnquist posited directly. While supporting Justice Rehnquist's thrust, one might thus question the vagueness or inflexibility of his standard for invoking the tenth amendment.

IV. RETREAT FROM *League of Cities*

Justice Rehnquist's footnote in *League of Cities*, contrasting the fourteenth amendment with the commerce power,[143] and his immediately subsequent opinion in *Fitzpatrick v. Bitzer*[144] resolve some doubt about which kind of analysis he wishes to employ. In *Fitzpatrick* Justice Rehnquist fashioned a statutory construction argument which affords broader power to the Congress to act under section 5 of the fourteenth amendment than under any of the granted powers—power sufficient to abrogate the eleventh amendment.

Fitzpatrick, an employee of the State of Connecticut, brought a class action on behalf of present and retired male employees against the Chairman of the State Employees Retirement Commission, the State Treasurer, and the State Comptroller, seeking declaratory and injunctive relief as well as damages for violation of the sex discrimination provisions of Title VII.[145] Connecticut's retirement

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[142] Justice Rehnquist had, however, specifically rejected this rationale in his dissent in Fry v. United States, 421 U.S. 542, 559 (1975): "[n]or do I believe that the showing of national emergency made here is sufficient."

[143] The footnote read:

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the Spending Power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

96 S. Ct. at 2474 n.17.

[144] 96 S. Ct. 2666 (1976).

[145] 42 U.S.C. § 2000e-2(a) was amended by the Equal Opportunity Act of 1972, Pub. L. No. 92-261, § 8(a), 86 Stat. 109 (1972)(current version at 29 U.S.C. § 2000e-2(a)(1970 & Supp. IV 1974)), to provide:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discrimi-

legislation allowed women employees with twenty-five years of service to retire with pension rights five years earlier than men, and those women employees retiring with less than twenty-five years of service were entitled to receive more favorable payments than men. Plaintiffs asked that living retired male employees be paid the difference between the female benefits and the male benefits that they had received since the beginning of their eligibility.

The Second Circuit held that the eleventh amendment barred this congressionally authorized action against the state for retroactive damages.[146] Following the analysis used in *Employees,* the Second Circuit first determined that Congress had intended by the 1972 amendments to Title VII to authorize actions against a "government, governmental agency, or political subdivision" for private damages for violation of Title VII. But using the *Edelman* standards, the court found no voluntary or constructive waiver by the state because it employed persons under a retirement system that had long predated Title VII. Thus the court was faced with determining the validity of congressional authorization of a private action in federal court against a state for retroactive damages for a violation of fourteenth amendment rights. The court recognized that, when the fourteenth amendment was ratified, Congress was granted great power to apply substantive legislation to the states, but felt that this grant was not inconsistent with the prohibition of certain remedies against the states and that the court should try to give effect to both amendments insofar as possible. The court used part of a separate opinion of Justice Brennan in *Perez v. Ledesma,*[147] to interpret *Edelman*:

> "*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Edelman v. Jordan* . . . must be read as reaffirming the necessity of maintaining this balance between

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nate against any individual with respect to his compensation, terms, conditions, or priviliges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees 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.

[146] Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir. 1975).

[147] 401 U.S. 82, 106 (1971).

> enforcement of individual constitutional rights and protection of the state's fiscal administration under the Eleventh.[148]

The court would not upset this general constitutional balance unless necessary in the fourteenth amendment area to enforce individual rights. Finding that prospective injunctive relief and suits by the United States in federal court or by individuals in state courts offered sufficient remedies, the court determined that "there is no reason in this case to depart from the balance between the Eleventh Amendment and other constitutional interests which was most recently reaffirmed in *Edelman*."[149] Since *Edelman* had expressly overruled several cases involving retroactive damages under the fourteenth amendment,[150] the Second Circuit interpreted *Edelman* to mean that the later enactment of the fourteenth amendment had not limited the eleventh.

The Supreme Court reversed the Second Circuit in a short opinion and upheld the 1972 extension of Title VII coverage to state employees. Writing for the Court, Justice Rehnquist reasoned that the state sovereignty principle was limited by the enforcement provisions of section 5 of the fourteenth amendment, which gives Congress authority to enforce that amendment's substantive provisions by "appropriate legislation." The fourteenth amendment was an affirmative limitation of state sovereignty prohibiting certain acts of the state and section 5 was an affirmative grant to the Congress of power to enforce those limitations:

> When Congress acts pursuant to § 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. We think that Congress may . . . provide for private suits against States or state officials which are constitutionally impermissible in other contexts.[151]

Thus, the state sovereignty considerations which Justice Rehnquist had articulated in *Edelman* and *League of Cities* in the context of

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[148] 519 F.2d at 570.

[149] *Id.* at 571.

[150] 415 U.S. at 670-71 (overruling State Dep't of Health & Rehabilitative Serv. v. Zarate, 407 U.S. 918 (1972); Wyman v. Bowens, 397 U.S. 49 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969)).

[151] 96 S. Ct. at 2671 (footnote omitted).

the commerce power had no force when Congress acted under the fourteenth amendment. "There can be no doubt," he said, "that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States."[152] Justice Rehnquist suggested that the state's defense was confined to a challenge to the relevant act's provisions as an improper exercise of section 5.

The opinion in *Fitzpatrick* seems unduly absolutist, particularly since the circuit court had offered a solution giving effect to both Title VII and the eleventh amendment so long as individual rights were not infringed. Justice Rehnquist clearly implied that the constitutional provision under which Congress acts determines whether Congress may intrude into state sovereignty, regardless of the degree of intrusion: de minimis intrusion under the commerce power is inappropriate just as is a fiscally crippling award of damages enforcing fourteenth amendment right. He seems to have boxed himself into a rigid approach when more flexibility would be useful and perhaps could better preserve adherence to federalism principles. His implicit premise that the grant of power to Congress under the commerce power is any less clear or strong than the grant under section 5 of the fourteenth amendment is also somewhat implausible, unless he also sees some underlying protection of certain individual rights central to constitutional principles in the fourteenth amendment and the Constitution as a whole. Presumably Justice Rehnquist intends some substantive distinction between the exercise of congressional power under the powers granted in the original Constitution and those granted in the fourteenth amendment rather than the mere admonition to Congress to select the proper power in its statement of purpose for future acts. If he so intends, however, he has not articulated the view in these opinions.

V. Balancing State Sovereignty and Federal Policy Interests

The *League of Cities* case did not deal with the constitutionality of the 1974 changes in section 16(b) of the FLSA,[153] since no claims

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[152] *Id.*

[153] The Senate Committee said the following with respect to the need for this amendment:

> The amendment on the maintaining of suits by state employees was recommended by the Department of Labor and unanimously concurred in by the Committee and was made necessary by the Supreme Court's opinion in Employees of the Dep't of Public Health & Welfare of Missouri v. Department of Public Health & Welfare of Missouri,

for backpay were involved in that action and since the decision rendered most state employee suits for damages moot. The enforcement of the provisions of the Equal Pay Act,[154] enacted in 1963 as an amendment to the FLSA, and other exercises of the commerce power in the labor policy area, such as the Age Discrimination in Employment Act,[155] have and will, however, present a conflict with the eleventh amendment (as well as the tenth). As the various acts seek to remedy arguably different problems, such as unequal pay based on sex discrimination, one may ask whether *League of Cities* is a controlling precedent—whether state governmental functions might not constitutionally be regulated even in the interest of a more pressing federal policy concern. Should the constitutionality of the federal policy turn on the congressional use of the fourteenth amendment rather than another granted power?

___ U.S. ___ (1973). There, the court held that Federal Court suits for enforcement of the FLSA brought by state employees pursuant to Section 16(b) of the Act could not be maintained and did so on the express ground that the Act does not authorize them. '(W)e have not found a word in the history of the 1966 amendments to indicate the purpose of Congress to make it possible for a citizen of that state or another state to sue the state in the Federal Courts.' (Slip op. at p. 6). This amendment makes this committee's and Congress' intent clear.

The amendment provides that employees of a public agency (defined to include the Government and agencies of the United States, a State or political subdivision, or any interstate governmental agency) may maintain an action against that public agency under Section 16(b) in any Federal or State court of competent jurisdiction, and suspends the statute of limitations to preserve rights of actions of State or local government employees which would otherwise be barred as a result of the Supreme Court's decision. It is emphasized that this provision is a limited suspension of the statute of limitations and is applicable only to certain public employees.

The Court did not question its earlier decision in *Maryland* v. *Wirtz* which upheld the extension of the Act to state-operated schools and hospitals. Nor did the Court indicate that, although Congress could thus extend coverage, it is powerless to provide what Congress considers meaningful and necessary enforcement devices. Indeed, the majority opinion suggests the contrary when it refuses to infer, in the absence of clear language to this effect, 'that Congress conditions the operation of these facilities on the forfeiture of immunity from suit in a federal forum.' (Id. at slip op., pp. 6-7).

Experience under the 1966 Amendments has shown that voluntary compliance with the Act's requirements cannot be expected from the state so as to render enforcement mechanisms unnecessary. Experience during that same period demonstrates that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily. Since the 1974 Amendments extend FLSA coverage to additional state government employees, it is now all the more necessary that employees in this category be empowered themselves to pursue vindication of their rights.

S. REP. No. 93-300, 93d Cong., 2d Sess. 28 (1974).

[154] 29 U.S.C. § 206 (1970).

[155] 29 U.S.C. §§ 621-624 (1970).

These questions have already arisen in five district court actions where defendant states have unsuccessfully urged *League of Cities* as a defense to suits under the Equal Pay Act and Age Discrimination in Employment Act. The Equal Pay Act of 1963 was made applicable to state and local government employees by virtue of the 1974 FLSA amendments. Three separate challenges to the equal pay provisions have been brought in Iowa[156] and one in South Carolina.[157] The first Iowa court to consider the question was careful to distinguish the equal pay from the minimum wage provisions by finding that, since the legislation in question merely proscribes sex discrimination in pay, the discrimination that the Act prevents "cannot validly be considered a 'fundamental employment decision' "[158] exclusively made by a sovereign state. The two subsequent Iowa decisions upheld the equal pay provisions in the same manner but, alternatively, also asserted a relationship with the objectives of the Title VII legislation upheld in *Fitzpatrick*.[159] The South Carolina court took the safest possible route and certified the challenge as a question for immediate appeal.[160] In the fifth case[161] to deal with *League of Cities,* the state defendant argued that the Age Discrimination in Employment Act (ADEA) was unconstitutional in its inclusion of state or political subdivisions as employers subject to the Act's prohibitions. The Utah District Court applied the balancing approach suggested by Justice Blackmun and found that the federal interest in preventing arbitrary employment discrimination on the basis of age outweighs the state policy choice to discriminate on the basis of age.[162] The five lower court decisions thus distinguish *League of Cities* and emphasize the strong federal interests to protect individuals.

The authors wish to suggest that these courts reached a proper decision by directing attention to the *League of Cities'* implicit test

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[156] Usery v. Bettendorf Community School District, No. 76-6-D (S.D. Iowa Sept. 1, 1976) (defendant's motion for summary judgment denied); Usery v. Fort Madison Community School District, No. 75-62-1 (S.D. Iowa Sept. 1, 1976) (defendant's motion to dismiss denied); Christensen v. Iowa, No. C 74-2030 (N.D. Iowa Aug. 4, 1976) (defendant's motion to dismiss denied).

[157] Usery v. Charleston County School District, No. 76-248 (D.S.C. Aug. 5, 1976).

[158] Christensen v. Iowa, No. C 74-2030, slip op. at 3-4 (N.D. Iowa Aug. 4, 1976).

[159] Usery v. Bettendorf Community School District, No. 76-6-D, slip op. at 3 (S.D. Iowa Sept. 1, 1976); Usery v. Fort Madison Community School District, No. 75-62-1, slip op. at 3 (S.D. Iowa Sept. 1, 1976).

[160] Usery v. Charleston Community School District, No. 76-248 (D.S.C. Aug. 5, 1976).

[161] Usery v. Board of Education of Salt Lake City, No. C 75-510 (D. Utah Sept. 1, 1976).

[162] *Id.* slip op. at 4-5.

of whether a state's fundamental interests were infringed and to the nature of the federal policy sought to be furthered. *League of Cities* clearly allows *some* flexibility in proposing the former test, but this test does not explicitly allow consideration of such important federal policy objectives as seeking to protect individuals or to insure uniform exercise of emergency economic policy (as in *Fry*). The Court could effect much greater flexibility by articulating, as have Justice Blackmun and the lower federal courts subsequently interpreting *League of Cities*, an explicit balancing test which protects state sovereignty by weighing the state's claim to independence in decisionmaking against the federal policy interests sought to be furthered.

The Second Circuit's decision in *Fitzpatrick* offers one milder form of this kind of decisionmaking. The Second Circuit felt that *Edelman* "reaffirmed" the full force of the eleventh amendment as defined by the Supreme Court in *Ex parte Young*. Although the fourteenth amendment succeeded the eleventh by some seventy years, contains explicit limitations on state power, and expressly grants Congress the power to enforce the article by "appropriate legislation," the Second Circuit would not allow Congress to use the fourteenth amendment to invade the immunity protected by the eleventh, unless individual rights could not otherwise be protected. The state immunity could be preserved and the Connecticut pension provisions reformed without great violence to either state or federal interests.

A balancing approach would seem to offer even Justice Rehnquist a more satisfactory method for accommodation of the concern for state fiscal solvency which he raised in *Fry*, *Edelman*, and *League of Cities*. Title VII actions or actions under other fourteenth amendment statutes could result in large awards of damage which would necessarily be paid out of state funds. The *Fitzpatrick* analysis affords a state no defense to such suits, but a balancing approach would allow a court to rule that the impact of the damages award would be so substantial that the state's ability to survive was threatened and thus that the state's interest was too great to allow a retroactive award. Conversely, federal guarantees of protection of individual rights could be deemed so important that no conceivable state interest could outweigh them such that the *Fitzpatrick* result could still be reached under the alternative test.

One should applaud Justice Rehnquist for freeing commerce clause analysis applied to federal regulation of *state* activity from its broad, unimpeachable scope vis-a-vis regulation of individuals.

He has effected a new tool of analysis which allows recognition of renewed federalism and protects the states from complete dominance by Congress, but his constitutional construction argument is too rigid. One might employ his analogy of the tenth amendment state right to its sovereignty to the other constitutional rights of individuals to remind the Court of its frequent approach to conflicts between individual rights and federal or social interests. The Court will maximize the protection of the individual right and allow only the least intrusive infringement essential to protection of the compelling federal interest sought. It may thus effect a balance between the two interests such that both may survive or weigh conceivable interests against threatened rights.[163] The Court might similarly seek to balance the congressional interest in regulating commerce and the economy against the state's tenth amendment right to freedom of decisionmaking in certain areas. On an ad hoc basis, when Congress seeks to regulate the "states as states" in such a manner that a state policy or function crucial to the state's survival is substantially affected, the Court might ask whether the federal policy sought is crucial or essential to the protection of valid constitutional guarantees and whether it may not otherwise be effected.[164] Such a solution would afford maximum protection to state sovereignty as a linchpin of federalism and preserve judicial flexibility to respond to peculiar factual situations and special individual needs.

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[163] The best examples of this kind of balancing probably occur in the first amendment context. The test suggested here is extracted from United States v. O'Brien, 391 U.S. 367 (1968). *See also* Professor Gunther's applause of the careful balancing by Justice Harlan in Cohen v. California, 403 U.S. 15 (1971), and Street v. New York, 394 U.S. 576 (1969). Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972).

[164] Even this test may be too stringent in that the analogy between the first and tenth amendments perhaps should not equate their strength. In the first amendment case, one balances frequently compelling state or federal interests against the right to speak (associate or freely practice religion) and the essential purpose of its protection. Relatively few interests may permit *any* intrusion on first amendment rights. The tenth amendment could conceivably admit more intrusion because of federal policy interests, *e.g.*, those examples of permissible intrusion listed by Justice Stevens in his *League of Cities* dissent. The tenth amendment question also arises usually in terms of congressional intrusion on the state tenth amendment right rather than, as frequently happens under the first amendment, state intrusion on an individual right, such that supremacy clause problems may more clearly (and differently) arise under tenth amendment cases. These distinctions, however, argue all the more forcefully for a blancing test in tenth amendment cases: strong federal policies must be weighed to determine whether they override an alleged state interest in making decisions in its role as a sovereign.