After *National League of Cities v. Usery*: Are Public Employees Still Covered by the Fair Labor Standards Act?*

AFTER NATIONAL LEAGUE OF CITIES v. USERY: ARE PUBLIC EMPLOYEES STILL COVERED BY THE FAIR LABOR STANDARDS ART? This comment examines the recent United States Supreme Court decision which held that police, fire, health, sanitation, and recreation employees are not covered by the federal wage and hour law. By exploring the criteria explicitly and implicitly relied upon by the Court, the comment sets out a standard for determining which activities are likely to be found covered by the FLSA in future decisions.

In the 1974 amendments to the Fair Labor Standards Act (FLSA),[1] Congress extended the federal minimum wage and overtime standards

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[1] Fair Labor Standards Act, 19 U.S.C. §§ 201-219 (1970 & Supp. V 1975). The 1974 amendments not only extended wage and hour coverage to public employees, but also covered additional employees in the private sector. The House of Representatives Report No. 93-913 indicated the broad scope of the 1974 amendments in the following table:

Proposed Extension of Minimum Wage and Overtime Protection

Minimum wage coverage will be extended to the following:	Overtime coverage will be extended to the following:
Federal employees.	Federal employees.
State and local employees.	State and local employees.
Domestic service employees.	Domestic service employees.
Retail and service employees.	Retail and service employees.
Conglomerate employees (in agriculture).	Conglomerate employees (in agriculture).
Telegraph agency employees.	Telegraph agency employees.
Motion picture theater employees.	Hotel, motel, and restaurant employees.
Logging employees.	Food service employees.
Shade grown tobacco processing employees.	Bowling establishment employees.
	Nursing home employees.
	Transit (local) employees.
	Cotton ginning and sugar processing employees.
	Seafood canning and processing employees.

to public employees. In so doing, Congress sought to upgrade substandard working conditions, to ensure that all public employees earned at least a minimum standard wage, and to compensate for overtime work. However, prior to this federal act, most state and local government employees received salaries at or above the federal minimum.[2] For the most part, though, they did not receive overtime payments for hours worked in excess of a normal work week. The general practice among public employers was to provide employees compensatory time off instead of premium wages.[3]

The 1974 amendments threatened to add greatly to state and local government costs, during a period in which these governments faced unprecedented increases in the costs of providing normal services.[4] The costs of running state and local governments have increased so rapidly during the 1970s that they have defied budgetary planning,

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Oil pipeline transportation employees.
Partsmen and mechanics in certain vehicle sales establishments.

H.R. REP. NO. 93-913, 93d Cong., 2d Sess. 3, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811, 2813.

The FLSA does not apply to professional, administrative, or executive employees. 29 U.S.C. § 213(a) (1970 & Supp. V 1975).

[2] In 1970, after a survey of state and local governments, the Department of Labor concluded that wage levels for public employees were "substantially higher" than for workers already covered by the Act. H.R. REP. NO. 93-913, 93d Cong., 2d Sess. 28 (1974).

[3] Brief for Appellants at 83-84, National League of Cities v. Usery, 426 U.S. 833 (1976).

[4] Expenses have increased at an astonishing rate, as illustrated in the following table. It is Table I of Reports of Essential Facts, the prospectuses of the 1976 bond issues for several New York municipalities.

Operating Expenses for Selected New York Municipalities, 1971 - 1975

Municipality	Operating Expenses		Percentage Increase
	1971	1975	
County of Westchester	$187,398,179	$330,213,024	76.21
County of Erie[1]	283,476,000	364,477,000	28.57
City of Newburgh	6,026,655	8,325,030	38.12
City of Rochester[1]	145,393,000	184,855,000	27.14
Town of Ramapo[2]	4.936,943	10,427,121	111.21
Town of Seneca Falls	285,410	362,184	26.90
Village of Great Neck Plaza	492,087	722,897	46.90
Village of Tarrytown[3]	2,283,143	3,891,419	70.44

1) 1972-75
2) 1970-74, town and special districts.
3) 1972-76, fiscal year ending May 31.

This table is noted in Bond, *Municipal Bankruptcy under the 1976 Amendments to Chapter IX of the Bankruptcy Act*, 5 FORDHAM URBAN L.J. 1, 2 (1976).

threatening to exceed the local revenue base in some cities.[5] These municipal costs have in large part been due to the inflationary pressures throughout the economy that have rapidly raised the costs of goods and services, particularly in the area of wages and salaries.[6]

In this setting of competing local and national concerns, of cautious fiscal planning versus increased benefits to public employees, the United States Supreme Court decided *National League of Cities v. Usery*[7] in 1976. In that decision, the Court held the 1974 FLSA amendments unconstitutional to the extent that they intruded into the sovereignty of state and local governments. The Court viewed the extension of FLSA coverage to public employees as an intrusion into the local decision-making process which interfered with local policies on what services government should perform and in what manner. In the Court's opinion, the Act not only increased the financial burden of local entities; this added burden resulted in a loss of local control over programs and services because of the consequent reallocation of budgets to meet the higher costs of mandated overtime payments.[8]

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[5]Traditionally the local revenue base has largely depended on local real property taxes. However, these are decreasing in many cities, as illustrated by the following Table 2 of Reports of Essential Facts. This table is noted in Bond, *supra* note 4, at 3.

State and Federal Aid and Real Property Taxes as a Percentage of Total Revenues for Selected New York Municipalities, 1971-75

A. Percentage Increase in State and Federal Aid
B. Percentage Increase in Real Property Taxes
C. Portion of Total Revenues, State and Federal Aid
D. Portion of Total Revenues, Real Property Taxes

	A	B	C		D	
Municipality	1971-75	1971-75	1971	1975	1971	1975
County of Westchester	43.23	35.68	51.51%	50.90%	38.40%	35.93%
County of Erie[1]	36.05	(4.76)	43.68	49.02	33.92	26.65
City of Newburgh	136.80	10.47	17.60	30.30	46.84	37.30
City of Rochester[1]	4.78	29.33	21.58	17.27	40.61	40.11
Town of Ramapo[2]	152.44	131.51	8.00	12.88	57.98	62.78
Town of Seneca Falls	73.19	3.08	26.09	34.68	66.66	51.27
Village of Great Neck Plaza	170.36	91.42	4.51	6.79	27.27	29.07
Village of Tarrytown[3]	43.43	45.91	4.43	3.91	66.34	59.69

1) 1972-75.
2) 1970-74, town and special districts.
3) 1972-75, fiscal year ending May 31.

As column C, above, indicates, the declining local revenues have often been supplemented by both state and federal funds.

[6]J. BOLLENS & H. SCHMANDT, THE METROPOLIS 216 (3d ed. 1975).

[7]426 U.S. 833 (1976).

[8]"Quite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." *Id.* at 847.

National League of Cities held that police and fire department employees were exempt from the 1974 amendments. The Court also listed other exempt occupational categories: parks and recreation, sanitation, and public health.[9] The decision leaves unanswered the question of whether the holding applies to governmental functions other than those specifically discussed. Moreover, it is not clear from the opinion whether the activities of every type of local government entity are to be exempt.[10] The impact of the decision is significant to both employers and employees in the public sector: local governments and states need to determine wage and hour policies in line with the Court's ruling, and public employees need to know to what extent they retain FLSA coverage.

In order to indicate to public employers and employees the limitations of FLSA coverage after the Court's decision in *National League of Cities v. Usery*, this article reviews that decision in detail and seeks to establish a workable test for coverage determinations. First, the article summarizes the gradual expansion of the FLSA to include public employees. Next, the article discusses the Court's decision in *National League of Cities*, including an examination of the Court's standard for applying the FLSA and the limitations of this standard in determining which activities are covered. Finally, the article considers the questions unaddressed in the *National League of Cities* opinion about the scope of the decision, such as to which kinds of entities it applies.

I. EXPANSION OF THE FLSA TO INCLUDE PUBLIC EMPLOYEES

A look at the development of the FLSA[11] indicates why, before the decision in *National League of Cities*, Congressional supporters appeared confident that the 1974 amendments fell within the scope of the commerce power. Congress enacted the FLSA in 1938 to alleviate the desperate situation of full-time workers caught in a downward spiral of wages during the Depression.[12] Congress intended the

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[9] [E]ven if we accept appellee's [Solicitor General's] assessments concerning the impact of the amendments, their application will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services.

Id. at 851.

[10] *See* text accompanying notes 158-161 *infra*.

[11] *See* Willis, *The Evolution of the Fair Labor Standards Act*, 27 U. MIAMI L. REV. 607 (1972); Donahue, *Underpinning the Poverty Program—The Wage and Hour Act Three Decades Later*, 20 N.Y.U. CONF. ON LAB. 59 (1967).

[12] LAB. L. REP. (CCH), 1 Wage and Hour ¶ 24,862. The FLSA has been called "the original anti-poverty law." Willis, *supra* note 11, at 607.

minimum wage and maximum hour standards to stimulate the economy and create new jobs. Congress also sought to encourage employers to hire more workers rather than to give overtime work to a small number of employees.[13] The Supreme Court upheld the consitutionality of the Act in *United States v. Darby*[14] in 1941.

There followed, over the next two decades, a series of amendments to the Act that broadened its coverage of private sector employees in furtherance of Congress' goal to alleviate substandard working conditions.[15] In 1966, Congress first extended the coverage of the Act to include a portion of the public sector. Specifically, wage and hour standards were applied to employees of schools, hospitals, and transit companies.[16] In the 1968 case of *Maryland v. Wirtz*,[17] the Court upheld the constitutionality of applying the FLSA

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[13] Section 2(b) of the Fair Labor Standards Act, 29 U.S.C. § 202(b) (1970), explicitly sets forth the policy of the Act:

> It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

[14] 312 U.S. 100 (1941). In *Darby*, the employer produced lumber within one state and sold it in interstate commerce. He challenged the wage requirement of the FLSA on the basis that the manufacture of goods wholly intrastate was not within the scope of the commerce power, even though the finished products were sold across state lines. The Court disagreed, holding the FLSA covered the lumbermill employees. The Court said that where intrastate activities have a substantial effect on interstate commerce, they are subject to commerce clause legislation.

[15] Congress has gradually increased the Act's coverage in the private sector by determining that more and more activities "affect interstate commerce."

Initially the FLSA applied only to private employees "engaged in interstate commerce," or "in the production of goods for commerce." Donahue, *supra* note 11, at 63. Thus it was possible that within one business some employees would be covered if, for example, they produced goods for commerce, while co-workers engaged in entirely local tasks would not have the protection of the Act. BUREAU OF NATIONAL AFFAIRS, THE NEW WAGE AND HOUR LAW 1 (rev. ed. 1967).

With the 1961 and 1966 amendments, the standard changed to focus on the activities of the private employer, by the addition of the "enterprise" concept to the Act, 29 U.S.C. § 203(r)-(s) (Supp. V 1975). On this basis, as long as some of the employees of a business "enterprise" were engaged in interstate commerce or in the production of goods for commerce, then all employees would be covered by the Act. The Act defines "enterprises" as businesses that have over $250,000 in gross volume of annual sales or business done, 29 U.S.C. § 203(s) (Supp. V 1975).

Amendments to the FLSA were added in the following years: 1949, 1955, 1956, 1957, 1961, 1963, 1966, and 1974. *See generally* Wage and Hour Manual 90:453-64, LAB. REL. REP. (BNA).

[16] In 1966 public and private transit system employees were exempted from overtime wages if they worked for companies whose rates and services were regulated by a state or local agency. The 1974 amendments provided for the gradual elimination of this exemption by 1976. Wage and Hour Manual 91: 1641, LAB. REL. REP. (BNA).

[17] 392 U.S. 183, 188-93 (1968).

to public employees. In that case, a large number of state and local governments challenged the constitutionality of the 1966 amendments covering public school and hospital employees. They argued that the tenth amendment[18] protected the sovereign position of the states from such an intrusion by the federal government. However, the Court held that the commerce power[19] was a plenary power not limited by claims of state sovereignty, and that therefore the legislation was constitutional.[20]

Maryland v. Wirtz thus provided an apparently firm basis for the expansion of the FLSA to other state and local government employees.[21] During Congressional deliberations over the proposed 1974 amendments, there was little in-depth discussion of the constitutionality of the proposed expanded coverage.[22] The same policies

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

[19] "The Congress shall have power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." U.S. CONST. art. I § 8, cl. 3.

[20] The Court noted that it had "ample power to prevent what the appellants [state and local governments] purport to fear, 'the utter destruction of the State as a sovereign political entity.'" Then the Court noted, "But while the commerce power has limits, valid regulations of commerce do not cease to be regulations of commerce because a State is involved." 392 U.S. at 196-97.

Maryland v. Wirtz also upheld the FLSA "enterprise" coverage, 29 U.S.C. §§ 203(r)-(s) (Supp. V 1975), on the basis that the commerce power permitted Congress to pass "appropriate legislation [to] regulate intrastate activities where they have a substantial effect on interstate activities." 392 U.S. at 197 n.27. The *Wirtz* Court noted that Congress had chosen to shift from its original limited implementation of the FLSA to more expansive coverage as constitutionally permitted by the broad scope of the commerce power. *Id.* at 190-91. It indicated that Congress not only had the power to expand the FLSA to the full reach of the commerce power, but that, through the enterprise provisions, it was beginning to do so. This view of the FLSA as coterminous with the scope of the commerce power was a departure from earlier decisions interpreting the FLSA. *See, e.g.*, Walling v. Jacksonville Paper Co. 317 U.S. 564 (1943).

[21] Most of the comments during Congressional deliberations on the proposed legislation suggested that its constitutionality had been settled by Maryland v. Wirtz, 392 U.S. 183 (1968). For example:

> Some people are concerned about the separation of powers and possible infringements on the privileges of other levels of government. The U.S. Supreme Court does not see things that way, because they have already upheld the authority of Congress to cover State and local employees. This opinion was delivered in *Maryland v. Wirtz*, a case in which the 1966 coverage of employees of State and local hospitals and schools was upheld.

119 CONG. REC. H4316 (daily ed. June 5, 1973) (Remarks of Rep. Jordan), *reprinted in* I LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS AMENDMENTS 9f 1974 (Pub. L. No. 93-259) at 263 (1976) [hereinafter cited as LEGISLATIVE HISTORY] (citation omitted).

[22] The Senate Report on S. 2747 (which later became the enacted amendments) stated the constitutional basis of the legislation:

> [There] is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may

behind the original legislation furnished the basis for the 1974 amendments.[23] However, significant differences existed between the 1966 amendments held constitutional in *Wirtz* and the proposed 1974 amendments. The earlier ones covered certain employees who all had private sector counterparts. In contrast, the 1974 amendments provided for blanket application of the Act to virtually all public employees.[24] The 1966 amendments also reflected an awareness of the differing circumstances among covered activities and the legislation accordingly imposed differing burdens.[25] The 1974 congressional

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> regulate them pursuant to its power to regulate interstate commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the activities and magnitude of all levels of government have an effect on commerce as well.

S. REP. NO. 93-690, 93d Cong., 2d Sess. 24 (1974), *reprinted in* II LEGISLATIVE HISTORY *supra* note 21 at 1528. Some opposition to the Committee's conclusions did exist. For example, Senator Taft made the following remarks during debate on the proposed amendments.

> I have reservations about the general premise upon which the theory of coverage to such employees is advanced. . . . I believe the advice of the advisory commission on intergovernmental relations is correct in stating that this approach is an unnecessary interference with the perogatives of local and State governments. I also question the constitutionality of extending the requirements of the act to such employees, although the theories of the Supreme Court decisions of Wickard v. Filburn, 317 U.S. 111 (1942), and Maryland v. Wirtz, 392 U.S. 183 (1968), may be arguably extended to include coverage of such employees under the act.

120 CONG. REC. S2830 (daily ed. March 5, 1974), *reprinted in* II LEGISLATIVE HISTORY *supra* note 21, at 1795 (remarks by Sen. Taft).

[23] Equity demands that a worker should not be asked to work for subminimum wages in order to subsidize his employer whether that employer is engaged in private business or in government business. The Senate has also applied wage ceilings to the wages paid public employees. The [Senate Committee on Labor and Public Welfare] sees no reason, therefore, why these employees should not be protected by the wage floor provided by the FLSA.

S. REP. NO. 93-690, 93d Cong., 2d Sess. 24 (1974), reprinted in II LEGISLATIVE HISTORY *supra* note 21, at 1528.

[24] Coverage to all nonsupervisory public sector employees was accomplished by expanding and adding definitions to include "public agencies" in the FLSA. *See* Fair Labor Standards Act, 29 U.S.C. § 203(d) (Supp. V 1975), definition of "employer"; 29 U.S.C. § 203(e) (Supp. V 1975), definition of "employee"; 29 U.S.C. § 203(r) (3) (Supp. V 1975), definition of "enterprise," modified to include a "public agency"; and 29 U.S.C. § 203(x) (Supp. V 1975), definition of "public agency." A "public agency" includes "the government of a State or a political subdivision thereof." *Id.*

[25] For instance, in 1966 Congress exempted local transit employees from overtime coverage. *See* note 16 *supra*. Special circumstances which Congress believed to justify the exemption were the serious financial problems of the smaller transit companies, particularly those privately owned. S. REP. NO. 1487, 89th Cong., 2d Sess. 15 (1966), *reprinted in* [1966] U.S. CODE CONG & AD. NEWS 3002, 3017.

deliberations exhibited a limited awareness of the burdensome costs which might result with regard to the application of the amendments to police and fire departments.[26] Some members of Congress[27] and witnesses[28] did discuss the likelihood of significant cost increases for state and local governments as a result of the amendments.[29]

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[26] Except for provisions regarding police and fire employees, Congress did not make allowances for different treatment of activities unique to state and local government, for which there are no equivalents in the private business sector. However, with regard to activities of law enforcement and fire protection, section 7(k) of the Act, 29 U.S.C. § 207(k) (Supp. V 1975), provided temporary relaxation of overtime provisions. *See* note 30 *infra*. Additionally, section 13(b)(20), 29 U.S.C. § 213(b)(20) (Supp. V 1975), exempted counties with less than five police or fire employees.

[27] One senator noted,

> I am particularly concerned . . . with the phase out of the exemption for firemen and policemen. This action by the committee I believe is not based on sound judgment and shows a great disregard as to the practical burdens that will be placed on many communities throughout the Nation. Specifically, the impact of such an action by the committee will be to, first, reduce the availability of fire and police protection to cities and towns due to the severe economic impact; and, second, reduce, if not completely curtail, supplemental employment opportunities to many employees in these occupational categories.

120 CONG. REC. S2830 (daily ed. March 5, 1974), *reprinted in* II LEGISLATIVE HISTORY *supra* note 29 at 1795 (remarks by Sen. Taft).

[28] *See, e.g., Fair Labor Standards Amendments of 1973: Hearings on H.R. 4757 and H.R. 2831 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 149-58 (1973) (Statement of William F. Danielson, Director of Personnel, City of Sacramento, California, representing National League of Cities).

[29] The amendments called for overtime pay to virtually all public employees after forty hours of work per week. However, some public employees, notably police and fire department employees, traditionally have worked under a different system. Their schedules typically involve several very long workdays followed by several days off. One witness, later lead plaintiff in National League of Cities v. Usery, 426 U.S. 833 (1976), testified with regard to the impact of the proposed amendments on the work patterns of firefighters, in particular:

> The traditional terms of employment for firemen provide for a 56-hour average duty week (24 hours on duty, 48 hours off), an arrangement which firemen have always preferred to the straight 40-hour work week, 8-hour workday of most other municipal employees. By accepted standards, fire department personnel spend a small percentage)1 to 3%—of their on-duty hours in response to fire calls and a far greater part—a minimum of 67%—of their time in stand-by activities such as eating, sleeping and recreation. The adoption of provisions which would phase in over-time pay would completely disrupt all existing labor contracts in addition to increasing significantly costs to municipalities.

Fair Labor Standards Amendments of 1973, Hearings on S. 1861, S. 1725, and H.R. 7935, Before the Subcomm. on Labor of the Senate Comm. on Labor, 93d Cong., 1st Sess. 500 (Statement submitted for the record by National League of Cities).

In response to strong opposition such as the above, the resulting amendments of 1974 partially exempted both police and firefighters from overtime coverage. However, the exemption was to have been short lived since it would have gradu-

As a whole, however, Congress indicated little concern,[30] perhaps because the projected costs were necessarily based on educated guesses.

Thus, specific assessments of the genuine need for the application of wage and hour standards were absent from the 1974 discussions. Even though information presented during the hearings indicated that most state and local government employees received in excess of the minimum wage prior to the passage of the amendments, Congress asserted its intention to create a benefit to public employees as the primary motivation for the amendments.[31]

II. *NATIONAL LEAGUE OF CITIES V. USERY*

State and local governments reacted to the 1974 legislation before the police and fire provisions took effect.[32] A group of states and cities brought suit for injunctive and declaratory relief before a three-judge federal district court, challenging the constitutionality of the amendments.[33] The three-judge court held that the question of

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ally phased out by 1978. Fair Labor Standards Amendments of 1974, § 6(c)(1)(A), P.L. 93-259, 88 Stat. 55 (1974).

[30] The Committee [on Labor and Public Welfare] anticipates that the financial impact on local government units will be minimal. Department of Labor has supplied the Committee with figures on impact of minimum wage coverage on state and local governments. They indicate that the cost of increasing state and local employees covered in 1966 and those covered in this bill . . . will be .3% of the annual wage bill of $128,000,000 (the first year] . . . [and] a .5% increase of $162,000,000 [the following year].

S. REP. NO. 93-690, 93d Cong., 2d Sess. 24 (1974), *reprinted in* II LEGISLATIVE HISTORY *supra* note 21 at 1528.

[31] The present bill is an attempt to insure that millions of low wage earners throughout the nation . . . will regain at least some of the ground they have lost because of the inflation which we have experienced in recent years. . . . The benefit to the economy, generally from updating the FLSA was another point considered by the committee. Together, these factors pointed up the need for immediate increases in the minimum wage rates and an expansion of coverage under the FLSA."

Id. at 8-9.

[32] Most of the 1974 amendments became effective May 1, 1974, Fair Labor Standards Amendments of 1974, § 29, P.L. 93-259, 88 Stat. 55 (1974). However, the police and fire provisions were scheduled to take effect January 1, 1975. *Id.*, § 6(c)(1)(A) and § 6(c)(1)(B).

[33] Plaintiffs were National League of Cities (an organization of 15,000 municipalities), the National Governors Conference, and individual cities and states. Originally the named cities and states were Arizona; Metropolitan Government of Nashville and Davidson County; Salt Lake City, Utah; Lompoc, California; and Cape Girardeau, Missouri. The state of California, which had initially filed a separate lawsuit in the same district court, was joined to the *National League of Cities* suit.

Plaintiff intervenors in the *National League of Cities* action were Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska,

whether the FLSA could be applied to public employees had been decided in *Maryland v. Wirtz*, and dismissed the suit.[34] The plaintiff-appellants obtained a stay of the implementation of the police and fire amendments pending their direct appeal to the Supreme Court.[35]

The most important constitutional issues raised in the appeal concerned the scope of the commerce power to regulate state activities and the corresponding protection of state sovereignty embodied in the tenth amendment. Appellants questioned whether the scope of the commerce power permitted Congress to regulate the terms of employment of virtually all state and local government employees. They contended that Congress was interfering with more than simply regulation of wages and hours. This regulation, they asserted, interfered with the sovereignty of the states and their political subdivisions in violation of the tenth amendment.[36] The increased costs, especially for overtime, would force curtailment of services and programs the governments had chosen to provide.[37]

The appellants further maintained that these rigid overtime requirements would inhibit their ability to respond to local needs in a flexible manner. One example, cited by appellants, of the problems peculiar to government employers in certain regions, was California's task of coping with the seasonal crises of enormous fires in wilderness areas.[38] The firefighters worked for extremely long periods during an emergency. The state's program did not include overtime wages after forty hours of work, because the state could not afford

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Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, and Washington.

[34] National League of Cities v. Brennan, 406 F.Supp. 826 (1974). The reluctance of the court to dismiss is reflected in its decision:

> Although plaintiffs have raised a difficult and substantial question of law, we feel that our decision is controlled by the decision of the Supreme Court in *Maryland v. Wirtz*. . . .
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> [Plaintiffs] contend that the amendments here will intrude upon the state's performance of essential governmental functions far more than did those reviewed in *Wirtz*, although here, as there, the federal requirements are nominally limited to wage and hour regulations. We are troubled by these contentions, and consider that they are substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of *Wirtz*; but that is a decision that only the Supreme Court can make, and as a Federal district court we feel obliged to apply the *Wirtz* opinion as it stands.

Id. at 827-28 (citation omitted).

[35] The stay was granted by Chief Justice Burger, in his capacity as circuit justice for the District of Columbia Circuit. National League of Cities v. Brennan, 419 U.S. 1321 (1974).

[36] Brief for Appellants, National League of Cities v. Usery, 426 U.S. 833 (1976), 82-92.

[37] *Id.* at 34-35, app. 29-35.

[38] Brief for Appellant State of California, National League of Cities v. Usery, 426 U.S. 833 (1976), 11-14.

the costs.[39] In lieu of overtime, however, after forty hours per week the state provided the employees compensatory time off which could be taken after the season ended. This scheme benefited firefighters as well as the state government, since it enabled firefighters to receive paychecks long after they had ceased working. The appellants pointed out that the FLSA's uniform overtime standard eliminated this manner of tailoring conditions of employment to fit the needs of the task, which benefited both the employer and employee. From the viewpoint of the appellants, the 1974 FLSA amendments appeared to be yet another step in federal efforts to curtail state and local autonomy through federal requirements and programs.[40]

A. The Decision

In a 5-4 decision,[41] the Supreme Court agreed with appellants that Congress had gone too far in enacting the 1974 FLSA amendments. The Court stated that the tenth amendment prevented Congress from mandating employment standards, to the extent that such standards interfered with essential sovereign functions of the states and their political subdivisions. The majority opinion examined the relationship between the commerce power and the tenth amendment, and held that the tenth amendment possesses an affirmative aspect that limits the scope of the commerce power.[42] The Court did not go so

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[39] In the fire season of 5 to 8 months a "campaign" of fire suppression was required over large mountainous regions. During such intensive campaigns, state employees received "fire mission pay," a 15% increase of the regular rate. Overtime took effect only after 84 hours per week. The FLSA, based on overtime after a forty-hour work week, would have been totally incompatible with the system established in California. *Id.* at 11-12.

[40] One of appellants' major objections to the 1974 FLSA legislation was that it coerced state compliance rather than encouraged it. Brief for Appellants, National League of Cities v. Usery, 426 U.S. 833 (1976), 67-77. Most federal statutes which regulate state activity, such as the Social Security Act of 1935, ch. 531, 49 Stat. 620 (1935), and the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Supp. V 1975), have not required involuntary state compliance. Instead they have conditioned major federal grants of assistance to the states on state compliance with federal requirements and standards. The FLSA, in contrast to this nominally voluntary acceptance of federal regulation, mandated state and local government acceptance of the federal standards.

[41] Mr. Justice Rehnquist wrote the decision for the Court, joined by Mr. Chief Justice Burger, Mr. Justice Stewart, and Mr. Justice Blackmun. Mr. Justice Blackmun also wrote a concurring opinion. Mr. Justice Brennan wrote a dissent in which Mr. Justice White, and Mr. Justice Marshall joined. Mr. Justice Stevens wrote a separate dissent.

[42] 426 U.S. at 840-52. This holding is a departure from the prior view of the tenth amendment. Previously the tenth amendment had been treated as merely a statement of the relationship between states and the national government. This view had prevailed during the 35 years since United States v. Darby, 312 U.S. 100 (1941).

The tenth amendment's effect has been the subject of discussion since the founding of the United States' federal system of government. In M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), Mr. Chief Justice John Marshall

far as to state that the tenth amendment completely barred the application of the Fair Labor Standards Act to state and local governments.[43] Instead it held that under the commerce power, Congress could only regulate those activities which are not "integral governmental functions."[44] The express holding of the Court begins with

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countered the argument that the tenth amendment had been added to the Constitution to put to rest the fears of opponents that states rights would be obliterated by the new constitution. Marshall noted that this was untrue because, unlike the earlier Articles of Confederation, in this amendment Congress omitted the word "expressly" before the word "delegated." *See* note 18 *supra.* The effect of the omission was to leave questions regarding whether a power had been delegated to the federal government or retained by the states to depend upon a construction of the whole instrument. *Id.* at 406. Thus the tenth amendment was not originally interpreted as a measurement of the powers granted to the federal government or reserved to the states.

Since Marshall's day, the Court has vacillated in its agreement with his interpretation of the tenth amendment. In the area of labor relations the Court initially applied the tenth amendment as a brake on federal regulations of the private sector, leaving that task to the states. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918). By 1941, because of the severe national depression which created popular pressure for federal economic regulation, and perhaps because of Roosevelt's courtpacking plan, the Court returned to Marshall's view that the tenth amendment was not intended to ban all economic and social legislation which affected the states. *See, e.g.*, Steward Machine Co. v. Davis, 301 U.S. 548 (1937), Helvering v. Davis, 301 U.S. 619 (1937), National Labor Relations Board v. Jones and Laughlin Steel, 301 U.S. 1 (1937). *See generally* Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV., 645, 883 (1946).

In deciding United States v. Darby, 312 U.S. 100 (1941), the Court expressly returned to the original view first stated by Marshall. Maryland v. Wirtz, 392 U.S. 183 (1968), further developed the prevailing view of the tenth amendment by stating that it did not prevent federal regulation of public sector activities. National League of Cities v. Usery marks the first major shift, since *Darby*, away from the view of the tenth amendment as only declarative of federal-state relations.

[43] 426 U.S. at 851.

[44] The Court thus reined in sharply Congress' authority under the commerce clause. The Court's decision limiting Congress' authority under the commerce power raises the question whether the revitalized concept of state sovereignty will also limit other delegated federal powers. The Court left open the matter, stating, "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, Article I, § 8, cl. 1, or § 5 of the Fourteenth Amendment." 426 U.S. at 852 note 17.

However, the Court subsequently addressed the question of the scope of the Fourteenth Amendment in Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976). That case concerned a constitutional challenge to the application of Title VII of the Civil Rights Act of 1964 to state and local government employees. The Court held a claim of state sovereign immunity did not limit the scope of the Fourteenth Amendment. Section 5 expressly empowers Congress to enact appropriate enforcement legislation, including that which regulates state activity. The Court noted that there was no dispute that Congress properly exercised its power under section 5, observing in contrast that in *National League of Cities* the dispute centered on the scope of the commerce power. *Id.* at 2670 n.9. Thus, unlike the commerce power, the power of Congress to require states to provide their citizens equal protection of the law and due process guarantees is

a limitation: "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress [by the commerce power]. . . ."[45]

Although the Court discussed in general terms the state and local governmental activities that are exempted from FLSA coverage, the Court declined to outline the precise dimensions of the exemption. In describing these protected activities, the Court emphasized several frequently-repeated phrases. For example, it said that such activities are "governmental functions"[46] that are "essential to the separate and independent existence of the states,"[47] activities in which governments "traditionally" have engaged,[48] and activities that "possess attributes of sovereignty."[49] Additionally, the Court said that such sovereign activities are "integrally related" to the tradi-

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not limited by claims of state sovereignty.

Likewise, the exclusive power of Congress to act in the national defense during wartime was upheld some time ago in Case v. Bowles, 327 U.S. 92 (1946), and cited with approval by *National League of Cities*. In *Case*, the Court held that price levels fixed under the war power applied to the state's sale of its timber. The state claimed an immunity from the federal law based on its sovereignty, since the sale was in furtherance of the essential governmental function of providing school revenues. Despite this assertion, the Court held the war power paramount to the state's interest, and not limited by state claims to sovereign immunity.

In a third and recent example of another federal delegated power treated differently than the treatment of the commerce power in *National League of Cities*, the Court considered the scope of the property clause, U.S. CONST., art. 4, § 3, cl. 2. The Court held that the federal government had authority over wild horses roaming on federal lands within the state of New Mexico, and that the property clause preempted the state's assertion of sovereign control over the wildlife within its boundaries. Kleppe v. New Mexico, 426 U.S. 529 (1976).

These three cases can be read as indications that the Court in *National League of Cities* was not attempting to cut off federal regulation of the states and local governments in the name of the tenth amendment, but that its focus was primarily on limiting the commerce power as an avenue for such regulation.

[45] *Id.* at 852 (emphasis added).

The Court this past term had before it another state challenge to broad federal legislation based on the commerce power, the Clean Air Act, 42 U.S.C. §§ 1857-1858a (1970 & Supp. V 1975). However, the Court did not reach the question of whether the Act's requirements involved an unconstitutional intrusion into state sovereignty. The Court declined to rule on the regulations implementing the Act apparently because the Solicitor General admitted that the regulations before the Court remanded the cases before it for consideration of mootness. Environmental Protection Agency v. Brown, 45 U.S.L.W. 4445, 4446 (1977).

[46] 426 U.S. at 851.

[47] *Id.* at 845, quoting Coyle v. Oklahoma, 221 U.S. 559, 565 (1911) (holding that it was unconstitutional for Congress to place as a condition on the admission of a state to the union the requirement that the state capitol be located in a designated city).

[48] 426 U.S. at 851.

[49] *Id.* at 849.

tional activities of government.[50] These general descriptive phrases[51] provide the primary indicators of a standard for determining which state and local governmental activities are free of FLSA regulation. The concept that certain functions have tenth amendment protection distinguishes between two types of activities which can be described as "governmental" and "nongovernmental." While not new to Supreme Court opinions,[52] this distinction appears in *National League of Cities* after a long period of disuse. Earlier cases which applied it often labelled the two types of activities as "governmental" and "proprietary."[53] In *National League of Cities*, Mr. Justice Rehnquist described the governmental/nongovernmental distinction thus: the FLSA was an unconstitutional intrusion into activities "in an area that the States have regarded as integral parts of their governmental activities."[54] In the 1940s, the Supreme Court had expressed serious doubts about the utility of the governmental/proprietary standard,

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[50] *Id.* at 851 (emphasis added).

[51] Webster's Seventh New Collegiate Dictionary (1967) defines the key terms noted in the text as follows:

> (a) governmental: relating to the organization, machinery or agency through which a political unit exercises authority and performs functions, and which is usually classified according to the distribution of power with it;
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> (b) essential: of the utmost importance: basic, indispensable, necessary;
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> (c) integral: essential to completeness; lacking nothing essential, entire;
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> (d) traditional: the handing down of information, beliefs, customs by word of mouth or by example; cultural continuity in cosial attitudes and institutions;
>
> (e) sovereign: possessed of supreme power; unlimited in extent; absolute.

[52] This distinction has frequently been used by the Supreme Court in taxation cases. *See* text accompanying notes 90-112 *infra*.

The governmental/proprietary distinction originated in municipal tort liability cases. *See* C. RHYNE, MUNICIPAL LAW 732-35 (1957). *See also* Comment, *Municipal Tort Immunity—The Rule or the Exception?*, this volume. With few exceptions, the United States Supreme Court has not ventured into the area of tort liability, thus permitting state law to govern. *Cf.* Harris v. District of Columbia, 256 U.S. 650 (1921) (governmental tort liability in the District of Columbia).

In the context of federal tort liability, the Court has flatly rejected this distinction for the reason that the Court "would not push the [federal] courts into the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955)(Mr. Justice Frankfurter, for the Court).

Despite the Court's view of the limitations of the standard in the context of federal tort liability, it traditionally used the standard in the context of the taxation cases. These cases are the focus of this comment.

[53] *See, e.g.*, South Carolina v. United States, 199 U.S. 437 (1905); Allen v. Regents of the University System of Georgia, 304 U.S. 439 (1938).

[54] 426 U.S. at 854 n.18.

criticizing the distinction as confusing and unworkable.[55] Yet despite this earlier criticism, the Court resurrected the old distinction in *National League of Cities.*

The Court used this standard to single out several applications of the Act as unconstitutional. This nonexhaustive treatment of all activities of government which the FLSA might cover was doubtless a result of sharp divisions of opinion among the Justices. Two rounds of oral argument stretched over two terms and finally resulted in two dissenting opinions and a concurrence, in addition to the majority opinion.[56]

Mr. Justice Brennan, in a dissenting opinion charged with indignation, wrote, "Today's repudiation of this unbroken line of [commerce clause] precedents that firmly reject my Brethrens' ill conceived abstraction can only be regarded as a transparent cover for invalidating a Congressional judgment with which they disagree."[57] He criticized the Court for limiting the scope of the commerce power by its "purported discovery in the Constitution of a restraint derived from the sovereignty of the states."[58] He stated that the Court had overturned controlling precedent on the tenth amendment, in a manner likely to astound constitutional scholars.[59] He argued that, contrary to the majority opinion,[60] early Supreme Court decisions as well as recent ones[61] supported the view that "nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress."[62]

Compared to Mr. Justice Brennan's strongly worded opinion, Mr. Justice Stevens' dissent was milder, and sympathetic to the majority's reasoning. Alluding to the difficult questions presented by the case, he agreed with the majority that it was unwise for the federal government to exercise the commerce power to require states to comply

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[55] *E.g.*, United States v. California, 297 U.S. 175 (1936); New York v. United States, 327 U.S. 572 (1946).

Mr. Justice Rehnquist, however, has expressed his approval of this distinction more than once. As he stated in Fry v. United States, 421 U.S. 542, 558 n.2 (1975) (dissenting opinion), "It is conceivable that the traditional distinction between 'governmental' and 'proprietary' activities might in some form prove useful in . . . line drawing." As of the decision in *National League of Cities*, a majority of the present Court apparently has come to agree that this is a useful distinction with regard to local governments and the application of the FLSA.

[56] *See* note 41 *supra.*

[57] 426 U.S. at 867.

[58] *Id.* at 858.

[59] *Id.* at 862.

[60] *See* text accompanying notes 42-45 *supra.*

[61] Mr. Justice Brennan cited the venerable opinions of Chief Justice Marshall in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), as well as the FLSA case of United States v. Darby, 312 U.S. 100 (1941).

[62] 426 U.S. at 862.

with the FLSA. However, this view did not affect his judgment that the regulation was a valid exercise of the commerce power. He concluded that, under the commerce clause "The Federal Government's power over the labor market is adequate to embrace these public employees."[63]

The fourth opinion in the case was a separate concurrence by Mr. Justice Blackmun. He viewed the majority's approach as a balancing between the federal interest in state and local cooperation in accomplishing a national goal, and the states' interest in conducting their affairs autonomously. Mr. Justice Blackmun found the latter interest more compelling in regard to the FLSA. He agreed with the majority that the Act should not apply indiscriminately to state and local governments.[64] The diversity of the opinions in *National League of Cities* indicates the high degree of controversy generated by the issue of federal authority under the commerce power to regulate state and local government activity by means of the FLSA.

B. National League of Cities' Treatment of Supreme Court Precedents

In holding that certain essential governmental activities are exempt from FLSA coverage, the Court in *National League of Cities* looked to earlier Supreme Court cases for its rationale. Many of these earlier cases concerned federal taxation[65] of states' activities, and required the Court to identify such activities as either "governmental"[66] or "proprietary"[67] in nature in order to justify different results under

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[63] *Id.* at 881.

[64] *Id.* at 856. One view of the Court's balancing approach is that it is weighing the public policies behind the FLSA against the maintenance of state and local government autonomy. That is, if state and local governmental functions are essential to the governments' sovereign existence, then the state or local government must remain free of the imposition of federal standards. *See* discussion of this balance in text accompanying notes 120-134 *infra*.

However, Mr. Justice Blackmun's view appeared to be quite different. He and the majority saw no authority under the commerce power for any regulation of employment conditions, but maintained that the commerce power would support regulation of state activities where the federal interest is demonstrably greater than in wage and hour regulations. Thus he suggested that environmental conditions would be an example of federal interest which required state and local cooperation to accomplish the national goal of clean air. The Court therefore might permit federal regulation of state and local government functions to further such a policy where it would not permit regulation to further wage and hour standards.

[65] *See* text accompanying notes 90-115 *infra*.

[66] Such activities, difficult to describe without repeating the word "governmental," can be defined as those which are of central importance to administering the government and maintaining an organized, functioning system of society. These activities are basic core functions without which the government could not maintain itself.

[67] "Proprietary" functions can be described as the opposite of "governmental"

the taxing power. However, *National League of Cities* concerned the Fair Labor Standards Act, a statute premised on the commerce power, not on the tax power.[68] This section explores the usefulness of borrowing a standard from taxation cases and applying it to a commerce clause case.

Prior to *National League of Cities*, the Court had treated the commerce power and the tax power independently from one another. Earlier cases had held federal authority under the commerce power to be virtually unlimited in scope, so long as the federal regulation concerned conduct which "affected interstate commerce."[69] In contrast, the Court's view of the federal power to tax had been much narrower. The taxation cases had retained many vestiges of the former principle of immunity between the federal and state governments, which had allowed neither to tax the activities of the other.[70] The Court contrasted the scope of the tax and commerce powers in *United States v. California:*.

> We look to activities in which the states have traditionally engaged as marking the boundary of the restriction 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.[71]

National League of Cities rejected this long-established view. The Court held that the tenth amendment imposed limits on the commerce power,[72] as it applied to governmental activities of the states and their political subdivisions. In effect the Court cut the commerce power down to the size of the taxing power when used as the basis of regulation of state and local government activities.[73] The Court's

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ones. They are commercial in nature and also exist in the private sector. They are also referred to as "non-governmental" functions.

[68] U.S. CONST. art I, § 8, cl. 1 (taxing power).

[69] *See, e.g.*, United States v. California, 297 U.S. 175 (1936).

[70] *See* text accompanying note 92 *infra*.

[71] 297 U.S. at 185 (emphasis added).

[72] The Court cited Maryland v. Wirtz for the idea that it had "ample power to prevent . . . the utter destruction of the State as a sovereign political entity." 392 U.S. 183, 196 (1968). For a more recent statement on the tenth amendment the Court cited Fry v. United States, which had said, "While the Tenth Amendment has been characterized as a 'truism', stating merely that 'all is retained which has not been surrendered,' United States v. Darby, 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system . . . ." 421 U.S. 542, 547 (1975).

[73] In contrast to its application to the public sector, the scope of the commerce power in regulating activity in the private sector remains very broad, after *National League of Cities*, since private conduct is not embraced in the tenth amendment's protection of states and political subdivisions. The Court has consistently upheld federal legislation wherever there is a finding that it regulates conduct having a significant effect on interstate commerce. Such statutes are not limited to areas of commercial activity but include areas of the law as diverse as

treatment of the commerce and taxing powers as parallel sources of authority indicates its reliance on the rationale in the earlier taxing cases in which the scope of the taxing power was viewed narrowly.

Because the *National League of Cities* Court treated the commerce power and the power to tax similarly, the case precedents which shaped the Court's decision are indicative of the change in the Court's thinking about the scope of the commerce power, and the scope of the FLSA for public employees.

1. Commerce cases

In those cases prior to *National League of Cities* in which federal regulation of state activity was based on the commerce clause, the Court generally determined the validity of the regulation in two steps. First the Court would consider whether the activity in question paralleled one in the private sector. If it did have a counterpart in the private sector, the Court would then decide whether the activity had a significant effect on interstate commerce. If the activity both paralleled a private sector activity and had a significant effect on interstate commerce, the federal regulation was upheld.

The first major commerce clause case involving regulation of state activities,[74] *United States v. California*,[75] decided in 1936, was one

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civil rights and criminal law.

For example, Congress has forbidden racial discrimination at public restaurants, hotels, and amusements which affect interstate commerce if providing services to travellers. Katzenbach v. McClung, 379 U.S. 294 (1964), Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and Daniel v. Paul, 395 U.S. 298 (1969). In criminal law certain offenses have been deemed federal crimes because they have been found to affect the free flow of commerce, however remote that effect might be. For example, the following crimes are all violations of federal law based on the commerce power: the crossing of state lines while transporting persons for immoral purposes, Mann Act, 18 U.S.C. § 2421 (1970); the driving of stolen vehicles across state lines, Dyer Act, 18 U.S.C. § 2312 (1970); the transporting of kidnap victims across state lines, 18 U.S.C. § 1201 (1970). The federal prohibition against loan sharking is an additional and unusual example of the very broad scope of the commerce power to regulate private conduct. The statute, 18 U.S.C. §§ 891-894 (1970) covers entirely intrastate transactions. It has been upheld as a valid commerce clause regulation on the basis that loan sharking is a "class of activities" which as a whole affects interstate commerce adversely because organized crime often controls such activities. Perez v. United States, 402 U.S. 146 (1971).

[74] Earlier cases exist which generally concerned federal regulation of state activity, notably Sanitary District of Chicago v. United States, 266 U.S. 405 (1925), Board of Regents of University of Illinois v. United States, 289 U.S. 48 (1933), and Case v. Bowles, 327 U.S. 92 (1946). These cases, however, do not add significantly to the discussion of the power to regulate interstate commerce as the basis for regulating state activities. All three cases concerned federal statutes which (unlike the FLSA) were based on more than simply the power to regulate interstate commerce.

Thus, *Board of Trustees* concerned the power of the federal government to impose a tax on state purchases in foreign commerce. *Sanitary District* concerned the federal power over commerce on navigable streams, an exclusive federal power. Case v. Bowles concerned a price freeze based on the commerce

of a group of cases that established that state-owned railroads were subject to federal regulation.[76] Without making the governmental/proprietary distinction, the Court in that case held that the states' power to run a railroad was limited by the federal government's power to regulate interstate commerce. The Court reasoned that since this activity was indistinguishable from private railroads, the same limitations should apply to the public railroad as applied to a private railroad. The state railroad was therefore required to comply with federal safety regulations.[77]

In *National League of Cities*, the Court limited *United States v. California* to its facts, labeling a state-run railroad as a non-integral part of the state's activities.[78] This distinguished a public railroad from the activities of police and fire protection. The Court dismissed much of the earlier discussion of the differences between the commerce power and tax power as "simply wrong."[79]

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power and on the exclusive war power. *See* note 44 *supra*. These cases were not ignored in National League of Cities v. Usery. The Court distinguished both *Case* and *Sanitary District* based on their different constitutional underpinnings. In contrast, Mr. Justice Brennan in his dissent cited *Case* as supporting authority. The *Case* Court discussed both the commerce and war powers and, stressing the emergency nature of the war-time legislation, concluded that under the war power the federal government had authority to control the state's selling price. Thus, none of these three cases presented squarely the issue of federal regulation of state activity based solely on the exercise of the commerce power.

[75] 297 U.S. 175 (1936).

[76] In four cases, the Court held that state-owned railroads were subject to federal law. Specifically, the state railroads were held subject to the Federal Safety Appliance Act, United States v. California, 297 U.S. 175 (1936); to the Federal Employees Liability Act, Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184 (1964); to the Railway Labor Act, California v. Taylor, 353 U.S. 553 (1957); and to the Shipping Act of 1916, California v. United States, 329 U.S. 577 (1944).

[77] In addition to railroads, other state and local government activities have been held subject to federal regulation on the basis that they are no different from activities pursued by private individuals or organizations. For example, the wheat crop of a state's penal and mental institutions was held subject to federal statutes regulating agriculture. United States v. Ohio, 385 U.S. 9 (1966), *per curium*, based on Wickard v. Filburn, 317 U.S. 111 (1942). As a part of its therapy and rehabilitation program the state of Ohio grew wheat which was tended by inmates and consumed by them at the state's mental and penal institutions. The state constitution forbade the crops being sold in commerce. The Court apparently saw no difference between the state farming activity and the individual private farmer who had been held subject to federal regulation in *Wickard*, Comment, 19 VAND. L. REV. 478 (1966).

[79] The Court stated,

> The holding of United States v. California, . . . is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in 'common carriage by rail in interstate commerce. . . .'

426 U.S. at 854 n.18 (citations omitted).

[79] 426 U.S. at 855.

Another important early case was *California v. Taylor*,[80] decided in 1957. The Court held that federal legislation governing employer-employee relations in the railroad industry[81] applied to the state. The Court held that like private railroads, the state was required to recognize the collective bargaining rights of its railway employees, even though state law did not extend such rights to state employees. Thus state personnel standards concerning the state railroad were obliged to yield to federal labor standards. This case is important because it justified federal involvement in state employment relations long before the Fair Labor Standards Act was applied to public employees.

National League of Cities cited this case simply as an illustration of nongovernmental activity. However, as noted, the *Taylor* case also stands for the principle that, prior to the FLSA, employment legislation based on the commerce clause was held constitutionally valid as applied to some state and local government employees.

Later, in the 1968 case of *Maryland v. Wirtz*,[82] the Court upheld FLSA coverage of public hospitals and schools. The Court based its holding in part on Congress' power to regulate interstate commerce, regardless of the fact that the regulation touched activity in the public as well as the private sectors.[83] The Court in *Wirtz* also determined that state and local government activities were similar to private activities and often in competition with them. It further determined that public schools and hospitals purchase a high volume of goods in interstate commerce, which in turn have a substantial effect on commerce. As a result, the working conditions of the public employees involved in these activities were properly the subjects of federal regulation under the commerce power.

National League of Cities overruled *Wirtz*, holding[84] that the tenth amendment was a brake on Congress' use of the commerce power to extend the FLSA to public employees.[85]

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[80] 353 U.S. 553 (1957).

[81] Railway Labor Act, 45 U.S.C. §§ 151-188 (1970).

[82] 392 U.S. 183 (1968).

[83] The decision relied on the earlier case of United States v. California, 297 U.S. 175 (1936), which had held there was no tenth amendment limitation on the commerce power, and had also established that the commerce power exceeded the tax power in scope. "If a state is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulations." 392 U.S. at 197 (1968).

[84] 426 U.S. at 855. Because *National League of Cities* did not discuss that part of the *Wirtz* decision that upheld the constitutionality of the enterprise concept of the FLSA, 29 U.S.C. §§ 203(r)-(s) (Supp. V 1975), presumably that branch of the opinion remains valid, at least as to private sector employees. *See* note 15 *supra*.

[85] 426 U.S. at 855.

In *Fry v. United States*,[86] a 1975 decision, the Court reiterated the *Wirtz* view that the scope of the commerce power was sufficiently broad to include regulation of some state and local governmental activities. In *Fry* the Court held that the commerce clause empowered Congress to enact an emergency wage freeze on the salaries of all state employees. The *Fry* Court, referring to the *Wirtz* view that intrastate expenditures by states significantly affect interstate commerce, observed that wage increases "to state employees could inject millions of dollars of purchasing power into the economy."[87] The wage freeze legislation applied to all public employees without any regard to whether the state's activities in which they were employed were paralleled in the private sector. *Fry*, therefore, is unusual in this line of cases since the Court did not assess the similarity between regulated public activities and those in the private sector. Implied in the Court's holding was the idea that such similarity between public and private activities was no longer a major factor in determining the validity of commerce power regulation of public sector activity. *Fry* indicated that the Court was moving toward a very expansive view of Congress' power under the commerce clause to regulate state and local government.

In *National League of Cities*, however, the Court retreated from this broadened view of the commerce power. It distinguished *Fry v. United States* as an emergency measure constitutionally valid under the commerce power even though the wage freeze in that case had extended to all public employees. Alert to the costs allegedly created by the FLSA, the Court noted that the legislation in Fry added no burden to the state fisc since it worked to prevent wage increases, and as a result did not interfere with the state sovereign's task of policy making.[88]

In general, the cases before *National League of Cities v. Usery* indicated that the Court's approach to commerce clause regulation was to affirm the legislation, so long as the regulated activity had an identifiable counterpart in the private sector. Moreover, the Court appeared to be taking a new, broader view, as indicated in *Fry*, by including all state activities within the commerce legislation if the Court perceived that they had a substantial effect on commerce. Yet, in *National League of Cities*, when again faced with legislation covering nearly all state and local governmental activities, the Court retreated from this position.[89]

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[86] 421 U.S. 542 (1975).

[87] *Id.* at 547.

[88] 426 U.S. at 852-53.

[89] Although the focus of this article is on the contrast between commerce and tax precedents, it is worthwhile to note that the *National League of Cities* Court did refer to cases other than those discussed herein. It mentioned several whose one common theme was the important roles of both the federal and state govern-

2. Taxation Cases

One case on which the *National League of Cities* Court relied heavily[90] was *New York v. United States*,[91] the last in a line of taxation decisions. Although the Court did not refer specifically to each one of the cases, they are reviewed here for their contribution to the standard applied in *National League of Cities*.

Historically the Supreme Court had developed the principle that between the federal government and the states there existed an intergovernmental immunity from taxation. In this two-way exemption neither government could tax any activity of the other.[92]

This double barrier of reciprocal immunity between the state and federal government began to crack as early as 1905 with *South Carolina v. United States*.[93] In that case, the state of South Carolina had a monopoly on all retail liquor sales. The Court denied federal tax immunity for this activity and implemented a new standard which has been referred to as the "doctrine of functions."[94] A later case, with similar facts, stated the doctrine well: "Whenever a state engages in a business of a private nature it exercises nongovernmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Con-

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ments in the federal system of government. 426 U.S. at 844 (discussing Texas v. White, 74 U.S. (7 Wall.) 700 (1869), which concerned collection of a debt by a southern state incurred during the American civil war; Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1869), in which the Court denied to the federal government any voice in regulating the collection by the state of state taxes from its own citizens). *Id.* at 849 (discussing Kovacs v. Cooper, 336 U.S. 77 (1949), in which the Court upheld a city ordinance limiting the use of sound trucks on city streets, challenged as a violation of the first amendment). *Id.* at 845 (discussing Coyle v. Oklahoma, 221 U.S. 559 (1911), in which the Court held the federal government could not put conditions on the entrance of a territory to the union).

Essentially these cases reflect the view that states are important entities in a federalist system of powers and retain areas of independent authority. Otherwise these cases have little in common. Moreover, they shed no light on the scope of federal authority under the commerce power to regulate state activity, which was the central issue in National League of Cities v. Usery.

[90] 426 U.S. at 843.

[91] 326 U.S. 572 (1946).

[92] The dual immunity was established gradually. First the federal government's immunity from taxation by the states emerged in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Federal immunity was based on the supremacy of the national government over the states in the exercise of its delegated powers. *Id.* at 406. Fifty years later in Collector v. Day, 78 U.S. (11 Wall.) 113 (1871), *overruled*, 306 U.S. 466, 486 (1939), the Court recognized that the states possessed a corresponding immunity from federal taxation. The immunity derived from the recognition that states were sovereign in the exercise of the powers "reserved" to them by the tenth amendment. The Court considered the immunity to be an implied limitation on the grant of federal power to tax. *Id.* at 127.

[93] 199 U.S. 437, 463 (1905).

[94] Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth*, 3 OKLA. L. REV. 131, 153 (1950).

stitution vests in the Congress."[95]

Since *South Carolina* the Court has considered other activities and found them to be nongovernmental or, in other words, proprietary in nature. For example, a corporation formed by the state to provide public transportation was held to be subject to federal taxation in one case.[96] The Court held that another proprietary activity was the presentation of sports and other events for an admission charge at a university stadium in *Allen v. Regents of the University System of Georgia.*[97] The Court reasoned that even if the funds were raised for the public purpose of education, the state was conducting a profit-making business usually conducted by private enterprise.[98]

In three later cases,[99] the Court examined other activities, found them to be proprietary, and as a result, held them to be subject to federal income taxes.[100] In one of these cases, the Court found that employees engaged in operating an urban transit company were working in a proprietary capacity.[101] In a second case, the Court

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[95] Ohio v. Helvering, 292 U.S. 360, 368 (1934).

[96] Flint v. Stone Tracy Co., 220 U.S. 107 (1911). Commenting generally on the types of state services that might be subject to federal tax, the Court in dictum said, "It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like." *Id.* at 172.

In contrast, Indian Motocycle Co. v. United States, 283 U.S. 570 (1931), invalidated a tax on the sale of motorcycles to a city's police force because of the governmental nature of the police function. *Indian Motocycle* was an unusual case. The plaintiff was a manufacturer who objected to a federal tax on sales by manufacturers, claiming it was a direct burden on its customer, the municipality. Without determining how the tax actually burdened the city, the Court assumed that it did, concluding that because of the governmental nature of the city police force, the city was immune from the tax. *Id.* at 579. This decision has not been followed.

[97] 304 U.S. 439 (1938).

[98] *Id.* at 452. The Court based its decision on South Carolina v. United States, 199 U.S. 437 (1905). Although a system of public education may be essential to a state (an issue the Court did not decide), the Court held the admissions charge paid by the public (not the state) was subject to a nondiscriminatory tax laid on all admissions to public exhibitions for which an entry fee is charged. A subsequent case reached the same result with regard to gate receipts collected at a public beach. Willmette Park Dist. v. Campbell, 338 U.S. 411 (1949). Relying on Helvering v. Gerhardt, 304 U.S. 405 (1938), the Court found the burden only indirect to the local government since individual citizens paid the tax as part of their admission fee. Finding no burden and thus no tax immunity, the Court stated it did not reach the question of the nature of the local government activity to determine whether it could be federally taxed. 338 U.S. at 419.

[99] Helvering v. Powers, 293 U.S. 214 (1934); Helvering v. Therrell, 303 U.S. 218 (1937); Helvering v. Gerhardt, 304 U.S. 405 (1938).

[100] In these three cases, the Court held certain activities proprietary in the context of holding state government employees subject to federal income tax.

[101] Helvering v. Powers, 293 U.S. 214 (1934). State-appointed trustees of the transit company claimed that they were officers of the state and thus "instrumentalities of its government." *Id.* at 220. The Court held that state immunity does not extend to participation in businesses "which constitute a departure from usual governmental functions" and which, because of their nature, would be taxable if engaged in by private citizens. *Id.* at 225.

held that state appointed attorneys liquidating insolvent private banks, and compensated from the assets of the banks, were engaged in proprietary activity.[102] In a third case, the activity found to be proprietary was the operation of a port.[103]

The last case in this line of Supreme Court taxation cases, *New York v. United States*,[104] was decided in 1946. The Court rejected the distinction between essential governmental and proprietary activities, but the Justices could not agree on an alternative. There was no majority opinion in this case in which the Court upheld a federal tax applied to the state sale of mineral water.[105] Mr. Justice Frankfurter stated one view: except for unique activities such as running a state house, a federal tax which touched state and local government activities would be upheld as long as it did not discriminate between activities of public and private entities. He rejected the governmental/proprietary distinction for taxation cases as permitting "too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion."[106] Chief Justice Stone stated a second view: the governmental/proprietary distinc-

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[102] Helvering v. Therrell, 303 U.S. 218 (1938).

[103] Helvering v. Gerhardt, 304 U.S. 405 (1938). Managerial employees of the New York Port Authority challenged a nondiscriminatory federal income tax as a burden on the states of New York and New Jersey. Mr. Chief Justice Stone, writing for the majority, articulated two principles limiting state immunity. The first, based on the nature of the activity, was that activities considered nonessential to state government were not immune from federal tax. The second, based on the amount of fiscal burden created by the tax, excluded from immunity instances, such as that before the Court, in which the tax burden was so speculative and uncertain as to restrict federal tax power without affording any corresponding state benefit. *Id.* at 419-20.

The activity of operating a port was held not immune, and in language similar to that used later in *National League of Cities*, the Court said it upheld the federal tax because it "neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government." *Id.* at 424.

A fourth case during this period, Brush v. Commissioner, 300 U.S. 352 (1937) (holding that the salary of the chief engineer of New York City's water supply was not subject to federal income tax), went against the trend. However its life was short; the result was overruled two years later in Graves v. New York, *ex rel.* O'Keefe, 306 U.S. 466, 492 (1939). Nonetheless, in that case the Court held that New York City's supplying water to its citizens was a governmental activity, reasoning that city dwellers were totally dependent on the city to supply the water despite the fact that in the past the water had been supplied by private companies. This case is significant because it indicates the difficulties the Court faced in defining the standards of the governmental/proprietary distinction. *See* text accompanying note 113 *infra*.

[104] 326 U.S. 572 (1946).

[105] Mr. Justice Frankfurter wrote an opinion upholding the tax in which Mr. Justice Rutledge joined, although Mr. Justice Rutledge also wrote a separate concurrence. Mr. Chief Justice Stone wrote an opinion also upholding the tax. He was joined by Mr. Justice Reed, Mr. Justice Murphy, and Mr. Justice Burton. Mr. Justice Douglas wrote a dissent in which Mr. Justice Black joined. Mr. Justice Jackson did not take part in the decision.

[106] *Id.* at 580.

tion is untenable,[107] but application of even a non-discriminatory tax would be unconstitutional if it unduly interfered with essential governmental functions.[108]

This decision, with four opinions, one a dissent, reflected the difficulties involved in distinguishing among different functions of government. Because of its varied opinions, the case previously was of little precedential value.[109] Nonetheless, the Court in *National League of Cities* did rely on *New York v. United States*, especially on Chief Justice Stone's opinion.[110]

However, upon examination, it appears that Mr. Chief Justice Stone's "undue interference" standard is little different from the earlier governmental/proprietary distinction.[111] Theoretically, at least, his view appears more tolerant of federal taxation since it does not forbid all federal taxation of "governmental" activity. His view would require instead that the tax be struck down only if it unduly interferes with the government. In practical terms, however, concluding that a "non-discriminatory" tax is invalid if it threatens the state's existence by "undue interference" is nearly the same as con-

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[107] "In view of our decision in South Carolina v. United States [and subsequent cases], we would find it difficult not to sustain the tax in this case, even though we regard as untenable the distinction between 'governmental' and 'proprietary' interests on which those cases rest to some extent." 326 U.S. at 586 (citations omitted).

[108] [W]e are not prepared to say that the national government may constitutionally lay a nondiscriminatory tax on every class of property and activities of States and individuals alike.

. . . .

If the phrase 'non-discriminatory' is to be taken in its long accepted meaning as referring to a tax laid on a like subject matter, without regard to the personality of the taxpayer, whether a State, a corporation or a private individual, it is plain that there may be non-discriminatory taxes which when laid on a State, would nevertheless impair the sovereign status of the State. . . . This is . . . because a sovereign government is the taxpayer, and the tax, even though non-discriminatory, may be regarded as infringing its sovereignty.

Id. at 586-87.

[109] It is noteworthy, however, that this was not the first time the case was cited in a decision concerning the validity of applying the FLSA to public employees. Mr. Justice Douglas had referred to the case in his dissent to Maryland v. Wirtz, 392 U.S. 183, 201 (1968), noting that he had earlier dissented in New York v. United States on the basis that the tax impinged on state sovereignty. He viewed the federal taxation as requiring that "the States pay the Federal Government 'for the privilege of exercising the powers of sovereignty guaranteed them by the constitution.' 326 U.S. at 596," 392 U.S. at 202.

[110] 426 U.S. at 843.

[111] *See* Rakestraw, *supra* note 94, at 159.

However, unlike Mr. Justice Frankfurter, Mr. Chief Justice Stone did not want to limit immunity to those unique functions in which only states engaged. Rather, he implied that a broader immunity existed, to be found wherever there was undue interference with government, regardless of whether the activity was unique to government.

cluding that the activity is "governmental."[112] As a result, with any given fact situation, the two standards will lead to the same consequences. For instance, whether police protection is deemed a "governmental" function, or whether its taxation is deemed an "undue interference" with an essential sovereign state function, it would be immune from federal taxation. Thus in placing reliance on the undue interference standard in *New York v. United States*, the Court in *National League of Cities* appears to have progressed no further than the earlier governmental/proprietary distinction.

The tax case opinions had first applied the governmental/proprietary distinction and then abandoned it in *New York v. United States.* In one early case the Court expressed its dissatisfaction with past formulations of the governmental/proprietary distinction by listing the various and shifting descriptions of the standard:

> The phrase "governmental functions," . . . has been qualified by this court in a variety of ways. Thus, in *South Carolina v. United States*, . . . it was suggested that the exemption of state agencies and instrumentalities from federal taxation was limited to those which were of a *strictly* governmental character, and did not extend to those used by the state in carrying on an ordinary private business. In *Flint v. Stone Tracy Co.*, . . . we said that the state "cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual* governmental functions and to which, by reason of their nature, the federal taxing power would normally extend," . . . . In *United States v. California*, . . . the suggested limit of the federal taxing power was in respect of activities in which the states have *traditionally* engaged.[113]

These vague descriptions showed the lack of clarity in the governmental/proprietary standard and raised doubts about its usefulness.

The difficulties inherent in applying the governmental/proprietary test in tax cases surfaced again when it was applied in the context of a commerce clause case in *National League of Cities.* The Court chose to disregard indications that Mr. Chief Justice Stone had not intended to use this analysis in a commerce clause case. The Chief Justice wrote the unanimous opinion in *United States v. California,*[114] in which he distinguished between the scope of the tax and com-

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[112] Under Chief Justice Stone's undue interference standard, taxation is not *per se* an undue interference with governmental functions. This may appear to be a distinction from the older governmental proprietary standard which prohibits any taxation of governmental functions. However, such a distinction is more apparent than real. In applying the governmental proprietary standard and calling an activity "governmental," a court would have concluded first that it was an activity essential to the independent existence of the government, and second that taxation would threaten that existence. Such a "threat" would be perceived in the nature of restrictions on the government's autonomy, or, in other words, of "undue interference" with its autonomy.

[113] Brush v. Commissioner, 300 U.S. 352, 361 (1937).

[114] 297 U.S. 175 (1936). *See* text accompanying notes 71-78 *supra.*

merce powers.[115] In so emphasizing the differences in the two federal powers, and the greater breadth of the commerce power, Mr. Chief Justice Stone implied that they should not be accorded the same treatment. Thus, although it is doubtful that the Justice who wrote the test in *New York v. United States* intended it to apply to the commerce power, *National League of Cities* imported this test to a commerce clause case. In applying this ambiguous standard to determine whether the FLSA constitutionally extended to all state and local government activities, *National League of Cities* failed to address questions about the usefulness of the standard which had been raised in earlier cases.

III. Is There Life Left in the 1974 Amendments After *National League of Cities v. Usery*?

The ambiguity of the decision in *National League of Cities* has left the parties in disagreement over its scope. The appellants have flatly asserted that the Court held all of the 1974 amendments covering state and local governments to be invalid.[116] Their position is that the Court recognized that determining wages of public employees is itself an attribute of state sovereignty, and thus immune from federal intervention.

These public employers, however, have overstated the Court's holding in *National League of Cities.* The Court's reliance on *New York v. United States,*[117] which distinguished between different activities of government, indicated its intent to apply the same distinction to FLSA coverage in *National League of Cities.*

In contrast, the appellee Department of Labor, which enforces the FLSA, has asserted that the Court's opinion is to be narrowly read and exempts only the essential governmental activities enumerated in the opinion.[118] Its position is that if the Court intended to invalidate the amendments, it would not have distinguished activities such as railroads as nongovernmental functions. Thus, any activities

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[115] He stated that, in the context of a commerce case, "[t]he analogy of the constitutional immunity of state instrumentalities from federal taxation is not illuminating." 297 U.S. at 184. *National League of Cities* disagreed with this view. 426 U.S. at 855. *See* text accompanying note 79 *supra.*

[116] *See, e.g.,* Rhyne & Rhyne, *National League of Cities v. Usery: Tactics in Constitutional Litigation,* 26 NEWS & VIEWS (AM. SOC'Y FOR PUB. AD.) 1 (Aug. 1976).

[117] 326 U.S. 572 (1946). *See* text accompanying notes 104-112 *supra.*

[118] The Department of Labor represents the interests of all public employees covered by the Act, and therefore is considered in this article to share the same views as public employees.

The Solicitor of Labor, William J. Kilberg, stated in an interview: "[W]e will have to determine either generally or on a case by case basis which activities are still subject to the Act's minimum wage and overtime provisions." [1976] GOV'T EMPL. REL. REP. (BNA), NO. 668, at B-4, B-6 (Aug. 2, 1976).

not mentioned in the opinion, it claims, requires an individual determination of coverage.[119]

A. A Standard by Which to Determine FLSA Coverage of Public Employees

Public employers and employees presently face the task of applying some sort of standard to activities not discussed by the Court. *National League of Cities* does not clearly establish a test for determining what activities remain subject to the FLSA. The Court's standard can be implied from its discussion of certain issues and case precedents. In examining the bases for the Court's rationale, this article sets out a suggested standard for determining FLSA coverage of public employees.

The Court's apparent standard[120] can be stated as follows:[121]

> The federal government may not regulate those governmental functions which are essential to the exercise of local autonomy.

This standard can be broken down into the following tests:

> 1. Is the activity an essential governmental function? That is, is it essential to maintaining the degree of sovereignty reserved to states and their political subdivisions under the tenth amendment, and is it thus immune from federal regulation based on the commerce power?
>
> 2. If an activity is not shown to be an essential governmental func-

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[119] Following its decision in National League of Cities v. Usery, the Court remanded the case to the three-judge district court where the suit had initially been brought. The three-judge panel determined the scope of the Supreme Court's decision, holding that the decision did not render totally inapplicable the wage and hour provisions. They held that the Court had limited the application of the FLSA by excluding integral operations in areas of traditional governmental functions from the coverage of the Act. National League of Cities v. Marshall, No. 74-1812 (D.D.C. March 9, 1977) (declaratory judgment), 2. The court noted that determination of activities "within the traditional governmental functions test" would require "elucidation in the factual settings presented by future cases." National League of Cities v. Marshall, No. 74-1812 (D.D.C. January 31, 1977) (memorandum opinion), 4.

Further, the court ordered the Department of Labor to give states and local governments 30 days notice that activities in question are not integral operations in areas of traditional governmental functions before filing any lawsuits for noncompliance with the Act; 29 C.F.R. § 775.2 (1977), added to the FLSA regulations, codifies this order. National League of Cities v. Marshall, No. 74-1812 (D.D.C. March 9, 1974) (declaratory judgment), 3, app. 3.

On a related issue, the three-judge court held that the Supreme Court's decision included only the wage and hour provisions of the FLSA, and did not preclude applicability to public employees of the Equal Pay Act of 1963, 29 U.S.C. § 106(d) (1970), the Portal to Portal Act, 29 U.S.C. §§ 251-262 (1975), or the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975).

[120] This suggested standard is based on the Court's rationale for its decision, indicated by such statements as "Congress has sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system.'" 426 U.S. at 852 (quoting Fry v. United States, 421 U.S. 542, 547 n.7).

[121] *See* text accompanying notes 90-110 *supra*.

> tion, is it clearly proprietary? That is, is it like a private business, and therefore subject to the FLSA?
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> 3. If an activity is neither an essential governmental function, nor a proprietary function, does the state or local interest in autonomy outweigh the federal interest in providing adequate working conditions?

Each of these tests is examined in turn below.

First, the Court seemed to classify an activity as "governmental" if it is an activity that traditionally motivated the formation of government.[122] However, this traditional definition of government is not always determinative, because government services have expanded into areas beyond the scope of traditional notions of governance. Another factor identifying governmental activities is that which is unique to government and therefore nonexistent in the private sector. For example, only a state can own a statehouse.[123]

A further characteristic of a governmental function is that it is essential to the maintenance of the separate and independent status of the state within the federalist system.[124] Thus, any function essential to the sovereign position[125] of the states *vis a vis* the federal government would be considered governmental. One illustration of such an activity is the duty of the state legislature to pass laws: any federal legislation that resulted in reducing the independence of the state legislature would interfere with essential aspects of the state's sovereignty, and could not be constitutional. A further indication of a governmental function is its origin in a state statute or local charter mandating that the state or local government carry out activities. Thus, if the government's activities in question are traditional, unique to government, essential to state sovereignty, or mandated by the state constitution, a court might well conclude that the activities are governmental in nature.

If an activity is not shown to be governmental within the preceding definition, the second test gleaned from case precedents is whether the activity is one in which a private business engages and is therefore subject to the FLSA. The more similarities between the government activity and a private commercial enterprise, the more likely a court would find the activity to be proprietary. One factor identifying an activity as proprietary is that the dominant purpose of the activity is to make a profit. Another factor is that the activity is in competition with private entrepreneurs. If not in direct compe-

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[122] 426 U.S. at 851.

[123] New York v. United States, 326 U.S. 572, 582 (1946) (Frankfurter, J.).

[124] 426 U.S. at 844.

[125] *National League of Cities* implicitly recognizes, of course, that the concept of state sovereignty is a relative one. States and their subdivisions possess a relative degree of sovereignty or, in the Court's words, some "attributes of sovereignty," over certain aspects of government, since, by forming the union, the states relinquished their status as absolute and discrete sovereignties. *Id.* at 845.

tition, an additional indication is that the activity is usually carried on by private businesses in other geographical areas.[126] For instance, a municipality may be the sole supplier of water to its inhabitants. In that situation, the determinative question becomes whether, as a general rule, government is the supplier of such utilities, or whether normally private commercial enterprise does so. If usually commercial, even though conducted by government in this instance, the activity may be considered proprietary since counterparts in the private sector commonly exist elsewhere.

An example of a proprietary function cited in *National League of Cities* is a railroad owned by the state.[127] The tax cases have provided other examples of proprietary activities which include: the sale of liquor[128] and mineral water,[129] operation of a transit company,[130] operation of a port,[131] liquidation of insolvent businesses,[132] production of sports events,[133] and operation of a public beach.[134]

Thus, these two tests establish the ends of a continuum of activities, one of which is occupied by governmental functions and the other by proprietary ones. These tests, implicit in *National League of Cities*, are not exhaustive, however, since they do not include treatment of activities that are neither clearly governmental nor clearly proprietary.

The third test, which covers the mixed functions, is a balancing of federal and state interests. Rigid line-drawing is not possible for many government activities of mixed character. This suggested balancing test seeks to provide a standard flexible enough to permit consideration of the competing interests of both employees and employer. The federal interest is in advancing the social and economic reforms of the FLSA on behalf of individual workers. The state and local interest is in retaining autonomy over as much of its government as possible, including wage and salary determinations. Where wage and hour conditions are so poor as to be insufficient to main-

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[126] *See* note 103 *supra* (discussing the Court's rationale in the case of Brush v. Commissioner, 300 U.S. 352 (1937), *overruled by* Graves v. New York, *ex rel.* O'Keefe, 306 U.S. 466, 492 (1939)).

[127] *See* notes 75-76 *supra.*

[128] South Carolina v. United States, 199 U.S. 437 (1905).

[129] New York v. United States, 326 U.S. 572 (1946).

[130] Helvering v. Powers, 293 U.S. 214 (1934).

[131] Helvering v. Gerhardt, 304 U.S. 405 (1938).

[132] Helvering v. Therrell, 303 U.S. 218 (1937).

[133] Allen v. Regents of the University System of Georgia, 304 U.S. 439 (1938).

[134] Wilmette Park Dist. v. Campbell, 338 U.S. 411 (1949).

National League of Cities implies caution however. If the public activity has a counterpart in the private sector but is perceived as an essential function of government, it is not to be deemed proprietary. Hospitals would seem to be a good example, existing both in the public and private sectors. Yet, Mr. Justice Rehnquist suggested public health was a traditional essential sovereign function, and thus exempt from the FLSA. 426 U.S. at 851 n.16.

tain even a modest standard of living, the balance would shift away from the need to protect the sovereignty of the employer-government.

This balancing test draws conclusions about activities of government on the basis of their consistency with constitutional principles of federalism. However, in seeking to persuade a court that an activity is either "governmental" or "proprietary," both public employers and employees would do well to consider other, more mundane considerations implicit in *National League of Cities.* These practical concerns are crucial factors in determining the character of activities located in the middle of the governmental/proprietary continuum.

One such consideration is whether the federal regulation in question creates financial burdens on the government fisc. The Court, however, in *National League of Cities* stated that neither overtime nor the other major increases in local budget demands was critical to its conclusions.[135] The Court nevertheless set forth a string of examples of costly changes, including overtime expenses,[136] required by the amendments. The effect of the FLSA, therefore, would be more than simply setting minimum wage standards: it also would interfere with decisions regarding personnel and ultimately with the types and quantities of services that a government could manage to deliver its citizens.

A second consideration of a practical nature that tends to influence the balance between federal and state spheres of activity is whether the employees sought to be covered will actually benefit from application of the 1974 FLSA. It is not surprising that states and local governments viewed the mandatory payments of overtime as the most unpalatable aspect of the 1974 amendments. State and local governments often substituted compensatory time off for premium wages for overtime. The unyielding statutory directive of the FLSA no doubt affected the Court's decision on police and fire

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[135] "We do not believe particularized assessments of actual impact are crucial to resolution of the issue presented. . . ." *Id.* at 851. In contrast, however, appellants National League of Cities credited their victory at the Supreme Court in large part to their strategy of painstakingly gathering and presenting a great deal of facts concerning the impact of the 1974 amendments. "The cities' and states' victory in *National League*, then, is attributable to their presentation of evidence that the FLSA altered and displaced local government decisionmaking; this evidence was not abstract argumentation, but 700 pages of reports from cities and states." Rhyne & Rhyne, *National League of Cities v. Usery: Tactics in Constitutional Litigation*, 26 NEWS & VIEWS (AM. SOC'Y FOR PUB. AD.) 1, 12 (Aug. 1976).

[136] For examples the Court cited allegations from appellants' complaint, one being that the Metropolitan Government of Nashville and Davidson County anticipated increases in costs of police and fire department employees' salaries to amount to $938,000 per year. In addition to costs, the Court cited the example of California's reduction in training programs for its Highway Patrol Cadets because the state could not meet overtime costs. 426 U.S. at 846-47.

activities.[137] It is apparent that many employees would rather be able to choose between receiving cash at the end of the pay period and storing up compensatory time off.[138] The FLSA does not permit such a choice. The Court, noting this change in compensatory time off procedures, stressed the disruptive aspect of the overtime policy, implying that there were no actual benefits for employees to offset the federal interference.

It is likely that behind the Court's opinion lay a critical attitude towards the actual drafting of the 1974 amendments. Not only were the overtime provisions rigid, but the coverage provisions were extremely broad, including virtually all public employees.[139] Moreover, in implementing the 1974 amendments, the Department of Labor did not issue any guiding regulations applicable to state and local governments in advance of the effective date of the amendments, except for police and fire activities.[140]

A third practical consideration is the feasibility of isolating a particular government activity in order to classify it as either governmental or proprietary without disruption of the entire civil service system. Isolation would be difficult among employees who divide their work time between "governmental" type activities and "proprietary" ones. For instance, employees in the city building and grounds

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[137] The size of the fiscal burden was left unresolved by the *National League of Cities* Court, although both sides took drastically different positions on the increase in costs. The Department of Labor did not dispute the fact, however, that only a small percentage of the total number of public employees would be affected by the minimum wage requirement, approximately 95,000 out of 11.4 million public employees. Brief for Appellee at 43. In contrast, many employees would be affected by the required overtime payments, and therefore the major impact of the act was from projected overtime costs.

[138] Where statutes or local practice permit public employees to negotiate conditions of employment through the collective bargaining process, the FLSA policy might require employment terms that employees find less favorable, such as imposing time and a half wages for all overtime rather than permitting an arrangement mutually acceptable to employees and employers for partial wages and partial compensatory time off.

[139] The legislative history did not indicate that Congress reflected on the enormous variations among states and cities; even the most obvious variables could create extremely different situations, especially for local governments. These include such factors as the size of the municipality, its financial resources, and services peculiar to certain geography, or particular interest groups. Because of the wide variety of communities, in the context of wages and hours, local standards, tailored to local problems, appear to be more workable than federally imposed uniformity.

In addition, the present extensive FLSA coverage of private businesses is the result of a 40-year evolution of lengthy and complex statutory provisions and regulations, explaining and extending the provisions of the FLSA. The detailed provisions have also included numerous exemptions from the Act.

[140] 29 C.F.R. §§ 553-553.21 (1975). These regulations appeared eleven days before their statutory effective date, January 1, 1975, allowing insufficient time for state and local governments to study them, let alone to bring themselves into compliance prior to the effective date of the police and fire provisions.

department might work part time at the civic auditorium, a proprietary function, and part time at city hall, a governmental function. It would be difficult for the city to determine the amounts of their paychecks, requiring several computations at each pay period for each such employee. A certain percentage would be paid at the federally mandated level based on time worked at the proprietary activity, and the remainder would be paid at the city's rate. Furthermore, the city personnel department would have to work out a combination of overtime wages and compensatory time off for such employees. The tasks of these workers, as shown, tend to overlap both governmental and proprietary activities, in contrast to police or fire department employees whose work can be fairly well segregated from the rest of government as one discrete function. Unlike these "mixed" functions, such segregated functions are easier to classify and can be managed with less disruption of prevailing personnel practices.

In sum, the extent of FLSA coverage to public employees, in light of *National League of Cities*, can be determined for individual activities by first determining whether they are governmental or proprietary. If neither, a balance is struck between the federal interest in promoting employee welfare and the states' interest in preserving its autonomy. Practical concerns inevitably enter the balancing process and thus should not be overlooked. Three such concerns are whether there is a financial impact on state and local government, whether actual benefits are to be received by covered employees, and whether the function can easily be isolated from other government activities so as not to disrupt the entire civil service system. This standard, as summarized here, can guide public employers and employees in determining the coverage of the FLSA after *National League of Cities v. Usery*.

B. An Illustration of the Standard: Public Utilities

The isolation of a particular local government activity permits an examination of the preceding suggested standard in greater depth. The supplying of utilities by a local government is one of many activities which does not slip easily into either the governmental or proprietary category.[141] Therefore, it is a useful subject for applying the standard for determining FLSA coverage of public employees.

Public utilities, owned by cities, counties or special districts,[142]

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[141] For purposes of this analysis, the local government is presumed to own the facilities directly, and to be the sole employer. This appears to be the presumption of the Court in *National League of Cities*.

[142] Special districts are limited-purpose governmental entities, established by state statutes. They do not share the broad powers possessed by cities or counties, although they are autonomous governments to the extent of their power. Special districts vary a great deal in purposes and powers and are widely used in

supply water and electricity to citizens and businesses within their boundaries.[143] In applying the suggested tests,[144] the overriding concern is whether the activity is essential to state sovereignty. The first of the three explicative tests[145] is whether providing utilities is a governmental function. Sound arguments can be made supporting the conclusion that providing utilities is an essential governmental function. First, the lack of any private competition in the immediate area serviced by the municipality makes government involvement in the service essential to the well being of the public. The Supreme Court once held that the water supply owned by a city was governmental in nature,[146] because of the public's total reliance on the city for this service. This view has never been expressly overruled, although the result in the cases was later reversed on other grounds.[147]

However, there are several valid arguments leading to the opposite conclusion. One might argue that applying the second explicative test[148] for proprietary activities, leads to the result that supplying

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many states, especially California and Illinois. For a survey of the law and problems involving special districts, *see* J. BOLLENS, SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES (1961); INSTITUTE FOR LOCAL GOVERNMENT, SPECIAL DISTRICTS OR SPECIAL DYNASTIES (1966); and R. G. SMITH, PUBLIC AUTHORITIES IN URBAN AREAS 241-89 (1969).

[143] Two examples of public utilities in California are the East Bay Municipal District ("East Bay MUD") and Sacramento Municipal Utility District ("SMUD"), authorized by the same enabling legislation, CAL. PUB. UTIL. CODE § 11,501-14,401 (West 1965 & Supp. 1977). These public agencies are authorized to construct, acquire, own, and operate works for supplying water and also other services including light, power, and heat. The East Bay MUD is exclusively involved in the acquisition and delivery of water, having constructed major dams and aqueducts to bring water to a large metropolitan area. SMUD supplies water and additionally produces and sells electric power.

[144] The standard is set out in the text accompanying note 121 *supra.*

[145] *See* text accompanying notes 120-140 *supra.*

[146] Brush v. Commissioner, 300 U.S. 352 (1937), held water supplies "governmental," basing its determination on the necessity of this service in an urban area where many people would be without means of getting water themselves if the supplier failed to carry out its responsibilities.

In addition, a Ninth Circuit decision, Pacific Gas & Electric Co. v. Sacramento Municipal Utility District, 92 F.2d 365 (9th Cir. 1937), considered the same question regarding electricity. The court compared the activity to the supplying of water and found electricity to be likewise an essential governmental function, stating,

> [t]he substitution, in the stifling heat of California's interior valleys, of the electric globe for the hot kerosene lamp, of the electric range for the coal-burning kitchen stove, and the introduction of the electric fan, and in the frosts of winter, of the portable electric heater, created a new era of human health and comfort. Such incidents of the electrical age can be multiplied indefinitely. We take judicial notice that the universal use of electric heat, light, and power has become a common necessity in California, comparable to the community supply of water for domestic use.

Id. at 369.

[147] Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).

[148] *See* text accompanying notes 126-134 *supra.*

utilities is a proprietary function. One argument which can be made is that supplying utilities is not governmental in nature because it is not a unique activity that only a state could do.[149] Also, privately owned utilities are prevalent and in many areas are the sole suppliers of services. In addition, since the function is not a traditional one for local government, the federal regulation would not be interfering with a long established practice, unlike the traditional work patterns associated with police and fire activities scrutinized in *National League of Cities*. Moreover, although the activity has become an important public service, it is not one central to the existence of the governing entity. That is, it is not directly associated with acts of governing. It is not comparable to making laws, enforcing laws, or collecting taxes. As a result, even if the local entity ceased to supply utilities, it would continue to exist as a viable government. Further, the fact that both public and private utilities are sometimes subject to the same state regulations[150] indicates that the public utility is treated as if it were in the private sector. A final indication of this function's proprietary quality is the frequent statutory requirement that utilities, public as well as private, set their rates sufficiently high to make their operations self-sustaining and profitable.[151] These factors point toward a conclusion that the activity of providing utilities is proprietary.

Both views can be supported by legitimate arguments, and neither side is clearly more compelling. It is helpful then to look at the balancing test[152] to determine whether the federal interest in promoting social policy outweighs that of the local government entity in preserving its autonomy.

These arguments indicate that federal interest in upgrading the standards of individual members of the work force will prevail over the state interest in preserving its autonomy. That is, the government would not cease to exist if it ended its involvement in utilities. Moreover, the interest in upgrading the incomes and working conditions of workers is a valid concern on the part of the federal government. In addition, adding to the balance those practical concerns of financial burdens on government and measurable benefit to employees tends to lead to the conclusion that the activity is proprietary. Municipal utilities vary in size and financial resources. Some large ones pay in excess of the federal minimum standards,[153] resulting in

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[149] This argument was made in dictum in the old case of Flint v. Stone Tracy Co., 220 U.S. 107 (1911). Because this dictum is very old, it does not present convincing authority for the argument that supplying water is a proprietary function.

[150] 2 H. ROGERS & A. NICHOLS, WATER FOR CALIFORNIA 254 (1967).

[151] *See, e.g.*, Cal. Pub. Util. Code § 12809 (West 1960).

[152] *See* text following note 134 *supra*.

[153] For example, for employees of the East Bay Regional Parks District, the

no cost increases for the employer, nor rise in benefits for the employee with the extension of the FLSA. However, smaller municipal utilities would face some cost increases as well as corresponding tangible benefits for employees. While this discussion does not lead irrevocably to a definite and tidy conclusion that municipal utilities are proprietary activities, there is one strong factor indicating that result: that is, that there is no conclusive demonstration that federal interference with this activity amounts to interference with state sovereignty. Therefore, it is reasonable to conclude that the Fair Labor Standards Act can be applied to the activity of supplying utilities, and that the function is a proprietary one.

C. Criticism of the Standard

As illustrated, the problem with these distinctions is that they are vague and therefore can be manipulated to meet predetermined ends. The line of separation between governmental and proprietary functions can be shifted easily from one end of the continuum to the other in order to accomplish a desired outcome. The choice of label is often result-oriented,[154] but justified in terms of state sovereignty so that it appears that the activity is one which the state requires for its survival. This is particularly evident when activities are considered individually, as has been the case in the most pertinent Supreme Court decisions. Moreover, nearly every state or local governmental activity could arguably exist in the private sector, including police and fire departments.[155] Thus, a court could manipulate the distinctions between governmental and proprietary functions depending on its perception of the most desirable outcome. Nor would a court be hindered by much controlling precedent since prior cases were decided narrowly. The opinions did little venturing beyond the immediate facts before the court because of the difficulty of the

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base rate is higher than the federal minimum wage standard, and the overtime rate begins after only eight hours of work in one day (rather than after 40 hours in a week, the lower federal standard). They have a negotiated contract with the employer. Interview with Mr. Tom Rankin, Employee Representative, Local 2428, American Federation of State County & Municipal Employees, East Bay Regional Parks District, via telephone (February 2, 1977).

[154] Past decisions tend to suggest that the governmental/proprietary determination has often been a result-oriented selection. One example is the line of decisions extending federal income tax liability to employees of state government, in which the Court looked to the nature of the activity in which public employees worked. The Court found each of the activities to be proprietary, the work of port employees, for example. Helvering v. Gerhardt, 304 U.S. 405 (1938). However, another consideration which inevitably affected the result in these cases was the view that the tax on employees' salaries was not a direct burden on the state, and thus would not hinder its operations. *See, e.g.*, Helvering v. Powers, 293 U.S. 214 (1934), and Helvering v. Therrell, 303 U.S. 218 (1937).

[155] This is suggested by the fact that the business of private guard and patrol services abounds in the private sector.

standard to be applied. Thus, as indicated, the application of this standard is criticized because it can be easily twisted to aid attainment of a desired outcome.

VI. QUESTIONS REMAINING

The decision in *National League of Cities* leaves many unanswered questions about the application of the FLSA to state and local governments. The most important of these questions are the decision's application to individual employees, the definition of a political subdivision, the size of the governmental unit and the application of the decision to activities in which the state or local government is not the sole participant.

A. Application to Individual Employees

One question after *National League of Cities* is precisely which public employees were included within the decision. Although the Court said the tenth amendment umbrella covered all "sovereign" functions of government, there are in all government agencies individuals employed at tasks which are clearly not "sovereign" in nature. For example, tasks such as custodial work and secretarial duties exist in all employment settings, both public and private. They are not the kinds of activities uniquely associated with government.

In the private sector, the FLSA applies to an entire business establishment if some of its employees engage in activities which affect interstate commerce. This coverage, explicit in the Act, is called the "enterprise" concept.[156] It is not clear whether the enterprise concept extends to the public sector although the Court's view tends to indicate that it does not. The Court emphasized the importance of preserving the sovereignty of states and their political subdivisions *vis à vis* the federal government, apparently at the expense of extending the national wage and hour policy to as many employees as possible.[157] Moreover, one member of the Court suggested that the Court intended to examine the activity of a public agency as a whole. This means that if an employee worked for the legislature, a "governmental" activity, that employee would be exempt from the FLSA

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[156] 29 U.S.C. §§ 203(r)-(s) (1970 & Supp. V 1975).

[157] We do not doubt that [spreading employment] may be a salutary result, and that it has a sufficiently rational relationship to commerce to validate the application of the overtime provisions to private employers. But, like the minimum wage provisions, the vice of the Act . . . is that it directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose.

426 U.S. at 849.

regardless of whether the employee were a janitor or a legislator.[158] The Court's focus on the function of the whole agency, in contrast to individual jobs, indicates that the tenth amendment exemption from the FLSA would apply to all employees within a governmental activity, regardless of the tasks performed by an individual employee.

B. What is a "Political Subdivision"?

It is not clear which kinds of local government entities were included in the *National League of Cities* decision. The governmental units included within the Act are "public agencies," which include "states and their political subdivisions."[159] The legislative history consistently refers to all types of local governments.[160] The Court did not expressly discuss this statutory ambiguity, but it couched its discussion of tenth amendment immunity in terms of states and their political subdivisions. Throughout the opinion the Court equated "local governments" with political subdivisions.[161] For example, it is not made explicit whether special district[162] employers were affected by the decision. The Court's only examples of FLSA impact concerned cities, counties or states, yet the Court did not intimate that any particular governmental units, such as special districts, were to be excluded from its consideration. In sum, both the FLSA and *National League of Cities* appear to utilize the term "political subdivisions" to include all forms of local government. Therefore any

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[158] Justice Stevens, in dissent, stated that the Court's holding meant that "the Federal Government may not interfere with a sovereign state's inherent right to pay a substandard wage to the janitor at the state capitol." 426 U.S. at 880. His comment suggests that the Court looked to the function of the agency as a whole here, not to the functions of individual employees. Therefore, if the agency itself were classified as governmental in nature, all its employees would appear to be immune from FLSA coverage.

[159] The FLSA defines public agency as follows: "'Public agency' means the Government of the United States; *the government of a State or political subdivision thereof;* any agency of the United States (including the United States Postal Service and Postal Rate Commission), *a State, or a political subdivision of a State;* or any interstate governmental agency." 29 U.S.C. § 203(x) (Supp. V 1975) (emphasis added).

[160] A study done in 1970 by the Workplace Standards Administration evaluated the feasibility of extending the FLSA to state and local government employees. The study included within the meaning of local governmental units, counties, municipalities, townships, and special districts. WORKPLACE STANDARDS ADMINISTRATION, DEPARTMENT OF LABOR, NONSUPERVISORY EMPLOYEES IN STATE AND LOCAL GOVERNMENTS A-3 (1971).

[161] The Court described political subdivisions as "local governmental units which . . . derive their authority and power from their respective states." 426 U.S. at 856 n.20. *But see* Mt. Healthy School Dist. v. Doyle, 97 S. Ct. 568, 572 (1977) (in which the Court adopted a narrower view of "political subdivisions," holding that a school district cannot claim immunity from suit under the eleventh amendment by claiming to be a "political subdivision" of the state).

[162] *See* note 142 *supra.*

essential function carried out by a governmental entity is excluded from FLSA coverage.

C. Size of Governmental Unit

Another question left open in the opinion was the precise level of government to which the governmental/proprietary standard is to apply. As noted, the FLSA uses a flexible standard for a "public agency": a public agency can be an entire state, a political subdivision of a state, a state agency, or an agency of a political subdivision.[163] When implementing the governmental/proprietary test to determine FLSA coverage, it is uncertain if it is to be applied to an entire city generally, or one agency of the city, or one office within an agency. A small town government, for example, may not consist of discrete agencies with large separate staffs but may conduct all its affairs through an executive officer and a small staff. Treating such a town as one entity is logical. But the suggested standard would seek to categorize the town government's activities to determine which are covered by the FLSA. Such an example illustrates that the governmental/proprietary distinction is designed to distinguish between discrete agencies, and not to focus on an entire government as a unit.

One practical answer to the question of what level of government the Court would examine to see if the FLSA applied, might be to apply the governmental/proprietary standard to that level of government which can be easily isolated and which carries out one principal function. For example, the small town government described above as a whole is a discrete unit which cannot be broken down to smaller segments. A few employees carry out all its functions, be they governmental or proprietary. Thus it can be looked upon as having one principal function—governing a small community. Any government larger than such a town and having discrete public agencies would not be treated as whole. For example, consider a city with a parks and recreation department. The department operates the city-owned municipal auditorium. Employees of the auditorium sue the city to obtain FLSA coverage. This auditorium is a profit-making activity and presents performers and other entertainment, charging admission fees competitive with private theaters. While on the surface this auditorium might appear to be a proprietary function and subject to the FLSA, the Court in *National League of Cities* considered parks and recreation to be an essential function of government and therefore exempt from FLSA coverage.[164] However, a rational argument can still be made that the auditorium by itself is a proprietary activity even though it exists within the parks depart-

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[163] *See* note 159 *supra.*

[164] *See* text accompanying note 10 *supra.*

ment bureaucracy. An early tax case held that a state university stadium charging admission was engaged in a nongovernmental activity.[165] The city auditorium's activity in this example is similar to the university stadium and would likewise be a proprietary activity. Applying the standard, it is readily seen that the profit-making activity of providing entertainment does not compare to a core governmental activity such as fire prevention or police protection and therefore should be considered proprietary. The solution proposed here would focus on an easily identifiable unit of government smaller than the entire parks department, looking beyond the larger department's general purposes of providing recreation and leisure activities to the particular activity of producing entertainment. This suggested solution permits somewhat broader implementation of the federal working standards with minimal interference with a governmental activity.

D. Application to Activities In Which Local Government is Not the Sole Participant

Another question left unresolved is whether the suggested standard would apply to functions which local government employees do not perform but that the government contracts out to a private company to do. This contrast is seen by looking at three different cities. Consider first a city that owns a fleet of garbage trucks and is in the business of collecting and dumping the city's refuse. It hires employees, and owns equipment used in carrying out this function. An argument that the activity is an essential governmental one appears convincing.[166] Thus, the tenth amendment protection would eliminate FLSA coverage. However, for a second city that has neither equipment nor personnel for the garbage detail but contracts with a private business to provide the service, the FLSA exemption might not survive. The exemption would probably not include a private business. The question also arises where a third city chooses to enter a joint relationship with a private company wherein the responsibility for the service is shared. The city might provide equipment and employees, and the company might manage the operations. In these three situations, using the test to determine that the activity is a governmental function does not help determine whether the employees are covered by the FLSA, because if the garbage business were privately owned, it would be subject to the FLSA.[167] Thus,

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[165] Allen v. Regents of the University System of Georgia, 304 U.S. 439 (1938).

[166] Garbage collection concerns public health and safety needs and has traditionally been a service of local government. Moreover, Mr. Justice Rehnquist cited sanitation and public health as examples of essential governmental functions in *National League of Cities*. *See* text accompanying note 10 *supra*.

[167] The activities would be covered if they fell within the FLSA definition of an enterprise. *See* note 15 *supra*.

here if a private business enters into a contract with a local government, this fact alone should not give the private business activity a public character sufficient to bring it under the tenth amendment umbrella. The sharing of the employer responsibilities by joint employers, however, presents a blending of public and private interests that might be very different from the two other examples since the control over the garbage collection employees is divided between city and private business. This is an open question which is currently the subject of litigation.[168]

These illustrations indicate the limited application of the Court's decision and the standard it implies. The standard is focused on activities owned and controlled by state or local governments. This means that functions that are not entirely owned, but are either contracted out to a private concern or made a joint public-private responsibility, are not clearly governmental functions because of the private sector involvement. Such situations, which were not addressed by the Court, suggest that the standard's viability may be limited to activities wholly within the public sector.

CONCLUSION

In *National League of Cities v. Usery*, the Court perceived the FLSA as a threat to the independent existence of states and their political subdivisions. The opinion serves to warn against denigrating the role of the states in maintaining the federalist system of governmental powers.

In holding that certain state and local government activities were not subject to a federal statute based on the commerce clause, the

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[168]The status of joint employers is a well-developed concept in labor law, and in the FLSA. *See, e.g.*, specific regulations regarding joint employment under the FLSA at 29 C.F.R. Part 791 (1975).

For litigation concerning the joint public-private employer situation, *see, e.g.*, Bonnette v. California Health and Welfare Agency, No. C-75-1812 (N.D. Cal. Nov. 17, 1976) (order denying motion to dismiss or for summary judgment), reported in 10 CLEARINGHOUSE REVIEW 371, 800 (1976-77). *Bonnette* is a suit brought by domestic workers and the disabled welfare recipients for whom the domestic workers provide chore services. They seek to obtain federal minimum wages for the domestic workers, asserting that the joint employers of the workers are both the welfare recipients and the defendant counties. The counties, they argue, are liable for failing to pay recipients enough welfare assistance to include payment of minimum wages to domestic workers. The district court denied a motion to dismiss despite defendants' claim that, under National League of Cities v. Usery, 426 U.S. 833 (1976), the FLSA had been invalidated as to traditional aspects of state sovereignty, which would encompass the welfare program in the action before the court. Plaintiffs successfully opposed the dismissal motion arguing that *National League of Cities* does not apply because the joint employer situation involved private employers who are subject to the Act. Moreover, they argued, since 75% of California's welfare funds come from the federal government, defendants cannot claim that the state is carrying out "functions essential to separate and independent existence." *Id.*

Court imported a governmental/proprietary test for FLSA coverage that originally had been used in taxation cases. Basically, the test attempts to examine whether application of the FLSA intrudes into essential governmental functions and therefore does not cover the employees working at that activity. The Court based this immunity on the aspects of sovereignty retained by the states under the tenth amendment.

In rejecting the prevailing view that the commerce power was not constrained by the tenth amendment, *National League of Cities v. Usery* marks a turning point for states and local governments because it has broken the momentum of ever increasing federal regulation of state and local affairs through the commerce power. Now that the Supreme Court has implicitly adopted the governmental/proprietary test for federal regulation of state activities it seems inevitable that many questions will again be raised about the viability of that standard. Moreover, because the Court's holding concerning immunity was limited to the specific functions of police, fire, sanitation, health, parks and recreation, the decision invites speculation about the remaining application of the FLSA to state and local government activities. These questions remain of concern to both public employees and their employers.

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