Constitutional Limitation of Congressional Commerce Clause Power

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CONSTITUTIONAL LIMITATION OF CONGRESSIONAL
COMMERCE CLAUSE POWER

United Transportation Union v. Long Island Rail Road
634 F.2d 19 (1980), cert. granted, 101 S. Ct. 3107 (June 22, 1981)

In 1976, in the case of National League of Cities v. Usery, the United States Supreme Court found a congressional regulation of interstate commerce to be an unconstitutional impairment of the sovereignty of state and local governments. The Court held that a 1974 amendment to the Fair Labor Standards Act which extended federal minimum wage and maximum hour regulations to state employees displaced the states' freedom to structure "integral operations in areas of traditional governmental functions." With its decision the Court overruled Maryland v. Wirtz which had upheld application of the FLSA to employees of state-owned schools and hospitals. Although the Court contended that the National League of Cities decision rested on an established concept of tenth amendment limitation on Congress' regulatory power under the commerce clause, the decision was a major shift from previous holdings.

2. Id. at 852.
3. The Fair Labor Standards Act of 1938, ch. 676, § 3(d), 52 Stat. 1060 (codified at 29 U.S.C. §§ 201–219 (1970)) [hereinafter referred to as FLSA] originally excluded state employees from coverage. Coverage was extended in 1974. The term "employer" was broadened to include "public agency" which was in turn expanded to include "the government of a state or political subdivision thereof." 29 U.S.C. § 203(d) (Supp. IV 1974).
4. 426 U.S. at 852.
6. Id. at 198.
7. U.S. CONST. amend. X provides: "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." The Court in National League of Cities stated: "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution." 426 U.S. at 842.
8. U.S. CONST. art. I, § 8, cl. 3 provides in relevant part: "The Congress shall have Power... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
9. It had been 40 years since the Court applied constitutionally based limitations on Congress' regulatory power under the commerce clause. See Carter v. Carter Coal Co., 298 U.S. 238 (1936). Commentators had noted a clue to this shift in a footnote to Fry v. United States, 421 U.S. 542 (1975). In Fry, the Court upheld the constitutionality of federal controls over wage increases to state employees under the Economic Stabilization Act of 1970. Title II of the Act of August 15, 1970, Pub. L. No. 91-379, 84 Stat. 799. The prophetic footnote pointed out that the petitioner's argument, based on a tenth amendment limitation of Congress' commerce power, was not without significance as that amendment declares that "Congress may not exercise power in a fashion that
National League of Cities has been criticized as the ambiguous expression of a divided court which does not provide workable guidelines for lower courts. In addition, the decision raised the question of the constitutionality of other federal regulations applying to state and local government employees.

In a recent decision, United Transportation Union v. Long Island Rail Road, the United States Court of Appeals for the Second Circuit relied on National League of Cities to find the operation of a state-owned railroad to be an integral governmental function free from federal commerce clause regulation. Employees of the Long Island Rail Road (LIRR) were granted the right to strike under the Railway Labor Act, which was enacted in 1926 and which, unlike later federal labor regulations, applied to public as well as private employees. New York State, their employer, on the other hand, prohibited public employee strikes because it would "impair the States' integrity or their ability to function effectively in a federal system." 421 U.S. at 547 n.7. See, e.g., Strong, Court v. Constitution: Disparate Distortions of the Indirect Limitations in the American Constitutional Framework, 54 N.C.L. REV. 125, 132-37 (1976); The Supreme Court, 1974 Term, 89 HARV. L. REV. 46, 48-50 (1975).


12. See, e.g., Currie, OSHA, 1976 AM. BAR FOUNDATION RESEARCH J. 1107, 1109 (Congress is banned from extending mandatory Occupational Health and Safety Act coverage to state and local governmental employees); Note, The Constitutionality of the ADEA After Usery, 30 ARK. L. REV. 363 (1976) (discussing the constitutionality of the Federal Age Discrimination Act as applied to state employment practices).


14. Railway Labor Act, 45 U.S.C. §§ 151-163, 181-188 (1976) [hereinafter referred to as RLA]. The purpose of the RLA is:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.


The Supreme Court upheld the RLA in the landmark decision of Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930), thereby recognizing Congress' authority to regulate labor relations in interstate commerce. Although not explicitly stated in the RLA, the parties may resort to self-help once the RLA's procedures have been exhausted. See also Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969).
strikes under the Taylor Law.\textsuperscript{15} When contract negotiations between the employees' unions and the state were on the verge of collapse, the unions filed suit in the Eastern District of New York seeking (1) a declaratory judgment that the relationship between the parties was governed by the RLA and (2) an injunction against state prosecution under the Taylor Law. The district judge found the LIRR to be a "carrier" engaged in interstate commerce and therefore subject to the RLA. He concluded that the federal scheme preempted the state regulation.\textsuperscript{16} On appeal, the Second Circuit reversed on the basis of \textit{National League of Cities}.\textsuperscript{17}

The decision in \textit{National League of Cities} was a substantial departure from the pattern of Supreme Court holdings on this issue during the previous forty-year period. Not since 1937 had the Court found a tenth amendment limitation of congressional commerce clause regulation. The Second Circuit decision in \textit{Long Island Rail Road} broadened the reach of \textit{National League of Cities} to prohibit employee activities previously sanctioned by well-established national labor law.\textsuperscript{18}

This comment will examine \textit{Long Island Rail Road} as it extends the \textit{National League of Cities} standard for limiting congressional regulation in the area of labor law. It will be shown that \textit{Long Island Rail Road} epitomizes the extent of misinterpretation that can occur when a lower court attempts to follow the indistinct guidelines of \textit{National League of Cities}. Since the United States Supreme Court has granted certiorari\textsuperscript{19} for \textit{Long Island Rail Road}, suggestions will be made concerning clarification of the \textit{National League of Cities} standard.

In order to appreciate the curtailing effect of \textit{National League of Cities}, it is necessary to trace the development of congressional commerce clause power. Case law illustrates the far-reaching ability of Congress to regulate commerce and labor law. In addition, it will be

\textsuperscript{15} N.Y. CIV. SERV. LAW § 210(1) (McKinney) provides that "[n]o public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage or condone a strike."


\textsuperscript{17} 634 F.2d at 20.


\textsuperscript{19} 101 S. Ct. 3107 (June 22, 1981).
shown that the type of tenth amendment limitation announced in *National League of Cities* and later brandished by the Second Circuit in *Long Island Rail Road* was earlier rejected by the Supreme Court.

**HISTORICAL BACKGROUND**

**Commerce Clause Power**

The commerce clause of the Constitution gives Congress the power to regulate interstate commerce. Although Congress did not exercise its power to regulate for one hundred years after the Constitution was drafted, the Supreme Court planted the seed of modern day commerce clause power in *McCulloch v. Maryland* in which congressional exercise of power not specifically enumerated in the Constitution was questioned. In *McCulloch*, the Court found that the federal government had implied authority, by virtue of the necessary and proper clause, to do what is necessary to achieve the purpose of an enumerated power.

In the 1824 decision of *Gibbons v. Ogden*, the Supreme Court defined interstate commerce as "that commerce which concerns more states than one." Interpretation of that phrase from *Gibbons v. Ogden* prompted the Court in early cases to decide that Congress could regulate activities that were interstate, and states could regulate activities that were intrastate. Thus, categories of private local conduct which were exclusively regulated by state authority were considered to be outside the reach of congressional power.

An alternate theory to the local versus interstate approach began developing with congressional attempts to regulate the fast growing, monopolistic railroad industry. In *Houston E. & W. Texas Railway v.*

20. *See* note 8 *supra*.
21. The Interstate Commerce Act of 1887 and the Sherman Act of 1890 were the first manifestations of commerce clause power.
23. U.S. CONST. art. I, §8, cl. 18: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof."
26. *Id.* at 194.
29. For an unromanticized commentary on the growth of the rail industry, see D. Brown,
United States (the Shreveport Rate Case), the Court upheld the authority of the Interstate Commerce Commission to regulate intrastate rail rates because of their "close and substantial relation to interstate traffic . . . ." Congressional regulation of local matters pertaining to railroad safety was upheld, as was prescription of maximum working hours for intrastate railroad workers connected with movement of interstate trains.

In addition to railroad regulations, federal laws enacted to protect public health and to preserve morality were upheld. These laws were concerned with prohibiting interstate transportation of persons or products and were successful up to the point that they interfered with economic considerations. For example, *Hammer v. Dagenhart* invalidated the Child Labor Act of 1916, which prohibited interstate transportation of child-made goods on the ground that production of goods intended for interstate commerce was a local matter. Thus, the local versus interstate distinction persisted. During the Depression, adherence to the theory that local activity was too indirectly related to interstate commerce to necessitate federal regulation resulted in the invalidation of numerous laws designed to deal with serious national problems.

Hear That Lonesome Whistle Blow (1977). The first transcontinental railroad was completed in 1869. *Id.* at 132. By 1893 five transcontinentals were in business: the Union Pacific-Central Pacific, Northern Pacific, Southern Pacific, Santa Fe, and Great Northern. *Id.* at 268. Brown aptly described the railroad monopoly:

Thousands and thousands of settlers who had regarded the Iron Horse with awe and gratitude for bringing them to their homes in the West soon realized that they were now totally dependent upon a railroad for their existence. They no longer controlled their own fortunes; they were helpless before the power of a corrupt monopoly capable of using bribery, force, any means to maintain its dominion . . . . The cost of shipping grain from the Dakotas to Chicago, for instance, was greater than the cost of shipping the same grain from Chicago to Liverpool.

*Id.* at 272-73.

30. 234 U.S. 342 (1914).
34. See, e.g., Weeks v. United States, 225 U.S. 618 (1918) (Pure Food and Drug Act); Hoke v. United States, 227 U.S. 308 (1913) (White Slave Act); Champion v. Ames, 188 U.S. 321 (1903) (Lottery Act).
35. 247 U.S. 251 (1918), overruled in United States v. Darby, 312 U.S. 100 (1941).
The trend changed in 1937 when the Supreme Court decided *National Labor Relations Board v. Jones & Laughlin Steel Corp.* In upholding the National Labor Relations Act, the Court declared “the close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local.” *Jones & Laughlin* gave new life to the rationale that national regulation could reach intrastate activities based on their practical effect on interstate commerce. In *United States v. Darby* the Court found that goods produced intrastate by substandard labor conditions had a practical effect on interstate commerce. *Darby* upheld the FLSA which prohibited both the interstate shipment of goods produced under substandard labor conditions and payment of insufficient wages and overtime in production of goods for commerce. The Court stated that Congress had the power to exclude substandard goods from interstate commerce and could “choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities.”

The rationale that purely local activities could be congressionally regulated because they “affect” interstate commerce was developed further in *Wickard v. Filburn.* In *Wickard* the Court upheld the authority of the Agricultural Adjustment Act of 1938 to regulate wheat produced solely for home consumption and laid to rest the idea that certain activities were beyond commerce clause reach because of their local character or indirect effect on interstate commerce.

With *Wickard,* the seed that had been planted in *McCulloch v. Ma-

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37. 301 U.S. 1 (1937).
39. 301 U.S. at 38.
40. *Id.* at 41-42. “We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.” *Id.*
41. 312 U.S. 100 (1941).
42. *Id.* at 122.
44. 312 U.S. at 121.
45. 317 U.S. 111 (1942).
47. 317 U.S. at 119-25. For commentary illuminating rejection of the idea that certain categories of private local activities should be exclusively regulated by the states, see Ely, *The Irrepres-sible Myth of Erie,* 87 Harv. L. Rev. 693, 701 (1974).
ryland reached full bloom. To determine the validity of federal regulation after Wickard, the Court merely looked for a rational connection between the challenged regulation and the constitutional grant of power in the commerce clause. If such a rational connection was found, the federal regulation prevailed, provided it was not limited by some other constitutional power. In particular, this approach had far-reaching effects in upholding federal authority to regulate labor relations.

Development of National Labor Law

The federal interest motivating enactment of national labor regulation was to strike a balance of power in labor-management relations. Congress determined that centralized administration of specially designed procedures was necessary to avoid the conflicts likely to result from a variety of local procedures. By basing validity of federal regulation on the rational connection between the regulation and commerce clause power, the new approach extended federal authority to local activities which affected interstate commerce even though the local activities themselves were neither interstate nor commercial. With this extension, regulation of private conduct concerned with labor relations became the exclusive jurisdiction of federal authority. For example, in 1945, the Court decided in Hill v. Florida ex rel.

48. In McCulloch the Court stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end... are constitutional." 17 U.S. at 421.
49. The analysis used in applying the standard was outlined in Reid v. Covert, 354 U.S. 1 (1956), in Justice Harlan's concurring opinion:

For analytical purposes, I think it useful to break down the issue before us into two questions: First, is there a rational connection between the [challenged statute]... and [a] power of Congress [enumerated in the Constitution]...; in other words, is there any initial power here at all? Second, if there is such a rational connection, to what extent does [the] statute, though reasonably calculated to subserve an enumerated power...; in other words, can this statute, however appropriate to the Article I power looked at in isolation, survive against [limitations expressed in the Constitution]...? I recognize that these two questions are ultimately one and the same, since the scope of the Article I power is not separable from the limitations imposed by [the Constitution]... . Nevertheless, I think it will make for clarity of analysis to consider them separately.

Id. at 70.

50. See Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1339 (1972) [hereinafter referred to as Cox].
52. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937), where it is stated that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."
that conduct protected by federal statute could not be made illegal by local law. In *Hill*, the Court held that state legislation which interfered with the right of employees to bargain collectively was inconsistent with guarantees of federal labor law and therefore unconstitutional.\(^\text{54}\)

In addition to preempting state authority over protected activity as in *Hill*, the Court found that federal law preempts state authority when the activity is prohibited by federal law. In *Garner v. Teamsters Local 776*,\(^\text{55}\) the Court held that the state could not enjoin picketing, even though the type of picketing in question was forbidden by both federal labor law and Pennsylvania law.\(^\text{56}\) Under this decision, states may not apply local law, whether statutory or common law in origin, which duplicates the federal statute.

The broad reach of federal authority in labor relations displaced state authority with few exceptions. States retained power to prevent violent conduct in labor disputes,\(^\text{57}\) and jurisdiction over certain tort\(^\text{58}\) and contract\(^\text{59}\) actions was left to the states. In all other areas, activities affecting interstate commerce were exclusively regulated by federal statute.\(^\text{60}\) However, *National League of Cities* gave new life to the old concept favoring state regulation of certain activities affecting interstate commerce. An examination of case law will indicate that *National League of Cities* adopted a constitutionally based limitation on con-

\(^{53}\) 325 U.S. 538 (1945).

\(^{54}\) *Id.* at 542. In the area of collective bargaining in particular, decisions forbid state regulation of strikes, picketing, and similar activity protected by federal law. *See*, *e.g.*, Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 286 (1970) (state preempted from adjudicating intraunion dispute); International Union v. O'Brien, 339 U.S. 454, 456-57 (1950) (Michigan strike control law invalidated).

\(^{55}\) 346 U.S. 485 (1953).

\(^{56}\) *Id.* at 498-501.

\(^{57}\) Where violence is likely to occur, the state may use its police power to ensure public safety. *See*, *e.g.*, UAW v. Russel, 356 U.S. 634 (1958) (union maliciously interfered with lawful occupation of employee); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (picketing accompanied by insults and abusive behavior likely to cause violence); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (contractor threatened and intimidated by union representative).

\(^{58}\) *See*, *e.g.*, Farmer v. United Bhd. of Carpenters, 430 U.S. 290 (1977) (union member recovered from union officials for intentional infliction of mental distress); Linn v. United Plant Workers, 383 U.S. 53 (1966) (malicious libel).


\(^{60}\) In addition to preempting state authority over conduct that is expressly protected, as in *Hill*, or prohibited, as in *Garner*, the Court has determined that conduct which is “arguably” protected or prohibited is also beyond state jurisdiction. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). For commentary on the preemption doctrine, see Cox, *supra* note 50.
gressional regulatory power that had been repeatedly rejected by the United States Supreme Court in prior cases.

Rejection of the Tenth Amendment Limitation of Commerce Clause Power

Although it is clear that Congress has authority to regulate interstate commerce, there have been numerous challenges to that authority when federal regulations are applied to activities carried on by state and local governments.61 Prior to National League of Cities, states attempted to remove themselves from federal regulation by arguing that certain of their activities were distinguishable from the sort Congress was empowered to regulate.62 A theoretical base for such arguments was the tenth amendment's reservation of power to the states,63 but as early as 1819, the Court decided that the tenth amendment could not be used to weaken Congress' enumerated powers.64 Thus, the threshold question addressed by the Court was whether Congress had any power to enact the particular regulation. If the regulation was a direct exercise of an enumerated power, or if the regulation had a legitimate purpose rationally related to an enumerated power, the regulation was held applicable to state activities.

For example, a leading case denying a state's exclusion from federal regulation was United States v. California.65 At issue in that case was whether the Safety Appliance Act66 applied to a state-owned and operated railroad. The state claimed that it should escape the reach of the Act because in operating the railroad it was "performing a public


63. For text of U.S. Const. amend. X see note 7 supra.

64. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) (the tenth amendment does not exclude from the Constitution any incidental or implied powers of the federal government; rather, these powers "depend on a fair construction of the whole instrument").

65. 297 U.S. 175 (1936).

function in its sovereign capacity.” The Court rejected the claim, stating that it was irrelevant that the activity was carried on in the state’s sovereign capacity. The Court observed that the state’s claim was no different from the sort of argument a private citizen might make. Neither claim provided limitation of federal commerce clause power.

The principle of United States v. California was used by the Court in Maryland v. Wirtz to uphold application of the minimum wage and maximum hour provisions of the FLSA to employees of state-owned schools and hospitals. The state claimed it should not be subject to the Act on the theory that the statute interfered with peformance of a state “governmental function.” After establishing that Congress had authority to regulate the minimum labor standards of schools and hospitals, the Court determined that the extent of intrusion on the state’s functioning was irrelevant to evaluating the statute’s validity. Because the Court located a rational basis for regarding the FLSA as regulation of interstate commerce among the states, the Court held that the Act was applicable to the state-owned institutions.

As recently as 1975, in Fry v. United States, the Court denied a claim that states should not be bound by commerce clause regulation because the tenth amendment limits Congress’ power. Although noting that the tenth amendment prohibits Congress from exercising power that “impairs the states’ integrity or their ability to function effectively in a federal system,” the Court nevertheless upheld application of the

67. 297 U.S. at 183.
68. The Court stated: “The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution . . . . In each case the power of the state is subordinate to the constitutional exercise of the granted federal power.” Id. at 184.
69. Id. at 185.
70. 392 U.S. 183, 198 (1968). The Court in Wirtz stated: “The principle of United States v. California is controlling here.” Id.
71. Application of the FLSA to private employees was previously upheld as a constitutionally valid exercise of congressional commerce clause power in United States v. Darby, 312 U.S. 100 (1941).
72. 392 U.S. at 195.
73. The Court found the requisite link to interstate commerce by pointing out the interruption of the flow of goods (a total estimated at $42.2 billion during the fiscal year) which could result if the employees in question engaged in work stoppages or strikes. Thus, labor conditions at the schools and hospitals affected interstate commerce. Id. at 194-95.
74. This Court “will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because these enterprises happen to be run by the State for the benefit of their citizens.” Id. at 199.
75. 421 U.S. 542 (1975).
76. Id. at 547 n.7.
Economic Stabilization Act\textsuperscript{77} to the wages of all state and local government employees.\textsuperscript{78}

Justification for denial of a tenth amendment limitation on Congress' commerce clause power centers on the idea that in joining the Union the state surrenders any part of its sovereignty which would block the regulation.\textsuperscript{79} Congress, composed of the elected representatives of the people of the individual states, is deemed to have legislated the regulation to afford fairness to the state and local interests involved.\textsuperscript{80} If the regulation is inappropriate, it is for the voters to determine by changing their elected representatives,\textsuperscript{81} not for the Court to determine by imposing a constitutionally based limitation. The Court does not judge the appropriateness of the regulation\textsuperscript{82} as applied to the states but looks for the link between the regulation and Congress' commerce clause power.\textsuperscript{83}

It was thought that the Court had silenced arguments for a tenth amendment limitation of commerce clause power.\textsuperscript{84} However, in 1976, with National League of Cities, the Court abruptly shifted its position after forty years of rejecting a tenth amendment limitation and in the process overruled Maryland v. Wirtz.

\textsuperscript{78} 421 U.S. at 548.
\textsuperscript{79} See Parden v. Terminal Ry., 377 U.S. 184, 192 (1964). See also United States v. Appalachian Power Co., 311 U.S. 377, 428 (1940), in which the Court stated: "At the formation of the Union, the states delegated to the Federal Government authority to regulate commerce among the states. So long as the things done within the states by the United States are valid under that power, there can be no interference with the sovereignty of the state."
\textsuperscript{80} See Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 2 (1972) (the standard gives "extreme deference to imaginable supporting facts and conceivable legislative purposes").
\textsuperscript{81} See, e.g., Railway Employes' Dept., A.F.L. v. Hanson, 351 U.S. 225, 234 (1956) ("If [Congress] acts unwisely, the electorate can make a change"). Cf. Matsumoto, National League of Cities—From Footnote to Holding—State Immunity from Commerce Clause Regulation, 35 Ariz. St. L.J. 35, 62 (1977) [hereinafter referred to as Matsumoto], where it is stated that "[b]ecause the Congress is politically responsible to the people through the electoral process, Congress and not the Court is in the better position to ascertain whether a given federal regulation reflects the contemporary notion of the appropriate balance between federal and state governmental authority."
\textsuperscript{82} See, e.g., Railway Employes' Dept., A.F.L. v. Hanson, 351 U.S. 225, 234 (1956), where it is stated that "[t]he task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises . . . . The decision rests with the policy makers, not with the judiciary." See also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (necessity for regulation determined by legislature).
\textsuperscript{83} See, e.g., Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) (once the legislature is found to have a rational basis for the regulation, the Court's role is finished).
\textsuperscript{84} United States v. Darby, 312 U.S. 100, 124 (1941) ("The [Tenth] [A]mendment states but a truism that all is retained which has not been surrendered").
National League of Cities v. Usery

In *National League of Cities*, the National Governor's Conference and the National League of Cities joined individual cities and states to protest the 1974 amendments to the FLSA which extended the minimum wage and maximum hour provisions of the Act to nonsupervisory state and municipal employees. The United States District Court for the District of Columbia granted the defendant Secretary of Labor's motion to dismiss on the authority of *Maryland v. Wirtz* in which the Supreme Court had upheld extension of the Act to employees of state-owned and operated hospitals and schools.

The Supreme Court, in a five-to-four decision, reversed the lower court and overruled *Wirtz*. Justice Rehnquist's plurality opinion did not question the authority of Congress to legislate the regulation but found the regulatory power was limited to the extent it intruded on "state sovereignty." The opinion called for limiting the commerce clause power anytime it served to displace "the States' freedom to structure integral operations in areas of traditional governmental functions . . . ." Thus, determining when commerce clause regulations do not apply to state and local governments depends on defining "integral operations" and "traditional governmental functions." Unfortunately Justice Rehnquist did not make clear what constitutes "integral" or "traditional" governmental functions. He lists those functions involved in the case as fire protection, police protection, sanitation, public health and parks and recreation but gives no guidelines for testing a function's validity as "integral" or "traditional." "Integral" functions could mean those activities carried on exclusively by state and local governments such as fire and police protection. However, by overruling *Wirtz*, the Court included schools and hospitals in the category of inte-

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85. Twenty states and four cities brought the suit, including the following: the states of Arizona, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington and Wyoming. California sued separately but joined in the appeal to the Supreme Court. City governments included were Lompoc, California; Cape Girardeau, Missouri; Nashville, Tennessee; and Salt Lake City, Utah.

86. *See* notes 3 & 71 *supra*.


88. 426 U.S. at 854-55.

89. "It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress." *Id.* at 840.

90. *Id.* at 842.

91. *Id.* at 852.

92. *Id.* at 851.
integral functions. Since all schools and hospitals are not solely state-operated, the Court makes clear the idea that integral functions are not limited to those conducted solely by state and local governments. "Traditional" functions could mean those which states have performed since the Union was formed; however, it has been pointed out that not all of the functions mentioned in the opinion were performed by states at the time the Union was formed. Giving form to the definition of "traditional" or "integral" or "governmental" functions is further hindered by the fact that Justice Rehnquist's opinion leaves intact two cases which deal with functions similar to those at issue in National League of Cities.

In Fry v. United States the Court upheld a regulation which prohibited state governments from granting wage increases higher than those specified by the Economic Stabilization Act of 1970. Although Justice Rehnquist emphasized that the regulation involved in Fry was a temporary restriction, it was no less a displacement of the state's choice of what wages to pay employees than the minimum wage provision of the FLSA in National League of Cities. Yet the Economic Stabilization Act of Fry was deemed a legitimate exercise of regulatory authority. Justice Rehnquist distinguished the operation of the state-owned railroad in United States v. California by saying it was not an area regarded as an integral part of governmental activity. There was no reason given why the operation of the railroad was excluded from the category of integral governmental functions. The exclusion was perplexing because the railroad in question was state-operated since the 1800's, and profits from the railroad were used to operate San Francisco's harbor. Operation of ports and harbors was traditionally considered a state function. Thus, a state activity which appeared to fit

93. See Matsumoto, supra note 81, at 73 n.205, where it is pointed out that publicly financed education and certain public health activities did not become common until the nineteenth century.
95. See note 77 supra.
96. 426 U.S. at 852.
97. Justice Brennan noted the inconsistency of upholding the Economic Stabilization Act while finding the FLSA amendments displaced state choices. 426 U.S. at 872 (Brennan, J., dissenting).
98. See text accompanying notes 65-69 supra.
99. 426 U.S. at 854 n.18.
the integral or traditional government function category was specifically omitted.

A major claim of the plaintiffs in National League of Cities was that the amendments to the FLSA would impose enormous fiscal burdens which would affect performance of government functions. Although Justice Rehnquist noted the potential impact of increased costs which could result from compliance with the amendments, he pointed out that the economic impact of the challenged regulation was not the basis for the Court's decision. Rather, it was the fact that the amendments would force the states to make choices which was the central factor in the Court's decision.

Relying for the most part on pre-WWII cases, the Court determined that the states had a constitutional right to make such decisions unhampered by federal regulation. However, after making the determination that some state activities were beyond federal regulatory power, the Court offered little guidance for establishing what those activities might be.

In a one-paragraph concurring opinion, Justice Blackmun stated that National League of Cities adopted a balancing test for determining when to limit congressional commerce clause regulations as applied to state and local government activities. There was nothing in Justice

103. 426 U.S. at 846.
104. "We do not believe particularized assessments of actual impact are crucial to resolution of the issue presented . . . ." Id. at 851.
105. "Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." Id. at 855.
106. See, e.g., Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926); Coyle v. Oklahoma, 221 U.S. 559 (1911); Texas v. White, 74 U.S. (7 Wall.) 700 (1868); Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1868). In his dissent, Justice Brennan strongly criticized the majority for disregarding the post-1937 precedents of the Court. 426 U.S. at 867.
107. 426 U.S. at 851-52.
108. The opinion used various labels for activities which could be sovereign, but none of the labels clarify the distinction; for example, "integral governmental functions," id. at 855, "important governmental activities," id. at 847, "those governmental services which their [state's] citizens require," id., "integral operations in areas of traditional governmental functions," id. at 852, and "integral parts of [states] governmental activities," id. at 854 n.18.
109. Justice Blackmun concurring:

The Court's opinion and the dissents [sic] indicate the importance and significance of this litigation as it bears upon the relationship between the Federal Government and our States. Although I am not troubled by certain possible implications of the Court's opinion—some of them suggested by the dissents—I do not read the opinion so despairingly as does my Brother Brennan. In my view, the result with respect to the statute under challenge here is necessarily correct. I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential . . . . With this understanding on my part of the Court's opinion, I join it.

Id. at 856.
Rehnquist’s opinion, however, to support the idea that the Court adopted a balancing test.\textsuperscript{110} Moreover, Justice Blackmun did not identify the constitutional basis for the balancing test, nor did he identify and evaluate the competing interests to be balanced.

Justice Rehnquist’s plurality opinion made clear that it is no longer sufficient to establish the rational link between the questioned regulation and the commerce clause power. Now, after finding the link, courts must check to be sure the regulation does not interfere with some “integral” state function. The Court established a categorical approach for deciding when state activity may ignore federal regulation but did not establish any method for deciding what activity fits the category. This broad standard may afford immunity to a state accused of violating a federal regulation where no immunity is warranted.\textsuperscript{111} States may argue that any activity is an integral governmental function and, once the activity is deemed to be within the integral governmental function category, federal regulation will not be permitted.\textsuperscript{112}

Thus, \textit{National League of Cities} announced a constitutionally based limitation on federal commerce power regulation as applied to state and local government activities. The decision failed, however, to provide succinct guidelines for applying the limitation.\textsuperscript{113} Although the Supreme Court failed to define a workable standard, lower courts have relied on \textit{National League of Cities} to decide when state activities may escape federal commerce clause regulation.

\textit{Decisions Relying on National League of Cities}

Lower courts have followed divergent paths when applying the \textit{National League of Cities’} tenth amendment limitation on congressional commerce clause power. Some courts have interpreted \textit{National League of Cities} strictly as a categorical standard as set out in the plurality opinion of Justice Rehnquist.\textsuperscript{114} The lower courts determined

\textsuperscript{110} See Matsumoto, supra note 81, at 73. ("Under Justice Rehnquist’s approach, once an activity is deemed traditional it is immune from federal regulation under the commerce clause, without any regard to the importance of the federal governmental interest in the regulation.")

\textsuperscript{111} See Schwartz, supra note 11, at 1125.

\textsuperscript{112} As evidenced by the Court’s refusal to overrule Fry v. United States, the Court apparently would sanction temporary federal regulation of immune state functions where needed in a national emergency. 426 U.S. at 852-53.

\textsuperscript{113} "Unfortunately, the decision of a sharply divided Court in \textit{National League of Cities} offers little to our understanding of the federal-state balance, except to remind us that state sovereignty is not a dormant doctrine." Comment, National League of Cities and the Parker Doctrine: \textit{The Status of State Sovereignty Under the Commerce Clause}, 8 Fordham Urb. L.J. 301, 303 (1980).

\textsuperscript{114} See, e.g., Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979); Alewine v. City
whether the state activity at issue was a traditional or integral governmental function. If it was, the federal regulation at issue did not apply. One example of a lower court's interpretation of the categorical approach is Christensen v. Iowa.115 In that case, the United States District Court for the Northern District of Iowa was faced with whether the Equal Pay Act116 applied to employees of state and local government. The Act prohibited payment of different wages to different sexes for the same work. Since the Equal Pay Act became law as an amendment to the FLSA in 1963 and applied to state and local governments by virtue of the same amendments at issue in National League of Cities, it was feared that it too would be struck down.117 The district court, however, concluded that the payment of discriminatory wages was never a traditional function of state and local government.118 Since the activity in question did not fit the traditional or integral function category, the federal regulation prevailed.

The United States Court of Appeals for the Sixth Circuit also utilized the categorical approach in Amersbach v. City of Cleveland.119 The question in Amersbach was whether or not the FLSA amendments applied to employees of a municipally owned airport. The Sixth Circuit stated that National League of Cities did not articulate a specific test to be applied in determining when an activity should be considered traditional or integral.120 The court proceeded to articulate elements "by which a protected government function may be identified."121 Having elaborated on the proper test to apply, the Amersbach court then found that operating an airport did fit the protected category; therefore, the FLSA amendments did not apply to the airport employees.122

115. 417 F. Supp. 423 (N.D. Iowa 1976), aff'd, 563 F.2d 353 (8th Cir. 1977).
118. 417 F. Supp. at 425.
119. 598 F.2d 1033 (6th Cir. 1979).
120. Id. at 1037.
121. The court identified the following elements:
   (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a communitywide need for the service or activity.
122. Id. at 1038.
Other courts have utilized a balancing test when applying National League of Cities.123 While dissatisfaction with the National League of Cities decision has sometimes been voiced,124 courts have usually pointed out that the balancing test was expressed in Justice Blackmun’s concurring opinion as an interpretation of the plurality opinion.125

One case that attempted to balance competing federal and state interests was Virginia Surface Mining & Reclamation Association v. Andrus,126 which dealt with a challenge to the 1977 Surface Mining Control and Reclamation Act.127 In particular, the district court determined whether or not the “steep slope” provisions128 of the Act contravened the tenth amendment by interfering with the state’s traditional governmental function of regulating land use.129 The Act prescribed federal minimum standards governing surface coal mining which the state could either implement itself or yield to a federally administered program.130 The district court found this constricted the state’s ability to make “essential decisions.”131 Relying on the economic impact of compliance—diminished land value and mine closings132—the court concluded that the federal interest of protecting the environment did not outweigh the state interest in “forward-looking land use planning.”133

Virginia Surface Mining was recently reversed by the Supreme


124. Tennessee v. Louisville & N.R. Co., 478 F. Supp. 199, 206 (M.D. Tenn. 1979): “[I]t is impossible to discern what test, if any, was established for analyzing congressional exercises of power pursuant to the Commerce Clause. Therefore, this Court looks to the judicial tests employed prior to National League of Cities . . . . ”


128. 30 U.S.C. § 1265(d)(4) (1976 & Supp. III 1979) defines a “steep slope” as “any slope above 20 degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or State.”

129. 30 U.S.C. § 1252(c) (1976 & Supp. III 1979) contains requirements governing: (a) restoration of land after mining to its prior condition; (b) restoration of land to its approximate original contour; (c) segregation and preservation of topsoil; (d) minimization of disturbance to the hydrologic balance; (e) construction of coal mine waste piles used as dams and embankments; (f) revegetation of mined areas; and (g) soil disposal.


131. 483 F. Supp. at 433.

132. Id. at 434.

133. Id. at 435.
Court in *Hodel v. Virginia Mining & Reclamation Association*. The Court in *Hodel* emphasized that *National League of Cities* drew a sharp distinction between congressional regulation of private business and federal regulation directed at state activity. *National League of Cities* was summarized in *Hodel* as follows:

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

Since the Surface Mine Act governed only activities of private operators, the state's challenge failed because the Act did not regulate states as "states." *Virginia Surface Mining* served the useful purpose of reaffirming that congressional commerce clause power over private activity is limited only by the requirement that the means chosen must be rationally related to the end permitted under the Constitution. Unfortunately, the decision did little to clarify when congressional power can be prevented by the tenth amendment from regulating state activity. After determining that the mining activities were those of private operators, the Court had no reason to elaborate on how a lower court can establish when a state activity fits the traditional or integral governmental function test. Since the Court reiterated the three requirements of *National League of Cities* without mentioning a balancing test, it can be inferred that the Court was reaffirming the categorical approach of Justice Rehnquist's plurality opinion in *National League of Cities*. However, a footnote cited Justice Blackmun's concurring opinion after warning: "Demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it

135. Id. at 2364.
136. Id. at 2366 (citations omitted; emphasis in original).
137. Id. at 2364-65.
138. Id. at 2360. Justice Rehnquist stated in a concurring opinion: "In my view, the Court misstates the test . . . . [I]t has long been established that the commerce power does not reach activity which merely 'affects' interstate commerce. There must instead be a showing that regulated activity has a substantial effect on that commerce." Id. at 2391 (Rehnquist, J., concurring) (emphasis in original).
The footnote alluded to a balancing test but did not elaborate on when such a test would be appropriate or how to identify the competing state and federal interests. *Virginia Surface Mining* left undetermined what standard *National League of Cities* provided for enforcing a tenth amendment limitation on commerce clause regulation. *Virginia Surface Mining* was decided after the case which is the subject of this comment and was therefore unavailable to the Second Circuit. Since the Supreme Court viewed the Surface Mine Act as a restriction of private operators and did not elaborate on guidelines for applying federal regulations to state activities, the decision would not have aided the Second Circuit even if it had been available.

**Factual Background:**

United Transportation Union v. Long Island Rail Road

The state-owned Long Island Rail Road is the only common rail carrier serving Nassau and Suffolk counties in New York State. The line transports approximately 250,000 commuters each weekday and interchanges freight with more than a dozen interstate rail carriers handling from 800 to 1000 freight cars per week. Freight revenues in 1979 accounted for $12.1 million of a total income in excess of $300 million. The railroad is a carrier within the definition of the Railway Labor Act. Its employees receive the benefits of the Railroad Retirement Act, the Railroad Unemployment Insurance Act and the Federal Employees Liability Act.

The United Transportation Union is one of seven collective bargaining representatives for the LIRR operating and train employees. In December of 1979, when the railroad and the bargaining representatives were on the verge of exhausting the collective bargaining procedures provided by the RLA, the union filed suit in the Eastern District of New York seeking (1) a declaratory judgment that the parties involved were subject to the RLA, and thus outside the sanction of New York's Taylor Law which prohibits strikes by public employees; and (2) injunctive relief to protect the employees' rights under the RLA, including an injunction against prosecution in a state court action to invoke the Taylor Law.

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139. *Id.* at 2366 n.29.
140. 634 F.2d at 22.
141. *Id.* at 23.
142. *Id.* at 21.
The district judge concluded that the railroad and the union were subject to the RLA which preempted the state's authority to regulate labor relations of the railroad's employees. The judge issued a permanent injunction restraining state action based on the Taylor Law and enjoined the union from striking, pending review by the Second Circuit.\footnote{United Transp. Union v. Long Island R.R., 509 F. Supp. 1300, 1306 n.4 (E.D.N.Y. 1980).}

**The Second Circuit's Reasoning**

In *United Transportation Union v. Long Island Rail Road*, the court was faced with the issue of whether to uphold the lower court ruling or to utilize the constitutional limitation suggested in *National League of Cities*. The lower court had concluded that the RLA was a legitimate expression of congressional commerce clause power which preempted state action in the same area.\footnote{Id.} The Second Circuit agreed with the lower court's finding that the LIRR was a carrier subject to the RLA and noted that if the railroad had been privately owned and operated the federal regulation would have prevailed.\footnote{634 F.2d at 22-23.} However, since the railroad was state-owned, the court reasoned that enforcing the RLA so as to allow a strike would interfere with the state's ability to structure employer-employee relationships in public commuter transportation.\footnote{Id. at 25.} Thus, the Second Circuit rejected the lower court's decision, finding instead that the operation of a state-owned railroad was an integral governmental function within the definition of *National League of Cities* which therefore prevented intrusion by federal regulation.\footnote{Id. at 30.}

To reach its decision, the court followed a two-tier inquiry.\footnote{Id. at 24-29.} First, the court established that the operation was an integral governmental function according to the categorical approach of the plurality opinion in *National League of Cities*. In the second part of its inquiry, the court utilized a balancing test as mentioned in Justice Blackmun's concurring opinion in *National League of Cities*.

On the question of what constitutes an integral governmental function, the court interpreted *National League of Cities* to mean that a state must retain power to make choices and decisions in its role as provider of certain public services.\footnote{Id. at 24-25.} According to the court's reason-
ing, the freedom to strike as guaranteed by the RLA could affect the collective bargaining process with the result that the state would be forced to pay higher wages than it might otherwise choose to pay. Thus, upholding the federal regulation would deprive New York State of the right to make a fundamental employment decision. If the higher wages were not paid and the transit workers went on strike, New York City would be economically crippled. Thus, the employment decision was one that was essential to the state's separate and independent existence.

Having found that the RLA could displace an essential governmental decision, the court established that the decision concerned an activity of the integral governmental category. The court encountered a major obstacle at that point. The Supreme Court in *National League of Cities* specifically did not overrule *United States v. California*, which had upheld application of federal safety regulations to the state-operated California Belt Railroad. The *National League of Cities* opinion singled out the California Belt Railroad as an example of an activity that was not an integral governmental function. Therefore, the Second Circuit had to distinguish *United States v. California*.

The court first stated that the category of essential public services is not static but must change to meet the times. The court next explained that since the LIRR was a passenger carrier and the California Belt Railroad was strictly a freight line, the LIRR was more directly beneficial to the public. The reason passenger service was more beneficial was that the LIRR was the only carrier in that part of the state. The court placed great emphasis on the negative economic impact that would result if the LIRR shut down, and the environmental effect from increased auto traffic in the event of a shutdown was also pointed out.

In light of the fact that the Supreme Court historically rejected focusing on the importance of a public service in determining validity of federal regulation, the court attempted to justify such focus by examining *Lafayette v. Louisiana Power & Light Co.* In *Lafayette* the

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150. *Id.* at 25.
151. See text accompanying notes 65-69 *supra*.
152. 426 U.S. at 854 n.18.
153. 634 F.2d at 26 (quoting Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979)).
154. "[T]he service is essential to the public and inures to its benefit much more directly than did that provided by the California Belt Railroad." 634 F.2d at 26.
155. *Id.* at 26-27.
Supreme Court plurality avoided an integral function test altogether in holding that municipally run utilities are not automatically exempt from federal antitrust laws. Recognizing this, the Second Circuit stated that *Lafayette* should be limited to its antitrust context. However, the court did find support in Justice Burger’s concurring opinion to *Lafayette* which relied on the fact that because the utility was a business enterprise it was not an integral governmental function. The court in *Long Island Rail Road* elaborated on the idea. Because a business enterprise in competition with private suppliers demonstrated that the public was not completely dependent on the municipality for the service, the court reasoned that the service was not an integral governmental function. Therefore, because the LIRR was not in competition with private suppliers, the LIRR was an integral governmental function.

Having satisfied itself that operating the LIRR constituted an integral governmental function, the court proceeded to the second part of its two-tier analysis, balancing the state and federal interest. The court noted that *National League of Cities* arguably did not involve a balancing test. Nonetheless, the court justified balancing because other courts had interpreted such an approach and also because without Justice Blackmun’s concurrence, from which the balancing test stemmed, *National League of Cities* would not have been decided as it was.

To apply the balancing test, the court identified the federal interest in upholding the RLA and the state interest in applying the Taylor Law. The court began by stating that a primary purpose of the RLA was to avoid interruption of interstate commerce and that the Taylor Law furthered that purpose. However, the court further defined the federal interest as a desire to ensure continued freight service, while the

157. *Id.* at 415.
158. 634 F.2d at 28.
159. *Id.*
160. *Id.* at 24.
162. 634 F.2d at 24.
163. *Id.* at 29.
state interest was to ensure operation of the passenger service.\textsuperscript{164} To weigh the two interests, the court translated them into percentages of the LIRR's total revenue. Since the passenger service accounted for over eighty percent of the revenue, the state interest outweighed the federal.\textsuperscript{165} Thus, "the federal interest in preserving the right of LIRR employees is not 'demonstrably greater' than New York State's interest in preventing LIRR strikes . . . ."\textsuperscript{166} The opinion concluded that "the rationale of \textit{National League of Cities} requires reversal . . . ."\textsuperscript{167}

\textbf{Analysis}

Although other lower courts had mentioned both the categorical approach of Justice Rehnquist's plurality opinion and Justice Blackmun's balancing test, the Second Circuit's two-tier analysis was novel by virtue of its attempted specificity.\textsuperscript{168} The court tried to do what the Supreme Court neglected to do; that is, it sought to set down a clear interpretation of \textit{National League of Cities} by utilizing the two approaches in a carefully divided two-step inquiry. The court's goal of establishing specific guidelines was commendable; unfortunately, the court both ignored what concrete guidelines already existed in Justice Rehnquist's opinion and also gave unwarranted definition to vague generalities found in Justice Blackmun's concurring opinion. For example, in order to find the operation of the LIRR to be an integral governmental function, the court relied on criteria which had been rejected as controlling factors by the Supreme Court in Justice Rehnquist's plurality opinion in \textit{National League of Cities}.

Central to the Second Circuit's decision was the impact that an LIRR strike would have on New York's state and local economy. The court warned of the "higher wages"\textsuperscript{169} that would have to be paid and

\textsuperscript{164} Id. at 29-30.
\textsuperscript{165} Id. at 30.
\textsuperscript{166} Id.
\textsuperscript{167} Id. at 25.
\textsuperscript{168} Courts cited by the Second Circuit as supporting the balancing test in addition to the categorical approach were reluctant to delineate strict interpretations. In Remmick v. Barnes County, 435 F. Supp. 914 (D.N.D. 1977), the court stated that the \textit{National League of Cities} conclusion was reached through what "appears to be a balancing of federal interest . . . against the states' interest . . . ." Id. at 915. The \textit{Remmick} court did not attempt to identify the interests in the case at bar. In Colorado v. Veterans' Adm., 430 F. Supp. 551 (D. Colo. 1977), aff'd on other grounds, 602 F.2d 926 (10th Cir. 1979), cert. denied, 444 U.S. 1014 (1980), the court did not identify interests and paid lip service to a balancing test by stating: "Accepting the balancing approach that the \textit{Usery} majority intimated . . . the reporting requirement . . . does not run afoul of the doctrine of intergovernmental immunity." Id. at 559.
\textsuperscript{169} 634 F.2d at 25.
the "devastating economic injury"\textsuperscript{170} that would result from allowing the right to strike. The "possible economic effect"\textsuperscript{171} was germane to the court's reasoning for labeling the state's decision to prohibit public employee strikes as a fundamental employment decision. If the railroad ceased operation, the court explained, there would be "a significant impact upon the economy of the city and the State."\textsuperscript{172} Thus, the court justified its decision, in large part, by relying on the impact that a strike could have on the economy. Yet, in the \textit{National League of Cities} plurality opinion, Justice Rehnquist unequivocally pointed out that the economic impact of the challenged regulation was not the basis for the Supreme Court's decision in that case.\textsuperscript{173} In addition, it should be remembered that upholding the RLA would not necessarily result in a strike. Indeed, as the court itself noted,\textsuperscript{174} the goal of the RLA was to guard against interruptions in rail service. Therefore, the court engaged in speculation of economic devastation that might never occur.

A second theme employed by the court was the idea that the LIRR qualified as an integral governmental function because it was not in competition with private enterprises. Reiterating that the LIRR furnished a service "supplied primarily by state and local governments,"\textsuperscript{175} the court reasoned that a public service in competition with private enterprises is not an integral governmental function.\textsuperscript{176} However, it must be remembered that the Supreme Court in \textit{National League of Cities} pointedly overruled \textit{Maryland v. Wirtz}\textsuperscript{177} thereby including state-operated schools and hospitals in the category of integral governmental functions. Since schools and hospitals are not totally state-operated, but are in competition with private institutions, it is obvious the Supreme Court did not intend for the lack of competition from private enterprise to be a controlling factor in deciding whether an activity is an integral governmental function worthy of immunity from federal regulation. Therefore, the Second Circuit's reliance on the absence of competition from private carriers as evidence of an integral governmental function was unpersuasive.

In the second part of its two-tier analysis, the court incorrectly as-

\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 26.
\textsuperscript{174} 634 F.2d at 29.
\textsuperscript{175} Id. at 26.
\textsuperscript{176} Id. at 28.
\textsuperscript{177} 426 U.S. at 854-55.
sessed the competing federal and state interests. The inaccurate identification of interests highlighted the problem incurred by following the so-called balancing test of Justice Blackmun’s *National League of Cities* concurrence. Since Justice Blackmun’s one-paragraph concurrence gave no guidelines for identifying the federal and state interests, the Second Circuit was at liberty to define them in any manner. In order to identify the federal and state interests, the court examined the purpose of both the RLA and the Taylor Law. The court stated that the two laws had the same goal because both sought to provide “an orderly method of dispute resolution and to ensure continuous service.”

However, the RLA was the first national labor law enacted by Congress to establish a balance of power between labor and management in collective bargaining. Thus, it is the balance of power that ensures amicable settlements of disputes, not merely the orderly method of collective bargaining established by a labor law. Since the Taylor Law denied the right to strike, it served to tip the balance of power in management’s favor; therefore, it was inaccurate for the Second Circuit to assume the RLA and the Taylor Law had the same goal.

The court further attempted to equate the federal interest with keeping the interstate portion of the railroad in business and the state interest with keeping the intrastate portion operating. By looking at the railroad’s total revenue, the court reasoned that since the intrastate portion accounted for over eighty percent of revenues, the state interest outweighed the federal. Such superficial reasoning overlooks the fact that the federal interest encompasses all activity that “affects commerce” and therefore includes the LIRR’s total operation, not merely the interstate portion. Therefore, if indeed such interests could be translated into percentages of revenue, the federal interest would cover one hundred percent.

*Long Island Rail Road* epitomizes the problems a lower court encounters when attempting to interpret *National League of Cities*. The plurality opinion in *National League of Cities* provides no guidance for defining a traditional or integral governmental function. The plurality opinion and Justice Blackmun’s concurring opinion read together leave unclear whether a categorical or a balancing test, or both, should be used to decide when a federal regulation can be invalidated as applied

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178. 634 F.2d at 29.
180. 634 F.2d at 30.
to state activity. *Long Island Rail Road* illustrates how *National League of Cities* can be manipulated to suit a court's objective. 182 As the dissent to *National League of Cities* pointed out, "[s]uch an approach . . . is a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress." 183 If the RLA has failed to keep step with the times it should be altered by its creator, Congress, not by the judiciary. 184

When the Supreme Court reviews *Long Island Rail Road*, it should establish concrete guidelines for determining what constitutes a traditional or integral governmental function. The Court must decide when, if ever, definition as an integral governmental function alone will suffice to invoke the tenth amendment limitation on federal regulation. The Court should clarify when, if ever, a balancing of federal versus state interests is necessary, and, if balancing is needed, the Court should indicate how to identify the competing interests. Unless these clarifications of *National League of Cities* are made, legitimate exercises of congressional commerce clause power remain in jeopardy.

**CONCLUSION**

The Second Circuit's decision in *Long Island Rail Road* is indicative of the feebleness of the *National League of Cities* decision. *National League of Cities* provides guidelines that at best are elusive and at worst are capable of being distended to suit a state's self-interest. In *Long Island Rail Road* the court juggled the clumsy language of *National League of Cities* to protect New York State from public employee strikes. The decision illustrates the ease with which Justice Rehnquist's ambiguous *National League of Cities* opinion can be manipulated. The court's reliance on Justice Blackmun's concurring opinion to derive a balancing approach not found in the *National League of Cities* plurality further magnifies the lack of substance of *National League of Cities*. The real danger of *National League of Cities* lies in the implications derived from *Long Island Rail Road*. If *National League of Cities* can be used to dismember a long-standing bastion of national labor policy such as the RLA, what federal labor regulation will be next to fall? As shown by *Long Island Rail Road*,

182. In his dissent to *National League of Cities*, Justice Brennan viewed the plurality decision as "a transparent cover for invalidating a congressional judgment with which [the Court] disagrees." 426 U.S. at 867.

183. *Id.* at 876.

states can discard federal regulation by intoning the unclear integral governmental function standard while paying lip service to the legitimate federal interest behind the regulation.

PATRICIA S. HENRY

* As this volume went to press, the Supreme Court handed down its decision in Long Island Rail Road, concluding that the operation of a passenger railroad is not among those governmental functions generally immune from federal regulation under National League of Cities. United Transportation Union v. Long Island Rail Road, 50 U.S.L.W. 4315 (U.S. March 23, 1982). In reversing the Second Circuit Court of Appeals' decision, the Supreme Court gave no guidelines, however, for applying the National League of Cities' standard and thus left unresolved the question of whether a categorical or balancing test ought to be applied by the lower courts.