SJR

43

Alaska State Legislature

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To: Senate Judiciary Members

From: Senator Bettye Fahrenkamp

Re: SJR 43, Relating to the 10th Amendment to the U.S. Constitution.

Date: April 18, 1989

This resolution would encourage the President of the United States and Congress to protect and strengthen the position of the states, and to avoid intrusion upon the prerogatives of the states, and afford protection to the proper governing authorities of the states.

At the Council of State Government's annual meeting, the Executive Committee took action urging the Council Governing Board members in each state to adopt a resolution affirming the substantive and operational effect of the 10th amendment to the U.S. Constitution.

This request stems from recent congressional and Supreme Court actions which have resulted in a serious shift in power from the states to Washington. Two Supreme Court decisions, Garcia v. San Antonio Metropolitan Transit Authority and South Carolina v. Baker, especially reduced the Tenth Amendment protection for state authority, holding that the states can find protection from congressional regulation only through the national legislative process itself. Congressional committees and federal regulatory agencies are now considering further extensions of national authority over state banks, businesses and tax systems.

The Council of State Governments will be conducting a national campaign designed to inform state leaders and the voting public about this issue. They created a special "intergovernmental Partnership Task Force" to spearhead this effort, co-chaired by Senators Douglas Henry of Tennessee and John Marchi of New York.

I urge your support of this resolution.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION SJR 43
PUBLISH DATE

FISCAL NOTE

REQUEST:
Revision Date:
Title: Relating to implementation by Congress of the Tenth Amendment to the...
Sponsor: Senator Fahrenkamp
Requestor: Senate Judiciary

Affect Agency Legislative Affairs Agency
BRU: Legislative Council
Components Session Expenses

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants, Claims						
Miscellaneous						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (THOUSANDS OF DOLLARS)

General Fund						
Federal Fund						
Other						
TOTAL	0	0	0	0	0	0

POSITIONS:

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)

No fiscal impact.

Prepared By: Pamela Stoops, Director — Pamela Stoops — Phone: 465-3850
Division: Administrative Services — Date: 4/14/89

Approved By: Warren Endicott, Executive Director — Warren W Endicott
Agency: Legislative Affairs Agency — Date: 4/14/89

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REQUESTOR
OFFICE OF MANAGEMENT & BUDGET
AGENCY (IES)

ARTICLE X.

Powers reserved to states or people. 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.[18]

ARTICLE XI.

Restriction of judicial power. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.[19]

ARTICLE XII.

Election of President and Vice President. The electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The

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18. Proposed by Congress on September 25, 1789, and declared ratified on December 15, 1791.

19. Proposed by Congress on March 4, 1794, and declared ratified on January 8, 1798.

[469 US 528]

JOE G. GARCIA, Appellant

v

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY et al.

RAYMOND J. DONOVAN, Secretary of Labor, Appellant

v

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY et al.

469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005

[Nos. 82-1913 and 82-1951]

Argued March 19, 1984. Reargued October 1, 1984. Decided February 19, 1985.

Decision: Application of minimum-wage and overtime requirements of Fair Labor Standards Act to public mass-transit authority held not violative of any constitutional provision.

SUMMARY

The San Antonio Metropolitan Transit Authority (SAMTA), a public mass-transit authority that is the major provider of transportation in the San Antonio, Texas, metropolitan area, filed an action in the United States District Court for the Western District of Texas seeking a declaratory judgment that, contrary to the determination of the Wage and Hour Administration of the Department of Labor, its operations are constitutionally immune from the application of the minimum-wage and overtime requirements of the Fair Labor Standards Act (FLSA) under National League of Cities v Usery (1976) 426 US 833, 49 L Ed 2d 245, 96 S Ct 2465, in which it was held that the commerce clause of the United States Constitution (Art I § 8 cl 3) does not empower Congress to enforce such requirements against the states in areas of traditional governmental functions. The District Court entered judgment for SAMTA, holding that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under National League of Cities, is exempt from the obligations imposed by the Fair Labor Standards Act (557 F Supp 445).

SUBJECT OF ANNOTATION

Beginning on page 1163, infra

Validity of federal regulation of wage rates and hours of service as affected by commerce clause of Federal Constitution (Art. I, § 8, cl 3)—Supreme Court cases

Briefs of Counsel, p 1160, infra.

On appeal, the United States Supreme Court reversed and remanded. In an opinion by BLACKMUN, J., joined by BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., the court held that there is nothing in the overtime and minimum-wage requirements of the Fair Labor Standards Act, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision.

POWELL, J., joined by BURGER, Ch. J., and REHNQUIST and O'CONNOR, JJ., dissented on the ground that the court's decision substantially alters the federal system embodied in the United States Constitution.

REHNQUIST, J., dissented, stating that under either the "balancing test" referred to by Justice POWELL in his dissent or the approach suggested by Justice O'CONNOR in her dissent, the District Court judgment in this case should be affirmed.

O'CONNOR, J., joined by POWELL and REHNQUIST, JJ., dissented, expressing the view that the true essence of federalism is that the states as states have legitimate interests which the national government is bound to respect even though its laws are supreme, and that if federalism so conceived and so carefully cultivated by the framers of the United States Constitution is to remain meaningful, the court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the states.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Commerce § 89; Labor § 150; States, Territories, and Possessions § 37 — Fair Labor Standards Act — public mass-transit authority

1a, 1b. There is nothing in the overtime and minimum-wage requirements of the Fair Labor Standards Act, as applied to a public mass-transit authority, that is destructive of state sovereignty or violative of any constitutional provision. (Powell, J., Burger, Ch. J., Rehnquist, J., and O'Connor, J., dissented from this holding.)

[See annotation p 1163, infra]

States, Territories, and Possessions § 12 — federal regulation — state immunity

2a, 2b. A rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional" is unsound in principle and unworkable in practice; any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. (Powell, J., Burger, Ch. J., Rehnquist, J., and O'Connor, J., dissented from this holding.)

[See annotation p 1163, infra]

Commerce §§ 105, 108 — congressional authority — intrastate activities

3. The authority of Congress under the commerce clause of the United States Constitution (Art I § 8, cl 3) extends to intrastate economic activities that affect interstate commerce.

[See annotation p 1163, infra]

States, Territories, and Possessions §§ 12, 16 — federal system — extent of state's power

4. The essence of the federal system is that within the realm of authority left open to them under the United States Constitution, the State must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else, including the judiciary, deems state involvement to be.

Commerce §§ 89, 90; Labor § 150 — Fair Labor Standards Act — public mass-transit authority

5. In affording employees of a public mass-transit authority the protections of the wage and hour provisions of the Fair Labor Standards Act, Congress contravened no affirmative limit on Congress' power under the commerce clause of the United States Constitution (Art I § 8, cl 3).

[See annotation p 1163, infra]

SYLLABUS BY REPORTER OF DECISIONS

Appellee San Antonio Metropolitan Transit Authority (SAMTA) is a public mass-transit authority that is the major provider of transportation in the San Antonio, Tex., metropolitan area. It has received substantial federal financial assistance under the Urban Mass Transportation Act of 1964. In 1979, the Wage and Hour Administration of the Department of Labor issued an opinion that SAMTA's operations are not immune from the minimum-wage and overtime requirements of the Fair Labor Standards Act (FLSA) under National League of Cities v Usery, 426 US 833, 49 L Ed 2d 245, 96 S Ct 2465, in which it was held that the Commerce Clause does not empower Congress to enforce such requirements against the States "in areas of traditional governmental functions." Id., at 852, 49 L Ed 2d 245, 96 S Ct 2465. SAMTA then filed an action in Federal District Court, seeking declaratory relief. Entering judgment for SAMTA, the District Court held that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under National League of Cities, is exempt from the obligations imposed by the FLSA.

Held: In affording SAMTA employees the protection of the wage and hour provisions of the FLSA, Congress contravened no affirmative limit on its power under the Commerce Clause.

(a) The attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental functions" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which Na-

tional League of Cities purported to rest. That case, accordingly, is overruled.

(b) There is nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. The States' continued role in the federal system is primarily guaranteed not by any externally imposed limits on the commerce power, but by the structure of the Federal Government itself. In these cases, the political process effectively protected that role.

557 F. Supp. 445, reversed and remanded.

Blackmun, J., delivered the opinion of the Court, in which Brennan, White, Marshall, and Stevens, JJ., joined. Powell, J., filed a dissenting opinion, in which Burger, C. J., and Rehnquist and O'Connor, JJ., joined. Rehnquist, J., filed a dissenting opinion. O'Connor, J., filed a dissenting opinion, in which Powell and Rehnquist, JJ., joined.

APPEARANCES OF COUNSEL.

Solicitor General Rex E. Lee reargued the cause for appellant in No. 82-1961.

Laurence Gold reargued the cause for appellant in No. 82-1913.

William T. Coleman, Jr., reargued the cause for appellees in both cases.

Briefs of Counsel, p. 1160, infra.

OPINION OF THE COURT

[469 US 530]

Justice Blackmun delivered the opinion of the Court.

[1a] We revisit in these cases an issue raised in National League of Cities v. Usery, 426 US 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976). In that litigation, this Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the States "in areas of traditional governmental functions." Id., at 852, 49 L. Ed. 2d 245, 96 S. Ct. 2465. Although National League of Cities supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. Since then, federal and state courts have struggled with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause.

In the present cases, a Federal District Court concluded that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under National League of Cities, is exempt from the obligations imposed by the FLSA. Faced with the identical question, three Federal Courts of Appeals and one state appellate court have reached the opposite conclusion.[1]

1. See Dove v. Chattanooga Area Regional Transportation Authority, 701 F.2d 50 (CA6 1983), cert. pending, sub nom. City of Macon v. Jones, No. 82-1974; Alewine v. City Council of Augusta, Ga., 690 F.2d 1350 (CA11 1983), cert. pending, No. 83-257; Kramer v. New Castle Area Transit Authority, 677 F.2d 308 (CA3 1982), cert. denied, 459 US 1146, 74 L. Ed. 2d 993, 103 S. Ct. 786 (1983); Francis v. City of Tallahassee, 424 So. 2d 61 (Fla. App. 1982).

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[2a] Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which National League of Cities purported to rest. That case, accordingly, is overruled.

I

The history of public transportation in San Antonio, Tex., is characteristic of the history of local mass transit in the United States generally. Passenger transportation for hire within San Antonio originally was provided on a private basis by a local transportation company. In 1913, the Texas Legislature authorized the State's municipalities to regulate vehicles providing carriage for hire. 1913 Tex. Gen. Laws, ch. 147, § 4, ¶ 12, now codified, as amended, as Tex. Rev. Civ. Stat. Ann., Art. 1175, §§ 20 and 21 (Vernon 1963). Two years later, San Antonio enacted an ordinance setting forth franchising, insurance, and safety requirements for passenger vehicles operated for hire. The city continued to rely on such publicly regulated private mass transit until 1959, when it purchased the privately owned San Antonio Transit Company and replaced it with a public authority known as the San Antonio Transit System (SATS). SATS operated until 1978, when the city transferred its facilities and equipment to appellee San Antonio Metropolitan Transit Authority (SAMTA), a public mass-transit authority organized on a countywide basis. See generally Tex. Rev. Civ. Stat. Ann., Art. 1118x (Vernon Supp. 1984). SAMTA currently is the major provider of transportation in the San Antonio metropolitan area; between 1978 and 1980 alone, its vehicles traveled over 26 million route miles and carried over 63 million passengers.

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As did other localities, San Antonio reached the point where it came to look to the Federal Government for financial assistance in maintaining its public mass transit. SATS managed to meet its operating expenses and bond obligations for the first decade of its existence without federal or local financial aid. By 1970, however, its financial position had deteriorated to the point where federal subsidies were vital for its continued operation. SATS' general manager that year testified before Congress that "if we do not receive substantial help from the Federal Government, San Antonio may . . . join the growing ranks of cities that have inferior [public] transportation or may end up with no [public] transportation at all."[2]

The principal federal program to which SATS and other mass-transit systems looked for relief was the Urban Mass Transportation Act of 1964 (UMTA), Pub. L. 88-365, 78 Stat. 302, as amended, 49 USC App. § 1601 et seq. [49 USCS Appx. §§ 1601 et seq.], which provides substantial federal assistance to urban mass-transit programs. See generally

2. Urban Mass Transportation: Hearings on HR 6563 et al. before the Subcommittee on Housing of the House Committee on Banking and Currency, 91st Cong., 2d Sess., 410 (1970) (statement of F. Norman Hill).

Jackson Transit Authority v Transit Union, 457 US 15, 72 L Ed 2d 639, 102 S Ct 2202 (1982). UMTA now authorizes the Department of Transportation to fund 75 percent of the capital outlays and up to 50 percent of the operating expenses of qualifying mass-transit programs. §§ 4(a), 6(d) and (e), 49 USC App §§ 1603(a), 1604(d) and (e) [49 USCS Appx §§ 1603(a), 1604(d) and (e)]. SATS received its first UMTA subsidy, a $4.1 million capital grant, in December 1970. From then until February 1980, SATS and SAMTA received over $51 million in UMTA grants—more than $31 million in capital grants, over $20 million in operating assistance, and a minor amount in technical assistance. During SAMTA's first two fiscal years, it received $12.5 million in UMTA operating grants, $26.8 million from sales taxes, and only $10.1 million from farea Federal subsidies.

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and local sales taxes currently account for about 75 percent of SAMTA's operating expenses.

The present controversy concerns the extent to which SAMTA may be subjected to the minimum-wage and overtime requirements of the FLSA. When the FLSA was enacted in 1938, its wage and overtime provisions did not apply to local mass-transit employees or, indeed, to employees of state and local governments. §§ 3(d), 13(a)(9), 52 Stat 1060, 1067. In 1961, Congress extended minimum-wage coverage to employees of any private mass-transit carrier whose annual gross revenue was not less than $1 million. Fair Labor Standards Amendments of 1961, §§ 2(c), 9, 75 Stat 65, 71. Five years later, Congress extended FLSA coverage to state and local-government employees for the first time by withdrawing the minimum-wage and overtime exemptions from public hospitals, schools, and mass-transit carriers whose rates and services were subject to state regulation. Fair Labor Standards Amendments of 1966, §§ 102(a) and (b), 80 Stat 831. At the same time, Congress eliminated the overtime exemption for all mass-transit employees other than drivers, operators, and conductors. § 206(c), 80 Stat 836. The application of the FLSA to public schools and hospitals was ruled to be within Congress' power under the Commerce Clause. Maryland v Wirtz, 392 US 183, 20 L Ed 2d 1020, 88 S Ct 2017 (1968).

The FLSA obligations of public mass-transit systems like SATS were expanded in 1974 when Congress provided for the progressive repeal of the surviving overtime exemption for mass-transit employees. Fair Labor Standards Amendments of 1974, § 21(b), 88 Stat 68. Congress simultaneously brought the States and their subdivisions further within the ambit of the FLSA by extending FLSA coverage to virtually all state and local-government employees. §§ 6(a)(1) and (6), 88 Stat 58, 60, 29 USC §§ 203(d) and (x) [29 USCS §§ 203(d) and (x)]. SATS complied with the FLSA's overtime requirements until 1976, when this Court, in National League of Cities, overruled Maryland v Wirtz, and held that the FLSA could not be

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applied constitutionally to the "traditional governmental functions" of state and local governments.[3] Four months after National League of Cities was handed down, SATS informed its employees that the decision relieved SATS of its overtime obligations under the FLSA.[3]

Matters rested there until September 17, 1979, when the Wage and Hour Administration of the Department of Labor issued an opinion that SAMTA's operations "are not constitutionally immune from the application of the Fair Labor Standards Act" under National League of Cities. Opinion WH-499, 6 LRR 91:1138. On November 21 of that year, SAMTA filed this action against the Secretary of Labor in the United States District Court for the Western District of Texas. It sought a declaratory judgment that, contrary to the Wage and Hour Administration's determination, National League of Cities precluded the application of the FLSA's overtime requirements to SAMTA's operations. The Secretary counterclaimed under 29 USC § 217 [29 USCS § 217] for enforcement of the overtime and recordkeeping requirements of the FLSA. On the same day that SAMTA filed its action, appellant Garcia and several other SAMTA employees brought suit against SAMTA in the same District Court for overtime pay under the FLSA. Garcia v SAMTA, Civil Action No. SA 79 CA 458. The District Court has stayed that action pending the outcome of these cases, but it allowed Garcia to intervene in the present litigation as a defendant in support of the Secretary. One month after SAMTA brought suit, the Department of Labor formally amended its FLSA interpretive regulations to provide that publicly owned local mass-transit systems are not entitled to immunity under

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National League of Cities. 44 Fed Reg 77630 (1979), codified as 29 CFR § 775.3(b)(3) (1984).

On November 17, 1981, the District Court granted SAMTA's motion for summary judgment and denied the Secretary's and Garcia's cross-motion for partial summary judgment. Without further explanation, the District Court ruled that "local public mass transit systems (including [SAMTA]) constitute integral operations in areas of traditional governmental functions" under National League of Cities. Juris Statement in No. 82-1913, p 24a. The Secretary and Garcia both appealed directly to this Court pursuant to 28 USC § 1252 [28 USCS § 1252]. During the pendency of those appeals, Transportation Union v Long Island R Co, 455 US 678, 71 L Ed 2d 547, 102 S Ct 1349 (1982), was decided. In that case, the Court ruled that commuter rail service provided by the state-owned Long Island Rail Road did not constitute a "traditional governmental function" and hence did not enjoy constitutional immunity, under National League of Cities, from the requirements of the Railway Labor Act. Thereafter, it vacated the District Court's judgment in the present cases and remanded them for further consideration in the light of Long Island. 457 US 1102, 73 L Ed 2d 1309, 102 S Ct 2897 (1982).

On remand, the District Court adhered to its original view and again entered judgment for SAMTA.

3. Neither SATS nor SAMTA appears to have attempted to avoid the FLSA's minimum-wage provisions. We are informed that basic wage levels in the mass-transit industry traditionally have been well in excess of the minimum wages prescribed by the FLSA. See Brief for National League of Cities et al. as Amici Curiae 7-8.

557 F Supp 445 (1983). The court looked first to what it regarded as the "historical reality" of state involvement in mass transit. It recognized that States not always had owned and operated mass-transit systems, but concluded that they had engaged in a longstanding pattern of public regulation, and that this regulatory tradition gave rise to an "inference of sovereignty." Id, at 447–448. The court next looked to the record of federal involvement in the field and concluded that constitutional immunity would not result in an erosion of federal authority with respect to state-owned mass-transit systems, because many federal statutes themselves contain exemptions for States and thus make the withdrawal of federal

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regulatory power over public mass-transit systems a supervening federal policy. Id, at 448–450. Although the Federal Government's authority over employee wages under the FLSA obviously would be curtailed, Congress had not asserted an interest in the wages of public mass-transit employees until 1966 and hence had not established a longstanding federal interest in the field, in contrast to the century-old federal regulatory presence in the railroad industry found significant for the decision in Long Island. Finally, the court compared mass transit to the list of functions identified as constitutionally immune in National League of Cities and concluded that it did not differ from those functions in any material respect. The court stated: "If transit is to be distinguished from the exempt [National League of Cities] functions it will have to be by identifying a traditional state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it." 557 F Supp, at 453.[4]

The Secretary and Garcia again took direct appeals from the District Court's judgment. We noted probable jurisdiction, 464 US 812, 78 L Ed 2d 79, 104 S Ct 64 (1983). After initial argument, the cases were restored to our calendar for reargument, and the parties were requested to brief and argue the following additional question:

> "Whether or not the principles of the Tenth Amendment as set forth in National League of Cities v Usery, 426 US 833 [49 L Ed 2d 245, 96 S Ct 2465] (1976), should be reconsidered?" 468 US 1213, 82 L Ed 2d 921, 104 S Ct 30 (1984).

Reargument followed in due course.

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II

[3] Appellees have not argued that SAMTA is immune from regulation under the FLSA on the ground that it is a local transit system engaged in intrastate commercial activity. In a practical sense, SAMTA's operations might well be characterized as "local." Nonetheless, it long has been settled that Congress' authority under the Commerce Clause extends

4. The District Court also analyzed the status of mass transit under the four part test devised by the Sixth Circuit in Amersbach v City of Cleveland, 598 F2d 1033 (1979). In that case, the Court of Appeals looked to (1) whether the function benefits the community as a whole and is made available at little or no expense, (2) whether it is undertaken for public service or pecuniary gain, (3) whether government is its principal provider, and (4) whether government is particularly suited to perform it because of a community wide need. Id, at 1037.

to intrastate economic activities that affect interstate commerce. See, e.g., Hodel v Virginia Surface Mining & Recl. Assn., 452 US 264, 276–277, 69 L Ed 2d 1, 101 S Ct 2352 (1981); Heart of Atlanta Motel, Inc. v United States, 379 US 241, 258, 13 L Ed 2d 258, 85 S Ct 348 (1964); Wickard v Filburn, 317 US 111, 125, 87 L Ed 122, 63 S Ct 82 (1942); United States v Darby, 312 US 100, 85 L Ed 609, 61 S Ct 451, 132 ALR 1430 (1941). Were SAMTA a privately owned and operated enterprise, it could not credibly argue that Congress exceeded the bounds of its Commerce Clause powers in prescribing minimum wages and overtime rates for SAMTA's employees. Any constitutional exemption from the requirements of the FLSA therefore must rest on SAMTA's status as a governmental entity rather than on the "local" nature of its operations.

The prerequisites for governmental immunity under National League of Cities were summarized by this Court in Hodel, supra. Under that summary, four conditions must be satisfied before a state activity may be deemed immune from a particular federal regulation under the Commerce Clause. First, it is said that the federal statute at issue must regulate "the 'States as States.'" Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.'" Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the relation of state and federal interests must not be such that "the nature of the federal interest . . . justifies state submission." 452 US, at 287–288, and n 29, 69 L Ed 2d 1, 101 S Ct 2352, quoting National League of Cities, 426 US, at 845, 852, 854, 49 L Ed 2d 245, 96 S Ct 2465.

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The controversy in the present cases has focused on the third Hodel requirement—that the challenged federal statute trench on "traditional governmental functions." The District Court voiced a common concern: "Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult." 557 F Supp, at 447. Just how troublesome the task has been is revealed by the results reached in other federal cases. Thus, courts have held that regulating ambulance services, Gold Cross Ambulance v City of Kansas City, 538 F Supp 956, 967–969 (WD Mo 1982), aff'd on other grounds, 705 F2d 1005 (CA8 1983), cert. pending, No. 83–138; licensing automobile drivers, United States v Best, 573 F2d 1095, 1102–1103 (CA9 1978); operating a municipal airport, Amersbach v City of Cleveland, 598 F2d 1033, 1037–1038 (CA6 1979); performing solid waste disposal, Hybud Equipment Corp. v City of Akron, 654 F2d 1187, 1196 (CA6 1981); and operating a highway authority, Molina-Estrada v Puerto Rico Highway Authority, 680 F2d 841, 845–846 (CA1 1982), are functions protected under National League of Cities. At the same time, courts have held that issuance of industrial development bonds, Woods v Homes and Structures of Pittsburg, Kansas, Inc., 489 F Supp 1270, 1296–1297 (Kan 1980); regulation of intrastate natural gas sales, Oklahoma ex rel. Derryberry v FERC, 494 F Supp 636, 657 (WD Okla 1980), aff'd, 661 F2d 852 (CA10 1981), cert. denied sub nom. Texas v

FERC, 457 US 1105, 73 L Ed 2d 1313, 102 S Ct 2902, 102 S Ct 2903 (1982); regulation of traffic on public roads, Friends of the Earth v Carey, 552 F2d 25, 38 (CA2), cert denied, 434 US 902, 54 L Ed 2d 188, 98 S Ct 296 (1977); regulation of air transportation, Hughes Air Corp. v Public Utilities Comm'n of Cal. 644 F2d 1334, 1340-1341 (CA9 1981); operation of a telephone system, Puerto Rico Tel. Co v FCC, 553 F2d 694, 700-701 (CA1 1977); leasing and sale of natural gas, Public Service Co. of N.C. v FERC, 587 F2d 716, 721 (CA5) cert denied sub nom Louisiana v FERC, 444 US 879, 62 L Ed 2d 108, 100 S Ct 168, 100 S Ct 167 (1979); operation of a mental health facility, Williams v Eastside Mental

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Health Center, Inc. 669 F2d 671, 680-681 (CA11), cert denied, 459 US 976, 74 L Ed 2d 294, 103 S Ct 318 (1982); and provision of in-house domestic services for the aged and handicapped, Bonnette v California Health and Welfare Agency, 704 F2d 1465, 1472 (CA9 1983), are *not* entitled to immunity. We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side. The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best.

Thus far, this Court itself has made little headway in defining the scope of the governmental functions deemed protected under National League of Cities. In that case the Court set forth examples of protected and unprotected functions, see 426 US, at 851, 854, n 18, 49 L Ed 2d 245, 96 S Ct 2465, but provided no explanation of how those examples were identified. The only other case in which the Court has had occasion to address the problem is Long Island.[8] We there observed: "The determination of whether a federal law impairs a state's authority with respect to 'areas of traditional [state] functions' may at times be a difficult one." 455 US, at 684, 71 L Ed 2d 547, 102 S Ct 1349, quoting National League of Cities, 426 US, at 852, 49 L Ed 2d 245, 96 S Ct 2465. The accuracy of that statement is demonstrated by this Court's own difficulties in Long Island in developing a workable standard for "traditional governmental functions." We relied in large part there on "the *historical reality* that the operation of railroads is not among the functions *traditionally* performed by state and local governments," but we

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simultaneously disavowed "a static historical view of state functions generally immune from federal regulation." 455 US, at 686, 71 L Ed 2d 547, 102 S Ct 1349 (first emphasis added; second emphasis in original). We held that the inquiry into a particular function's "traditional" nature was merely a means of determining whether the federal statute at issue unduly handicaps "basic state prerogatives," id., at 686-687, 71 L Ed 2d 547, 102 S Ct 1349, but we did not offer an explanation of what makes one state function a "basic prerogative" and another function not basic. Finally, having disclaimed a rigid reliance on the historical pedigree of state involvement in a particular area, we nonetheless found it appropriate to emphasize the extended historical record of *federal* involvement in the field of rail transportation. Id., at 687-689, 71 L Ed 2d 547, 102 S Ct 1349.

Many constitutional standards involve "undoubted[d] . . . gray areas," Fry v United States, 421 US 542, 558, 44 L Ed 2d 363, 95 S Ct 1792 (1975) (dissenting opinion), and, despite the difficulties that this Court and other courts have encountered so far, it normally might be fair to venture the assumption that case by case development would lead to a workable standard for determining whether a particular governmental function should be immune from federal regulation under the Commerce Clause. A further cautionary note is sounded, however, by the Court's experience in the related field of state immunity from federal taxation. In South Carolina v United States, 199 US 437, 50 L Ed 261, 26 S Ct 110 (1905), the Court held for the first time that the state tax immunity recognized in Collector v Day, 11 Wall 113, 20 L Ed 122 (1871), extended only to the "ordinary" and "strictly governmental" instrumentalities of state governments and not to instrumentalities "used by the State in the carrying on of an ordinary private business." 199 US, at 451, 461, 50 L Ed 261, 26 S Ct 110. While the Court applied the distinction outlined in South Carolina for the following 40 years, at no time during that period did the Court develop a consistent formulation of the kinds of governmental functions that were entitled to immunity. The Court identified the protected functions at various times as "essential," "usual," "traditional," or "strictly governmental."[9]

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While "these differences in phraseology . . . must not be too literally contradistinguished," Brush v Commissioner, 300 US 352, 362, 81 L Ed 691, 57 S Ct 495, 108 ALR 1428 (1937), they reflect an inability to specify precisely what aspects of a governmental function made it necessary to the "unimpaired existence" of the States. Collector v Day, 11 Wall, at 127, 20 L Ed 122. Indeed, the Court ultimately chose "not, by an attempt to formulate any general test, [to] risk embarrassing the decision of cases [concerning] activities of a different kind which may arise in the future." Brush v Commissioner, 300 US, at 365, 81 L Ed 691, 57 S Ct 495, 108 ALR 1428.

If these tax immunity cases had any common thread, it was in the attempt to distinguish between "governmental" and "proprietary" functions.[7] To say that the distinction

8. See also, however, Jefferson County Pharmaceutical Assn. v. Abbott Laboratories, 460 US 150, 154 n 6, 74 L Ed 2d 882, 103 S Ct 1011, (1983); FERC v Mississippi, 456 US 742, 781, and n 7, 72 L Ed 2d 532, 102 S Ct 2126 (1982) (opinion concurring in judgment in part and dissenting in part); Fry v United States, 421 US 542, 558, and n 2, 44 L Ed 2d 363, 95 S Ct 1792 (1975) (dissenting opinion).

9. In South Carolina, the Court relied on the concept of "strictly governmental" functions to uphold the application of a federal liquor license tax to a state-owned liquor distribution monopoly. In Flint, the Court stated: "The true distinction is between . . . those operations of the States essential to the execution of its [sic] governmental functions, and which the State can only do itself, and those activities which are of a private character"; under this standard, "[i]t is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like." 220 US, at 172,

between

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"governmental" and "proprietary" proved to be stable, however, would be something of an overstatement. In 1911, for example, the Court declared that the provision of a municipal water supply "is no part of the essential governmental functions of a State." Flint v. Stone Tracy Co. 220 US 107, 172, 55 L. Ed. 389, 31 S. Ct. 342. Twenty-six years later, without any intervening change in the applicable legal standards, the Court simply rejected its earlier position and decided that the provision of a municipal water supply *was* immune from federal taxation as an essential governmental function, even though municipal water works long had been operated for profit by private industry. Brush v. Commissioner, 300 US, at 370-373, 81 L. Ed. 691, 57 S. Ct. 495, 108 ALR 1428. At the same time that the Court was holding a municipal water supply to be immune from federal taxes, it had held that a state-run commuter rail system was *not* immune. Helvering v. Powers, 293 US 214, 79 L. Ed. 291, 55 S. Ct. 171 (1934). Justice Black, in Helvering v. Gerhardt, 304 US 405, 427, 82 L. Ed. 1427, 58 S. Ct. 969 (1938), was moved to observe: "An implied constitutional distinction which taxes income of an officer of a state-operated transportation system and exempts income of the manager of a municipal water works system manifests the uncertainty created by the 'essential' and 'non-essential' test" (concurring opinion). It was this uncertainty and instability that led the Court shortly thereafter, in New York v. United States, 326 US 572, 90 L. Ed. 326, 66 S. Ct. 310 (1946), unanimously to conclude that the distinction between "governmental" and "proprietary" functions was "untenable" and must be abandoned. See id., at 583, 90 L. Ed. 326, 66 S. Ct. 310 (opinion of Frankfurter, J., joined by Rutledge, J.); id., at 586, 90 L. Ed. 326, 66 S. Ct. 310 (Stone, C. J., concurring, joined by Reed, Murphy, and Burton, JJ.); id., at 590-596, 90 L. Ed. 326, 66 S. Ct. 310 (Douglas, J., dissenting, joined by Black, J.). See also Massachusetts v. United States, 435 US 444, 457, and n. 14, 56 L. Ed. 2d 403, 98 S. Ct. 1153 (1978) (plurality opinion); Case v. Bowles, 327 US 92, 101, 90 L. Ed. 552, 66 S. Ct. 438 (1946).

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Even during the heyday of the governmental/proprietary distinction in intergovernmental tax immunity doctrine the Court never explained the constitutional basis for that distinction. In South Carolina, it expressed its concern that unlimited state immunity from federal taxation would allow the States to undermine the Federal Government's tax base by expanding into previously private sectors of the economy. See 199 U. S., at 454-455, 50 L. Ed. 261, 26 S. Ct. 110.[8] Although the need to reconcile state and federal interests obviously demanded that state immunity have some limiting principle, the Court did not try to justify the particular result it reached; it simply concluded that a "line [must] be drawn," id., at 456, 50 L. Ed. 261, 26 S. Ct. 110, and proceeded to draw that line. The Court's elaborations in later cases, such as the assertion in Ohio v. Helvering, 292 US 360, 369, 78 L. Ed. 1307, 54 S. Ct. 725 (1934), that "[w]hen a state enters the market place seeking customers it divests itself of its quasi sovereignty pro tanto," sound more of ipse dixit than reasoned explanation. This inability to give principled content to the distinction between "governmental" and "proprietary," no less significantly than its unworkability, led the Court to abandon the distinction in New York v. United States.

The distinction the Court discarded as unworkable in the field of tax immunity has proved no more fruitful in the field of regulatory immunity under the Commerce Clause. Neither do any of the alternative standards that might be employed to distinguish between protected and unprotected governmental functions appear manageable. We rejected the possibility of making immunity turn on a purely historical standard of "tradition" in Long Island, and properly so. The most obvious defect of a historical approach to state immunity is that it prevents a court from accommodating changes in the historical functions of States, changes that have resulted

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in a number of once private functions like education being assumed by the States and their subdivisions.[9] At the same time, the only apparent virtue of a rigorous historical standard, namely, its promise of a reasonably objective measure for state immunity, is illusory. Reliance on history as an organizing principle results in linedrawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state ac-

55 L. Ed. 389, 31 S. Ct. 342. In Ohio v. Helvering, 292 US 360, 78 L. Ed. 1307, 54 S. Ct. 725 (1934), another case involving a state liquor distribution monopoly, the Court stated that "the business of buying and selling commodities . . . is not the performance of a governmental function," and that "[w]hen a state enters the market place seeking customers it divests itself of its quasi sovereignty pro tanto and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned." Id., at 369, 78 L. Ed. 1307, 54 S. Ct. 729. In Powers, the Court upheld the application of the federal income tax to the income of trustees of a state-operated commuter railroad. The Court reiterated 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," regardless of the fact that the proprietary enterprises "are undertaken for what the State conceives to be the public benefit." 293 US, at 226, 79 L. Ed. 291, 55 S. Ct. 171. Accord, Allen v. Regents, 304 US 439, 451-463, 82 L. Ed. 1448, 58 S. Ct. 980 (1938).

8. That concern was especially weighty in South Carolina because liquor taxes, the object of the dispute in that case, then accounted for over one-fourth of the Federal Government's revenues. See New York v. United States, 326 US 572, 598, n. 1, 90 L. Ed. 326, 66 S. Ct. 310 (1946) (dissenting opinion).

9. Indeed, the "traditional" nature of a particular governmental function can be a matter of historical nearsightedness. Today's self-evidently "traditional" function is often yesterday's subject of innovation. Thus, National League of Cities offered the provision of public parks and recreation as an example of a traditional governmental function. 426 US, at 851, 49 L. Ed. 2d 245, 96 S. Ct. 2465. A scant 80 years earlier, however, in Shoemaker v. United States, 147 US 282, 37 L. Ed. 170, 13 S. Ct. 361 (1893), the Court pointed out that city commons originally had been provided not for recreation but for grazing domestic animals "in common," and that "[i]n the memory of men now living, a proposition to take private property (by eminent domain) for a public park . . . would have been regarded as a novel exercise of legislative power." Id., at 297, 37 L. Ed. 170, 13 S. Ct. 361.

volvement had to be for federal regulatory authority to be defeated.[9]

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A nondoctrinal standard for selecting immune governmental functions is likely to be just as unworkable as is a historical standard. The goal of identifying "uniquely" governmental functions, for example, has been rejected by the Court in the field of government tort liability in part because the notion of a "uniquely" governmental function is unmanageable. See Indian Towing Co. v United States, 350 US 61, 64-68, 100 L Ed 48, 76 S Ct 122 (1955); see also Lafayette v Louisiana Power & Light Co. 435 US 389, 433, 55 L Ed 2d 364, 98 S Ct 1123 (1978) (dissenting opinion). Another possibility would be to confine immunity to "necessary" governmental services, that is, services that would be provided inadequately or not at all unless the government provided them. Cf. Flint v Stone Tracy Co. 220 US, at 172, 55 L Ed 389, 31 S Ct 342. The set of services that fits into this category, however, may well be negligible. The fact that an unregulated market produces less of some service than a State deems desirable does not mean that the State itself must provide the service; in most if not all cases, the State can "contract out" by hiring private firms to provide the service or simply by providing subsidies to existing suppliers. It also is open to question how well equipped courts are to make this kind of determination about the workings of economic markets.

[4] We believe, however, that there is a more fundamental problem at work here, a problem that explains why the Court was never able to provide a basis for the governmental/proprietary distinction in the intergovernmental tax immunity cases and why an attempt to draw similar distinctions with respect to federal regulatory authority under National League of Cities is unlikely to succeed regardless of how the distinctions are phrased. The problem is that neither the governmental/proprietary distinction nor any

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other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal,

9. For much the same reasons, the existence vel non of a tradition of federal involvement in a particular area does not provide an adequate standard for state immunity. Most of the Federal Government's current regulatory activity originated less than 50 years ago with the New Deal, and a good portion of it has developed within the past two decades. The recent vintage of this regulatory activity does not diminish the strength of the federal interest in applying regulatory standards to state activities, nor does it affect the strength of the States' interest in being free from federal supervision. Although the Court's intergovernmental tax immunity decisions ostensibly have subjected particular state activities to federal taxation because those activities "ha[ve] been traditionally within [federal taxing] power from the beginning," New York v United States, 326 US, at 580, 90 L Ed 326, 66 S Ct 310 (Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.), the Court has not in fact required federal taxes to have long historical records in order to be effective. The income tax at issue in Powers, supra, took effect less than a decade before the tax years for which it was challenged, while the federal tax whose application was upheld in New York v United States took effect in 1932 and was rescinded less than two years later. See Helvering v Powers, 293 US, at 222, 79 L Ed 291, 55 S Ct 171; Rabkestrom, The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth, 11 Fed Bar J 13, 31, n 116 (1950).

no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. "The science of government . . . is the science of experiment," Anderson v Dunn, 6 Wheat 204, 226, 5 L Ed 242 (1821), and the States cannot serve as laboratories for social and economic experiment, see New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed 747, 52 S Ct 371 (1932) (Brandeis, J., dissenting), if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands. In the words of Justice Black:

> "There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires." Helvering v Gerhardt, 304 US, at 427, 82 L Ed 1427, 58 S Ct 969 (concurring opinion).

[2b] We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a

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particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government's power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them. We accordingly return to the underlying issue that confronted this Court in National League of Cities—the manner in which the Constitution insulates States from the reach of Congress' power under the Commerce Clause.

III

The central theme of National League of Cities was that the States occupy a special position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. Of course, the Commerce Clause by its specific language does not provide any special limitation on Congress' action with respect to the States. See EEOC v Wyoming, 460 US 226, 248, 75 L Ed 2d 18, 103 S Ct 1054 (1983) (concurring opinion). It is equally true, however, that the text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for "[b]ehind the words of the constitutional provisions are postulates which limit and control." Monaco v Mississippi, 292 US 313, 322, 78 L Ed 1282, 54 S Ct 745 (1934). National League of Cities reflected the general conviction that the Constitution precludes "the National Government [from] devour-

[ing] the essentials of state sovereignty." Maryland v Wirtz, 392 US, at 205, 20 L Ed 2d 1020, 88 S Ct 2017 (dissenting opinion). In order to be faithful to the underlying federal premises of the Constitution, courts must look for the "postulates which limit and control."

What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of these limitations. One approach to defining the limits on Congress'

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authority to regulate the States under the Commerce Clause is to identify certain underlying elements of political sovereignty that are deemed essential to the States' "separate and independent existence." Lane County v Oregon, 7 Wall 71, 76, 19 L Ed 101 (1869). This approach obviously underlay the Court's use of the "traditional governmental function" concept in National League of Cities. It also has led to the separate requirement that the challenged federal statute "address matters that are indisputably 'attribute[s] of state sovereignty.'" Hodel, 452 US, at 288, 69 L Ed 2d 1, 101 S Ct 2352, quoting National League of Cities, 426 US, at 845, 49 L Ed 2d 245, 96 S Ct 2465. In National League of Cities itself, for example, the Court concluded that decisions by a State concerning the wages and hours of its employees are an "undoubted attribute of state sovereignty." 426 US, at 845, 49 L Ed 2d 245, 96 S Ct 2465. The opinion did not explain what aspects of such decisions made them such an "undoubted attribute," and the Court since then has remarked on the uncertain scope of the concept. See EEOC v Wyoming, 460 US, at 238, n 11, 75 L Ed 2d 18, 103 S Ct 1054. The point of the inquiry, however, has remained to single out particular features of a State's internal governance that are deemed to be intrinsic parts of state sovereignty.

We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on a priori definitions of state sovereignty. In part, this is because of the elusiveness of objective criteria for "fundamental" elements of state sovereignty, a problem we have witnessed in the search for "traditional governmental functions." There is, however, a more fundamental reason: the sovereignty of the States is limited by the Constitution itself. A variety of sovereign powers, for example, are withdrawn from the States by Article I, § 10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation. See

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Hodel, 452 US, at 290-292, 69 L Ed 2d 1, 101 S Ct 2352. By providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law. See Martin v Hunter's Lessee, 1 Wheat 304, 4 L Ed 97 (1816). Finally, the developed application, through the Fourteenth Amendment, of the greater part of the Bill of Rights to the States limits the sovereign authority that States otherwise would possess to legislate with respect to their citizens and to conduct their own affairs.

The States unquestionably do "retai[n] a significant measure of sovereign authority." EEOC v Wyoming, 460 US, at 269, 75 L Ed 2d 18, 103 S Ct 1054 (Powell, J., dissenting). They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government. In the words of James Madison to the Members of the First Congress: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States." 2 Annals of Cong 1897 (1791). Justice Field made the same point in the course of his defense of state autonomy in his dissenting opinion in Baltimore & Ohio R. Co. v Baugh, 149 US 368, 401, 37 L Ed 772, 13 S Ct 914 (1893), a defense quoted with approval in Erie R. Co. v Tompkins, 304 US 64, 78-79, 82 L Ed 1188, 58 S Ct 817, 11 Ohio Ops 246, 114 ALR 1487 (1938):

> "[T]he Constitution of the United States . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. [Federal] [s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of

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> the authority of the State and, to that extent, a denial of its independence."

As a result, to say that the Constitution assumes the continued role of the States is to say little about the nature of that role. Only recently, this Court recognized that the purpose of the constitutional immunity recognized in National League of Cities is not to preserve "a sacred province of state autonomy." EEOC v Wyoming, 460 US, at 236, 75 L Ed 2d 18, 103 S Ct 1054. With rare exceptions, like the guarantee, in Article IV, § 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace. James Wilson reminded the Pennsylvania ratifying convention in 1787: "It is true, indeed, sir, although it presupposes the existence of state governments, yet this Constitution does not suppose them to be the sole power to be respected." 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 439 (J. Elliot 2d ed 1876) (Elliot). The power of the Federal Government is a "power to be respected" as well, and the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies. In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.

When we look for the States' "residuary and inviolable sovereignty," The Federalist No. 39, p 285 (B. Wright ed 1961) (J. Madison), in the shape of the constitutional scheme rather than in predetermined notions of sovereign power, a different measure of state sovereignty

emerges. Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal

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Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.[11] The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. US Const, Art I, § 2, and Art II, § 1. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. Art I, § 3. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent. Art V.

The extent to which the structure of the Federal Government itself was relied on to insulate the interests of the States is evident in the views of the Framers. James Madison explained that the Federal Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, p 332 (B. Wright ed 1961). Similarly, James Wilson observed that "it was a favorite object in the Convention" to provide for the security of the States against federal encroachment and that the structure of the Federal Government itself served that end. 2 Elliot, at 438–439. Madison placed particular reliance on the equal representation of the States in the Senate, which he saw as "at once a constitutional recognition of the portion of sovereignty remaining in the individual

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States, and an instrument for preserving that residuary sovereignty." The Federalist No. 62, p 408 (B. Wright ed 1961). He further noted that "the residuary sovereignty of the States [is] implied *and secured* by that principle of representation in one branch of the [federal] legislature" (emphasis added). The Federalist No. 43, p 315 (B. Wright ed 1961). See also McCulloch v. Maryland, 4 Wheat 316, 435, 4 L Ed 579 (1819). In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

The effectiveness of the federal

11. See, e.g., J. Choper, Judicial Review and the National Political Process 175–184 (1980); Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum L Rev 543 (1954); La Pierre, The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation, 69 Wash U L Q 779 (1982).

political process in preserving the States' interests is apparent even today in the course of federal legislation. On the one hand, the States have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid. The federal role in assisting state and local governments is a longstanding one. Congress provided federal land grants to finance state governments from the beginning of the Republic, and direct cash grants were awarded as early as 1887 under the Hatch Act.[12] In the past quarter-century alone, federal grants to States and localities have grown from $7 billion to $96 billion.[13] As a result, federal

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grants now account for about one-fifth of state and local government expenditures.[14] The States have obtained federal funding for such services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation.[15] Moreover, at the same time that the States have exercised their influence to obtain federal support, they have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause. For example, the Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Sherman Act all contain express or implied exemptions for States and their subdivisions.[16] The fact that some federal statutes such as the FLSA extend general obligations to the States cannot obscure the extent to which the political position of

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the States in the federal system has served to minimize the burdens that

12. See, e.g., A. Howitt, Managing Federalism: Studies in Intergovernmental Relations 3–18 (1984); Advisory Commission on Intergovernmental Relations, Break, Fiscal Federalism in the United States: The First 200 Years' Evolution and Outlook, in The Future of Federalism in the 1980s, pp 39–54 (July 1981).

13. A. Howitt, supra, at 8; Bureau of the Census, U. S. Dept. of Commerce, Bureau of the Census, Federal Expenditures by State for Fiscal Year 1983, p 2 (1984) (Census, Federal Expenditures); Division of Government Accounts and Reports, Fiscal Service, Bureau of Government Financial Operations, Dept. of the Treasury, Federal Aid to States: Fiscal Year 1982, p 1 (1982) (rev ed).

14. Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism 120, 122 (1984).

15. See, e.g., the Federal Fire Prevention and Control Act of 1974, 88 Stat 1535, as amended, 15 USC § 2201 et seq [15 USCS §§ 2201 et seq]; the Urban Park and Recreation Recovery Act of 1978, 92 Stat 3538, 16 USC § 2501 et seq [16 USCS §§ 2501 et seq]; the Elementary and Secondary Education Act of 1965, 79 Stat 27, as amended, 20 USC § 2701 et seq [20 USCS §§ 2701 et seq]; the Water Pollution Control Act, 62 Stat 1155, as amended, 33 USC § 1251 et seq [33 USCS § 1251 et seq]; the Public Health Service Act, 58 Stat 682, as amended, 42 USC § 201 et seq [42 USCS §§ 201 et seq]; the Safe Drinking Water Act, 88 Stat 1660, as amended, 42 USC § 300f et seq [42 USCS §§ 300f et seq]; the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat 197, as amended, 42 USC § 3701 et seq [42 USCS §§ 3701 et seq]; the Housing and Community Development Act of 1974, 88 Stat 633, as amended, 42 USC § 5301 et seq [42 USCS §§ 5301 et seq]; and the Juvenile Justice and Delinquency Prevention Act of 1974, 88 Stat 1109, as amended, 42 USC § 5601 et seq [42 USCS §§ 5601 et seq]. See also Census, Federal Expenditures 2–15.

16. See 16 USC § 824(f), 29 USC § 152(2), 29 USC § 403(a), 29 USC § 652(5), 29 USC §§ 1003(b)(1), 1002(32) [16 USCS § 824(f), 29 USCS § 152(2), 29 USCS § 402(e), 29 USCS § 652(5), 29 USCS §§ 1003(b)(1), 1002(32)]; and Parker v. Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307 (1943).

the States bear under the Commerce Clause.[17]

We realize that changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political process.[18] Nonetheless, against this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy." EEOC v. Wyoming, 460 U.S. at 236, 75 L. Ed. 2d 18, 103 S. Ct. 1054.

[16] Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.

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In these cases, the status of public mass transit simply underscores the extent to which the structural protections of the Constitution insulate the States from federally imposed burdens. When Congress first subjected state mass-transit systems to FLSA obligations in 1966, and when it expanded those obligations in 1974, it simultaneously provided extensive funding for state and local mass transit through UMTA. In the two decades since its enactment, UMTA has provided over $22 billion in mass-transit aid to States and localities.[19] In 1983 alone, UMTA funding amounted to $3.7 billion.[20] As noted above, SAMTA and its immediate predecessor have received a substantial amount of UMTA funding, including over $12 million during SAMTA's first two fiscal years alone. In short, Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass-transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area. Congress' treatment of public mass transit reinforces our conviction that the national political process systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation.[21]

17. Even as regards the FLSA, Congress incorporated special provisions concerning overtime pay for law enforcement and firefighting personnel when it amended the FLSA in 1974 in order to take account of the special concerns of States and localities with respect to these positions. See 29 USC § 207(k) [29 USCS § 207(k)]. Congress also declined to impose any obligations on state and local governments with respect to policymaking personnel who are not subject to civil service laws. See 29 USC §§ 203(e)(2)(C)(i) and (ii) [29 USCS §§ 203(e)(2)(C)(i) and (ii)].

18. See, e.g., Choper, supra, at 177-178; Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 860-868 (1979).

19. See Department of Transportation and Related Agencies Appropriations for 1983: Hearings before a Subcommittee of the House Committee on Appropriations, 97th Cong., 2d Sess., pt. 4, p. 809 (1982) (fiscal years 1965-1982); Census, Federal Expenditures 15 (fiscal year 1983).

20. Ibid.

IV

[5] This analysis makes clear that Congress' action in affording SAMTA employees the protections of the wage and hour

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provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause. The judgment of the District Court therefore must be reversed.

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.

These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. See Coyle v. Oklahoma, 221 U.S. 559, 55 L. Ed. 853, 31 S. Ct. 688 (1911). We note and accept Justice Frankfurter's observation in New York v. United States, 326 U.S. 572, 583, 90 L. Ed. 326, 66 S. Ct. 310 (1946):

> "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court."

Though the separate concurrence providing the fifth vote in National League of Cities was "not untroubled by certain possible implications" of the decision, 426 U.S. at 856, 49 L. Ed. 2d 245, 96 S. Ct. 2465, the Court in that case attempted to articulate affirmative limits on the Commerce Clause power in terms of core governmental functions and fundamental attributes of state sovereignty. But the model of democratic decisionmaking the

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Court there identified underestimated, in our view, the solicitude of the national political process for the continued vitality of the States. Attempts by other courts since then to draw guidance from this model have proved it both impracticable and doctrinally barren. In sum, in National League of Cities the Court tried to repair what did not need repair.

We do not lightly overrule recent

21. Our references to UMTA are not meant to imply that regulation under the Commerce Clause must be accompanied by countervailing financial benefits under the Spending Clause. The application of the FLSA to SAMTA would be constitutional even had Congress not provided federal funding under UMTA.

precedent." We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause. See United States v. Darby, 312 US 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451, 132 ALR 1430 (1941). Due respect for the reach of congressional power within the federal system mandates that we do so now.

National League of Cities v. Usery, 426 US 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), is overruled. The judgment of the District Court is reversed, and these cases are remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINIONS

Justice Powell, with whom The Chief Justice, Justice Rehnquist, and Justice O'Connor join, dissenting.

The Court today, in its 5-4 decision, overrules National League of Cities v. Usery, 426 US 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), a case in which we held that Congress lacked authority to impose the requirements of the Fair Labor Standards Act on state and local governments. Because I believe this decision substantially alters the federal system embodied in the Constitution, I dissent.

I

There are, of course, numerous examples over the history of this Court in which prior decisions have been reconsidered and overruled. There have been few cases, however, in which the principle of stare decisis and the rationale of recent

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decisions were ignored as abruptly as we now witness.[1] The reasoning of the Court in National League of Cities, and the principle applied there, have been reiterated consistently over the past eight years. Since its decision in 1976, National League of Cities has been cited and quoted in opinions joined by every Member of the present Court. Hodel v. Virginia Surface Mining & Recl. Assn., 452 US 264, 287-293, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981); Transportation Union v. Long Island R. Co., 455 US 678, 684-686, 71 L. Ed. 2d 547, 102 S. Ct. 1349 (1982); FERC v. Mississippi, 456 US 742, 764-767, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982). Less than three years ago, in Long Island R. Co., supra, a unanimous Court reaffirmed the principles of National League of Cities but found them inapplicable to the regulation of a railroad heavily engaged in interstate commerce. The Court stated:

> "The key prong of the National League of Cities test applicable to this case is the third one [repeated and reformulated in Hodel], which examines whether 'the states' compliance with the federal law would directly impair their ability "to structure integral operations in

22. But see United States v. Scott, 437 US 82, 98, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978), overruled Maryland v. Wirtz, 392 US 183, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968). Unlike National League of Cities, the rationale of Wirtz had not been repeatedly accepted by our subsequent decisions.

1. National League of Cities, following some changes in the composition of the Court, had

areas of traditional governmental functions." ' " 456 US, at 684, 71 L. Ed. 2d 547, 102 S. Ct. 1349.

The Court in that case recognized that the test "may at times be a difficult one," ibid., but it was considered in that unanimous decision as settled constitutional doctrine.

As recently as June 1, 1982, the five Justices who constitute the majority in these cases also were the majority in FERC v. Mississippi. In that case, the Court said:

> "In National League of Cities v. Usery, supra, for example, the Court made clear that the State's regulation of its relationship with its employees is an 'undoubted attribute of state sovereignty.' 426 US, at 845 [49 L. Ed. 2d 245, 96 S. Ct. 2465]. Yet,

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> by holding 'unimpaired' California v. Taylor, 353 US 553 [1 L. Ed. 2d 1034, 77 S. Ct. 1037] (1957), which upheld a federal labor regulation as applied to state railroad employees, 426 US, at 854, n. 18 [49 L. Ed. 2d 245, 96 S. Ct. 2645]. National League of Cities acknowledged that not all aspects of a State's sovereign authority are immune from federal control." 456 US, at 764, n. 28, 49 L. Ed. 2d 179, 96 S. Ct. 2337.

The Court went on to say that even where the requirements of the National League of Cities standard are met, "'[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission.'" Ibid., quoting Hodel, supra, at 288, n. 29, 69 L. Ed. 2d 1, 101 S. Ct. 2352. The joint federal/state system of regulation in FERC was such a "situation," but there was no hint in the Court's opinion that National League of Cities—or its basic standard—was subject to the infirmities discovered today.

Although the doctrine is not rigidly applied to constitutional questions, "any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 US 203, 212, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984). See also Oregon v. Kennedy, 456 US 667, 691-692, n. 34, 72 L. Ed. 2d 416, 102 S. Ct. 2083 (1982) (Stevens, J., concurring in judgment). In the present cases, the five Justices who compose the majority today participated in National League of Cities and the cases reaffirming it.[2] The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitous overruling of multiple precedents that we witness in these cases.[3]

Whatever effect the Court's decision may have in weakening the application of stare decisis, it is likely to be less

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important than what the Court has done to the Constitution itself. A unique feature of the United States is the *federal* system of government guaranteed by the Constitution and implicit in the very name of our country. Despite

2. Justice O'Connor, the only new Member of the Court since our decision in National League of Cities, has joined the Court in reaffirming its principles. See Transportation Union v. Long Island R. Co., 455 US 678, 71 L. Ed. 2d 547, 102 S. Ct. 1349 (1982); and FERC v. Mississippi, 456 US 742, 775, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982) (O'Connor, J., dissenting in part).

3. As one commentator noted, stare decisis represents "a natural evolution from the very nature of our institutions." Lile, Some Views on the Rule of Stare Decisis, 4 Va. L. Rev. 96, 97 (1916).

some genuflecting in the Court's opinion to the concept of federalism, today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause. The Court holds that the Fair Labor Standards Act ("FLSA") "contravened no affirmative limit on Congress' power under the Commerce Clause" to determine the wage rates and hours of employment of all state and local employees. Ante, at 556, 83 L. Ed 2d, at 1037. In rejecting the traditional view of our federal system, the Court states:

> "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the *structure* of the Federal Government itself." Ante, at 550, 83 L. Ed 2d, at 1034, (emphasis added).

To leave no doubt about its intention, the Court renounces its decision in National League of Cities because it "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." Ante, at 546, 83 L. Ed 2d, at 1031. In other words, the extent to which the States may exercise their authority, when Congress purports to act under the Commerce Clause, henceforth is to be determined from time to time by political decisions made by members of the Federal Government, decisions the Court says will not be subject to judicial review. I note that it does not seem to have occurred to the Court that *it* — an unelected majority of five Justices — today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only a single passing reference to the Tenth Amendment. Nor is so much as a dictum of any court cited in support of the view that the role of the States in the federal system may depend upon

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the grace of elected federal officials, rather than on the Constitution as interpreted by this Court.

In my opinion that follows, Part II addresses the Court's criticisms of National League of Cities. Part III reviews briefly the understanding of federalism that ensured the ratification of the Constitution and the extent to which this Court, until today, has recognized that the States retain a significant measure of sovereignty in our federal system. Part IV considers the applicability of the FLSA to the indisputably local service provided by an urban transit system.

II

The Court finds that the test of state immunity approved in National League of Cities and its progeny is unworkable and unsound in principle. In finding the test to be unworkable, the Court begins by mischaracterizing National League of Cities and subsequent cases. In concluding that efforts to define state immunity are unsound in principle, the Court radically departs from long-settled constitutional values and ignores the role of judicial review in our system of government.

A

Much of the Court's opinion is devoted to arguing that it is difficult to define *a priori* "traditional governmental functions." National League of Cities neither engaged in, nor required, such a task.[4] The Court discusses and condemns

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as standards "traditional governmental functions," "purely historical" functions, "'uniquely' governmental functions," and "'necessary' governmental services." Ante, at 539, 543, 545, 83 L. Ed 2d, at 1026, 1029-1030. But nowhere does it mention that National League of Cities adopted a familiar type of balancing test for determining whether Commerce Clause enactments transgress constitutional limitations imposed by the federal nature of our system of government. This omission is noteworthy, since the author of today's opinion joined National League of Cities and concurred separately to point out that the Court's opinion in that case "adopt[s] a balancing approach [that] does not outlaw federal power in areas . . . where the federal interest is demonstrably greater and where state . . . compliance with imposed federal standards would be essential." 426 US, at 856, 49 L. Ed 2d 245, 96 S. Ct. 2465 (Blackmun, J., concurring).

In reading National League of Cities to embrace a balancing approach, Justice Blackmun quite correctly cited the part of the opinion that reaffirmed Fry v. United States, 421 US 542, 44 L. Ed 2d 363, 95 S. Ct. 1792 (1975). The Court's analysis reaffirming Fry explicitly weighed the seriousness of the problem addressed by the federal legislation at issue in that case, against the effects of compliance on state sovereignty. 426 US, at 852-853, 49 L. Ed 2d 245, 96 S. Ct. 2465. Our subsequent decisions also adopted this approach of weighing the respective interests of the States and Federal

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Government.[5] In EEOC v. Wyoming, 460 US 226, 75 L.

4. In National League of Cities, we referred to the sphere of state sovereignty as including "traditional governmental functions," a realm which is, of course, difficult to define with precision. But the luxury of precise definitions is one rarely enjoyed in interpreting and applying the general provisions of our Constitution. Not surprisingly, therefore, the Court's attempt to demonstrate the impossibility of definition is unhelpful. A number of the cases it cites simply do not involve the problem of defining governmental functions. E.g., Williams v. Eastside Mental Health Center, Inc., 669 F.2d 671 (CA11), cert. denied, 459 US 976, 74 L. Ed 2d 294, 103 S. Ct. 318 (1982); Friends of the Earth v. Carey, 552 F.2d 25 (CA2), cert. denied, 434 US 902, 54 L. Ed 2d 188, 98 S. Ct. 296 (1977). A number of others are not properly analyzed under the principles of National League of Cities, notwithstanding some of the language of the lower courts. E.g., United States v. Best, 573 F.2d 1095 (CA9 1978); and Hybud Equipment Corp. v. City of Akron, Ohio, 654 F.2d 1187 (CA6 1981). Moreover, rather than carefully analyzing the case law, the Court simply lists various functions thought to be protected or unprotected by courts interpreting National League of Cities. Ante, at 539-539, 83 L. Ed 2d, at 1025-1026. In the cited cases, however, the courts considered the issue of state immunity on the specific facts at issue; they did not make blanket pronouncements that particular things inherently qualified as traditional governmental functions or did not. Having thus considered the cases out of context, it was not difficult for the Court to conclude that there is no "organizing principle" among them. See ante, at 539, 83 L. Ed 2d, at 1026.

5. In undertaking such balancing, we have considered, on the one hand, the strength of the federal interest in the challenged legislation and the impact of exempting the States from its reach. Central to our inquiry into the federal interest is how closely the challenged action implicates the central concerns of the Commerce Clause, viz., the promotion of a national economy and free trade among the States. See EEOC v. Wyoming, 460 US 226, 241, 75 L. Ed 2d 18, 103 S. Ct. 1054 (1983) (Stevens, J., concurring). See also, for example, Transportation Union v. Long Island R. Co., 455 US 678, 688, 71 L. Ed 2d 547, 102 S. Ct. 1349 (1982) ("Congress long ago concluded that federal regulation of railroad labor-management is necessary to prevent disruptions in vital rail service essential to the national economy"); FERC v. Mississippi, 456 US 742, 757, 72 L. Ed 2d 532, 102 S. Ct. 2126 (1982) ("It is difficult to conceive of a more basic element

Ed 2d 18, 103 S Ct 1054 (1983), for example, the Court stated that "[t]he principle of immunity articulated in National League of Cities is a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system . . . not be lost through undue federal interference in certain core state functions." Id., at 236, 75 L Ed 2d 18, 103 S Ct 1054. See also Hodel v Virginia Surface Mining & Reclamation Assn. 452 US 264, 69 L Ed 2d 1, 101 S Ct 2352 (1981). In overruling National League of Cities, the Court incorrectly characterizes the mode of analysis established therein and developed in subsequent cases.[8]

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Moreover, the statute at issue in this case, the FLSA, is the identical statute that was at issue in National League of Cities. Although Justice Blackmun's concurrence noted that he was "not untroubled by certain possible implications of the Court's opinion" in National League of Cities, it also stated that "the result with respect to the statute under challenge here [the FLSA] is *necessarily correct*." 426 US, at 856, 49 L Ed 2d 245, 96 S Ct 2465 (emphasis added). His opinion for the Court today does not discuss the statute, nor identify any changed circumstances that warrant the conclusion today that National League of Cities is *necessarily wrong*.

II

Today's opinion does not explain how the States' role in the electoral process guarantees that particular exercises of the Commerce Clause power will not infringe on residual state sovereignty.[9] Members of Congress are elected from the various States, but once in office they are Members of the

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Federal Government.[10] Although the States participate in the Electoral College, this is hardly a reason to view the President as a representative of the States' interest against federal encroachment. We noted recently "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . ." INS v Chadha, 462 US 919, 951, 77 L Ed 2d 317, 103 S Ct 2764 (1983). The Court offers no reason to think that this pressure will not operate when Congress seeks to invoke its powers under the Commerce Clause, notwithstanding the electoral role of the States.[11]

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The Court apparently thinks that the States' success at obtaining federal funds for various projects and exemptions from the obligations of some federal statutes is indicative of the "effectiveness of the federal political process in preserving the States' interests. . . ." Ante, at 552, 83 L Ed 2d, at 1034-1035.[12]

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of interstate commerce than electric energy . . . ."). Similarly, we have considered whether exempting States from federal regulation would undermine the goals of the federal program. See Fry v United States, 421 US 542, 44 L Ed 2d 363, 95 S Ct 1792 (1975). See also Hodel v Virginia Surface Mining & Recl. Assn. 452 US 264, 282, 69 L Ed 2d 1, 101 S Ct 2352 (1981) (national surface mining standards necessary to insure competition among States does not undermine States' efforts to maintain adequate intrastate standards). On the other hand, we have also assessed the injury done to the States if forced to comply with federal Commerce Clause enactments. See National League of Cities, 426 US, at 846-851, 49 L Ed 2d 245, 96 S Ct 2465.

8. In addition, reliance on the Court's difficulties in the tax immunity field is misplaced. Although the Court has abandoned the "governmental/proprietary" distinction in this field, see New York v United States, 326 US 572, 90 L Ed 326, 66 S Ct 310 (1946), it has not taken the drastic approach of relying solely on the structure of the Federal Government to protect the States' immunity from taxation. See Massachusetts v United States, 435 US 444, 55 L Ed 2d 401, 98 S Ct 1153 (1978). Thus, faced with an equally difficult problem of defining constitutional boundaries of federal action directly affecting the States, we did not adopt the view many would think naive, that the Federal Government *itself* will protect whatever rights the States may have.

7. Late in its opinion, the Court suggests that after all there may be some "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." Ante, at 556, 83 L Ed 2d, at 1037. The Court asserts that "[i]n the factual setting of these cases the internal safeguards of the political process have performed as intended." Ibid. The Court does not explain the basis for this judgment. Nor does it identify the circumstances in which the "political process" may fail and "affirmative limits" are to be imposed. Presumably, such limits are to be determined by the Judicial Branch even though it is "unelected." Today's opinion, however, has rejected the balancing standard and suggests no other standard that would enable a court to determine when there has been a malfunction of the "political process." The Court's failure to specify the "affirmative limits" on federal power, or when and how these limits are to be determined, may well be explained by the transparent fact that any such attempt would be subject to precisely the same objections on which it relies to overrule National League of Cities.

8. One can hardly imagine the Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle. The Tenth Amendment also is "an essential part of the Bill of Rights." See infra, at 569-570, 83 L Ed 2d, at 1045-1046.

9. At one time in our history, the view that the structure of the Federal Government sufficed to protect the States might have had a somewhat more practical, although not a more logical, basis. Professor Wechsler, whose seminal article in 1951 proposed the view adopted by the Court today, predicated his argument on assumptions that simply do not accord with current reality. Professor Wechsler wrote: "National action has . . . always been regarded as exceptional in our politics, an intrusion to be justified by some necessity, the special rather than the ordinary case." Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum L Rev 543, 544 (1954). Not only is the premise of this view clearly at odds with the proliferation of national legislation over the past 30 years, but "a variety of structural and political changes occurring in this century have combined to make Congress particularly *insensitive* to state and local values." Advisory Commission on Intergovernmental Relations (ACIR), Regulatory Federalism: Policy, Process, Impact and Reform 50 (1984). The adoption of the Seventeenth Amendment providing for direct election of Senators, the weakening of political parties on the local level, and the rise of national media, among other things, have made Congress increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies. Id., at 50-51. As one observer explained: "As Senators and members of the House develop independent constituencies among groups such as farmers, businessmen, laborers, environmentalists, and the poor, each of which generally supports certain national initiatives, their tendency to identify with state interests and the positions of state officials is reduced." Baden, Federalism in the Courts: Agenda for the 1980s, in ACIR, The Future of Federalism in the 80s, p 97 (July 1981).

See also Baden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum L Rev 847, 849 (1979) (changes in political practices and the breadth of national initiatives mean that the political branches "may no longer be as well suited as they once were to the task of safeguarding the role of the states in the federal system and protecting the fundamental values of federalism"), and ACIR, Regulatory Federalism, supra, at 1-24 (detailing the "dramatic shift" in kind of federal regulation applicable to the States over the past two decades). Thus, even if one were to ignore the numerous problems with the Court's position in terms of constitutional theory, there would remain serious questions as to its factual premises.

10. The Court believes that the significant financial assistance afforded the States and localities by the Federal Government is relevant to the constitutionality of extending Commerce Clause enactments to the States. See ante, at 552-553, 555, 83 L Ed 2d, at 1034-1036. This Court has never held, however, that the mere disbursement of funds by the Federal Government establishes a right to control activities that benefit from such funds. See Pennhurst State School and Hospital v

But such political success is not relevant to the question whether the political *processes* are the proper means of enforcing constitutional limitations.[9] The fact that Congress generally

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does not transgress constitutional limits on its power to reach state activities does not make judicial review any less necessary to rectify the cases in which it does do so.[10] The States' role in our system of government is a matter of constitutional law, not of legislative grace. "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." US Const, Amdt 10.

More troubling than the logical infirmities in the Court's reasoning is the result of its holding, *i.e.*, that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power. This result is inconsistent with the fundamental principles of our constitutional system. See, *e.g.*, The Federalist No. 78 (Hamilton). At least since Marbury v Madison, 1 Cranch 137, 177, 2 L Ed 60 (1803), it has been the settled province of the federal judiciary "to say what the law is" with respect to the constitutionality of acts of Congress. In rejecting the role of the judiciary in protecting the States from federal overreaching, the Court's opinion offers no explanation for ignoring the

Halderman, 451 US 1, 17 L Ed 2d 691, 101 S Ct 1531 (1981). Regardless of the willingness of the Federal Government to provide federal aid, the constitutional question remains the same whether the federal statute violates the sovereign powers reserved to the States by the Tenth Amendment.

11. Apparently in an effort to reassure the States, the Court identifies several major statutes that thus far have not been made applicable to state governments: the Federal Power Act, 16 USC § 824(f) [16 USCS § 824(f)], the Labor Management Relations Act, 29 USC § 152(2) [29 USCS § 152(2)], the Labor Management Reporting and Disclosure Act, 29 USC § 402(e) [29 USCS § 402(e)], the Occupational Safety and Health Act, 29 USC § 652(5) [29 USCS § 652(5)], the Employee Retirement Income Security Act, 29 USC §§ 1003(b), 1003(b)(2) [29 USCS §§ 1003(b), 1003(b)(2)], and the Sherman Act, 15 USC § 1 et seq. [15 USCS § 1 et seq.]; see Parker v Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307 (1943). Ante, at ——, 83 L Ed 2d at ——. The Court does not suggest that this restraint will continue after its decision here. Indeed, it is unlikely that special interest groups will fail to accept the Court's open invitation to urge Congress to extend these and other statutes to apply to the States and their local subdivisions.

12. This Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process. As the Court noted in National League of Cities, a much stronger argument as to inherent structural protections could have been made in cases like Buckley v Valeo, 424 US 1, 46 L Ed 2d 659, 96 S Ct 612 (1976), or Myers v United States, 272 US 52, 71 L Ed 160, 47 S Ct 21 (1926). How can he make here. In these cases, the President signed legislation that limited his authority with respect to certain appointments and thus arguably "it was ... no concern of this Court that the law violated the Constitution." 426 US, at 841, 842, n 12, 49 L Ed 2d 245, 96 S Ct 2465. The Court nevertheless held the laws unconstitutional because they infringed on Presidential authority. The President's consent notwithstanding. The Court does not address this point, nor does it cite any authority for its contrary view.

teaching of the most famous case in our history.[13]

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III

A

In our federal system, the States have a major role that cannot be preempted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding of federalism. Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized.

Much of the initial opposition to the Constitution was rooted in the fear that the National Government would be too powerful and eventually would eliminate the States as viable political entities. This concern was voiced repeatedly until proponents of the Constitution made assurances that a Bill of Rights, including a provision explicitly reserving powers in the States, would be among the first business of the new Congress. Samuel Adams argued, for example, that if the several States were to be joined in "one entire Nation, under one Legislature, the Powers of which shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost." Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), reprinted in Anti-Federalists versus Federalists

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159 (J. Lewis ed. 1967). Likewise, George Mason feared that "the general government being paramount to, and in every respect more powerful than the state governments, the latter must give way to the former." Address in the Ratifying Convention of Virginia (June 4–12, 1788), reprinted in Anti-Federalists versus Federalists, supra, at 208–209.

Antifederalists raised these concerns in almost every state ratifying convention.[14] See generally 1–4 Debates in the Several State Conventions on the Adoption of the Federal Constitution (J. Elliot 2d ed. 1876). As a result, eight States voted for the Constitution only after proposing amendments to be adopted after rat-

13. The Court states that the decision in National League of Cities "invites an unelected federal judiciary to make decisions about which state policies it favors and which ones its dislikes." Curiously, the Court then suggests that under the application of the "traditional" governmental function analysis, "the States cannot serve as laboratories for social and economic experiment." Ante, at 546, 83 L Ed 2d at 1021, citing Justice Brandeis' famous observation in New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed [1, 7] 52 S Ct 371 (1932) (Brandeis, J., dissenting). Apparently the Court believes that when an "unelected federal judiciary" makes decisions as to whether a particular function is one for the Federal or State Governments, the States no longer may engage in "social and economic experiment." Ante, at 546, 83 L Ed 2d, at 1021. The Court does not explain how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as "laboratories."

14. Opponents of the Constitution were particularly dubious of the Federalists' claim that the States retained powers not delegated to the United States in the absence of an express provision so providing. For example, James Winthrop wrote that "[i]t is a mere fallacy ... that what rights are not given are reserved." Letters of Agrippa, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 510, 511 (1971).

ification.[9] All eight of these included among their recommendations some version of what later became the Tenth Amendment. Ibid. So strong was the concern that the proposed Constitution was seriously defective without a specific bill of rights, including a provision reserving powers to the States, that in order to secure the votes for ratification, the Federalists eventually conceded that such provisions were necessary. See 1 B. Schwartz, The Bill of Rights: A Documentary History 505 and passim (1971). It was thus generally agreed that consideration of a bill of rights would be among the first business of the new Congress. See generally 1 Annals of Cong. 432-437 (1789) (remarks of James Madison). Accordingly, the 10 Amendments that we know as the Bill of Rights were proposed and adopted early in the first session of the First Congress. 2 Schwartz, The Bill of Rights, supra, at 993, 1167.

[469 US 570]

This history, which the Court simply ignores, documents the integral role of the Tenth Amendment in our constitutional theory. It exposes as well, I believe, the fundamental character of the Court's error today. Far from being "unsound in principle," ante, at 546, 83 L. Ed. 2d, at 1031, judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution.

II

The Framers had definite ideas about the nature of the Constitution's division of authority between the Federal and State Governments. In The Federalist No. 39, for example, Madison explained this division by drawing a series of contrasts between the attributes of a "national" government and those of the government to be established by the Constitution. While a national form of government would possess an "indefinite supremacy over all persons and things," the form of government contemplated by the Constitution instead consisted of "local or municipal authorities [which] form distinct and independent portions of the supremacy, no more subject, within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere." The Federalist No. 39, p. 256 (J. Cooke ed. 1961). Under the Constitution, the sphere of the proposed government extended to jurisdiction of "certain enumerated objects only, . . . leav[ing] to the several States a residuary and inviolable sovereignty over all other objects." Ibid.

Madison elaborated on the content of these separate spheres of sovereignty in The Federalist No. 45:

> "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce. . . . The powers

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> reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State." Id., at 313.

Madison considered that the operations of the Federal Government would be "most extensive and important in times of war and danger; those of the State Governments in times of peace and security." Ibid. As a result of this division of powers, the state governments generally would be more important than the Federal Government. Ibid.

The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective "counterpoise" to the power of the Federal Government. The States would serve this essential role because they would attract and retain the loyalty of their citizens. The roots of such loyalty, the Founders thought, were found in the objects peculiar to state government. For example, Hamilton argued that the States "regulat[e] all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake. . . ." The Federalist No. 17, p. 107 (J. Cooke ed. 1961). Thus, he maintained that the people would perceive the States as "the immediate and visible guardian of life and property," a fact which "contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government." Ibid. Madison took the same position, explaining that "The people will be more familiarly and minutely conversant" with the business of state governments, and "with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments. . . ." The Federalist No. 46, p. 316 (J. Cooke ed. 1961). Like Hamilton, Madison saw the States' involvement in the everyday concerns of the people as the source of

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> their citizens' loyalty. Ibid. See also Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 S. Ct. Rev. 81.

Thus, the harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. National League of Cities, 426 US, at 846, 851, 49 L. Ed. 2d 245, 96 S. Ct. 2465. Nor is it a matter of the wisdom or folly of certain policy choices. Cf. ante, at 546, 83 L. Ed. 2d, at 1031. Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.

C

The emasculation of the powers of the States that can result from the Court's decision is predicated on the Commerce Clause as a power "delegated to the United States" by the Constitution. The relevant language states: "Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Section eight identifies a score of powers, listing the authority to lay taxes, borrow money on the credit of the United States, pay its debts, and provide for the common defense and the general

[9] Indeed, the Virginia Legislature came very close to withholding ratification of the Constitution until the adoption of a Bill of Rights that included, among other things, the substance of the Tenth Amendment. See 2 Schwartz, The Bill of Rights, supra, at 762-766 and passim.

welfare *before* its brief reference to "Commerce." It is clear from the debates leading up to the adoption of the Constitution that the commerce to be regulated was that which the States themselves lacked the practical capability to regulate. See, e.g., 1 M. Farrand, The Records of the Federal Convention of 1787 (rev. ed. 1937). The Federalist Nos. 7, 11, 22, 42, 45. See also EEOC v. Wyoming, 460 U.S. 226, 265, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983) (Powell, J., dissenting). Indeed, the language of the Clause itself focuses on activities that only a National Government could regulate: commerce with foreign nations and Indian tribes and *"among"* the several States.

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To be sure, this Court has construed the Commerce Clause to accommodate unanticipated changes over the past two centuries. As these changes have occurred, the Court has had to decide whether the Federal Government has exceeded its authority by regulating activities beyond the capability of a single State to regulate or beyond legitimate federal interests that outweighed the authority and interests of the States. In so doing, however, the Court properly has been mindful of the essential role of the States in our federal system.

The opinion for the Court in National League of Cities was faithful to history in its understanding of federalism. The Court observed that "our federal system of government imposes definite limits upon the authority of Congress to regulate the activities of States as States by means of the commerce power." 426 U.S., at 842, 49 L. Ed. 2d 245, 96 S. Ct. 2465. The Tenth Amendment was invoked to prevent Congress from exercising its "'power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.'" Id., at 842-843 (quoting Fry v. United States, 421 U.S., at 547, n. 7, 44 L. Ed. 2d 363, 95 S. Ct. 1792).

This Court has recognized repeatedly that state sovereignty is a fundamental component of our system of government. More than a century ago, in Lane County v. Oregon, 7 Wall. 71, 19 L. Ed. 101 (1869), the Court stated that the Constitution recognized "the necessary existence of the States, and, within their proper spheres, the independent authority of the States." It concluded, as Madison did, that this authority extended to "nearly the whole charge of interior regulation . . ., to [the States] and to the people all powers not expressly delegated to the national government are reserved." Id., at 76, 19 L. Ed. 101. Recently, in Community Communications Co. v. Boulder, 455 U.S. 40, 53, 71 L. Ed. 2d 810, 102 S. Ct. 835 (1982), the Court recognized that the state-action exemption from the antitrust laws was based on state sovereignty. Similarly, in Transportation Union v. Long Island R. Co., 455 U.S., at 680, 71 L. Ed. 2d 547, 102 S. Ct. 1349, although finding the Railway Labor Act applicable to a state-owned railroad, the

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unanimous Court was careful to say that the States possess constitutionally preserved sovereign powers.

Again, in FERC v. Mississippi, 456 U.S. 742, 752, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982), in determining the constitutionality of the Public Utility Regulatory Policies Act, the Court explicitly considered whether the Act impinged on state sovereignty in violation of the Tenth Amendment. These represent only a few of the many cases in which the Court has recognized not only the role, but also the importance, of state sovereignty. See also, e.g., Fry v. United States, supra; McCardle & Eddy v. Mitchell, 269 U.S. 514, 70 L. Ed. 394, 46 S. Ct. 157 (1926); Coyle v. Oklahoma, 221 U.S. 559, 55 L. Ed. 853, 31 S. Ct. 688 (1911). As Justice Frankfurter noted, the States are not merely a factor in the "shifting economic arrangements" of our country, Kovacs v. Cooper, 336 U.S. 77, 95, 93 L. Ed. 513, 69 S. Ct. 448, 10 A.L.R.2d 608 (1949) (concurring), but also constitute a "coordinate element in the system established by the Framers for governing our Federal Union." National League of Cities, supra, at 849, 49 L. Ed. 2d 245, 96 S. Ct. 2465.

D

In contrast, the Court today propounds a view of federalism that pays only lipservice to the role of the States. Although it says that the States "unquestionably do 'retai[n] a significant measure of sovereign authority,'" ante, at 549, 83 L. Ed. 2d, at 1033 (quoting EEOC v. Wyoming, supra, at 269, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (Powell, J., dissenting)), it fails to recognize the broad, yet specific areas of sovereignty that the Framers intended the States to retain. Indeed, the Court barely acknowledges that the Tenth Amendment exists.[16] That Amendment states explicitly that "[t]he powers not delegated to the United States are reserved to the States." The Court recasts this language to say that the States retain their sovereign powers "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal

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Government." Ante, at 549, 83 L. Ed. 2d, at 1033. This rephrasing is not a distinction without a difference; rather, it reflects the Court's unprecedented view that Congress is free under the Commerce Clause to assume a State's traditional sovereign power, and to do so without judicial review of its action. Indeed, the Court's view of federalism appears to relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy.[17]

In National League of Cities, we spoke of fire prevention, police protection, sanitation, and public health as "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S., at 851, 49 L. Ed. 2d 245, 96 S. Ct. 2465. Not only are these activities remote from any normal concept of interstate commerce, they are also activities that epitomize the concerns of local, democratic self-government. See n. 5, supra. In emphasizing the need to protect traditional governmental functions, we identified the kinds of activities engaged in by state and local governments

16. The Court's opinion mentions the Tenth Amendment only once, when it restates the question put to the parties for reargument in these cases. See ante, at 536, 83 L. Ed. 2d, at 1024.

17. As the amici argue, "the ability of the States to fulfill their role in the constitutional scheme is dependent solely upon their effectiveness as instruments of self-government." Brief for State of California et al. as Amici Curiae 20. See also Brief for National League of Cities et al. as Amici Curiae in brief on behalf of every major organization representing the concerns of state and local governments.

that affect the everyday lives of citizens. These are services that people are in a position to understand and evaluate, and in a democracy, have the right to oversee.[18] We recognized that "it is

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functions such as these which governments are created to provide . . ." and that the States and local governments are better able than the National Government to perform them. 426 US at 851, 49 L Ed 2d 245, 96 S Ct 2465.

The Court maintains that the standard approved in National League of Cities "disserves principles of democratic self-government." Ante, at 547, 83 L Ed 2d, at 1031. In reaching this conclusion, the Court looks myopically only to persons elected to positions in the Federal Government. It disregards entirely the far more effective role of democratic self-government at the state and local levels. One must compare realistically the operation of the state and local governments with that of the Federal Government. Federal legislation is drafted primarily by the staffs of the congressional committees. In view of the hundreds of bills introduced at each session of Congress and the complexity of many of them, it is virtually impossible for even the most conscientious legislators to be truly familiar with many of the statutes enacted. Federal departments and agencies customarily are authorized to write regulations. Often these are more important than the text of the statutes. As is true of the original legislation, these are drafted largely by staff personnel. The administration and enforcement of federal laws and regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they hardly are as accessible and responsive

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as those who occupy analogous positions in state and local governments.

In drawing this contrast, I imply no criticism of these federal employees or the officials who are ultimately in charge. The great majority are conscientious and faithful to their duties. My point is simply that members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are

18. The Framers recognized that the most effective democracy occurs at local levels of government, where people with first hand knowledge of local problems have more ready access to public officials responsible for dealing with them. E. g., The Federalist No. 17, p. 107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961). This is as true today as it was when the Constitution was adopted. "Participation is likely to be more frequent, and exercised at more different stages of a governmental activity at the local level, or in regional organizations than at the state and federal levels. [Additionally,] the proportion of people actually involved from the total population tends to be greater, the lower the level of government, and this, of course, better approximates the citizen participation ideal." ACIR, Citizen Participation in the American Federal System 95 (1980).

Moreover, we have witnessed in recent years the rise of numerous special interest groups that engage in sophisticated lobbying, and make substantial campaign contributions to some Members of Congress. These groups are thought to have significant influence in the shaping and enactment of certain types of legislation. Contrary to the Court's view, a "political process" that functions in this way is unlikely to safeguard the sovereign rights of States and localities. See n. 9, supra.

state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies. It is at these state and local levels—not in Washington as the Court so mistakenly thinks—that "democratic self-government" is best exemplified.

IV

The question presented in these cases is whether the extension of the FLSA to the wages and hours of employees of a city-owned transit system unconstitutionally impinges on fundamental state sovereignty. The Court's sweeping holding does far more than simply answer the question in the negative. In overruling National League of Cities, today's opinion apparently authorizes federal control, under the auspices of the Commerce Clause, over the terms and conditions of employment of all state and local employees. Thus, for purposes of federal regulation, the Court rejects the distinction between public and private employers that had been drawn carefully in National League of Cities. The Court's action reflects a serious misunderstanding, if not an outright rejection, of the history of our country and the intention of the Framers of the Constitution.[19]

[469 US 578]

I return now to the balancing test approved in National League of Cities

19. The opinion of the Court in National League of Cities makes clear that the very essence of a federal system of government is to impose definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power. 426 US, at 842, 49 L Ed 2d 245, 96 S Ct 2465. See also the Court's opinion in Fry v. United States, 421 US 542, 547, n. 7, 44 L Ed 2d 363, 95 S Ct 1792 (1975).

20. As Justice Douglas observed in his dissent in Maryland v. Wirtz, 392 US, at 203, 20 L Ed 2d 94, 88 S Ct 2017, extension of the FLSA to the States could "disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education."

trol, water, and sewerage systems." Services of this kind are precisely those with which citizens are more "familiarly and minutely conversant." The Federalist No. 46, p. 316 (J. Cooke ed. 1961). State and local officials of course must be intimately familiar with these services and sensitive to their quality as well as cost. Such

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officials also know that their constituents and the press respond to the adequacy, fair distribution, and cost of these services. It is this kind of state and local control and accountability that the Framers understood would insure the vitality and preservation of the federal system that the Constitution explicitly requires. *See* National League of Cities, 426 U.S., at 847-852, 49 L. Ed. 2d 245, 96 S. Ct. 2465.

V

Although the Court's opinion purports to recognize that the States retain some sovereign power, it does not identify even a single aspect of state authority that would remain when the Commerce Clause is invoked to justify federal regulation. In Maryland v. Wirtz, 392 U.S. 183, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968), overruled by National League of Cities and today reaffirmed, the Court sustained an extension of the FLSA to certain hospitals, institutions, and schools. Although the Court's opinion in *Wirtz* was comparatively narrow, Justice Douglas, in dissent, wrote presciently that the Court's reading of the Commerce Clause would enable "the National Government [to] devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment." 392 U.S., at 205, 20 L. Ed. 2d 1020, 88 S. Ct. 2017. Today's decision makes Justice Douglas' fear once again a realistic one.

As I view the Court's decision today as rejecting the basic precepts of our federal system and limiting the constitutional role of judicial review, I dissent.

Justice Rehnquist, dissenting.

I join both Justice Powell's and Justice O'Connor's thoughtful dissents. Justice Powell's reference to the "balancing test" approved in National League of Cities is not identical with the language in that case, which recognized that Congress could not act under its commerce power to infringe on certain fundamental aspects of state sovereignty that are essential to "the States' separate and independent existence." Nor is either test, or Justice

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O'Connor's suggested approach, precisely congruent with Justice Blackmun's views in 1976, when he spoke of a balancing approach which did not outlaw federal power in areas "where the federal interest is demonstrably greater." But under any one of these approaches the judgment in these cases should be affirmed, and I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.

Justice O'Connor, with whom Justice Powell and Justice *Rehnquist* join, dissenting.

The Court today surveys the battle scene of federalism and sounds a retreat. Like Justice Powell, I would prefer to hold the field and, at the very least, render a little aid to the wounded. I join Justice Powell's opinion. I also write separately to note my fundamental disagreement with the majority's views of federalism and the duty of this Court.

The Court overrules National League of Cities v. Usery, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465, (1976), on the grounds that it is not "faithful to the role of federalism in a democratic society." Ante, at 546, 83 L. Ed. 2d, at 1031. "The essence of our federal system," the Court concludes, "is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal. . . ." Ibid. National League of Cities is held to be inconsistent with this narrow view of federalism because it attempts to protect only those fundamental aspects of state sovereignty that are essential to the States' separate and independent existence, rather than protecting all state activities "equally."

In my view, federalism cannot be reduced to the weak "essence" distilled by the majority today. There is more to federalism than the nature of the constraints that can be imposed on the States in "the realm of authority left open to them by the Constitution." The central issue of federalism,

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of course, is whether any realm is left open to the States by the Constitution—whether any area remains in which a State may act free of federal interference. "The issue . . . is whether the federal system has any *legal* substance, any core of constitutional right that courts will enforce." C. Black, Perspectives in Constitutional Law 30 (1963). The true "essence" of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme. Younger v. Harris, 401 U.S. 37, 44, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.

Due to the emergence of an integrated and industrialized national economy, this Court has been required to examine and review a breathtaking expansion of the powers of Congress. In doing so the Court correctly perceived that the Framers of our Constitution intended Congress to have sufficient power to address national problems. But the Framers were not single-minded. The Constitution is animated by an array of intentions. FERC v. Wyoming, 460 U.S. 226, 265-266, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983) (Powell, J., dissenting). Just as surely as the Framers envisioned a National Government capable of solving national problems, they also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States. FERC v. Mississippi, 456 U.S. 742, 790, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982) (O'Connor, J., dissenting). In the 18th century these intentions did not conflict because

21. In Long Island R. Co. the unanimous Court recognized that Dillon's Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." 426 U.S., at 496, 71 L. Ed. 2d 547, 102 S. Ct. 1349.

technology had not yet converted every local problem into a national one. A conflict has now emerged, and the Court today retreats rather than reconcile the Constitution's dual concerns for federalism and an effective commerce power.

[426 US 862]

We would do well to recall the constitutional basis for federalism and the development of the commerce power which has come to displace it. The text of the Constitution does not define the precise scope of state authority other than to specify, in the Tenth Amendment, that the powers not delegated to the United States by the Constitution are reserved to the States. In the view of the Framers, however, this did not leave state authority weak or defenseless; the powers delegated to the United States, after all, were "few and defined." The Federalist No. 45, p 313 (J. Cooke ed 1961). The Framers' comments indicate that the sphere of state activity was to be a significant one, as Justice Powell's opinion clearly demonstrates, ante at 570-572, 83 L Ed 2d, at 1046-1047. The States were to retain authority over those local concerns of greatest relevance and importance to the people. The Federalist No. 17, pp 106-108 (J. Cooke ed 1961). This division of authority, according to Madison, would produce efficient government and protect the rights of the people:

> "In a single republic, all the power surrendered by the people, is submitted to the administration of a single government, and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controuled by itself." The Federalist No. 51, pp 350-351 (J. Cooke ed 1961).

See Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 S Ct Rev 81, 88.

Of course, one of the "few and defined" powers delegated to the National Congress was the power "To regulate Commerce

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with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const. Art. I, § 8, cl 3. The Framers perceived the interstate commerce power to be important but limited, and expected that it would be used primarily if not exclusively to remove interstate tariffs and to regulate maritime affairs and large-scale mercantile enterprise. See Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn L Rev 432 (1941). This perception of a narrow commerce power is important not because it suggests that the commerce power should be so narrowly construed today. Rather, it explains why the Framers could believe the Constitution assured significant state authority even as it bestowed a range of powers, including the commerce power, on the Congress. In an era when interstate commerce represented a tiny fraction of economic activity and most goods and services were produced and consumed close to home, the interstate commerce power left a broad range of activities beyond the reach of Congress.

In the decades since ratification of the Constitution, interstate economic activity has steadily expanded due to industrialization, coupled with advances in transportation and communications, has created a national economy in which virtually every activity occurring within the borders of a State plays a part. The expansion and integration of the national economy brought with it a considerable expansion in the scope of national problems. This Court has been increasingly generous in its interpretation of the commerce power of Congress, primarily to assure that the National Government would be able to deal with national economic problems. Most significantly, the Court in NLRB v Jones & Laughlin Steel Corp. 301 U. S. 1, 81 L Ed 893, 57 S Ct 615, 108 ALR 1352 (1937), and United States v Darby, 312 US 100, 85 L Ed 609, 61 S Ct 451, 132 ALR 1430 (1941), rejected its previous interpretations of the commerce power which had stymied New Deal legislation. Jones & Laughlin and Darby embraced the notion that Congress can regulate intrastate activities that affect

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interstate commerce as surely as it can regulate interstate commerce directly. Subsequent decisions indicate that Congress, in order to regulate an activity, needs only a rational basis for a finding that the activity affects interstate commerce. See Heart of Atlanta Motel, Inc. v United States, 379 US 241, 258, 13 L Ed 2d 258, 85 S Ct 348 (1964). Even if a particular individual's activity has no perceptible interstate effect, it can be reached by Congress through regulation of that class of activity in general as long as that class, considered as a whole, affects interstate commerce. Fry v United States, 421 US 542, 44 L Ed 2d 363, 95 S Ct 1792 (1975); Perez v United States, 402 US 146, 28 L Ed 2d 686, 91 S Ct 1357 (1971).

Incidental to this expansion of the commerce power, Congress has been given an ability it lacked prior to the emergence of an integrated national economy. Because virtually every *state* activity, like virtually every activity of a private individual, arguably "affects" interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers. It is in this context that recent changes in the workings of Congress, such as the direct election of Senators and the expanded influence of national interest groups, see ante, at 544, n 9, 83 L Ed 2d, at 1043 (Powell, J., dissenting), become relevant. These changes may well have lessened the weight Congress gives to the legitimate interests of States as States. As a result, there is now a real risk that Congress will gradually erase the division of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic.

It would be erroneous, however, to conclude that the Supreme Court was blind to the threat to federalism when it expanded the commerce power. The Court based the expansion on the authority of Congress, through the Necessary and Proper Clause, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." United States v Darby, supra, at 121, 85 L Ed 609, 61 S Ct 451, 132 ALR 1430. It is through this reason-

ing that an intrastate activity "affecting" interstate commerce can be reached through the

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commerce power. Thus, in United States v. Wrightwood Dairy Co., 315 US 110, 119, 86 L Ed 726, 62 S Ct 523 (1942), the Court stated:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. See McCulloch v. Maryland, 4 Wheat 316, 421 [4 L Ed 579]."

United States v. Wrightwood Dairy Co. was heavily relied upon by Wickard v. Filburn, 317 US 111, 124, 87 L Ed 122, 63 S Ct 82 (1942), and the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce. See, e.g., Fry v. United States, supra, at 547, 44 L Ed 2d 363, 95 S Ct 1792; Perez v. United States, supra, at 151–152, 28 L Ed 2d 686, 91 S Ct 1357; Heart of Atlanta Motel, Inc. v. United States, supra, at 258–259, 13 L Ed 2d 258, 85 S Ct 348.

It is worth recalling the cited passage in McCulloch v. Maryland, 4 Wheat 316, 421, 4 L Ed 579 (1819), that lies at the source of the recent expansion of the commerce power. "Let the end be legitimate, let it be within the scope of the constitution," Chief Justice Marshall said, "and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter *and spirit* of the constitution, are constitutional" (emphasis added). The *spirit* of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme. Fry v. United States, supra, at 547, n 7, 44 L Ed 2d 363, 95 S Ct 1792.

It is not enough that the "end be legitimate"; the means to that end chosen by Congress must not contravene the spirit of the Constitution. Thus many of this Court's decisions acknowledge that the means by which national power is exercised must take into account concerns for state autonomy. See, e.g., Fry v. United States, supra, at 547, n 7, 44 L Ed 2d 363, 95 S Ct 1792; New

[469 US 556]

York v. United States, 326 US 572, 586–587, 90 L Ed 326, 66 S Ct 310 (1946) (Stone, C. J., concurring); NLRB v. Jones & Laughlin Steel Corp. supra, at 37, 81 L Ed 893, 57 S Ct 615, 108 ALR 1352 ("Undoubtedly, the scope of this [commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government"); Santa Cruz Fruit Packing Co. v. NLRB, 303 US 453, 466–467, 82 L Ed 954, 58 S Ct 656 (1938). See also Sandalow, Constitutional Interpretation, 79 Mich L Rev 1033, 1055 (1981) ("The question, always, is whether the exercise of power is consistent with the entire Constitution, a question that can be

answered only by taking into account, so far as they are relevant, all of the values to which the Constitution as interpreted over time gives expression"). For example, Congress might rationally conclude that the location a State chooses for its capital may affect interstate commerce, but the Court has suggested that Congress would nevertheless be barred from dictating that location because such an exercise of a delegated power would undermine the state sovereignty inherent in the Tenth Amendment. Coyle v. Oklahoma, 221 US 559, 565, 55 L Ed 853, 31 S Ct 688 (1911). Similarly, Congress in the exercise of its taxing and spending powers can protect federal savings and loan associations, but if it chooses to do so by the means of converting quasi-public state savings and loan associations into federal associations, the Court has held that it contravenes the reserved powers of the States because the conversion is not a reasonably necessary exercise of power to reach the desired end. Hopkins Federal Savings & Loan Assn. v. Cleary, 296 US 315, 80 L Ed 251, 56 S Ct 235, 100 ALR 1403 (1935). The operative language of these cases varies, but the underlying principle is consistent: state autonomy is a relevant factor in assessing the means by which Congress exercises its powers.

[469 US 557]

This principle requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power. National League of Cities v. Usery represented an attempt to define such limits. The Court today rejects National League of Cities and washes its hands of all efforts to protect the States. In the process, the Court opines that unwarranted federal encroachments on state authority are and will remain "horrible possibilities that never happen in the real world." Ante, at 556, 83 L Ed 2d, at 1037, quoting New York v. United States, supra, at 583, 90 L Ed 326, 66 S Ct 310 (opinion of Frankfurter, J.). There is ample reason to believe to the contrary.

The last two decades have seen an unprecedented growth of federal regulatory activity, as the majority itself acknowledges. Ante, at 544–545, n 10, 83 L Ed 2d, at 1030. In 1954, one could still speak of a "burden of persuasion on those favoring national intervention" in asserting that "National action has . . . always been regarded as exceptional . . . our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum L Rev 543, 544–545 (1954). Today, as federal legislation and coercive grant programs have expanded to embrace innumerable activities that were once viewed as local, the burden of persuasion has surely shifted, and the extraordinary has become ordinary. See Engdahl, Sense and Nonsense About State Immunity, 2 Constitutional Commentary 93 (1985). For example, recently the Federal Government has, with this Court's blessing, undertaken to tell the States the age at which they can retire their law enforcement officers, and the regulatory standards, procedures, and even the agenda which their utilities commissions must consider and follow. See EEOC v. Wyoming, 460 US 226, 75 L Ed 2d 18, 103 S Ct 1054 (1983); FERC v. Mississippi, 456 US 742, 72 L Ed 2d 532, 102 S Ct 2126 (1982). The political

process

[469 US 558]

has not) protected against these encroachments on state activities, even though they directly impinge on a State's ability to make and enforce its laws. With the abandonment of National League of Cities, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint.

The problems of federalism in an integrated national economy are capable of more responsible resolution than holding that the States as States retain no status apart from that which Congress chooses to let them retain. The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States. It is insufficient, in assessing the validity of congressional regulation of a State pursuant to the commerce power, to ask only whether the same regulation would be valid if enforced against a private party. That reasoning, embodied in the majority opinion, is inconsistent with the spirit of our Constitution. It remains relevant that a State is being regulated, as National League of Cities and every recent case have recognized. See EEOC v. Wyoming, supra; Transportation Union v. Long Island R. Co. 455 US 678, 684, 71 L. Ed. 2d 547, 102 S. Ct. 1349 (1982); Hodel v. Virginia Surface Mining & Recl. Assn. 452 U.S. 264, 287-288, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981); National League of Cities, 426 US, at 841-846, 49 L. Ed. 2d 245, 96 S. Ct. 2465. So far as the Constitution is concerned, a State should not be equated with any private litigant. Cf. Nevada v. Hall, 440 US 410, 428, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979) (Blackmun, J., dissenting) (criticizing the ability of a state court to treat a sister State no differently than a private litigant). Instead, the autonomy of a State is an essential component of federalism. If state autonomy is ignored in assessing the means by which Congress regulates matters affecting commerce, then federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such a commerce power "may well be negligible." Ante, at 545, 83 L. Ed. 2d, at 1030.

It has been difficult for this Court to craft bright lines defining the scope of the state autonomy protected by National

[469 US 559]

League of Cities. Such difficulty is to be expected whenever constitutional concerns as important as federalism and the effectiveness of the commerce power come into conflict. Regardless of the difficulty, it is and will remain the duty of this Court to reconcile these concerns in the final instance. That the Court shuns the task today by appealing to the "essence of federalism" can provide scant comfort to those who believe our federal system requires something more than a unitary, centralized government. I would not shirk the duty acknowledged by National League of Cities and its progeny, and I share Justice Rehnquist's belief that this Court will in time again assume its constitutional responsibility.

I respectfully dissent.

EDITOR'S NOTE

An annotation on "Validity of federal regulation of wage rates and hours of service as affected by commerce clause of Federal Constitution (Art. I, § 8, cl. 3)—Supreme Court cases," appears p. 1163, infra.

Survey, Briefs, Annos

SURVEY OF THE TERM,

ANNOTATIONS AND BRIEFS

FOR CASES REPORTED IN THIS VOLUME

The annotations herein, prepared by the Editors, are indexed in the "Index to Decisions and Annotations" appearing at the end of this volume. For additional annotation references, consult the separate Index to Annotations volume of U.S. Supreme Court Reports, Lawyers' Edition, the "Index to Cases and Annotations" in the U.S. Supreme Court, Lawyers Edition 24 Desk Book or appropriate topics and sections in the U.S. Supreme Court Digest, Lawyers' Edition.

Selected summaries of briefs are by the publisher's staff.

STATE OF SOUTH CAROLINA, Plaintiff

v

JAMES A. BAKER, III, Secretary of the Treasury of the United States

485 US —, 99 L. Ed. 2d 592, 108 S. Ct. —

[No. 94, Orig.]

Argued December 7, 1987. Decided April 20, 1988.

Decision: 26 USCS § 103(j)(1), which subjects interest on unregistered state or local bonds to federal income tax, held not to violate (1) Tenth Amendment or (2) intergovernmental tax immunity doctrine.

SUMMARY

Section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (26 USCS § 103(j)(1)) removes the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds are issued in registered form. The state of South Carolina, invoking the original jurisdiction of the United States Supreme Court, claimed that § 310(b)(1) was invalid under the Federal Constitution as a violation (1) of the Tenth Amendment and related constitutional principles of federalism, because § 310(b)(1) effectively required state and local governments to issue only registered bonds, and (2) of the doctrine of intergovernmental tax immunity, which had been held in Pollock v. Farmers' Loan & Trust Co. (1895) 157 US 429, 39 L. Ed. 759, 15 S. Ct. 673, mod. 158 US 601, 39 L. Ed. 1108, 15 S. Ct. 912, to bar federal taxation of any interest earned on a state bond. The Supreme Court (1) granted the state leave to file a complaint against the United States Secretary of the Treasury and (2) appointed a Special Master. The Special Master found that § 310(b)(1) did have the effect of requiring bonds to be issued in registered form; but he nevertheless determined that § 310(b)(1) was constitutional, and he recommended that judgment be entered for the Secretary. South Carolina and an intervenor filed exceptions to various factual findings of the Special Master and to the Master's legal conclusions regarding their constitutional challenges.

On exceptions to the report of the Special Master, the United States Supreme Court overruled the exceptions and approved the Master's recommendation to enter judgment for the Secretary. In an opinion by BRENNAN, J., joined by WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., and joined in part (as to holding 2 below) by Scalia, J., it was held that § 310(b)(1) is not unconstitutional, because (1) the federal imposition of a bond registration requirement on state and local governments does not violate the Tenth Amendment, where the national political process did not operate in a defective manner in regard to its enactment, and (2) a nondiscriminatory federal tax on the interest earned on state and local government bonds does not violate the intergovernmental tax immunity doctrine—overruling Pollock v. Farmers' Loan & Trust Co., supra.

STEVENS, J., concurred, expressing the view that the Court's decision does not express any opinion about the wisdom of taxing the interest on bonds issued by state or local governments.

SCALIA, J., concurred in part and concurred in the judgment, expressing the view (1) that precedents applying the Tenth Amendment do not support the proposition (a) that the national political process is the states' only constitutional protection, and (b) that nothing except the demonstration of some extraordinary defects in the operation of that process can justify judicial relief; but (2) that the federal constitutional structure does not prohibit what the Federal Government has done by enacting § 310(b)(1).

REHNQUIST, Ch. J., concurred in the judgment, expressing the view (1) that § 310(b)(1) does not contravene the doctrine of intergovernmental tax immunity, and (2) that the Special Master's finding that § 310(b)(1) has had no substantive effect on states' political processes or ability to raise debt capital was sufficient to establish its validity under the Tenth Amendment.

O'CONNOR, J., dissented, expressing the view that the Tenth Amendment and principles of federalism inherent in the Federal Constitution prohibit Congress from taxing or threatening to tax the interest paid on state and municipal bonds.

KENNEDY, J., did not participate.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

States, Territories, and Possessions § 37 — federal regulation of state and local bonds

1a-1f. Assuming that § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (26 USCS § 103(j)(1)), which removes the federal tax exemption for interest earned on certain bonds issued by state and local governments unless those bonds are registered, directly regulates those governments by effectively requiring them to issue bonds in registered rather than bearer form, then such a requirement does not violate the Tenth Amendment to the Federal Constitution or principles of federalism derived generally from the Constitution, where the national political process did not operate in a defective manner in regard to the enactment of § 310(b)(1), there is no merit in the argument that it is unconstitutional to commandeer the state or local legislative and administrative process by coercing state or local governments into enacting legislation which authorizes bond registration and into administering the registration scheme.

Income Taxes § 12 — federal tax power — interest on state and local bonds

2a-2e. A nondiscriminatory federal tax on the interest earned on bonds issued by state or local governments does not violate the intergovernmental tax immunity doctrine, and § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (26 USCS § 103(j)(1)), which removes the federal tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds are registered, thus is not unconstitutional as a violation of that doctrine, given (1) that § 310 imposes no direct tax on state or local governments, because the tax is imposed on and collected from bondholders and any increased administrative costs incurred by state and local governments in implementing the registration system are not "taxes" within the meaning of the tax immunity doctrine, and (2) that § 310(b)(1) does not discriminate against state and local governments, because other provisions of § 310 seek to assure that all publicly offered long-term bonds are issued in registered form; the holding in Pollock v Farmers' Loan & Trust Co. (1895) 157 US 429, 39 L Ed 759, 15 S Ct 673, mod 158 US 601, 39 L Ed 1108, 15 S Ct 912, that state bond interest is immune from a nondiscriminatory federal tax is overruled; the owners of state or local bonds have no constitutional entitlement not to pay taxes on income which they earn from such bonds. (O'Connor, J., dissented from this holding.)

Records and Recording Laws § 18 — transfer of registered bond

3a, 3b. A transfer of record ownership of a registered bond requires entering the change on the central registration list; however, since the record owner of a registered bond may sometimes differ from the beneficial owner, sellers can transfer beneficial ownership of most types of registered bonds without entering a change on the central list.

Bonds § 7; Evidence § 308 — ownership of bearer bond

4. Ownership of a bearer bond is presumed from possession and is transferred by physically handing over the bond.

States, Territories, and Possessions §§ 12, 37 — federal regulation of state activities — taxation of state bond interest

5a, 5b. The limits imposed on Congress' authority to regulate state activities under (1) the Federal Constitution's Tenth Amendment, or (2) principles of federalism derived generally from the Constitution, are structural, not substantive—that is, state and local governments must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable activity; although it is possible that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the above constitutional rules, there is no merit in a state's argument that § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (26

USCS § 103(j)(1)—which removes the federal tax exemption for interest earned on certain bonds issued by state and local governments unless those bonds are registered and thus allegedly forces such governments to issue only registered bonds—is the result of a failure in the national political process and therefore violates those constitutional rules, where the state does not allege that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless, but alleges only that § 310(b)(1) was imposed by the vote of an uninformed Congress which, in adopting that statute to combat alleged concealment of taxable income using bearer bonds, relied upon incomplete information and chose an ineffective remedy; courts are not authorized under the above constitutional principles to second-guess the substantive bases for congressional legislation.

States, Territories, and Possessions § 12 — state response to federal regulations

6. The fact that a state wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity presents no federal constitutional defect.

Internal Revenue § 4; United States § 15 — validity of conditional tax — power of Congress

7. The United States cannot convert an unconstitutional tax into a constitutional one simply by making the tax conditional; whether Congress could have imposed the condition by direct regulation is irrelevant, as Congress cannot employ unconstitutional means to reach a constitutional end.

Internal Revenue § 11.5; Taxes § 81 — state and federal tax immunities

8a, 8b. The immunity of the states from federal taxation arises from the federal constitutional structure and a concern for protecting state sovereignty, whereas the Federal Government's immunity from state taxation arises from the supremacy clause of the Federal Constitution (Art VI, cl 2).

Taxes §§ 68, 82 — state and federal governments — tax immunization of others

9a, 9b. The Federal Government has the power to enact statutes immunizing those with whom it deals from state taxation even if intergovernmental tax immunity doctrine would not otherwise confer an immunity; but the states lack any such power.

Internal Revenue § 11.4; Taxes §§ 81, 82 — taxes on governments and government contractors

10a-10c. State and local governments can never tax the United States directly but can tax any private parties with whom the United States does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals; a tax is considered to be directly on the Federal Government only when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to that government that the two cannot realistically be viewed as separate entities; the rule with respect to state tax immunity is essentially the same, except that at least some nondiscriminatory federal taxes can be collected directly from state and local governments even though a parallel state or local tax could not be collected directly from the Federal Government, the issue whether a nondiscriminatory federal tax might nonetheless violate state tax immunity does not arise unless the Federal Government seeks to collect the tax directly from a state or local government. (O'Connor, J., dissented in part from this holding.)

Income Taxes §§ 10, 12 — construction of Sixteenth Amendment — taxation of state bond interest

11a, 11b. The legislative history of the Sixteenth Amendment to the Federal Constitution—which authorizes Congress to collect taxes on income "from whatever source derived" without apportionment—does not manifest an intent to freeze into the Constitution the tax immunity for state bond interest that existed in 1913, but merely shows (1) that the words "from whatever source derived" were not affirmatively intended to authorize Congress to tax state bond interest or to have any other effect on the question of which incomes were subject to federal taxation, and (2) that the sole purpose of the Sixteenth Amendment was to remove the apportionment requirement for whichever incomes were otherwise taxable.

Bonds §§ 74, 155 — state and local bonds — interest rates

12. State and local governments have no federal constitutional entitlement to issue bonds paying lower interest rates than other issuers.

Income Taxes § 23 — government bond interest

13. Only state and local government bonds enjoy any exemption from the federal income tax on bond interest.

Income Taxes § 22 — corporate bond interest

14. Corporate bond interest is subject to federal income tax.

Internal Revenue § 11 — validity of tax

15a, 15b. Because Congress could have prohibited state and local governments from issuing any unregistered bonds by direct regulation, there is no merit in the argument that § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (26 USCS § 103(j)(1))—which removes the federal tax exemption for interest earned on certain bonds issued by state and local governments unless those bonds are registered—is an impermissible regulatory tax because it imposes a tax on activities that are not subject to federal regulatory power; the fact that § 310(b)(1) is purely regulatory in purpose and effect and was never intended to raise any federal revenue does not alone render it unconstitutional.

Supreme Court of the United States § 68 — original action by state against United States

16. In an action wherein a state invoked the original jurisdiction of the United States Supreme Court and filed a complaint against the United States Secretary of the Treasury, which complaint challenged the constitutionality of § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (26 USCS § 103(j)(1)), which removes the federal tax exemption for interest earned on certain bonds issued by state and local governments unless those bonds are registered, the Su-

preme Court—having found no merit in the state's claims that § 310(b)(1) violates various particular rules under the Federal Constitution—will (1) overrule the state's exceptions to the report of a Special Master who concluded that § 310(b)(1) was constitutional, and (2) approve the Special Master's recommendation to enter judgment for the Secretary.

SYLLABUS BY REPORTER OF DECISIONS

Section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 removes the federal income tax exemption for interest earned on publicly offered long-term bonds (hereinafter referred to as bonds) issued by state and local governments (hereinafter referred to collectively as States) unless those bonds are issued in registered (as opposed to bearer) form. South Carolina invoked this Court's original jurisdiction, contending that § 310(b)(1) is constitutionally invalid under the Tenth Amendment and the doctrine of intergovernmental tax immunity. A Special Master was appointed. After conducting hearings and taking evidence, he concluded that § 310(b)(1) is constitutional and recommended entering judgment for the defendant. South Carolina and the National Governors' Association (NGA), as an intervenor, filed exceptions to various factual findings of the Master and to his legal conclusions concerning their constitutional challenges.

Held:

1. Section 310(b)(1) does not violate the Tenth Amendment or constitutional principles of federalism by effectively compelling States to issue bonds in registered form.

(a) The Tenth Amendment limits on Congress' authority to regulate state activities are structural, not substantive—that is, the States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity. In this case, South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless. The allegations South Carolina does make—that Congress was uninformed and chose an ineffective remedy—do not amount to an allegation that the political process operated in a defective manner.

(b) NGA's contention that § 310 is invalid because it commandeers the state legislative and administrative process by coercing States into enacting legislation authorizing bond registration and into administering the registration scheme finds no support in the claim left open by FERC v Mississippi, 456 US 742, 72 L Ed 2d 532, 102 S Ct 2126. Section 310 regulates state activities; it does not, as did the statute in FERC, seek to control or influence the manner in which States regulate private parties. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect. Moreover, under NGA's theory, any State could immunize its activities from federal regulation by simply codifying the manner in which it engages in those activities.

2. Section 310(b)(1) does not violate the doctrine of intergovernmental tax immunity by taxing the interest

earned on unregistered state bonds. Section 310(b)(1) is inconsistent with this Court's holding in Pollock v Farmers' Loan & Trust Co., 157 US 429, 39 L Ed 759, 15 S Ct 673, that state bond interest was immune from a nondiscriminatory federal tax, but that decision has been effectively overruled by subsequent case law. Under the intergovernmental tax immunity jurisprudence prevailing at Pollock's time, neither the Federal nor the State Governments could tax income that an individual directly derived from *any* contract with the other government. This general rule was based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax "on" the government because it burdened the government's power to enter into the contract. That rationale has been repudiated by modern intergovernmental tax immunity case law, and the government contract immunities have been, one by one, overruled. The owners of state bonds have no constitutional entitlement not to pay taxes on income they earn from the bonds, and States have no constitutional entitlement to issue bonds paying lower interest rates than other issuers. The nondiscriminatory tax under § 310 is imposed on and collected from bondholders, not States, and any increased administrative costs incurred by States in implementing the registration system are not "taxes" within the meaning of the tax immunity doctrine. Moreover, the provisions of § 310 seek to assure that *all* publicly offered long-term bonds are issued in registered form, whether issued by state or local governments, the Federal Government, or private corporations.

Exceptions to Special Master's Report overruled, and judgment entered for defendant.

Brennan, J., delivered the opinion of the Court, in which White, Marshall, Blackmun, and Stevens, JJ., joined, and in which Scalia, J., joined except for Part II. Stevens, J., filed a concurring opinion. Scalia, J., filed an opinion concurring in part and concurring in the judgment. Rehnquist, C. J., filed an opinion concurring in the judgment. O'Connor, J., filed a dissenting opinion. Kennedy, J., took no part in the consideration or decision of the case.

APPEARANCES OF COUNSEL

John P. Linton argued the cause for plaintiff.

Lewis B. Kaden argued the cause for the National Governors' Association, as plaintiff-in-intervention by special leave of court.

Solicitor General Charles Fried argued the cause for defendant.

OPINION OF THE COURT

Justice Brennan delivered the opinion of the Court.

[1a, 2a] Section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. 97-248, 96 Stat. 596, 26 USC § 103(j)(1) [26 USCS § 103(j)(1)], removes the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds are

issued in registered form.[1] This original jurisdiction case presents the issues whether § 310(b)(1) of TEFRA either (1) violates the Tenth Amendment and constitutional principles of federalism by compelling States to issue bonds in registered form or (2) violates the doctrine of intergovernmental tax immunity by taxing the interest earned on unregistered state bonds.

I

[3a, 4] Historically, bonds have been issued as either registered bonds or bearer bonds. These two types of bonds differ in the mechanisms used for transferring ownership and making payments. Ownership of a registered bond is recorded on a central list, and a transfer of record ownership requires entering the change on that list.[2] The record owner automatically receives interest payments by check or electronic transfer of funds from the issuer's paying agent. Ownership of a bearer bond, in contrast, is presumed from possession and is transferred by physically handing over the bond. The bondowner obtains interest payments by presenting bond coupons to a bank that in turn presents the coupons to the issuer's paying agent.

In 1982, Congress enacted TEFRA, which contains a variety of provisions, including § 310, designed to reduce the federal deficit by promoting compliance with the tax laws. Congress had become concerned about the growing magnitude of tax evasion; Internal Revenue Service (IRS) studies indicated that unreported income had grown from an estimated range of $31.1 billion to $32.2 billion in 1973 to a range of $93.3 billion to $97 billion in 1981. Compliance Gap: Hearing before the Subcommittee on Oversight of the Internal Revenue Service of the Senate Committee on Finance, 97th Cong, 2d Sess, 126 (1982). Unregistered bonds apparently became a focus of attention because they left no paper trail and thus facilitated tax evasion. Then Assistant Secretary of the Treasury for Tax Policy John Chapoton testified before the House Ways and Means Committee that a registration requirement would help prevent tax evasion because bearer bonds often represent unreported and untaxed income that, without a system of recorded ownership, the IRS has difficulty reconstructing. Hearings on HR 6300 before the House Committee on Ways and Means, 97th Cong, 2d Sess, 35 (1982). He also expressed concern that bearer bonds were being used to avoid estate and gift taxes and as a medium of exchange in the illegal sector. Ibid. In reporting out the bill containing the provision that eventually became § 310 of TEFRA, the Senate Finance Committee Report expressed the same concerns:

> "The committee believes that a fair and efficient system of information reporting and withholding cannot be achieved with respect to interest-bearing obligations as long as a significant volume of long-term bearer instruments is issued. A system of book-entry registration will preserve the liquidity of obligations while requiring the creation of ownership records that can produce useful information reports with respect to both the payment of interest and the sale of obligations prior to maturity through brokers. Furthermore, registration will reduce the ability of noncompliant taxpayers to conceal income and property from the reach of the income, estate, and gift taxes. Finally, the registration requirement may reduce the volume of readily negotiable substitutes for cash available to persons engaged in illegal activities." S Rep No. 97-494, Vol 1, p 242 (1982).

Section 310 was designed to meet these concerns by providing powerful incentives to issue bonds in registered form.

Because § 310 aims to address the tax evasion concerns posed generally by unregistered bonds, it covers not only state bonds but also bonds issued by the United States and private corporations. Section 310(a) requires the United States to issue publicly offered bonds with a maturity of one year or more in registered form.[3] With respect to similar bonds issued by private corporations, §§ 310(b)(2)-(6) impose a series of tax penalties on nonregistration. Corporations declining to issue the covered bonds in registered form lose tax deductions and adjustments for interest paid on the bonds, §§ 310(b)(2) and (3), and must pay a special excise tax on the bond principal, § 310(b)(4). Holders of these unregistered corporate bonds generally cannot deduct capital losses or claim capital-gain treatment for any losses or gains sustained on the bonds. §§ 310(b)(5) and (6). Section 310(b)(1) completes this statutory scheme by denying the federal income tax exemption for interest earned on state bonds to owners of long-term publicly offered state bonds that are not issued in registered form.

South Carolina invoked the original jurisdiction of this Court, contending that § 310(b)(1) is constitutionally invalid under the Tenth Amendment and the doctrine of intergovernmental tax immunity. We granted South Carolina leave to file the instant complaint against the Secretary of the Treasury of the United States, South Carolina v Regan, 465 US 367, 79 L Ed 2d 372, 104 S Ct 1107 (1984), and appointed as Special Master the Honorable Samuel J. Roberts, 466 US 948, 80 L Ed 2d 535, 104 S Ct 2148 (1984). The National Governors' Association (NGA) intervened. After conducting hearings and taking evidence, the Special Master concluded that § 310(b)(1) was constitutional and recommended entering judgment for the defendant. South Carolina and the NGA filed exceptions to various factual findings of the Special Master and to the Master's legal conclusions concerning their constitutional challenges.

II

[1b] We address the claim that § 310(b)(1) violates the Tenth

1. For simplicity, we will refer to state and local governments collectively as "States" and will refer to publicly offered long-term bonds as "bonds."

2. [3b] The record owner of a registered bond may sometimes differ, however, from the beneficial owner, and sellers can transfer beneficial ownership of most types of registered bonds without entering a change on the central list.

3. Section 310 also provides various special exceptions to the registration requirements and incentives provided under subsections (a) and (b) for long-term publicly offered bonds issued by private corporations and federal and state governments, but those exceptions are not relevant here.

Amendment first.[4] South Carolina and the NGA contend, and the Master found, that § 310 effectively requires States to issue bonds in registered form, noting that if States issued bonds in unregistered form, competition from other nonexempt bonds would force States to increase the interest paid on state bonds by 28-35%, and that even though almost all state bonds were issued in bearer form before § 310 became effective, since then no State has issued a bearer bond. Report of Special Master pp 2, 23-24. South Carolina and the NGA thus argue that, for purposes of Tenth Amendment analysis, we must treat § 310 as if it simply banned bearer bonds altogether without giving States the option to issue nonexempt bearer bonds. The Secretary does not dispute the finding that § 310 effectively requires registration, see Brief for Defendant p 19 (urging the Court to adopt all the Master's findings), preferring to argue that § 310 survives Tenth Amendment scrutiny because a blanket prohibition by Congress on the issuance of bearer bonds can apply to States without violating the Tenth Amendment. For the purposes of Tenth Amendment analysis, then, we treat § 310 as if it directly regulated States by prohibiting outright the issuance of bearer bonds.[5]

A

[5a] The Tenth Amendment limits on Congress' authority to regulate state activities are set out in Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985). Garcia holds that the limits are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity. Id., at 537-554, 83 L Ed 2d 1016, 105 S Ct 1005. South Carolina contends that the political process failed here because Congress had no concrete evidence quantifying the tax evasion attributable to unregistered state bonds and relied instead on anecdotal evidence that taxpayers have concealed taxable income using bearer bonds. It also argues that Congress chose an ineffective remedy by requiring registration because most bond sales are handled by brokers who must file information reports regardless of the form of the bond and because beneficial ownership of registered bonds need not necessarily be recorded.

[1c, 5b] Although Garcia left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in Garcia had no occasion to identify or define the defects that might lead to such invalidation. See id., at 556, 83 L Ed 2d 1016, 105 S Ct 1005. Nor do we attempt any definitive articulation here. It suffices to observe that South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in any way that left it politically isolated and powerless. Cf. United States v Carolene Products Co., 304 US 144, 152, n 4, 82 L Ed 2d 1234, 58 S Ct 778 (1938). Rather, South Carolina argues that the political process failed here because § 310(b)(1) was "imposed by the vote of an uninformed Congress relying upon incomplete information." Brief for Plaintiff 101.[6] But nothing in Garcia or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation. Cf. Minnesota v Clover Leaf Creamery Co., 449 US 456, 464, 66 L Ed 2d 659, 101 S Ct 715 (1981). Where, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated.

B

[1d] The NGA argues that § 310 is invalid because it commandeers the state legislative and administrative process by coercing States into enacting legislation authorizing bond registration and into administering the registration scheme. They cite FERC v Mississippi, 456 US 742, 72 L Ed 2d 532, 102 S Ct 2126 (1982), which left open the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests, id., at 761-764, 72 L Ed 2d 532, 102 S Ct 2126. The extent to which the Tenth Amendment claim left open in FERC survives Garcia or poses constitutional limitations independent of those discussed in Garcia is far from clear. We need not, however, address that issue because we find the claim discussed in FERC inapplicable to § 310.

The federal statute at issue in FERC required state utility commissions to do the following: (1) adjudicate and enforce federal standards, (2) either consider adopting certain federal standards or cease regulating public utilities, and (3) follow certain procedures. The Court in FERC first distinguished National League of Cities v Usery, 426 US 833, 49 L Ed 2d 245, 96 S Ct 2465 (1976), noting that the statute in National League of Cities presented questions concerning "the extent to which state sovereignty shields the States from generally applicable federal regulations," whereas the statute in FERC "attempts to use state regulatory machinery to advance federal goals."

4. We use "the Tenth Amendment" to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution.

5. Given our holding infra, at ——, 99 L Ed 2d ——, that a federal tax on the interest paid on state bonds does not violate the intergovernmental tax immunity doctrine, one could argue that any law exempting state bond interest from the tax applicable to interest on other bonds is, in effect, a subsidy, and that Congress' decision to subsidize only registered state bonds must be judged under our Spending Clause cases. See generally South Dakota v Dole, 483 US ——, —— —, 97 L Ed 2d 171, 107 S Ct 2793 (1987) (stating that "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not consistently limit the range of conditions legitimately placed on federal grants," but that at some point "the financial inducement offered by Congress might be so coercive" as to be unconstitutional). The parties have not, however, chosen to attack or defend § 310(b)(1) based on a Spending Clause theory, and we decline to address the unlitigated issues of whether Spending Clause analysis applies or what its import would be in this case.

6. South Carolina also filed a number of exceptions to the Master's findings that the registration requirement imposed little financial or administrative burden on States and had little effect on States' ability to raise capital. These exceptions, and the NGA's exception to the Master's failure to find an interest rate differential between registered and bearer bonds, raise no issue concerning the operation of the national political process, and we need not address them here.

FERC, 456 US, at 759, 72 L Ed 2d 532, 102 S Ct 2126. The Court in FERC then concluded that, whatever constitutional limitations might exist on the federal power to compel state regulatory activity, Congress had the power to require that state adjudicative bodies adjudicate federal issues and to require that States regulating in a pre-emptible field consider suggested federal standards and follow federally mandated procedures. Id., at 759-767, 72 L Ed 2d 532, 102 S Ct 2126.

[1a, 6] Because, by hypothesis, § 310 effectively prohibits issuing unregistered bonds, it presents the very situation FERC distinguished from a commandeering of state regulatory machinery: the extent to which the Tenth Amendment "shields the States from generally applicable federal regulations." 456 US, at 759, 72 L Ed 2d 532, 102 S Ct 2126. Section 310 regulates state activities; it does not, as did the statute in FERC, seek to control or influence the manner in which States regulate private parties. The NGA nonetheless contends that § 310 has commandeered the state legislative and administrative process because many state legislatures had to amend a substantial number of statutes in order to issue bonds in registered form and because state officials had to devote substantial effort to determine how best to implement a registered bond system. Such "commandeering" is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect. After Garcia, for example, several States and municipalities had to take administrative and legislative action to alter the employment practices or raise the funds necessary to comply with the wage and overtime provisions of the Federal Labor Standards Act.[7] Indeed, even the pre-Garcia line of Tenth Amendment cases recognized that Congress could constitutionally impose federal requirements on States that States could meet only by amending their statutes. See EEOC v Wyoming, 460 US 226, 253-254, and n 2, 75 L Ed 2d 18, 103 S Ct 1054 (1983) (Burger, C. J., dissenting) (citing state statutes from over half the States that did not comply with the federal statute upheld by the Court). Under the NGA's theory, moreover, any State could immunize its activities from federal regulation by simply codifying the manner in which it engages in those activities. In short, the NGA's theory of "commandeering" would not only render Garcia a nullity, but would restrict congressional regulation of state activities even more tightly than it was restricted under the now overruled National League of Cities line of cases. We find the theory foreclosed by precedent, and uphold the constitutionality of § 310 under the Tenth Amendment.

III

[2b] South Carolina contends that even if a statute banning state bearer bonds entirely would be constitutional, § 310 unconstitutionally violates the doctrine of intergovernmental tax immunity because it imposes a tax on the interest earned on a state bond. We agree with South Carolina that § 310 is inconsistent with Pollock v Farmers' Loan & Trust Co., 157 US 429, 39 L Ed 759, 15 S Ct 673 (1895), which held that any interest earned on a state bond was immune from federal taxation.

[7] The Secretary and the Master, however, suggest that we should uphold the constitutionality of § 310 without explicitly overruling Pollock because § 310 does not abolish the tax exemption for state bond interest entirely but rather taxes the interest on state bonds only if the bonds are not issued in the form Congress requires. In our view, however, this suggestion implicitly rests on a rather mischievous proposition of law. If, for example, Congress imposed a tax that applied exclusively to South Carolina and levied the tax directly on the South Carolina treasury, we would be obligated to adjudicate the constitutionality of that tax even if Congress allowed South Carolina to escape the tax by restructuring its state government in a way Congress found more to its liking. The United States cannot convert an unconstitutional tax into a constitutional one simply by making the tax conditional. Whether Congress could have imposed the condition by direct regulation is irrelevant; Congress cannot employ unconstitutional means to reach a constitutional end. Under Pollock, a tax on the interest income derived from any state bond was considered a direct tax on the State and thus unconstitutional. 157 US, at 585-586, 39 L Ed 759, 15 S Ct 673. If this constitutional rule still applies, Congress cannot threaten to tax the interest on state bonds that do not conform to congressional dictates. We thus decline to follow a suggestion that would force us to embrace implicitly a proposition of law far more controversial than the current validity of Pollock's ban on taxing state bond interest, and proceed to address whether Pollock should be explicitly overruled.[8]

Under the intergovernmental tax immunity jurisprudence prevailing at the time, Pollock did not represent a unique immunity limited to income derived from state bonds. Rather, Pollock merely represented one application of the more general rule that neither the federal nor the state governments could tax income an individual directly derived from *any* contract with another government.[9] Not only was it unconstitutional for the Federal Government to tax a bondowner on the interest she received on any state bond, but

7. See generally Hearings on S 1870 before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 98th Cong. 1st Sess (1985); The Impact of the Supreme Court's Garcia Decision Upon States and Their Political Subdivisions: Hearing before the Subcommittee on Economic Goals and Intergovernmental Policy of the Joint Economic Committee Congress of the United States, 98th Cong. 1st Sess (1985).

8. The Secretary also argues that we need not reach the tax immunity issue on the ground that, because all state bonds have been issued in registered form since § 310 became effective, no federal tax on state bearer bond interest has ever actually been imposed. We see no reason, however, why South Carolina cannot bring a facial challenge to § 310 rather than an as-applied challenge.

9. Income indirectly derived from a contract with the government was treated differently. See, e.g., Willcuts v Bunn, 282 US 216, 227-230, 75 L Ed 304, 51 S Ct 125, 71 ALR 1260 (1931) (constitutional to tax capital gain on sale of state bond because State not a party to the sale contract); see also Greiner v Lewellyn, 258 US 384, 66 L Ed 676, 42 S Ct 324 (1922) (constitutional to tax transfer of estate even though state bonds are included in determining the value of the estate).

it was also unconstitutional to tax a state employee on the income earned from his employment contract, Collector v Day, 11 Wall 113, 20 L Ed 122 (1871), to tax a lessee on its income derived from lands leased from a State, Burnet v Coronado Oil, 285 US 393, 76 L Ed 815, 52 S Ct 443 (1932), or to impose a sales tax on proceeds a vendor derived from selling a product to a state agency, Indian Motocycle Co v United States, 283 US 570, 75 L Ed 1277, 51 S Ct 601 (1931). Income derived from the same kinds of contracts with the Federal Government were likewise immune from taxation by the States. See Weston v City Council of Charleston, 2 Pet 449, 7 L Ed 481 (1829) (federal bond interest immune from state taxation); Dobbins v Commissioners of Erie County, 16 Pet 435, 10 L Ed 1022 (1842) (federal employee immune from state tax on salary); Gillespie v Oklahoma, 257 US 501, 66 L Ed 338, 42 S Ct 171 (1922) (income derived from federal lease immune from state tax); Panhandle Oil Co. v Knox, 277 US 218, 72 L Ed 857, 48 S Ct 451, 56 ALR 583 (1928) (vendor immune from sales tax on vendor's proceeds from sale to the United States). Cases concerning the tax immunity of income derived from state contracts freely cited principles established in federal tax immunity cases, and vice versa. See, e.g., Coronado Oil, supra, at 398, 76 L Ed 816, 52 S Ct 443; Indian Motocycle, supra, at 575-579, 75 L Ed 1277, 51 S Ct 601; Pollock, supra, at 58639 L Ed 759, 15 S Ct 673. See generally Indian Motocycle, supra, at 575, 75 L Ed 1277, 51 S Ct 601 (immunity of States from federal tax equal to immunity of Federal Government from state tax); Metcalf & Eddy v Mitchell, 269 US 514, 521-522, 70 L Ed 384, 46 S Ct 172 (1926), Collector v Day, supra, at 127, 20 L Ed 122.

[8a, 9a] This general rule was based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax "on" the government because it burdened the government's power to enter into the contract. The Court in Pollock borrowed its reasoning directly from the decision in Weston exempting federal bond interest from state taxation:

> "'The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends upon the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. . . . The tax on government stock is thought by this court to be a tax on the contract, a tax on the [government's] power to borrow money . . . and consequently to be repugnant to the Constitution.'" Pollock, supra, at 586, 39 L Ed 759, 15 S Ct 673, quoting Weston, supra, at 467, 468, 7 L Ed 481.

Thus, although a tax was collected from an independent private party, the tax was considered to be "on" the government because the tax burden might be passed on to it through the contract. This reasoning was used to define the basic scope of both federal and state tax immunities with respect to all types of government contracts.[10] See, e.g., Coronado Oil, supra, at 400-401, 76 L Ed 816, 52 S Ct 443 ("Here the lease was an instrumentality of the State. . . . To tax the income of the lessee arising therefrom would amount to an imposition upon the lease itself"); Panhandle Oil, supra, at 222, 72 L Ed 857, 48 S Ct 451, 56 ALR 583 ("It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests"); Gillespie, supra, at 505-506, 66 L Ed 338, 42 S Ct 171 ("A tax upon the lessee is a tax upon the power to make them . . ." quoting Indian Territory Illuminating Oil Co v Oklahoma, 240 US 522, 530, 60 L Ed 779, 36 S Ct 453 (1916)). The commonality of the rationale underlying all these immunities for government contracts was highlighted by Indian Motocycle, supra. In that case, the Court reviewed the then current status of intergovernmental tax immunity doctrine, observing that a tax on interest earned on a state or federal bond was unconstitutional because it would burden the exercise of the government's power to borrow money and that a tax on the salary of state or Federal Government employee was unconstitutional because it would burden the government's power to obtain the employee's services. Id., at 576-578, 75 L Ed 1277, 51 S Ct 601. It then concluded that under the same principle a sales tax imposed on a vendor for a sale to a state agency was unconstitutional because it would burden the sale transaction. Id., at 579, 75 L Ed 1277, 51 S Ct 601.

[10a] The rationale underlying

10. **[8b, 9b]** The sources of the state and federal immunities are, of course, different. The state immunity arises from the constitutional structure and a concern for protecting state sovereignty whereas the federal immunity arises from the Supremacy Clause. The immunities have also differed somewhat in their underlying political theory and in their doctrinal contours. Many of this Court's opinions have suggested that the Constitution should be interpreted to confer a greater tax immunity on the Federal Government than on States because all the people of the States are represented in the Federal Government whereas all the people of the Federal Government are not represented in individual States. Helvering v Gerhardt, 304 US 405, 412, 82 L Ed 1427, 58 S Ct 969 (1938); McCulloch v Maryland, 4 Wheat 316, 435-436, 4 L Ed 579 (1819); New York v United States, 326 US 572, 577, and n 3, 90 L Ed 326, 66 S Ct 310 (1946) (Opinion of Frankfurter, J.). In fact, the federal tax immunity has always been greater than the States' immunity. The Federal Government, for example, possesses the power to enact statutes immunizing those with whom it deals from state taxation even if intergovernmental tax immunity doctrine would not otherwise confer an immunity. See, e.g., Graves v New York ex rel. O'Keefe, 306 US 466, 478, 83 L Ed 927, 59 S Ct 595, 120 ALR 1466 (1939). The States lack any such power. Also, although the Federal Government has always enjoyed blanket immunity from any state tax considered to be "on" the government under the prevailing methodology, the States have never enjoyed immunity from all federal taxes considered to be "on" a State. See infra, at ——, 99 L Ed 2d ——, and n 13. To some, Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985), may suggest further limitations on state tax immunity. We need not, however, decide here the extent to which the scope of the federal and state immunities differ or the extent, if any, to which States are currently immune from direct nondiscriminatory federal taxation. It is enough for our purposes that federal and state tax immunity cases have always shared the identical methodology for determining whether a tax is "on" a government, and that this identity has persisted even though the methodology for both federal and state immunities has changed as intergovernmental tax immunity doctrine shifted into the modern era. See Graves, supra, at 486, 83 L Ed 927, 59 S Ct 595, 120 ALR 1466.

Pollock and the general immunity for government contract income has been thoroughly repudiated by modern intergovernmental immunity caselaw. In Graves v New York ex rel. O'Keefe, 306 US 466, 83 L Ed 927, 59 S Ct 595, 120 ALR 1466 (1939), the Court announced, "The theory . . . that a tax on income is legally or economically a tax on its source, is no longer tenable." Id., at 480, 83 L Ed 927, 59 S Ct 595, 120 ALR 1466. The Court explained,

> "So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes . . . ." Id., at 487, 83 L Ed 927, 59 S Ct 595, 120 ALR 1466.

See also James v Dravo Contracting Co., 302 US 134, 160, 82 L Ed 155, 58 S Ct 208, 114 ALR 318 (1937) (the fact that a tax on a government contractor "may increase the cost to the Government . . . would not invalidate the tax"); Helvering v Gerhardt, 304 US 405, 424, 82 L Ed 1427, 58 S Ct 969 (1938). The thoroughness with which the Court abandoned the burden theory was demonstrated most emphatically when the Court upheld a state sales tax imposed on a government contractor even though the financial burden of the tax was entirely passed on, through a cost-plus contract, to the Federal Government. Alabama v King & Boozer, 314 US 1, 86 L Ed 3, 62 S Ct 43, 140 ALR 615 (1941). The Court stated:

> "The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as part of the construction cost to the Government. So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, we think it no longer tenable." Id., at 8-9, 86 L Ed 3, 62 S Ct 43, 140 ALR 615 (citations omitted).

King & Boozer thus completely foreclosed any claim that the nondiscriminatory imposition of costs on private entities that pass them on to States or the Federal Government unconstitutionally burdens state or federal functions. Subsequent cases have consistently reaffirmed the principle that a non-discriminatory tax collected from private parties contracting with another government is constitutional even though part or all of the financial burden falls on the other government. See

Washington v United States, 460 US 536, 540, 75 L Ed 2d 264, 103 S Ct 1344 (1983); United States v New Mexico, 455 US 720, 734, 71 L Ed 2d 580, 102 S Ct 1373 (1982); United States v County of Fresno, 429 US 452, 460-462, and n 9, 50 L Ed 2d 683, 97 S Ct 699 (1977); United States v City of Detroit, 355 US 466, 469, 2 L Ed 2d 424, 78 S Ct 474 (1958).

[11a] With the rationale for conferring a tax immunity on parties dealing with another government rejected, the government contract immunities recognized under prior doctrine were, one by one, eliminated. Overruling Burnet v Coronado Oil, 285 US 393, 76 L Ed 815, 52 S Ct 443 (1932), and Gillespie v Oklahoma, 257 US 501, 66 L Ed 338, 42 S Ct 171 (1922), the Court upheld the constitutionality of a federal tax on net income a corporation derived from a state lease in Helvering v Mountain Producers Corp., 303 US 376, 82 L Ed 907, 58 S Ct 623 (1938). See also Oklahoma Tax Comm'n v Texas Co., 336 US 342, 93 L Ed 721, 69 S Ct 561 (1949) (upholding constitutionality of federal tax on gross income derived from state lease). Later, the Court explicitly overruled Collector v Day, 11 Wall 113, 20 L Ed 122 (1871), and upheld the constitutionality of a nondiscriminatory state tax on the salary of a federal employee. Graves v New York ex rel. O'Keefe, 306 US 466, 83 L Ed 927, 59 S Ct 595, 120 ALR 1466 (1939).[11] And in the course of upholding a sales tax on a cost-plus government contractor, the Court in King & Boozer overruled Panhandle Oil Co. v Knox, 277 US 218, 72 L Ed 857, 48 S Ct 451, 56 ALR 583 (1928). See also James, supra (upholding state tax on gross income independent contractor received from Federal Government). The only premodern tax immunity for parties to government contracts that has so far avoided being explicitly overruled is the immunity for recipients of governmental bond interest.[12] That this Court has yet to overrule Pollock explicitly, however, is explained not by any distinction between the income derived from government bonds and the income derived from other government contracts, but by the historical fact that Congress has always exempted state bond interest from taxation by statute, beginning with the very first federal income

11. Prior to that the Court had already confined Collector v Day, 11 Wall 113, 20 L Ed 122 (1871), to its facts in Helvering v Gerhardt, 304 US 405, 82 L Ed 1427, 58 S Ct 969 (1938), which upheld the constitutionality of a federal tax on the salaries of state employees involved in state construction projects.

12. [11b] South Carolina and the Government Finance Officers Association as amicus curiae argue that the legislative history of the Sixteenth Amendment, which authorizes Congress to "collect taxes on incomes, from whatever source derived, without apportionment," manifests an intent to freeze into the Constitution the tax immunity for state bond interest that existed in 1913. We disagree. The legislative history merely shows that the words "from whatever source derived" of the Sixteenth Amendment were not affirmatively intended to authorize Congress to tax state bond interest or to have any other effect on which incomes were subject to federal taxation, and that the sole purpose of the Sixteenth Amendment was to remove the apportionment requirement for whichever incomes were otherwise taxable. 45 Cong Rec 2245-2246 (1910), id., at 2539; see also Brushaber v Union Pacific R. Co., 240 US 1, 17-18, 60 L Ed 493, 36 S Ct 236 (1916). Indeed, if the Sixteenth Amendment had frozen into the Constitution all the tax immunities that existed in 1913, then most of modern intergovernmental tax immunity doctrine would be invalid.

tax statute, Act of Oct. 3, 1913, ch 16, § II(B), 38 Stat 168.

[10b] In sum, then, under current intergovernmental tax immunity doctrine the States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals. See Washington, supra, at 540, 76 L Ed 2d 264, 103 S Ct 1344; County of Fresno, supra, at 460-463, 50 L Ed 2d 683, 97 S Ct 699; City of Detroit, supra, at 473, 2 L Ed 2d 424, 78 S Ct 474; Oklahoma Tax Comm'n, supra, at 359-364, 93 L Ed 721, 69 S Ct 561. A tax is considered to be directly on the Federal Government only "when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." New Mexico, supra, at 735, 71 L Ed 2d 580, 102 S Ct 1373. The rule with respect to state tax immunity is essentially the same, see, e.g., Graves, supra, at 485, 83 L Ed 927, 59 S Ct 595, 120 ALR 1466; Mountain Producers Corp., supra, at 386-387, 82 L Ed 907, 58 S Ct 623, except that at least some nondiscriminatory federal taxes can be collected directly from the States even though a parallel state tax could not be collected directly from the Federal Government." See generally supra, at ——, n 10, 99 L Ed 2d ——.

13. [10c] All federal activities are immune from direct state taxation, see Graves, 306 US at 477, 83 L Ed 927, 59 S Ct 595, 120 ALR 1466, but at least some state activities have always been subject to direct federal taxation. For a time, only the States' governmental, as opposed to proprietary, activities enjoyed tax immunity, see e.g., Helvering v Powers, 293 US 214, 227, 79 L Ed 291, 55 S Ct 171 (1934); South Carolina v United States, 199 US 437, 454-463, 50 L Ed 261, 26 S Ct 110 (1905), but this distinction was subsequently abandoned as untenable by all eight justices participating in New York v United States, 326 US 572, 90 L Ed 320, 66 S Ct 310 (1946). See id., at 579-581, 583, 90 L Ed 326, 66 S Ct 310 (opinion of Frankfurter, J., joined by Rutledge, J.); id., at 586, 90 L Ed 326, 66 S Ct 310 (Stone, C. J., concurring, joined by Reed, Murphy and Burton, JJ.); id., at 591, 90 L Ed 326, 66 S Ct 310 (Douglas, J., dissenting, joined by Black, J.). Two justices reasoned that any nondiscriminatory tax on a State was constitutional, even if directly collected from the State. See id., at 582-584, 90 L Ed 326, 66 S Ct 310 (Frankfurter, J., joined by Rutledge, J.). Four other justices declined to hold that every nondiscriminatory tax levied directly on a State would be constitutional because "there may be nondiscriminatory taxes which, when laid on a State, would nevertheless impair the sovereign status of the State quite as much as a like tax imposed by a State on property or activities of the national government." Mayo v United States, 319 US 441, 447-448, 87 L Ed 1494, 63 S Ct 1137, 147 ALR 761. This is not because the tax can be regarded as discriminatory but because a sovereign government is the taxpayer, and the tax, even though nondiscriminatory, may be regarded as infringing its sovereignty. 326 US at 587, 90 L Ed 326, 66 S Ct 310 (Stone, C. J., concurring, joined by Reed, Murphy and Burton, JJ.) (emphasis added). The cited discussion from Mayo stressed the difference between levying a tax on a government and on those with whom the government deals; see also id., at 588, 90 L Ed 326, 66 S Ct 310 ("Only when and because the subject of taxation is State property or a State activity must we consider whether such a nondiscriminatory tax unduly interferes with the performance of the State's functions as government"). The four justices then concluded that the tax at issue was constitutional even though directly levied on the State because recognizing an immunity would "accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning." Ibid. We need not concern ourselves here, however, with the extent to which, if any, States are currently immune from direct federal taxation. See supra, at ——, n 10, 99 L Ed 2d ——. For our purposes, the important principle New York

[2c, 12] We thus confirm that subsequent caselaw has overruled the holding in Pollock that state bond interest is immune from a nondiscriminatory federal tax. We see no constitutional reason for treating persons who receive interest on government bonds differently than persons who receive income from other types of contracts with the government, and no tenable rationale for distinguishing the costs imposed on States by a tax on state bond interest from the costs imposed by a tax on the income from any other state contract. We stated in Graves, "as applied to the taxation of salaries of the employees of one government, the purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to a government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private. . . ." 306 US, at 483, 83 L Ed 927, 59 S Ct 595, 120 ALR 1466. Likewise, the owners of state bonds have no constitutional entitlement not to pay taxes on income they earn from state bonds, and States have no constitutional entitlement to issue bonds paying lower interest rates than other issuers."

realizing is that the issue whether a nondiscriminatory federal tax might nonetheless violate state tax immunity does not even arise unless the Federal Government seeks to collect the tax directly from a State.

14. South Carolina distinguishes the taxes by arguing that the interest paid to a State's bondholders is more essential to the maintenance of a state government than the salaries paid to employees. This strikes us as counterintuitive in fact. More importantly, the essential/nonessential distinction it invokes is exactly the type of distinction we concluded was unworkable in Garcia, 469 US, at 542-547, 83 L Ed 2d 1016, 105 S Ct 1005 (rejecting rules of state immunity turning on whether a governmental function is "essential," "governmental" versus "proprietary," "traditional", "uniquely governmental", "necessary", or "integral").

"There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people, acting not through the courts but through their elected legislative representatives, have the power to determine as conditions demand, what services and functions the public welfare requires." Id., at 546, 83 L Ed 2d 1016, 105 S Ct 1005, quoting Gerhardt, 304 US, at 427, 82 L Ed 1427, 58 S Ct 969 (Black, J., concurring).

Similarly, Justice O'Connor would have us judge the constitutionality of each tax imposing an indirect burden on state and local governments by determining whether the tax had "substantial" adverse effects on those governments. Post, at —— ——, 99 L Ed 2d 616-616. We fail to see how this substantiality test distinguishes taxes on state bond interest from taxes on state employees' salaries. More importantly, we disagree with Justice O'Connor's apparent assumption that if this Court does not undertake the open-ended and administratively daunting inquiry required by her test, we leave States at the mercy of a congressional power to destroy them via excessive taxation. Post, at —— ——, 99 L Ed 2d 616-617. The nondiscrimination principle at the heart of modern intergovernmental tax immunity caselaw does not leave States unprotected from excessive federal taxation—it merely recognizes that the best safeguard against excessive taxation (and the most judicially manageable) is the requirement that the government tax in a nondiscriminatory fashion. For where a government imposes a nondiscriminatory tax, judges can term the tax "excessive" only by second-guessing the extent to which the taxing government and its people have taxed themselves, and the threat of destroying another government can be realized only if the taxing government is willing to impose taxes that will also destroy itself or its constituents.

Indeed, this Court has in effect acknowledged that a holder of a government bond could constitutionally be taxed on bond interest in Memphis Bank & Trust Co. v Garner, 459 US 392, 74 L Ed 2d 562, 103 S Ct 692 (1983), which involved a state tax on federal bond interest. Although that case involved an interpretation of 31 USC § 742 [31 USCS § 742], we premised our statutory interpretation on the observation that "[o]ur decisions have treated § 742 as principally a restatement of the constitutional rule." 459 US, at 397, 74 L Ed 2d 562, 103 S Ct 692. We then stated: "Where, *as here*, the economic but not the legal incidence of the tax falls upon the Federal Government, such a tax generally does not violate the constitutional immunity if it does not discriminate against holders of federal property or those with whom the Federal Government deals." Ibid. (emphasis added)

[2d, 13, 14] TEFRA § 310 thus clearly imposes no direct tax on the States. The tax is imposed on and collected from bondholders, not States, and any increased administrative costs incurred by States in implementing the registration system are not "taxes" within the meaning of the tax immunity doctrine. See generally United States v Mississippi Tax Comm'n., 421 US 599, 606, 44 L Ed 2d 404, 95 S Ct 1872 (1975) (describing tax as an enforced contribution to provide for the support of government). Nor does § 310 discriminate against States. The provisions of § 310 seek to assure that *all* publicly offered long-term bonds are issued in registered form, whether issued by state or local governments, the Federal Government, or private corporations. See *supra*, at ——, 99 L Ed 2d ——. Accordingly, the Federal Government has directly imposed the same registration requirement on itself that it has effectively imposed on States. The incentives States have to switch to registered bonds are necessarily different than those of corporate bond issuers because only state bonds enjoy any exemption from the federal tax on bond interest, but the sanctions for issuing unregistered corporate bonds are comparably severe. See ibid. Removing the tax exemption for interest earned on state bonds would not, moreover, create a discrimination between state and corporate bonds since corporate bond interest is already subject to federal tax.

IV

[1f, 2e, 15a, 16] Because the federal imposition of a bond registration requirement on States does not violate the Tenth Amendment and because a nondiscriminatory federal tax on the interest earned on state bonds does not violate the intergovernmental tax immunity doctrine, we uphold the constitutionality of § 310,[16] overrule the exceptions to the Special Master's Report, and approve his recommendation to enter judgment for the defendant.

[16. [15b] Because we hold that Congress could have prohibited States from issuing any unregistered bonds by direct regulation, we necessarily reject South Carolina's argument that § 310(b)(1) is an impermissible regulatory tax because it imposes a tax on activities not subject to federal regulatory power. That § 310(b) is purely regulatory in purpose and effect and was never intended to raise any federal revenue does not alone render it unconstitutional. See Minor v United States, 396 US 87, 98 n 11, 24 L Ed 2d 283, 90 S Ct 284 (1969).]

It is so ordered.

Justice Kennedy took no part in the consideration or decision of this case.

SEPARATE OPINIONS

Justice Stevens, concurring.

Although the Court properly finds Support for its holding in Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985), the outcome of this case was equally clear well before that case was decided. See South Carolina v Regan, 465 US 367, 403-419, 79 L Ed 2d 372, 104 S Ct 1107 (1984) (Stevens, J., concurring in part and dissenting in part). It should be emphasized, however, that neither the Court's decision today, nor what I have written in the past, expresses any opinion about the wisdom of taxing the interest on bonds issued by state or local governments.

Justice Scalia, concurring in part and concurring in the judgment.

I join in the Court's judgment, and in its opinion except for Part II. I do not join the latter because, as observed by The Chief Justice, *post*, at ——, 99 L Ed 2d 614, it unnecessarily casts doubt upon FERC v Mississippi, 456 US 742, 72 L Ed 2d 532, 102 S Ct 2126 (1982), and because it misdescribes the holding in Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985). I do not read Garcia as adopting—in fact I read it as explicitly disclaiming—the proposition attributed to it in today's opinion, *ante*, at —— —— ——, 99 L Ed 2d 602-603, that the "national political process" is the States' only constitutional protection, and that nothing except the demonstration of "some extraordinary defect" in the operation of that process can justify judicial relief. We said in Garcia: "These cases do not require us to identify or define what affirmative limits *the constitutional structure* might impose on federal action affecting the States under the Commerce Clause. See Coyle v Oklahoma, 221 US 559[55 L Ed 853, 31 S Ct 688] (1911)." See 469 US, at 556, 83 L Ed 2d 1016, 105 S Ct 1005 (emphasis added). I agree only that that structure does not prohibit what the Federal Government has done here.

Chief Justice Rehnquist, concurring in the judgment.

Today the Court reaches two results regarding § 310(b)(1) of TEFRA that I believe are analytically distinct. First, the Court finds that § 310(b)(1) does not violate the Tenth Amendment by compelling States to issue bonds in registered form. Second, the majority concludes that the statute also does not contravene the doctrine of intergovernmental tax immunity; in doing so, the majority overrules our decision in Pollock v Farmers' Loan & Trust Co., 157 US 429, 39 L Ed 759, 15 S Ct 673 (1895). While I agree that the principles of intergovernmental tax immunity are not threatened in this case, in my view the Court unnecessarily casts doubt on the protective scope of the Tenth Amendment in the course of upholding § 310(b)(1).

The Special Master appointed by the Court made a number of factual determinations about the impact that the TEFRA registration re-

quirements would have upon the States. Most notably, the Special Master found that the registration requirements have had no substantive effect on the abilities of States to raise debt capital, on the political processes by which States decide to issue debt, or on the power of the States to choose the purpose to which they will dedicate the proceeds of their tax-exempt borrowing. After an exhaustive investigation, the Special Master summarized: "TEFRA has not changed how much the States borrow, for what purposes they borrow, how they decide to borrow, or any other obviously important aspect of the borrowing process." Report of Special Master 118.

This well-supported conclusion that § 3(b)(1) has had a de minimis impact on the States should end, rather than begin, the Court's constitutional inquiry. Even the more expansive conception of the Tenth Amendment espoused in National League of Cities v Usery, 426 US 833, 49 L Ed 2d 245, 96 S Ct 2465 (1976), recognized that only congressional action that "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," runs afoul of the authority granted Congress. Id., at 852, 49 L Ed 2d 245, 96 S Ct 2465. The Special Master determined that no such displacement has occurred through the implementation of the TEFRA requirements; I see no need to go further, as the majority does, to discuss the possibility of defects in the national political process that spawned TEFRA, nor to hypothesize that the Tenth Amendment concerns voiced in FERC v Mississippi, 456 US 742, 72 L Ed 2d 532, 102 S Ct 2126 (1982), may not have survived Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985). These issues, intriguing as they may be, are of no moment in the present case and are best left unaddressed until clearly presented.

Justice O'Connor, dissenting.

The Court today overrules a precedent that it has honored for nearly a hundred years and expresses a willingness to cancel the constitutional immunity that traditionally has shielded the interest paid on state and local bonds from federal taxation. Henceforth the ability of state and local governments to finance their activities will depend in part on whether Congress voluntarily abstains from tapping this permissible source of additional income tax revenue. I believe that state autonomy is an important factor to be considered in reviewing the National Government's exercise of its enumerated powers. Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 581, 83 L Ed 2d 1016, 105 S Ct 1005 (1985) (O'Connor, J., joined by Powell and Rehnquist, JJ., dissenting). I dissent from the decision to overrule Pollock v Farmers' Loan & Trust Co., 157 US 429, 39 L Ed 759, 15 S Ct 673 (1895), and I would invalidate Congress' attempt to regulate the sovereign States by threatening to deprive them of this tax immunity, which would increase their dependence on the National Government.

Section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), 26 USC § 103(j)[126 USCS § 103(j)(1)], provides that the interest paid on state and local bonds will be subject to federal income tax unless the bonds are issued in registered

form. The Court readily concludes that Congress could have prohibited outright the issuance of bearer bonds without violating the Tenth Amendment. Ante, at ———, 99 L. Ed. 2d 602-603. But regardless of whether Congress could have required registration of the bonds directly under its commerce power, I agree with the Court that Congress may not accomplish the same end by an unconstitutional means. Ante, at ———, 99 L. Ed. 2d 604-605. In my view, the Tenth Amendment and principles of federalism inherent in the Constitution prohibit Congress from taxing or threatening to tax the interest paid on state and municipal bonds. It is also arguable that the States' autonomy is protected from substantial federal incursions by virtue of the Guarantee Clause of the Constitution, Art. IV, § 4. See Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 70-73 (1988) (arguing that judicial enforcement of the Guarantee Clause is proper).

The Court never expressly considers whether federal taxation of state and local bond interest violates the Constitution. Instead, the majority characterizes the federal tax exemption for state and local bond interest as an aspect of intergovernmental tax immunity, and it describes the decline of the intergovernmental tax immunity doctrine in this century. But constitutional principles do not depend upon the rise or fall of particular legal doctrines. This Court has a continuing responsibility "to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States." Garcia, supra, at 581, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (O'Connor, J., joined by Powell and Rehnquist, JJ., dissenting). In my view, the Court shirks its responsibility because it fails to inquire into the substantial adverse effects on state and local governments that would follow from federal taxation of the interest on state and local bonds.

Long-term debt obligations are an essential source of funding for state and local governments. In 1974, state and local governments issued approximately $23 billion of new municipal bonds; in 1984, they issued $102 billion of new bonds. Report of Special Master 20. State and local governments rely heavily on borrowed funds to finance education, road construction, and utilities, among other purposes. As the Court recognizes, States will have to increase the interest rates they pay on bonds by 28-35% if the interest is subject to the federal income tax. Ante, at ——, 99 L. Ed. 2d 602. Governmental operations will be hindered severely if the cost of capital rises by one-third. If Congress may tax the interest paid on state and local bonds, it may strike at the very heart of state and local government activities.

In the pivotal cases which first set limits to intergovernmental tax immunity, this Court paid close attention to the practical effects of its decisions. The Court limited the government's immunity only after it determined that application of a tax would not substantially affect government operations. Thus in the first case to uphold federal income taxation of revenue earned by a state contractor, this Court observed that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." Metcalf & Eddy v Mitchell, 269

US 514, 523-524, 70 L. Ed. 384, 46 S. Ct. 172 (1926). When this Court extended its holding to the case of a state tax on a federal contractor, it expressly noted that the tax "does not interfere in any substantial way with the performance of federal functions." James v. Dravo Contracting Co., 302 US 134, 161, 82 L. Ed. 155, 58 S. Ct. 208, 114 ALR 318 (1937). In upholding the application of the federal income tax to income derived from a state lease, this Court decided that mere theoretical concerns about interference with the functions of government did not justify immunity, but that "[r]egard must be had to substance and direct effects." Helvering v. Mountain Producers Corp., 303 US 376, 386, 82 L. Ed. 907, 58 S. Ct. 623 (1938). In Helvering v. Gerhardt, 304 US 405, 82 L. Ed. 1427, 58 S. Ct. 969 (1938), this Court upheld the application of the federal income tax to income earned by a state employee, because there is "[no] immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government." Id., at 419-420, 82 L. Ed. 1427, 58 S. Ct. 969.

The instant case differs critically from the cases quoted above because the Special Master found that, if the interest on state and local bonds is taxed, the cost of borrowing by state and local governments would rise substantially. This certainly would affect seriously state and local government operations. The majority is unconcerned with this difference because it is satisfied with the formal test of intergovernmental tax immunity that can be distilled from later cases. Under this test, if a tax is not imposed directly on the government, and does not discriminate against the government, then it does not violate intergovernmental tax immunity. See ante, at ——— ———, 99 L. Ed. 2d 610.

I do not think the Court's bipartite test adequately accommodates the constitutional concerns raised by the prospect of applying the federal income tax to the interest paid on state and local bonds. This Court has a duty to inquire into the devastating effects that such an innovation would have on state and local governments. Although Congress has taken a relatively less burdensome step in subjecting only income from bearer bonds to federal taxation, the erosion of state sovereignty is likely to occur a step at a time. "If there is any danger, it lies in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." L. Tribe, American Constitutional Law 381 (2d ed. 1988).

Federal taxation of state activities is inherently a threat to state sovereignty. As Chief Justice Marshall observed long ago, "the power to tax involves the power to destroy." McCulloch v. Maryland, 4 Wheat. 316, 431, 4 L. Ed. 579 (1819). Justice Holmes later qualified this principle, observing that "[t]he power to tax is not the power to destroy while this Court sits." Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 US 218, 223, 72 L. Ed. 857, 48 S. Ct. 451, 56 ALR 583 (1928) (Holmes, J., joined by Brandeis and Stone, JJ., dissenting). If this Court is the States' sole protector against the threat of crushing taxation, it must take seriously its responsibility to sit in judgment of federal tax initiatives. I do not think that the Court has lived up to its constitutional role in this case. The Court has failed to enforce the constitutional safeguards of state autonomy and self-sufficiency that may be found in the Tenth Amendment and the Guarantee Clause, as well as in the principles of federalism implicit in the Constitution. I respectfully dissent.