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be camouflaged and the prophylactic purposes of the Act readily evaded.\textsuperscript{30}

Thus, by refusing to review the status of the at-large positions, the \textit{Beer} majority adopted a procedure permitting the avoidance of the purpose of the Act.

\textbf{III. Conclusion}

The reasoning of the Court in \textit{Beer} will affect voting rights litigation in several ways: First, courts will continue to accept the "retrogression" test. This test would permit the absurd situation of a black population majority in New Orleans by the 1980 census, but an apportionment plan which gives only one council seat to a district with a black voting majority. According to the Court's reasoning, since no retrogression occurred, the plan would be constitutional.

The second effect of \textit{Beer} is to cast uncertainty on the question of who carries the burden of proof in section 5 cases. But most importantly, \textit{Beer} encourages a minimalistic approach to the problem of voting discrimination. In testifying during hearings on the original Voting Rights Act, former Attorney General Katzenbach stated: "The lesson is plain. [The Civil Rights Acts of 1957, 1960 and 1964] have had only minimal effect. They have been too slow."\textsuperscript{31} Only further litigation will determine whether the Court's decision in \textit{Beer v. United States} has "slowed" the Voting Rights Act of 1965 in general, and section 5 specifically, to the point of ineffectiveness.

\textbf{ROBERT S. BERMAN}

\textbf{Constitutional Law — Tenth Amendment — Fair Labor Standards Act — Minimum Wage Requirement Held Inapplicable to State Employees} — Since the United States Supreme Court's abrupt reversal of direction in 1941 in \textit{United States v. Darby}\textsuperscript{1} the power of Congress to regulate private persons and corporations under the commerce clause\textsuperscript{2} has been

\textsuperscript{30} Id. at 159 (footnote omitted).
\textsuperscript{31} 1965 Hearings, supra note 29, at 4.

\textsuperscript{1} 312 U.S. 100 (1941).
\textsuperscript{2} U.S. Const. art. I, § 8, cl. 3.
embracing and penetrating." Except for some instances in which the Supreme Court has found congressional enactments to infringe on constitutionally guaranteed rights, Congress has exercised power under the commerce clause without judicial restraint. Congressional regulation of private activity has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution."

In a line of cases beginning with United States v. California in 1936, the Court has refused to limit otherwise valid Congressional regulations based on the commerce clause merely because the person regulated is the state or one of its subdivisions. When the Court decided Maryland v. Wirtz in 1968, it appeared settled that the states' right to challenge regulations based on the commerce power was no different than that of a private individual.

However, in National League of Cities v. Usery, the Supreme Court unexpectedly called a halt to the further expansion of congressional power over the states under the commerce clause. In that case the Court held that Congress may not exercise its power so as "to directly displace the States' freedom to structure integral operations in areas of traditional government functions."

In applying this rule to provisions of the Fair Labor Standards Act which made the minimum wage and overtime restrictions applicable to all nonsupervisory employees of states and their political subdivisions, the Court found that the amendment's provisions would have "impermissibly interfer[ed] with the integral government functions of these

4. Congressional enactments which have been found to be fully within the grant of the legislative authority contained in the commerce clause have nevertheless been invalidated because found to offend against the right to trial by jury contained in the sixth amendment, United States v. Jackson, 390 U.S. 570 (1968); or the due process clause of the fifth amendment, Leary v. United States, 395 U.S. 6 (1969).
6. 297 U.S. 175 (1936).
8. Id. at 198.
10. Id. at 2474.
bodies.\textsuperscript{12} The Court distinguished the power of Congress to regulate private citizens and businesses under the commerce clause from its power over the states as states,\textsuperscript{13} and concluded that there are attributes of sovereignty attaching to every state which may not be impaired by Congress, although Congress possesses the authority to regulate the subject matter under the commerce clause. This limitation on the power of Congress exists because of our federal system of government embodied in the Constitution and particularly in the tenth amendment.\textsuperscript{14}

However, the majority opinion in \textit{National League of Cities}, written by Justice Rehnquist, did not declare that every congressional enactment under the commerce clause which affects the states as states is unconstitutional. Rather, the Court established the "essential function test,"\textsuperscript{15} so named by Justice Brennan in his dissenting opinion, in which the constitutionality of any congressional action enacted under the commerce clause affecting the states as states is determined by asking whether the exercise of the commerce power in these circumstances forces directly upon the states that choice of Congress "as to how essential decisions regarding the conduct of integral governmental functions are to be made."\textsuperscript{16} This test is one of degree,\textsuperscript{17} and as explained by Justice Blackmun in his concurring opinion, it adopts a balancing approach whereby the interest of the states in controlling their integral governmental functions is weighed against federal power in areas where the federal interest is demonstratively greater and where state compliance with imposed federal standards would be necessary.\textsuperscript{18}

\section*{I. Legislative History of the Fair Labor Standards Act Through the 1974 Amendments.}

In 1938 Congress enacted the Fair Labor Standards Act (F.L.S.A.) requiring employers covered by the Act to pay their employees a minimum hourly wage,\textsuperscript{19} to pay them at one-and-

\begin{itemize}
\item\textsuperscript{12} 96 S. Ct. at 2473.
\item\textsuperscript{13} \textit{Id.} at 2471.
\item\textsuperscript{14} \textit{U.S. Const.} amend. X states, "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."
\item\textsuperscript{15} 96 S. Ct. at 2487 (Brennan, J., dissenting).
\item\textsuperscript{16} \textit{Id.} at 2475-76.
\item\textsuperscript{17} \textit{Id.} at 2473.
\item\textsuperscript{18} \textit{Id.} at 2476.
\item\textsuperscript{19} 29 U.S.C. § 206(a) (1970) (originally enacted ch. 676, § 1, 52 Stat. 1060).
\end{itemize}
one-half times their regular rate of pay for hours worked in excess of forty during a work week\textsuperscript{20} and to keep certain records to aid in the enforcement of the Act.\textsuperscript{21} In \textit{United States v. Darby}\textsuperscript{22} the Supreme Court upheld the Act as a valid exercise of congressional power under the commerce clause.

Since its enactment in 1938, the Act has been continuously amended to extend coverage to a greater number of industries and employees. The 1961 amendments to the Act extended its coverage to persons who were employed in enterprises engaged in commerce or in the production of goods for commerce.\textsuperscript{23} The effect of this amendment was to extend coverage to employees not personally engaged in commerce, but employed by an enterprise with employees who were engaged in commerce.

As originally enacted, the Act excluded the states and their political subdivisions from its coverage.\textsuperscript{24} In 1966 Congress amended the definition of “employer” under the Act, removing the exemption of the states and their political subdivisions with respect to employees of state hospitals, institutions, schools and transit companies.\textsuperscript{25} The enterprise concept was also made applicable to these government entities.\textsuperscript{26} The rationale for this extension is stated in the 1966 Committee Reports: “These enterprises, which are not proprietary, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose.”\textsuperscript{27} Both the 1961 and 1966 amendments, as they apply to the states, were upheld by the Court in \textit{Maryland v. Wirtz}.\textsuperscript{28}

In 1974, Congress again broadened the coverage of the Act by including within the definition of “employer” a “public agency” and including within the definition of “enterprises

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\textsuperscript{21} 29 U.S.C. § 211(c) (1970) (originally enacted ch. 676, § 1, 52 Stat. 1060).
\textsuperscript{22} 312 U.S. 100 (1941).
\textsuperscript{24} 29 U.S.C. § 203(d) (1940).
\textsuperscript{27} S. REP. No. 1487, 89th Cong., 2d Sess. (1966); H.R. REP. No. 1366, 89th Cong. 2d Sess. 16 (1966).
\textsuperscript{28} 392 U.S. 183 (1968).
engaged in commerce or in the production of goods for commerce" — "an activity of a public agency." Thus, the 1974 amendments completely removed the Act's prior exemption of employees of states and their political subdivisions, except for some executive, administrative and professional personnel, and for individuals holding public elective office or serving such an officeholder in one of several capacities. In effect, the amendments applied the minimum wage and maximum hour requirements of the Act to eleven million state and city government employees, and imposed on the states requirements almost identical to those imposed on private employers.

II. JUDICIAL HISTORY OF THE ACT AS APPLIED TO STATE AND CITY FUNCTIONS

A. Maryland v. Wirtz

The Court considered the constitutionality of the 1966 amendments to the Act extending the minimum wage and maximum hour provisions to employees of state hospitals, institutions, and schools in Maryland v. Wirtz. In that case the State of Maryland contended that the expansion of coverage through the enterprise concept was beyond the power of Congress under the commerce clause and that coverage of state-operated hospitals and schools was also beyond the commerce power.

The Court rejected the State's challenge to the enterprise concept holding that the validity of the concept is supported by strong judicial precedent and by common sense. In rejecting the State's contention that the extension of the Act's coverage was an unconstitutional exercise of the commerce power because it interfered with sovereign state functions, the Court in Wirtz documented the effect of state-run hospitals and schools on commerce and concluded that: "It is therefore clear

34. 392 U.S. 183 (1968).
35. Id. at 187.
36. Id.
37. Id. at 188.
that a 'rational basis' exists for congressional action prescribing minimum labor standards for schools and hospitals, as for other importing enterprises. 3

The Court then rejected the State's argument that although the labor conditions in the schools and hospitals were within the reach of the commerce power, that power was unconstitutionally applied and therefore must yield to state sovereignty when the state exercised its governmental functions. 39 Finding the argument untenable, the Court ruled that nothing in the Constitution required either the national or a state government to exercise its powers so as not to interfere with the other's exercise of its power. 40 The Court held that:

[W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation. This was settled by the unanimous decision in United States v. California . . . . 41

In a strong dissenting opinion, Justice Douglas contended that the majority's decision was a serious invasion of state sovereignty protected by the tenth amendment that is not consistent with constitutional federalism. 42 Justice Douglas noted the effects of the Act on the state legislatures and the political subdivisions of the states, concluding that the exercise of the commerce power should never be allowed to destroy state sovereignty. He further suggested that the question of whether a particular commerce power regulation of state activity was permissible should be governed by the principle set forth in New York v. United States, 43 i.e., that the federal government may not unduly interfere with the sovereign functions of a state government. 44

The Wirtz decision represented a logical extension of the commerce power under the precedent of Darby. The majority's

38. Id. at 195.
39. Id.
41. Id. at 196-97 (citation omitted).
42. Id. at 203.
43. 326 U.S. 572 (1946).
dismissal of the argument that the tenth amendment and the principle of state sovereignty existed as a limitation on the congressional power under the commerce clause followed from previous case law. However, as noted by Justice Douglas in his dissent, the question of just how far the federal government could go in regulating the states under the commerce clause remained undecided.

B. The Lower Court Decision in National League of Cities v. Brennan

In late December 1974, the National League of Cities brought an action in the district court for the District of Columbia, seeking both declaratory and injunctive relief against the 1974 amendments' application to them. A three-judge district court granted the Secretary of Labor's motion to dismiss the complaint for failure to state a claim upon which relief might be granted. The district court, while conceding that the defendants' claim of federal intrusion into essential state governmental functions was substantial, stated that only the Supreme Court could make the decision to modify the extensive reach of the Wirtz decision.46

That same day, Chief Justice Burger, sitting as a circuit judge, granted the states' and municipalities' application for a stay and injunction against the enforcement of certain parts of the 1974 amendments to the Act, pending appeal from the three-judge district court to the full Supreme Court.47

III. The National League of Cities Decision and the Essential Function Test

In arguing before the Supreme Court, the appellant cities and states had to convince a majority of the Justices that their position was correct in spite of a line of cases which supported the 1974 amendments to the Act. Not only did they have the reasoning of the Wirtz decision to contend with, but the Court had recently decided the case of Fry v. United States,48 holding the Economic Stabilization Act of 197049 to be a valid exercise of the commerce power as applied to the states. The Fry Court

46. Id. at 828.
cited the *Wirtz* case as controlling in rejecting the state's contention that the application of the Economic Stabilization Act to state employees interfered with sovereign state functions. In addition to this substantial contrary precedent, the appellants had to contend with the retirement of Justice Douglas, who wrote the strong dissent in *Wirtz*.

In *National League of Cities* the Supreme Court recognized a distinction between the power of Congress to regulate individual businesses and private citizens from the power to regulate states as states, under the commerce clause. Although the Court found that the 1974 amendments to the Act were within the plenary power of Congress under the commerce clause, the Court recognized an affirmative limitation on the exercise of this power in the federal system of government embodied in the Constitution, expressly recognized in the tenth amendment.

Justice Rehnquist, writing for the majority of the Court, acknowledged the states' contention that the application of congressional commerce power directly to them as employers encountered a "constitutional barrier." He noted that in *Wirtz* the Court had carefully assured the states that it had the power to prevent the destruction of the sovereign political entity of the state. He further noted that the Court in *Fry* had recognized an express declaration of this limitation in the tenth amendment.

Justice Rehnquist then equated the constitutional barrier of state sovereignty, which the Court had held to prohibit the federal government from imposing nondiscriminatory taxes on the states in *New York v. United States*, with the barrier upon the exercise of the commerce power. In a footnote he dismissed Justice Brennan's dissenting contention that Chief Justice Stone in the *New York* case was not addressing the question of a state sovereignty restraint upon the exercise of the commerce

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50. 96 S. Ct. at 2471.
51. Id. at 2469.
52. Id. at 2469-70, citing 392 U.S. at 196.
53. Id. at 2470. In *Fry*, Justice Marshall, speaking for the majority, stated that although the tenth amendment has been characterized as a mere truism, "it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity on their ability to function effectively in a federal system." 421 U.S. at 547 (1975). Thus, to some extent, the *Fry* case can be seen as a bridge between *Wirtz* and *National League of Cities* in recognizing the tenth amendment as an affirmative limitation.
power, but was addressing the principle of implied immunity of the states and federal government from taxation by each other. Justice Rehnquist concluded that the distinction was not valid since the federal power to tax is a delegated power just as is the commerce power: "[C]haracterizing the limitation recognized upon the federal taxing power as an 'implied immunity' [does not] obscure the fact that this 'immunity' is derived from the sovereignty of the States and the concomitant barriers which such sovereignty presents to otherwise plenary federal authority."\(^5\)

After tracing the role of the states in our federal system of government through earlier decisions of the Court, Justice Rehnquist stated that the test as to whether congressional action under the commerce clause would abrogate state sovereignty, and thus be unconstitutional, was "whether these [states'] determinations are 'functions essential to separate and independent existence'."\(^5\) He concluded that:

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.\(^5\)

Justice Rehnquist then examined the degree to which the amendments would interfere with traditional aspects of state sovereignty. Echoing many of the findings of Justice Douglas' dissent in \(Wirtz\),\(^5\) Justice Rehnquist found that the 1974 amendments would have a significant impact on the governmental bodies involved by: (1) increasing costs in providing essential police and fire protection, without any increase in service, (2) forcing relinquishment of important governmental activities, and (3) displacing state policies and choices regarding the manner in which it will structure delivery of governmental services which its citizens require.\(^5\) Rehnquist viewed the result as leaving to the states only the discretion "to attempt to increase their revenue to meet the additional financial

\(^5\) 96 S. Ct. at 2470 n. 14.
\(^5\) Id. at 2471.
\(^5\) Id.
\(^5\) See, e.g., 392 U.S. at 202-03.
\(^5\) 96 S. Ct. at 2471-72.
burden . . . or to reduce [their existing complement of employees] to a number which can be paid the federal minimum wage without increasing revenue. 

Therefore, he concluded that the 1974 amendments on the states would impermissibly interfere with the integral governmental functions of these bodies. 

Minimizing the importance of the estimation of the effect which the Act would have on the states' current levels and patterns of governmental activity, Justice Rehnquist stated that:

the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively within a federal system,"

The final portion of the majority opinion in National League of Cities is devoted to clarifying the essential function test by distinguishing the Fry and United States v. California cases, and by overruling the Wirtz case. Justice Rehnquist distinguished the Fry case by noting that the Economic Stabilization Act was occasioned by an extremely serious problem which only collective action by the central government might forestall. He also noted that the means selected by Congress interfered with the states' freedom for only a very limited period of time. Additionally, he recognized that the across-the-board wage freeze authorized by that Act did not displace any state choices as to how governmental operations should be structured. Distinguishing Fry, Justice Rehnquist concluded that the Economic Stabilization Act operated to reduce the pressures upon state budgets rather than increase them.

This conclusion appears to shed a great deal of light on the real problem that the majority found with the extension of the F.L.S.A. to the states. Unlike the Economic Stabilization Act which operated to reduce state budgetary pressures, the extension of the F.L.S.A. would increase them. In distinguishing Fry, Justice Rehnquist formulated the general rule that the

60. Id. at 2472.
61. Id. at 2473.
62. Id. at 2474 (citation omitted).
63. Id. at 2475.
limits imposed upon the exercise of the commerce power when applied to the states by Congress do not preclude temporary enactments designed to resolve national emergencies.44

In overruling Wirtz, the Court concluded that its reasoning could no longer be regarded as authoritative.45 Justice Rehnquist noted that the Wirtz case relied heavily on the Court's decision in United States v. California (as did Justice Brennan in his dissent), in which the Court differentiated between the limitation restricting the federal taxing power and the power of Congress under the commerce clause.46 However, he argued that the language from United States v. California relied upon in Wirtz was simply "dicta" and "wrong."47 In a footnote, Justice Rehnquist stated that:

The holding of United States v. California, . . . as opposed to the language quoted in the text, is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce. . . ."48

From this reasoning two principles emerge which must now be kept in mind when attempting to determine whether congressional legislation under the commerce clause has impermissibly interfered with the integral governmental functions of the states. First, the degree to which the federal action interferes with the traditional operations of state and local government must be determined. If the effect is such as to destroy the separate and independent existence of the states, the congressional action is not within the power of the commerce clause. This principle is derived from the test suggested by Chief Justice Stone in New York v. United States and involves a determination of whether the activity attempted to be regulated is one traditionally undertaken by the state.49

64. Id.
65. Id.
66. In United States v. California, 297 U.S. 175 (1936), the Court had held that, unlike the restriction on the federal taxing power, there was no such limitation upon the plenary power of Congress to regulate commerce. As to the commerce clause power, the Court placed the state on the same level as any individual citizen.
67. 96 S. Ct. at 2475.
68. Id. n. 18 (citations omitted).
69. To answer this question, it might prove useful to determine whether a regulated
Second, it appears that the degree of permissible interference with the traditional operations of state and local governments is greater when there is a national emergency or an extremely serious problem which endangers the well-being of all the component parts of our federal system and which only collective action by the national government might forestall. This principle would justify action by the central government such as that taken by Congress in enacting the Economic Stabilization Act and stems directly from the Fry case.

IV. CONCLUSION

The Supreme Court’s decision in National League of Cities was labeled by Justice Brennan in his dissent as an “ill-conceived abstraction [which could] only be regarded as a transparent cover for invalidating a congressional judgment with which [the majority] disagree.”

Justice Brennan charged that the majority of the Court were returning to an analysis of the commerce clause and the tenth amendment resembling that found in the 1930’s, which had provided a constitutional crisis for the Court.

In his dissent, Justice Brennan recognized that the majority opinion is a departure from previous constitutional precedent, and thus, a major landmark in United States constitutional law. The decision has given the constitutional principle of federalism new meaning by recognizing that the tenth amendment stands as an affirmative limitation upon the authority of Congress to regulate activities of states as states by means of the commerce power. Although the Court noted that it expressed no opinion as to whether different results might obtain if integral operations of state governments were affected by congressional action under the spending power, section five of the fourteenth amendment, or the war power, the constitutional significance of this new principle is still great. The idea that the tenth amendment exists as an affirmative limitation on the power of the federal government is a far cry from viewing the

activity is “proprietary” or “governmental,” as suggested by Justice Rehnquist in his dissent in the Fry case. See 421 U.S. at 558 n. 2.

70. 96 S. Ct. at 2481.
72. 96 S. Ct. at 2474 n. 17.
73. Id. at 2475 n. 18.
tenth amendment as a mere "truism."\textsuperscript{74}

Besides the far-reaching implications which the \textit{National League of Cities} decision presents for future relationships between the states and the federal government, the decision also has immediate implications. The Court has prohibited Congress from utilizing its power under the commerce clause "to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."\textsuperscript{75} Decisions by the states in reference to their employees' wages and overtime were conclusively determined to be "essential decisions." However, as noted above, the Court specifically limited its decision to the utilization of the commerce power. Thus, it is possible that the Court would not find this "affirmative limitation" in respect to Congress' other plenary powers. However, since Congress has utilized the commerce power since the late 1930's for authority for a large amount of its legislation, some of this legislation as applied to the states as states becomes subject to attack under the tenth amendment.

The congressional legislation most obviously subject to challenge are the amendatory acts to the F.L.S.A. itself, \textit{i.e.}, the Age Discrimination Act,\textsuperscript{76} and the Equal Pay Act.\textsuperscript{77} Although the Court in \textit{National League of Cities} did not specifically discuss these amendatory Acts, they were enacted by Congress under the commerce power and are thus subject to the same constitutional attack as in \textit{National League of Cities}. Therefore, if attacked by the states as unconstitutional they would have to meet the essential function test.

In \textit{Christensen v. Iowa},\textsuperscript{78} the first district court to be faced with this issue interpreted the \textit{National League of Cities} case narrowly, stating that the decision "should be confined strictly to its factual context."\textsuperscript{79} The court held that the Equal Pay Act may be constitutionally applied to the states pursuant to the commerce clause since discrimination in pay on the basis of sex

\textsuperscript{74} See generally Justice Brennan's dissent, 96 S. Ct. at 2478-79 in which he discussed the principle enunciated in United States v. Carby, \textit{i.e.}, the tenth amendment is a mere "truism."
\textsuperscript{75} 96 S. Ct. at 2475-76.
\textsuperscript{78} 417 F. Supp. 423 (N.D.Iowa, 1976).
\textsuperscript{79} Id. at 424.
cannot validly be considered a fundamental employment decision essential to the separate and independent existence of the state. The court also noted that the ability to exercise such discrimination is not an attribute of sovereignty. The district court's opinion seems to be consistent with the National League of Cities rationale, yet it is too early to say that this restrictive interpretation will be adopted by the higher courts.

Other federal legislation which at first appears to be subject to a constitutional attack by the states is the Equal Employment Opportunities Act of 1972 and Title VII of the Civil Rights Act of 1964. Title VII as originally enacted was based on Congress' power under the commerce clause. However, when Congress extended the application of Title VII to the states as employers by the Equal Employment Opportunity Act of 1972, Congress based this extension not only on the commerce power, but also on section five of the fourteenth amendment. As previously noted, the Court in National League of Cities specifically stated that it expressed no opinion as to whether the affirmative limitation of state sovereignty, which it recognized as to the exercise of congressional power under the commerce clause, also existed in relation to the power of Congress under section five of the fourteenth amendment. Thus, a question is posed as to whether section five is limited by the tenth amendment rationale promulgated by the National League of Cities case.


83. U.S. CONST. amend. XIV § 5 provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." See, e.g., H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 10-11 (1971). This point was also noted by Justice Rehnquist in his majority opinion in Fitzpatrick v. Bitzer, 96 S. Ct. 2666, 2670 n. 9 (1976).
An interpretation recently given to section five of the fourteenth amendment by Justice Rehnquist in *Fitzpatrick v. Bitzer*\(^4\) sheds light on this question. In that case, Justice Rehnquist, speaking for the Court, held that the eleventh amendment\(^5\) did not bar an award of pension benefits owed by the State of Connecticut under a Title VII claim, since that amendment and the principle of state sovereignty which it represents is limited by the enforcement provisions of section five of the fourteenth amendment. Moreover, these enforcement provisions themselves embody significant limitations on state authority.

In *Fitzpatrick* the Court distinguished the power of Congress to transgress the eleventh amendment limitation under the commerce clause from that power under section five of the fourteenth amendment. The Court interpreted Congress' power to regulate the states under the fourteenth amendment to be much broader than under the commerce clause and not limited by the eleventh amendment. This is because the substantive provisions of the fourteenth amendment are by express terms directed at the states and impress upon them duties with respect to their treatment of private individuals. Additionally, standing behind these substantive imperatives is the power of Congress to enforce them by appropriate legislation.\(^6\) Although this broad and powerful interpretation of section five of the fourteenth amendment is given in relation to the effect on regulation of the states of the eleventh amendment, the reasoning would seem equally to apply to the effect of the tenth amendment. In fact, Justice Rehnquist implied as much in a footnote in *Fitzpatrick*.\(^7\) Thus, there is authority for distinguishing between the limitations on congressional regulation of the states under the F.L.S.A. as enunciated in the *National League of Cities* case and the Title VII provisions grounded upon the fourteenth amendment.

*National League of Cities* also appears to limit efforts in Congress to bring state and local government employees under

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84. 96 S. Ct. 2666 (1976).
85. "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." U.S. Const. amend. XI.
86. 96 S. Ct. at 2670.
87. Id. n. 9.
a federal collective bargaining law. The House Labor Subcom-
mittee was reportedly awaiting the outcome of the National
League of Cities case before continuing work on a bill which
would have required collective bargaining between nonfederal
governments and their employees. Since collective bargaining
would interfere with the essential functions of state govern-
ment as much as would the regulation of minimum hours and
overtime held unconstitutional in National League of Cities,
the bill presently being drafted appears now to be unconstitu-
tional.

In National League of Cities the Court was careful not to
foreclose completely the power of Congress to regulate the
states. It established the essential function test and left open
the door for congressional regulation of essential state functions
under the commerce clause where collective action by the na-
tional government is necessary to forestall extraordinary public
harm. The Court also specifically left open federal regulation
of the states under other clauses of the Constitution. For exam-
ple, congressional power to regulate discriminatory state prac-
tices under section five of the fourteenth amendment has not
been restricted.

These restrictions suggest that Justice Blackmun, in his
concurring opinion, has interpreted the Court’s opinion cor-
correctly by asserting that the Court has adopted a balancing
approach. Theoretically, this approach allows for the exercise
of federal power where necessary, but prevents the further dim-
ination of the role of the states in our federal system of govern-
ment. But National League of Cities leaves the factors to be
weighed unclear. Thus, it also appears that the Court will be
the ultimate arbitrator in balancing the respective interests
involved.

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91. 96 S. Ct. at 2476.