Nos. 82-1913 and 82-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF APPELLANT JOE G. GARCIA ON REARGUMENT

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BRIEF OF APPELLANT JOE G. GARCIA ON REARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

In its Order of July 5, 1984, the Court requested the parties to this case to address the following question:

> "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered?"

In Part I we urge an affirmative answer to that question.[1]

National League held that considerations of state sovereignty, embodied in the Tenth Amendment, place

[1] In the briefs we filed last Term, we demonstrated that it is not necessary for the Court to overrule *National League* in order to reverse the judgment below and sustain the application of the Fair Labor Standards Act to public transit employees. We rest on that demonstration with respect to how this case should be decided under the principles of *National League* and its progeny.

"an affirmative limitation on the exercise of [Congress'] power" under the Commerce Clause, 426 U.S. at 841. But the text of the Constitution, the proceedings at the constitutional convention, the *Federalist Papers*, and the debates which led to the enactment of the Tenth Amendment all establish that *National League* has distorted the relationship between the Federal Government and the States which the framers of the Constitution intended to create. Pp. 5-12, *infra*. As James Madison said:

> 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 laws, or even the Constitution of the States. [II *Annals of Cong.* 1897 (Remarks of James Madison)]

National League is also contrary to the precedents in this Court which, beginning with Chief Justice Marshall's opinions in *McCulloch v. Maryland*, 4 Wheat. 316 (1819) and *Gibbons v. Ogden*, 9 Wheat. 1 (1824), have adhered to this fundamental principle. And from *Sanitary District v. United States*, 266 U.S. 405 (1925) (Holmes, J.) to *Maryland v. Wirtz*, 392 U.S. 183 (1968) (Harlan, J.), the Court consistently applied Madison's teaching with undiminished force when States were subjected to regulation under the Commerce Clause, scrutinizing such regulations to insure that they were, indeed, regulations of commerce and sustaining them if they passed that test. Pp. 12-20, *infra*.

The decisions which were cited in support of the decision in *National League* provide no support for the conclusion that Congress' delegated power to regulate commerce is diminished because a State, rather than a private party, is engaged in the activity which constitutes commerce. Pp. 20-24, *infra*. And the tax immunity doctrine, on which *National League* relied, not only is inapposite but, moreover, the troubled history of that doctrine vindicates the framers' decision not to attempt

to subordinate Congress' enumerated powers to considerations of state sovereignty. Pp. 24-30, *infra*.

Finally, to complete our showing, we demonstrate that even on its own terms, *National League* cannot withstand close analysis, for the limitations it places on Congress' power are lacking in logic and not susceptible to principled judicial application. Pp. 30-33, *infra*.

For all these reasons we respectfully urge that *National League* be overruled.

In Part II we argue that even if *National League*'s holding that there is a state-sovereignty restriction on Congress' commerce power were not overturned, the extent of that restriction should be limited in two respects.

First, as we show in Part II(A), the States should not be immunized from federal regulation when they act as providers of goods or services. State activity creating goods and services is economic activity which can powerfully affect interstate commerce, and the entire point of the Commerce Clause is seriously jeopardized by denying Congress the power to regulate such activity. Moreover, the creation of goods and services is not an essential attribute of sovereignty; as to any given service, many entities that are not sovereign perform the service, and many entities that are sovereign do not. State sovereignty is secure so long as the law-making and law-enforcement functions (within the realm open to the States) are unimpaired. Pp. 34-43, *infra*.

Second, in Part II(B), we show that activities of political subdivisions should not be clothed with Tenth Amendment immunity. The Court has repeatedly held that the Eleventh Amendment—which places an express limit on federal (judicial) power in order to protect state sovereignty—does not afford any shelter to local governmental bodies. There is no greater reason for stretching the implied immunity of the Tenth Amendment beyond any natural boundary to protect such local entities. Pp. 44-46.

ARGUMENT

I. THE TENTH AMENDMENT PRINCIPLES OF *NATIONAL LEAGUE OF CITIES v. USERY*, 426 U.S. 833, SHOULD BE RECONSIDERED AND OVERRULED

A. In *National League* this Court held that Congress acted unconstitutionally in extending the Fair Labor Standards Act to various classes of state and local employees. 426 U.S. at 851-52. In so holding, the Court recognized that the FLSA amendments were "fully within the grant of legislative authority contained in the Commerce Clause," *id.* at 841, but concluded that the Act nonetheless "transgresses an affirmative limitation on the exercise of [Congress'] power," *id.* The Court explained:

> [T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. [*Id.* at 845]

To the extent the Court identified a source for the limitation announced in *National League* that source was the Tenth Amendment, *see id.* at 842.

The premise of *National League*'s holding was that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States' ", 426 U.S. at 844, *quoting Texas v. White*, 7 Wall. 700, 725 (1869). The validity of that premise cannot be denied. The framers of the Constitution clearly envisioned a federal system—one in which both the federal government and the States possess sovereign authority.

The *National League* opinion proceeds on the theory that this premise carries with it two further propositions: first, that the framers must have intended that federal sovereignty is subject to being subordinated to state sovereignty—in *National League*'s words, that considerations of state sovereignty place "an affirmative limitation on the exercise of [Congress'] power" under the

Commerce Clause, 426 U.S. at 841; and second, that the framers intended to enforce this "affirmative limitation" by vesting the judiciary with a commission to invalidate laws enacted by the legislative branch which the judiciary views as unduly intrusive on state sovereignty. As we proceed to show, those propositions are, in fact, entirely alien to the scheme of government the framers intended.

B. The Constitution carefully enumerates the powers that the framers intended to delegate to the federal government. The Tenth Amendment in terms makes explicit that which otherwise would be implicit in that enumeration—that the federal government is to exercise only those powers that have been delegated, and that 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." But the text and structure of the Constitution contains no hint of the rule announced in *National League* that powers that are delegated to the federal government nonetheless are to be limited (through case-by-case judicial review) in the interest of preserving state sovereignty. To the contrary, Article VI of the Constitution declares that,

> This Constitution, *and the Laws of the United States which shall be made in Pursuance thereof* . . . shall be the Supreme Law of the Land . . . any Thing in the constitution or Laws of any States to the contrary notwithstanding.

Moreover, the suggestion that the framers intended to subordinate federal power to concerns of state sovereignty fundamentally misconceives the very essence of the enterprise undertaken and carried through at the constitutional convention. The purpose of that convention, after all, was to replace the Articles of Confederation, which created merely a confederacy of sovereign States, with a national government to which each State would necessarily surrender certain sovereign powers. One of the first acts of the convention was to defeat the New Jersey plan, which would have "revised, corrected

and enlarged"—but not replaced—the Articles of Confederation, and to instead embrace the Virginia plan which called for a "national Government . . . consisting of a *supreme* Legislative, Executive and Judiciary" (emphasis added).[2] And at the convention the framers *defeated* a proposal which would have precluded Congress from "interfer[ing] with the government of the individual states in any matters of internal policy which respect the government of such states only, and wherein the general welfare of the United States is not concerned."[3] Thus, as Professor Scheiber has observed:

> [t]he delegates . . . were willing to confront an inevitably powerful opposition to ratification based on

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[2] *See* W. Murphy, *The Triumph of Nationalism* 146 (1967); Diamond, *What the Framers Meant by Federalism* in R. Golden (ed.), *A Nation of States* 30-31 (1963).

[3] W. Murphy, *supra* n.2, at 179. Also indicative of the framers' views on the respective roles of the federal and state governments is the fact that a proposal to authorize Congress to "negative" (*i.e.*, veto) any state law was defeated by only one vote, II M. Farrand (ed.), *The Records of the Federal Convention*, 391 (1911). Moreover, the opposition to negativing was based upon the fact that the amendment was "unnecessary," II *id.* at 390 (Mr. Sherman), 391 (Mr. Williamson and Mr. Gouverneur Morris) in light of the alternative protection of federal power in the Supremacy Clause which opponents of negativing had proposed earlier in the convention and which had been adopted, *see* II *id.* at 28-29. *See also* W. Murphy, *supra*, at 218-19; Scheiber, *Federalism and the Constitution: The Original Understanding*, in L. Friedman & H. Scheiber (eds.), *American Law and Constitutional Order* 89 (1978).

It is also noteworthy in this regard that the first Congress, in drafting the Bill of Rights, adopted recommendations that the States had made during the ratification process that were protective of individual rights, but rejected all recommendations that were aimed at enhancing state sovereignty at the expense of federal authority, such as proposals by New York, Massachusetts and Virginia to limit the federal taxing power to instances in which a State failed to provide revenue for the federal government and to limit the federal power to regulate congressional elections to instances in which a State failed to establish appropriate laws in that regard. *See* W. Murphy, *supra*, at 337, 368, 385. *See also* n.21 *infra*.

> the popular fear of centralized government, even at the risk of losing all, precisely because they thought all had been nearly lost already. National government under the Articles of Confederation, they thought, was a nullity incapable of pursuing the great purposes of nationhood.[4]

The role that the framers envisioned the States would play within the federal system is revealed quite clearly in the writings and speeches of James Madison.[5] In a letter to George Washington shortly before the constitutional convention began, Madison stated his goal to be a "due supremacy of the national authority" which would "not exclude the local authorities *wherever they can be subordinately useful.*" W. Murphy, *supra* n.2, at 63 (emphasis added). During the course of the convention Madison argued that "[w]ere it practicable for the General Government to extend its care to every requisite object without the cooperation of the State Governments the people would not be less free as members of one great Republic than as members of thirteen small ones" and that therefore even if there were to be "a tendency in the General Government to absorb the State Governments no fatal consequence could result." I *Records of the Federal Convention*, *supra* n.3 at 358. *See also* I *id.* at 463, 471. And while serving in Congress Madison stated (during the debates over the creation of the Bank of the United States):

> 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;

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[4] Scheiber, *supra* n.3 at 86. *See also e.g.*, Diamond, *supra* n.2 at 37; W. Murphy, *supra* n.1; G. Wood, *The Creation of the American Republic, 1776-1787* at 467 (1969).

[5] We focus on Madison's views in text because of his central role at the constitutional convention. Madison assumed that role precisely because he had the faculty to articulate the majority's sentiments, as is made clear by Professor Murphy's thorough review of the views of the individual delegates. *See* W. Murphy, *supra* n.2, at 58-142.

> if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.[6]

In *The Federalist Papers* Madison addressed at length the question whether "the powers transferred to the federal government . . . will be dangerous to the portion of authority left in the several States."[7] He answered that question in the negative, not because he believed that there were judicially-enforceable affirmative limitations on the exercise of the powers that were delegated to Congress (such as the limitation the Court discovered in *National League*) but rather because Congress' powers were limited to those enumerated in the Constitution and because of *political constraints* that Congress would face in exercising its enumerated powers. Madison stated the crux of his argument as follows:

> The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments [the federal and State governments] not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivate may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every

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[6] *II Annals of Cong.* 1897 (Remarks of James Madison). The Court quoted this statement as authoritative in *Sperry v. Florida Bar*, 373 U.S. 379, 403 (1963) and in *Reina v. United States*, 364 U.S. 507, 512 (1960).

[7] *The Federalist Papers*, No. 45, p. 288 (Rossiter ed.). The question Madison posed reflected one of the two principal grounds of opposition to the proposed Constitution advanced by the anti-federalists. *See* W. Murphy, *supra* n.2, at 400.

> case should be supposed to depend on the sentiments and sanction of their common constituents.[8]

Madison added that while it was "beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States," if that were to change, "the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due."[9] Thus, as students of the constitutional debates consistently have concluded:

> [I]n the last analysis the settlement of conflicts between the states and Congress would have to be decided by the informal political process. When the framers took up the defense of the Constitution against Antifederalist critics during the ratification controversy, repeatedly they rested their case upon

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[8] *The Federalist Papers, supra* n.7, No. 46, p. 294.

[9] *Id.*, No. 46, pp. 294-95. *See also id.*, No. 17, pp. 118-119 (A. Hamilton) ("the sense of the constituent body of the national representatives, or, in other words, the people of the several States, would control" any tendency of Congress to "absorb" the States' "residuary authorit[y]"); No. 31, p. 197.

Madison had made the same argument at the constitutional convention itself:

> In some of the States, particularly in Connecticut, all the Townships are incorporated and have a certain limited jurisdiction. Have the Representatives of the people of the Townships in the Legislature of the State ever endeavored to despoil the Townships of any part of their local authority? As far as this local authority is convenient to the people they are attached to it; and their representatives chosen by and amenable to them (naturally) respect their attachment to this, as much as their attachment to any other right or interest. [I *Records of the Federal Convention, supra* n.3 at 357]

To protect the states' ability to compete within the political arena, the framers established certain constitutional safeguards, most notably the provision for a Senate to be composed of two representatives of each State, chosen by the state legislature. Roger Sherman argued for "the equality of votes not so much as security for the small states, as for the state governments," I *id.* at 200. *See also* I *id.* at 155-56 (George Mason).

an estimate of how the political process would actually work.[10]

Finally, in light of the stress that *National League* and the subsequent cases have placed on the Tenth Amendment, we emphasize that nothing in that Amendment was intended to alter the framers' original understanding or to impose new limits on Congress' power. As previously noted—and as this Court has repeatedly stated, *see* pp.

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[10] Scheiber, *supra* n.3, at 89. *See also e.g.*, W. Murphy, *supra* n.2, at 403 ("When the Anti-federalists . . . lamented the lack of *constitutional* limitations on the power of the national government to keep it from overwhelming the state governments, the main answer of the Federalists was to point to those features of the Constitution which afforded *political* limitations on the exercise of national powers") (emphasis in original); 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, 558 (1954) ("For the containment of the national authority, Madison did not emphasize the function of the Court; he pointed to the composition of Congress and to the political processes.").

In *EEOC v. Wyoming*, —— U.S. ——, 103 S. Ct. 1054 (1983), Justice Powell, in dissent, reached a conclusion quite at odds from all of the historians just cited. Pointing to various assertions by the States during the pre-Civil War period of an authority to override federal law—for example, the Kentucky and Virginia resolutions adopted by the legislatures of those States in 1798 to protest the Alien and Seditions Acts and the nullification doctrine expounded by John Calhoun—Justice Powell concluded that these assertions evidenced the framers' intent for "the reserved powers of the States [to] limit[] the delegated powers of the National Government." *Id.* at 1079. But, notably, in the incidents to which Justice Powell referred that was *not* the claim the States made; rather the States claimed that their authority was superior to Federal authority. As Justice Powell ultimately acknowledges in his dissent—and as the Court squarely held in *Texas v. White*, *supra*, on which *National League* ironically relied, *see* p. 20, *infra*—these assertions of state supremacy were not "constitutionally sound," 103 S. Ct. at 1079 n.8; indeed they were the very antithesis of the system the framers had intended to create. As Madison wrote, "[a] plainer contradiction in terms, or a more fatal inlet to anarchy, cannot be imagined" than "a nullification of a law of the U.S." by a single State. 9 *The Writings of James Madison* 575 (Hunt ed. 1910).

12-19, *infra*—the language of the Amendment does not permit such a reading. And the "legislative history" of the Amendment is equally clear. Indeed, in proposing the Tenth Amendment at the first Congress Madison explained:

> I find from looking into the amendments proposed by the State conventions that several are particularly anxious that it should be declared in the Constitution that the powers not therein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it. [*History of Cong.* 441 (June 8, 1789)] [11]

Significantly, the only controversy that the Tenth Amendment engendered was over a proposal, recommended by Massachusetts during the ratification process and advanced on three occasions in Congress, to provide that power not "expressly" delegated to the federal government be reserved to the States.[12] "Madison objected to this proposal, because it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication unless the Constitution descended to recount every minutiae." *I Annals of Cong.* 790. Madison's position prevailed, and the word "expressly" was not included in the Amendment. Commenting on this history, Justice Story concluded:

> It is plain . . . that it could not have been the intention of the framers of this amendment to give

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[11] During the debate in Virginia over ratifying the Constitution —before the Tenth Amendment had been added—Madison argued that it was "obviously and self-evidently the case that every thing not granted is reserved." III S. Elliot (ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 565 (1836).

[12] *See* A. Mason, *The States Rights Debate* 94 (1964); W. Murphy, *supra* n.2 at 337 (Massachusetts).

> it effect, as an abridgment of any of the powers granted under the constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation, by which other powers should be assumed beyond those which are granted. . . . The attempts, then, which have been made from time to time, to force upon this language an abridging, or restrictive influence, are utterly unfounded in any just rules of interpreting the words, or the sense of the instrument. Stripped of the ingenious disguises in which they are clothed, they are neither more nor less than attempts to foist into the text the word "expressly;" to qualify what is general, and obscure what is clear and defined. [3 J. Story, *Commentaries on the Constitution of the United States* 753-54 (1st ed. 1833)]

C. For over one hundred and fifty years the principles just set forth—that federal power, where it exists, is supreme and that the safeguard for state sovereignty lies in the political process, and not the judicial—prevailed in this Court's decisions concerning the scope of Congress' power under the Commerce Clause. As Justice Brennan in his dissenting opinion demonstrated, and we now recapitulate, *National League* represented a sharp departure from these precedents.

The Court first addressed the subject at length in *McCulloch v. Maryland*, 4 Wheat. 316 (1819). In that case Chief Justice Marshall declared the principle that controlled until *National League*:

> If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. [*Id.* at 405]

And Chief Justice Marshall stated, too, that the Tenth Amendment was "framed for the purpose of quieting the excessive jealousies which had been excited" and

> declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving

> the question, whether the particular power which might become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair constitution of the whole instrument. [*Id.* at 406]

In *Gibbons v. Ogden*, 9 Wheat. 1 (1824), the Court, again speaking through Chief Justice Marshall, reaffirmed the teaching of *McCulloch*: "the sovereignty of Congress, though limited to specified objects, is plenary as to those objects," and thus Congress' "power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government." 9 Wheat. at 197. Echoing the argument of *The Federalist Papers* as to the source of the limitation on Congress' ability to exercise its enumerated powers the Court declared:

> The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to save them from its abuse. They are the restraints on which the people must often rely solely, in all representational governments. [9 Wheat. at 197]

The principles stated in *McCulloch v. Maryland* and *Gibbons v. Ogden* were consistently followed thereafter by this Court with one possible exception.[13] There was a rela-

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[13] For example, in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), the first Justice Harlan, writing for the Court, rejected the argument that federal regulation of a State-chartered corporation invaded the States' reserved authority under the Tenth Amendment:

> We cannot conceive how it is possible for anyone to seriously contend for such a proposition. It means nothing less than that Congress in regulating interstate commerce, must act in subordination to the will of the states when exerting their power to create corporations. No such view can be entertained for a moment.
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> * * * *
>
> Such a view cannot be maintained without destroying the just authority of the United States. It is inconsistent with all

tively brief period of time during which the Court read Congress' powers under the Commerce Clause quite narrowly; *Hammer v. Dagenhart*, 247 U.S. 251 (1918),

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> the decisions of this court as to the powers of the national government over matters committed to it. [*Id.* at 345]

One year earlier, Justice Harlan, had made the same points in *The Lottery Case*, 188 U.S. 321, 356-57 (1903). *See also e.g., United States v. Harris*, 106 U.S. 629, 636 (1883) ("Whenever . . . a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided."); *In re Rahrer*, 140 U.S. 545, 562 (1891) ("The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge"); *Hoke v. United States*, 227 U.S. 308, 320 (1913) ("The power of Congress under the commerce clause of the Constitution is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons *or states* is not material to be considered. It is the supreme law of the land, and persons *and states* are subject to it." (emphasis added); *The Minnesota Rate Cases*, 230 U.S. 352, 399 (1913) (the Constitution reserves to the States "only . . . that authority which is consistent with and not opposed to the grant to Congress."); *United States v. Sprague*, 282 U.S. 716, 733 (1931) ("The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people. It added nothing to the instrument as originally ratified."); *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) ("effective restraints on [the commerce clause power's] exercise must proceed from political rather than judicial processes.")

The same principles were consistently applied by the Court in addressing the scope of other powers of Congress. For example, in *Wright v. Union Central Ins. Co.*, 304 U.S. 502, 516 (1938), the Court held that "[i]n view of our decision that the law is within the bankruptcy power, scant reliance can be placed on the Tenth Amendment." In *Ashwander v. TVA*, 297 U.S. 288, 330 (1936), the Court concluded that "to the extent that the power of disposition is . . . expressly conferred, it is manifest that the Tenth Amendment is not applicable." And in *Sperry v. Florida Bar, supra*, a case involving the patent power, the Court stated:

> Congress having acted within the scope of the powers "delegated to the United States by the Constitution," it has not exceeded the limits of the Tenth Amendment despite the con-

which invalidated a federal child labor law, is the leading case from that era. In that case, the Court buttressed its argument that Congress had exceeded its authority under the Commerce Clause by invoking the Tenth Amendment, *see id.* at 274, 275-76 (although the Court did not there suggest, as *National League* was later to hold, that a law that was a proper regulation of commerce could nonetheless violate the Tenth Amendment).

The *Hammer v. Dagenhart* era was short-lived; in *United States v. Darby*, 312 U.S. 100 (1941) the Court expressly overruled *Dagenhart*, rejecting both its cramped reading of the Commerce Clause, and its misplaced reliance on the Tenth Amendment. With respect to the latter point the Court in *Darby* stated:

> The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.
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> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. [312 U.S. at 124]

D. The foregoing cases all involved federal regulation of private individuals, in which a claim was made that Congress had invaded powers reserved to "the people" or

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current effects of this legislation upon a matter otherwise within the control of the State. [373 U.S. at 403]

See also James Everard Breweries v. Day, 265 U.S. 545, 558 (1924).

had infringed upon state sovereignty by overturning state law. The principles developed in those cases were—until *National League*—likewise consistently applied by the Court to federal regulation of the "States as States," no less than to federal laws displacing state regulation of private individuals.

The seminal case is *Sanitary District v. United States*, 266 U.S. 405 (1925). At issue in that case was the power of the federal government to limit the amount of water that the State of Illinois could withdraw from Lake Michigan; Illinois argued that its need was "to take care of the sewage and drainage of Chicago," *id.* at 424, and that "great evils . . . would ensue if the flow were limited," *id.* The Court nonetheless unanimously sustained the federal law. Writing for the Court Justice Holmes noted that Congress had acted pursuant to its authority "to remove obstruction to interstate and foreign commerce," *id.* at 425, and he explained that,

> There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants. In matters where the states may act, the action of Congress overrides what they have done. [*Id.* at 426]

Justice Holmes added: "This is not a controversy between equals." *Id.* at 425. *See also Board of Trustees v. United States*, 289 U.S. 48 (1933) (Hughes, C.J.) (foreign commerce).

The Court returned to the subject in *United States v. California*, 297 U.S. 175 (1936), in which the question was Congress' power to regulate a state-run railroad. The Court, per Stone, J., unanimously sustained that power:

> That in operating its railroad [California] is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to

> regulate interstate commerce, which has been granted specifically to the national government. *The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.* [*Id.* at 183-84; emphasis added]

Justice Stone added that "there is no . . . limitation upon the plenary power to regulate commerce," and that "[t]he state can no more deny the power if its exercise has been authorized by Congress than can an individual." *Id.* at 185. *See also California v. Taylor*, 353 U.S. 553 (1957); *Parden v. R. Terminal Co.*, 377 U.S. 184 (1964).[14]

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[14] In *National League* the Court termed the last quoted sentence from *United States v. California* "dicta," 426 U.S. at 854, and disapproved that sentence as "simply wrong," *id.* at 855. The *National League* Court purported not to disapprove of the "holding" of *California*, which the Court understood as follows:

> 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. . . ." 297 U.S. at 182. [426 U.S. at 854 n.18]

In fact, however, Justice Stone's opinion for the Court in *California* expressly *declined* to base the decision on the nature of the activity in which the State was there engaged. *See* 297 U.S. at 183 ("we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or its 'private' capacity"); *id.* at 185 (refusing to decide whether operating a railroad is an "activit[y] in which the states have traditionally engaged").

The unanimity of *California* is especially impressive since *United States v. Butler*, 297 U.S. 1 (1936), had been decided just four weeks earlier, and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) was decided later at the same Term. Yet even the Justices who read the Commerce Clause narrowly in *Butler* and *Carter Coal*—four of whom were later to bitterly resist what they regarded to be an unwarranted expansion of the commerce power in *Labor Board v. Jones & Laughlin Corp.*, 301 U.S. 1 (1937)—considered it to be entirely consistent with state sovereignty that the States should be subject to the commerce power to the same extent as private individuals.

Other cases likewise have sustained Congress' power to regulate the States as States. In *Oklahoma v. Atkinson Co.*, 313 U.S. 508 (1941), the Court sustained Congress' power to build a dam which would flood 3,800 acres of state-owned land which was being used by the state "for school purposes, for a prison farm, for highways, rights of way, and bridges." *Id.* at 511. The Court concluded that the issues raised by the State "raise not constitutional issues but questions of policy." *Id.* at 527. In *California v. United States*, 320 U.S. 577 (1944), the Court upheld federal regulation of state-owned waterfront terminals, stating that "it is too late in the day to question the power of Congress under the Commerce Clause to regulate such an essential part of interstate and foreign trade . . . whether they be the activities and instrumentalities of private persons or of public agencies." *Id.* at 586. And in *Case v. Bowles*, 327 U.S. 92 (1946), the Court concluded that Congress constitutionally had included the States within the reach of the Emergency Price Control Act, rejecting the State's Tenth Amendment claim on the ground that "the Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the national government.'" *Id.* at 102; *see also id.* at 101.[15]

Finally, in *Maryland v. Wirtz*, 392 U.S. 183 (1968), the Court, sustained federal power to apply the Fair Labor Standards Act to state employees. Summarizing the principles that had been developed over the preceding four decades, Justice Harlan stated:

> There is no general "doctrine implied in the Federal Constitution that 'the two governments, national and state, are each to exercise it powers so as not to

[15] Although *National League* distinguished *Case*'s Tenth Amendment discussion as limited to the war power, *see* 426 U.S. at 854-855, n.18, the *Case* opinion itself states a general proposition disapproving the petitioner's reliance on the Tenth Amendment and nowhere suggests such a distinction. Moreover, the distinction is untenable, as has been clear since *Gibbons v. Ogden*, which equated Congress' commerce and war powers. *See* 9 Wheat. at 197, quoted at p. 13, *supra*.

> interfere with the free and full exercise of the powers of the other.'" *Case v. Bowles*, 327 U.S. 92, 101.
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> * * * *
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> [W]hile the commerce power has limits, valid general regulations of comerce do not cease to be regulation of commerce because a State is involved. If a State is engaged in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the States too may be forced to conform its activities to federal regulation. [*Id.* at 195, 196.]

National League remarkably cites *Wirtz* for the proposition that "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution." 426 U.S. at 842. But, as unmistakably appears, the assurance that the Court has "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity,'" 392 U.S. at 196, was based on "the constitutional differentiation" between activities which are and which are not "commerce with foreign nations and among the several States," *id.* The distinction between this legitimate constitutional protection for the States, and the doctrine adopted in *National League* was emphasized by Justice Harlan at the conclusion of *Wirtz's* constitutional analysis:

> This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens. [392 U.S. at 198-199]

Justice Harlan's statement that "[t]he Court will not carve up the commerce power" echoes Madison's injunction at the constitutional convention: "the regulation of Com-

merce [is] in its nature indivisible and ought to be wholly under one authority." II *Records of the Federal Convention, supra* n.3, at 625.

E. The *National League* opinion not only failed to treat adequately with the abundant precedent which was contrary to the Court's conclusion, but relied heavily on language from decisions which provide no support for that conclusion. We briefly examine those decisions in chonological order.

National League first cited *Texas v. White, supra,* 7 Wall. at 725, for the proposition that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." But Chief Justice Chase made that point in *Texas v. White* in the course of answering in the *negative* "the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States." *Id.* at 724. In short, the sentence quoted in *National League* forcefully asserts the incontestable proposition that the Constitution establishes a *federal* system to which the States are irrevocably bound. That sentence says nothing about the respective powers of the Union and of the States in that federal system; Chief Justice Chase spoke to *that* issue in an earlier sentence in the same paragraph:

> Under the Constitution, though the powers of the States were much restricted, still all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. [7 Wall. at 725]

Thus, *Texas v. White* did not imply, let alone decide, that Congress' delegated powers must in any way yield to the sovereignty of the States.[16]

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[16] It cannot be denied, however, that even prior to *National League, Texas v. White* had been cited for that proposition. *See Carter v. Carter Coal Co.,* 298 U.S. 238, 295 (1936); *Ashton v. Cameron County Dist.,* 298 U.S. 513, 528 (1936); *Steward Machine Co. v. Davis,* 301 U.S. 548, 598, 611 (1937) (McReynolds, J., dissenting).

National League next cited *Lane County v. Oregon*, 7 Wall. 71, 76 (1869) for the declaration that "in many articles of the Constitution the necessary existence of the States, and, *within their proper spheres*, the independent authority of the States, is distinctly recognized" (emphasis added). In the *Lane County* opinion the Court elaborated upon the "proper sphere" of the States vis-a-vis the federal government:

> The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. [*Id.*]

The *Lane County* Court also made clear that the States' power to tax its own citizens:

> is, indeed, a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. [*Id.* at 77] [17]

Third, the *National League* Court cited *Coyle v. Oklahoma*, 221 U.S. 559 (1911), which declares that the "power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers." *Id.* at 565. But all that *Coyle* held is that Congress' authority under Article IV § 3 to admit new States into the Union does not empower the national legislature to impose conditions on admission whereby the new State would be on other than an equal footing with the other States, and that therefore Congress exceeded its powers under Article IV, § 3 of the Constitution by limiting Oklahoma's power to determine the location of its state

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[17] In *Florida v. Mellon*, 273 U.S. 12, 17 (1927), Justice Sutherland for a unanimous Court, cited *Lane County*, among other cases, for the rule that:

> Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield.

capitol in the Act enabling Oklahoma to become a State. In so construing Article IV § 3 (in accordance with much earlier precedent) the Court performed the function of determining the scope of one of Congress' powers delegated in Article I, in the same manner, for example, as the Court acts in determining what is "commerce" for purposes of Article I, § 8, cl. 3. And *Coyle* expressly recognized that while Congress could not impose a condition on a new State by virtue of its control over admission in Article IV § 3, the national legislature could do so as a regulation of commerce because that would be within Congress' delegated powers.[18]

The *National League* opinion relied also on two tax immunity opinions, both written by Chief Justice Stone: *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926) and *New York v. United States*, 326 U.S. 572 (1946) (plurality opinion). Prior to *National League*, however, that doctrine was considered to be *sui generis*, and to provide

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[18] The Court said:

> It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress.
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> No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capitol of the state, if construed as forbidding a removal by the state after its admission as a state, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new states. [221 U.S. at 574 (citations omitted)]

no analogy which would create an intergovernmental immunity from exercise of the interstate and foreign commerce power. Chief Justice Stone himself made the point in *United States v. California*, *supra*, 297 U.S. at 185: "[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce." [19]

National League does not, to be sure, push the tax immunity analogy to the limits of its illogic. Rather than applying the tax immunity doctrine to all of Congress' Article I power, the Court there "express[ed] no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1," 426 U.S. at 852 n.17, and the Court distinguished *Case v. Bowles*, *supra*, as a "war power" case, 426 U.S. at 854-855, n.18.[20] (The distinction is without basis in the *Case* opinion and is unsound in principle, *see* p. 18 n. 15, *supra*.) The *National League* opinion fails, however, to explain why the intergovernmental tax immunity doctrine should be extended to limit the power to regulate interstate commerce but not to limit other powers delegated in Article I. And extending the doctrine only to the commerce clause power is especially difficult to justify when it is recalled that "[n]o other federal power was so universally assumed to be necessary [as the commerce power], no other state power was so readily relinquished." *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534 (1949). *See also EEOC v. Wyoming*,

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[19] That there are differences between the commerce clause and tax powers has been clear since at least *Gibbons v. Ogden*, *supra*. *See* 9 Wheat. at 199-201.

[20] Subsequently, in *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 n.13 (1979), the Court said, "It has never been suggested that Congress' power to regulate foreign commerce could be so limited [as in *National League*]."

supra, 103 S. Ct. at 1054, 1065 (Stevens, J., concurring); *National League*, 426 U.S. at 864-865 n.6 (Brennan, J., dissenting).

National League cited as well *United States v. Jackson*, 390 U.S. 570 (1965), and *Leary v. United States*, 395 U.S. 6 (1969), which held that Congress' exercise of the commerce power is subject to the provisions in the Bill of Rights which in terms limit the powers of the national government. The only constitutional provision on which *National League* rests, however, is the Tenth Amendment (*see* p. 3, *supra*), which does *not*, in terms, limit any of the delegated powers, but is declarative of the principle of federalism that powers which have *not* been delegated to the federal government are reserved to the States or the people.

Fry v. United States, 421 U.S. 542 (1975), the only other decision cited in *National League*, contains a footnote which does broach a broader view of the Tenth Amendment. The Court said that the "Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* at 547 n.7. Since it was not necessary for the decision—the Court followed *Wirtz* and sustained an exercise of the commerce power against the States—the *Fry* footnote did not give further content to that "constitutional policy." And the footnote—in an opinion issued on the same day that *National League* was set for reargument—was truly "*dicta*," which, if intended to give substantive scope to the Tenth Amendment, would be inconsistent with all the precedents discussed at pp. 12-19, *supra*.

F. While as we have just shown the tax immunity doctrine does not justify a commerce clause immunity doctrine, the former does warrant close separate examination, for its history reveals the futility of judicial attempts to impose principled and workable limitations on an enumerated power of Congress.

The rule that States enjoy some measure of constitutional immunity from federal taxation was first announced in *Collector v. Day*, 11 Wall. 113 (1871), in which the Court held that the income of a state judge could not be taxed by the federal government.[21] The Court in that case expressed concerns strikingly similar to those voiced in *National League*: the States "are separable and distinct sovereignties," *id.* at 124, their "unimpaired existence . . . is . . . essential," *id.* at 127, and they "should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax," *id.* at 125-26. Based on those concerns, the Court held that "the means and instrumentalities employed by . . . [state] government to carry into operation . . . their reserved powers" to be "exempt from Federal taxation." *Id.* at 127.

Over the next several decades, the Court searched for principled means to cabin the immunity principle announced in *Collector v. Day* (just as this Court in the past eight years has searched for principled means of limiting *National League*'s regulatory immunity). Specifically the Court attempted to limit the immunity to traditional/governmental, as distinguished from non-traditional/proprietary activities of state governments, and on that basis sustained federal taxes on state-run liquor operations, *South Carolina v. United States*, 199

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[21] There is a certain irony in the holding of *Collector v. Day*. At the constitutional convention—and in the subsequent ratification debates—the issue in dispute with respect to the taxing power was whether the federal government should have authority to tax the people directly; the anti-federalists urged that the federal government's taxing authority should be addressed to the States (as States)—and not to the people—and that authority to tax the people should exist only "in the case of the non-compliance of a State, as a punishment for its delinquency." III *Records of the Federal Convention*, App. A, CLVIII, *supra* n.3, at 205. Indeed, three States, in ratifying the Constitution, called for such a limitation on the taxing power to be added to the Bill of Rights, but those calls were not heeded. *See* W. Murphy, *supra* n.2, at 337, 368, 385.

U.S. 437 (1905); *Ohio v. Helvering*, 292 U.S. 360 (1934); and state-run transit operations, *Helvering v. Powers*, 293 U.S. 214, 225 (1934).[22]

In *Helvering v. Gerhardt*, 304 U.S. 405 (1938), the Court took a large step away from the principle of *Collector v. Day* and the tax immunity doctrine. The holding of *Gerhardt* was narrow enough: the income of employees of Port of New York Authority, a bi-state corporation created by compact between two states, was subject to federal taxation. But the reasoning of *Gerhardt* represented a striking retreat from *Collector v. Day*:

> There are cogent reasons why any constitutional restriction upon the taxing power granted to Congress, so far as it can be properly raised by implication, should be narrowly limited. One . . . is that the people of all the states have created the national government and are represented in Congress. Through that representation they exercise the national taxing power. The very fact that when they are exercising it they are taxing themselves, serves to guard against its abuse through the possibility of resort to the usual processes of political action which

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[22] The Court likewise recently has stated that "[i]t is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities." *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, —— U.S. ——, 103 S. Ct. 1011, 1014 n.6 (1983); *see also Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678, 685 n.11 (1982) ("the running of a business enterprise is not an integral operation in the area of traditional government functions"); *Reeves Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants"). And, of course, the *National League* holding is limited to "traditional operations of state and local governments." 426 U.S. at 851 n.16. *See, e.g., Transportation Union, supra*, 455 U.S. at 686 (sustaining federal regulation of labor management relations of state-owned railroad because "the operation of railroads is not among the functions *traditionally* performed by state and local governments" (emphasis in original).

We discuss the problems this limitation poses *infra* at pp. 36-37.

> provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other.
>
> Another reason [for limiting tax immunity] rests upon the fact that any allowance of a tax immunity for the protection of state sovereignty is at the expense of the sovereign power of the nation to tax. Enlargement of the one involves diminution of the other. [304 U.S. at 416]

One year later, *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), expressly "overruled" *Collector v. Day* "so far as [it] recognize[d] an implied constitutional immunity from income taxation of the salaries of officers or employees of . . . a state government or [its] instrumentalities." *Id.* at 486. The Court reaffirmed the teaching of *Gerhardt* "that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted." *Id.* at 483. And the Court concluded that the fact that at least part of "the burden of a non-discriminatory general tax upon the incomes of employees of a government . . . may be passed on economically to that government, through the effect of the tax on the price level of labor or materials," *id.* at 487, is an insufficient basis for finding an infringement of sovereignty.

New York v. United States, 326 U.S. 572 (1946), represents a still further retreat. The Court there sustained the application to New York of a tax on the sale of mineral water, and in so doing rejected as "untenable" the distinction previously drawn between traditional/governmental and nontraditional/proprietary state functions. *Id.* at 586 (Stone, J., concurring); *see id.* at 580 (Frankfurter, J.). Justice Frankfurter explained:

> To rest the federal taxing power on what is "normally" conducted by private enterprise in contradiction to the "usual" governmental function is too shift-

> ing a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. [*Id.* at 580] [23]

Finally, in *Massachusetts v. United States*, 435 U.S. 444 (1978), the most recent tax immunity decision, the Court, while divided over what, if anything, remains of the tax-immunity doctrine, concluded that "[a] nondiscriminatory taxing measure that operates to defray the cost of a federal program by recovering a fair approximation of each beneficiary's share of the cost"—in that case a registration tax on aircraft—is plainly constitutional as applied to the States. *Id.* at 460. The Court acknowledged that application of the tax to the State "will increase the cost of the state activity," but the Court reaffirmed that "an economic burden on traditional

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[23] Justice Frankfurter put the point this way in his opinion for the Court a few years later in *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955): the governmental-proprietary distinction is "so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."

Although the Court in *New York v. United States* agreed on the inadequacy of the prior lines that had been drawn to define the States' tax immunity, the Court was unable to arrive at a majority position as to a new line. In his opinion announcing the judgment of the Court, Justice Frankfurter urged that the appropriate rule was that "so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State." 326 U.S. at 582. Justice Stone, in a concurring opinion which three other Justices joined, argued that Justice Frankfurter's nondiscrimination principle was insufficiently protective of state sovereignty because that principle might permit

> a general non-discriminatory real estate tax . . . or an income tax laid upon citizens and States alike [to be] applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands . . . . [*Id.* at 587-88]

Justice Stone concluded that such hypothetical taxes would be unconstitutional because they would "unduly interfere[] with the performance of the State's functions of government." *Id.*

state functions without more is not a sufficient basis for sustaining a claim of immunity." *Id.* at 461.[24]

The tax immunity cases teach two lessons that are especially relevant here. First, of course, those cases highlight the difficulty of the task the Court attempted in *Collector v. Day* with respect to the taxing power and in *National League* with respect to the commerce clause power: imposing principled and workable limits—not contained in the Constitution itself—on an enumerated congressional power. Second, and equally important, the experience with federal taxation of the States confirms the wisdom of the point that Madison made in *The Federalist Papers*, and that the Court made in *Helvering v. Gerhardt, supra*: "the usual processes of political action . . . provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands" of the national and state governments. *Gerhardt, supra*, 304 U.S. at 416. For the fact of the matter is that, during the almost 80 years prior to *Collector v. Day*, the 70 years that decision was good law, and, the almost 40 years since *New York v. United States* left the law in this area uncertain, the *only* federal taxes Congress ever has enacted that this Court has found to be unduly intrusive on state sovereignty were taxes on the income of state

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[24] Contrast the teaching quoted in text from *Massachusetts v. U.S.* and from *Graves v. New York* (at p. 27, *supra*) with the Court's attempt in *EEOC v. Wyoming, supra*, to distinguish *National League*:

> The most tangible consequential effect identified in *National League of Cities* was financial: forcing the States to pay their workers a minimum wage and an overtime rate would leave them with less money for other vital state programs. . . . In this case, we cannot conclude from the nature of the ADEA that it will have either a direct or an obvious negative effect on state finances. [103 S. Ct. at 1062-63]

The dissent in *EEOC v. Wyoming* argued that a principal constitutional vice in the application of the ADEA to the States was the economic burden placed upon the States. *See id.* at 1070-71 (Burger, C.J., dissenting).

employees, and not even the most ardent advocate of state sovereignty would any longer contend that such nondiscriminatory income taxes are unconstitutional. Congress' prudence in exercising the taxing power demonstrates the wisdom of Justice Frankfurter's caution:

> 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. [*New York v. United States*, *supra*, 326 U.S. at 583]

The ultimate message of the tax immunity cases, then, is that, as Madison predicted, the political process provides a more than adequate check on Congress and that the judicial process is not competent to provide additional restraints on Congress' exercise of its enumerated powers.[25]

G. This conclusion is confirmed by a close analysis of the decision in *National League* itself. For the limitations that the Court placed on the rule of immunity there announced further demonstrate that, in Justice Frankfurter's words:

> Any implied limitation upon the supremacy of the federal power . . . brings fiscal and political factors into play. The problem cannot escape issues that do

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[25] As one commentator has persuasively observed:

> The ultimate issue is not whether the national political process protects federalism interests perfectly. Indeed, in the nature of things mistakes inevitably will be made. The real question is whether judicial intervention is likely to rectify those mistakes without multiplying them. If state interests could be identified objectively we might be able to say with confidence that Congress had ignored a real state interest, and that therefore a judicial role would not entail great risks. But . . . it seems that the risk of judicial error is quite high in light of difficulties in devising appropriate doctrines limiting Congress' power.

Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 U.C.L.A. L. Rev. 1301, 1335 (1978).

> not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges. [*New York v. United States*, *supra*, 326 U.S. at 581]

The first limitation of *National League* was announced in the second paragraph of the Court's analysis in that case: notwithstanding any concerns of state sovereignty, Congress is empowered to enact laws that override (*i.e.*, preempt) "express state law determinations." 426 U.S. at 840; *see id.* at 845. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981), the Court developed the point further:

> Although such congressional enactments obviously curtail or prohibit the States' prerogative to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result.[26]

Yet in elaborating *National League* the Court has recognized that "' the authority to make . . . fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty. . . . Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982) (citations omitted). The upshot is that under what one commentator terms "the curious doctrine of *National League of Cities*," [27] the State is not acting "as a State"—and hence is subject to being overridden by Congress—

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[26] *See also Fidelity Federal S&L Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982) ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail").

[27] Alfange, *Congressional Regulation of the "States Qua States": From National League of Cities to EEOC v. Wyoming*, 1983 Sup. Ct. Rev. 215, 228-29, 232 (1983). *See also* L. Tribe, *American Constitutional Law* 311-12 (1978); Tushnet, *supra* n.25, at 1340.

when engaging in a "quintessential" exercise of sovereignty, but is acting as a State, and is immune from federal regulation, when fixing the wages of its employees.[28]

The second limitation on *National League* results from the Court's distinction of its decision one Term earlier in *Fry v. United States*, *supra*, which had sustained Congress' power to temporarily freeze the wages of state and local government employees. The *National League* Court explained that the ceiling on wages produced by the freeze at issue in *Fry* was constitutionally different from the floor established by the FLSA because the wage freeze "was occasioned by an extremely serious problem," "displaced no state choices as to how governmental operations should be structured," and "operated to reduce the pressures upon state budgets rather than increase them." 426 U.S. at 853.[29] On similar grounds, the Court in *EEOC v. Wyoming*, *supra*, sustained the application of the Age Discrimination in Employment Act to state employees performing what the Court viewed to be "clearly a traditional state function," 103 S. Ct. at 1062, as the Court found that "the degree of federal intrusion" involved in precluding the States from basing their employment decisions on the age of employees (or applicants for employment) "is sufficiently less serious" than the intrusion involved in requiring the States to pay at least minimum

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[28] Of course in many States the fixing of public employee wages is done by legislation, and thus *National League* necessarily exalts for Supremacy Clause purposes some state laws over others.

[29] The force of the latter distinction is considerably undermined because *National League* did "not believe [that] particularized assessments of actual impact are crucial to resolution of the issue . . . ." 426 U.S. at 851. This was said to be so because the FLSA amendments in any event "significantly alter[ed] or displace[d] the States' abilities to structure employer-employee relationships . . . ." *Id.* But the statute at issue in *Fry* significantly interfered with such structuring because, as was pointed out on petitioners' side in that case, a wage freeze undermines the States' ability to recruit employees and thereby seriously and adversely affects the quality of government operations.

wages to state employees "so as to make it unnecessary for us to override Congress' express choice to extend its regulatory authority to the States. . . ." *Id.*

As Professor Alfange aptly observes, under this approach to the Tenth Amendment questions of constitutionality necessarily turn on whether, in the view of the judiciary, "Congress is imposing unnecessary or unjustified requirements on the states," Alfange, *supra* n.27, at 266-67, just as under *Lochner v. New York*, 198 U.S. 45 (1905), constitutional questions turned on whether, in the judiciary's view, burdens on individuals were "unnecessary or unjustified." This approach thus is "a vehicle by which the Court, in the guise of constitutional law, can replace policy determinations of Congress concerning interstate commerce with [policy determinations of] its own," Alfange, *supra* n.27, at 267.[30]

H. For all of the foregoing reasons we respectfully submit that the Court should overrule *National League*

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[30] *See also* Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 848 (1979) (*National League* "articulates no principles of sufficient generality to aid lawmakers or lower federal courts in testing federal regulations of state activity"); Cox, *Federalism and Individual Rights Under the Burger Court*, 73 Nw. L. Rev. 1, 22 (1978) (*National League* "reveal[s] nothing beyond the Court's willingness to grant the states immunity from federal regulation entailing what five Justices consider an unduly burdensome increase in the cost of state and local government").

Justice Stevens made the point best in his concurring opinion in *EEOC v. Wyoming, supra*:

> My conviction that Congress had ample power to enact this statute, as well as the statute at issue in *National League of Cities*, is unrelated to my views about the merits of either piece of legislation. . . . My personal views on such matters are . . . totally irrelevant to the judicial task I am obligated to perform. There is nothing novel about this point—it has been made repeatedly by more learned and more experienced judges. But it is important to emphasize this obvious limit on the proper exercise of judicial power, one that is sometimes overlooked by those who criticize our work product. [103 S. Ct. at 1068]

and hold that Congress' commerce clause power is not subject to any constitutional limits derived from state sovereignty. Only such a holding would be faithful to the framers' intent. Pp. 5-12, *supra*. Only such a holding would accord with this Court's jurisprudence for the one hundred and fifty years preceding *National League*. Pp. 12-19, *supra*. Only such a holding would resolve the tensions just noted in the doctrine the Court has formulated. And only such a holding would enable the Court to escape the task which, we submit, experience teaches is inherently incapable of judicial resolution: that of reading into the Constitution an "affirmative limitation," 426 U.S. at 841, on the "manner" in which Congress "exercis[es] the authority" granted it by the Commerce Clause," *id.* at 845.[31]

II. EVEN IF *NATIONAL LEAGUE* WERE CORRECT IN HOLDING THAT STATE SOVEREIGNTY PLACES A LIMIT ON THE COMMERCE CLAUSE POWER, THE EXTENT OF THE LIMIT ESTABLISHED BY *NATIONAL LEAGUE* SHOULD BE RECONSIDERED

Even if, contrary to what we have just shown, the Court were to conclude that *National League* is sound in recognizing a state-sovereignty limit on the commerce power, we respectfully suggest that the extent of the limitation established by that case should be reconsidered. For as we now show, in all events it is clear that the Court in *National League* erred (A) by equating state sovereignty with the State's provision of goods and services, and (B) by equating the States with their political subdivisions.

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[31] This is the conclusion urged by Alfange, *supra* n.27, and Tushnet, *supra* n.25. Professor Cox reaches essentially the same conclusion, but with one caveat: "Judicial second-guessing of *nondiscriminatory* regulation is not necessary in order to protect the existence and effective functioning of the states against destruction at the hands of the national government." Cox, *supra* n.30, at 25 (emphasis added). And thirty years ago, Professor Wechsler reached a similar conclusion: "Federal intervention as against the states is . . . primarily a matter for congressional determination in our system as it stands." Wechsler, *supra* n.10, 559.

A. The Provision of Goods and Services Is Not an Essential Part of State Sovereignty

1. In *National League* the Court, after concluding that considerations of state sovereignty limit the commerce power, stated that "[t]he question we must resolve" is whether determining the wages and hours of work of state employees "are ' "functions essential to separate and independent existence," ' so that Congress may not abrogate the States' otherwise plenary authority to make them." 426 U.S. at 845-46 (citation omitted). The Court answered that question as follows:

> [T]he 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 in a federal system." This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. [426 U.S. at 852]

And *Maryland v. Wirtz* was overruled because the *National League* Court "agree[d] that such assertions of [federal] power [as were entailed in the application of the FLSA to the States] would indeed, as Mr. Justice Douglas cautioned in his dissent in *Wirtz*, allow 'the National Government [to] devour the essentials of state sovereignty.' " 426 U.S. at 855.

The stated rule of *National League* thus is that Congress may not threaten the States' "separate and independent existence," "impair the States' 'ability to function effectively in a federal system,' " or "devour the essentials of state sovereignty." [32] But that rule does not

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[32] Subsequent cases have reaffirmed that this is the intended scope of the limit on Congress' power. *See, e.g., Transportation Union v. Long Island R. Co., supra,* 455 U.S. at 687 (Congress may not "hamper the State government's ability to fulfill its role in the Union"); *EEOC v. Wyoming, supra,* 103 S. Ct. at 1060.

in itself require that application of the FLSA to some or all state employees providing goods and services is invalid; it is not intuitively obvious that requiring the States to abide by the labor protections for such employees stated in the FLSA would, for example, "devour the essentials of state sovereignty," let alone jeopardize the "separate and independent existence" of the States. That conclusion follows only if it is agreed that provision of goods and services is an essential of state sovereignty or state existence.

The Court in *National League* was not prepared to go quite that far. To rationalize its holding with the Court's precedents permitting federal regulation of state-owned railroads, *see* pp. 16-17, *supra* (including federal regulation of the labor-management relations of such railroads) —and, moreover, to assure that the States' immunity from federal regulation would not be ever-expanding as the States assumed new functions—the *National League* Court limited its conception of state sovereignty to the provision of only "traditional," 426 U.S. at 851, or "integral," *id.* at 854 n.18, services, and permitted federal regulation of the employment conditions of state employees engaged in the performance of other state functions.[33]

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[33] In light of this limitation, it is clear that, despite some dictum in the opinion, *National League* does not mean that establishing the wages of the employees the State hires is an essential attribute of state sovereignty; rather, under *National League*, that is true with respect to only certain employees, and it is true about those employees only because they are engaged in functions which the Court determined to be essential to the State and whose performance the Court determined could be disputed by the application of the FLSA.

Even as to those services with respect to which *National League* recognized a state immunity from federal regulation, the Court in *National League* was not prepared to hold that immunity to be absolute; thus the Court based its holding, in part, upon the degree of intrusion that it believed application of the FLSA would cause. As previously noted, the limitation on *National League* to especially intrusive federal laws is itself problematic. *See* pp. 32-33, *supra*.

As the commentators have observed, this limitation on the reach of *National League* underscores an anomaly in the doctrine announced in that case:

> [I]t is difficult to understand how a distinction drawn by a federal court between what could be described as nontraditional services (subject to federal control) and traditional services (not subject to federal control) would not itself make a severe inroad into a state's "sovereign perogative of choice." . . . On the other hand, if "traditional" is redefined to mean "important" or "essential" the concept becomes boundless.[34]

Precisely because this is so the debate in this case comes down to whether state-operated buses and subways are constitutionally distinguishable from state-operated commuter trains.

This difficulty suggests that even if the Court were to continue to limit Congress' commerce clause power so as to protect state sovereignty, there would be a need to reconsider the question of to what extent, if at all, the States must be permitted to provide goods and services free and clear of federal commerce clause regulation in order to preserve the essentials of state sovereignty.

2. In addressing that question it is important to bear in mind, at the threshold, that the concept of "state sovereignty" is not self-defining. The word "sovereignty" ordinarily connotes a single, supreme government—a nation-state. Within the unique federal system that the framers created, however, state sovereignty cannot have that meaning, for within that system there is a national government which is preeminently the sovereign and

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[34] Alfange, *supra* n.27, at 233-34. *See also* L. Tribe, *supra* n.27, at 311; Kaden, *supra* n.30, at 887; Tushnet, *supra* n.25, at 1339; La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 Wash. U.L.Q. 779, 958 (1982).

whose laws are the "supreme law of the land." [35] Thus the term "state sovereignty" must be defined *ab initio* with specific reference to the unique federal system created by the Constitution. As the Court stated in *EEOC v. Wyoming*:

> The 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 in which the States enjoy a "separate and independent existence" not be lost through undue federal interference in certain core state functions. [103 S. Ct. at 1060]

One of the "unique benefits of [this] federal system" is the existence of a supreme power in the federal government to insure a free flow of commerce, "to enact 'all appropriate legislation' for 'its protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564); [and] to

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[35] For precisely that reason, a number of delegates at the constitutional convention urged that it was misleading even to speak of the States as sovereigns. For example, Rufus King of Massachusetts argued as follows:

> The states were not "sovereigns" in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties. Considering them as political Beings, they were dumb, for they could not speak to any foreign Sovereign whatever. They were deaf, for they could not hear any propositions from such Sovereign. They had not even the organs or faculties of defense or offense, for they could not of themselves raise troops, or equip vessels, for war. [I *Records of the Federal Convention, supra* n.3, at 323]

Madison himself likewise argued:

> Some contend that states are sovereign, when in fact they are only political societies. There is a gradation of power in all societies, from the lowest corporation to the highest sovereign. The states never possessed the essential rights of sovereignty. These were always vested in congress. . . . The states, at present, are only great corporations, having the power of making by-laws, and these are effectual only if they are not contradictory to the general confederation. [I *Id.* at 471]

adopt measures 'to promote its growth and insure its safety' (*Mobile County v. Kimball*, 102 U.S. 691, 696, 697) . . . ." *Labor Board v. Jones & Laughlin Steel Corp.*, *supra*, 301 U.S. at 36-37. Indeed, "the need for centralized commercial regulation was universally recognized as the primary reason for preparing a new constitution." Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335, 1340-41 (1934). *See also* pp. 23-24, *supra*. Whatever meaning is given to the concept of "state sovereignty," therefore, that concept should not be such as to defeat the point of the Commerce Clause.

3. There is no doubt that when the States create goods or services they are engaged in economic activity that can powerfully affect interstate commerce.[36] The Court at least implicitly acknowledged the point in *National League*, *see* 426 U.S. at 840-41, 845, and developed the point at some length in *Maryland v. Wirtz*, *supra*, with respect to the state-operated schools and hospitals at issue in that case:

> It is clear that labor conditions in schools and hospitals can affect commerce. The facts stipulated in this case indicate that such institutions are major users of goods imported from other States. For example:
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> > In the current fiscal year an estimated $38.3 billion will be spent by State and local public educational institutions in the United States. In the fiscal year 1965, these same authorities spent $3.9 billion operating public hospitals. . . .[37]

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[36] In 1982, for example, over 10% of the gross national product—$363,400,000,000—was accounted for by governments at all levels. Government purchases accounted for over 20% of the GNP—$649,000,000,00. *See 1984 Statistical Abstract of the United States* at 449-50.

[37] For the year 1981, the comparable figure for hospitals was $17.6 billion; for 1983, the comparable figure for schools, was $135.9 billion. *1984 Statistical Abstract of the United States* at 113, 139.

> For Maryland, which was stipulated to be typical of the plaintiff States, 87% of the $8 million spent for supplies and equipment by its public school system during the fiscal year 1965 represented direct interstate purchases. Over 55% of the $576,000 spent for drugs, x-ray supplies and equipment and hospital beds by the University of Maryland Hospital and seven other state hospitals were out-of-state purchases.
>
> Similar figures were supplied for other States. [392 U.S. at 194-95]

Defining state sovereignty to include such economic activities—and thereby denying Congress the power to adopt such regulations as the national legislature deems necessary to protect the flow of commerce—thus jeopardizes, rather than furthers, one of the "unique benefits of our federal system." [38]

While we do not believe it either wise or necessary to categorize the mischief that will ensue from hobbling Congress' power to regulate commerce by denying what commerce is—a cunningly interrelated complex constantly in the process of change—we do pause to repeat one point noted in our brief last Term. If the States as providers of goods and services were immune from federal regulatory authority, the Tenth Amendment would create a powerful incentive for transferring business enterprises from private to public ownership. Federal regulation, in the interest of other social objectives, often imposes costs on the operation of a private good or service producing entity, as the instant case and *National League* both illustrate. If those costs could be avoided merely by state

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[38] As the discussion in text indicates, our argument here is limited to situations like that posed by the FLSA in which Congress regulates the States in common with other entities engaged in the same activity. As Professor Cox observes, "[r]egulation aimed only at state activities would present a quite different question." Cox, *supra* n.30, at 25. *See also* n.23, *supra* (discussing Justice Frankfurter's opinion in *New York v. United States*).

acquisition of a business, it would become economically advantageous for the States to acquire and operate business enterprises free of the federally-imposed costs. Yet plainly the Tenth Amendment was not intended to encourage a state take-over from the private sector of the provision of goods and services.

4. There is another, equally fundamental reason for concluding that, in general, state provision of goods and services is not one of "the essentials of state sovereignty." In contrast to the making and enforcement of laws—which is the exclusive province of government (and the "quintessential attribute of sovereignty," *FERC v. Mississippi*, *supra*, 456 U.S. at 761)—when providing a good or service a State does act, contrary to the assertion in *National League*, 426 U.S. at 849, like the other "factor[s] in the 'shifting economic arrangements'" for providing that good or service. States run schools, hospitals, parks and the like, but so do private for-profit and not-for-profit entities.[39] From the perspective of the employees engaged in delivering these services; the manufacturers, sellers and transporters of goods used in creating the services; and the ultimate consumers of the service, the service is very much the same whether supplied privately or publicly. The practice of medicine in public and private hospitals is the same, the suppliers of both institutions are the same, and both draw on the same corps of trained medical personnel. The parallels between public and private educational institutions are equally close—indeed these are the common source of the trained personnel employed by public and private hospitals. In sum, in Justice Frankfurter's phrase, the provision of services does not "partake of uniqueness from the point of view of intragovernmental relations." *New York v. United States*, *supra*, 326 U.S. at 582.

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[39] For an elaborate demonstration of this point, *see* the brief appellee San Antonio Metropolitan Transit Authority filed in this case last Term, pp. 35-38. *See also* Brief of American Public Transit Association at 25 n.33.

Furthermore, no law of nature, no political principle, and no rule of economics determines which goods and services will be produced by the State and which will not. The range of options open to the States is wide; it includes: leaving production to private enterprises; regulating the private sector's production of the good or service; providing financial assistance to would-be-purchasers of the good or service (this assistance may be limited by a means-test or may be in the form of vouchers distributed to all individuals); licensing one or more private entities to create the good or service; subsidizing production of the good or service by private entities; or providing the good or service through government employees.[40]

There is no theory—certainly none enshrined in the Constitution—that explains why, in our society, governments generally have chosen not to be involved in, *e.g.*, the production and distribution of what are undoubtedly two of the most important goods of all, food and clothing, but frequently have chosen to run, *e.g.*, golf courses and zoos. Moreover, as to many services, different governments, at different times, have made different choices: services that in some localities are provided by the government itself in other localities are provided by a private entity pursuant to a contract with the government or by private entities operating in a competitive market. And even in a single locality different options may be tried and retried over time.[41]

The example of refuse collection, perhaps the most mundane of *National League's* "traditional" functions,

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[40] *See, e.g.*, E. Savas, *Privatizing the Public Sector* 55-75 (1982); H. Hatry, *A Review of Private Approaches for Delivery of Public Services* (1983).

[41] *See* sources cited n.40, *supra*. In this regard it is noteworthy that recently it has become increasingly common for governments to contract with a private entity to provide a particular service to the government's citizens rather than for the government to provide that service itself. *See* AFSCME, *Passing the Bucks: The Contracting Out of Public Services* 10-11 (1983).

see 426 U.S. at 851, serves to illustrate our point. The manner in which this service is delivered varies greatly from place to place. In some cities, the government itself provides the service. In other cities, the government contracts with a private firm to do the work at government expense. On the West Coast, it is common for the city to award a territorially exclusive franchise to a private firm which bills the households it serves for its service. And in a number of communities, the free market is relied upon to provide this service on a competitive basis. Indeed, of the various options outlined above "only the voucher system is not utilized to provide [refuse] service in the United States." [42]

Given the range of choices for providing goods and services recognized in this society it simply cannot be said as a general matter that providing goods and services is an "essential" of state sovereignty. The fact that, as to any given good or service, some entities that are *not* sovereign provide the service while some entities that *are* sovereign do not, demonstrates that such activity is not an essential attribute of state sovereignty. Without doubt, a State that provided no services whatsoever would still be a State. So long as the State's authority and discretion to make and enforce laws (within the realm open to it under the Constitution) is not hindered, the State's sovereignty is secure and its "ability to function effectively in a federal system" and "to fulfill its role in the Union" (p. 35, *supra*), is not impaired.

For all of these reasons we submit that, at the least, the Court should limit *National League* so that it restricts Congress' commerce clause power only as necessary to protect that which *FERC v. Mississippi* teaches is the "quintessen[ce]" of state sovereignty: the making and enforcement of laws.

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[42] E. Savas, *supra* n.40, at 71-72. Surveys have indicated that upwards of 30% of cities contract out for solid waste collection. AFSCME, *supra* n.41, at 10.

B. Federal Regulation of Political Subdivisions Does Not Infringe State Sovereignty

In *National League*, the Court invalidated the FLSA insofar as it applied not only to State employees engaged in "traditional" or "integral" functions, but also insofar as it applied to employees of cities, counties, and other political subdivisions engaged in such functions. The sole basis for this aspect of the ruling was set forth in a footnote:

> As the denomination "political subdivision" implies, the local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself. [426 U.S. at 855-56, n.20]

The foregoing is fundamentally unsound. Its fallacy is perhaps best revealed by *Community Communcations Co. v. Boulder*, 455 U.S. 40 (1982), in which the Court rejected a city's argument that its "cable television moratorium ordinance is an 'act of government' performed by the city *acting as the State* in local matters, which meets the 'state action' criterion of *Parker* [*v. Brown*, 317 U.S. 341 (1943)]." 455 U.S. at 53; emphasis in original. The Court concluded that this argument

> both misstates the letter of the law and misunderstands its spirit. The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a "*dual* system of government," *Parker*, 317 U.S. at 351 (emphasis added), which has no place for sovereign cities. As this Court stated long ago, all sovereign authority "within the geographical limits of the United States" resides either with

> the Government of the United States, or [with] the States of the Union. *There exists within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in subordination to one or the other of these." *United States v. Kagama*, 118 U.S. 375, 379 (1886) (emphasis added).
>
> The dissent in the Court of Appeals correctly discerned this limitation upon the federalism principle: "We are a nation not of 'city-states' but of States." [455 U.S. at 53-54]

This same understanding is reflected in this Court's decisions interpreting the Eleventh Amendment. That Amendment, to a greater extent than the Tenth Amendment,[43] "embodies" the "principle of state sovereignty," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), for "immunity from suit is a high attribute of sovereignty," *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911). Yet the Court has never concluded that state sovereignty considerations require that the immunity established by that Amendment extend to political subdivisions; to the contrary, "the Court has consistently *refused* to construe the Amendment to afford protection to political subdivisions such as counties and municipalities . . . ." *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391, 401 (1979) (emphasis added); *Mt. Healthy Board of Ed. v. Doyle*, 429 U.S. 274 (1977); *Old Colony Trust Co. v. Seattle*, 271 U.S. 426 (1926); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).[44] And it is

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[43] The Eleventh Amendment is a quite explicit restriction on the power of the federal government (specifically the power of Congress under Article III to vest certain jurisdiction in the federal courts) whereas the Tenth Amendment limits federal power, if at all, only by implication.

[44] In *Lincoln County*, the Court refused to extend the Eleventh Amendment's protections beyond States, although *on the same day*

entirely impermissible to treat the Tenth Amendment as giving the word "State" a broader meaning than that word has in the Eleventh, or to hold that political subdivisions share in the States' "sovereignty" for Tenth Amendment purposes although not for the purposes under the Eleventh.

CONCLUSION

For the foregoing reasons, and those stated in our briefs last Term, the judgment of the district court should be reversed.

Respectfully submitted,

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(March 3, 1980), in *Hans v. Louisiana*, 134 U.S. 1, the Court expanded that Amendment beyond its literal language to foreclose federal jurisdiction over a suit against the State by one of its own citizens.