Nos. 82-1951 and 82-1913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
and AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees

JOE G. GARCIA,
Appellant

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
and AMERICAN PUBLIC TRANSIT ASSOCIATION,
Appellees

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

SUPPLEMENTAL BRIEF FOR THE AMERICAN PUBLIC TRANSIT ASSOCIATION ON REARGUMENT

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QUESTIONS PRESENTED

"In addition to the questions presented . . . previously briefed and argued, the parties are requested to brief and argue 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."

Order of the Supreme Court of the United States, 52 U.S.L.W. 3937 (U.S. July 5, 1984).

The questions previously briefed and argued are:

1. *National League of Cities v. Usery*, 426 U.S. 833 (1976), held that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act interfere with an essential attribute of state sovereignty and therefore constitutionally cannot be applied to integral activities in areas of traditional governmental functions. Are publicly owned local mass transit services integral activities in areas of traditional governmental functions, thus precluding the application of these federal statutory provisions to them?

2. Did *National League of Cities* find unconstitutional so much of Congress' intended coverage of state and local governmental functions by the minimum wage and overtime compensation provisions of the Fair Labor Standards Act that it is unwarranted to apply these requirements to publicly owned local mass transit systems without new congressional enactment?

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SUMMARY OF ARGUMENT

This Court should reaffirm the principles of the Tenth Amendment set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and the federalism values reflected therein. The United States does not claim that its Commerce Clause power is unconstrained by principles of federalism and the Tenth Amendment when it seeks to regulate directly state and local governments, nor does it claim that determinations by state and local govern-

ments of wages and overtime compensation for their employees is not a protected "core state function." Thus, the only effective difference between the federal appellant's position and that of appellees is whether such constitutional protection embraces state and local governments engaged in providing local publicly owned mass transit services.

The court below correctly held that the United States Secretary of Labor may not require the San Antonio Metropolitan Transit Authority ("SAMTA"), a political subdivision of the State of Texas, to alter its wage and overtime compensation policies to conform to the requirements of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982) ("FLSA"). This conclusion was required by developments in Commerce Clause and federalism jurisprudence, *National League of Cities*, and four subsequent decisions of this Court. These five cases, as well as previous decisions, recognize two constraints on Congress' exercise of Commerce Clause power in the direct regulation of the States and their political subdivisions: (1) the principles of federalism embodied in the constitutional structure, 426 U.S. at 842, 849, 851-52, 854; and (2) the Tenth Amendment, *id.* at 842. These constitutional limitations invalidate Congress' extension of the FLSA wage and overtime provisions to the operations of state and local governments engaged in delivering traditional public services. This Court has several times concluded that the States' ability to determine the wages and hours of their employees is a core function of state and local governments that Congress, in the otherwise proper exercise of its commerce powers, cannot impair. *See infra* at 36-42.

That federalism principles restrain the exercise of certain of Congress' plenary powers set forth in Article I, Section 8 of the Constitution of the United States, has been an important part of this Court's federalism jurisprudence from *Collector v. Day*, 78 U.S. (11 Wall.) 113

(1871), to *EEOC v. Wyoming*, 103 S. Ct. 1054, 1062 (1983). The deviation from these principles in *Maryland v. Wirtz*, 392 U.S. 183 (1968), was soon recognized as such and specifically reversed within eight years after the decision.

Four decisions of this Court after *National League of Cities* reconsidered, refined, and clarified the principles articulated therein.[1] It is now established that Congress has virtually unlimited commerce power to regulate private persons within the States and thereby preempt, pursuant to the Supremacy Clause, inconsistent state regulation of such persons. But at least eight Justices of this Court, including three of the four who dissented in *National League of Cities*, also have recognized the requisite corollary of Congress' extension of commerce regulation to purely local activities: Congress may not regulate directly the internal operations of States as States in ways that impair their capacity to function effectively in the federal system. For, if Congress can regulate the States, including their political subdivisions, in ways that "hamper" their core governmental capacity to deliver the public services their citizens require, deem essential, and pay taxes to fund, the States then will be unable "to fulfill [their] role in the Union." *LIRR*, 455 U.S. at 687. The standard of immunity that has evolved from *National League of Cities* and subsequent decisions is a relatively narrow one, but it is firmly rooted in the structure of the Constitution, fully supported by the debates of the framers, at harmony with the substantial body of this Court's federalism jurisprudence, and essential to the practical preservation of democratic federalism today. It is a standard upon which state and local governments have relied in structuring the delivery of essential governmental services.

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[1] *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983); *FERC v. Mississippi*, 456 U.S. 742 (1982); *United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678 (1982) ("*LIRR*"); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981).

The Solicitor General concurs. He nevertheless attempts to limit the federalism protection of state and local governments in ways that exclude local public mass transit services even though he does not deny that today such services are pervasively rendered by state and local governments; his theories, however, are inconsistent with the principles articulated in *National League of Cities*. In *LIRR*, this Court interpreted those principles and rejected a "static historical view" such as that proposed by the Solicitor General in limiting federalism immunity, 455 U.S. at 686. *See* Brief for the American Public Transit Association ("APTA") (October Term, 1983) ("APTA Br.") 22-25. The Solicitor General's suggestion that the crucial inquiry is whether the States provided the service before enactment of the federal regulatory legislation is unrelated to the constitutional principles at stake and is an unworkable doctrine. But, in any event, this test is satisfied here since state and local governments pervasively provided local public transit services before Congress sought to impose intrusive FLSA requirements on transit operators—public or private. *See* APTA Br. 23-24; 27-35. Also, contrary to the Solicitor General's position on the relevance of federal mass transit assistance, this Court, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), held that the acceptance of federal grants does not subject the States to implicit conditions not authorized in the funding statute. *See also Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 27 (1982); APTA Br. 35-45.

Appellant Garcia seeks to limit the federalism protections accorded the States through application of four fundamental misperceptions. In reality, contrary to Garcia's contention, the framers of the Constitution were concerned that Congress, in the exercise of its delegated powers, should not impair the States' capacity to meet their local responsibilities, and an important purpose of the Tenth Amendment was to protect the States from such

federal impairment. *See infra* at 25-32. Second, the framers intended that the judiciary should arbitrate issues of federalism, and from its inception the Court readily accepted its umpire role, confirming that "in many articles of the Constitution . . . the independent authority of the States, is distinctly recognized." *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869). *See infra* at 41-42. Third, the federalism protection applies to the States as providers of traditional public services, which are not of a lesser constitutional status than the making and enforcement of laws. The provision of essential governmental services, which include police and fire protection as well as public education and transit, is a fundamental part of the local public health, safety and welfare responsibilities that the Constitution presumes the States will retain the unimpaired capacity to administer. *See infra* at 42-48. Finally, the States' decision not to provide some police, transit, park, or health services directly but rather through regional authorities or local governments which the States have created to perform such governmental functions, does not provide any constitutional basis for excluding political subdivisions of the States from this constitutional protection. *See infra* at 35-36.

The limits of constitutional federalism and the Tenth Amendment on Congress' commerce power to regulate state and local governments directly, as articulated in *National League of Cities* and four subsequent cases, should again be reaffirmed. This case falls squarely within those principles. This Court has held and repeatedly confirmed that application of the FLSA wage and overtime compensation provisions to state and local governments is regulation of the States as States, and impairs an essential attribute of state sovereignty. APTA Br. 7, 13. It also has held that local political subdivisions and cities are embraced in this protection. 426 U.S. at 833 n.20; *see infra* at 35-36. Local public mass transit

services—which are provided pervasively by state and local governments [2] at substantial cost to their taxpayers to meet community-wide needs that cannot be met by the private sector—are as traditional, as required, and as essential as the public services identified in *National League of Cities*. APTA Br. 15-22.

ARGUMENT

IN *NATIONAL LEAGUE OF CITIES* AND SUBSEQUENT DECISIONS, THIS COURT AGAIN HAS RECOGNIZED AND PROPERLY APPLIED TWO CONSTITUTIONAL LIMITATIONS ON THE EXERCISE OF THE COMMERCE POWER OVER STATE AND LOCAL GOVERNMENTS: PRINCIPLES OF CONSTITUTIONAL FEDERALISM AND THE TENTH AMENDMENT.

Fry v. United States, 421 U.S. 542, 547 n.7 (1975), reaffirms "the constitutional policy that Congress may not exercise [its commerce] power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." That longstanding constitutional principle again was applied in *National League of Cities* to prohibit Congress' exercise of its Commerce Clause authority in ways that would impair "core state functions," *EEOC*, 103 S. Ct. at 1060, and thereby endanger the States' "separate and independent existence." 426 U.S. at 845, 851. Congress therefore could not "displace the States' abilities to structure employer-employee relationships" in the performance of such traditional governmental responsibilities as "administering the public law

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[2] State and local governments provide at least 94 percent of all local mass transit passenger trips. APTA, *Transit Fact Book* 43 (1981). Virtually all of the large cities provide public transit services. APTA Br. 24. Of the fourteen large cities with private systems as of 1960, noted in the Solicitor General's brief last Term ("U.S. Br.") at 17, all are now publicly owned. U.S. Department of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 2-7 (1981).

and furnishing public services." *Id.* at 851 (emphasis added). "This exercise of congressional authority," the Court held, "does not comport with the federal system of government embodied in the Constitution," *id.* at 852, in which a discrete and separate role for the States is recognized and preserved in the structure of the Constitution and the Tenth Amendment,[3] *id.* at 842, 849, 851-52, 854. As this Court's doctrine of Commerce Clause power evolved in response to Congress' expanding exercise of it, the principles of federalism applied in *National League of Cities*, and refined in subsequent decisions, have become "sound and enduring constitutional doctrine." [4]

I. THIS COURT HAS DEVELOPED AN EXACTING BUT PRACTICAL TEST THAT PROPERLY RESPECTS COMPETING CONSTITUTIONAL VALUES.

National League of Cities has become a working part of our constitutional law. On four occasions since 1976, this Court has reaffirmed the principles of the Tenth Amendment and clarified the boundaries of constitutional federalism as limitations on the exercise of the commerce power as set forth in *National League of Cities.* What has developed is a useful doctrine protective of competing federal and state interests.

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[3] *See, e.g.*, Justice Brennan for the Court in *EEOC*, 103 S. Ct. at 1064 n.18 (noting "Tenth Amendment constraints . . . circumscribe the exercise of [Congress'] Commerce Clause powers"); *id.* at 1069 (Burger, C.J., dissenting) ("Congress' authority under the Commerce Clause is restricted by the protections afforded the states by the Tenth Amendment"); *id.* at 1078 (Powell, J., dissenting) (federalism limitation was "implicit in the Constitution as originally ratified"); *Nevada v. Hall*, 440 U.S. 410, 430 (1979) (Blackman, J., dissenting) (state immunity "implied as an essential component of federalism").

[4] Supplemental Brief for the Secretary of Labor ("U.S. Supp. Br.") 2, 9 ("Few principles are more pervasively reflected in the text and overall structure of the Constitution; few are more fundamental to the Framers' conception of our system of government").

The first case interpreting and applying *National League of Cities* to federal commerce power regulation is *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981). Justice Marshall writing for the Court clarified the distinction in *National League of Cities* between Congress' proper exercise of its plenary commerce powers over the private marketplace within the States that, pursuant to the Supremacy Clause, preempts inconsistent state regulation of private persons, and Congress' direct regulation of the internal operations of state and local governments, which may be unconstitutional if it impairs the States' ability to function effectively in the federal system. With this crucial distinction in mind, the Court articulated a useful test for state immunity from federal regulation:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

452 U.S. at 287-88 (citations omitted; emphasis in original).

Recognizing that the constitutional balance struck in *National League of Cities* between federal wage and overtime regulation and the States' freedom to structure relationships with their employees may be different when the federal regulation governs other than wages and overtime, the Court, influenced by Justice Blackmun's concurring opinion in *National League of Cities*, 426 U.S. at 856, added a footnote caveat:

> Demonstrating that these three requirements are met does not, however, guarantee that a Tenth

> Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies submission.

452 U.S. at 288 n.29 (citations omitted).

In *United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678 (1982), Chief Justice Burger writing for the Court reaffirmed the *Hodel* articulation of the *National League of Cities* test and applied it to the federal Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1982), which provided railroad employees the right to strike under certain conditions. The Court confirmed that "under most circumstances federal power to regulate commerce could not be exercised in such a manner as to undermine the role of the states in our federal system," 455 U.S. at 686, but nevertheless upheld the application of the federal law to the state-owned Long Island Railroad. The Court concluded that interstate railroads uniquely had been "subject to comprehensive federal regulation for nearly a century" and that "Congress long ago concluded that federal regulation of railroad labor relations is necessary to prevent disruptions in vital rail service essential to the *national economy*." *Id.* at 687, 688 (emphasis added). The Long Island Railroad, part of the private nationwide rail system for over one hundred years, had continued to comply with federal railway labor regulation during the first thirteen years of state ownership, until, in the midst of a labor dispute, the State attempted to assert Tenth Amendment immunity. *Id.* at 681. In upholding the continued application of federal law to the railroad, the Court simply followed the guidance of *National League of Cities*, which, citing three precedents,[5] had concluded that occasional state ownership of a railroad connected to the interstate system was one activity clearly not protected by the Tenth Amendment since it was not a tradi-

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[5] *Parden v. Terminal Railway*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *United States v. California*, 297 U.S. 175 (1936).

tional local government activity.[6] 426 U.S. at 854 n.18. *See also* APTA Br. 27-30. The federal interest in uniform railroad labor regulation has always been substantial; the State acquired the railroad with that knowledge and its submission to the federal requirements further demonstrated that no equivalent state interest was put at risk.

FERC v. Mississippi, 456 U.S. 742 (1982), "present[ed] an issue of first impression," *id.* at 759, and therefore an opportunity to define further the constitutional principles set forth in *National League of Cities.* Unlike *National League of Cities*, the Court was not asked to consider the applicability of general regulation to the States as States but rather to consider an attempt by the federal government through the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"), "to use state regulatory machinery to advance federal goals," 456 U.S. at 759, in the States' regulation of private parties. The Court emphasized that PURPA functioned in an area where the federal government could preempt entirely State regulation, but instead "out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards." *Id.* at 765 (emphasis in original).

The "central point" of Justice Blackmun's opinion for the Court in *FERC* is the "proposition[] that Congress may pre-empt the States in the regulation of private con-

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[6] The Court in *LIRR* noted that there were only two state-owned commuter railroads in the nation. 455 U.S. at 686 n.12. The Solicitor General had urged the Court to distinguish between a "commuter railroad" and "a conventional public mass transit system," U.S. Br. 24-25, *LIRR*, which " 'is now of necessity provided almost exclusively by state and local governments,' " *id.* at 25-26 (citation omitted), noting that this distinction "is firmly grounded in the separate histories," "the applicable law," and "the usages" of two entirely different types of transportation, *id.* at 25 n.19.

duct." *Id.* at 767 n.30.[7] He states: "We hold only that Congress may impose conditions on the State's regulation of private conduct in a pre-emptible area. This does not foreclose a Tenth Amendment challenge to federal interference with the State's ability 'to structure employer-employee relationships,' 426 U.S., at 851, while providing 'those governmental services which [its] citizens require,' *id.*, at 847, as was the case in *National League of Cities.*" 456 at 769-70 n.32. Thus, the Court again affirmed the vitality of the principles set forth in *National League of Cities* and its application to federal regulation of the States as States but carefully distinguished PURPA's impact on the actions taken by states to regulate private parties.[8]

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[7] *Compare with Pacific Gas & Electric Co. v. State Commission,* 103 S. Ct. 1713 (1983). At least since *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 340-41 (1816), "it has always been the law that state legislative and judicial decisionmakers must give preclusive effect to federal enactments concerning non-governmental activity, no matter what the strength of the competing local interests." *FERC,* 456 U.S. at 766. This is true though Congress exercises its authority "in a manner that displaces the States' exercise of their police powers," *Hodel,* 452 U.S. at 291, or in such a way as to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important," *id.* at 290, or, to put it still more plainly, in a manner that is "extraordinarily intrusive," *id.* at 305 (Powell, J., concurring).

[8] Justice Blackmun recognized that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," *id.* at 761-62, but noted there is nothing in PURPA "directly compelling" the States to enact or enforce a "regulatory program." *Id.* at 765. Rather, in adopting "a less intrusive scheme," *id.*, "Congress intended to defer to state prerogatives—and—expertise. . . ." *Id.* at 765 n.29. Moreover, the State could have abandoned "regulation of the field altogether," *id.* at 766, was not required to adopt or implement any standards, and could have adopted different standards. *Id.* at 749-50. While the Court found PURPA's requirement that the state adjudicate disputes arising under the statute "more troublesome," *id.* at 759, it noted that the State Commission had jurisdic-

FERC emphasizes the precise principle of federalism underlying *National League of Cities*: It is when Congress regulates the States directly but denies them the choice between opting out of a federal program or waiving their immunity and participating that the federal statute most threatens state sovereignty. Thus, Congress' direct and unconditional imposition of the FLSA minimum wage and overtime compensation requirements was so "intru[sive]" that "even the State's discretion to achieve its goals in *the way it thinks best* is . . . overridden entirely," *EEOC*, 103 S. Ct. at 1062 (emphasis in original) (quoting 426 U.S. at 848). FLSA regulation endangered "the States' ability to structure operations and set priorities over a wide range of decisions," *id.* (quoting 426 U.S. at 849-50), and "threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decisionmaking." *Id.* (citing 426 U.S. at 846-52). Congress imposed these requirements without providing the State any policy options. Nor was the federal government prepared to step in and require maintenance of essential services or provide them directly should the States find that compliance with the FLSA impaired their ability to perform essential governmental functions. It is questionable, in fact, whether the federal government, without the States' consent, could assume, consistent with the Constitution, the

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tion to entertain analogous State claims, *id.* at 760, and that therefore the principles of *Testa v. Katt*, 330 U.S. 386, 395 (1947) (state courts must enforce federal law where they have appropriate jurisdiction) were controlling. Thus, to the extent that Congress' partial preemption of state regulation of private utilities in an area of overriding national concern—energy conservation—impinges on the state regulatory machinery, Justice Blackmun painstakingly demonstrated that Congress left the States policy choices, selected the least intrusive approach and remained within the bounds of established precedent, holding that, unlike the FLSA, there is nothing in PURPA that "impair[s] the ability of the States 'to function effectively in a federal system.'" *Id.* at 765-66 (quoting *Fry*, 421 U.S. at 547 n.7).

direct provision and operation of police, fire, transit and other local traditional governmental functions.[9]

On the other hand, this Court has upheld conditions on states receiving federal grants authorized pursuant to the spending powers because the States may reject both the aid and the conditions. "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' . . . . There can, of course, be no knowing acceptance, if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . ." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. at 17; *see also* APTA Br. 39-44.[10]

The fourth case which articulates the current doctrine of Tenth Amendment and federalism constraints on the

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[9] States have provided police protection, transit services, public hospitals, fire departments, libraries and schools over the course of decades not as a matter of choice, but because such services were critical to the community and could not be provided privately or by the federal government. As Justice Marshall noted in an analogous context, "[t]o suggest that the State had the choice of either ceasing operation of these vital public services [operating hospitals and schools] or 'consenting' to federal suit [under the FLSA] suffices, I believe, to demonstrate that the State had no true choice at all. . . ." *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 296 (1973) (Marshall, J., concurring).

[10] *See also Edelman v. Jordan*, 415 U.S. 651, 688-89 (1974) (Marshall, J., dissenting) ("Unlike the Fair Labor Standards Act involved in . . . *Employees*, . . . the Social Security Act does not impose federal standards and liability upon all who engage in certain regulated activities, including often-unwilling state agencies. Instead, the Act seeks to induce state participation in the federal welfare programs by offering federal matching funds in exchange for the State's voluntary assumption of the Act's requirements. I find this basic distinction crucial: it leads me to conclude that by participation in the programs, the States waive whatever immunity they might otherwise have from federal court orders requiring retroactive payment of welfare benefits.").

commerce power is *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983). The Court in an opinion by Justice Brennan upheld the application of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (1982) ("Age Act"), against a mandatory state retirement policy for state-employed game wardens because in the judgment of the majority, one part of the three-part test was not met. The Court recognized that the case involved, *first*, federal regulation of the State *qua* State, 103 S. Ct. at 1061, and *second*, an area of traditional governmental functions, *id.* at 1062. This left only the issue of whether the federal law displaced a "core state function." The Court concluded that, unlike the FLSA, 103 S. Ct. at 1061 n.11, the Age Act provisions "[do] not 'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions' " because they do not preclude the States from keeping only fit game wardens. *Id.* at 1062. The States could accomplish their objective by changing the age requirement to a fitness requirement, or by continuing "to do *precisely what they are doing now*," *id.* (emphasis in original), and invoking the *bona fide* occupational qualification exception to the Age Act. Thus *EEOC* "conclude[d] that the degree of federal intrusion in this case is sufficiently less serious than it was in *National League of Cities* so as to make it unnecessary for us to override Congress' express choice to extend its regulatory authority to the States." *Id.* *See also* APTA Br. 14, 42 n.64. Unlike federal regulation of wages and hours, the Age Act requirements in the view of the majority [11] simply did not present the same "wide-ranging and profound threat to the structure of State governance," 103 S. Ct. at 1062, as does the FLSA.

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[11] The four dissenting Justices thought that the Age Act had a more significant effect on the "core state function" of hiring and keeping employees and therefore would have held the Age Act's application to state game wardens unconstitutional. 103 S. Ct. at 1069-72.

As these decisions demonstrate, the Court has continued to consider and refine the principles of federalism recognized in *National League of Cities*, while remaining "faithful to the fundamental constitutional insight that links *National League of Cities* to the broad mainstream of this Court's federalism jurisprudence." U.S. Supp. Br. 11. The principles articulated in *National League of Cities* and in subsequent decisions are relatively narrow,[12] but form a constitutionally appropriate restraint on Congress' expanding exercise of its commerce powers.[13]

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[12] *See, e.g., EEOC*, 103 S. Ct. at 1061 n.10 ("It is worth emphasizing . . . that it is precisely this prong of the *National League of Cities* test [requiring regulation of the States as States] that marks it as a specialized immunity doctrine rather than a broad limitation on federal authority.").

[13] Garcia, but not the Solicitor General, urges overruling all, or part of, *National League of Cities*. Our legal system, however, is premised on respect for the authority and guidance of precedent, and "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 104 S. Ct. 2305, 2311 (1984). *See also Florida Department of Health and Rehabilitation Services v. Florida Nursing Home Association*, 450 U.S. 147, 153 (1981) (Stevens, J., concurring). Here, several factors strengthen the presumption that *National League of Cities* should not be overruled. First, it is a relatively recent decision, which was correctly decided and reaffirmed in several subsequent decisions. Moreover, since it was decided, all of the Justices who dissented from it, except Justice Stevens, have written or joined in opinions confirming its validity. *Compare EEOC*, 103 S. Ct. at 1060; *FERC*, 456 U.S. at 758-59; *LIRR*, 455 U.S. at 683, 686; *Hodel*, 452 U.S. at 287-88; *with EEOC*, 103 S. Ct. at 1067 (Stevens, J., concurring). Second, it is consistent with this Court's federalism precedent. *Cf. Washington Revenue Department v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 745-50 (1978). Third, state and local governments have relied upon it in structuring their employee relations and budgetary allocations and in initiating or expanding existing essential services. *See United States v. Mason*, 412 U.S. 391, 399-400 (1973). Since FLSA requirements would have a major impact on state budgetary allocations, *see infra* at 22 & n.29, and the States' ability to perform the services they have determined their populations need, *stare decisis* has particular force

II. THE PRINCIPLES SET FORTH IN *NATIONAL LEAGUE OF CITIES* AND SUBSEQUENT DECISIONS ARE DERIVED FROM THE LONG DEVELOPMENT OF THE LAW CONCERNING FEDERAL AND STATE POWERS.

Few doctrines of constitutional law have undergone the expansive reach of interpretation accorded the Commerce Clause. This Court stated in 1824 that Congress' commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the Constitution.*" *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (emphasis added).[14] But for more than one hundred years there-

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in this case. *Perez v. Campbell*, 402 U.S. 637, 667 (1971) (Blackmun, J., dissenting) (*stare decisis* has "particular validity and application in a situation" involving "a substantive matter peculiarly within [the States'] competence").

Finally, *stare decisis* provides "stability" in legal decision-making in general and the Supreme Court's precedents in particular. *Illinois v. Gates*, 103 S. Ct. 2317, 2335, 2338 (1983) (White, J., concurring). *See also United States v. Rabinowitz*, 339 U.S. 56, 86 (1950) (Frankfurter, J., dissenting); *Helvering v. Hallock*, 309 U.S. 106, 129 (1940) (Roberts, J., dissenting); Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1, 2, 9 (1983); Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 218. *See also Donovan v. Dewey*, 452 U.S. 594, 607 (1981) (Stevens, J., concurring) ("disagreement with the holding in a prior case is not a sufficient reason for refusing to honor it"). The dissent's perception that *National League of Cities* would have "profoundly pernicious consequences," 426 U.S. at 860 (Brennan, J., dissenting), has not come to pass. Thus, this is an especially strong case for adherence to the doctrine of *stare decisis*.

[14] In *Gibbons*, Chief Justice Marshall "described the federal commerce power with a breadth never yet exceeded," *Wickard v. Filburn*, 317 U.S. 111, 120 (1942), but he was careful to observe that it did not extend to those internal concerns "which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." 22 U.S. (9 Wheat.) at 195.

after, Congress enacted few statutes utilizing this regulatory power. It was only when Congress attempted to regulate state and local governments directly that the constraints of federalism inherent in the structure of our Constitution and expressly stated in the Tenth Amendment took on particular significance in the reconciliation of competing constitutional values. To aid in this reconciliation, the Court applied its extensive federalism jurisprudence derived from the structure of the Constitution and the framers' vision of a federalist system.[15]

A. *National League Of Cities* And Subsequent Decisions Provide The Requisite Corollary To This Court's Approval Of Congress' Expanding Exercise Of Its Commerce Powers.

Commerce Clause doctrine initially developed in cases where, in the absence of congressional action, this Court assessed whether state laws intruded too far into the interstate domain. This assessment invited a narrower view of federal power than that espoused in *Gibbons* since often the Court was only concerned with whether a particular activity regulated by the State (*e.g.*, insurance, mining, manufacturing) was or was not in inter-

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[15] The derivation of constitutional doctrine from the structure of the Constitution and the implications of its provisions is not unique to federalism. *See, e.g., Jones v. Helms*, 452 U.S. 412, 418-19 (1981) (right to travel); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (same); *United States v. Guest*, 383 U.S. 745, 757-58 (1966) (same); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (right of privacy); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (same); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (same—marriage and procreation); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (freedom of association); *NAACP v. Button*, 371 U.S. 415, 430-31 (1963) (same); *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2781-82 (1983) (separation of powers). *Compare, e.g., Massachusetts v. United States*, 435 U.S. 444, 454-55 (1978) (Brennan, J.) (principles of federalism).

state commerce.[16] When Congress first began to exercise its commerce authority directly, similar analysis was sometimes invoked to limit the scope of federal power.[17] In most cases after the turn of this century, however, the Court upheld Congress' limited extension of its commerce power to private intrastate transactions that affected the interstate market.[18] It was not until the 1930's that Congress, in response to the Great Depression, sought to exercise its commerce powers fully in ways thought to impinge upon state policy choices affecting the intrastate marketplace. The Court initially responded by invoking a limited view of the exercise of commerce power to frustrate Congress' enactment of New Deal legislation.[19] Such limitations on congressional commerce power were neither constitutionally correct nor, during the economic depression, politically practicable. The 1930's conflict between federal and state power in the regulation of private commerce was resolved in favor of an expansive view of congressional power under the Commerce Clause. *E.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100, 115 (1941) (upholding federal wage and hour regulations for producers of goods for interstate commerce, holding that "regulations of commerce *which do not infringe on some constitutional prohibitions* are within the plenary power conferred on Congress by the Commerce

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[16] *See, e.g., Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869); *Nathan v. Louisiana*, 49 U.S. (8 How.) 73 (1850).

[17] *See, e.g., Hammer v. Dagenhart*, 247 U.S. 251 (1918); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). These cases are no longer good law.

[18] *See, e.g., The Shreveport Rate Case, Houston & Texas Railway v. United States*, 234 U.S. 342 (1914).

[19] *E.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (Bituminous Coal Conservation Act); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546-50 (1935) (National Industrial Recovery Act); *see* Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv. L. Rev. 645, 653 (1946).

Clause") (emphasis added). Today, the restraints within the Commerce Clause itself seem limited solely by the imagination of Congress, which need show only that there is a "rational basis for finding a chosen regulatory scheme necessary to the protection of commerce. . . ." [20]

Concomitant with the expanding exercise of the Commerce Clause was the increasing recognition by this Court that other provisions of the Constitution, including the amendments guaranteeing individual rights, placed limitations on the commerce power.[21] The expansion of federal commerce regulation to purely intrastate local activities also created the potential of federal interference with core state functions. The conflict initially was avoided because Congress expressly exempted state and local governments in statutes such as the National Labor Relations Act and the FLSA.[22] Instead, it generally chose one of two routes of "cooperative federalism." It employed its policy requirements for state action as explicit conditions of federal funding under the Spending Clause. This gave States the option of rejecting the aid and the conditions that came with it. *See, e.g., Oklahoma v. Civil Service Commission,* 330 U.S. 127, 143 (1947) (while Congress cannot "regulate[] local political activities," it may fix the

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[20] *Katzenbach v. McClung,* 379 U.S. 294, 304 (1964). *See also, e.g., Perez v. United States,* 402 U.S. 146 (1971); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964); *Wickard v. Filburn,* 317 U.S. 111 (1942).

[21] *E.g., Leary v. United States,* 395 U.S. 6 (1969) (Fifth Amendment privilege against self-incrimination); *United States v. Jackson,* 390 U.S. 570 (1968) (Sixth Amendment); *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 336 (1893) (Fifth Amendment takings clause).

[22] 29 U.S.C. § 152(2) (1982); Fair Labor Standards Act, ch. 676, § 3(d), 52 Stat. 1060 (1938). *See also* Occupational Safety and Health Act, 29 U.S.C. § 652(5) (1982); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1003(b)(1), 1321(b)(2) (1982). Thus, when in *United States v. Darby,* 312 U.S. 100 (1941), the Court made its subsequently repudiated comment that

terms upon which funds to the States are disbursed).[23] Alternatively, Congress urged the States to cooperate in achieving mutually shared objectives and limited the scope of direct federal regulation to national and interstate concerns, providing for state decision-making and flexibility in the local implementation of national policies.[24]

For almost two hundred years of constitutional federalism, a broad assault on core state functions under the Commerce Clause was avoided either because Congress expressly excluded the States from direct federal regulation

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the Tenth Amendment "states but a truism," *id.* at 124, it was solely in reference to congressional regulation of private persons.

[23] *See, e.g.*, Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, § 10 [§ 13], 78 Stat. 302, 307 (codified as amended at 49 U.S.C. app. § 1069 (1982)); Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, tit. III, § 314, 92 Stat. 2689, 2750-51 (codified at 49 U.S.C. app. § 1615 (1982)); Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, tit. III, § 318(b), 96 Stat. 2097, 2154 (codified at 49 U.S.C. app. § 1618 (1982)); Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, tit. VI, § 605, 79 Stat. 27, 58 (codified as amended at 20 U.S.C. § 3384 (1982)); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, tit. V, § 513, 86 Stat. 816, 894 (codified at 33 U.S.C. § 1372 (1982)); Hospital and Medical Facilities Amendments of 1964, Pub. L. No. 88-443, § 3(a), 78 Stat. 447, 452-53, 455-56, as amended by Medical Facilities Construction and Modernization Amendments of 1970, Pub. L. No. 91-296, §§ 115, 116(b)-(c), 123, 84 Stat. 336, 341, 342, 344 (codified at 42 U.S.C. §§ 291d, 291g (1982)). *See also Steward Machine Co. v. Davis*, 301 U.S. 548, 586 (1937) (drawing "the line intelligently between duress and inducement").

[24] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, §§ 706(b), 706(c), 708, 709(b), 78 Stat. 241, 259-60, 262-63, *as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 4, 6, 86 Stat. 103, 104-05, 107-08 (codified at 42 U.S.C. §§ 2000e-5(c), 2000e-5(d), 2000e-7, 2000e-8(b) (1982)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 18, 84 Stat. 1590, 1608-09 (codified at 29 U.S.C. § 667 (1982)). *See* D. Walker, *Toward a Functioning Federalism* 65-114 (1981); R. Leach, *American Federalism* 227-28 (1970).

or the Court interpreted Congress' intent to exclude them.[25] But the issue finally was joined when Congress removed the statutory exemption of state and local governments from FLSA federal wage and hour regulations.[26] Congress first sought to bring certain employees of publicly owned schools and hospitals into the coverage of the FLSA through its "enterprise" concept. The Court upheld Congress' actions in *Maryland v. Wirtz*, 392 U.S. 183 (1968). It failed, however, to recognize the distinctive nature of broad federal regulation of the State *qua* State, in contrast to federal regulation of private individuals within the State. Justice Douglas, joined by Justice Stewart, dissented, stressing this distinction and concluding that by its regulation of the State *qua* State, Congress' actions were "such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism."[27] *Id.* at 201.

Emboldened by *Wirtz*, Congress acted to apply the FLSA to almost all state and local government employ-

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[25] In a few instances, Congress' regulation of interstate or foreign commerce may have affected directly the isolated involvement of a state as a participant in a nationwide network of railroads or waterways. *See LIRR*, 455 U.S. 678; *Parden v. Terminal Railway*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *United States v. California*, 297 U.S. 175 (1936); *Sanitary District v. United States*, 266 U.S. 405 (1925). In other cases, the federal war powers justified temporary restraints on the states. *E.g., Case v. Bowles*, 327 U.S. 92 (1946). But in none of the cases did this Court address an attempt by Congress, in the exercise of its Commerce Clause powers, to regulate broadly and directly a core function of state government.

[26] Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830, 831.

[27] Justice Douglas, who supportively participated in decisions approving Congress' expanding exercise of the commerce power, noted:

ees.[28] This Court's expansive view of the commerce power and its decision in *Wirtz* encouraged an unprecedented congressional attempt to usurp fundamental state decision-making authority over employee relations with a potentially crippling effect on state budgets.[29] In *National League of Cities*, the Court rejected that attempt, reaffirming Congress' plenary commerce power, limited only by other provisions in the Constitution, and held that Congress' attempt to apply FLSA wage and hour provisions to most state employees had struck unconstitutionally at the core functions of the States in contravention of the principles of federalism. 426 U.S. at 851.

National League of Cities, contrary to Garcia's position and that of Justice Stevens in his concurring opinion in *EEOC*, 103 S. Ct. at 1064, did not spring full born into a hostile field of case law. In fact, the Court's

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> The exercise of the commerce power may also destroy state sovereignty. All activities affecting commerce, even in the minutest degree, *Wickard v. Filburn*, 317 U.S. 111, may be regulated and controlled by Congress. . . . If constitutional principles of federalism raise no limits to the commerce power where regulation of State activities are concerned, could Congress compel the States to build superhighways crisscrossing their territory in order to accommodate interstate vehicles, . . . to quadruple their police forces to prevent commerce-crippling riots, etc.?

Id. at 204-05. While the majority rejected this argument, it did acknowledge that courts have "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity.'" *Id.* at 196.

[28] Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 58-62.

[29] In *National League of Cities*, the state and local government appellants made a compelling showing of the substantial costs and other major dislocations that would result from application of the FLSA. *But see* 426 U.S. at 851 (". . . particularized assessments of actual impact are [not] crucial to resolution of the issue presented, however"); *EEOC*, 103 S. Ct. at 1063; *FERC*, 456 U.S. at 770 n.33; *Hodel*, 452 U.S. at 292 n.33.

analysis in related cases subsequent to *Wirtz* soon led it to conclude that "we do not believe the reasoning in *Wirtz* may any longer be regarded as authoritative." 426 U.S. at 854. These post-*Wirtz* decisions presaged the *National League of Cities* reversal of *Wirtz*. In *Fry*, for example, this Court expressly rejected the statement uttered thirty-four years earlier in *Darby* that the Tenth Amendment is a mere "truism," but instead found it "not without significance" in declaring "the constitutional policy" that Congress may not impair "the States' integrity or their ability to function effectively in a federal system." 421 U.S. at 547 n.7.[30]

Despite *Fry*'s recognition of the limits of federalism contained in the Tenth Amendment, the temporary national wage freeze at issue there was upheld because it was justified by a national emergency and placed no affirmative obligations on the States.[31] The same "heightened solicitude for the role of the state in the federal system," [32] found in *Fry* was exhibited in other decisions

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[30] The Solicitor General in *National League of Cities*, as in the case at bar, acknowledged that the Tenth Amendment placed some limitation on the exercise of the commerce power. Brief of the Appellee 38 (October Term, 1974).

[31] It is enlightening to examine the statute at issue in *Fry* under the test of *National League of Cities* as it has evolved today. *See supra* at 8. The federal legislation is directed at States *qua* States and addresses the compensation of state employees, which indisputably is an attribute of state sovereignty. 426 U.S. at 845. Since the nationwide wage freeze was comprehensive, it necessarily covered some traditional governmental functions. But it survived the States' claim of immunity because the federal interest justified the States' submission. *Hodel*, 452 U.S. at 288 n.29. The federal interest in comprehensive emergency controls justified the minimal interference with the States resulting from a temporary freeze of the wage choices that the States themselves had made for their employees and that reduced rather than increased pressures on the States' budgets.

[32] Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 Harv. L. Rev. 1871, 1874 (1976).

of this Court after *Wirtz*. In *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973), the Court concluded that the FLSA could not be read to authorize suits against the States by their employees in federal court. The Court did not decide whether the Eleventh Amendment or federalism would bar such suits should Congress expressly authorize them, but out of heightened deference to the States, the Court denied employees access to the federal courts. 411 U.S. at 286-87.[33]

The limitations on federal commerce power set forth in *National League of Cities* are consistent with the principles of constitutional federalism elsewhere applied by this Court, although the nature of federal power and the State's constitutional interest may vary.[34] Congress' power to enforce by appropriate legislation the human rights guarantees of the Fourteenth Amendment, for example, required a special constitutional provision to authorize Congress in these limited circumstances to prohibit certain state actions. In the exercise of these

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[33] For other cases "manifesting multiple strains of solicitude for states," Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 Harv. L. Rev. 1871, 1876 (1976), see *Paul v. Davis*, 424 U.S. 693 (1976), and *Edelman v. Jordan*, 415 U.S. 651 (1974). *See also Fry*, 421 U.S. at 549 (Rehnquist, J., dissenting).

[34] *Compare, e.g., National League of Cities*, 426 U.S. at 833 (interstate commerce powers); *Younger v. Harris*, 401 U.S. 37 (1971) (federal courts will not enjoin certain state court criminal proceedings); *Hopkins Savings Association v. Cleary*, 296 U.S. 315 (1935) (necessary and proper clause); *Coyle v. Oklahoma*, 221 U.S. 559 (1911) (location of state capital); *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, 583-86 (1895) (tax on state instrumentalities) *and Hans v. Louisiana*, 134 U.S. 1 (1890) (federal courts will not entertain suits against a State by its citizens), *with Case v. Bowles*, 327 U.S. 92 (1946) (war power); *Board of Trustees v. United States*, 289 U.S. 48 (1933) (foreign commerce); *and Sanitary District v. United States*, 266 U.S. 405 (1925) (treaty powers).

powers, therefore, "Congress is not limited by the same constraints that circumscribe the exercise of its Commerce Clause powers." [35]

B. *National League Of Cities* And Subsequent Decisions Are Deeply Rooted In The Structure Of The Constitution And Fully Consistent With This Court's Development Of Federalism Jurisprudence.

This Court's reliance on the constitutional policy of federalism and the Tenth Amendment to preserve the States' capacity to function effectively is fully supported by the structure of the Constitution itself and the framers' intent in establishing a federal system in which "[t]he Federal and State Governments are in fact but different agents and trustees of the people instituted with different powers and designated for different purposes." *The Federalist No. 46*, at 315 (J. Madison) (J. Cooke ed. 1961).

The founding fathers did not always establish clear jurisdictional boundaries between the federal and state governments, but the Solicitor General's conclusion is beyond doubt: "The Constitution, read as a whole, necessarily presupposes the existence of, and thus requires the protection of, some sphere of autonomy for the states in

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[35] *See EEOC*, 103 S. Ct. at 1064 n.18, *but see id.* at 1072-73 (Burger, C.J., dissenting). Congress has the "power to enforce by appropriate legislation" the Thirteenth, Fourteenth, and Fifteenth Amendments, U.S. Const. amend. XIII, § 2, amend. XIV, § 5, and amend. XV, § 2. Congress' authority to pass legislation enforcing the Due Process Clause of the Fourteenth Amendment includes, by incorporation, authority to enforce portions of the first eight Amendments as well. *See Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). This Court has consistently held that Congress' power to enact legislation under the Fourteenth Amendment is not limited by the principles of federalism in the same way as is the Commerce Clause. *City of Rome v. United States*, 446 U.S. 156, 178-80 (1980); *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 n.54 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

the conduct of their own core operations." [36] U.S. Supp. Br. 4. Thus, the States were preserved as separate governmental entities with essential functions to perform in the federal system, and the Constitution expressly recognized and guaranteed their distinct governmental role.[37] States, moreover, retain "certain exclusive and very important portions of sovereign power." [38] Limitations on that power are expressly stated in the Constitution; [39] federal power, on the other hand, is limited to specifically enumerated authority.[40] The very purpose of limiting congressional power to expressly delegated authority was to prevent federal interference with the States' capacity to meet their local responsibilities.[41] The structure of the

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[36] Garcia apparently agrees. G. Supp. Br. 4 ("The framers of the Constitution clearly envisioned a federal system—one in which both the federal government and the States possess sovereign authority.").

[37] *E.g.*, the Constitution provides specific guarantees for the States against invasion, and of a republican form of government, U.S. Const. art. IV, § 4. It assures full faith and credit to state court judgments, art. IV, § 1; interstate rendition of fugitives from justice, art. IV, § 2; territorial integrity, art. IV, § 3, cl. 1; protection against domestic violence, art. IV, § 4; reserved governmental powers, amend. X; and immunity from suit, amend. XI.

[38] *The Federalist No. 9*, at 55 (A. Hamilton) (J. Cooke ed. 1961) (hereinafter all citations to *The Federalist* are to J. Cooke ed. 1961).

[39] *See, e.g.*, U.S. Const. art. I, § 10; amend. XIV, § 1.

[40] The principal sources of federal power are found at U.S. Const. arts. I, II, III and IV and amends. XIII, XIV, XV, XVI, XIX, XXIII, XXIV and XXVI.

[41] *See* I *The Records of the Federal Convention of 1787* (M. Farrand ed. 1966) ("Farrand") 53 (Butler and Randolph); *id.* at 133 (Sherman); *id.* at 492 (Ellsworth); *id.* at 340-41 (Martin); *id.* at 404 (Pinckney); III Farrand at 132 (Madison). *See* also III *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (J. Elliot 2d ed. 1896) ("Elliot") 40, 107 (Virginia); IV Elliot 50 (North Carolina); I Elliot 492 (Letter of Sherman and Ellisworth); *cf.* III Elliot 420 (Virginia) (Marshall

Constitution thus presumes that the States will retain their ability to perform essential functions and services for their citizens.[42] As James Madison explained:

> The powers delegated by the proposed Constitution to the Federal Government . . . will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; . . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.[43]

Ultimately, the responsibility for mediating the boundaries of federalism devolved, during the course of the framers' debates, to the federal judiciary. The original Virginia Plan presented at the Constitutional Convention would have vested this power in Congress. It contained resolutions that would have empowered the national legislature "to call forth the force of the Union [against] any member of the Union failing to fulfill its duty under the articles thereof," [44] and to "negative all laws passed

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stated: "[a]ll the restraints intended to be laid on the state governments (besides where an exclusive power is expressly given to Congress) are contained in the 10th section of the 1st article."). *See also EEOC*, 103 S. Ct. at 1077-80 (Powell, J., dissenting).

[42] *See The Federalist No. 39*, at 256-57 (J. Madison) ("local or municipal authorities" are not "subject within their respective spheres to the general authority"); *The Federalist No. 40*, at 261-62 (J. Madison); *The Federalist No. 45* (J. Madison); *The Federalist No. 32*, at 199-200, 203 (A. Hamilton) ("all authorities of which the States are not explicitly divested in favor of the Union remain with them in full vigor"); *The Federalist No. 59*, at 399-400 (A. Hamilton); *The Federalist No. 82*, at 553-54 (A. Hamilton); *see also I Farrand* 86, 136 (Dickinson); *id.* at 137 (Pinckney); *id.* at 155 (Mason); *id.* at 157 (Wilson); *id.* at 439 (Martin); *id.* at 406 (Ellsworth); *see* II Elliot 355 (New York); III Elliot 257-59 (Virginia); III Farrand 139-40, 144 (Pennsylvania).

[43] *The Federalist No. 45*, at 313 (J. Madison).

[44] I Farrand 21.

by the several States, contravening in the opinion of the National Legislature the articles of Union." [45] The first proposal was deleted without a vote and the second was extensively debated in various forms, and several times rejected.[46] In its place, the Supremacy Clause was adopted and its interpretation was vested in the Supreme Court.[47] As Gouverneur Morris, a principal draftsman of the Constitution, declared, "[a] law that ought to be negatived will be set aside in the Judiciary," and thus this Court became the ultimate arbiter of federalism issues.[48]

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[45] *Id.*

[46] *See* I Farrand 54, 162-63, 164, 168, 171, 173; II Farrand at 28, 390-92. Garcia's statement, G. Supp. Br. 6 n.3, that the congressional power to veto state laws "was defeated by only one vote," and only because it was thought "unnecessary," distorts the records of the Federal Convention. The defeat Garcia refers to was on a vote to resubmit the issue to committee for further consideration. II Farrand 390-92. Congressional power to negative state laws was opposed on many grounds. Mr. Williamson, for example, opposed the power on the grounds that "it might restrain the States from regulating their internal police," I Farrand 165, that "[t]he national legislature ought to possess the power to negativing such laws only as will encroach on the national government," *id.* at 169, and that the "State Legislatures ought to possess independent powers in cases purely local, and applying to their internal policy." *Id.* at 171. *See also* I Farrand at 167 (Bedford); *id.* at 168 (Butler); II Farrand at 27 (Sherman); *id.* at 27-28 (Morris); *id.* at 391 (Rutledge).

[47] U.S. Const. art. VI, cl. 2; *see* II Farrand 28-29, 389.

Describing the Supremacy Clause as "only declaratory of a truth," Hamilton cautions that "it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers but which are invasions of the residuary authorities of the smaller societies will become the supreme law of the land. They will be merely acts of usurpation and will deserve to be treated as such." *The Federalist No. 33*, at 204, 207 (A. Hamilton). *See also* "Opinion as to the Constitutionality of the Bank of the United States" *reprinted in* G. Gunther, *Cases and Materials on Constitutional Law* 97 (10th ed. 1980) (Congress "is not authorized to *regulate* the *police* of [Philadelphia].") (emphasis in original).

[48] II Farrand 28; IV Farrand 83-84 (Madison) ("Judicial Department as a final resort in relation to the States"); *see also The*

This Court's identification of the Tenth Amendment as an affirmative expression of constitutional limits on federal power to regulate the States as States is fully supported by the history of State ratification of the Constitution and adoption of the Tenth Amendment. To address the substantial concern expressed during the ratification debates about federal encroachment on the States' essential responsibilities, the Tenth Amendment was proposed, not to establish residual state capacity to perform essential governmental functions—that capacity was clearly presumed in the structure of the Constitution itself—but rather to confirm expressly the importance of protecting the States from "an undue administration of the federal government." [49] Indeed, during the ratification process, the proposal to amend the Constitution to reserve state powers was recommended by more States than any of the other proposals later adopted in the Bill of Rights.[50] One concern expressed in the de-

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Federalist No. 39, at 256 (J. Madison). This conclusion was confirmed during the ratification debates. As Oliver Ellsworth told the Connecticut convention: "If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void." II Elliot 196. *See* III Elliot 553 (commentary of John Marshall); IV Elliot 485 (Van Buren). According to Hamilton, under "a limited constitution," the Court has the duty "to declare all acts contrary to the manifest tenor of the constitution void." *The Federalist No. 78*, at 524 (A. Hamilton) "Courts of justice are to be considered as bulwarks of a limited constitution against legislative encroachments." *Id.* at 526. *See also The Federalist No. 39*, at 256 (J. Madison).

[49] *See* I Elliot 322 (Ratification of Commonwealth of Massachusetts).

[50] I Elliot 322 (Massachusetts); *id.* at 326 (New Hampshire) ("all powers not expressly and particularly delegated by the aforesaid Constitution are reserved to the several states . . . ."); *id.* at 327 (New York); II Elliot 406 (New York); I Elliot 336 (Rhode Island). *See also id.* at 325 (South Carolina); III Elliot 107, 420, 626, 659 (Virginia); II Elliot 550 (Maryland); IV Elliot 242, 244 (North Carolina); II Elliot 545 (Pennsylvania).

bates was that even though the Constitution limited federal authority to expressly enumerated powers, it was possible that in the exercise of such delegated powers, Congress could so encroach upon the residual powers of the States so as to destroy their capacity to function as governmental entities.[51] Without the confidence that a provision expressly protecting the residual powers of the States would be adopted, it is doubtful that ratification would have taken place.[52] The ratification debates make clear that the Tenth Amendment is not merely a "truism;" it was necessary to ensure that the powers delegated to the federal government were not "perverted in ways that would destroy the general welfare," [53] and to "effectually guard against an undue administration of the Federal government." [54]

From the principles of federalism envisioned by the framers and embraced in the constitutional structure, this Court has woven a tapestry of federalism jurisprudence, of which *National League of Cities* is an integral part. It is the linchpin if this nation is to remain a federal society. Its teachings are fully consistent with other applications of this Court's federalism precedent which reflect "sensitivity to the legitimate interests of both State and National Governments." *Younger v. Harris*, 401 U.S. 37, 44 (1971). These principles have

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[51] *See, e.g.*, IV Elliot 51, 75, 136-38, 152-55, 163-64, 168 (North Carolina).

[52] North Carolina refused to ratify the Constitution until the amendments were "laid before Congress." I Elliot 332; IV Elliot 243-44. *See also* I Elliot 329 (New York); III Elliot 242, 626, 659 (Virginia).

[53] III Elliot 442 (Virginia); *see also* IV Elliot 163 (North Carolina); II Elliot 131 (Massachusetts).

[54] I Elliot 326 (New Hampshire). The States wanted to ensure that if "Congress, under pretence of executing one power, should, in fact, usurp another, they will violate the Constitution." IV Elliot 179 (North Carolina); *see also id.* at 163.

been applied in numerous ways to recognize and preserve the authority and responsibilities of state and local governments so that "the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*[55]

Federalism limits on federal judicial power are increasingly pronounced in cases raising Eleventh Amendment challenges to federal jurisdiction over state governments. This Court early held that the federalism principle underlying the Eleventh Amendment—that a sovereign government cannot be sued without its consent—would bar a suit by a citizen against his own State in federal court even though the Eleventh Amendment speaks only of a "suit . . . against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI; *see Hans v. Louisiana*, 134 U.S. 1 (1980). The Eleventh Amendment represents a fundamental structural principle of our federal system. *Edelman v. Jordan*, 415 U.S. 651 (1974); *see Pennhurst State School and Hos-*

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[55] *See also* Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019 (1977); *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926) ("neither government may destroy the other nor curtail in any substantial manner the exercise of its powers"); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (division of power among the "legislative, executive and judicial powers of a State" is a matter solely for state determination); *Ex parte Siebold*, 100 U.S. (10 Otto) 371, 394 (1880) ("the national and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution."); *United States v. Baltimore & Ohio Railroad Co.*, 84 U.S. (17 Wall.) 322, 327 (1873) (upholding "[t]he right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies . . ."); *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869) (there can "be no loss of separate and independent autonomy to the States, through their union under the Constitution"); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869) ("in many articles of the Constitution . . . the independent authority of the States, is distinctly recognized.").

pital v. Halderman, 104 S. Ct. 900, 911 (1984) (federal courts may not order state officials to conform their conduct to state law since this "conflicts directly with the principles of federalism that underlie the Eleventh Amendment").

Principles of federalism also, for example, have been applied to constrain certain congressional interference with the establishment of voter qualifications in state elections.[56] They have been applied to limit Congress' power to tax certain functions of the States and their political subdivisions;[57] and to invalidate laws constraining the location of a state capital.[58] They have on countless occasions influenced the construction of congressional intent in ways that defer to important state prerogatives.[59] In sum, the principles of federalism articulated in *National League of Cities* are the constitutional underpinnings of the large body of federalism doctrine that pervades the precedents of this Court.

III. THE THREE-PART ANALYSIS OF FEDERAL REGULATION OF STATE ACTIVITIES CURRENTLY INVOKED BY THIS COURT PRESERVES CONGRESSIONAL AUTHORITY WHILE PROTECTING THE INTEGRITY OF STATE GOVERNMENTS AND THEIR POLITICAL SUBDIVISIONS.

The analysis established in *National League of Cities*, stated succinctly as a three-part test in *Hodel*, *see supra* at 8, and applied in subsequent cases, is a fully work-

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[56] *Oregon v. Mitchell*, 400 U.S. 112 (1970) (Black, J.).

[57] *See Indian Motocycle Co. v. United States*, 283 U.S. 570 (1931); *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895); *see also* cases cited *infra* at 43 n.74.

[58] *Coyle v. Oklahoma*, 221 U.S. 559 (1911).

[59] *E.g., Bates v. State Bar of Arizona*, 433 U.S. 350, 359-63 (1977); *United States v. Bass*, 404 U.S. 336, 349-51 (1971); *Indian Motocycle Co. v. United States*, 283 U.S. 570 (1931); *Ambrosini v. United States*, 187 U.S. 1 (1902).

able doctrine that ensures thorough consideration of all legitimate federal and state constitutional interests. The result of such judicial scrutiny is in effect a balancing of the importance of each sovereign's interests—a balancing for which the Court's tests and precedents provide objective and understandable criteria. It furthermore is a modern doctrine that fully recognizes Congress' plenary power to regulate the interconnected national marketplace; it also, however, preserves the essential integrity and core governmental capacity of the States to function effectively in the federal system, so important today as the nation's population grows, and local needs become increasingly critical, increasingly diverse, and increasingly incapable of a single national solution.

A. This Court Should Continue To Subject To Its Closest Scrutiny Attempted Federal Regulation Of The State *Qua* State.

Attempted federal regulation of the State's internal operations raises the greatest potential threat to its capacity to function effectively in the federal system. Federal interference with state regulation of private parties in areas delegated to the federal government under the Constitution does not normally raise a similar threat to the State's separate and independent existence. The people, citizens of both the States and the national government, recognize that Congress and the States share the power to regulate private commerce within the States; when Congress acts in furtherance of its commerce powers, however, its actions are supreme and preempt inconsistent state regulation of private individuals. Thus, neither the State's credibility with its citizens, nor its accountability to its electorate, is directly threatened when such federal regulation displaces state regulation.[60]

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[60] Earlier attempts to invoke the Tenth Amendment to limit the extension of commerce powers to private activities within the State have been discredited and cannot now be revived under the test articulated in *Hodel*, 452 U.S. at 287-88.

When Congress attempts to regulate directly the internal decision-making process of state government, however, the situation dramatically changes. For it then encroaches upon the very existence of the States as governmental entities.[61] To enable the States to function in a federal system, the "means and instrumentalities employed for carrying on the operations of their governments . . . should be left free and unimpaired. .. ." *Collector v. Day*, 78 U.S. at 125.[62] Usurpation of a State's internal decision-making authority over its own operations endangers the State's authority over its actions. Public respect for and accountabiilty of a State requires that it be able to "administer its affairs within its own sphere" without "undue interference" by the federal government. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).[63]

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[61] The framers recognized the important distinction between Congress' regulation of private individuals and regulation of the States themselves. *See, e.g.*, I Farrand 34, 133 (Mason); *id.* 404 (Pinckney) (federal powers operate "upon the people, and not upon the States"); IV Elliot 163 (North Carolina Ratifying Convention) ("laws of Congress were to operate upon individuals, and not upon states . . . as the government was not to operate against states"); *see also id.* at 137.

[62] *See also* Note, *Redefining the National League of Cities State Sovereignty Doctrine*, 129 U. Pa. L. Rev. 1460, 1480 (1981) ("Respect for the independent role of state governments in the federal system dictates that the state legislatures retain control over decisions affecting their ability to provide services for which they are considered responsible"); Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 Sup. Ct. Rev. 81, 107 ("The capacity of states to elicit participation in government depends in large part on their authority to organize and control the units of local government").

[63] State and local governments cannot assume the increased costs of federal regulation of financial decisions as central to their budgets as wage and salary decisions without raising local taxes or taking some other extraordinary action. Forty-two state constitutions in some way limit debt for state governments (some also limit debt for local governments); of these, 30 have debt prohibitions (with

Garcia offers no legitimate doctrinal basis for his effort to limit the immunity at stake in this case to states and not their political subdivisions. *National League of Cities* holds otherwise. 426 U.S. at 855 n.20. In fact, from colonial days on, the States have chosen to provide their traditional law enforcement and public service responsibilities identified in *National League of Cities* largely through their cities and political subdivisions. The Constitution thus presumes that in this, as in several other areas of constitutional law, *e.g.*, applications of the First, Fifth and Fourteenth Amendments, and the Privileges and Immunities Clause, the actions of local governments are encompassed along with the States'. Garcia's emphasis on evolving antitrust law doctrine is not relevant since what is at issue there is congressional intent; under a constitutional analysis, the federal interest advanced by the antitrust laws would present an entirely different question than does Congress' attempt to regulate the wages and overtime of state and local employees. For the constitutional purpose served by the immunity here, municipalities and other political subdivisions are clearly governmental entities which derive their power and definition from the States, and have long been delegated many of the state decisions and public service functions that the principles of federalism and the Tenth Amendment are intended to protect. Public mass transit systems, like public hospitals or police departments, may be provided by states, their political subdivisions or local

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exceptions allowing debt under some conditions) and 10 have debt ceilings, usually based on some formula which serves to limit debt to a given percentage of the value of taxable property in the State. *See* Appendix *infra*.

Almost half the States have explicit constitutional provisions that in some way mandate a balanced state budget. The most common method is simply to ban expenditures which are in excess of actual or anticipated revenue. Some States require that the legislature raise revenue sufficient to cover all appropriations, rather than limiting appropriations to available funds. *Id.*

governments. It would be senseless to extend limited immunity to only those systems that are owned by the States directly. Tremendous inequities would result if police, education or transit services provided directly by the States were immunized but not those provided by local governments.

B. There Are Essential Attributes Of State Sovereignty With Which The Federal Government May Not Interfere Without Threatening The Separate Existence Of The States.

To establish state immunity, it also must be shown that the federal regulation addresses "attribute[s] of state sovereignty," *National League of Cities*, 426 U.S. at 855, *Hodel*, 452 U.S. at 287, or "core state functions," *EEOC*, 103 S. Ct. at 1060. Since *National League of Cities*, this Court has repeatedly reaffirmed that state authority to determine the wages and overtime compensation of its employees is such a core state function.[64] That a State's ability to manage employment relationships is an essential governmental function, however, was well established before *National League of Cities*. James Madison, for example, recognized that in the system of federalism adopted by the Constitution the States retained certain "residuary and inviolable sovereignty."

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[64] *See EEOC*, 103 S. Ct. at 1061 n.11; *FERC*, 456 U.S. at 770. Contrary to the Solicitor General's assertion, U.S. Reply Br. 2-3, it is not the service provided, such as public schools, public libraries or public transit, that must be essential to state sovereignty; rather this Court recognized in *National League of Cities*, 426 U.S. at 845, and again in *EEOC*, 103 S. Ct. at 1016 n.11, that it is displacement of the State's policy choices determining the wages and overtime compensation for its own employees that is the core state function that must be protected. *National League of Cities* did not hold, for example, that the independent existence of a State is threatened if it does not provide public hospital, recreational or sanitation services. And *EEOC* did not consider whether the independent existence of Wyoming would be threatened if it could not have game wardens.

The Federalist No. 39, at 256 (J. Madison). He further noted that the "functionaries of the states are in their appointment and responsibility *wholly independent* of the United States," [65] and that "the component parts of the State Governments, *will in no instance* be indebted for their appointment to the direct agency of the federal government." [66]

That the States have special rights and responsibilities with respect to the selection, compensation and control of their officers and employees has long been recognized by this Court. *See Newton v. Board of County Commissioners*, 100 U.S. (10 Otto) 548, 559 (1880) ("[t]he legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. . . . And it may increase or diminish the salary or change the mode of compensation"); *see also EEOC*, 103 S. Ct. at 1077 n.5 (Powell, J., dissenting) ("the power to determine the terms and conditions of employment for the officers and employees who constitute a State's government . . . is as sovereign a power as any that a State possesses, and, it is far removed from the original concerns of the Commerce Clause"); *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042, 1051 (1983) (Blackmun, J., concurring and dissenting) ("The States have a sovereign interest in some freedom from federal interference when hiring state employees"). [67]

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[65] Letter from James Madison to Edward Everett (August 1830) (discussing opposition to nullification), in *The Complete Madison* 156 (S. Padover ed. 1973) (emphasis added).

[66] *The Federalist No. 45*, at 311-12 (J. Madison) (emphasis added).

[67] *See also Kotch v. River Port Pilot Commission*, 330 U.S. 552, 557 (1947) (important factor is "the right and power of a state to select its own agents and officers"); *Metcalf & Eddy v. Mitchell*, 269 U.S. at 522 ("employment of officers who are agents to administer its laws . . . [is] intimately connected with the necessary

By extending the FLSA to state and local governments, Congress targeted an essential attribute of state sovereignty—the State's decision about what it pays its own employees. Congress attempted to regulate these core state functions without consideration of less restrictive means of reaching its declared statutory goals of avoiding labor strife caused by substandard working conditions, and unfair competition in commerce.[68] The effect on the States of Congress' actions was the "forced relinquishment of important governmental activities," *National League of Cities*, 426 U.S. at 847, the imposition of "substantial costs," *id.* at 846, the "displacement of state decisions," *id.* at 849, and the disruption of "accepted [public] employment practices," *id.* at 850. Moreover, since wages and overtime compensation are usually established through longstanding and carefully defined collective bargaining arrangements, Congress has intruded into another state prerogative where the "propriety of local regulation has long been recognized." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970) (quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 796

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functions of government . . ."); *Taylor v. Beckman*, 178 U.S. 548, 570-71 (1900) ("[i]t is obviously essential to the independence of the States, . . . that their power to prescribe the qualifications of their own officers, the tenure of their officers . . . should be exclusive, and free from external interference . . ."); *Wilson v. North Carolina ex rel. Caldwell*, 169 U.S. 586, 593-94 (1898) (policy of noninterference with state discipline of employee unless fundamental rights are involved); *Collector v. Day*, 78 U.S. at 126 (without the power of "the appointment of officers to administer their laws," the States could not "long preserve [their] existence"); *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 415-16 (1850) (state's decision to reduce wages of canal commissioners involved "regulation of their internal and exclusive policy" which was not subject "to the tribunals and authorities of the federal government" under "the federal Constitution").

[68] *See* P. Brest, *Processes of Constitutional Decisionmaking: Cases and Materials*, ch. 10 (1975); *see also FERC*, 456 U.S. at 765, 769 n. 32.

(1945) (Douglas, J., dissenting)); *see also Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. at 27-28 (1982); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443 (1978); *id.* at 448 (Blackmun, J., concurring).[69]

In evaluating the extent to which federal regulation impairs an essential attribute of state sovereignty, the balancing of federal and state interests of which Justice

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[69] *National League of Cities* found that the FLSA imposed substantial displacement of state policy choices in structuring employment relationships. Such displacement would adversely affect local public transit agencies. Transit operators must respond to the local needs as they arise, in particular to morning and afternoon rush hours. Hours and length of day are structured with the requirements of particular routes clearly in mind. Numerous special premiums have evolved through years of negotiations to compensate public transit employees for their unique schedules and working hours. As one example, bus drivers may work between 6:00 a.m. and 10:00 a.m. and then again between 3:00 p.m. and 6:00 p.m. While they actually work only seven hours, they may receive premium compensation for hours worked after a spread of eleven hours, *i.e.*, from 4:00 p.m. to 6:00 p.m., or pay for a guaranteed eight hour day. Affidavit of Herbert J. Scheuer, Acting Vice President, APTA, ¶¶ 9-11, R. 25. Application of the FLSA fails to account for these premium arrangements and thus would substantially increase the rate and cost of overtime. *See* 29 U.S.C. § 207(e) (1982). Moreover, the FLSA also would require the maintenance of detailed records concerning employees, wages, hours and employment conditions, 29 U.S.C. § 211 (1982), 29 C.F.R. § 516 (1983), and impose penalties of back pay and liquidated damages for noncompliance. 29 U.S.C. § 216(c) (1982). *See* APTA Br. 20-21. In response to the substantial increase in employment compensation, the Solicitor General suggests that "management and labor [should] renegotiate existing premium pay arrangements" to conform to FLSA requirements, U.S. Supp. Br. 30 n.11, but this intrusion into the local governments' collective bargaining process is precisely the type of coercive regulatory intrusion (for no discernible public purpose) that *National League of Cities* sought to prevent. *See* 426 U.S. at 850 (criticizing "the effect of coercing the States to structure work periods . . . in a manner substantially different from practices which have long been commonly accepted among local governments of this Nation").

Blackmun spoke, 426 U.S. at 856, becomes relevant. As Justice Marshall noted in *Hodel*, the nature of the federal interest may justify state submission, even though an essential "attribute of state sovereignty" is impaired.[70] 452 U.S. at 288 & n.29. With respect to the FLSA, this balance has already been struck against federal intrusion. *Id.*; *see also LIRR*, 455 U.S. at 684 n.9. To apply this test, moreover, Congress must have made the federal objective clear so that the Court can weigh the respective federal and state interests in balancing the conflicting constitutional values at stake.[71] *See Fry*, 421 U.S. at 558 (Rehnquist, J., dissenting).

The federal interests in enacting the FLSA, as described by the Court in *Wirtz*, were to prevent labor

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[70] For Congress to override this central feature of a State's relationship with its employees, there must be a substantially more compelling national interest than the minimal "rational basis" test that the Constitution requires when Congress regulates private activity.

[71] The balancing of competing federal and state interests in Commerce Clause cases is not without ample precedent. For example, such a factual inquiry was undertaken in *Washington Revenue Department v. Association of Washington Stevedoring Cos.*, 435 U.S. at 748:

> Although the balancing of safety interests naturally differs from the balancing of state financial needs, . . . a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government. . . . All tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity.

See also Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). Similarly, the Court regularly engages in such balancing of interests in the First Amendment area. *See Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968).

strife such as strikes caused by substandard working conditions, and to preclude an unfair advantage in the public sector over private conduct of certain activities. 392 U.S. at 192. *See also* 29 U.S.C. § 202(a) (1982). The Solicitor General emphasizes that the federal interest in this case is "in preventing unfair competition in commerce." U.S. Reply Br. 7. These interests do not justify the application of federal wage and overtime compensation regulations to state and local governments. There is no allegation that state and local employees are paid substandard wages. Elected state decision-makers are accountable to the voters and subject to close scrutiny by the press; they are thus unlikely to provide their own employees with substandard working conditions. There is no evidence that federal regulation would reduce the prospect of strikes, particularly since many states have provisions outlawing strikes by public employees. Nor is there any merit to the Solicitor General's claim that application of the FLSA to the States would prevent some kind of unfair competitive advantage over private parties engaged in similar activities. *National League of Cities* correctly rejected such argument, 426 U.S. at 848-49. The general federal interest in "preventing unfair competition in commerce" clearly has no meaningful application to the employment policies of state and local governmental agencies which provide public services, heavily funded at the local taxpayers' expense, because such services cannot be provided profitably in the private sector. *See* APTA Br. 18-19.

The Court in this case should not presume, as the Solicitor General suggests, U.S. Supp. Br. 13-16, an implicit congressional determination that the federal interest is strong enough to outweigh the state interest; nor should this Court defer entirely to Congress on issues of federalism, as Garcia contends. G. Br. 34. In extending the FLSA to most employees of state and local governments after *Wirtz*, Congress acted on the strength of that decision, believing that it had comprehensive au-

thority to regulate state and local governmental activities without regard to limitations of constitutional federalism. Given Congress' reliance on a judicial decision subsequently overruled, this is a particularly strong case for judicial determination of the "competing claims of the states and the nation." U.S. Supp. Br. 16.[72] As the Chief Justice stated in *EEOC*: "While this theory [of judicial deference to Congress] may have some importance in matters of strictly federal concern, it has no place in deciding between the legislative judgments of Congress and that of [the State] Legislature. Congress is simply not as well equipped as state legislators to make decisions involving purely local needs." 103 S. Ct. at 1074 n.8. (Burger, C.J., dissenting).

C. Traditional Governmental Functions To Which State and Local Government Immunity Must Extend Are Readily Identifiable.

Under the *National League of Cities* test clarified in *Hodel*, the exercise of congressional commerce power is limited only if it impairs the States' ability "to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852. The description of tradi-

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[72] Complete deference to Congress is inappropriate because members of Congress today are not selected to represent the interests of state and local government. *See* Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 Col. L. Rev. 847, 857-68 (1979); Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 Harv. L. Rev. 1871, 1885 (1976); *cf.* J. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*, ch. 4 (1980). They properly are preoccupied with national and international issues, expert in areas of committee assignment, and responsive to nationally organized interest groups, such as labor unions or business associations. Indeed, it is well recognized that the national legislative agenda is better served if members do not advocate insular, parochial views. Further, interests of particular states or localities often are not adequately uniform to command a majority in Congress.

tional governmental activities[73] and the examples used to illustrate them in *National League of Cities* suggest that the Court used this term as a means of identifying those governmental services that are pervasively provided by state and local governments in fulfillment of their local public health and safety responsibilities.[74] These traditional responsibilities have included preserving public safety and order through police and fire services and the maintenance of a transportation infrastructure, and protecting the public health through basic health and sanitation services.[75] The Solicitor General urges a rigid, static

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[73] In describing these protected governmental functions, *National League of Cities* used terms such as "integral," "important," and "traditional" interchangeably. *See, e.g.*, 426 U.S. at 847, 852, 855. It referred to "those governmental services which their citizens require," *id.* at 847, to areas that states "have regarded as integral parts of their governmental activities," *id.* at 854 n.18, to "governmental services which the States and their political subdivisions have traditionally afforded their citizens," *id.* at 855, and to activities that "are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* at 851.

[74] The Court has used similar terms in the cases on intergovernmental tax immunity as a means of identifying governmental functions and services immune from federal taxation. *See Ohio v. Helvering*, 292 U.S. 360, 368 (1934) (tax immunity limited to "agencies which are of a governmental character"); *Helvering v. Powers*, 293 U.S. 214, 227 (1934) (tax applicable to the trustees of the temporarily quasi-publicly operated private street railway which was not a usual governmental activity); *see also New York v. United States*, 326 U.S. 572, 589-90 (1946) (Stone, C.J., concurring) (substituting test of "impair[ing] . . . the appropriate exercise of the functions of the government"); *Massachusetts v. United States*, 435 U.S. 444, 456, 458-59 (1978) (Brennan, J.) (immunity "necessary to protect the continued ability of the States to deliver traditional governmental services").

[75] *See The Federalist No. 45*, at 313 (J. Madison). *See also* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 Yale L.J. 1165, 1173 (1977) ("deeply entrenched in the traditional and actual political practice of American federalism is an understanding that the task of providing certain important social services . . . is one that belongs chiefly to state and local governments. . .").

historical test to define what these traditional functions are at any given point in time, suggesting that the constitutionality of Congress' power be frozen at the time Congress attempts to use the power.[76] His proposal to straightjacket states by choices they made based on their communities' needs at earlier points in history is completely insensitive to the constitutional values at stake. It is, moreover, newly created out of whole cloth; it cannot be woven out of precedent. In fact, this Court has specifically rejected such a "static concept" of state and local government. *LIRR*, 455 U.S. at 686 ("[t]his Court's emphasis on traditional governmental functions . . . was not meant to impose a static historical view of state functions generally immune from federal regulation"); *New York v. United States*, 326 U.S. at 579 (Frankfurter, J.) ("It could hardly remain a satisfactory constitutional doctrine that only such State activities are immune from federal taxation as were engaged in by the States in 1787. Such a static concept of government denies its essential nature").[77] The Solicitor General's suggestion

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[76] This test is fraught with inconsistencies and subjects constitutional values to the vagaries of the legislative process. Moreover, as the opinion of the court below makes clear, local public transit was pervasively provided by government before Congress attempted to regulate the way transit operators are compensated, the federal intrusion at issue here. *See* Appendix to Jurisdictional Statement for Federal Appellant ("U.S.J.S.") 6a-10a; APTA Br. 23-24, 27-35.

[77] *See* Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019, 1034 (1977) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *see also Kusper v. Pontikes*, 414 U.S. 51, 63 (1973) (Blackmun, J., dissenting) (the Court's invalidation of a state voter registration requirement "fail[ed] to give the States the elbow room they deserve and must possess if they are to formulate solutions for the many and particular problems confronting them . . ."); *Sailors v. Board of Education*, 387 U.S. 105, 110-11 (1967) ("Viable local governments may need many innovations, numerous

will not allow state and local governments to perform their traditional function of serving the needs of their community in changing times.[78]

In determining whether a particular activity of state and local government is a "traditional governmental function," the Court may look to various indicators, including the following:[79] (1) Is the service pervasively provided by state and local governments? (2) Do these gov-

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combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions.").

Innovative state legislation has provided the basis for federal legislation in a number of instances. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 Col. L. Rev. 847, 854-55 (1979).

[78] Sometimes these needs require state performance of functions that the private sector formerly performed, but such a history does not preclude characterization of the function as a "traditional governmental function." "[I]t is hard to think of any governmental activity on the 'operational level' . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed." *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955). *See also* W. Wilson, *Constitutional Government in the United States*, 193-95 (1911); *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring):

> Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand what services and functions the public welfare requires.

[79] The Solicitor General attempts to provide authority for his novel historical test by citing cases where federal authority would have been limited if state immunity were applied in an area where the federal government previously legitimately operated. *See* U.S. Supp. Br. 19-21. As discussed in full in APTA's initial brief, APTA Br. 27-35, and as found by the court below, U.S.J.S. at 6a-10a, traditional federal statutory regulation would not be eroded if the FLSA is not applicable to state and local public transit agencies.

ernments provide the service to meet community-wide needs that cannot be met by the private sector? (3) Is the service supported by state and local taxpayers because it cannot be provided at a profit and cannot be abandoned? [80] (4) Do the states and cities regard this activity as an essential public service that is provided in furtherance of their traditional public health and welfare responsibilities? (5) Does the activity serve primarily local needs? [81] *See* APTA Br. 15-25. *Wirtz* was overruled in *National League of Cities* because there was no reasonable basis upon which to distinguish schools and hospitals from police, fire, recreation and the other governmental activities at issue in *National League of Cities.* States provide these public services for essentially the same reason that they provide mass transit services. 426 U.S. at 855; *see* APTA Br. 15-25.

Appellant Garcia apparently suggests that *Wirtz* be reinstated and that "traditional governmental functions" be limited to "the making and enforcement of laws," excluding the provision of all public services. G. Supp. Br. 41-43. This fragmented view of state and local government totally miscasts their fundamental responsibil-

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[80] Federal grant assistance, along with state and local tax revenues, often provides support for traditional governmental services, but this does not justify the imposition of the FLSA requirements where compliance is not an express condition of the grant which the States have voluntarily accepted. *See* APTA Br. 39-41; *see also Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union,* 457 U.S. at 27 (Congress intended that public transit labor relations be governed by local law).

[81] It is not inconsistent with this standard to exclude from such protection activities that a particular State may undertake to operate as a business, to generate a profit, or to participate directly in a nationwide, federally regulated interstate system (*e.g.*, railroads or telephones). For useful guidelines articulated by the lower courts in evaluating what governmental services are traditional, see *Molina-Estrada v. Puerto Rico Highway Authority,* 680 F.2d 841 (1st Cir. 1982); *Amersbach v. City of Cleveland,* 598 F.2d 1033 (6th Cir. 1979).

ity in our system of constitutional federalism to meet the public health and welfare needs of local communities and ignores this Court's federalism precedent which embraces both administering the public law *and* furnishing public services. *See, e.g., Massachusetts v. United States*, 435 U.S. at 456 (Brennan, J.). States and their political subdivisions serve as providers of last resort, ensuring educational opportunity, access to health care, and mobility for all segments of the community. State and local budgets encompass these essential service needs which must compete with law enforcement agencies for scarce tax dollars. Indeed, law enforcement and essential public services are interrelated and interdependent. For example, if public transit services are curtailed, additional law enforcement officers are needed to manage increased traffic and the social consequences of higher unemployment. Appellant's implication that the States provide essential public services to compete in the private marketplace is misplaced, *see* APTA Br. 18-19; these services are provided to preserve public order and safety and healthful urban and rural communities. Such functions are inherently governmental; and in a federalist system, the principal responsibility for providing them is entrusted to state and local governments,[82] which ultimately

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[82] Office of Management and Budget, Executive Office of the President, *Major Themes and Additional Budget Details Fiscal Year 1983* at 121 (*"Primary responsibility for mass transit should remain with State and local governments. Decisions about service levels, equipment and facilities, fares, wage rates and management practices are better left to local decisionmakers"*) (emphasis added). If state and local legislative bodies are to remain accountable to their electorate for the decisions they make concerning the level and quality of services provided, the fees or fares charged, and the taxes leveled in support of governmental services, then they also must have the unimpaired capacity to set the wages and hours of the public employees who deliver these services. *See* Note, *Redefining the National League of Cities State Sovereignty Doctrine*, 129 U. Pa. L. Rev. 1460, 1482 n.155 (1981) ("The critical question" is whether Congress or the states "will be faulted for an insufficient

are held accountable by their electorates for the quality and sufficiency of the services provided.

CONCLUSION

For the reasons stated herein, as well as in APTA's brief filed in the October Term, 1983, and the oral argument on March 19, 1984, this Court should affirm the court below.

Respectfully submitted,

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level or quality of service."). *See, e.g.*, Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 Yale L.J. 1165, 1184 (1977) ("State 'sovereignty' . . . must be taken as a metaphor for its citizens' interests in the adequacy of the State['s] performance of its service functions."); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 Harv. L. Rev. 1065, 1090 (1977) ("When the federal government leaves to states and localities the fulfillment of the government duty, it cannot act so as to undermine the ability of the states and their subdivisions to perform that duty.").