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Note: The Right of the Federal Government to Regulate State Employment Practices

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THE RIGHT OF THE FEDERAL GOVERNMENT TO REGULATE STATE EMPLOYMENT PRACTICES

I. Introduction

The power of the federal government to regulate aspects of private employment (*i.e.*, minimum wages, overtime pay, the right to unionize) has become a recognized aspect of the relationship between employers and employees.[1] The Supreme Court has upheld such federal regulation as a valid exercise of congressional power to regulate interstate commerce.[2] In the past decade, Congress has extended the coverage of labor statutes[3] to workers in the public sector.

The Fair Labor Standards Act (FLSA)[4] was enacted to foster the "maintenance of the minimum standards of living necessary for health, efficiency and general well-being of workers . . . ."[5] To achieve this end, FLSA establishes minimum wages[6] and maximum hours after which the employer must pay his employees at a premium rate.[7] In 1974 Congress extended the statute's minimum wage and maximum hour provisions to employees of state and local governments.[8] In *National League of Cities v. Usery*,[9] the Supreme Court struck down the FLSA amendment as an infringement on the

1. *See, e.g.*, National Labor Relations Act of 1935, Pub. L. No. 74-198, ch. 372, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-66 (1970)); Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-19 (1970)).

2. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

3. *See, e.g.*, Equal Pay Act, 29 U.S.C. § 206 (1970), *as amended*, (Supp. V, 1975); Age Discrimination in Employment Act, 29 U.S.C. § 621 (1970), *as amended*, (Supp. V, 1975).

4. 29 U.S.C. §§ 201-19 (1970), *as amended*, (Supp. V, 1975) [hereinafter cited as FLSA]. The amendment brought the states and their political subdivisions within the statutory definition of an employer. 29 U.S.C. § 203(d) (Supp. V, 1975).

5. *Id.* § 202(a) (1970).

6. *Id.* § 206 (1970), *as amended*, (Supp. V, 1975).

7. *Id.* § 207 (1970), *as amended*, (Supp. V, 1975).

8. 29 U.S.C. §§ 206-07 (Supp. V, 1975), *amending* 29 U.S.C. §§ 206-07 (1970).

9. 426 U.S. 833 (1976). Petitioner National League of Cities was an organized lobbying group whose purpose was to represent the interests of its member municipalities in various lobbying efforts and litigation. Other petitioners included the National Governors' Conference, nineteen states, and four individual cities. All petitioners claimed that application of FLSA's minimum wage and maximum hour provisions to their employees would severely infringe upon their governmental sovereignty. *Id.* at 837.

sovereign power retained by the states and their subdivisions under the tenth amendment.[10] The Court did not address the validity of other statutes imposing federal policy on state employment practices. This Note will explore the effect of *National League of Cities* on such statutes,[11] particularly those which, unlike FLSA, are based on constitutional provisions other than the commerce power.[12]

II. *National League of Cities v. Usery*

Petitioners in *National League of Cities* challenged the 1974 FLSA amendment subjecting states and their political subdivisions to the Act's minimum wage and maximum hour provisions.[13] They contended that the federal government should be estopped from enforcing these provisions against state governmental entities on the basis of the states' intergovernmental immunity derived from the tenth amendment.[14]

Petitioners alleged that Congress, in attempting to regulate the states' activities as public employers, had violated that constitutional prohibition by regulating the states in their role as state employers.[15] They also argued that enforcement of the 1974 amendment would severely limit the power of states and their political subdivisions to make decisions regarding delivery of essential services to their populations.[16] Furthermore, the amendment would

10. *Id.* at 855. "[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." U.S. CONST. amend. X.

11. Equal Pay Act, 29 U.S.C. § 206 (1970), *as amended*, (Supp. V, 1975); Age Discrimination in Employment Act, 29 U.S.C. § 621 (1970), *as amended*, (Supp. V, 1975).

12. U.S. CONST. art. I, § 8.

13. *See* notes 6-7 *supra* and accompanying text.

14. 426 U.S. at 842.

15. *Id.* at 841.

> Appellants . . . contention . . . is that when Congress seeks to regulate directly the activities of the States as public employers, it transgresses an affirmative limitation on its exercise of power akin to other commerce power affirmative limitations contained in the Constitution . . . . Appellants' essential contention is that the 1974 amendments to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a similar constitutional barrier because they are applied directly to the States . . . as employers.

Id.

16. *Id.* at 846-47. The State of California, unable to meet the overtime pay provisions of FLSA, reduced by over 50 percent the hours of classroom training given to recruits for the state's highway patrol. *Id.* Two California cities, unable to afford compliance with the minimum wage provisions, were forced to terminate educational internship programs. *Id.* The

force the states to increase spending in order to maintain preexisting programs essential to the public well-being.[17]

Respondent Secretary of Labor moved for dismissal, alleging that petitioners had failed to state a claim upon which relief could be granted.[18] The United States District Court for the District of Columbia granted the motion.[19] On appeal, the Supreme Court found the 1974 amendment unconstitutional.[20] It stated that the amendment would result in an increase of expenditure imposed upon the state governments and this would "impermissibly interfere with [their] integral governmental functions."[21]

In deciding *National League of Cities* the Supreme Court expressly overruled[22] *Maryland v. Wirtz*.[23] In *Wirtz* the Court had upheld the validity of earlier FLSA amendments,[24] extending the statute's minimum wage and maximum hour provisions to employees of schools and hospitals, including those owned or operated by states or their political subdivisions.[25]

The Economic Stabilization Act of 1970[26] also involved federal intrusion into state employee relations. That Act authorized presidential action to stabilize wages. The Federal Pay Board, estab-

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effect of the provisions appears to have been twofold, cutting both the quality and the quantity of the services governmental bodies could afford to provide.

17. *Id.* at 846. For example, Arizona contended that the FLSA requirements would force an increase in the state's budget of over two and one-half million dollars annually to maintain services at then current levels. California envisioned increased state spending of anywhere from eight to sixteen million dollars per year. *Id.*

18. National League of Cities v. Brennan, 406 F. Supp. 826, 827 (D.D.C. 1974), *rev'd*, 426 U.S. 833 (1976).

19. *Id.* at 828.

20. 426 U.S. at 851-52.

21. *Id.* at 851.

22. *Id.* at 855.

23. 392 U.S. 183 (1968).

24. *Id.* Besides extending coverage to institutions, the 1966 amendments "modified the definition of 'employer' so as to remove the exemption of the States and their political subdivisions with respect to employees of hospitals, institutions, and schools." *Id.* at 187. The Court in *Wirtz*, supporting the then recently broadened coverage of FLSA, took issue with the notion that the federal government was seeking to direct the manner in which the states delivered services to their domiciliaries, terming such a contention "not factually accurate." *Id.* at 193. Admitting the amendments' effect on the state decision-making power, the Court reasoned that the intrusion was allowable in light of Congress' rational basis in enacting the amendments. *Id.* at 195.

25. *Id.* at 201.

26. Act of August 15, 1970, Pub. L. No. 91-379, 84 Stat. 799, *as amended*, 12 U.S.C. § 1904 (Supp. I, 1971) (the act expired on April 30, 1974).

lished under the Act, refused to approve a pay increase for state employees which the Ohio legislature had authorized. After the Supreme Court of Ohio directed the state to pay the raises,[27] the United States obtained an injunction to prevent payments in excess of those authorized by the Pay Board.[28]

The Supreme Court in *Fry v. United States*[29] sustained the action of the Pay Board.[30] The Court held that Congress, in enacting the Economic Stabilization Act, was attempting to counter a serious problem of national dimensions.[31] The Court stated that Congress had the power to act in such a situation.[32] It accepted the proposition that an effective solution for the problem of "galloping" inflation called for wage controls on a national scale.[33] Exclusion of state employees from the Act's coverage would have greatly reduced the program's chances for success.[34]

The Court in *National League of Cities* distinguished *Fry* on two grounds.[35] First, *Fry* involved a serious national problem which permitted such extraordinary federal action as was necessary to preserve the "well being of all the component parts of our federal system."[36] Second, the Economic Stabilization Act did not require the states to perform any affirmative acts nor did it impose upon them any actual operating decisions made by the federal government.[37]

In *National League of Cities,* the Court was unwilling to allow such federal intrusions into the operations of the states.[38] The Court stated:[39]

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27. State *ex rel.* Fry v. Ferguson, 34 Ohio St. 2d 252, 256, 298 N.E.2d 129, 132 (1973).

28. United States v. Ohio, 487 F.2d 936, 944 (Temp. Emer. Ct. App. 1973), *cert. denied,* 421 U.S. 1014 (1975).

29. 421 U.S. 542 (1975).

30. *Id.* at 548.

31. *Id.*

32. *Id.* The Court confirmed this reasoning in *National League of Cities.* 426 U.S. at 853.

33. 421 U.S. at 548.

34. *Id.* "It seems inescapable that the effectiveness of federal action would have been drastically impaired if wage increases to this sizeable group of employees were left outside the reach of these emergency federal wage controls." *Id.*

35. 426 U.S. at 852-53.

36. *Id.* at 853.

37. *Id.* "The effect of the across-the-board freeze authorized by that Act . . . displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves." *Id.*

38. *Id.* at 842-46.

39. *Id.* at 855 (citation omitted).

> Congress may not exercise that power [the commerce power] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be be made. We agree that such assertions of power . . . would indeed . . . allow "the National Government [to] devour the essentials of state sovereignty," . . . and would therefore transgress the bounds of authority granted Congress under the Commerce Clause.

The majority, however, discussed two possible constitutional bases which would support federal legislation to regulate state public employment practices.[40] These were the spending power in article 1, section 8, of the Constitution,[41] and section five of the fourteenth amendment,[42] which empowers Congress to enact such laws as are necessary to ensure the constitutional guarantees of due process and equal protection.[43]

In a concurring opinion, Mr. Justice Blackmun sought to interpret the meaning of the majority opinion.[44] He stressed the need to use a balancing test to evaluate the respective interests of the federal and state governments. Such an approach would not "outlaw federal power . . . where the federal interest is demonstrably greater and where state . . . compliance with imposed federal standards would be essential"[45] to effectuate the broader national interest.

III. Post-*National League of Cities* Cases

Since the decision in *National League of Cities,* several lower courts have sought to evaluate the constitutionality of applying various federal statutes[46] to employment practices of the states and their political subdivisions. Attempts have been made to raise the tenth amendment as a shield, so that state governments and their subdivisions might escape federal regulation of employment practices. Such an interpretation of the tenth amendment is not consis-

40. *Id.* at 852, n.17.

41. U.S. CONST. art. I, § 8. While the decision in *National League of Cities* refers to this section as a possible alternative method of affecting the integral operations of state governments, it is less than clear from the language of the footnote just how the section would be employed. Most likely, the power to provide for the general welfare would be employed. 426 U.S. at 852 n.17.

42. U.S. CONST. amend. XIV, § 5.

43. *Id.*

44. 426 U.S. at 856. (Blackmun, J., concurring).

45. *Id.*

46. *See* note 3 *supra.*

tent with the intent of those who drafted the amendment.[47]

In *Christensen v. Iowa*,[48] the issue of federal regulation of state employment practices arose over the application of the Equal Pay Act[49] to employees of a state university. The employees contended that the university had violated the Equal Pay Act by paying higher salaries to men than to comparably qualified women doing comparable work. They also asserted that the university discriminated in hiring and promotions.[50]

The university moved to dismiss the charges, arguing that the federal government lacked power to regulate the employment practices of the states. The United States District Court for the Northern District of Iowa denied the motion, holding that *National League of Cities* "should be confined strictly to its factual context [*i.e.*, the minimum wage and maximum hour provisions of FLSA]."[51]

The *Christensen* court offered a new standard for judging whether federal legislation infringed upon the states' sovereignty protected

47. United States v. Sprague, 282 U.S. 716 (1931). "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States are reserved to the States or to the people. It added nothing to the instrument as originally ratified . . . ." *Id.* at 733. *See also* United States v. Darby, 312 U.S. 100 (1941), where the Supreme Court stated:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

Id. at 124.

Two commentators have tried to determine how *National League of Cities* affects intergovernmental decisions under the tenth amendment: "[T]he Court will eventually turn explicitly to a balancing test which will allow an ad hoc weighing of the federal and state interests at stake, a test often employed when the constitutional rights of two individuals or entities clash." Beaird and Ellington, *A Commerce Power Seesaw: Balancing National League of Cities*, 11 GA. L. REV. 35, 36 (1977).

48. 417 F. Supp. 423 (N.D. Iowa 1976).

49. 29 U.S.C. § 206 (1970), *as amended*, (Supp. V, 1975).

50. 417 F. Supp. at 424. Employer University of Northern Iowa was charged with "classifying jobs according to sex, of paying less for the services of female clerical employees than is paid to male employees who are performing comparable work and who have comparable qualifications, and of failing to hire and promote women . . . because of their sex." *Id.*

51. *Id.*

by the tenth amendment.[52] Under this standard, a court would determine "whether the integral functions at issue were 'functions essential to separate and independent existence' of the states."[53] The court reasoned that the functions involved in *National League of Cities* were clearly necessary for the states to remain sovereign.[54] In contrast, the Equal Pay Act did not infringe on the powers needed by the states to retain their sovereignty.[55] The court stated:[56]

> It is difficult to say that the capacity of a state or its subdivision to direct that different pay be accorded for comparable work, based solely on the sex of the worker, is a function "essential to separate and independent existence" of the state. Congress has not sought here as in [National League of Cities], "to wield its power in a fashion that would impair the states' 'ability to function effectively [with]in a federal system'."

The decision in *National League of Cities* alluded to several possible grounds of constitutional support for federal legislation which may appear to infringe on the sovereignty of the states.[57] Relying on this language, several lower courts have used section five of the fourteenth amendment to uphold federal regulation of state employment practices.[58] That section grants to Congress the power to enact legislation which is reasonable and necessary to insure the substan-

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52. *Id.* at 424-25.

53. *Id.* at 425.

54. *Id.*

55. *Id.* "It has simply sought to extend the proscription of discrimination in pay on the basis of sex to the states and their subdivisions." *Id.*

56. *Id.*

57. 426 U.S. at 833. Footnote seventeen of the opinion in *National League of Cities* suggests two possible bases that might be acceptable for Congress to rely on in enacting legislation where the commerce power would not be an acceptable means. The footnote states:

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, Cl. 1, or § 5 of the Fourteenth Amendment.

Id. at 852 n.17.

58. *See, e.g.*, Usery v. Allegheny Inst. Dist., 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 1582 (1977); Brown v. County of Santa Barbara, 427 F. Supp. 112 (C.D. Cal. 1977); Usery v. Board of Educ., 421 F. Supp. 718 (D. Utah 1976); Usery v. Bettendorf School Dist., 13 Fair Empl. Prac. Cas. 634 (S.D. Iowa 1976). *But see* Usery v. Owensboro-Daviess County Hosp., 423 F. Supp. 843 (W.D. Ky. 1976) holding that as a result of *National League of Cities*, FLSA equal pay provisions did not apply to a county hospital since it was no longer considered to fall within the statutory definition of the term "employer." *Id.* at 844-45. This district court relied heavily on aspects of stare decisis to differentiate its holding from those in *Christensen, Salt Lake City Bd. of Educ.*, and *Allegheny County Hosp. Id.* at 846-47.

tive protections guaranteed by the fourteenth amendment.[59]

In *Usery v. Bettendorf School District*[60] defendant contended that application of the Equal Pay Act[61] would "displace the State's freedom to structure integral operations in areas of traditional governmental functions," and therefore would violate the state's sovereignty insured by the tenth amendment.[62] The United States District Court for the Southern District of Iowa held that extension of the Equal Pay Act provisions to public sector employment was a valid exercise of Congress's fourteenth amendment powers.[63] The court distinguished *National League of Cities*, and discussed the effect of compliance with the Equal Pay Act on the performance of integral state functions.[64] While *National League of Cities* mandated that specific spending be undertaken by the states, *Bettendorf* dealt only with a requirement that the states be neither arbitrary nor capricious in their salary and promotion policies.[65] The court concluded that a state, when acting as an employer, can be prohibited from engaging in arbitrary discrimination. This prohibition constitutes a minimal intrusion upon a state's sovereignty and does not warrant setting aside the legislation in question.[66]

In *Usery v. Board of Education*,[67] the Secretary of Labor charged that defendant board of education violated the Age Discrimination

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59. U.S. CONST. amend. XIV, § 5 provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

60. 13 Fair Empl. Prac. Cas. 634 (S.D. Iowa 1976).

61. *See* note 51 *supra*.

62. 13 Fair Empl. Prac. Cas. at 635.

63. *Id.*

64. *Id.*

65. *Id.*

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> [T]hese . . . concerns about functions essential to the separate and independent existance of state government and fundamental employment decisions are not applicable to the minimal intrusion caused by imposition of the Equal Pay provisions. Discrimination in pay on the basis of sex is not an attribute of sovereignty within the contemplation of the Tenth Amendment . . . .

Id.

The court in *Bettendorf* also suggested an alternative basis for supporting the regulative legislation in question, Title VII of the 1964 Civil Rights Act, 45 U.S.C. § 2000e (1970). The use of Title VII in dealing with state governmental action has been approved by the Supreme Court since its decision in *National League of Cities*. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

67. 421 F. Supp. at 718 (D. Utah 1976).

in Employment Act (ADEA)[68] by discriminating in a promotion decision against three school officials on the basis of age. Defendant argued that the constraints of ADEA deprived the board of education of its "freedom to exercise integral state governmental functions."[69]

The United States District Court for the District of Utah denied defendant's motion for a summary judgment.[70] Relying on Mr. Justice Blackmun's concurring opinion in *National League of Cities*,[71] the court employed a balancing test.[72] It pointed out that "Congress has a national interest in preventing arbitrary discrimination in employment on the basis of age and this includes protecting the significant number of individuals employed by states or instrumentalities and agencies thereof."[73] It balanced this national interest against the right of a state to determine its own employment standards. The court held that the national policy of nondiscriminatory access to employment opportunity clearly outweighed the states' right involved.[74] In addition, the district court concluded that the application of ADEA to state employment was supported by Congress' fourteenth amendment power to enact the legislation to assure the citizenry those substantive rights guaranteed by the amendment.[75] Referring to arbitrary age discrimination in employment, the condition which ADEA was intended to remedy, the dis-

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68. 29 U.S.C. § 621 (1970), *as amended*, (Supp. V, 1975).

69. 421 F. Supp. at 718-19.

70. *Id.* at 721.

71. *Id.* at 719.

72. *Id.* at 720.

> [T]he court must determine whether the constitutional source of power by which Congress chose to protect individuals against age discrimination in state employment, as embodied in ADEA, is consistent with the *National League of Cities'* balanced limitation on congressional commerce power over integral state government operations.

Id.

73. *Id.*

74. *Id.*

> Such a policy choice to discriminate on the basis of age in selecting individuals for employment within a state education system is outweighed by the significant national interest in insuring nondiscriminatory employment practices in areas affecting interstate commerce, even assuming that public education represents an integral state governmental operation.

Id.

75. *Id.* at 721.

trict court stated that it "would constitute forbidden state action that denies equal protection of the law."[76] In reaching its decision that the application of ADEA to state employers was valid, the district court relied on the fourteenth amendment rather than the commerce clause.[77]

ADEA imposed a duty upon the states to refrain from performing acts which Congress had determined were contrary to the national interest. This is analagous to the situation in *Fry* where the Court held that Congress' anti-inflation program would be effectively stymied if the states' employees were excluded from the statutory scheme.[78] While ADEA sought to prevent employers from arbitrarily discriminating on the basis of age, the Economic Stabilization Act challenged in *Fry* sought to restrain employers from increasing wages and salaries in a manner considered adverse to the national economic interest. These restrictions are critically different from the affirmative duties and budget decisions imposed by the wage and hour provisions of FLSA.

IV. Conclusion

Two factors appear to be determinative in deciding whether a federal regulatory intrusion into a state's sovereignty will be permitted.

The Supreme Court, in *National League of Cities,* has shown its unwillingness to allow the Congress to impose its judgment upon the states in areas of policy requiring state spending and the reordering of state budgetary priorities. Those federal regulations which the lower courts have enforced with regard to state employment since the decision in *National League of Cities* have not imposed such

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76. *Id.*

77. *Id.* at 719-21.

> Individuals within those state systems continue to enjoy constitutionally guaranteed rights which are statutorily protected in such federal legislation as the ADEA. Otherwise, *National League of Cities* . . . would undermine constitutionally and statutorily recognized and protected individual rights in employment merely because the federal legislation affects, in some manner, an integral state governmental function. Such an absolute interpretation would itself derogate from the federal system by unduly restricting congressional power to statutorily protect individual rights in employment in which the federal government has a significant interest.

Id. at 719.

78. 421 U.S. at 548.

budgetary determinations upon the states.[79] Rather, they have prohibited specific state action.

The regulations that have been enforced have dealt with broad federal policy decisions designed to guarantee constitutional rights protected by the fourteenth amendment. As in *Fry*, the root issues have been questions of national policy. It appears likely that those federal attempts to regulate state employment practices based on the constitutional rights of the individual will be permitted despite a minimal intrusion upon state sovereignty.

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79. *See* notes 57-77 *supra* and accompanying text.