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NATIONAL LEAGUE OF CITIES V. USERY REVISITED—IS THE QUONDAM CONSTITUTIONAL MOUNTAIN TURNING OUT TO BE ONLY A JUDICIAL MOLEHILL?

BERNARD SCHWARTZ*

INTRODUCTION

FEW decisions of the Burger Court appeared more far reaching in their implications than National League of Cities v. Usery. In a single stroke, the Court appeared to revive the doctrine of dual federalism or at least breathe life into the nearly forgotten ghost of state sovereignty. For the first time since the “constitutional revolution” of the 1930’s, an exercise of congressional power under the commerce clause was struck down. The Court held that the federal statute at issue unconstitutionally interfered with the very operation of the states as independent governments. In addition, the Court relied upon “traditional aspects of state sovereignty” to invalidate the statute. Thus, the tenth amendment was resurrected as “an express declaration of [a] limitation” on federal sovereignty.

Soon after National League of Cities was decided, this author prepared an article analyzing the case’s possible impact. Given the time of the article’s writing, however, it was necessarily based entirely upon pre-National League of Cities jurisprudence and therefore could contain only general predictions of future judicial application of the new Supreme Court doctrine. Now, seven years of post-National League of Cities decisions, including several by the Supreme Court,

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4. 426 U.S. at 851.
5. Id. at 849.
6. Id. at 842.
permit a more accurate assessment of the impact of *National League of Cities*.  

The cases since *National League of Cities* indicate that the reports of the death of modern federalism were greatly exaggerated. Rather than restoring the traditional concept of dual federalism, *National League of Cities* may prove only an aberration. The first part of this Article discusses the background of the American system of dual federalism and its metamorphosis into a strong centralized federal government. The Article continues with an examination of *National League of Cities* and the apparent resurrection of dual federalism. Part II demonstrates that *National League of Cities* has done little to revive dual federalism. The Supreme Court has construed the language of the case narrowly and has recognized broad exceptions to its holding. In addition, Congress has circumvented the holding by conditioning state access to federal funds on compliance with federal policy. The Article concludes that despite pressure from the White House and the Court's recognition of state sovereignty in *National League of Cities*, the trend toward federal preeminence continues.

I. FROM EARLY AMERICAN FEDERALISM TO NATIONAL LEAGUE OF CITIES

A. Dual Federalism

During much of its history, the American system of government was based upon what has been termed dual federalism, premised upon the notion of "two mutually exclusive, reciprocally limiting fields of power . . . ." The federal and state governments co-exist, or confront one another, as absolute equals with the proper equilibrium maintained by the strict demarcation of federal and state authority. This rigid delimitation of their respective lines of authority is thought necessary to prevent disruption of the union. Thus, under this system, the federal government and the states act separately from and independently of one another within their respective spheres. The tenth amendment provides that while the federal government, in its

10. See E. Corwin, supra note 9, at 135.
appropriate sphere, may be preeminent, the states possess all the powers not expressly granted to the federal government.\textsuperscript{13} Through the mid-1930's, the Supreme Court, concerned primarily with protecting the states from undue encroachments by the federal government, limited the exercise of federal regulatory authority.\textsuperscript{14} The advent of the New Deal, however, tipped the balance toward the federal government.\textsuperscript{15} Few, if any, economic activities are now considered beyond the expanded reach of congressional commerce power.\textsuperscript{16} Thus, federal authority today extends even to areas that were formerly deemed solely within the competence of the states.\textsuperscript{17} This development in commerce clause/tenth amendment jurisprudence seemed to portend the replacement of the federal system by a unitary government in which the states would be reduced to vestigial appendages of an omnipotent federal government. The Court's decision in \textit{National League of Cities}, however, seemed to presage a revival of dual federalism.

\textbf{B. National League of Cities}\\

In \textit{National League of Cities}, the Court considered a challenge to the Fair Labor Standards Act Amendments of 1974 (FLSA Amend-

\begin{enumerate}
\item U.S. Const. amend. X; \textit{see} Collector v. Day, 78 U.S. (11 Wall.) 113, 124 (1870); K. Wheare, \textit{supra} note 9, at 2.
\item \textit{See}, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 309-10 (1936) (invalidating federal law regulating wages and hours of coal miners); Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (invalidating federal law prohibiting interstate transportation of goods produced by child laborers working excessive hours).
\item \textit{See}, e.g., United States v. South E. Underwriters, 322 U.S. 533, 545 (1944) (local insurance is a business that affects interstate commerce and is within federal commerce power); Wickard v. Filburn, 317 U.S. 111, 127 (1942) (growing wheat for primarily family consumption affects interstate commerce and is subject to federal regulation); United States v. Darby, 312 U.S. 100, 117 (1941) (production for interstate commerce includes goods that may, but actually do not, enter interstate commerce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937) (union-management relations affect interstate commerce).
\end{enumerate}
ments), which extended federal minimum wage and maximum hour requirements to most state and local government employees. The Court ruled that Congress could not impose the requirements of the FLSA Amendments on states. Although the Court recognized that the conditions of employment of private sector employees are not beyond the scope of the federal commerce power, a sharp distinction was drawn between congressional regulation of private businesses and regulation "directed... to the states as states." When Congress attempts direct regulation of the states as states, and also impairs the integral operations of traditional state functions, the tenth amendment sets limits "upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce."

In a 1983 decision, the Court discussed the rationale behind National League of Cities. The Court stated "that the imposition of certain federal regulations on state governments might, if left unchecked, 'allow "the National Government [to] devour the essentials of state sovereignty." ' The tenth amendment embodies an affirmative limitation on the exercise of congressional power under the commerce clause much like other affirmative limitations on commerce power. Congress, therefore, may not exercise its commerce power in a manner that may impair the states' ability to function effectively as separate and independent entities.

II. Beyond National League of Cities

The Court recently established a framework within which to determine whether tenth amendment limitations on federal power should apply:

[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

20. Id. at 852.
21. Id. at 840-41.
22. Id. at 845.
23. Id. at 842.
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." 27

The first and third prongs of this test have been the focus of recent Supreme Court analysis of the scope of the tenth amendment. 28 The Court has "had little occasion to amplify on [the] understanding of the" second prong. 29 The impact of National League of Cities has been substantially diminished by the Court's strict interpretation of the first and third prong requirements. In addition, exceptions to the application of the National League of Cities doctrine have been delineated to protect overriding federal interests. 30 Moreover, Congress has circumvented the possible impact of the test's application through artful use of the legislature's power of the purse. 31

A. The Three-Prong Test

1. The First Prong

Under the first prong of the test, a federal law must regulate "states as states" to come within the purview of National League of Cities. 32 In the 1981 case of Hodel v. Virginia Surface Mining & Reclamation Association, 33 the Court determined that a federal law establishing mandatory minimum federal standards for surface mining operations did not regulate the states as states. 34 In upholding the federal statute, the Court did not look at the effect of the statute on the state regulatory agency, but rather focused upon the underlying "activities actually regulated by the [statute]." 35 If the underlying activity is carried out by a private entity and affects commerce, the federal government has the authority to preempt state law pursuant to its commerce

30. See infra notes 91-109 and accompanying text.
31. See infra notes 120-48 and accompanying text.
34. Id. at 288.
35. Id. at 289.
clause power. The state remains free, however, to promulgate concurrent, nonconflicting legislation. For example, under the statute, the state could enact surface mining regulations that were stricter than the federal standards. Such a statute, according to the Court, exemplifies a “program of cooperative federalism” that permits states, within federal limits, to pursue their own policy goals. Thus, a federal law that establishes strict minimum standards does not constitute regulation of a “state as a state.”

In *FERC v. Mississippi,* the Court, without explicitly utilizing the three-prong test, applied the *Hodel* preemption analysis. The Supreme Court considered the constitutionality of the Public Utility

36. *See id.* at 289-90; *FERC v. Mississippi,* 456 U.S. 742, 764 (1982). Justice O'Connor, in her partial dissent in *FERC,* disagreed with the majority’s preemption analysis. She stated that “[u]nder the Court’s analysis, for example, *National League of Cities v. Usery...* would have been wrongly decided, because the States could have avoided the Fair Labor Standards Act by ‘choosing’ to fire all employees subject to that Act and to close those branches of state government.” *Id.* at 781-82 (O'Connor, J., concurring in part, dissenting in part) (citation omitted). Thus, the choice of ceasing regulation in an area of parallel federal regulation enables a state to avoid that federal regulation. Therefore, federal regulation of the area would not be limited by the tenth amendment under the preemption analysis. Justice O'Connor further stated that although the federal statute’s purpose was to regulate private utility companies, its commands were addressed solely to the States, “[making it] difficult to argue that [it] is not a regulation of the ‘State.’” *Id.* at 779.

Justice O'Connor may be misinterpreting the majority’s analysis. The Court provided some guidance regarding the scope of preemption analysis when it stated that “[w]e hold only that Congress may impose conditions on the State’s regulation of private conduct in a pre-emptible area.” *Id.* at 769-70 n.32. The holding “does not suggest that the Federal Government may impose conditions on state activities in fields that are not pre-emptible, or that are solely of intrastate concern. And it does not purport to authorize the imposition of general affirmative obligations on the States.” *Id.* at 770 n.32. The majority attempted to prevent the inference of the overruling of *National League of Cities* by stating that the holding “does not foreclose a Tenth Amendment challenge to federal interference with the State’s ability ‘to structure employer-employee relationships.’” *Id.* The Court will apparently be able to distinguish between statutes that interfere with this relationship and those that are legitimate exercises of federal power. Justice O'Connor, however, is apparently skeptical of the Court’s ability to make this distinction. *See id.* at 782 n.9 (O'Connor, J., concurring in part, dissenting in part) (“The Court... does not explain why our *National League of Cities* opinion did not consider compliance with the Fair Labor Standards Act in fields such as ‘licensing of occupations and businesses... preserv[ation] of environmental quality,... [and] protection of the public against fraud and sharp practice,’ a ‘condition[n] on the State’s regulation of private conduct in a pre-emptible area.’ )” (quoting *FERC v. Mississippi,* 456 U.S. 742, 769 n.32 (1982) and Jurisdictional Statement of Appellant, app. I, at 16, *National League of Cities v. Usery,* 426 U.S. 833 (1976) (reprint of complaint)).

37. 452 U.S. at 289.
38. *See id.*
39. *Id.*
41. *Id.* at 759, 764-67.
Regulatory Policies Act of 1978 (PURPA)—a federal law that requires state agencies to implement national public utility regulatory programs. The state, as part of the implementation of these programs, is required to resolve disputes arising under the federal statute. In addition, under PURPA, state agencies that regulate electric utilities must conduct administrative proceedings to consider and determine whether national rate design policies and service standards should be adopted and enforced with respect to each regulated electric utility. The Court upheld the dispute resolution provisions based upon the "constitutional command" that the federal policy underlying PURPA is the prevailing policy in every state and thus the state regulatory agency must enforce this policy. In addition, the federal commerce power was invoked to support the mandatory consideration of federal standards by the states. The Court noted that the federal government has unquestioned authority to regulate private utilities and may preempt the state entirely in this area of regulation. Thus, PURPA does not infringe upon state sovereignty simply because state participation in regulation is conditioned upon consideration of federal standards.

In the more recent case of EEOC v. Wyoming, the Court again had occasion to apply the first prong of the test. In contrast to Hodel, however, the Court ruled that the federal statute regulated the state as a state. The federal law directed the state not to retire its game wardens at age fifty-five. The facts were akin to those in National League of Cities in which the challenged federal law directed the state to pay its employees a minimum wage and imposed a maximum hour requirement. Thus, unless a federal law regulates states as states, for example in their role as public employers, the law will not come under the restrictions of National League of Cities.

The Court has recognized that this first prong marks National League of Cities as a "specialized immunity doctrine rather than a broad limitation on federal authority."

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45. 456 U.S. at 760 (quoting Testa v. Katt, 330 U.S. 386, 393 (1947)).
46. Id. at 761-67.
47. Id. at 764.
48. Id. at 765.
50. Id. at 1061.
51. See id. at 1059, 1064.
pretation of the third prong has further restricted the impact of Na-
tional League of Cities.

2. The Third Prong

a. Traditional State Functions: United Transportation Union v. Long
   Island Rail Road

   The statute at issue in National League of Cities was held unconsti-
tutional because it displaced state policies regarding the manner in
which the delivery of governmental services, such as police and fire
protection, would be structured.54 The challenged amendments thus
abridged the states' freedom to structure "integral operations in areas
of traditional governmental functions."55

   All federal interference with state operations, however, does not
necessarily interfere with "traditional state functions." Under the
commerce clause, Congress may regulate a state that is engaged in
non-traditional state functions.56 In the 1936 case of United States v.
California,57 for example, the Court held that a state-run freight
railroad was subject to federal safety regulations.58 While the activity
was within the reserved powers of the state, it was an activity "com-
monly carried on by private enterprise."
59 The Court in National
League of Cities distinguished United States v. California on the
ground that the FLSA Amendments interfered with a traditional state
function—the allocation of state resources.60

   This distinction was also the basis for upholding a federal statute in
the post-National League of Cities decision of United Transportation
Union v. Long Island Rail Road.61 The Long Island Rail Road is a
passenger line owned and operated by New York State. During a 1979
labor dispute, the pertinent federal and state laws conflicted. The
state law prohibited strikes by public employees.62 Federal law, how-
however, permitted railroad employees to strike after mediation ef-

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54. 426 U.S. at 851.
55. Id. at 852.
(Burger, C.J., concurring); United States v. California, 297 U.S. 175, 182 (1936).
57. 297 U.S. 175 (1936).
58. Id. at 177.
59. Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619, 624 (1934); see
United States v. California, 297 U.S. 175, 183 (1936) (citing Puget Sound Power &
Light Co. v. Seattle, 291 U.S. 619 (1934)).
forts failed. When negotiation and mediation efforts did fail, the union sued for a declaratory judgment that the labor dispute was governed by the federal law.

In *Long Island Rail Road*, the key issue was "whether [the] federal law impair[ed] the state's authority with respect to 'areas of traditional [state] functions.'" The Court concluded that it did not, because in the United States, operation of railroads "has traditionally been a function of private industry, not state or local governments." The fact "that some . . . railroads have come under state control in recent years . . . does not alter the historical reality that the operation of railroads is not among the functions traditionally performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a State's ability to function as a State." States cannot, "by acquiring functions previously performed by the private sector, erode federal authority in areas traditionally subject to federal statutory regulation." Thus, *National League of Cities* has not altered the interpretation of "traditional state functions." The tenth amendment does not immunize the states from federal regulation of functions not historically performed by state governments.


In *EEOC v. Wyoming*, the Supreme Court indicated that the tenth amendment does not restrict the application of federal law when the federal regulation does not "directly impair [state] ability 'to structure integral operations in areas of traditional functions.'" In this case, the Court considered the constitutionality of amendments to the Age Discrimination in Employment Act (ADEA). The ADEA prohibits employment discrimination because of age by states against workers between the ages of forty and seventy, except when age is a "bona fide occupational qualification" for a given job. In 1974, Congress extended the ADEA to states acting as

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65. 455 U.S. at 684.
66. Id. at 686.
67. Id.
68. Id. at 687.
70. Id. at 1069 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-88 (1981)).
73. Id. § 623(f)(1) (1976).
employers.\textsuperscript{74} Wyoming law, however, required game wardens to retire at age fifty-five.\textsuperscript{75} The state claimed that the federal law violated the principle of state sovereignty laid down in \textit{National League of Cities}. The Supreme Court disagreed, upholding the extension of the federal statute.\textsuperscript{76}

The Court conceded that "management of state parks is clearly a traditional state function."\textsuperscript{77} Nonetheless, the Court found that the ADEA, in contrast to the FLSA, did not impair the integral operation of this function.\textsuperscript{78} In \textit{National League of Cities}, the federal law had a substantial financial effect because it forced the states to pay their workers a minimum wage and an overtime rate that would leave those states with less money for other state programs.\textsuperscript{79} In \textit{EEOC v. Wyoming}, on the other hand, there was no such effect. The state could continue to pay its workers exactly the same rate it would have paid without the federal statute.\textsuperscript{80} In addition, the state could continue to assess the fitness of its game wardens and dismiss those found unfit. Indeed, the federal law permits a state to continue its employment practice if it "can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden."\textsuperscript{81} The Court concluded "that the degree of federal intrusion in this case is sufficiently less serious than it was in \textit{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."\textsuperscript{82}

The Court, as pointed out in a strong dissent by Chief Justice Burger, neglected to address the actual costs of the FLSA Amendments.\textsuperscript{83} Like the law in \textit{National League of Cities}, "the statute can give rise to increased employment costs caused by forced employment of older individuals."\textsuperscript{84} Older workers are at the upper end of the pay scale, their pension and health insurance costs are higher, and disability costs may be involved.\textsuperscript{85}

There are other costs as well. Under the rubric of non-economic hardships, the state as employer is "prevented from hiring those phys-
cally best able to do the job." Further, older workers inevitably "occupy a disproportionate share of the upper-level and supervisory positions." A bar on mandatory retirement therefore also impedes promotion opportunities. The absence of "such opportunities tends to undermine younger employees' incentive to strive for excellence, and impedes the state from fulfilling affirmative action objectives." From this point of view, the federal age requirement has an impact upon the state's ability to structure and operate its civil service similar to that of the wage and hour requirements invalidated in National League of Cities. Recognizing this incongruity, Chief Justice Burger stated that he found it "impossible to say that [the bona fide occupational qualification exception to the ADEA] provides an adequate method for avoiding significant impairment to the state's ability to structure its integral governmental operations." Even if the majority is correct in its attempt to distinguish the ADEA from the statute invalidated in National League of Cities, the Court can hardly deny that EEOC v. Wyoming subjects the states to federal power in a manner that belies the notion of state equality with the federal government. The Court's strict interpretation of "traditional state function" and "integral state operations" tends to vitiate the efficacy of National League of Cities. States can no longer confidently rely on the decision to defend noncompliance with federal law. Moreover, even if the three-prong test is satisfied, state sovereignty may still be supplanted by overriding federal interests.

B. Overriding Federal Interests: Civil Rights and Environmental Protection

Over a century ago, in Kentucky v. Dennison, the Supreme Court declared that Congress "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." In FERC v. Mississippi, the Court referred to this now-famous statement, but went on to say that "[r]ecent cases, however, demonstrate that this . . . is not representative of the law today." FERC thus implies that the state and federal government may no longer "be viewed as coe-

86. Id. at 1071.
87. Id.
88. Id.
89. Id. at 1072.
91. 65 U.S. (24 How.) 66 (1861).
92. Id. at 107.
94. Id. at 761.
qual sovereigns" in all situations. Rather, the national government has the power to control areas of activity that, half a century ago, were considered within the reserved powers of the states.

The Supreme Court has determined that certain rights warrant a preferred status under the Constitution. In the area of civil rights, for example, the Court has granted Congress broad discretion to protect individual liberty interests. In addition, the Court has carved out an exception to the general rule against intrusion into integral state operations when constitutionally protected civil rights are jeopardized by state action. When Congress properly exercises its power to protect civil rights, it is not limited by the same tenth amendment constraints that restrict the exercise of its commerce clause powers. Thus, the Supreme Court has indicated that National League of Cities does not limit the power of Congress to enforce the constitutional guaranty of racial equality in elections through regulation of state voting practices. Similarly, congressional authority to protect other constitutional rights against state violations is free from tenth amendment restraints.

The principle has been applied in cases involving Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment on the grounds of race, color, sex, religion, or national origin. In 1972, Congress amended the Civil Rights Act to include states as "persons" subject to the prohibition. Federal courts, concluding that Congress has the power to apply the same standard to both private employers and states as employers, have had no difficulty upholding this provision. For example, the Ninth Circuit recently held that "National League of Cities does not apply because the Tenth Amendment only limits laws passed pursuant to the Commerce

95. Id.
101. Id. § 2000e-2(a)(1).
The national interest in enforcing laws against discrimination outweighs whatever intrusion on state sovereignty may be involved. Even in cases to which National League of Cities applies, the federalism argument cannot be used to prevent congressional action to enforce the fourteenth amendment.

This exception to National League of Cities is not limited to the protection of civil rights. The Court has determined that other interests may also warrant interposition of federal law. For example, courts have accorded environmental protection a preferred status in relation to the tenth amendment. The Sixth Circuit upheld the power of Congress to prohibit a state from granting motor vehicle licenses to vehicles that fail to comply with federal air pollution standards. The court determined that the "federal interest in controlling air pollution far outweighs any state interest in permitting non-complying vehicles to use public streets and highways." This holding bears out Justice Blackmun's statement in his concurring opinion in National League of Cities that the tenth amendment "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."

104. Norris v. Arizona Governing Comm. for Tax Deferred Compensation Plans, 671 F.2d 330, 336 (9th Cir. 1982) (emphasis in original), aff'd in part, rev'd in part on other grounds, 103 S. Ct. 3492 (1983); see also United States v. Virginia, 620 F.2d 1018, 1023 (4th Cir.) (Congress has authority to apply fair employment law to state and local governments to enforce equal protection clause of fourteenth amendment), cert. denied, 449 U.S. 1021 (1980).


106. In United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982), the Court restated the three-prong test to be applied in evaluating claims under National League of Cities. Id. at 684. The Court went on to say, in a footnote: "However, even if these three requirements are met, the federal statute is not automatically unconstitutional under the Tenth Amendment. The federal interest may still be so great as to justify[ ] State submission." Id. at 684 n.9 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 n.29 (1981)).


C. Federal Highway Regulation

In contrast to state laws affecting civil rights and the environment, state regulation of trucking traditionally has been accorded a preferred position in relation to federal commerce power. In the absence of conflicting federal regulation, a state law relating to highway safety will not necessarily be invalidated under the commerce clause. If the state has a proven and substantial safety interest, the state law will survive a commerce clause attack.

In the presence of a conflicting federal law, however, the safety rationale has not been sufficient to invoke the tenth amendment limitation on federal commerce power. For example, in January 1983, Congress enacted a law forbidding states from prohibiting tandem trucks from using major state roads. Despite the federal statute, Connecticut passed just such a law four months later. The federal government brought an action for a preliminary injunction to stop the state from enforcing its law. The federal district court in Connecticut agreed to issue the injunction in spite of the state's admittedly substantial safety interests. The court held that only Congress can decide that the federal law's effects warrant its repeal.

113. Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, §§ 133, 411, 96 Stat. 2097, 2123-24, 2159-60 (current version at 23 U.S.C.A. § 127 (West Supp. 1983); 49 U.S.C.A. § 2311 (West Supp. 1983)). Such trucks have been called "killer trucks," because of the number of fatal accidents in which they have been involved, as well as the extensive highway damage they have caused. Indeed, according to a 1982 U.S. Department of Transportation study, such trucks do "at least 87 times as much damage to the pavement as the heaviest auto." N.Y. Times, Feb. 4, 1983, at A27, col. 2.
116. Id. at 578.
117. Id.
people of a state does not amount to an adequate claim that the Federal statute violates the Tenth Amendment.”

A state seeking to regulate trucks has a greater burden when it is acting in the face of competing congressional legislation than when Congress has not spoken. Thus, even after National League of Cities, rationales that have traditionally supported state law in areas where there are no contradictory federal regulations are not sufficient to uphold the state law in the presence of a contradictory federal statute.

D. Spending Power

It has been suggested that Congress may use its spending power to achieve what it cannot achieve under the commerce clause—state compliance with federal policy. The 1947 case of Oklahoma v. Civil Service Commission demonstrates the extent to which Congress can attach conditions to funds granted to the states. The case involved a challenge to the Hatch Act, which was designed to prevent public employees from engaging in political activities. The principles of federalism underlying National League of Cities preclude a direct congressional prohibition of political activities by state employees. In Oklahoma v. Civil Service Commission, however, Congress was able to attain the same result by conditioning federal grants on state enactment of legislation prohibiting such participation.

Several lower federal courts have concluded that National League of Cities does not affect the reasoning of Oklahoma v. Civil Service Commission. In New Hampshire Department of Employment Security v. Marshall, for example, the court sustained the requirement that there be a program providing unemployment compensation ben-

118. Id.
119. Id. at 575 n.6.
123. 330 U.S. at 143-44.
126. 616 F.2d 240 (1st Cir.), appeal dismissed, 449 U.S. 806 (1980).
fits to most state employees as a condition of federal approval of state unemployment compensation programs.\textsuperscript{127} Under the Federal Unemployment Tax Act (FUTA),\textsuperscript{128} federal approval is required before such state programs can receive certain federal grants. In addition, federal approval is a precondition to exemption of private employers from both federal and state unemployment taxes.\textsuperscript{129}

The effect of the 1976 federal unemployment compensation law upon the states is similar to that of the statute held invalid in \textit{National League of Cities}. Both laws control states in their capacity as employers and increase the costs of employment for states.\textsuperscript{130} Nonetheless, federal courts have upheld the enforcement of the 1976 statute under Congress’ spending power.\textsuperscript{131} Courts distinguish between voluntary compliance with the unemployment compensation requirement and the mandatory controls on states involved in \textit{National League of Cities}.\textsuperscript{132} Courts stress that the unemployment compensation law does not set wage rates or affect hours worked, and, as a result, FUTA does not impermissibly interfere with state employment schemes.\textsuperscript{133} Thus, the holding of \textit{National League of Cities} is limited to statutes that mandate “local compliance with a discretion-less federal enactment.”\textsuperscript{134} Federal laws based on the spending power do not fall into this category because they give states the choice of conforming to the federal requirements or refusing to participate.

This choice, however, is illusory. For example, every state except New Hampshire immediately conformed to the 1976 federal statute and enacted laws providing unemployment compensation coverage for public employees.\textsuperscript{135} Even New Hampshire, after initiating a challenge to the statute, enacted a law conforming to the federal stat-
The New Hampshire legislature, however, expressly stated that it was acting only to avoid the onerous cost of noncompliance to the state's businesses.\footnote{See N.H. Rev. Stat. Ann. § 282-A (1981).}

Other post-National League of Cities cases involving use of the federal spending power have arisen under the National Flood Insurance Program.\footnote{136. See N.H. Rev. Stat. Ann. § 282-A (1981).} The program provides that all grants of federal funds for "acquisition or construction purposes" in an area with special flood hazards are conditioned on community participation in the federal program.\footnote{137. According to the legislature, the loss of offset credits "against taxes imposed by the Federal Unemployment Tax Act which would amount to in excess of 40 million dollars, [is] a price which is totally disproportionate to the cost of benefits to governmental employees." 1979 N.H. Laws 359; La Pierre, supra note 120, at 832 n.210.} This requirement is met by state enactment of land use control measures that meet federal standards for minimizing flood damage.\footnote{138. 42 U.S.C. §§ 4001-4128 (1976); e.g., Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.D.C. 1978), aff'd mem., 598 F.2d 311 (D.C. Cir.), cert. denied, 444 U.S. 927 (1979); North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), aff'd mem., 435 U.S. 962 (1978). The statute's purposes include inducing the states to adopt land use control measures that will reduce damage from floods, 42 U.S.C. § 4001(e) (1976), and encouraging property owners in areas that are susceptible to floods to purchase flood insurance, \textit{id.} § 4001(a)(4).} If a community refuses to enact the required measures, the landowners in the area are denied important federal financial assistance, including federally subsidized mortgage loans and federal disaster relief assistance.\footnote{139. 42 U.S.C. § 4003(a)(4) (1976).}

In \textit{Texas Landowners Rights Association v. Harris},\footnote{140. \textit{Id.} §§ 4012(e), 4012a. The federal standards restrict development in flood-prone areas, require flood-proof construction, and require land-use planning to avoid flood damage. \textit{Id.} § 4102.} the district court interpreted \textit{National League of Cities} as prohibiting the federal government from directly ordering the states to enact laws regulating land use.\footnote{141. \textit{Id.} § 4012a; see La Pierre, supra note 120, at 835-36.} The court, however, ruled that such regulation may be achieved indirectly by conditioning receipt of federal funds on state compliance with federal policy.\footnote{142. 453 F. Supp. 1025 (D.D.C. 1978), aff'd mem., 598 F.2d 311 (D.C. Cir.), cert. denied, 444 U.S. 927 (1979).} In order to receive funds, states and localities must exercise their legislative powers to enact land use control laws that meet federal standards. Moreover, the court ruled that states could be required to bear the costs of enforcing those laws. Once again federal "coercion" through the spending power was upheld. In upholding the National Flood Insurance Program, the court viewed

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140. \textit{Id.} §§ 4012(e), 4012a. The federal standards restrict development in flood-prone areas, require flood-proof construction, and require land-use planning to avoid flood damage. \textit{Id.} § 4102.
141. \textit{Id.} § 4012a; see La Pierre, supra note 120, at 835-36.
143. \textit{Id.} at 1029-30; see 42 U.S.C. §§ 4012(c), 4012a (1976).
144. 453 F. Supp. at 1030.
the law merely as a "carrot and a stick" scheme that offered "certain inducements for state participation." The states had a choice whether to participate in the program—a choice that would be based upon "the potential local benefits of flood insurance against the costs of participation to local sovereignty and pocketbooks."

Here, too, the choice is virtually nonexistent. A state's refusal to adopt the land-use controls will render property owners in flood-prone areas ineligible for federal financial assistance. In practice, no state has chosen to reject the federal financial benefits associated with compliance. If Congress can so easily affect integral functions of state governments, National League of Cities becomes an easily surmountable barrier to congressional encroachments upon state operations.

III. "NEW FEDERALISM"

The shifting balance of power brought about by the decline of dual federalism was customarily characterized as the "new federalism." The outstanding feature of this "new federalism" was the growth of federal power, notably through the power of the purse exercised through conditional grants-in-aid to the states. The recent expansion of federal authority has led to calls for still another "new federalism"—this time to reverse the centripetal trend. In particular, there have been calls to reduce state dependence on federal grants, or at a minimum to remove some of the conditions that must be met before federal funds are granted.

[P]robably no one can say today how much state and local tax revenue—the lifeblood of local autonomy—is committed to programs the standards for which are set and controlled under federal

145. Id.
146. Id.
147. See La Pierre, supra note 120, at 838.
149. See J. Clark, The Rise of a New Federalism passim (1938).
152. See Herbers, supra note 151, at 4E, col 1.
law. Yet there must be limits on such conditions if the political values of federalism are to be preserved despite this fiscal centralization.\textsuperscript{153}

President Reagan has made a "new federalism" proposal a cornerstone of his Administration. In his State of the Union message on January 25, 1983, the President stated that his federalism proposal was intended "to restore to states and local governments their roles as dynamic laboratories of change in a creative society."\textsuperscript{154} The Reagan proposal has two principal parts. First, it involves the restoration to the states of the responsibility for important programs undertaken in recent years by the federal government, including those providing aid to families with dependent children and food stamps to the needy.\textsuperscript{155} The second is to replace "categorical" federal grants to the states with "block grants," under which funds are returned to the states with minimal conditions.\textsuperscript{156} The block grants are made for general programs such as community development, law enforcement, and employment and manpower training. As long as states spend the money for the general programs involved, they are free to use the funds subject to a minimum number of stipulations.\textsuperscript{157}

The adoption of President Reagan's "new federalism" proposals, however, would not revive dual federalism. Turning over programs and funds to the states would hardly be enough to reestablish the states as equals to the federal government in the American federal system. Neither \textit{National League of Cities} nor the advent of Reagan's "new federalism" has substantially altered the trend toward federal predominance. The 1982 Supreme Court decision in \textit{FERC v. Mississippi}\textsuperscript{158} confirms this point. The Court, as previously discussed,\textsuperscript{159} considered the constitutionality of \textit{PURPA}.\textsuperscript{160} Under \textit{PURPA}, states that have agencies regulating electric utilities are required to conduct

\begin{footnotes}


\item[156] \textit{Id.} at A17, col. 2. Categorical grants are made for specific narrow purposes under conditions specified in the grants.

\item[157] \textit{Id.} at A17, col. 2. The Reagan version of "new federalism," however, has encountered substantial resistance from three sources. Congress has been reluctant to give up the control that has accompanied most categorical grants. The ultimate recipients of such grants believe they need federal protection to ensure that the federal funds will be spent properly. Finally, the states have not been receptive to the Reagan proposals because of the difficulty in raising sufficient funds to finance the programs, such as food stamps, now operated by the federal government. See Herbers, \textit{supra} note 151, at 4E, col. 1.

\item[158] 456 U.S. 742 (1982).

\item[159] See \textit{supra} notes 38-48 and accompanying text.

\end{footnotes}
administrative proceedings to consider and determine whether federal standards should be adopted and enforced with respect to each regulated electric utility. Traditionally, states have retained the power to make decisions and set policy. This includes the power to decide which proposals are worthy of consideration, the order in which they should be considered, and the form in which they should be considered. PURPA, however, forces state agencies to consider the national standards, and deprives states of their discretion over how and when to debate these standards. It sets the agenda of state agencies, not agencies of the national government.

Nonetheless, the Court upheld the statute and rejected the claim that it violated the tenth amendment or the principle of *National League of Cities*. If a state were to abandon utility regulation or abolish its regulatory agency, the state would no longer be forced to consider the federal standards for regulation of electric and gas utilities. Thus, the statutory requirements do not impose invalid commands upon the states. This, however, leaves states with only a Hobson's choice: either to regulate utilities and agree to implement the federal law, or to abandon utility regulation.

In upholding the statute the Court permitted "the Federal Government . . . to use state regulatory machinery to advance federal goals." The Court acknowledged that the authority to make fundamental decisions is an essential attribute of state sovereignty. In this case, however, the state is not able to consider and promulgate regulations of its choosing, but must instead consider the federal standards. The agenda to be considered by state decision-makers is set by federal fiat. Justice O'Connor, dissenting in part in *FERC*, suggested that the decision transforms the state legislatures and administrative agencies into "field offices of the national bureaucracy."

**Conclusion**

Judicial decisions and congressional action since 1976 inexorably lead to the conclusion that *National League of Cities v. Usery* has not
significantly shifted the balance in the federal system toward the states.\(^1\) Despite the fears expressed by commentators and political pressures from President Reagan's "new federalism" proposal, \textit{National League of Cities} has not provided a vehicle for the revival of dual federalism in the American system.

In his dissent in \textit{National League of Cities}, Justice Stevens asserted:

The Court holds that the Federal Government may not interfere with a sovereign State's inherent right to pay a substandard wage to the janitor at the state capitol. The principle on which the holding rests is difficult to perceive.

The Federal Government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the Governor's limousine over 55 miles an hour. Even though these and many other activities of the capitol janitor are activities of the State \textit{qua} State, I have no doubt that they are subject to federal regulation.\(^2\)

\textit{National League of Cities} does not invalidate these federal regulations. Cases since \textit{National League of Cities} have upheld such regulations either because they involve federal protection of civil rights or the environment, federal spending power, or federal interests that far outweigh any competing state interest.

Thus, \textit{National League of Cities} has not turned back the constitutional clock to the days of dual federalism. Even after \textit{National League of Cities}, the states and the federal government do not confront each other as equals. The federal government may impose its will without direct regulation under the commerce clause. One may agree with the \textit{National League of Cities} effort to preserve the states as independent governments, free from federal control in their integral operations. Nonetheless, one Supreme Court decision is not enough to hold back the onrushing flood of federal power.


\(^2\) 426 U.S. at 880-81 (Stevens, J., dissenting).