EQUAL PAY ACT UPHELD UNDER COMMERCE CLAUSE: *MARSHALL V. CITY OF SHEBOYGAN*

The meaning of the Tenth Amendment[1] and its relationship to the commerce clause[2] has fostered debate for nearly two hundred years. Since the Supreme Court's decision in *National League of Cities v. Usery*,[3] the controversy has intensified as the lower federal courts struggle to ascertain the scope of the new state sovereignty limitation on Congress' power to regulate state activities. In *Marshall v. City of Sheboygan*,[4] the Seventh Circuit recently held that the application of the Equal Pay Act[5] (EPA) to the states and their political subdivisions is a valid exercise "of Congress' power under the Commerce Clause and that the exercise of that power is not prohibited by the Tenth Amendment."[6]

In *Sheboygan*, the Secretary of Labor sought to enjoin the City of

1. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

2. U.S. CONST. art. I, § 8, cl. 3: "Congress shall have the power . . . , To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

3. 426 U.S. 833 (1976).

4. 577 F.2d 1 (7th Cir. 1978).

5. 29 U.S.C. § 206(d) (1976). The EPA provides in part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, . . . *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Id. § 206(d)(1).

6. 577 F.2d at 6.

Sheboygan from violating the EPA.[7] The Secretary alleged that women employed as custodians in the city's public schools received a lower wage rate than men doing essentially the same work.[8] The city filed a motion for judgment on the pleadings contending the Supreme Court in *National League of Cities* had held that Congress lacked the constitutional authority to regulate the wages which a state or local government pays its employees.[9] The federal district court[10] denied the city's motion and certified the case for interlocutory appeal.[11] On appeal, the Seventh Circuit rejected the contention that the Supreme Court's decision in *National League of Cities* had specifically rendered all provisions of the Fair Labor Standards Act[12] (FLSA) inapplicable to the states.[13]

Before ratification of the Constitution, James Madison and Alexander Hamilton expressed differing views about state sovereignty and the extent of the national government's power in intrastate matters.[14] Their names have come to represent two opposing interpretations of the Tenth Amendment and its relationship to the commerce clause.[15] Madisonians argue that the basic governmental organization is a compact of free and independent states[16] and that the Constitution should be construed as allowing federal activity only in strictly interstate or international affairs. Hamiltonians, on the other hand, be-

7. *Id.* at 1.

8. *Id.* at 2.

9. *Id.*

10. Usery v. City of Sheboygan, 13 EMPL. PRAC. DEC. 6383 (E.D. Wis. 1976).

11. Judiciary and Judicial Procedure Act of 1948, 28 U.S.C. § 1292(b) (1976).

12. 29 U.S.C. §§ 201-219 (1976).

13. Marshall v. City of Sheboygan, 577 F.2d 1, 3 (7th Cir. 1978).

14. *See* THE FEDERALIST No. 23 (A. Hamilton); No. 31 (A. Hamilton); No. 39 (J. Madison); No. 45 (J. Madison); No. 46 (J. Madison). *The Federalist* was written by Hamilton, Madison, and John Jay in order to persuade New York to ratify the Constitution but it has often been treated as a "legislative history" of the Constitution.

15. These two theories of the Tenth Amendment are not entirely contrary. Both, for instance, emphasize that any federal action must be based on the enumerated powers found in the Constitution. Cowen, *What Is Left of the Tenth Amendment*, 39 N.C. L. REV. 154, 157 (1961). The courts have used the Hamiltonian philosophy to promote a strong national government while application of the Madisonian viewpoint has usually led to increased power for the states. *Id. See* notes 24, 30 and 31 *infra*. *See generally* Casto, *The Doctrinal Development of the Tenth Amendment*, 51 W. VA. L.Q. 227, 227-28 (1949). Note, *The Reaffirmation of State Sovereignty as a Fundamental Tenet of Constitutional Federalism*, 18 B.C. IND. & COM. L. REV. 736, 758-65 (1977) [hereinafter cited as *Reaffirmation of State Sovereignty*].

16. Cowen, *supra* note 15, at 157.

lieve that the federal government is supreme in its area of delegated powers and that it has no obligation to preserve any aspect of state authority in that area.[17]

The federalist judges adopted a strict Hamiltonian stance.[18] In *McCulloch v. Maryland*,[19] Chief Justice Marshall stated that the powers of the national government while limited in number are complete.[20] He also indicated that the Tenth Amendment places no restriction on those powers.[21] Similarly, in *Gibbons v. Ogden*,[22] Marshall summarily dismissed the idea that the Tenth Amendment might restrict the commerce power by simply saying that it provided no limitation.[23]

After Chief Justice Marshall's death, the Madisonian position was reasserted and remained predominant throughout the 19th century.[24]

17. *Id.*

18. Perhaps Justice Story offers the most lucid explication of the position taken by the Federalist judges on the Tenth Amendment. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1906-08 (1833). Justice Story asserted that the Tenth Amendment "is a mere affirmation of what upon any just reasoning is a necessary rule of interpreting the Constitution." *Id.* § 1907. He then noted that when the Tenth Amendment was before Congress for ratification it was suggested that the word "expressly" be inserted so that the amendment would read "powers not *expressly* delegated" (emphasis in text). The framers pointed out at the time that it was impossible to confine a government to the exercise of express powers, and that such an attempt had been one of the most significant defects of the Articles of Confederation. *Cf.* ART. OF CONFED. art. 2. Justice Story concluded that the framers of the Tenth Amendment could not, therefore, have intended "to give it effect as an abridgement of any of the powers granted under the Constitution whether express or implied, direct or incidental. Its sole design, is to exclude any interpretation by which other powers should be assumed beyond those which are granted." J. STORY, *supra* § 1908.

19. 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, the State of Maryland sought to impose a tax on a branch of the Bank of the United States located in Maryland. The Court held that the state lacked the power to tax or otherwise control any effort by Congress to carry out any legitimate end enumerated in the Constitution, regardless of the type of means Congress selects to carry out that end.

20. *Id.* at 406.

21. *Id.* at 405-07.

22. 22 U.S. (9 Wheat.) 1 (1824). In *Gibbons*, the Court considered the question whether an act by the New York State Legislature giving exclusive navigation rights on riverways to certain individuals was repugnant to the commerce clause. In deciding that the act was unconstitutional, the Court held that the power to regulate interstate commerce, unlike the power to tax, is exclusively vested in Congress.

23. *Id.* at 196-97.

24. The first case to impose a Madisonian interpretation was Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837), in which the Court, over a vigorous dissent by Justice Story, upheld a New York law which required the captains of ships arriving in New York to provide certain information about each person on board their vessels. The Court based its decision on the argument that once a ship was in port it became a

The Madisonian viewpoint was pushed to its logical extreme during the Great Depression when it was used to strike down efforts at social legislation.[25]

In *NLRB v. Jones & Laughlin Steel Corp.*,[26] the Supreme Court reversed its position on the Tenth Amendment and "substantially expanded the breadth of the federal commerce power over intrastate matters."[27] Chief Justice Stone in *United States v. Darby*[28] demonstrated the extent of the Court's shift back to the Hamiltonian posi-

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matter of purely local concern and as such was out of the realm of Congress' commerce power. The state was therefore free to legislate in regard to a ship in port under its "internal police power." *Id.* at 138.

Later cases fairly consistently reinforced the Madisonian stance. *See, e.g.*, United States v DeWitt, 76 U.S. (9 Wall.) 41 (1869) (the commerce clause does not give Congress the authority to regulate the sale or the mixture of chemical substances within the states); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868) ("in many articles of the Constitution the necessary existence of the states, and . . . , [the] independent authority . . . is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not *expressly* delegated to the national government are reserved.") (Emphasis added); Thurlow v. Massachusetts (License Cases), 46 U.S. (5 How.) 504 (1847) (state laws requiring licenses for the sale of liquor, even liquor imported from outside the state, found to be an exercise of police power reserved to the states and not within the scope of the commerce power). *But see* Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903) (Congress can prevent transportation of lottery tickets between two states even though neither state prohibited the sale of lottery tickets).

25 *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 294-95 (1936) ("It is no longer open to question that the general government unlike the states . . . possesses no *inherent* power in respect of [sic] 'the internal affairs of the states, and emphatically not with regard to legislation.' ") (citing Hammer v. Dagenhart, 247 U.S. 251, 275 (1918)); United States v. Butler, 297 U.S. 1 (1936) (agricultural production is a strictly local activity and therefore Congress cannot regulate it under the commerce power); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (Congress cannot regulate the wages and hours of workers engaged in intrastate activities under its commerce power); Hammer v. Dagenhart, 247 U.S. 251 (1918) (manufacturing is a local operation and, therefore, Congress does not have the authority to prevent transportation in interstate commerce of articles manufactured by child labor). *See generally* Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

26. 301 U.S. 1 (1937). In *Jones*, the Court noted that activities may be entirely intrastate in character when separately considered. If as a group, however, they have "such a close and substantial relationship to interstate commerce" that their control is necessary in order to prevent obstruction of commerce, Congress has the power to control those activities. *Id.* at 37.

27. Comment, *National League of Cities v. Usery: A New Federalism?* 13 URBAN L. ANN. 169, 171-72 (1977).

28. 312 U.S. 100 (1941). In *Darby*, the Court upheld the 1938 Fair Labor Standards Act which provided, among other things, minimum wage and maximum hour requirements for employees engaged in interstate commerce.

tion when he wrote "the [tenth] amendment states but a truism that all is retained which is not surrendered."[29] Until 1976, the Supreme Court uniformly reinforced this view of the Tenth Amendment, regardless of whether the intrastate activity was a part of private industry[30] or whether it was state operated.[31]

In *National League of Cities*,[32] the Court adopted a novel interpretation of the relationship between the Tenth Amendment and the commerce clause. The Court was asked to decide the constitutionality of the 1974 Amendments to the FLSA[33] which expanded the Act's

29. *Id.* at 124. The Chief Justice then went on to delineate a line of reasoning reminiscent of Chief Justice Marshall's position in *McCulloch*:

> There is nothing in the history of [the tenth amendment's] 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.

30. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (upholding a federal statute regulating local loan-shark credit activity); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding the application of wheat market quotas to a small farmer who grew wheat entirely for consumption by his own livestock); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) (upholding a minimum price regulation for milk produced and sold intrastate).

31. *See, e.g.*, Fry v. United States, 421 U.S. 542 (1975) (upholding the Economic Stabilization Act of 1970, Pub. L. No. 91-379, §§ 201-06, 84 Stat. 799, *reprinted in* 12 U.S.C. § 1904 app., at 586 (1976), which froze wages and prices, including the wages of public employees, as a constitutional exercise of the commerce power); Maryland v. Wirtz, 329 U.S. 183 (1968) (upholding the constitutionality of the 1966 amendments to the Fair Labor Standards Act, Pub. L. No. 89-601, § 102(b), 80 Stat. 830 (current version at 29 U.S.C. § 203 (1976), extending coverage to employees of public schools and hospitals); Parden v. Terminal Ry., 377 U.S. 184, 191 (1964) ("the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce"); Case v. Bowles, 327 U.S. 92, 102 (1946) ("the tenth amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the National Government' "); Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508, 526 (1941) ("the exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce").

32. 426 U.S. 833 (1976).

33. Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 58 (amending 29 U.S.C. § 203 (1970)). When originally enacted, the FLSA only covered employees engaged in private industry. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, § 3(d), 52 Stat. 1060 (current version at 29 U.S.C. § 203 (1976)). In 1966 Congress expanded the definition of employer to include workers in state or local hospitals and schools. Fair Labor Standards Act Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 831 (current version at 29 U.S.C. § 203

definition of "employer" to include all nonsupervisory personnel of the states and their political subdivisions. Justice Rehnquist, writing for a plurality of four justices, accepted as "beyond preadventure [sic]" that the commerce clause "is a grant of plenary authority to Congress,"[34] citing with approval[35] Hamiltonian language in *Darby* and *Heart of Atlanta Motel v. United States*.[36] Nevertheless, the Court held that the Tenth Amendment provides an affirmative limitation on the commerce power when Congress seeks to regulate directly "attributes of sovereignty" essential to a "separate and independent" state existence.[37] The Tenth Amendment barrier only exists, the Court said, around the "traditional functions of state government."[38] Thus, the underlying principle in *National League of Cities* is that the Tenth Amendment restricts regulations promulgated under the commerce power which are directed at the essential functions of states *qua* states even though the same regulations may legitimately apply to private activities or nonessential state functions.[39]

(1976)). The Supreme Court upheld the 1966 amendments in Maryland v. Wirtz, 329 U.S. 183 (1968). In *National League of Cities* the Court explicitly overruled *Wirtz* when it struck down the 1974 amendments to the FLSA. 426 U.S. at 855.

34. 426 U.S. at 840.

35. *Id.*

36. 379 U.S. 241 (1964). In *Heart of Atlanta*, the Court held that Congress has the power under the commerce clause to prevent a motel from discriminating on the basis of race in offering accommodations to the public. The Court noted that "the power of Congress to promote interstate commerce also includes the power to regulate local incidents thereof," allowing regulation at a motel whose business was "purely local in character" to the extent that "local" motels as a group have an impact on interstate commerce. *Id.* at 258.

37. 426 U.S. at 845.

38. *Id.* at 851.

39 While the Court has never before used this line of reasoning in commerce clause cases, Justice Rehnquist found analogous precedent in intergovernmental tax immunity cases. *Id.* at 843-45. The concept of federal tax immunity originated in *McCulloch* when the Court invalidated a state tax on a branch of the national bank. Later decisions made the immunity reciprocal. *See, e.g.*, Collector v. Day, 78 U.S. (11 Wall.) 113 (1871). The intergovernmental tax immunity doctrine at one time gave all officials of one government immunity from taxation by the other. Subsequent cases eroded this protection. *See, e.g.*, Graves v. New York, 306 U.S. 466 (1939) (permitting state taxation of federal officials); Helvering v. Gerhardt, 304 U.S. 405 (1938) (permitting federal taxation of state officials).

In Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926), the Supreme Court used a "necessary functions" test to determine whether the intergovernmental tax immunity doctrine applied to a state agency. The Court held that agencies "intimately connected with the necessary functions of government" should be granted tax immunity. *Id.* at 522. In New York v. United States, 326 U.S. 572 (1946), however, the Court

Since *National League of Cities*, a large number of legal scholars[40] and a few courts[41] have tried to define "attribute of sovereignty necessary to separate and independent existence" and "traditional state function" in order to determine the scope of the Tenth Amendment limitation on the commerce power. To a large extent this inquiry has focused on those provisions of the FLSA not discussed in *National League of Cities*, primarily sections of the Equal Pay Act of 1963.[42] Many courts, however, have tried to avoid the Tenth Amendment-commerce clause issue whenever possible, often deciding EPA challenges on other grounds.[43]

In *Usery v. Allegheny County Institution District*,[44] for instance, the Third Circuit held that the EPA could be justified under section five of the Fourteenth Amendment[45] which gives Congress the authority to prohibit sex discrimination in employment.[46] Two other circuit

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seemed to abandon this governmental-proprietary distinction because it "was too shifting a basis for determining constitutional power." *Id.* at 580.

Justice Rehnquist's reference to intergovernmental tax immunity seems to derive from the defunct "necessary functions" concept of *Metcalf & Eddy*. Today, state employees engaged in "essential state functions" are no more immune from federal taxation than are people working in private industry or "proprietary" state functions. Fry v. United States, 421 U.S. 542, 554 (1975) (Rehnquist, J., dissenting). *See generally Barber, National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161, 177-78; *Reaffirmation of State Sovereignty*, *supra* note 15, at 769-73.

40. *See, e.g.*, Barber, *supra* note 39; *Reaffirmation of State Sovereignty*, *supra* note 15; Comment, *At Federalism's Crossroads: National League of Cities v. Usery*, 57 B.U.L. REV. 178 (1977); Comment, *Applying the Equal Pay Act to State and Local Governments: The Effect of National League of Cities v. Usery*, 125 U. PA. L. REV. 665 (1977); Comment, *National League of Cities v. Usery: A New Federalism?*, 13 URBAN L. ANN. 169 (1977).

41. *See, e.g.*, Usery v. Edward J. Memorial Hosp., 428 F. Supp. 1368, 1369 (W.D. N.Y. 1977) (definitions in *National League of Cities* must be narrowly construed); Usery v. Bettendorf Community School Dist., 423 F. Supp. 637, 639 (S.D. Iowa 1976) ("[d]iscrimination in pay on the basis of sex is not an attribute of sovereignty").

42. To date at least 34 federal district courts and 5 circuit courts of appeals have discussed the effects of the *National League of Cities* decision on the Equal Pay Act. *See* Brief for Secretary of Labor at 4 n.5, Marshall v. Kent State University, No. 77-3284 (6th Cir., filed Oct. 31, 1977) for a partial list of cases.

43. *See, e.g.*, cases cited in note 47 *infra*.

44. 544 F.2d 148 (3d Cir. 1976), *cert. denied sub nom.*, Allegheny City Institutional Dist. v. Marshall, 430 U.S. 946 (1977).

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

46. The court found that the Tenth Amendment places no restriction on Congress' section 5 Fourteenth Amendment power, based on the Supreme Court's decision in

courts have followed the *Allegheny* court's reasoning[47] and upheld the extension of the EPA's coverage to state employees under the Fourteenth Amendment[48] while explicitly declining to discuss

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). In *Fitzpatrick*, decided four days after *National League of Cities*, the Court unanimously held that under Section 5 of the Fourteenth Amendment Congress may provide for private suits against states or state officials which the Eleventh Amendment would otherwise prohibit. The Supreme Court noted that the Fourteenth Amendment was specifically designed to apply to the states, and the state sovereignty arguments proposed in *National League of Cities* were, therefore, not relevant.

47. Marshall v. Owensboro-Daviess County Hosp., 581 F.2d 116 (6th Cir. 1978) (applying the EPA to nursing assistants in a county hospital on the basis of the section 5 Fourteenth Amendment power); Usery v. Charleston County School Dist., 558 F.2d 1169 (4th Cir. 1977) (upholding the application of the EPA to public school personnel as a proper exercise of Congress' power to enforce the Fourteenth Amendment).

Courts also have upheld the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34 (1976), which forbids employment discrimination on the basis of age, as within Congress' power under section 5 of the Fourteenth Amendment. In Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977), for instance, the Fourth Circuit Court of Appeals applied the ADEA to a police department which had refused to hire a 40-year-old man as a patrolman solely because of his age. The court concluded "that in enacting ADEA and in extending it to the states Congress exercised its powers under § 5 of the Fourteenth Amendment" and did not, therefore, violate the Tenth Amendment. *Id.* at 1270-71. Most district courts have also relied exclusively on the Fourteenth Amendment argument when faced with the problems of applying the ADEA to state and local governments. *See, e.g.*, Remmick v. Barnes County, 435 F. Supp. 914 (D. N.D. 1977) (upholding the application of the ADEA to local government employees under section 5 of the Fourteenth Amendment without reaching the commerce clause issue). *But see* Usery v. Board of Educ. of Salt Lake City, 421 F. Supp. 718 (D. Utah 1976) (the ADEA may be applied to public employees under both the commerce power and the Fourteenth Amendment).

48. There are several problems related to upholding the EPA as an exercise of the section 5 Fourteenth Amendment power. First, the EPA is part of the FLSA which Congress enacted pursuant to the commerce power. Second, the preamble of the EPA, Pub. L. 88-38 § 2(b), 77 Stat. 56, *reprinted in* 29 U.S.C. § 206 app., at 751 (1976), as well as its legislative history, *e.g.*, H.R. REP. NO. 309, 88th Cong., 1st Sess., *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 687, clearly indicates that Congress intended to enact the EPA under its commerce clause power.

The *Allegheny* court responded to the first of these arguments by pointing out that the FLSA is subject to a broad severability provision, 29 U.S.C. § 219 (1976). Moreover, the EPA was enacted as an amendment to the FLSA mainly to allow use of the existing FLSA administrative procedure. *E.g.*, H.R. REP. NO. 309, 88th Cong., 1st Sess., *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 687, 688 ("utilization [of the FLSA] . . . eliminates the need for a new bureaucratic structure to enforce equal pay legislation").

The *Allegheny* court did not address the question of whether Congress' intention to enact the EPA under the commerce power precluded it from being upheld under the Fourteenth Amendment. In Usery v. Charleston County School Dist., 558 F.2d 1169 (4th Cir. 1977), however, the Fourth Circuit concluded that Congress' total authority

whether the same result might be reached under the commerce clause.[49]

The *Sheboygan* court was the first appellate court, after *National League of Cities*, to directly face the question of whether the EPA could be applied to state and local employees under the commerce power.[50] The court emphasized that the prerogative to pay women employees a lower rate of wages than men performing equal work is not a fundamental "employment decision."[51] Under the EPA, states are free to determine all "substantive terms of employment such as wages, type of compensation or period of employment."[52] The only limitation imposed by the EPA is that whatever substantive terms of employment the state does decide to implement should "not be determined arbitrarily or in a discriminatory fashion."[53] The court concluded that the ability to discriminate solely on the basis of sex in the payment of wages cannot be considered "an attribute of sovereignty necessary to a separate and independent existence."[54]

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determines the constitutionality of federal legislation, not whether it "correctly guessed" the particular power needed to adopt a piece of legislation. *Id.* at 1171. This line of reasoning appears to be a logical extension of the principle that Congressional action should be construed as constitutional whenever possible. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 ("as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act").

49. All three courts have strongly implied that they did not believe that the extension of EPA coverage to state employees could be accomplished under the commerce clause. In *Owensboro-Daviess*, the Sixth Circuit, while claiming that it need not reach the Tenth Amendment-commerce clause issue, nevertheless indicated in a footnote that "the seemingly definite and inflexible language of the Supreme Court in *National League of Cities* . . . would appear to prohibit such regulation, at least as far as employee wage scales are involved." Marshall v. Owensboro-Daviess County Hosp., 581 F.2d 116, 119 n.3 (6th Cir. 1978).

50. A number of district courts upheld the EPA as an exercise of the commerce power prior to *Sheboygan. See, e.g.*, Christensen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976) *aff'd*, 563 F.2d 353 (8th Cir. 1977) (applying the EPA to clerical workers at a state university using commerce power reasoning); Nilsen v. Metropolitan Fair and Exposition Auth., 435 F. Supp. 1159 (N.D. Ill. 1977) (upholding the EPA as applied to a political subdivision of a state under both the commerce clause and Fourteenth Amendment powers); Usery v. Bettendorf Community School Dist., 423 F. Supp. 637 (S.D. Iowa 1976) (applying the EPA to public school employees using commerce power reasoning).

51. 577 F.2d at 6.

52. *Id.*

53. *Id.*

54. *Id.*

Of equal importance, according to the court, was the fact that unlike in *National League of Cities*, where the states had legitimate reasons for not complying with the federal statute,[55] the city here had no legitimate interest to weigh against the EPA.[56] The court thus implied that it had used a balancing test to compare the relative state and federal interests at stake.[57]

The *Sheboygan* decision represents an attempt by the federal courts to narrowly construe the special Tenth Amendment restriction imposed on the commerce power in *National League of Cities*.[58] The court simply has not, however, provided a principled basis relevant to the commerce clause for distinguishing the EPA from the minimum wage and overtime hour provisions.[59]

By interpreting "attribute of sovereignty" to allow Congress to reg-

55 In *National League of Cities*, Justice Rehnquist stated that legitimate reasons for not complying with the wage and hour provisions included increased expense and inability either to continue providing essential services or to provide services of the same quality or in the usual manner. 426 U.S. 833, 847-50 (1976). For example, California was forced to reduce the length of its training program for state troopers in order to comply with the overtime hour provisions. *Id.* at 847, and many states would "feel" obliged to eliminate programs offering summer employment to juveniles because of the minimum wage requirement. *Id.* at 848.

56. 577 F.2d at 6.

57 In his concurring opinion in *National League of Cities*, Justice Blackmun stated that the Court had used a balancing test in reaching its decision and had merely found that the state interest had outweighed that of the federal government. 426 U.S. at 855. While the *Sheboygan* court did not explicitly state that it had used a balancing approach, its comparison of the relative federal interest in seeking compliance with the city's interest in retaining control over the wages of its public employees clearly indicates use of a balancing test. 577 F.2d at 6.

58 The *National League of Cities* decision has not been popular with the lower federal courts and it has often been given a very restricted interpretation. *See, e.g.*, Usery v. Edward J. Meyer Memorial Hosp., 428 F. Supp. 1368, 1369 (W.D. N.Y. 1977) (the only issue dealt with in *National League of Cities* was the constitutionality of the minimum wage and overtime hour provisions as applied to the states); National League of Cities v. Marshall, 429 F. Supp. 703, 705 (D. D.C. 1977) (Justice Rehnquist's opinion in *National League of Cities* is limited to invalidating the minimum wage and maximum hour provisions); Christensen v. Iowa, 417 F. Supp. 423, 424 (N.D. Iowa 1976), *aff'd*, 559 F.2d 1135 (8th Cir. 1977) ("[I]t is the view of the court that *[National League of Cities v.] Usery* should be confined strictly to its factual context.").

59. The easiest way to distinguish the EPA from the minimum wage and overtime provision is to view the EPA as an exercise of Congress' power via section 5 of the Fourteenth Amendment. Paying women lower wages than men raises a clear equal protection question while equal protection is not an issue when all workers are paid a substantial wage. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971) (striking down a state statute giving preference to men as administrators of intestate estates).

ulate the wages of city employees engaged in what is admitted to be a traditional state function,[60] the *Sheboygan* court created an exception to even the narrowest reading of *National League of Cities*. Yet the court does not explain why this exception exists. In terms of the commerce power, there is no objective basis for finding that the authority to pay women lower wages than men is any less an "attribute of sovereignty" than the ability to pay any employee a wage at which he or she cannot live.[61] In either case, regardless of the wisdom of the state policy, congressional action would impair the states' freedom to structure the salary level of their employees in areas of traditional governmental function.

The court's use of a balancing test to weigh the relative federal interest in seeking compliance with a statute against the state's interest in retaining control of its essential attributes of sovereignty provides no better basis for distinguishing the facts of *Sheboygan* from those of *National League of Cities*. There exists considerable debate about whether the language of Justice Rehnquist's opinion in *National League of Cities* rules out the use of a balancing test.[62] Even assuming the validity of the balancing approach, it remains unclear which values should be afforded greater or lesser weight.[63] Without such guidelines, a balancing test can easily become nothing more

60. Justice Rehnquist did not list public schools among his examples of traditional state operations, but by overruling *Wirtz*, which had allowed application of the FLSA to public schools and hospitals, he clearly indicated that such operations were among those typically provided. 426 U.S. at 854-55.

61. The practical problems associated with applying the wage and hour provisions to public employees would also appear to be present with regard to the EPA. The *Sheboygan* court admitted that the city might suffer increased costs by having to comply with the EPA (since it cannot lower wages to comply with the Act) but it asserted that such "impact is minimal when compared to the potential costs of the minimum wage and overtime provisions." 577 F.2d at 6 n.18. The only evidence supplied to support this assertion, however, was that the city did not claim that compliance with the EPA would cause it either to raise taxes or release employees. *Id.* Nevertheless, when applied on a wider scale there seems to be little doubt that compliance with the EPA would lead to the same increased expenses or curtailment of services problems caused by the wages and hours provisions.

62. *Compare* Casenote, *National League of Cities v. Usery*, 54 U. DET. J. URB. L. 617, 635-36 (1977) ("Justice Rehnquist spoke in absolute terms not couching his arguments about balancing interests") *with Reaffirmation of State Sovereignty, supra* note 15, at 750 (the Court appeared to follow a 'balancing approach,' as recognized by Justice Blackmun in his concurring opinion).

63. This difficulty in determining priorities is due, in part, to the failure of the Supreme Court in *National League of Cities* to explicate any criteria for determining "an essential attribute of sovereignty" or for determining when a "federal interest is

than an excuse for judicial supervision of policy judgments usually left to Congress.[64] Nevertheless, the *Sheboygan* court made absolutely no effort to delineate a set of priority guidelines.

It is not yet clear what view the Supreme Court or the other circuits will take of *Sheboygan*. Despite the widespread criticism of *National League of Cities*,[65] preliminary signs do not indicate a general acceptance of the *Sheboygan* reasoning[66] and most courts will probably continue to uphold the EPA as an exercise of the section 5 Fourteenth Amendment power.[67] In any event, the decision in *Sheboygan* may be seen as an effort by the federal judiciary to reassert the Hamiltonian view of the Tenth Amendment.

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demonstrably greater" than that of a state. National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring).

64. *Id.* at 876 (Brennan, J., dissenting).

65. *See* note 58 *supra*.

66. Since the *Sheboygan* decision, two additional appellate courts have confronted the issue of whether the EPA applies to public employees under the commerce power. In Marshall v. Owensboro-Daviess County Hosp., 581 F.2d 116 (6th Cir. 1978), the Sixth Circuit Court of Appeals rejected *Sheboygan's* commerce clause reasoning. *See* note 49 *supra*. In Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979) the Fifth Circuit Court of Appeals followed *Sheboygan* and held that the extension of the EPA "to the states and their political subdivisions is a valid exercise of Congress' power under the commerce clause." *Id.* at 132. Thus, to date three circuit courts have found it necessary to resort to the section 5 Fourteenth Amendment power in order to uphold the EPA as applied to state employees. *See* note 46 and accompanying text *supra*. Two circuit courts, the *Sheboygan* court and the *Pearce* court, have held that the commerce power will still suffice for this purpose.

67. The section 5 Fourteenth Amendment reasoning will only save a very narrow range of legislation, and, thus far, it has only been used in EPA and ADEA cases. Thus, the *National League of Cities* decision has greatly inhibited congressional action on a public sector collective bargaining bill. *See* Brown, *Federal Regulation of Collective Bargaining by State and Local Employees: Constitutional Alternatives*, 29 S.C. L. REV. 343, 344 (1977). *See, e.g.*, Nolan, *Public Sector Collective Bargaining: Defining the Federal Role*, 63 CORNELL L. REV. 419, 448 (1978) ("[T]he Court's opinion in *National League of Cities* is not specific enough to insure that . . . any approach [to a public employee bargaining bill] based on the commerce power, could survive constitutional attack.").