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James J. Lopach
Professor of Political Science, University of Montana

THE NEW FEDERALISM OF THE SUPREME COURT: DIMINISHED EXPECTATIONS OF NATIONAL LEAGUE OF CITIES

James J. Lopach*

I. INTRODUCTION

The concept of federalism that lies at the heart of the American governmental system has neither an inherent nor a consistent justification. Its beginning was in politics and not principle, the result of a compromise struck in 1787 between centralists and confederationists. Agreement as to the meaning of federalism runs only to the observation that there are two levels of government available for solving the nation's and states' problems. Disagreement abounds over which level of government should act or prevail in a given set of circumstances. Both the United States Supreme Court and Congress have repeatedly altered the shape of federalism, sometimes strengthening the national government and sometimes favoring the states. In recent years the Supreme Court has recognized a narrow range of exceptions to Congress' broad regulatory power under the commerce clause and created a new category of federalism cases. The judiciary's brand of "new federalism" has paralleled a decade of congressional concern for decentralizing governmental power and strengthening the states.

In 1976 in *National League of Cities v. Usery*,[1] the United States Supreme Court began this new chapter in the law of American federalism. A majority of five justices ruled that in some instances the powers reserved to the states under the tenth amendment limit the regulatory power of Congress under the commerce clause. The opinion by Justice Rehnquist emphasized the "essential role of the States in our federal system of government"[2] and uncovered a critical element of state sovereignty that must be kept free from federal control. A few days later in a dissenting opinion in another case, Chief Justice Burger repeated these sentiments for a realigned federalism:

> Only last week in *National League of Cities v. Usery* . . . [w]e took steps to arrest the downgrading of States to a role comparable to the departments of France, governed entirely out of the national capital. Constant inroads on the powers of the States to

* Associate Professor and Chairman of the Political Science Department, University of Montana; Ph.D., University of Notre Dame, 1973.

1. 426 U.S. 833 (1976).
2. *Id.* at 844.

> manage their own affairs cannot fail to complicate our system and centralize more power in Washington.[3]

The *National League of Cities* decision caused considerable speculation concerning how far the Court was prepared to go in revitalizing the states' governmental role.

The Supreme Court's new federalism is of keen interest to energy producing states, including Montana, that derive a significant proportion of their revenue from various kinds of severance taxes. The Supreme Court in *Commonwealth Edison Co. v. Montana*[4] held that Congress was the proper battleground to resolve the controversy over the level of state severance taxes. A congressional attack on state severance taxes on coal did occur at the same time that *Commonwealth Edison* was running its course.[5] If Congress does act to limit the taxing power of Montana and other states, Montana undoubtedly would go to court again but this time with a defense based on *National League of Cities*. This article scrutinizes the shadow cast by *National League of Cities* and suggests that its limited reach probably does not cover federal restriction of routine state taxation and regulation.

II. The Decision

A. *The Two-Step Reasoning Process*

National League of Cities involved a declaration that Congress' 1974 amendments to the Fair Labor Standards Act were unconstitutional. The Court said that the commerce clause could not be used to extend minimum wage and maximum hour provisions to employees of state and local governments. The sovereignty of the states protected by the tenth amendment included freedom to manage employer-employee relationships when traditionally governmental services were affected. A two-step reasoning process was used by the Court to come to this judgment.

The first step in the Court's analysis in *National League of*

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3. Elrod v. Burns, 427 U.S. 347, 375 (1976) (Burger, C.J., dissenting).

4. 101 S. Ct. 2946 (1981) (at time of publication, U.S. cite available at 453 U.S. 609 (1981)).

5. In 1979 bills were introduced in both houses, H.R. 6825, H.R. 6654, H.R. 7163, S. 1778, S. 2695, 96th Cong. (1979), and two years later the 97th Congress took up similar measures, H.R. 1313, S. 178, 97th Cong. (1981). Two types of approaches were used in these bills: (1) a 12.5 percent limit on state severance taxes on all energy resources extracted from Indian or federally owned land, and (2) an identical ceiling for levies on all coal destined for interstate commerce to be used for producing electricity. The principal backers of the bills represented the midwestern states that supported the suit in *Commonwealth Edison*. In late 1981 there was a retreat by opponents of the coal producing states, but a renewed effort in 1982 was predicted by the Montana governor and the Montana Congressional delegation.

Cities was a determination that the federal government significantly affected the state's ability to act in its sovereign capacity. In the Court's language, this was "Congressional authority directed not to private citizens, but to the States as States."[6] The concern of the Court, therefore, was not congressional regulation of private enterprise which, in a federal system, may also be subject to the regulation of state government. "States qua States," to the Court, meant "functions essential to separate and independent existence."[7] In *National League of Cities* the Court decided that the state's discretion to determine the shape of employer-employee relationships—wages paid, hours worked, overtime rate—was such a function. Speaking in more general terms, the Court said that for Congress "to directly displace the States' freedom to structure integral operations"[8] constituted an invasion of the state's sovereignty.

The Court's judgment of unconstitutionality did not rest solely on the finding that Congress had acted to "significantly alter or displace the States' abilities to structure employer-employee relationships."[9] A second determination was necessary, namely that the federal limitation on the state's discretion "to structure integral operations" frustrated the state's responsibilities of "traditional governmental functions."[10] The Court took several stabs at explaining what it meant by these kinds of services. Specific examples were given: "fire prevention, police protection, sanitation, public health, and parks and recreation."[11] These functions also were defined in terms of the origin of local governments: "[I]t is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens."[12] Finally, these functions were explained in terms of the basic purpose of local government: "These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services."[13]

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6. National League of Cities, 426 U.S. at 845.

7. *Id.* at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911) and Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).

8. National League of Cities, 426 U.S. at 852.

9. *Id.* at 851.

10. *Id.* at 852.

11. *Id.* at 851.

12. *Id.*

13. *Id.*

B. *Commentary on the Decision*

The Court's guidance as to what is an "integral operation" of a sovereign entity and what is a "traditional" governmental service was not sufficient to prevent uncertainty or unrealistic interpretation of the decision. For some commentators, *National League of Cities* would be the principal rationale of the Burger Court's "solid states' rights stance"[14] or even justification for "extravagant claims of state sovereignty."[15] For example, one interpretation speculated that the rule of the case could serve "to shield state energy regulation from federal preemption."[16] If *National League of Cities* departed from the "settled jurisprudence of the Commerce Clause,"[17] then the possibility existed that federal activity concerning utility rates, mining reclamation, and natural gas production would be unconstitutional.

The majority opinion in *National League of Cities,* however, clearly anticipated that the federal government would continue to have a role to play when a strong national interest is present, even though this activity involves "intrusion upon the protected area of state sovereignty."[18] Justice Blackmun in his concurring opinion gave special emphasis to this point:

> [I]t seems to me that [the Court] adopts a balancing approach, and 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.[19]

Thus, to interpret *National League of Cities* as the death knell of federal regulation was unwarranted.

Another view was that of a leading constitutional commentator who held out the possibility that the decision contained the groundwork for judicial recognition of "individual rights to decent levels of basic governmental services."[20] This interpretation preferred to attach the Court's use of the word "essential" to the "traditional governmental services" in the second step of analysis

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14. Smith, *Independent Interpretation: California's Declaration of Rights or Declaration of Independence,* 21 SANTA CLARA L. REV. 199, 231 n.141 (1981).

15. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services,* 90 HARV. L. REV. 1065, 1104 (1977) [hereinafter cited as Tribe].

16. Catalano, *Balancing Federal Energy Regulation and State Sovereignty: The Emerging Controversy,* 107 PUB. UTIL. FORT. 53 (1981).

17. *Id.* at 56.

18. National League of Cities, 426 U.S. at 852.

19. *Id.* at 855.

20. Tribe, *supra* note 15, at 1102.

rather than to the delineation of "sovereignty" in the first step. Ironically, the Burger Court was viewed as calling for judicial carving out of new "essential" substantive rights rather than deferring to local governmental processes for deciding what rights were essential. Numerous commentators on *National League of Cities* made the consistent point that the case lacked a precise standard. Rulings of the federal judiciary at the appellate court and Supreme Court levels had the potential of providing the missing precision.

C. *Circuit Court Interpretation and the Balancing Test*

Since 1976 the United States Courts of Appeals have ruled in a large number and variety of cases in which *National League of Cities* figured in the parties' arguments and the courts' reasoning. The controversies involved varying degrees of interference in local activities by the federal government,[21] but the reasoning of the appeals courts was not consistent and occasionally departed from the approach of *National League of Cities*. In some cases the language of the Supreme Court was twisted so that the two critical perspectives of "integral" operations of a sovereign state and "traditional" governmental services became intertwined. For example, operation of an airport was found to be "within the category of traditional-integral government functions."[22]

Several cases used the balancing approach suggested by Justice Blackmun in his *National League of Cities* concurring opinion. In determining that New York City was required to enforce a local transportation plan pursuant to the national Clean Air Act,[23] the Second Circuit felt compelled "to balance the reason for the exercise against the extent of usurpation of state policymaking or invasion of integral state functions that would result."[24] The Fifth

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21. For example, the controversies have involved the Clean Air Act, Equal Pay Act, Civil Rights Act of 1964, Omnibus Crime Control and Safe Streets Act of 1968, Fair Labor Standards Act, Veterans Reemployment Rights Act, Railroad Revitalization and Regulatory Reform Acts, criminal statutes defining mail fraud, racketeering, and tax evasion, the Federal Communications Commission, Department of Transportation, Environmental Protection Agency, and Federal Energy Regulatory Commission. Local activities that allegedly were either an "integral" aspect of sovereignty or a "traditional" governmental service included the following: regulation of traffic for pollution control, providing telephone service, defining criminal actions, paying unemployment compensation, licensing drivers, powers of escheat, running a postal service, operating a cement plant, regulating natural gas, and running an oil and gas business. The appeals courts concluded that unemployment compensation, driver licensing and airport operation were protected from federal intrusion by the states' mantle of sovereignty.

22. Amersbach v. City of Cleveland, 598 F.2d 1033, 1036-37 (6th Cir. 1979).

23. 42 U.S.C. §§ 1857-1857f (1976).

24. Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir. 1979).

Circuit used the balancing approach in upholding the Federal Energy Regulatory Commission's abandonment jurisdiction concerning a state-owned gas operation of Texas:

> [W]e have determined that the important federal interest in securing a continuous supply of natural gas in interstate markets outweighs the incidental effect that Commerce regulation might have on the school children of Texas.[25]

That court also used a balancing test to determine that congressional interest in securing reemployment for veterans outweighed Florida's right to decide how to provide its essential services.[26] Other strands of reasoning used by the appeals courts in resolving federal-state conflicts included a governmental-proprietary distinction for local activities,[27] an evolutionary interpretation of the words traditional and integral in order "to meet the changing times,"[28] a distinction between federal "coercion" of states and optional federal grants-in-aid "with strings attached,"[29] and a distinction based on the constitutional grounds of the federal action (war powers[30] and the fourteenth amendment[31] more easily overcoming a tenth amendment challenge than the commerce clause).

The decisions of the appeals courts did not have a direct bearing on the question of a congressional restriction of state severance taxes. There was language in the opinions, however, that might be useful in predicting a judicial determination in the future concerning a coal tax ceiling. The critical issue would be, of course, whether congressional action under the commerce clause could interfere with the states' power of taxation. An opinion of the Fifth Circuit Court of Appeals held that an exercise of Congress' war powers could outweigh the interests of a state as an employer, but it also speculated that "[e]ven nonemergency exercises of the commerce power, the source of the amendments invalidated in *National League of Cities*, outweigh state interests in certain circumstances."[32] This court indicated that congressional action was beyond challenge when it protected national interests or dealt with major national problems. In another Fifth Circuit case, the national energy situation was judged to be a sufficiently serious na-

25. Public Serv. Co. v. FERC, 587 F.2d 716, 721 (5th Cir. 1979).
26. Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979).
27. Puerto Rico Tel. Co. v. FCC, 553 F.2d 694 (1st Cir. 1977).
28. Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979).
29. Shell Oil Co. v. Train, 585 F.2d 408 (9th Cir. 1978).
30. Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979).
31. Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976).
32. Peel, 600 F.2d at 1084.

tional concern to outweigh Texas' unilateral control of its natural gas business whose income was dedicated to public education.[33]

From the severance tax perspective, the pertinent inquiry would be whether a congressionally enacted coal tax ceiling, based on the commerce clause and arguably for the purpose of enhancing national energy independence, would withstand a challenge based on the states' tenth amendment power to tax. The power to tax is undoubtedly of the very essence of governmental sovereignty, unlike many other more mundane state functions. The United States Court of Appeals for the Second Circuit clearly made the point that taxation is an integral operation of the state:

> Appellants have asserted that the postal power is analogous to the taxing power, which is exercised simultaneously by both the federal government and the individual states. This analogy is patently false. The Constitution provides for a system of dual sovereignties; the power to tax is necessary to the survival of the federal government and of the states. History demonstrates that the states can survive without running postal services.[34]

Could Congress then limit the states' power to levy severance taxes? Another Second Circuit case suggests that possibly it could. Against a challenge based on *National League of Cities,* this court held that Congress had power under the commerce clause to preclude "imposition of New York estate taxes upon veterans' estates which escheat to the United States."[35] *National League of Cities* was distinguished on the grounds that it involved federal interference with "integral governmental functions," while the New York case did not deal with "day-to-day affairs of the states."[36] The critical question concerning mineral severance taxes would be whether they were sufficiently integral to state sovereignty.

Two 1981 cases, one in the Ninth Circuit[37] and one in the Tenth Circuit,[38] involved state taxation and state revenue sources, but neither case forecloses speculation about the constitutional fate of a coal tax ceiling. In the Ninth Circuit case the appeals court rejected a tenth amendment challenge to the Railroad Revitalization and Regulatory Reform Act.[39] That measure prohibited a state from taxing railroad property at a higher rate than other bus-

33. Public Serv. Co., 587 F.2d at 716.
34. United States Postal Serv. v. Brennan, 574 F.2d 712, 716 (2d Cir. 1978).
35. New York v. United States, 574 F.2d 128, 131 (2d Cir. 1978).
36. *Id.* at 131 n.6.
37. Arizona v. Atchison, T. & S.F. R.R., 656 F.2d 398 (9th Cir. 1981).
38. Oklahoma v. FERC, 661 F.2d 832 (10th Cir. 1981).
39. 49 U.S.C. § 11503 (Supp. III 1979).

iness property. The court's reasoning struck a balance in favor of the national interest in a renewed railroad industry and said that taxation of "instrumentalities of interstate commerce" was not an integral state power.[40] The Tenth Circuit also used a balancing test to uphold the Natural Gas Policy Act of 1978[41] against a *National League of Cities* argument, but the court's critical point was that regulating the price of natural gas was not a "traditional state function."[42] Although the case did not directly involve state taxes, a low federally imposed price would reduce state revenue under an existing percent of value tax. The court, in commenting on this possibility, could have been prophesying a later court's pronouncement on a congressionally imposed coal tax cap:

> If the financial impact on the functioning of the governmental bodies involved were so severe as to impair the state's ability to function effectively in a federal system, as in *National League of Cities,* then it could be said that the impact and intrusion threaten the state's separate and independent existence. Such is not the case here. Federal regulation which has an indirect effect on state treasuries is not the same impermissible intrusion on state sovereignty found in *National League of Cities.*[43]

These two recent cases, consequently, echo the previous *National League of Cities* construction of the circuit courts. Congress in pursuit of a national interest, it seems, can limit a state tax as long as that tax is not truly inherent to state sovereignty and a principal contributor to the state treasury.

D. *Supreme Court Interpretation*

In 20 cases since *National League of Cities,* the United States Supreme Court has heard arguments calling for the application, extension, or restriction of the new doctrine of federalism. The Supreme Court's decisions in these cases reflected the cautiousness of the courts of appeals in that the *National League of Cities* rule was normally given the narrowest interpretation. A review of the holdings and observations of these decisions will help to predict the probable fate of a tenth amendment challenge to a congressionally imposed coal tax ceiling.

The cases which comprise the progeny of *National League of Cities* make it clear that the 1976 majority of Rehnquist, Burger,

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40. Atchison, T. & S.F. R.R. 656 F.2d at 408.
41. 15 U.S.C. §§ 3301-3432 (1976).
42. Oklahoma v. FERC, 661 F.2d at 836.
43. *Id.*

Stewart, Blackmun, and Powell had in mind a major reform of American federalism. In a dissenting opinion in *Nevada v. Hall*,[44] Justice Rehnquist, the majority's draftsman in *National League of Cities*, wrote that the Court must recognize the "doctrinal evolution of concepts of state sovereignty."[45] The clear message was that the Court would further a trend toward strengthened state government. Justice Powell, in another case, used his concurring opinion to link the *National League of Cities* philosophy to the following states-rights remarks of Justice Hugo Black: "[T]he National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[46]

The progeny of *National League of Cities* suggest how far the proponents of the new theory were willing to go. In a dissent in a 1976 case, for example, Chief Justice Burger argued for a halt in the "downgrading of States" in the realm of state sovereignty by including the right to use a political patronage system.[47] A year later Burger used *National League of Cities* in another dissent to argue that the federal government could not require a state to pay for law libraries in prisons.[48] Justice Powell supported Burger's position in a concurring opinion in a subsequent case. Citing *National League of Cities*, Powell wrote that a federal court order requiring a state to appropriate funds ordinarily "would raise the gravest constitutional issues."[49] In that case the order was sustained because its purpose was to remedy unconstitutional segregation by the state itself. Additional examples of the possible extent of the *National League of Cities* philosophy are found in other dissenting opinions. Justice Stewart agrued that the tenth amendment precludes application of federal antitrust law to municipalities to preserve their "wide latitude . . . in the manner in which they will structure delivery of those governmental services which their citizens require."[50] Justice Powell would have voided the Attorney General's preclearance of changes in local election practices under the 1965 Voting Rights Act:

> This Court has emphasized the importance in a democratic society of preserving local control of local matters . . . . Preservation

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44. 440 U.S. 410, 434 (1979) (Rehnquist, J., dissenting).

45. *Id.* at 434.

46. Rose v. Mitchell, 443 U.S. 545, 579 (1979) (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)).

47. Elrod v. Burns, 427 U.S. 347, 375 (1976) (Burger, C.J., dissenting).

48. Bounds v. Smith, 430 U.S. 817 (1977) (Burger, C.J., dissenting).

49. Milliken v. Bradley, 443 U.S. 267, 295 (1977) (Powell, J., concurring).

50. City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 439 (1978) (Stewart, J., dissenting).

> of local control, naturally enough, involves protecting the integrity of state and local governments. See *National League of Cities* . . . .[51]

The continuing appearance of *National League of Cities* in Supreme Court jurisprudence, therefore, was principally in minority opinions. In only one case[52] since 1976 did a majority rely on *National League of Cities* as grounds for its decision. Here, Justice Powell found the majority's interpretation of *National League of Cities* so strained that he left their company and joined Justices Brennan, White and Stevens in dissent. The majority ignored the critical proprietary-governmental distinction when it ruled that the commerce clause did not prohibit South Dakota from preferring its residents in selling state-owned cement. Justice Blackmun, for the majority, wrote:

> Considerations of sovereignty independently dictate that marketplace actions involving "integral operations in areas of traditional governmental functions"—such as the employment of certain state workers—may not be subject even to congressional regulation pursuant to the commerce power.[53]

Justice Powell's dissent rejected this extreme version of state sovereignty and relied on traditional commerce clause doctrine, of which *National League of Cities* was a part:

> The application of the Commerce Clause to this case should turn on the nature of the governmental activity involved. If a public enterprise undertakes an "integral operatio[n] in areas of traditional governmental functions," the Commerce Clause is not directly relevant. If however, the State enters the private market and operates a commercial enterprise for the advantage of its private citizens, it may not evade the constitutional policy against economic Balkanization.[54]

National League of Cities has not had a dynamic career before the Supreme Court. Four Justices, Burger, Rehnquist, Stewart, and Blackmun, have attempted to use the case to alter longstanding governmental relations, but no basic changes have materialized. Justice Brennan, a dissent writer in *National League of Cities,* has periodically called attention to the progress and scope of the proposed revolution. In 1976 he expressed concern about the majority's increasing willingness to defer to state action: "The

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51. City of Rome v. United States, 446 U.S. 156, 201-02 n.12 (1980).
52. Reeves, Inc. v. Stake, 447 U.S. 429 (1980).
53. *Id.* at 438 n.10.
54. *Id.* at 449-50 (Powell, J., dissenting).

Court continues its reinterpretation of the Commerce Clause and its repudiation of established principles guiding judicial analysis thereunder . . . ."[55] In 1977, in a non-commerce clause case,[56] Justice Brennan questioned whether the advocates of the new philosophy knew where they were headed. To Brennan, *National League of Cities* had meant that the "States' authority to tax, spend money, and generally make financial decisions is among the most important of their governmental powers."[57] In this non-commerce clause case the majority held that taxing and spending powers were outside the rule that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty."[58] Brennan's response was one of puzzlement: "One may rightfully feel unease that the Court is in the process of developing a concept of state sovereignty that is marked neither by consistency nor intuitive appeal."[59]

The best assessment of the failure of *National League of Cities* as a precedent lies in the many cases where a Supreme Court majority rejected claims so based. The Court set aside tenth amendment challenges to the following federal actions: the Clean Air Act's requirement of a local transportation plan,[60] the Sherman Antitrust Act's application to municipalities,[61] the federal registration tax on civil aircraft,[62] a section 1983 suit under the Civil Rights Act of 1871 against local governing bodies,[63] an anti-discrimination remedy based on the enforcement provision of the fourteenth amendment,[64] the Price-Anderson Act's limitation on liability for nuclear accidents,[65] congressional regulation of foreign commerce under the commerce clause,[66] the federal judiciary's refusal to create an evidentiary privilege for state legislators,[67] the 1965 Voting Rights Act's regulation of local elections,[68] and implementation of the Surface Mining Control and Reclamation Act of

55. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 817 (1976) (Brennan, J., dissenting).
56. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).
57. *Id.* at 51 n.15 (Brennan, J., dissenting).
58. *Id.* at 23.
59. *Id.*
60. Beame v. Friends of the Earth, 434 U.S. 1310 (1977).
61. City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978).
62. Massachusetts v. United States, 435 U.S. 444 (1978).
63. Monell v. New York City Dep't of Social Sciences, 436 U.S. 658 (1978).
64. Hutto v. Finney, 437 U.S. 678 (1978).
65. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 436 U.S. 658 (1978).
66. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).
67. United States v. Gillock, 445 U.S. 360 (1980).
68. City of Rome v. United States, 446 U.S. 156 (1980).

1977.[69] What is significant about the five-year history of *National League of Cities* is that the Supreme Court has not once extended its rule to federal activity that affects state and local governments beyond the Fair Labor Standards Act.

The United States Supreme Court has made fewer rulings than the federal courts of appeals that implicate *National League of Cities* and would be relevant to a state challenge to a federally imposed restriction on severance taxes. The one case that warrants consideration from this perspective, *Hodel v. Virginia Surface Mining and Reclamation Association,*[70] makes the same point as the pertinent cases of the appeals courts discussed above. The message is that in its ultimate decision the Supreme Court will use a balancing test, and not the *National League of Cities* step-by-step analysis, in determining whether a congressional solution to a national problem inordinately interferes with a state's sovereignty.

The *Hodel* case was a 9-0 decision in which Justice Marshall wrote the Court's opinion and Justice Rehnquist wrote a concurring opinion. A federal district court had determined that the 1977 Surface Mining Control and Reclamation Act[71] was an invasion of the states' sovereignty protected by the tenth amendment. This holding, the Supreme Court said, rested on "an unwarranted extension of the decision in *National League of Cities.*"[72] The importance of the *Hodel* case is its strict interpretation of the *National League of Cities* rule and its formulation of the proper test for applying that rule.

The Court in narrowly construing *National League of Cities* emphasized that its tenth amendment prohibition applied to "federal regulation directed not to private citizens, but to the States as States."[73] The 1977 Reclamation Act was directed at the affairs of private businesses which were subject to the regulatory jurisdiction of both the national and state governments. Congress, the Court said, at any time could "displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law."[74]

The Court fashioned a three-part test out of the *National League of Cities* opinion to be used to determine if a congressional commerce power enactment violated the tenth amendment. All

69. Hodel v. Virginia Surface Min. and Reclam. Ass'n, 452 U.S. 264 (1981).
70. *Id.*
71. 30 U.S.C. §§ 1201-1328 (Supp. I 1977).
72. Hodel, 452 U.S. at 288.
73. *Id.* at 286.
74. *Id.* at 290.

three of the following requirements had to be satisfied to permit invalidation of a federal action:

> First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputable "attributes 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 functions."[75]

The Act challenged in *Hodel* ran afoul of the first requirement.

The Court indicated, however, that measuring up to the three requirements would not guarantee that a tenth amendment challenge would prevail. Even though all three analytical steps repeat an emphasis on state sovereignty—"States as States," "attributes of state sovereignty," and "integral operations"—a balancing test (in fact, a fourth and superseding requirement) could favor the national activity: "There are situations in which the nature of the federal interest advanced may be such that it justifies State submission."[76] In support of this position the Court cited *Fry v. United States*[77] and the majority opinion and Blackmun's concurring opinion in *National League of Cities*.[78]

E. *Congressional Limitation of a State's Powers of Taxation*

There is little doubt that Montana and other states would rely on the *National League of Cities* and *Hodel* cases in challenging the constitutionality of a congressional limitation on their power of taxation. Several *amicus curiae* briefs on behalf of the appellees argued in *Commonwealth Edison* that *National League of Cities* stood in the way of the federal judiciary's utilization of the commerce clause to void the Montana coal tax. When the *National League of Cities* approach, as recently used and refined in *Hodel*, is reduced to its essential elements, there are three inquiries that must be made: (1) has the federal government interfered with the state in its sovereign capacity; (2) has this intrusion limited the state's ability to perform traditional governmental services; and (3) has this impairment been justified by a compelling national need?

It is difficult to imagine that a congressionally imposed severance tax ceiling would not be judged as an invasion of state sover-

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75. *Id.* at 287-88.

76. *Id.* at 288 n.29.

77. 421 U.S. 542 (1975).

78. National League of Cities, 426 U.S. at 852-53; *id.* at 856 (Blackmun, J., concurring).

eignty. Appellees' brief in *Commonwealth Edison* used *Gibbons v. Ogden*[79] to argue that the state taxation was critical for the states to have a meaningful role in the federal system: "As this Court has always recognized, the states' 'power of taxation is indispensable to their existence.' "[80] The *amicus curiae* brief of the State of Wyoming in *Commonwealth Edison* made a similar point. The argument was that either judicial action or a congressional enactment based on the commerce clause that upset a responsible exercise of the states' taxing and spending powers would threaten the states' "separate and independent existence."[81] The brief of the Western Conference of the Council of State Governments said that "no other challenge could be so disruptive of the states' sovereign authority" as federal interference with its taxing and spending powers.[82]

Secondly, it would not be a difficult task for a state to link its severance tax to the provision of basic and traditional services that residents need and demand. The State of Montana through its elected officials, for example, relied on first-hand experience with earlier mining boom and bust to decide what to do in the case of coal. Thus Montana itself, and not the federal government, took steps to provide for the known and unknown needs associated with mining development. The State of Wyoming, in its brief in *Commonwealth Edison,* speaking from the insight of that state's sometime sorry experience, said:

> This case involves governmental functions and services as discussed in the *Usery* case. The Appellants' restrictive view of governmental functions and services does not reduce the impact of rapid coal development in a sparsely populated area. Typically, the existing ranching or farming community lacks the infrastructure or resources to accomodate rapid industrial growth. Some towns will be created overnight. Millions of dollars must be expended for necessary capital facilities, including: sewage treatment, water treatment and distribution, solid waste, mental and physical health care, recreation and library, transportation, and educational facilities. In addition, the traditional police, fire and sanitation services must be provided.[83]

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79. 22 U.S. (9 Wheat.) 1 (1824).

80. Brief for Appellees at 44, Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946 (1981).

81. Brief for Wyominng, et al. at 11, Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946 (1981).

82. Brief for Western Conference of the Council of State Governments at 29, Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946 (1981).

83. Brief for Wyoming, et al. at 12, Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946 (1981).

Wyoming went on to argue that a state government's duty to provide for the public good includes "decisions now to meet future expectations of basic governmental services."[84] The basic point was that current and future governmental services tied to coal development must be paid for out of the state treasury. Therefore, according to Wyoming's standards, Montana's creation of a trust fund to meet governmental costs when its wealth of coal is gone was both prudent and legitimate.

The first two inquiries that would be made when applying *National League of Cities* to a congressional limit on a state severance tax could easily be resolved in favor of the states. The third inquiry, whether congressional action had been based upon a serious national need, undoubtedly would lend itself to judicial subjectivity and thus indeterminateness. As a result, a future Court, especially after giving Congress a green light in this matter in *Commonwealth Edison,* would have good reason to defer to the wisdom of its elected cousins. Given a congressional finding of grave national concern, the Court's check most likely would be precipitated only by absolute or permanent impairment of the taxing power. The Court's resort to a balancing test *in ultimo* leads to the suggestion of the judiciary's ineptness to determine the shape of American federalism.

III. Conclusion

This article has analyzed a recent attempt by the United States Supreme Court to strengthen the role of the states in our federal scheme of government. The Court's new federalism was announced by a five-justice majority in 1976, but since that time propagation of this new federalism has been confined almost exclusively to dissenting opinions. The failure of the *National League of Cities* rationale to catch hold is probably due to the fact that it represents only one of two dominating themes of the contemporary Court. Supreme Court majorities have repeatedly demonstrated respect for the health and competence of local government, but they also have made it clear that the vehicle of this localism should be deference and not activism. *National League of Cities* was the pronouncement of an activist Court, marking the first time in 40 years that the Supreme Court had voided a congressional measure based on the commerce clause. The *Commonwealth Edison* decision, on the other hand, combined regard for local processes and recognition of the Court's institutional limitations. The Court refused to

84. *Id.* at 14.

develop new law that would have positioned it, rather than Congress, as the watchdog of state taxes in the federal system. An activist posture in realigning state and federal taxation policy simply had no appeal for the Court. The *National League of Cities* progeny have the same theme as *Commonwealth Edison*: if there is to be a new federalism, it should be the creation of the political branches and not the judiciary. For Montana this might mean a Court unreceptive to arguments of state sovereignty over taxation and environmental issues. For the national scheme of government, however, this directive means that the legislature rather than the judiciary should chart the contours of federalism. Such a pronouncement appears to have dampened the effect of *National League of Cities*.