"Congress may not exercise that power [over commerce] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."—Justice REHNQUIST

"This Court is simply not at liberty to erect a mirror of its own conception of a desirable governmental structure."—Justice BRENNAN

National League of Cities v. Usery

426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976).

In 1974 Congress amended the Fair Labor Standards Act to bring within its minimum wage and maximum hours coverage almost all public employees in the states and cities. Individual cities, states, the National League of Cities, and the National Governors' Conference brought suit in a special three-judge federal district court to enjoin the secretary of labor from enforcing these amendments, claiming they violated the Tenth Amendment. The district court dismissed the suit, and plaintiffs appealed directly to the U.S. Supreme Court.

Mr. Justice **REHNQUIST** delivered the opinion of the Court. . . .

II

It is established beyond peradventure that the Commerce Clause of Article I of the Constitution is a grant of plenary authority to Congress. That authority is, in the words of Mr. Chief Justice Marshall in Gibbons v. Ogden (1824), "the power to regulate; that is, to prescribe the rule by which commerce is to be governed." When considering the validity of asserted applications of this power to wholly private activity, the Court has made it clear that

> [e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. Fry v. United States (1975).

Congressional power over areas of private endeavor, even when its exercise may pre-empt express state law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution." Heart of Atlanta Motel v. United States (1964).

Appellants in no way challenge these decisions establishing the breadth of authority granted Congress under the commerce power. Their contention . . . is that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution. . . . Appellants' essential contention is that the 1974 amendments

to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a . . . constitutional barrier because they are to be applied directly to the States and subdivisions of States as employers.

This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce. . . . In [Maryland v.] Wirtz [1968], for example, the Court took care to assure the appellants that it had "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity.' " In *Fry,* the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," United States v. Darby (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

In New York v. United States (1946), Mr. Chief Justice Stone, speaking for four Members of an eight-Member Court in rejecting the proposition that Congress could impose taxes on the States so long as it did so in a non-discriminatory manner, observed:

> A State may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general nondiscriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed. . . .

The expressions in these more recent cases trace back to earlier decisions of this Court recognizing the essential role of the States in our federal system of government. Mr. Chief Justice Chase,. . . . [i]n Texas v. White (1869), declared that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." In Lane County v. Oregon (1869), his opinion for the Court said:

> Both the States and the United States existed before the Constitution. . . . [I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. . . .

Appellee Secretary argues that the cases in which this Court has upheld sweeping exercises of authority by Congress, even though those exercises pre-empted state regulation of the private sector, have already curtailed the sovereignty of the States quite as much as the 1974 amendments to the Fair Labor Standards Act. We do not agree. It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the

dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. . . .

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are " 'functions essential to separate and independent existence.' " Coyle v. Oklahoma (1911), quoting from *Lane County*, so that Congress may not abrogate the States' otherwise plenary authority to make them. . . .

Judged solely in terms of increased costs in dollars, these allegations show a significant impact on the functioning of the governmental bodies involved. The Metropolitan Government of Nashville and Davidson County, Tenn., for example, asserted that the Act will increase its costs of providing essential police and fire protection, without any increase in service or in current salary levels, by $938,000 per year. . . . The State of California . . . estimated that application of the Act to its employment practices will necessitate an increase in its budget of between $8 million and $16 million …

Quite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require. The Act, speaking directly to the States qua States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress. It may well be that as a matter of economic policy it would be desirable that States, just as private employers, comply with these minimum wage requirements. But it cannot be gainsaid that the federal requirement directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment. . . . The only "discretion" left to them under the Act is either to attempt to increase their revenue to meet the additional financial burden imposed upon them by paying congressionally prescribed wages to their existing complement of employees, or to reduce that complement to a number which can be paid the federal minimum wage without increasing revenue.

This dilemma presented by the minimum wage restrictions may seem not immediately different from that faced by private employers, who have long been covered by the Act. . . . The difference, however, is that a State is not merely a factor in the "shifting economic arrangements" of the private sector of the economy, Kovacs v. Cooper (1949) (Frankfurter, J., concurring), but is itself a coordinate element in the system established by the Framers for governing our Federal Union. . . .

Our examination of the effect of the 1974 amendments . . . satisfies us that both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral

governmental functions of these bodies. . . . [T]heir application will . . . significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. 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. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' " 'separate and independent existence.' " *Coyle*. Thus, even if appellants may have overestimated the effect which the Act will have upon their current levels and patterns of governmental activity, the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system." *Fry*. This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art I, § 8, cl. 3.

Mr. Justice **BLACKMUN,** concurring.

. . . Although I am not untroubled by certain possible implications of the Court's opinion . . . I do not read the opinion so despairingly as does my Brother Brennan. In my view, the result with respect to the statute under challenge here is necessarily correct. I may misinterpret the Court's opinion, but it seems to me that it 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 federal standards would be essential. With this understanding on my part of the Court's opinion, I join it.

Mr. Justice **BRENNAN**, with whom Mr. Justice **WHITE** and Mr. Justice **MARSHALL** join, dissenting.

The Court concedes that Congress enacted the 1974 amendments pursuant to its exclusive power under Art I, § 8, cl. 3, of the Constitution "[t]o regulate Commerce . . . among the several States." It must therefore be surprising that my Brethren should choose this bicentennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Mr. Chief Justice John Marshall, discarding his postulate that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process. For 152 years ago Mr. Chief Justice Marshall enunciated that principle to which, until today, his successors on this Court have been faithful.

> [T]he power over commerce . . . is vested in Congress as absolutely as it would be in a single government. . . . *The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at*

> *elections, are . . . the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.* Gibbons v. Ogden (1824) [emphasis added].

Only 34 years ago, Wickard v. Filburn (1942) reaffirmed that "[a]t the beginning Chief Justice Marshall . . . made emphatic the embracing and penetrating nature of [Congress' commerce] power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes."

My Brethren do not successfully obscure today's patent usurpation of the role reserved for the political process by their purported discovery in the Constitution of a restraint derived from sovereignty of the States on Congress' exercise of the commerce power. Mr. Chief Justice Marshall recognized that limitations "prescribed in the constitution," Gibbons v. Ogden, restrain Congress' exercise of the power. . . . Thus laws within the commerce power may not infringe individual liberties protected by the First Amendment, . . . the Fifth Amendment, . . . or the Sixth Amendment. . . . But there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on the commerce power. . . .

My Brethren thus have today manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent. An abstraction having such profoundly pernicious consequences is not made less so by characterizing the 1974 amendments as legislation directed against the "States qua States." . . . [M]y Brethren are also repudiating the long line of our precedents holding that a judicial finding that Congress has not unreasonably regulated a subject matter of "commerce" brings to an end the judicial role. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland [1819].

The reliance of my Brethren upon the Tenth Amendment as "an express declaration of [a state sovereignty] limitation," . . . must astound scholars of the Constitution. For not only early decisions, *Gibbons*, *McCulloch*, and Martin v. Hunter's Lessee (1816), hold that nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress. Rather, as the Tenth Amendment's significance was more recently summarized:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment. . . . United States v. Darby [emphasis added].

My Brethren purport to find support for their novel state-sovereignty doctrine in the concurring opinion of Mr. Chief Justice Stone in New York v. United States (1946). That reliance is plainly misplaced, . . . [for] the Chief Justice was addressing not the question of a

state sovereignty restraint upon the exercise of the commerce power, but rather the principle of implied immunity of the States and Federal Government from taxation by the other. . . .

In contrast, the apposite decision that Term to the question whether the Constitution implies a state sovereignty restraint upon congressional exercise of the commerce power is Case v. Bowles (1946). . . . The Court . . . in an opinion joined by Mr. Chief Justice Stone, reason[ed]:

> [T]he [State's] argument is that the extent of that power as applied to state functions depends on whether these are "essential" to the state government. The use of the same criterion in measuring the constitutional power of Congress to tax has proved to be unworkable, and we reject it as a guide in the field here involved. Cf. United States v. California. . . .

. . . Even more significant for our purposes is . . . United States v. California. . . .[which] directly presented the question whether any state sovereignty restraint precluded application of the Federal Safety Appliance Act to a state-owned and -operated railroad. . . . Mr. Justice Stone rejected the contention in an opinion for a unanimous Court. His rationale is a complete refutation of today's holding:

> . . . The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. . . .

Certainly the paradigm of sovereign action—action qua State—is in the enactment and enforcement of state laws. Is it possible that my Brethren are signaling abandonment of the heretofore unchallenged principle that Congress "can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause"? Bethlehem Steel Co. v. New York State Board (1947) (opinion of Frankfurter, J.) [T]he ouster of state laws obviously curtails or prohibits the States' prerogatives to make policy choices respecting subjects clearly of greater significance to the "State qua State" than the minimum wage paid to state employees. . . .

My Brethren do more than turn aside longstanding constitutional jurisprudence that emphatically rejects today's conclusion. More alarming is the startling restructuring of our federal system, and the role they create therein for the federal judiciary. This Court is simply not at liberty to erect a mirror of its own conception of a desirable governmental structure. If the 1974 amendments have any "vice," . . . my Brother Stevens is surely right that it represents "merely . . . a policy issue which has been firmly resolved by the branches of government having power to decide such questions." It bears repeating "that effective restraints on . . . exercise [of the commerce power] must proceed from political rather than from judicial processes." *Wickard.*

It is unacceptable that the judicial process should be thought superior to the political process in this area. Under the Constitution the Judiciary has no role to play beyond finding that Congress has not made an unreasonable legislative judgment respecting what is "commerce." . . .

Judicial restraint in this area merely recognizes that the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and that the States are fully able to protect their own interests in the premises. Congress is

constituted of representatives in both the Senate and House elected from the States. *The Federalist* No. 45. . . . Decisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are in that sense decisions of the States themselves. Judicial redistribution of powers granted the National Government by the terms of the Constitution violates the fundamental tenet of our federalism that the extent of federal intervention into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress. There is no reason whatever to suppose that in enacting the 1974 amendments Congress, even if it might extensively obliterate state sovereignty by fully exercising its plenary power respecting commerce, had any purpose to do so. Surely the presumption must be to the contrary. Any realistic assessment of our federal political system, dominated as it is by representatives of the people *elected from the States,* yields the conclusion that it is highly unlikely that those representatives will ever be motivated to disregard totally the concerns of these States. *The Federalist* No. 46. . . .

We are left then with a catastrophic judicial body blow at Congress' power under the Commerce Clause. Even if Congress may nevertheless accomplish its objectives—for example, by conditioning grants of federal funds upon compliance with federal minimum wage and overtime standards, cf. Oklahoma v. CSC (1947)—there is an ominous portent of disruption of our constitutional structure implicit in today's mischievous decision. I dissent.

Mr. Justice **STEVENS**, dissenting.

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 qua State, I have no doubt that they are subject to federal regulation.

I agree that it is unwise for the Federal Government to exercise its power in the ways described in the Court's opinion. . . .

My disagreement with the wisdom of this legislation may not, of course, affect my judgment with respect to its validity. On this issue there is no dissent from the proposition that the Federal Government's power over the labor market is adequate to embrace these employees. Since I am unable to identify a limitation on that federal power that would not also invalidate federal regulation of state activities that I consider unquestionably permissible, I am persuaded that this statute is valid. . . .

Editors' Notes

(1) **Query:** How did Rehnquist's and Brennan's structuralist approaches and their visions of the Constitution differ? To what extent did each (or either) seek and find support in the constitutional text? To what extent did each reinforce his structuralism with citations to judicial doctrine?

(2) **Query:** Blackmun's joining Rehnquist's opinion was essential to its becoming the opinion of the Court rather than merely expressing the views of four justices. To what extent was Blackmun's interpretation of Rehnquist's opinion justified? In effect, was Blackmun publicly serving notice that he would not endorse a return to dual federalism? Compare his opinion for the Court in Garcia v. San Antonio MTA (1985), the very next case we reprint.

(3) Brennan's assertion that *National League of Cities* would "astound scholars of the Constitution" turned out to be accurate. See espec.: Sotirios A. Barber, "National League of Cities v. Usery: New Meaning for the Tenth Amendment," 1976 *Sup.Ct.Rev.* 161; Karen Flax, "In the Wake of National League of Cities v. Usery: A Derelict Makes Waves," 34 *So.Car.L.Rev.* 649 (1983); Charles A. Lofgren, "National League of Cities v. Usery: Dual Federalism Reborn," 4 *Claremont Jo. of Pub. Affrs.* 19 (1977); Frank I. Michelman, "States' Rights and States' Roles: The Permutations of 'Sovereignty' in *National League of Cities v. Usery*," 86 *Yale L.J.* 1165 (1977); C. Herman Pritchett, *Constitutional Law of the Federal System* (Englewood Cliffs, N.J.: Prentice–Hall, 1983), pp. 234–235; Laurence H. Tribe, "Unravelling *National League of Cities*," 90 *Harv.L Rev.* 1065 (1977).