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DEFINING THE SCOPE OF STATE SOVEREIGNTY UNDER THE TENTH AMENDMENT: A STRUCTURAL APPROACH

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The distribution of power is the fundamental concern in constitutional law analysis. For most of the last fifty years, the proper balance between the powers of government and the rights of the individual has been the dominant constitutional inquiry.[1] In the last decade, however, there has been a revival of interest in questions concerning the proper balance of power between governmental units in our federal system.[2] In 1976, the Supreme Court, in *National League of Cities v. Usery,*[3] revived the long-dormant proposition that the tenth amendment to the Constitution[4] bars federal interference with certain activities properly within the scope of state sovereignty.

The issue left unresolved by *National League of Cities* was the proper scope of the state sovereignty concept. A broad definition of those areas of governmental activity in which the states are supreme would require serious changes in the constitutional doctrine developed over the last fifty years. Additionally, such a broad definition would require new ways of approaching the problems of distributing power in our federal system.

Immediately following *National League of Cities,* commentators began the search for new theories and approaches to define the concept of state sovereignty. Some suggestions were quite novel and far-reaching.[5] In the last few years, however, a series of Supreme Court decisions has steadily narrowed the scope of *National League of Cities* to the point where it might be asked whether the case retains any significance at all beyond its own narrow facts.[6] In light of this, the temptation is strong to simply dismiss *National*

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1. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1-8 (1978).

2. *Id.*

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

4. The tenth amendment provides: "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." U.S. CONST. amend. X.

5. The most prominent commentators were Michelman, *States' Rights and States' Roles: Permutations of 'Sovereignty' in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977) (regarding the state's service role as crucial to its special constitutional place) and Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services,* 90 HARV. L. REV. 1065 (1977) (using state sovereignty as a means to provide states leeway in affording their citizens basic governmental services guaranteed by the Constitution).

6. *See infra* notes 43-81 and accompanying text.

League of Cities as an ultimately unimportant aberration, and thus reinstate the belief that the tenth amendment is a mere tautology which will not bar any federal action affecting the states.[7]

If it was a mistake to overestimate the impact of *National League of Cities,* it is likewise a mistake to regard that case as having little or no importance. This article proposes that while the particular holding of *National League of Cities* is, in fact, unimportant and incorrect, the case remains valuable for its valid assertion that there is a narrow area of state sovereignty upon which the federal government may not intrude. The scope of state sovereignty must not be ascertained by an inevitably futile attempt to identify some types of governmental regulation as "inherently" local or by looking for those areas of governmental activity "traditionally" occupied by state governments.[8] Rather, this article proposes that the scope of state sovereignty be ascertained by examining the role of the states in the overall constitutional structure established to assure a democratic form of government and to protect the people from governmental abuse of their rights. Such an inquiry leads to the conclusion that the basic lesson of *National League of Cities,* namely, that a core of inviolable state sovereignty is protected by the tenth amendment, is correct, but that the core is an extremely narrow one.

Part I of this article traces the concept of state sovereignty and the history of the tenth amendment through Supreme Court opinions before and after *National League of Cities.* In light of the unsatisfactory results of the Court's attempts to define state sovereignty, part II of this article defines a core of essential state activity by looking not to judicial precedent, but to the basic goals of the Constitution and the structures set up to attain those goals. This inquiry leads to the conclusion that the essential role of the states is to serve as effective vehicles for the participation of their people in democratic governmental processes at the state and federal levels. Moreover, this inquiry leads to the conclusion that the particular means through which the states carry out this role is to retain, on behalf of the people, the power to amend the Constitution and thus prevent any undue aggregation of power in the federal government. Part III of this article examines the consequences of this conclusion on the jurisprudence of federalism and the tenth amendment.

I. FEDERALISM, NATIONAL LEAGUE OF CITIES AND ITS PROGENY

A. The First Two Hundred Years

Constitutional law is a "meta-law," that is, a law about law which governs lawmakers and all other non-constitutional law. The power to make law and the limitations on that power are the subject of all constitutional

7. "The amendment states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941). For an example of a recent scholarly commentary minimizing the lasting impact of *National League of Cities,* see Schwartz, National League of Cities v. Usery *Revisited—Is the Quondam Constitutional Mountain Turning Out To Be Only A Judicial Molehill?,* 52 FORDHAM L. REV. 329 (1983).

8. *See infra* notes 57-60 and accompanying text.

jurisprudence. Although in the latter part of the twentieth century the focus of constitutional inquiry shifted to individual rights as effective limitations on government, for most of American history the central concern of constitutional law was the proper balance of power between the national government and the states.[9]

Any federalist system[10] presents problems concerning the proper distribution of power between the central government and its local units. This is particularly true when the federal system is voluntarily created by, and out of, a number of pre-existing sovereign entities. Such is the case in the United States.[11] On the one hand, the obvious purpose of the new structure was to enhance the power of the central government. On the other hand, that central government is a creature of the states whose powers it now could eclipse.[12] As a result of this, nineteenth century statesmen developed doctrines such as nullification,[13] interposition,[14] and the right

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9. *See* L. TRIBE, *supra* note 1, at 1-6. Note, however, that Tribe points out that the concern with structures of federalism and separation of powers was not thought of as unrelated to questions of individual liberty. To the contrary, the preservation of state and local autonomy was a means of preserving individual liberty. *Id.* at 2. This insight will be of great significance in defining the proper scope of state sovereignty under the tenth amendment. *See infra* notes 103-04 and accompanying text.

10. The term describes a wide variety of governmental systems. What they all have in common is simultaneous governance of the people by the central national government and by local or regional governments. *See generally* P. KING, FEDERALISM AND FEDERATION (1982) (discussing several variations on federalism, each being marked with a concern for territorial representatives and the representation of regional units in the legislature).

11. The states' sovereignty was, of course, a product of the Revolutionary War. Scholars have noted that the colonial era provided the states with a history of federalism to draw upon. In other words, prior to the Revolution, the colonists lived under a system where certain powers were seen as legitimately held by the central government (London) and others belonged to the regional units (each colony). Abuse of this "federal" system by London led to the overthrow of the central, imperial government in the colonies, which then acquired full sovereignty. Thus, creation of the United States can be seen as a return to federalism, rather than a new invention. *See* W. BENNETT, AMERICAN THEORIES OF FEDERALISM 15-37 (1964).

12. This is not always the purpose or history of federal governments. Federalism can result from a decision by a strong unitary government to diffuse power. An example of this "decentralist federalism" is the postwar West German Constitution. For a discussion of various theories and approaches to federalism, see P. KING, *supra* note 10. Another type of federalism, "centralist federalism," occurs when local units seek to strengthen themselves collectively by shifting power to the central government. King's principal model of this is the United States. *Id.* at 24-38.

13. A state government has the "unquestionable right to judge" the constitutionality of acts of the federal government and, finding them unconstitutional, to nullify "all unauthorized acts done under color of that instrument." Resolution of the Kentucky Legislature (Nov. 14, 1799), *reprinted in* VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, WE THE STATES 155 (1964). Although nineteenth century states' rights theories would play their most prominent role in debates on slavery and race relations, this resolution and other seminal documents on states' rights theories were a reaction to the Alien and Sedition Acts. J. NOWAK, HANDBOOK ON CONSTITUTIONAL LAW 546-47 (1978).

14. "[T]hat in case of a deliberate, palpable and dangerous exercise of . . . powers [by the federal government], not granted by the [Constitution], the States who are parties thereto,

of succession,[15] which went so far as to assert the fundamental supremacy of the individual states over the central government. Nevertheless, the Civil War clearly established federal supremacy, at least in those areas of law entrusted to federal control by the Constitution. Advocates of states' rights now became advocates of dual federalism. This doctrine conceded federal supremacy, but sought to limit such supremacy to specific areas of government activity: the "enumerated powers" of the federal government set forth in the Constitution and interpreted narrowly.[16]

Analysis of the constitutionality of federal action is a two-step process.[17] First, the presence or absence of federal power to act on a particular matter must be ascertained.[18] Second, if such power exists, the determination must be made as to whether the specific act in question runs afoul of any other constitutional provision.[19] Even though legislation has satisfied the first part of the inquiry, the provisions of the Bill of Rights dealing with individual liberties will often serve to invalidate it at the second stage of this analysis. For example, a statute taxing illegal activities might be found to be a legitimate exercise of Congress' power to tax. Nevertheless, that statute might

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have the right, and are in duty bound, to interpose for arresting the progress of the evil." Resolution of the General Assembly of Virginia (Dec. 21, 1798), *reprinted in* VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, WE THE STATES 152 (1964). John C. Calhoun was the most significant and eloquent nineteenth century defender of this doctrine. *See* The Fort Hill Address of John C. Calhoun (July 26, 1831), *reprinted in* VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, WE THE STATES 277-96 (1964).

15. A state has the right to withdraw from the union. Of course, the Civil War settled this issue, at least in the United States. The right to secession, however, continues to have serious adherents in other federal systems (e.g., Quebec nationalists in Canada). *See* P. KING, *supra* note 10, at 109. King points out that no federal system has ever, either in practice or constitutional theory, explicitly endorsed (or tolerated) the right of secession. *Id.* at 108-13. *But see* C. ANTIEAU, STATES' RIGHTS UNDER FEDERAL CONSTITUTIONS 154 (1984) (noting that it is possible for a state to legally leave the Federation of Malaysia). It is interesting to note that not even the Confederate States of America, an entity founded by the act of secession, set forth explicit constitutional permission for any of its states to leave the Confederacy. As a matter of fact, the states' rights provision of the Confederate Constitution was a word-for-word adoption of the tenth amendment, except that powers were reserved not "to the States . . . or to the people," U.S. CONST. amend. X, but rather "to the States . . . or to the people thereof," Constitution of the Confederate States of America art. VI, § 6, *reprinted in* VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, WE THE STATES 139 (1964). This may be a subtle indication that the people under the Confederate Constitution were to be more closely identified with their states, rather than standing alone (and potentially against state interests) as they do under the tenth amendment. Of course, it is arguable that confederate thinkers clearly believed that the right of secession was implicit in this language and there was no need for a specific grant of that right to the states. Moreover, setting forth such a right in the Confederate Constitution might be seen as an admission that no such right existed under the United States Constitution.

16. The term was used and defined by Professor Edward Corwin. *See* E. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY 8 (1934).

17. This analytical framework is set forth in L. TRIBE, *supra* note 1, at 224.

18. Tribe calls this the question of "internal limits on congressional power." *Id.*

19. Tribe calls this the question of "external limits on congressional power." *Id.*

be invalidated as violative of the fifth amendment insofar as it requires those engaged in illegal activity to report such conduct.[20]

The tenth amendment,[21] the central constitutional affirmation of states' rights, might have been used in the same manner as other Bill of Rights provisions to strike down federal legislation at the second stage of that analysis. Nevertheless, that amendment was not used for such purposes. Instead, it was largely ignored while questions of congressional power turned on the first analytical step, the issue of whether article I authorized federal action in the area in question at all. While "states' rights" advocates won significant victories, they did so not on the grounds of a powerful tenth amendment, but rather on the grounds of a narrow article I.[22]

These victories, however, were short lived as the Supreme Court broadened its view of congressional power under the commerce clause[23] and other provisions of article I.[24] This view has been so expanded that Congress now functionally has something near plenary power to deal with problems that transcend the borders of any single state.[25] In broadening congressional power

20. *See* Marchetti v. United States, 390 U.S. 39 (1968) (assertion of fifth amendment privilege against self-incrimination barred prosecution of the defendent for violating the federal wagering tax statute).

21. *See supra* note 4 for the text of the tenth amendment.

22. Article I sets out the powers of the federal government. *See* U.S. CONST. art. I. Cases striking down congressional action during the early part of the twentieth century consistently did so by holding that Congress had no power to act rather than by relying on the tenth amendment as a barrier to otherwise valid legislation. *See, e.g.,* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that Congress did not have the authority to regulate hours and wages of employees involved in local coal production); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding that the attempt of Congress to regulate the intrastate activities of poultry slaughterhouses was invalid because Congress only had power over interstate activities); Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding that a congressional attempt to control local manufacturing was not authorized by the commerce clause).

23. In a consistent line of opinions beginning with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Court has upheld commerce clause legislation. *See* Perez v. United States, 402 U.S. 146 (1971) (Congress may regulate intrastate loan-sharking activities when that class of activities affects interstate commerce); Wickard v. Filburn, 317 U.S. 111 (1942) (Congress may regulate local wheat production and consumption when the aggregate of such activity has a substantial economic effect on interstate commerce); United States v. Darby, 312 U.S. 100 (1941) (Congress has the authority to regulate wages and hours of local manufacturing directly effecting interstate commerce).

24. For example, in Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922), the Court held that the taxing power would not permit federal tax statutes that were primarily intended as regulatory measures. The tax power was subsequently extended in Sonzinsky v. United States, 300 U.S. 506, 514 (1937), in which the Court held that the taxing power authorized any measure that produced some revenue, regardless of Congress' motive to use that power to restrict certain types of activity. This power has been further extended in a consistent line of cases since *Sonzinsky*. *See* Minor v. United States, 396 U.S. 87 (1969) (recognizing independent congressional power to achieve the tax's regulatory results under the commerce clause); United States v. Kahriger, 345 U.S. 22 (1953) (recognizing congressional authority to tax gambling, even though the tax's purpose was to suppress wagering, because the tax raised revenue).

25. L. TRIBE, *supra* note 1, at 236-42. Support can be found in constitutional history for the proposition that this broad view of federal powers was originally intended, and that subsequent narrow readings of federal power under the Constitution frustrated that intent. *See* Stern,

under the provisions of article I, the Court also rejected the proposition that the tenth amendment stood as a barrier to federal action authorized by that article.[26] The amendment, unlike the other provisions of the Bill of Rights, was said to be a mere tautology, meant not to limit grants of power to the federal government, but merely to affirm that whatever powers (if any) not granted to the federal government would devolve upon the states.[27] Forty years of consistent precedent that rejected all attempts to invalidate commerce clause-based congressional action had apparently turned the tenth amendment into a mere curiosity.[28]

B. National League of Cities

In 1976, however, students of federalism were roused from their slumber by *National League of Cities*. By means of the 1974 amendments to the Fair Labor Standards Act (FLSA), Congress had eliminated the exemption of state and local government employees from the minimum wage and maximum hour provisions of the FLSA.[29] The National League of Cities challenged the constitutionality of the amendments, and in a five to four decision, the Supreme Court struck them down.[30] It was the first successful challenge on federalism grounds to a statute based on commerce clause power since 1936.[31]

The National League of Cities did not challenge the fact that the amendments were within the scope of the commerce clause,[32] but rather argued that the tenth amendment stood as a "constitutional barrier" to the application of the FLSA to states and their subdivisions.[33] The Court, accepting this argument, held that the tenth amendment prevented federal regulation of a number of activities that were "attributes of sovereignty attaching to every state government,"[34] and that the determination of wages and hours of public employees was one of these activities.[35] The Court, however, failed to provide a clear and satisfying definition of the boundaries of this protected area of sovereignty. On the one hand, the Court addressed the possibility of "the utter destruction of the State as a sovereign political entity."[36] This would suggest that the tenth amendment would protect only

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That Commerce Which Concerns More States Than One, 47 HARV. L. REV. 1335 (1934).

26. L. TRIBE, *supra* note 1, at 313-14.

27. United States v. Darby, 312 U.S. 100, 124 (1941).

28. L. TRIBE, *supra* note 1, at 311.

29. *National League of Cities*, 426 U.S. at 838. The FLSA is codified at 29 U.S.C. §§ 201-19 (1982).

30. 426 U.S. at 840.

31. The last such successful challenge had come in Carter v. Carter Coal Co., 298 U.S. 238 (1936).

32. 426 U.S. at 841.

33. *Id.*

34. *Id.* at 845.

35. *Id.*

36. *Id.* at 842 (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968)).

a narrow scope of truly essential and fundamental activities. On the other hand, the Court suggested a broad scope of tenth amendment protection by stating that the FLSA amendments were invalid because they conflicted with "traditional aspects of state sovereignty."[37] Possibly the closest thing to a workable rule of law that can be found in *National League of Cities* is the statement that "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[38]

Response to *National League of Cities* was immediate and significant. The decision was both praised and criticized for its apparent revival of the doctrine of dual federalism.[39] The extent of this dual federalism, however, was still a matter of speculation. Some foresaw and advocated a return to long-abandoned, broadly based conceptions of states' rights.[40] Others urged restraint in tampering with federal powers.[41] Still others, reading the opinion in creative ways clearly going beyond the intent of the Court, saw the potential for using the case as a vehicle for establishing that states not only have rights to structure government services as they choose, but also duties to provide at least some essential services to their citizens.[42]

C. *Post* National League of Cities *Decisions*

Several Supreme Court decisions, beginning in 1981, have refined the *National League of Cities* state sovereignty concept. They have done so in a way, however, which has led many to wonder whether anything substantial remains of the concept at all. In *Hodel v. Virginia Surface Mining & Reclamation Association,*[43] the Court unanimously reversed a district court ruling which found several provisions of the Surface Mining Control and Reclamation Act of 1977[44] unconstitutional. The Act placed a number of restrictions on mine operators engaged in surface mining operations. Most

37. 426 U.S. at 849.

38. *Id.* at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

39. *See, e.g.,* Percy, National League of Cities v. Usery: *The Tenth Amendment Is Alive and Doing Well,* 51 TUL. L. REV. 95 (1976) (generally favorable toward the Court's opinion); Comment, *Constitutional Law—Commerce Power Limited to Preserve States' Role in the Federal System,* 30 RUTGERS L. REV. 152 (1976) (generally critical).

40. "[T]he *Usery* decision is a salutary one if it heralds the Court's recognition that a significant degree of political and economic autonomy for the states may be as indispensible to the genius of our federal system as the safeguarding of our personal freedoms." Percy, *supra* note 39, at 106-07.

41. "If a state can be heard to claim that these activities [efforts to provide services] are (or become) 'essential', then, in effect, the states have been given the power to define and enlarge an affirmative constitutional right and, correspondingly, to reduce federal power. Such a result is clearly undesirable." Note, *The Re-Emergence of State Sovereignty as a Limit on Congressional Power Under the Commerce Clause,* 28 CASE W. RES. 166, 200 (1977).

42. *See* Tribe, *supra* note 5, at 1065-66.

43. 452 U.S. 264, 305 (1981). Justices Burger, Powell, and Rehnquist each filed a separate concurrence.

44. 30 U.S.C. §§ 1201-1328 (1982).

significantly, the Act required that the mine operators restore the land to its prior contours and condition after mining operations were complete.[45]

The plaintiffs, mining companies which were subject to the Act, challenged it on several constitutional grounds.[46] The district court, relying on *National League of Cities,* held that the Act violated the tenth amendment.[47] The court found that regulation of land was a traditional function of state governments, and as such fell within the scope of "state sovereignty."[48] Thus, the court reasoned, federal statutes regulating land use would operate "to displace the States' freedom to structure integral operations in areas of traditional governmental functions."[49] The district court, in short, read *National League of Cities* as broadly as one could; it saw a return to the pre-1937 days of broad substantive areas of law beyond the control of federal legislation.

The Supreme Court, unsurprisingly, disagreed. It held that *National League of Cities,* whatever effect it may have had on Congress' power to regulate the states, did not invalidate legislation which directly regulated the activity of private parties and was otherwise justified under the commerce clause.[50] The Court enunciated a three-step test to determine if a statute was invalid under the tenth amendment:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the federal regulation must address matters that are indisputably "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."[51]

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45. 452 U.S. at 269. These provisions are codified at 30 U.S.C. § 1265(b) (1982). In addition to restoration of land to its prior contours, the Act also sets standards for the preservation of top soil to minimize the disturbance to the hydrologic balance caused by mining operations, the use of coal mine waste piles as dams, and revegetation of land and soil disposal. *Id.*

46. The plaintiffs challenged the Act on the grounds that it violated the commerce clause, the equal protection and due process guaranties of the fifth amendment's due process clause, the fifth amendment's just compensation clause, and the tenth amendment. 452 U.S. at 273.

47. Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 435 (W.D. Va. 1980), *modified sub nom.* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

48. 452 U.S. at 435.

49. *Id.* (quoting *National League of Cities,* 426 U.S. at 853). The district court interpreted *National League of Cities* as calling for a balancing test. It found that the Act "drastically" limited the State of Virginia. Furthermore, the court ignored the contrary opinion of Congress, and with little hesitation determined that the requirement of returning land to its original contours "[was] not environmentally sound and [did] not serve the conservation interests of the federal government." *Id.* This analysis indicates just how powerful a tool the "balancing test" suggested by Justice Blackmun in his *National League of Cities* concurring opinion can be in the hands of a judge who is unwilling to defer to federal legislative acts, and the findings upon which they are based.

50. 452 U.S. at 291.

51. *Id.* at 287-88 (citations omitted) (emphasis in original).

Under this test, the plaintiffs' challenge in *Hodel* failed to satisfy even the first step, and the Act was upheld.[52]

Still further refinement of the *National League of Cities* state sovereignty concept occurred in 1982, when the Supreme Court upheld direct federal regulation of states in *United Transportation Union v. Long Island Railroad Co.*[53] and *FERC v. Mississippi.*[54] In *United Transportation Union,* the Court unanimously held that certain provisions of the Railway Labor Act[55] could be applied to the New York state-owned Long Island Railroad.[56] Focusing on the third step of the *Hodel* test, the Court found that the operation of a passenger railroad was not a "traditional" state function, and was therefore not protected by the tenth amendment.[57]

The use of tradition as the primary tool of tenth amendment analysis poses enormous problems if *National League of Cities* is seen as a call for a return to a dual federalism. Such an analysis requires a determination of the areas of governmental regulation that are appropriate or proper subjects of state responsibility. History demonstrates that many activities once thought to be beyond the proper scope of government, such as the maintenance of public schools,[58] can become, over time, not only accepted as proper, but also thought of as central activities of state and local government.[59] Thus, tradition can hardly be the proper touchstone for classification of activities under such a dual federalism system.

The *United Transportation Union* Court, in addressing this problem, shed some light on the meaning of *National League of Cities.* The use of tradition is not an end in itself according to the Court, but rather simply a means of determining "whether the federal regulation affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union."[60] In other words, tradition is important because it may serve as evidence that an activity is or is not essential to

52. *Id.* at 288.

53. 455 U.S. 678 (1982).

54. 456 U.S. 742 (1982).

55. 45 U.S.C. § 151 (1982).

56. 455 U.S. at 690.

57. *Id.* at 685.

58. The "common school," *i.e.,* a school funded and controlled by government authorities, was primarily a product of the nineteenth century. *See* S. GOLDSTEIN & E. GEE, LAW AND PUBLIC EDUCATION 6 (1980).

59. *See* L. TRIBE, *supra* note 1, at 308-13.

60. 455 U.S. at 686-87. The Court employs the "tradition" test to prevent states from eroding valid federal authority simply "by acquiring functions previously performed by the private sector" and thereby protecting them under the tenth amendment. *Id.* at 687. This is certainly a valid point, although the Court's analysis is limited by the statement that it fears the erosion of federal authority in "areas traditionally subject to federal statutory regulation." *Id.* Concepts of what is properly a federal interest have changed even more rapidly than concepts of "traditional" state functions. The Court would have been more accurate, and certainly more in keeping with the supremacy clause, had it stated that states should not, simply by acquiring functions, be able to erode federal authority in areas "properly" subject to federal statutory regulation.

the existence of a state. While the fact that one type of governmental activity is traditional cannot, by itself, establish that it is essential to a state's existence, the fact that most states throughout history have not engaged in such activity would seem to be conclusive proof that such activity cannot be part of the essence of state power.

Seen in this light, both the outcome and rationale of *United Transportation Union* seem clearly correct. Thus, while state activity that is not traditional cannot be essential and entitled to tenth amendment protection, *United Transportation Union* by no means requires the conclusion that state activity that is traditional is necessarily essential and protected. *United Transportation Union* goes a long way toward clearly identifying what is not part of state sovereignty. Unfortunately, it does little to clarify what is included in that concept.

Much the same can be said of the Court's opinion in *FERC,* the second 1982 tenth amendment case. In that case, the State of Mississippi claimed that the Public Utility Regulatory Policies Act of 1978 (PURPA)[61] infringed upon state sovereignty in violation of the tenth amendment.[62] PURPA required state agencies to consider certain energy conservation standards and to enforce certain federal rules in this regard.[63] Mississippi alleged that PURPA clearly regulated the states directly "as states," and limited their ability to act freely in the most traditional and essential of all state roles: the determination of state policy.[64] Despite the strong dissents of four Justices,[65] the Court upheld PURPA. The *FERC* court reasoned that requiring states to consider standards did not infringe upon the states' "power to make decisions and set policy [which] gives the State its sovereign nature" because that requirement only forced the states to consider, but not adopt, policy.[66]

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61. 16 U.S.C. §§ 2601-2645 (1982).

62. 456 U.S. at 752.

63. The Public Utility Regulatory Policies Act (PURPA) was enacted to further the goals of energy conservation, efficient use of energy resources, and equitable rates for energy consumers. 16 U.S.C. § 2611 (1982). The highlights of the legislative history of PURPA are reprinted in 1978 U.S. CODE CONG. & AD. NEWS 7659. The Act requires that state utility regulatory authorities consider the use of six specified approaches to structuring utility rates, 16 U.S.C. § 2621(a), (d) (1982); consider adoption of a set of standards which would govern the terms on which electricity is provided to consumers, *id.* § 2623; and consider promulgation of lower rates for essential service to residential consumers, *id.* § 2624. PURPA sets forth procedures to be used by authorities in considering these matters. *Id.* §§ 2621(b), (c), 2623(a), (c). Basically, the statute calls for public notice and hearings, and written determinations by the regulatory body that are available to the public. *Id.* § 2621(b)(1). Furthermore, PURPA directs the Federal Energy Regulatory Commission to promulgate rules to encourage cogeneration and establishment of small power production facilities. *Id.* § 824a-3. State regulatory agencies are required to implement and enforce these federal rules. *Id.* § 824a-3(f).

64. 456 U.S. at 752-54.

65. Justice Powell filed a separate opinion concurring in part and dissenting in part. *Id.* at 771 (Powell, J., dissenting). Additionally, Justice O'Connor filed a separate opinion concurring in part and dissenting in part in which Chief Justice Burger and Justice Rehnquist joined. *Id.* at 775 (O'Connor, J., dissenting).

66. *Id.* at 761.

Moreover, the Court reasoned that requiring a state agency to enforce otherwise valid federal rules was no more intrusive on state sovereignty than requiring state courts to respect federal law and adjudicate claims arising under federal statutes.[67] According to the Court, Congress clearly has the authority to pre-empt the states in the field of energy conservation by both providing for federal rulemaking and federal enforcement of those rules.[68] Such pre-emption would obviously impair the states' freedom to act in the field. Thus, the Court reasoned that the less intrusive alternative of providing for state involvement in the enforcement of federal rules cannot be constitutionally invalid.[69] Although this reasoning seems quite logical, *FERC* may be the most troubling decision for anyone who believes that *National League of Cities* creates an area of state sovereignty which is absolutely immune from federal interference. If the processes of rulemaking and enforcement are not an essential state function, what is?

In light of the Court's actions in its 1981 and 1982 tenth amendment decisions, the resolution of two tenth amendment disputes against state claims in 1983 was hardly surprising. In *Jefferson County Pharmaceutical Association v. Abbott Laboratories,*[70] the Court held that the Robinson-Patman Act[71] could be applied to state and local governmental hospitals when their activities were proprietary and in competition with private business.[72] This is clearly consistent with *United Transportation Union,* inasmuch as proprietary state activities are obviously not traditional, and an activity which is not traditional cannot be an essential part of the states' function protected by the tenth amendment.

Similarly, in *EEOC v. Wyoming*[73] the Court held that the Age Discrimination in Employment Act of 1967[74] could be applied to states and local governments as employers. In *EEOC,* preventing a state from discharging older workers, where age was not a bona fide occupational qualification, was found not to "directly impair" the ability of the state to carry out its function.[75] While this decision seems clearly consistent with post-*National League of Cities* precedent, it is not at all clear that it can be reconciled with *National League of Cities.* If a state is free from federal interference to set wages and maximum hours of state employees, why may a state not also decide policy with respect to mandatory retirement ages without federal interference?

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67. *Id.* at 760-61.

68. *Id.* at 765.

69. *Id.*

70. 103 S. Ct. 1011 (1983).

71. 15 U.S.C. § 13 (1982). The Act prohibits price discrimination by sellers of goods. *Id.*

72. 103 S. Ct. at 1014. It has been clear for many years that a state loses its character as a sovereign, immune from federal interference, when it enters a market as a participant in competition with federally regulated private business. *See, e.g.,* New York v. United States, 326 U.S. 572 (1946) (state that sold bottled mineral waters taken from a state-owned spring was not immune from non-discriminatory federal excise tax on soft drinks).

73. 460 U.S. 226, 243 (1983).

74. 29 U.S.C. §§ 621-634 (1982).

75. 460 U.S. at 238-39.

Justice Blackmun was joined by the four *National League of Cities* dissenters to form the majority in *EEOC*.[76] In his concurrence in *National League of Cities,* Justice Blackmun stated that although there was an area of activity properly thought of as "state sovereignty," such activity was not absolutely immune from federal regulation.[77] Rather, to determine if such activity was immune, a balancing of the state and federal interests was called for.[78] While in *National League of Cities* Justice Blackmun struck that balance in favor of the states,[79] in *EEOC* the federal interest in combatting age discrimination prevailed.[80] It is a very short step from Justice Blackmun's balancing test to the pre-*National League of Cities* position that any otherwise valid federal act will not be invalidated by the tenth amendment. A balancing test may inevitably be resolved in favor of the federal interest, and indeed, that may be entirely proper. Nevertheless, courts seem to be in no better position than Congress to determine whether a federal interest is sufficiently strong to justify intrusion on state prerogatives. Thus, deference to congressional judgment would seem entirely proper.[81]

This series of Supreme Court decisions, consistently rejecting post-*National League of Cities* tenth amendment claims, has resulted in a great deal of confusion regarding the significance of *National League of Cities.*[82] Although it would be clearly incorrect to characterize *EEOC* as overruling *National League of Cities,*[83] it is now entirely possible to consider *National League*

76. *See The Supreme Court, 1982 Term,* 97 HARV. L. REV. 70, 202-03 (1983). Justice O'Connor was among the dissenters in *EEOC*. She had replaced Justice Stewart, who was a member of the *National League of Cities* majority. *Id.* at 306.

77. 426 U.S. at 856 (Blackmun, J., concurring).

78. *Id.* (Blackmun, J., concurring).

79. *Id.* (Blackmun, J., concurring).

80. The *EEOC* court held that the states, while having the right to assure that their workers were fit for their jobs, had no interest in regulating the age of workers per se. The court further noted that because states could dismiss older workers when age actually impaired job performance, the states' interests were not being impaired in any significant way. 460 U.S. at 239.

81. Justice Stevens stressed that the merits of the legislation in question were not at issue, and that "the judicial task" did not include overriding legislative judgments. *Id.* at 250-51 (Stevens, J., concurring). A balancing test, however, does result in courts second-guessing legislative judgments, as did the district court in *Hodel, see supra* note 49.

82. This confusion is evident from the conflicting interpretations given to the *National League of Cities* case by federal courts addressing tenth amendment claims. Some courts have reconciled *National League of Cities* with the decisions that followed it, finding that the later decisions clarify *National League of Cities* to narrow the scope of the tenth amendment exemption. *See* Johnson v. Mayor of Baltimore, 731 F.2d 209, 214-15, 215 n.19 (4th Cir. 1984) (*EEOC* may be distinguished from, but does not overrule *National League of Cities*); United States v. Onslow County Bd. of Educ., 728 F.2d 628, 638-39 (4th Cir. 1984) (decisions following *National League of Cities* narrow the scope of the tenth amendment exemption); Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1471 (9th Cir. 1983) (*EEOC* clarifies *National League of Cities*). Other courts have found *National League of Cities* irreconcilable with later decisions. *See* Johnson Controls, Inc. v. City of Cedar Rapids, Iowa, 713 F.2d 370, 378 (8th Cir. 1983) (*EEOC* overrules *National League of Cities*).

83. *See* Johnson v. Mayor of Baltimore, 731 F.2d 209 (4th Cir. 1984); United States v. Onslow County Bd. of Educ., 728 F.2d 628 (4th Cir. 1984); Bonnette v. California Health

of Cities to have been little more than an aberration which will have minimal significance in checking the expanding power of the federal government.[84]

The impulse to dismiss *National League of Cities* as unimportant, however, is just as unwise as the impulse to exaggerate its significance. *National League of Cities* still stands for the proposition that there is something called "state sovereignty" which is protected from federal interference by the tenth amendment. The Supreme Court, by its own admission, has failed to reliably define the boundaries of state sovereignty. In *EEOC,* the Court stated: "Precisely what it meant by an 'undoubted attribute of state sovereignty' is somewhat unclear, however, and our subsequent cases . . . have had little occasion to amplify on our understanding of the concept."[85] Discovering the boundaries of state sovereignty is essential if the tenth amendment is to be treated as an effective limitation on federal power.

II. State Sovereignty: Identifying the Core

In beginning an analysis of the scope of state sovereignty, it is useful to recall that for most of American history, the more common term used to designate these prerogatives has been "states' rights."[86] Although that term seems to have fallen into disuse (perhaps discredited by its longtime association with racial segregation), it conveys the message that the tenth amendment confers rights upon states just as the rest of the Bill of Rights confers rights upon individuals.

The word "right" can, of course, be used in at least two different ways. On the one hand, it can be used in the weak sense of the word, to describe an entitlement conferred by positive law (statutory or decisional) that can be eliminated by changing the law through normal procedures.[87] Examples of such rights would include the right to receive a certain level of unemployment compensation[88] or the right to specific performance of a contract.[89] On the other hand, the word "right" can be used in the strong sense of the word, to describe an entitlement that does not depend on statutes or

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& Welfare Agency, 704 F.2d 1465 (9th Cir. 1983). Justice Stevens, in his concurring opinion in *EEOC,* called for a clear decision overruling *National League of Cities,* which he described as a "modern embodiment of the Articles of Confederation." 460 U.S. at 250 (Stevens, J., concurring).

84. *See, e.g.,* Schwartz, *supra* note 7, at 339.

85. 460 U.S. at 238 n.11.

86. *See, e.g.,* Cowen, *Some Additional Thoughts on "States' Rights,"* 39 St. John's L. Rev. 288, 285 (1964-65) (outlining the traditional approach to states' rights); The Fort Hill Address of John C. Calhoun (July 26, 1831), *reprinted in* Virginia Commission on Constitutional Government, We the States 277 (1964) (discussing the relationship between state and federal government, strongly supporting state sovereignty).

87. This kind of "right" has existed as long as there has been law and some moral sense of duty to obey that law. *See* Pennock, *Rights, National Rights and Human Rights—A General View,* in Human Rights 1 (Nomos XXIII, 1981).

88. *See* Okin, *Liberty and Welfare: Some Issues in Human Rights Theory,* in Human Rights 231 (Nomos XXIII, 1981).

89. *See* Pennock, *supra* note 87, at 2.

judicial holdings, and that can be taken away either not at all or only through extraordinary procedures.[90] The word is commonly used in this latter sense when speaking of the rights conferred upon individuals by the Constitution.[91] Moreover, when advocates of states' rights use the word, they also seem to be speaking of a strong right: one that cannot be taken away by simple majoritarian procedures.

In a nation committed to democratic governmental processes, it is certainly valid to ask why there should be any rights that can be asserted against the will of the majority or its representatives. Claims to such rights are invariably based on the premise that certain freedoms or entitlements are essential to human existence.[92] Rights are things possessed by human beings because of their humanity.[93] Although debate continues on the question of what entitlements should properly be recognized as rights, both advocates and opponents of the recognition of particular entitlements as rights focus on whether the claimed right is fundamental to the welfare of the individual.[94]

Given this basis for the recognition of rights, the question must be asked whether, and under what circumstances, a state (or any governmental body) can claim to possess a right. A state is not a human being, but rather an entity created by human beings. If rights are based in their possessors' humanity, then it follows that a state, or any other non-human entity, cannot have rights. Nevertheless, states are by no means irrelevant in a discussion of rights. As a center of legitimate power in society, the state has the

90. The existence of this type of right has not been universally recognized. Many thinkers have subordinated any human rights to the general good of the community, and have concluded that the duty to obey laws enacted in the public interest is of primary importance in political philosophy. An extreme statement of this position was set forth by F.H. Bradley: "The rights of the individual today are not worth serious criticism. . . . The welfare of the community is the end and is the ultimate standard. And over its members the right of its moral organism is absolute." *Id.* at 4. But most late twentieth century discussion of "rights" does appear to accept the existence of this strong type of right. Probably the most widely quoted recent definition of this type of right was given by Ronald Dworkin: "If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so." R. DWORKIN, TAKING RIGHTS SERIOUSLY 269 (1978).

91. R. DWORKIN, *supra* note 90, at 190.

92. *See* Pollis & Schwab, *Human Rights: A Western Construct with Limited Applicability,* in HUMAN RIGHTS CULTURAL AND IDEOLOGICAL PERSPECTIVES 2 (1979). As the title of the article indicates, the authors point out that the question of the existence of individual rights as against a group can be, and frequently is, answered in the negative in some cultures. *Id.* at 13-14. *But see* The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948) (individual rights are to be limited only for the purpose of securing recognition of the rights and freedoms of others and meeting the requirements of public morality, order, and the general welfare). In international forums, in a century which has experienced Naziism and other atrocities, nations seem to feel compelled to at least pay lip service to the primacy of human rights. Pollis & Schwab, *supra,* at 7.

93. *See* Okin, *supra* note 88, at 182.

94. See the various viewpoints collected in Pennock, *supra* note 87. Susan Okin adopts this position in asserting that welfare rights constitute human rights: "[C]ertain rights are human rights and should be recognized as such, because human beings have fundamental needs and capacities that make certain goods and freedoms essential to their continued existence as human beings." Okin, *supra* note 88, at 231.

potential to act either as the most serious threat to human rights, or as the institution most effective in securing and protecting the human rights of its citizens. Given the existence of powerful forces, governmental or otherwise, which threaten the existence of the rights of a relatively weak individual, the existence of some institutions to assist in the preservation of the individual's rights becomes essential.

Thus, states may be seen to have rights not as ends in themselves, but as means to protect the rights of their people. Nevertheless, in light of the obvious dangers inherent in giving a state a right that can be asserted against the wishes of a popular majority, such rights should be recognized only in very limited circumstances. When the right of the state is necessary to preserve the rights of its people, the state's right should receive no less protection than the underlying individual rights. When the right of the state, however, is not necessary to preserve individual rights, the justification for allowing the state to frustrate majoritarianism disappears.

The derivative nature of states' rights, or state sovereignty, has long been noted.[95] It serves as the starting point for Professor Tribe's attempt to use *National League of Cities* as a basis for recognizing the affirmative right of citizens to essential governmental services. Professor Tribe proposes that if states have the right to be free of federal interference in providing services, it must be because citizens of those states are entitled to those services in the first place.[96] The ultimate beneficiaries of a right must be people. Yet, as Professor Tribe notes, current constitutional doctrine does not recognize individual rights to government services.[97] Professor Tribe further notes that the Justices comprising the *National League of Cities* majority almost certainly did not intend that opinion to serve as a basis for such rights.[98]

Moreover, recognizing affirmative rights of individuals to certain governmental services would not necessarily lead to the need for state sovereignty in the provision of those services. Such services, it seems, may be provided by any level of government and still satisfy the individual's right to them. Even if somehow the principle of subsidiarity[99] should be read into the Constitution, the proposition does not necessarily follow that functions traditionally performed by states are those which states are most capable of "properly" performing. Federal involvement in some areas traditionally within state control was a result of perceived inadequacies of exclusive local sovereignty.[100] Moreover, one can easily imagine a situation in which the

95. *See, e.g.*, Cowen, *supra* note 86, at 297-98.

96. Tribe, *supra* note 5, at 1090.

97. *Id.* at 1066.

98. *Id.*

99. The principle of subsidiarity requires that government functions be carried out by the smallest unit capable of properly performing them. The term is most often found in Catholic social thought. *See, e.g.*, C. CURRAN, AMERICAN CATHOLIC SOCIAL ETHICS 35 (1982).

100. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1176-77 (1977) [hereinafter cited as *Developments in the Law*].

federal government might have to override state sovereignty in order to assure the satisfaction of a citizen's affirmative right to essential services, when a state is reluctant to do so. Thus, the recognition of a citizen's affirmative right to essential services can just as easily be seen as requiring the abrogation of state sovereignty as its recognition. Therefore, regardless of the merits of the contention that citizens possess such affirmative rights, such rights lend little to understanding the scope of state sovereignty protected by the tenth amendment. We are then confronted with the question of whether there are any rights belonging to the people which depend upon the existence and unfettered functioning of the states. If there are none, then the existence of any state sovereignty which is free from federal interference becomes highly suspect.

The individual rights enumerated in the Bill of Rights are the most obvious source of constitutional protection of the people. The existence of the Bill of Rights is largely due to the objections raised by those who opposed ratification of the Constitution.[101] These opponents of the Constitution can be seen as the earliest, and in some ways the most important, advocates of states' rights, because they opposed the new form of government as an undue centralization of power. Although their arguments were framed in terms of the sovereignty or rights of the states themselves,[102] their position "rested on the belief that there was an inherent connection between the states and the preservation of individual liberty."[103] History had shown that small units of government were essential to the preservation of individuals' rights.[104] Thus, from its earliest manifestation, a states' rights position has depended on its relation to individual rights.

Regardless of the lessons of pre-Revolutionary War history, subsequent events have made it clear that the individual rights enumerated in the Bill

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101. *See* Storing, *What the Anti-Federalists Were For,* in 1 THE COMPLETE ANTI-FEDERALIST 64-70 (H. Storing ed. 1981).

102. The most famous example is probably the peroration of Patrick Henry:

> "Sir, give me leave to demand, what right had they [the framers] to say, *We, the People.* My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask who authorised [sic] them to speak the language of, *We, the People,* instead of *We, the States?* States are the characteristics, and the soul of a confederation."

Speech by Patrick Henry in the Virginia State Ratifying Convention (June 4, 1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 211 (H. Storing ed. 1981) (emphasis in original).

103. Storing, *supra* note 101, at 15.

104. Opponents of the Constitution frequently argued that the size of the government was directly related to the loss of liberty. *See, e.g.,* Letter from Robert Yates & John Lansing to Governor Clinton (Dec. 21, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 16-17 (H. Storing ed. 1981) ("a general government . . . must unavoidably . . . be productive of the destruction of the civil liberty of such citizens . . . by reason of the extensive territory of the United States"); Letter, The Federal Farmer (Oct. 8, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 230 (H. Storing ed. 1981) (citing "the opinions of many great authors, that a free elective government cannot be extended over large territories"). The pseudonymous Federal Farmer, one of the most prominent Anti-Federalist pamphleteers, is thought by many to have been Richard Henry Lee. *Id.* at 215.

of Rights clearly do not require the existence or unfettered functioning of the states. Notably, the use of the concept of state sovereignty in defense of slavery, the ultimate negation of individual rights, provoked the most severe constitutional crisis in American history.[105] Federal military power was necessary to assure the primacy of individual rights in the nineteenth century, and constitutional law subsequent to the ratification of the fourteenth amendment has largely consisted of federal judicial intervention to promote individual rights against state violations of those rights.[106] Thus, history since 1787 indicates that states have often acted to impede, rather than promote, these rights.

Not only have federal courts acted to protect individual rights against state violations of those rights, but federal legislation to protect such rights has been enacted pursuant to the fourteenth amendment.[107] Courts have consistently held that federal legislation to secure individual rights passed pursuant to Congress' power under the fourteenth amendment cannot be defeated by a state claim of sovereignty under the tenth amendment.[108] Just as state sovereignty is not essential to the recognition of affirmative rights of citizens to government services, such sovereignty seems clearly not essential to the preservation of the enumerated individual liberties of the Bill of Rights. In

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105. *See Developments in the Law, supra* note 100, at 1141-42.

106. Courts have acted in both the substantive and procedural contexts to protect individual claims to basic governmental services. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (state's one-year residency requirement for receipt of free non-emergency medical care by indigents declared unconstitutional); Fuentes v. Shevin, 407 U.S. 67 (1972) (state replevin statute that permitted replevin without prior hearing declared unconstitutional); Goldberg v. Kelly, 397 U.S. 254 (1970) (the fourteenth amendment requires an adequate evidentiary hearing prior to termination of state aid to welfare recipients); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (state garnishment procedures permitting a creditor to seize debtor's wages without notice or hearing declared unconstitutional); Shapiro v. Thompson, 394 U.S. 618 (1969) (state's one-year residency requirement for receipt of welfare assistance declared unconstitutional).

107. Most of these statutes have been enacted in the last 20 years, beginning with the Civil Rights Act of 1964, 42 U.S.C. §§ 1971 to 2000h-6 (1982). Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), prohibits discrimination in employment on the basis of race, color, sex, religion, or national origin. *Id.* § 2000e-2(a)(1). The Civil Rights Act was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(a) (1982)), pursuant to the equal protection clause of the fourteenth amendment, to extend Title VII coverage to state and local governmental employees. This exercise of congressional authority has been upheld. *See* Norris v. Arizona Governing Comm. for Tax Deferred Annuity, 671 F.2d 330 (9th Cir. 1982), *aff'd in part, rev'd on other grounds,* 103 S. Ct. 3492 (1983); United States v. Virginia, 620 F.2d 1018 (4th Cir.), *cert. denied,* 449 U.S. 1021 (1980); *see also* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (the fourteenth amendment basis of Title VII limits the extent to which a state may be insulated from monetary liability). The tenth amendment challenge has also been raised with respect to the Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1974e (1982). The Voting Rights Act, which was enacted pursuant to the equal protection clause of the fourteenth amendment to prohibit the abridgement of the right to vote on the basis of race or color, *id.* § 1973, has similarly been upheld against tenth amendment challenge. *See* United States v. Garcia, 719 F.2d 99 (5th Cir. 1983); United States v. Louisiana, 265 F. Supp. 703 (E.D. La. 1966), *aff'd,* 386 U.S. 270 (1967).

108. *See infra* notes 153, 167 and accompanying text.

fact, state sovereignty may well be positively dangerous to those rights. Again, we have failed to establish the necessity of state sovereignty to protect individual rights.

The rights enumerated in the Bill of Rights are not a complete list of the rights of the individual in the constitutional system. This is explicitly noted in the ninth amendment.[109] Moreover, the Supreme Court has recognized a number of rights which are not explicitly set forth in the first eight amendments.[110] Although the particular rationale for the existence of such rights has been stated in different ways, the rights are usually found to be implicit in the overall structure of government which was established by the Constitution.[111]

Arguments continue to rage about whether certain rights not enumerated in the first eight amendments should be recognized as implicitly called for by the Constitution.[112] Nevertheless, it would seem relatively uncontroversial to state that the Constitution confers, as a fundamental right, the right of the citizen to participate in the processes of government.[113] This participation is most directly seen in acts of the individual such as voting,[114] participating in election campaigns,[115] and petitioning the government.[116] But it does not end there. In a republic, individuals participate in government through their representatives. Thus, if properly elected representatives are frustrated in their attempts to rightfully participate in the lawmaking process, the rights of their constituents would ultimately be violated. Here, for the

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109. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

110. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy); NAACP v. Alabama, 357 U.S. 449 (1958) (freedom of association).

111. In NAACP v. Alabama, 357 U.S. 449 (1958), for example, the Court noted that the right to speak effectively in the political process may require the right to associate with others who share the speaker's beliefs, and further, that the right to associate may in some instances require privacy in group association. Thus the right to associate, while not specifically set forth in the Bill of Rights, is justified by its close link to enumerated first amendment freedoms. 357 U.S. at 460-62. In Roe v. Wade, 410 U.S. 113 (1973), the Court recognized a right of privacy as a part of the guarantee of due process under the fourteenth amendment, founded in the concept of personal liberty and restrictions upon state action. 410 U.S. at 153. At least some would classify *Roe v. Wade* as a modern affirmation of "substantive due process." *Id.* at 167-68 (Stewart, J., concurring). *But see* Doe v. Bolten, 410 U.S. 179, 212 n.4 (1973) (Douglas, J., concurring) (stating that *Roe v. Wade* had nothing to do with substantive due process).

112. *Compare* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (arguing that there are unenumerated rights that should be recognized) *with* Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972) (arguing that only enumerated rights should be recognized).

113. *See, e.g.*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (provision limiting eligible voters in school district elections to property owners and parents of children in public schools found unconstitutional); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (striking down Virginia poll tax).

114. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

115. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976).

116. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963).

first time in this analysis, a situation becomes apparent in which the right of an individual must be accompanied by the right of a governmental institution. State legislatures must have the right to express the views of their citizens. If they do not, the right of the citizen to participation in the political process is lost.

Importantly, however, the right to participate in political decision-making does not include the right to prevail on any particular issue.[117] By substituting the right to prevail over a decision duly made by Congress for the right to participate in the making of that decision, nineteenth century states' rights advocates distorted the proper scope of state sovereignty.[118] State legislatures have the right to prevail only on those issues outside the proper scope of federal concern. Moreover, history has shown that those issues are very few.[119] In this sense, the pre-*National League of Cities* view of the tenth amendment as a "mere truism"[120] is correct. This view in no way interferes with the citizen's right to participate in the political process through his or her representatives. In fact, to refuse to permit federal supremacy in all areas of proper federal concern would itself interfere with that right.

In a federal republic, the citizen's right of participation in the political process depends not only on the effectiveness of the citizen's state legislature, but also on the effectiveness of the national legislature. The national legislature can act to protect the rights of citizens in several ways. The national legislature can implement the people's will through the enactment of federal legislation. Additionally, if people are concerned that a proposed course of action by the federal government would be improper, the national legislature is the first check on the federal government's power. Through their representatives in Congress, the people can prevent the enactment of unwise or improper legislation.

Finally, and most importantly in this analysis, the state legislatures and both houses of Congress share a power which is essential to preserving the fundamental rights of the citizen: the power to amend the Constitution.[121] This power can be seen as a way of institutionalizing what was recognized by the framers of the Constitution to be an extremely important right, namely, the right of the people to re-make their government, or, put more simply, the right of revolution.

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117. Mobile v. Bolden, 446 U.S. 55, 65 (1980) ("The Fifteenth Amendment does not entail the right to have Negro candidates elected.").

118. *See supra* notes 13-15 and accompanying text.

119. *See infra* notes 172-77 and accompanying text; *see also* Coyle v. Smith, 221 U.S. 559 (1911) (pre-dating *National League of Cities,* holding that a state has a right to determine its own seat of government).

120. *See supra* note 7 and accompanying text.

121. The provisions for amending the Constitution are set forth in article V. An amendment is proposed in either of two ways. An amendment is proposed when two-thirds of each House of Congress deems it necessary, or when two-thirds of the States call a convention for the purpose of proposing an amendment. A proposed amendment is valid when ratified by three-fourths of the state conventions. U.S. CONST. art. V.

Central to the Constitution, and to the political philosophy of those who drafted it, is the proposition that government derives its legitimacy from the consent of the governed.[122] A necessary corollary to that principle is that such consent may be withdrawn, and that where government has abused its power, the people have the right to revolt to change that government.[123] There is strong evidence that the framers saw this right of revolution not as merely an abstract principle of philosophy or natural law, but rather as a firmly recognized part of the unwritten law of England.[124] There can be no doubt that, by their actions, the framers demonstrated their belief in this right.[125] Thus, it would seem to follow that this right to change a form of government which had become oppressive would become a recognized part of the legacy of rights conferred upon citizens by the new nation.

Just as British rule was abused, thus leading to the need for change,[126] certainly the supporters of the new Constitution must have realized that the new federal government could abuse its power, and in so doing infringe the rights of individuals.[127] To prevent such abuse, the people would have to retain the right to change the form of government and the distribution of power in American society, either in part or entirely. While the right of violent revolution might be necessary in extreme cases, it would obviously be preferable to establish a political mechanism for changes in the nation's fundamental law. By providing a mechanism for amending the Constitution in article V, the framers did just that.[128] Article V creates a peaceful process for the exercise of the right of revolution.[129] Should the federal government usurp legislative powers never intended to be given to it, the amendment process may be used to correct that imbalance.

Successful revolutions are rare, and that is probably all to the good: "Governments long established should not be changed for light and tran-

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122. *See* The Declaration of Independence para. 2 (U.S. 1776): "Governments are instituted among Men, deriving their just powers from the consent of the governed. . . ."

123. "[W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it. . . ." *Id.*

124. *See* Reid, *The Irrelevance of the Declaration*, in LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW 70-89 (H. Hartog ed. 1981).
ed. 1981).

125. "The late rebellion in Massachusetts has given more alarm than I think it should have done. . . . No country should be so long without one." Letter from Thomas Jefferson to John Madison (Dec. 20, 1787), *reprinted in* VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, WE THE STATES 234 (1964).

126. *See supra* note 11.

127. *See generally* VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, WE THE STATES (1964) (the framers of the Constitution, after being newly freed from the tyrannies of the British Crown would not permit tyranny of domestic origin; thus, certain powers not delegated to the federal government were retained by the states and ultimately by individuals).

128. U.S. CONST. art. V.

129. *See, e.g.*, The Fort Hill Address of John C. Calhoun, (July 26, 1831), *reprinted in* VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, WE THE STATES 293-95 (1964) (Calhoun characterizes the article V provisions for amending the Constitution as a substitute for the use of force to bring about changes in government).

sient causes."[130] Successful revolutions are, and probably should be, difficult. Thus, the amendment process is intentionally cumbersome, permitting success only when the proponents of change in the fundamental structure of government demonstrate a clear consensus in favor of such change.[131] On the other hand, since the right to seek "revolution" through the amendment process is now legitimatized, the cost of launching a legal "revolution" and failing is much lower than the cost of seeking change through illegal means. The right of revolution, the right to seek change, is thus incorporated into the Constitution. The right to succeed in such a revolution depends upon the successful use of democratic processes, rather than force.

The states are essential to the amendment process in at least two broad respects. First, in keeping with the principle that fundamental changes in society's distribution of power should occur only when there is a clear call for such change by the people, the amendment process calls for the agreement of a super-majority of Congress,[132] and for something approaching a consensus of the state legislatures.[133] Thus, article V attempts to insure that opposition from any significant minority will prevail. Second, the use of the states as vehicles for ratification would assure that proposed governmental changes were supported not only by overall national majorities, but also by majorities within various regions, interest groups, and cultures that states represent.

When article V was drafted, the states clearly differed in economic interest, religion, and culture.[134] The use of the states in the ratification process, along with the principle of equal representation of each state in the Senate, would protect the views of the people from being buried in a nationwide majority of contrary positions by representing majorities within their own cultural and political groups.[135] Use of the states was an effective and convenient way of assuring respect not only for the view of the overall majority of

130. The Declaration of Independence para. 2 (U.S. 1776).

131. The requirement of a two-thirds vote of each House of Congress, and ratification by three-fourths of the states, has resulted in a total of only 26 amendments. There are, however, only 25 amendments currently in force since the eighteenth amendment was rescinded by the twenty-first amendment. *See* U.S. CONST. amends. I-XXVI. The first 10 amendments, incorporated almost immediately upon ratification, are hardly "amendments" in that they simply clarify understandings held by all of individual rights at the time of the Revolution. *See, e.g.*, Ratification of the Constitution by the State of Virginia (June 27, 1788), *reprinted in* VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, WE THE STATES 70-75 (1964). Since 1791, there have been only 16 amendments. U.S. CONST. amends. XI-XXVI.

132. The agreement of two-thirds of "both houses" of Congress is required. U.S. CONST. art. V. "Both houses" is, by modern usage, grammatically incorrect; it means, and is read to mean, "each house."

133. The agreement of three-fourths of the state legislatures is required. U.S. CONST. art. V.

134. *See* W. BENNETT, *supra* note 11, at 127-39; THE COMMISSION ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT 11-13 (1978).

135. *See* W. BENNETT, *supra* note 11, at 127-39.

the people, but also of concurrent majorities of significant political sub-groups.[136]

To some extent, of course, this situation has changed. The differences among people of various states have declined; the diversity of people within individual states has increased.[137] Nevertheless, differences in political interests and cultural preferences among state populations have not disappeared entirely. Regardless of whether or not the states are currently the most accurate and reliable intermediaries for registering the political views of not only the overall majority but also majorities of relevant constituent groups, they are the only such intermediaries legitimatized by the Constitution. The use of any other type of group (based on racial, religious or class distinctions), while possibly better at indicating the presence or absence of true consensus in society on an issue, would seriously offend basic constitutional principles calling for equality and a basic bias toward majoritarianism in government processes.[138] In short, the states are essential to the structure established by the Constitution that allows the people to effectively participate in the process of constitutional change, a process which is the peaceful equivalent of the right of revolution recognized by the framers.

In addition to their role in the process of constitutional change itself, the states are essential as potential sovereigns in the event that the amendment process ever results in the ultimate amendment: disbanding the union, in whole or in part. While such a move to totally rework the constitutional distribution of power is unlikely to occur, the potential power of the states to resume their brief roles as sovereign entities does serve as a weapon, which could be used in the event of profound public dissatisfaction with the current federal distribution of power. The ability to pursue an amendment permitting secession or dissolution of the union through legal means has certainly been of more than mere academic interest in recent years in Canada.[139] Such potential power can give states leverage to insist on actual reforms. Again, what is needed is a state government that accurately reflects the views of its people, and a state government that could, if necessary, resume full sovereign functions.

Having seen that the sole justification for the recognition of state sovereignty is that it is essential to the preservation of some right of the individual, we have now isolated an instance in which state sovereignty is necessary. Unlike the individual rights enumerated in the first eight amendments, and unlike any right of a citizen to receive governmental services (neither of which require a federal system for their protection),[140] the right to engage in a peaceful constitutional revolution through the amendment

136. *See id.*

137. *See* THE COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 134, at 13.

138. It is clear that "economic or other sorts of group interests" are not "permissible factors in attempting to justify disparities from population-based representation." Reynolds v. Sims, 377 U.S 533, 579-80 (1964).

139. *See* P. KING, *supra* note 10, at 86.

140. *See supra* text accompanying notes 95-106.

process does require the existence of state and national legislators who have the power to voice the views of their people on constitutional matters. Despite the fact that states traditionally perform numerous functions and provide many services to their people, the vast majority of these are not "essential" to the character of the state.[141] They may be limited, or even taken away, without making the state impotent in its truly essential role in the constitutional structure: to serve as a vehicle for the people's right to change that structure, and, if they choose, to limit federal power.

The scope of this essential role is narrow, but important. In order to exercise its proper function, a state must continue to exist as a recognized political entity; it must retain the right to send to Congress representatives and senators who will accurately reflect the views of a majority of its citizens, both on proposed constitutional amendments and other legislative matters, and it must retain the right to select and maintain a legislature that will accurately reflect the view of a majority of its citizens when constitutional change is sought.

With this as the core of state sovereignty, the scope of the tenth amendment follows naturally. When a federal action is challenged as violative of state sovereignty under the tenth amendment, the test should be whether that action threatens the state's role as representative of its people in registering their agreement or disagreement with the current constitutional distribution of power. If it does, the tenth amendment should stand as an absolute bar to that federal action. Once again, the fact that the state has the right only to participate in the amendment process, and not necessarily to have its view prevail, must be stressed. Thus, if the challenged federal action in no way impairs the ability of the people, acting through the states, to remedy constitutional imperfections in the federal system (through the amendment process and through participation in federal legislative decisions), the essential role of the state is not being impaired, and the tenth amendment has not been violated.

III. Application of the Proposed Definition of the Scope of State Sovereignty

The rule proposed here is that the state sovereignty protected by the tenth amendment consists of the ability of the state to accurately and effectively represent the view of its citizens in the resolution of constitutional issues through the structures established by the Constitution for national legislation and constitutional amendment. This proposed rule is significantly different from either of the two principal positions on the meaning of the tenth amendment which have been put forth in American history. Unlike the dual federalism position,[142] it does not contend that the tenth amendment creates certain areas of governmental regulation in which the states may act, free of federal intervention. Yet, unlike the dominant constitutional doctrine over

141. *See id.*
142. *See supra* note 16 and accompanying text.

the forty year period preceeding *National League of Cities*,[143] it does not dismiss the tenth amendment as a largely meaningless truism.

Recognition of the role of the states as vehicles for the protection of their citizens' right to influence and participate in changing the structures of the national government would require new ways of thinking about tenth amendment questions. Nevertheless, this proposed rule is quite consistent with much current constitutional doctrine, and would require outright rejection of few existing precedents. The proposed definition of the scope of state sovereignty should be examined against the background of other constitutional provisions and current tenth amendment caselaw to determine its impact. Finally, consideration must be given to the impact of the proposed definition on future tenth amendment questions.

A. Other Constitutional Provisions

The proposed rule is based upon the role of the states in the overall constitutional structure and that structure's allocation of decision-making powers. Thus, the rule must be tested to determine how comfortably it would fit into that overall structure. An examination of the Constitution as a whole supports the contention that there is an essential state role in the overall structure of government. That role, however, is limited to serving as a vehicle for the participation of the state's citizens in the national political processes of legislation and constitutional amendment. In contrast to the complete absence of guidance in the text of the tenth amendment as to just what rights are reserved to the states, other constitutional provisions are very explicit in protecting the continued existence of the states. The existence and integrity of the states is protected by article IV, which provides that states may not be merged or divided without their consent, as well as the consent of Congress.[144] This assures the continued existence of the states, which, as noted above, is essential not only because of the states' actual role in the resolution of constitutional issues, but also because of their potential role as full sovereigns, in the event that the amendment process ever results in disunion. In addition, article IV preserves the ability of the states to provide accurate representation of their citizens in constitutional matters.

Dividing or merging states could serve as gerrymandering tactics[145] by which the voices of a state's citizens could be distorted or silenced by submerging

143. *See supra* text accompanying note 7.

144. The pertinent portion of article IV reads as follows:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

U.S. CONST. art. IV, § 3.

145. The term "gerrymander" was first defined by a United States court in 1882 as a "method of creating civil divisions of the state for improper reasons." State *ex. rel.* Moreland v. Whitford, 54 Wis. 150, 158, 11 N.W. 424, 427 (1882). More recent definitions emphasize that reapportionment of voting power and reclassification of school districts are primary purposes of gerrymandering. *See* Kirksey v. Board of Supervisors, 468 F. Supp. 285, 299 (S.D. Miss. 1979);

them in a larger political entity in which the former majority would now be a weak minority. The integrity of the states, therefore, is essential to preserving the ability of the constitutional structure to produce a valid consensus regarding proposed constitutional changes. The state as an entity must have its integrity preserved in order to preserve the rights of the majority of its citizens to be heard in constitutional debates.

In addition to the provisions of article IV, the Constitution gives each state the right to equal representation in the Senate.[146] Not only is each state awarded an equal voice in the Senate, but article V provides that such equal suffrage is an utterly inviolable principle of the constitutional system, one of only two subjects which may not be tampered with even through the amendment process.[147] Once again, when the state is granted a specific right by the Constitution, it concerns the ability of the state to represent its people in the national political process. These specific constitutional provisions make clear that the states are indispensable as participants in the national political structure. Thus, interpreting the broad language of the tenth amendment in a manner consistent with these specific provisions seems reasonable. Moreover, this interpretation leads to the conclusion that the tenth amendment is concerned with the right of the state to accurately represent its citizens in national political processes.

Nevertheless, the state's ability to determine its own form of government is not without limits. Article IV also provides that "The United States shall guarantee to every State in this Union a Republican Form of Government."[148] The judicial determination that the issue of defining a "republican" form of government is not justiciable has prevented the development of a body of caselaw elaborating on this clause.[149] Nevertheless, the clause clearly

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Nickel v. School Bd., 157 Neb. 813, 817, 61 N.W.2d 566, 570 (1953) (citing BLACK'S LAW DICTIONARY 816 (4th ed. 1951)).

The origin of the word "gerrymander" can be traced to Massachusetts Governor Elbridge Gerry's redistribution of voting districts in 1812 to favor his Democratic party. In response to a comment that one district was so geographically distorted that it represented a salamander, Benjamin Russell, an ardent Federalist, replied that the term "gerrymander" would be a more appropriate description. Annot., 2 A.L.R. FED. 1337-38 (1919).

146. U.S. CONST. art. I, § 3, cl. 1, provides: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."

147. The other restriction on the amendment process was only temporary, lasting until 1808. That restriction prevented the amendment of a clause which provided that Congress could not prohibit "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit." U.S. CONST. art. I, § 9, cl. 1. With the lapse of that provision, the equal suffrage of each state in the Senate became the only explicit provision of the Constitution which could not be amended. *See* U.S. CONST. art. V.

148. U.S. CONST. art. IV, § 4.

149. *See* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (holding that the question of whether an amendment to Oregon's constitution, providing for initiative and referendum, was violative of article IV, § 4, did not present a justiciable issue); Luther v. Borden, 48 U.S. 1 (1849) (declining to decide the question of which of two opposing governments in Rhode Island held the legitimate power on the ground that it was not a justiciable issue).

indicates the intent of the framers that each state, as well as the federal government, be governed in accordance with the will of its people.[150] This clause is further evidence that whatever rights a state has are valid only insofar as those rights protect the rights of the state's citizens. A state does not have a right to be non-republican; it does not have a right to employ a governmental structure which fails to represent the will of the people. This limitation on the power of a state is completely consistent with the proposition that the essential function of a state is to serve as a vehicle for the participation of its people in the political processes of the nation. Just as the federal government may not silence or distort the voice of a state's people in those processes by gerrymandering a state's borders, a state itself cannot do the same by adopting a form of government which does not accurately reflect its people's choices.[151] There is a basic constitutional bias toward majoritarianism in government, provided that individual rights are also respected.

This constitutional commitment to majoritarianism was greatly strengthened by the ratification of the fourteenth amendment, with its judicially enforceable equal protection clause and its authorization of congressional action to implement the principle of equality.[152] Supreme Court opinions have made it clear that the tenth amendment cannot invalidate congressional legislation enacted in pursuance of the fourteenth amendment power to enforce equal protection; the fourteenth amendment overrides federalism principles to the extent necessary to make its guarantees effective.[153] The post-Civil War Constitution, even more clearly than the original document, indicates that the states (and their rights) are subordinate to the rights of the people.[154] In

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150. *E.g.*, Duncan v. McCall, 139 U.S. 449, 461 (1891); *see also* Bonfield, Baker v. Carr: *New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245, 257-59 (1962) (guarantee clause, article IV, was meant to ensure that the expectations of the American people about the nature of their republic governments were met); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 558-60 (1962) (appropriate use of the guarantee clause, article IV, could compensate for the deficiencies in the fourteenth amendment and attain and protect individual's political and civil rights) [hereinafter cited as Bonfield, *The Guarantee Clause*].

151. *See* REPORT ON THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 30, 39th Cong., 1st Sess. 7 (1866) (concluding that post-Civil War southern states did not meet article IV, § 4's requirement of a republican form of government, and had to be brought into conformity with that provision).

152. *Cf.* Brown v. Board of Educ., 347 U.S. 483 (1954) (state laws permitting segregation of schools deny black children the equal protection of the law mandated by the fourteenth amendment); Bonfield, *The Guarantee Clause, supra* note 150, at 557-58 (fourteenth amendment construed to prohibit unconscionable state discrimination and to enable federal intervention to protect individuals from abusive governance).

153. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 178-79 (1980) (Rome's changes in its electoral system did not comply with the Voting Rights Act of 1965 in that they had a discriminatory effect on minority citizens).

154. The adoption of the fourteenth amendment served to reinforce, and to an extent replace, article IV, § 4's protection of individual rights against over-extensions of state sovereignty. Bonfield, *The Guarantee Clause, supra* note 150, at 557.

short, the entire constitutional structure seems to support the proposition that state sovereignty consists only of the power to protect the rights of a state's citizens to participate effectively in the national political process.

This proposed understanding of state sovereignty also allows us to view in an entirely new light the "one man, one vote" principle of *Baker v. Carr*[155] and subsequent cases extending that principle to state and local elections.[156] At first glance, this historically unprecedented federal interference with state elections[157] appears to be a significant interference with state sovereignty. Nevertheless, if the legitimate sovereign power of the state depends upon the state accurately representing the will of its people, the conclusion follows that *Baker* and its progeny did not violate any legitimate principles of state sovereignty. Moreover, *Baker* and its progeny were necessary to assure that such principles worked as they should. State sovereignty exists only to the extent that it allows citizens effective participation in government. Thus, when it fails to serve that purpose (or actually works against it), federal intervention is necessary to remedy the distortion.

Paradoxically, in the *Baker* line of cases federal interference was necessary in order to preserve legitimate state sovereignty. The same can be said of congressional and judicial actions designed to prevent states from excluding citizens from the political process.[158] The exclusion of minorities from the political process obviously distorts the representative nature of the state's government. When such a state speaks on constitutional issues, either through its representatives and senators in Congress or through its legislature in matters concerning proposed amendments, it is not accurately reflecting the will of its people. Once again, federal intervention becomes necessary to assure

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155. 369 U.S. 186 (1962) (holding that the question of whether Tennessee's scheme of districting its state legislature violated the fourteenth amendment's equal protection guarantee presented a justiciable issue).

156. *See, e.g*, Reynolds v. Sims, 377 U.S. 533, 563 (1964) (holding that the equal protection clause required that state legislative apportionments comply with the "one man, one vote" doctrine); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 674 (1964) (applying the doctrine to both houses of a state legislature); *see also* Avery v. Midland County, 390 U.S. 474, 479 (1968) (extending the doctrine to include political subdivisions, such as a commissioner's court, that have broad policy-making functions).

157. Prior to *Baker,* matters dealing with the reapportionment of state voting districts were held not to be justiciable questions. *See* South v. Peters, 339 U.S. 276, 277 (1950); Colegrove v. Green, 328 U.S. 549, 556 (1946).

158. The fifteenth, nineteenth, and twenty-sixth amendments were adopted to prohibit restrictions on the voting franchise on the bases of race, sex, and age, respectively. In addition, congressional legislation, such as the Voting Rights Act Amendment of 1970, Pub. L. No. 91-285, § 1, 84 Stat. 314, 314 (codified as amended at 42 U.S.C. § 1973(b), (c) (1982)), which proscribed the use of literacy tests in state elections, has ensured minority participation in the political process. Similarly, courts have used the equal protection clause as a vehicle for invalidating state legislation that restricted the right to vote. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (using a strict scrutiny approach to reject a New York statute restricting the franchise in school board elections to those who either owned taxable property or had children enrolled in the district's schools); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (holding unconstitutional a Virginia poll tax on state elections).

the proper functioning of a state when it exercises its legitimate sovereign role.

Thus, the proposed scope of state sovereignty under the tenth amendment seems entirely consistent with the structure established by constitutional provisions which expressly deal with the rights of the states as against the federal government, as well as limits on those rights.

B. Recent Tenth Amendment Case Law

The view of state sovereignty suggested here would not require courts to overrule many recent tenth amendment holdings, although it would change the ways in which the courts would approach tenth amendment cases. Since *National League of Cities,* courts have rejected most tenth amendment claims because they attempt to extend the principle of that case too far.[159] Rejection of those claims would also follow from an analysis based upon the principles set forth here.

Looking first at Supreme Court decisions, the most interesting result of applying the view of state sovereignty suggested here is the conclusion that the holding in *National League of Cities* was incorrect. Even if we accept the fact that the FLSA amendments at issue would result in an increase in the cost of government, [160] the amendments in no way interfere with the political rights of any state's citizens. Should citizens disagree with the wisdom or constitutionality of the amendments, they are in no way hampered in their right to have them repealed through their representatives and senators. Furthermore, the amendments did not restrict the citizen's right to participate in bringing about a constitutional amendment to bar such legislation. The amendments would have left state legislatures no less able to accurately reflect the feelings of their constituencies on this, or any other, issue. States would lose only the ability to have their views about the proper minimum wage for state employees prevail over contrary federal views, and that ability is not part of the essential role of the state discussed above.

With the holding of *National League of Cities* overruled,[161] the case should retain importance only insofar as it was the first reminder in many years of the principle that the tenth amendment does have significance. It is an important reminder that some state activities cannot be tampered with, even if the Court did extend the principle too far in applying it to the FLSA amendments at issue. *National League of Cities* seems to have been, in Justice Cardozo's phrase used in a different context, "[an] instinct . . . imperfectly expressed"[162]—a flawed application of the valid principle that some core of state sovereignty was protected from federal interference, that resulted from an inability to correctly isolate just what the core was.

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159. *See supra* notes 43-84 and accompanying text.

160. *See National League of Cities,* 426 U.S. at 846.

161. Overruling *National League of Cities* would hardly be a drastic change in constitutional doctrine, because *EEOC* has already significantly narrowed it. *See supra* notes 73-84 and accompanying text.

162. Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214, 214 (1917).

All of the Supreme Court opinions subsequent to *National League of Cities,*[163] that have rejected tenth amendment claims and narrowed the scope of state sovereignty, are clearly consistent with the rule suggested here. Only in *FERC* did the federal act in question even arguably tamper with the ability of state government to serve as a vehicle for citizen participation in government.[164] As the Supreme Court noted, PURPA did influence state legislatures to act in a certain way in the field of utility regulation.[165] The Court, however, additionally found that this area was a matter in which Congress could, if it so desired, preempt the states entirely.[166] Thus, Congress may permit states to choose to share in regulation of a field open to exclusive federal regulation. Moreover, the state's decision to do so is presumably an accurate reflection of the preferences of its citizens when legitimately presented with the alternative of exclusive federal control. PURPA does not limit the ability of citizens, acting through their representatives in Congress and state legislatures, to amend or repeal that Act, or to amend the Constitution to eliminate federal involvement in local utility regulation. While *FERC,* with its direct impact on state government, is clearly the strongest tenth amendment claim to reach the Supreme Court in recent years, it would seem that the Court was correct in concluding that PURPA was not an unconstitutional infringement on state sovereignty.

Lower federal courts have also been generally reluctant to uphold tenth amendment claims since *National League of Cities.* As noted above, rejection of such a claim often turned on the principle that tenth amendment claims cannot invalidate otherwise valid legislation enacted pursuant to congressional power under the fourteenth amendment.[167] Where the fourteenth amendment did not serve as the basis for the decision, the lack of clear guidance from Supreme Court decisions has led to some obviously inconsistent holdings. For example, in *Bonnette v. California Health & Welfare Agency,*[168] the Ninth Circuit held that despite *National League of Cities,* state workers who provide in-home services to disabled public assistance recipients are properly subject to coverage under FLSA provisions.[169] The court based its decision on the distinction in *United Transportation Union* between traditional and non-traditional governmental services.[170] The tenth amendment was deemed not applicable because the provision of in-home services

163. *See supra* notes 43-84 and accompanying text.

164. *See supra* note 54, and *supra* notes 61-69 and accompanying text.

165. *FERC,* 456 U.S. at 759-60.

166. *Id.* at 759.

167. *See, e.g.,* EEOC v. County of Calumet, 686 F.2d 1249, 1253 n.2 (7th Cir. 1982) (upholding a congressional statute prohibiting state governments from discharging a person between 40 and 70 years of age solely because of age); Marshall v. Delaware River & Bay Auth., 471 F. Supp. 886, 891 (D. Del. 1979) (invalidating a compact between New Jersey and Delaware in which state employees were required to retire before they were 65 years old).

168. 704 F.2d 1465 (9th Cir. 1983).

169. *Id.* at 1472.

170. *See supra* note 53, and *supra* notes 55-60 and accompanying text.

was non-traditional.[171] In contrast, in *San Antonio Metropolitan Transit Authority v. Donovan,*[172] the District Court for the Western District of Texas held that the tenth amendment did prevent FLSA from being applied against the San Antonio Transit Authority. The court avoided the apparently clear and binding contrary holding of *United Transportation Union* through the utterly unconvincing argument that although the operation of commuter trains was not a traditional government function, the operation of commuter buses was.[173]

Such inconsistencies demonstrate the inadequacy of current tenth amendment rationales. Resolution of these cases under the rule suggested here would be simple and consistent. In neither case would application of the federal law interfere with the participation of the state's people in national political processes. Thus, in neither case did the federal statute interfere with any "essential" role of the state. Therefore, the tenth amendment claims would be rejected in both cases. Moreover, this conclusion could have been reached without strained attempts to classify activity as traditional or non-traditional.

San Antonio is not the sole example of an overgenerous extension of tenth amendment protection by federal courts. In *United States v. Best,*[174] the Ninth Circuit held that a federal court could not order a state to suspend the driver's license of a defendant who had been convicted of a traffic offense committed on a federal enclave within that state.[175] Such tampering would be an undue intrusion on the state's right to regulate its highways.[176] Again, it is difficult to see how exclusive control over the licensing of drivers can be said to be essential to the existence of a state as a state. This is particularly true in an age of extensive federal involvement not only with highways, but also with setting national standards for the behavior of drivers and the safety of vehicles.[177]

Confusion over what is truly an essential role of a state can lead not only to decisions which improperly extend the concept of state sovereignty, but also to decisions which improperly restrict that concept. In *United States v. Tonry,*[178] the court held that the tenth amendment was not violated by a grant of probation by the federal government to a convicted former government official that was conditioned on the agreement of the official not to run for public office. Although the court recognized that "federal courts may not, save to safeguard federal rights, intervene in the state electoral

171. 704 F.2d at 1472.

172. 557 F. Supp. 445, 454 (W.D. Tex. 1983), *prob. juris. noted,* 104 S. Ct. 64 (1983).

173. 557 F. Supp. at 448.

174. 573 F.2d 1095 (9th Cir. 1978).

175. *Id.* at 1097.

176. *Id.* at 1102.

177. *See, e.g.,* The Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2311 (1982); Department of Transportation Appropriations Act of 1983, Pub. L. No. 97-369, 96 Stat. 1765 (1983). Each act sets forth uniform standards for the length, width, and weight of trucks using the interstate highway system and other highways built with federal aid.

178. 605 F.2d 144, 149 (5th Cir. 1979).

process,"[179] it went on to state that Tonry's probation neither mandated any state action nor affected the state's right to determine qualifications of persons for office.[180]

There was no reason to believe that the federal action in question was motivated by anything other than a genuine desire to frame appropriate punishment for violation of federal campaign practices statutes.[181] Nevertheless, the disqualification by the federal government of someone from service as an elected representative in either the federal or state government poses serious problems. Should the people of Louisiana, or any of its subdivisions, decide that Tonry would best represent their views in the national or state legislature despite his prior conviction, a federal veto of that decision strikes at the heart of the people's right to ultimately control their government. It is this type of direct tampering with the right of the majority to choose representatives who will act on behalf of the people which is most dangerous to the truly essential role of the state.[182] Selective prosecution, either for violation of campaign practice acts or other statutes, might, in the hands of an unscrupulous administration, become a tool for the elimination of troublesome political voices from positions of power. While the conditional probation in this case can be seen as primarily a restriction on Tonry, it is at the same time an order which, in effect, prohibits the people of his home state from choosing him to represent them. The restrictions thus limit their right to participate in government through the representative of their choice. *Tonry* would appear to be an example of that rare case in which the tenth amendment, properly understood, should limit federal actions. Yet, in the present state of confusion over just what the essentials of state sovereignty are, one circuit permits the federal government to limit the right of a state's citizens to freely choose their own representatives, while at the same time another circuit enshrines the issuing of driver's licenses as an essential state role in our constitutional system.

C. Effect Of Adoption of the Rule

Adoption of the definition of state sovereignty proposed here will not cause radical shifts in legal doctrine. The vast majority of traditional tenth amendment challenges, based on the dual federalism notion of certain activities as being intrinsically subject to state rather than federal control, will fail

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179. *Id.*

180. *Id.*

181. Tonry was convicted under the general federal conspiracy statute, 18 U.S.C. § 371 (1982), for conspiring to violate the Federal Election Campaign Act; 18 U.S.C. §§ 2, 600 (1982), for promising benefits for political contributions; and the Federal Election Campaign Act, 2 U.S.C. §§ 431-441(j) (1982), for accepting a political contribution in excess of $100. 605 F.2d at 146.

182. Even in the most famous recent instance of an attempt by Congress to exercise its power to exclude one of its members, Representative Adam Clayton Powell, Powell was not prevented from again seeking election to Congress. When he was returned to the 91st Congress by his constituents, the House of Representatives acceded to the wishes of the people of his district and allowed him to take his seat. *See* Powell v. McCormack, 395 U.S. 486, 490 (1969).

as they have consistently failed over the last half century. Courts will, however, be in a much better position to articulate the reasoning behind such decisions without going to the extreme of labelling the tenth amendment as meaningless. Furthermore, a clear and narrow definition of the scope of tenth amendment protection may save court time by discouraging assertion of meritless tenth amendment claims.

At the same time, such a definition, by affirming that the amendment does stand as an absolute bar to a narrow scope of activity and is not simply an admonition permitting courts to engage in balancing tests, will assure that in instances where the truly essential functions of a state are challenged, the amendment will prove effective in protecting the rights of the states and their people. The amendment is not meaningless, and discussion of it is not merely academic. For example, in the recent campaign for the Democratic nomination for president, the suggestion was raised that federal funds be withheld from states which refuse to ratify any new congressionally endorsed version of the equal rights amendment.[183] A clearer example of federal interference with the truly essential role of the states could hardly be found. If the federal government can manipulate the process by which the underlying constitutional balance of power among the national and state governments and the people is struck, then the fundamental principle that each level of government is subordinate to the will of the people is seriously undermined. The tenth amendment, although inapplicable to the vast majority of federal attempts to wield legislative power, should serve as a barrier to this exceptional type of attempt to interfere with the state's role in representing its people. This is especially so where, as here, the federal action directly interferes with the processes of national legislation and constitutional amendment, which are the truly essential functions of the states in our constitutional system.

CONCLUSION

The importance of the tenth amendment has tended to be alternately overestimated and underestimated. From a nineteenth century view of dual federalism as a central constitutional principle, the pendulum swung to the prevalent post-1936 view of the amendment as a largely meaningless curiosity. *National League of Cities* once again revived the view of the amendment as a potentially serious impediment to federal regulation, but only a few years later, decisions limiting the scope of that holding have caused commentators to revert to discounting its importance.

This pendulum of overreaction can be stopped only through the creation of a defensible theory defining the scope of essential state activity. An

183. *Democrats Line Up on Feminist Issues,* N.Y. Times, July 11, 1983, at 1, col. 2. Senators Hart and Cranston supported withholding federal money from states which opposed the amendment. Walter Mondale and Senator Hollings "implied that they would use federal funds to bargain for support of the amendment." *Id.*

examination of the nature of states' rights and of the overall governmental structure established by the Constitution indicates that the states' essential role is to act as representatives of their people by participating in the processes of enacting federal legislation and in amending the Constitution. It is this function which should be recognized as the proper extent of state sovereignty protected from federal interference by the tenth amendment. As long as federal activity does not impair the ability of the states to accurately represent their people, the tenth amendment should not bar such activity. If the national government attempts to interfere with that truly essential function, however, the amendment should and must be taken just as seriously as any other provision of the Bill of Rights.