AN AFFIRMATIVE CONSTITUTIONAL RIGHT: THE TENTH AMENDMENT AND THE RESOLUTION OF FEDERALISM CONFLICTS

> Surely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments.[1]

The Supreme Court is currently faced with a direct conflict over allocation of federal and state authority.[2] State and municipal officials are attempting to use the tenth amendment as a shield against extensive federal regulations of local government functions.[3] The tests presently applied to resolve such controversies are poorly defined,[4] and judicial dissatisfaction with them has been expressed.[5] This discontent may be based on more than the inadequacy of the tests as tools for analysis, for indications exist that the Burger Court is becoming increasingly responsive to claims of state auton-

1. Fry v. United States, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting).

2. National League of Cities v. Usery, No. 74-878 (U.S., filed Jan. 17, 1975). The petitioners initially applied for injunctive or declaratory relief from the United States District Court for the District of Columbia. National League of Cities v. Brennan, 75 CCH L C ¶ 33,182 (1974-75). Acting as Circuit Justice, Chief Justice Warren Burger granted a stay. 75 CCH L C ¶ 33,183 (1974-75). The case was argued April 16, 1975, and restored to the calendar for reargument on May 27, 1975. National League of Cities v. Dunlop, 421 U.S. 986 (1975). Scheduled for reargument *sub nom.* National League of Cities v. Usery, 44 U.S.L.W. 3483 (U.S. Feb. 24, 1976).

Congress extended coverage of the Fair Labor Standards Act to nonsupervisory municipal and state employees, including police and firemen. Pub. L. No. 93-259, 88 Stat. 55, *amending* 29 U.S.C. § 201 *et seq.* (1974). This action will remove from local control the ability to determine these employees' wages and hours. The budgetary impact of this action is severe: Wages will be increased; overtime compensation rates will be in effect much more frequently, for compensatory time off is barred; and a complex, expensive reporting system is required. Brief for Appellant, National League of Cities v. Dunlop, No. 74-878 (U.S., filed Jan. 17, 1975).

3. Application of the Fair Labor Standards Act wage and hour provisions to nonsupervisory municipal and state employees is at issue. The Supreme Court has considered imposition of federal regulations on state agencies in cases such as Maryland v. Wirtz, 392 U.S. 183 (1968) and United States v. California, 297 U.S. 175 (1936). *See also* Casto, *The Doctrinal Development of the Tenth Amendment*, 51 W. VA. L. REV. 227 (1949).

4. *See* text accompanying notes 39-47 *infra.*

5. Fry v. United States, 421 U.S. 542, 551-52, 559 (1975) (Rehnquist, J., dissenting).

omy.[6] In deciding these controversies, the Court should employ a test which allows greater consideration of federalism[7] concerns. This Comment will determine which tests the Court has used in the past to weigh the competing considerations of federalism and will analyze possible new models.

A FEDERALISM PERSPECTIVE

The Tenth Amendment

The tenth amendment[8] is understood best as a "symbolic device of the powers not delegated to Congress"[9] and as a guarantee of the rights reserved to the states.[10] In this sense it is a crystallization of the balance of power struck in the Constitution between the federal and state governments. A few authorities believe that the embodiment of this affirmation in the form of an amendment is significant.[11] Others urge that it is merely tautologous.[12] Those

6. *See* notes and text accompanying notes 44-47, 74-75, 99-100 *infra*.

7. Federalism in the United States embraces the following elements: (1) as in all federations, the union of several autonomous political entities, or "States," for common purposes; (2) the division of legislative powers between a "National Government," on the one hand, and constituent "States," on the other, which division is governed by the rule that the former is "a government of enumerated powers" while the latter are governments of "residual powers"; (3) the direct operation, for the most part, of each of these centers of government, within its assigned sphere, upon all persons and property within its territorial limits; (4) the provision of each center with the complete apparatus of law enforcement, both executive and judicial; (5) the supremacy of the "National Government" within its assigned sphere over any conflicting assertion of "State" power; (6) dual citizenship. CONGRESSIONAL RESEARCH SERVICE, CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 92-82, 92d Cong., 2d Sess. 18 (1972).

8. U.S. CONST. amend. X states: "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."

9. Interview with Paul Brest, Associate Professor of Constitutional Law, Stanford University, in San Diego, Jan. 16, 1976.

10. New York v. United States, 326 U.S. 572, 595 (1946) (Douglas & Black, JJ., dissenting).

11. Justice Rehnquist, dissenting in Fry v. United States, 421 U.S. 542, 553 (1975), described the tenth amendment as "an affirmative constitutional right" of the states, similar to the affirmative rights of individuals in the first and fifth amendments.

The amendment form itself has been urged to be significant because of the rule of constitutional interpretation that if some inconsistency exists between a constitution as originally adopted and a subsequent provision added by amendment, the latter will prevail. Casto, *The Doctrinal Development of the Tenth Amendment*, 51 W. VA. L. REV. 227, 228 (1949).

12. Justice Stone described the tenth amendment as "a truism that all

presenting the latter view find support in the debates surrounding the ratification of the tenth amendment.[13]

The Constitution was drafted in recognition of the inadequacies of the Articles of Confederation.[14] Unlike the Articles, however, the Constitution did not clearly delineate federal and state powers.[15] The delegates at the Constitutional Convention feared state encroachment on national authority.[16] Nevertheless, when the document was presented to state ratifying conventions, there was great concern over broad federal powers. Ratification was achieved only after the convention delegates understood that a Bill of Rights, including limitations on the national government contained in the tenth amendment, would be added.[17]

When the proposed amendment was discussed at the First Congress, the word *expressly* was suggested as a limitation on the powers delegated to the United States.[18] Although the proposal was rejected, the state legislatures ratified the amendment.[19] The Federalists[20] used the rejection of this limitation as support for the proposition that national government is supreme in the exercise of its enumerated powers and has no duty either to consider the coexistence of the states or to maintain any particular relationship of

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is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941). Professor Brest suggested that in cases involving federalism the Supreme Court's decisions would have been the same even if the tenth amendment did not exist. Interview with Paul Brest, Associate Professor of Constitutional Law, Stanford University, in San Diego, Jan. 16, 1976.

13. United States v. Darby, 312 U.S. 100, 124 (1941); Gillmore, *Governor Meldrum Thompson and the Tenth Amendment*, 16 N.H.B.J. 246, 249, 257 (1975).

14. *See generally* M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES (1913); C. WARREN, THE MAKING OF THE CONSTITUTION (1937).

15. Article II reads: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled." ARTICLES OF CONFEDERATION, in 1 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 79 (1836).

16. *Id.* at 432.

17. *See* C. BLOCH, STATES' RIGHTS, THE LAW OF THE LAND 17-25 (1958). *See generally* Ames, *Proposed Amendments to the Constitution 1789-1889*, in 2 AMERICAN HISTORICAL ASSOCIATION, ANNUAL REPORT FOR 1896, at 165 (1897).

18. 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 608 (1836).

19. *See* E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 148 (8th ed. 1946).

20. *See, e.g.*, M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819).

power with the states.[21] In recognition of one of its ardent proponents,[22] this view is designated *Hamiltonian.* The contrasting Madisonian approach characterizes our nation as a compact of free states, delegating power to a central government to act in interstate and international matters and leaving the states themselves free to regulate internal concerns.[23]

An Approach to Federalism Decisions

These conflicting theories on the balance of power in the United States have been evident in the decisions of the Supreme Court when it is faced with a federalism problem.[24] The contested issue in all federalism controversies is an exercise of power by either the federal government or a state government which potentially infringes on the sovereignty of the other. The Court uses a variety of tests to facilitate decisionmaking in examining the validity of regulations resulting from such exercises of power. This Comment will analyze federalism cases to determine which factors have been identified in constructing tests.

There are two standards that characterize the possible impact of governmental regulation. The legislation in question will be invalidated if it becomes a *burden* or hindrance on a certain activity. The legislation will also be struck down if it singles out or *discriminates* against a particular activity. The Court applies the burden and discrimination standards to a number of activities; for example,

21. Cowen, *What Is Left of the Tenth Amendment?*, 39 N.C. L. REV. 154, 157 (1961); Casto, *The Doctrinal Development of the Tenth Amendment*, 51 W. VA. L. REV. 227, 228 (1949).

22. Hamilton wrote of the new Union: "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care . . . free from every other control, but a regard to the public good, and to the sense of the people." THE FEDERALIST No. 31, at 195 (J. Cooke ed. 1956) (A. Hamilton). *See* E. CORWIN, TWILIGHT OF THE SUPREME COURT 47, 48 (1934).

23. Madison described the relationship as: "[T]he powers proposed to be lodged in the Federal Government, are as little formidable to those reserved to the individual States, as they are indispensibly necessary to accomplish the purposes of the Union . . . ." THE FEDERALIST No. 46, at 323 (J. Cooke ed. 1956) (J. Madison). *See* Cowen, *What is Left of the Tenth Amendment?*, 39 N.C. L. REV. 154, 157 (1961).

24. E. CORWIN, TWILIGHT OF THE SUPREME COURT 47-48 (1934).

a state enterprise undertaken in its sovereign capacity or flow of goods in interstate commerce. The application of standards to a given activity determines the validity of specific governmental regulations. If a sovereign state government function, such as allocation of tax revenue, is the activity in question, the test might be: "Does the regulation burden or impair the state government function?" or, "Does the regulation discriminate against the state government function?" A finding that the statute is discriminatory or excessively burdensome will result in the invalidation of the regulation.

Federalism decisions[25] fall into two broad categories: either regulation by one governmental entity directly upon the other's functions as a sovereign or regulation of all other activities which may be engaged in by both private and governmental entities. These categories may be further divided into two groups separating state and federal exercises of power. This analysis results in four classes: federal regulation of sovereign state functions, federal regulation of other matters, state regulation of sovereign federal functions, and state regulation of other matters. These divisions will be used to examine federalism tests.

Intergovernmental Immunities

Federal Regulation of State Functions

Through the exercise of its enumerated powers, the federal government may regulate certain state functions. Challenges to these regulations have been resolved using variations of the burden and discrimination standards. Because enactments based on the taxing or commerce powers have frequently come under attack, tests employed by the Court to settle these conflicts are well-developed.

1. Taxing Power

During the late nineteenth century, initial federal attempts to tax income[26] or interest[27] generated by a state or municipal government

25. Although these cases will be examined only for their resolution of conflicting federalism concerns, other values, such as individual rights, may of course be involved. The addition of these factors may affect the resolution of the fundamental power struggle. In some instances, the Court seems to prefer to base its decision on federalism considerations rather than to deal with an equal protection or due process issue. *See generally* Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 Stan. L. Rev. 208 (1959).

26. Collector v. Day, 78 U.S. (11 Wall.) 113 (1871) (state judge's income exempt from federal taxation).

27. United States v. Baltimore & O.R.R., 84 U.S. (17 Wall.) 322 (1872)

were rebuffed as too burdensome. The Supreme Court expressed its rationale in this way: "If [government instruments and agencies] may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted."[28]

This deference continued into the 1930's but was diminished by recognition of the federal government's right to tax states engaged in private business.[29] The ability to tax came to rest on a distinction between proprietary functions, which were taxable, and governmental functions, which were exempt. This distinction encompasses burden and discrimination standards. Because true government activities were not being taxed, any burden on the state as a sovereign was insubstantial. Additionally, a state which engaged in business of a private nature became subject to the same taxes as any individual involved in that business.

By the end of the decade, the burden rationale was applied stringently to taxation of state government agents. State employees lost their immunity from federal income taxation, for they could not demonstrate that "the burden upon the state function [was] actual and substantial, not conjectural."[30]

Increasingly diverse government functions led the Court in *New York v. United States* to reject the governmental versus proprietary distinction.[31] Although a majority agreed that New York State's water bottling business was taxable, the justices could not concur in which test should be used to determine the legitimacy of the tax.[32] Justice Frankfurter, applying the discrimination standard,

(federal imposition of tax on interest received by a city on railroad bonds was denied).

28. *Id.* at 327-28. The zealous protection of the states was an outgrowth of a perception of the state and federal government as competing "dual sovereignties." This doctrine held that "the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States." Collector v. Day, 78 U.S. (11 Wall.) 113, 124 (1871).

29. Ohio v. Helvering, 292 U.S. 360 (1934) (state-owned liquor store subject to federal taxation).

30. Helvering v. Gerhardt, 304 U.S. 405, 421 (1938).

31. 326 U.S. 572 (1946).

32. Justice Douglas' dissent, concurred in by Justice Black, relied heavily on the tenth amendment to reject any taxation on states. *Id.* at 590-98.

deemed any tax valid if its subject was a revenue generating activity, regardless of who engaged in it.[33] The only restriction was that the activity must not be one which a state was uniquely capable of performing. Chief Justice Stone, employing both standards, stated that a constitutional federal tax must neither discriminate nor unduly interfere with a function of state government.[34]

A period of flux in applying the burden and discrimination standards culminated in the *New York* case, the Court's last major confrontation with claims of state government immunity from federal taxes. The federal government's ability to tax state employees' income had been accepted because this power did not substantially burden the states. However, the Supreme Court left unresolved the question of whether a federal tax on a state agency was constitutionally required to be merely nondiscriminatory or both nondiscriminatory and nonburdensome.

2. Commerce Power

In the early twentieth century federal regulations under the commerce power mushroomed. State functions became increasingly diverse. Conflict arose when states claimed the tenth amendment protected their business activities from federal controls. *United States v. California*[35] presented this problem at a time when the validity of federal taxation of state agencies was determined by the governmental-proprietary distinction. Application of this distinction to conflicts under the commerce power was rejected with a phrase that expressed both burden and discrimination standards. The Court concluded that federal regulation would prevail, for "[it] is as capable of being obstructed by state as by individual action."[36] Under this approach the focus of the burden standard apparently shifts when an exercise of the commerce power is questioned. The Court prohibits interference with either the purpose or provisions of a federal statute.

33. *Id.* at 582. Justice Frankfurter emphasized the passage of tax measures by Congress, which is composed of the representatives of all the states. *Id.* at 582-83. This argument foreshadows Herbert Wechsler's analysis that because Congress expresses local interests, it acts as the guardian of federalism in our political system. H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 49-82 (1961). In dissent Justice Douglas countered this view with an assertion that "the sovereign position of the States" must not depend on "the will of a transient majority." New York v. United States, 326 U.S. 572, 594 (1946).

34. 326 U.S. at 588.

35. 297 U.S. 175 (1936) (state-owned railroad held to be subject to the Federal Safety Appliance Act).

36. *Id.* at 186.

Relying on the strong precedent of *California*, subsequent decisions rarely treated claims of state sovereignty as sufficiently significant to warrant forceful refutations.[37] Not until a state's immunity from a citizen suit brought under the Federal Employers' Liability Act was in issue[38] did the Court again analyze the implications of intrusive federal regulations. The governmental-proprietary distinction, which contemplates discrimination and burden on the state, was employed to uphold the federal enactment. When a state right of near-constitutional proportions was denied, state sovereignty replaced federal purposes as the subject of the burden standard. More intrusive federal measures were met with greater judicial scrutiny.

Maryland v. Wirtz[39] presents the Court's most articulate recent consideration of the application of commerce-based regulations to state activities. Drawing on justifications used in applying commerce regulations to private industry, the majority upheld the extension of the Fair Labor Standards Act to state school and hospital employees.[40] Potential labor disputes[41] or unfair competition[42] had been established as tests for the validity of federal con-

37. Imposition of federal regulations was also upheld in United States v. Ohio, 385 U.S. 9 (1966), *rev'g per curiam*, 354 F.2d 549 (1965) (state liable for penalties for exceeding wheat acreage allotment on its prison farm) and California v. Taylor, 353 U.S. 553 (1957) (F.E.L.A. rules applicable to state in its capacity as railroad employer).

38. The Court allowed a state to be sued by an employee of its railroad. Parden v. Terminal Ry., 377 U.S. 184, 196-97 (1964).

39. 392 U.S. 183 (1968).

40. Justice Douglas dissented, characterizing the decision as "such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view, not consistent with our constitutional federalism." *Id.* at 201.

41. The basis for this theory is that labor strife will disrupt the interstate flow of goods. It was developed in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Both the labor dispute and unfair competition tests (note 42 *infra*) were applied in *Wirtz* through the "enterprise concept." This application allowed extending coverage of federal regulations to one whose fellow employee in the same enterprise was already subject to federal control. The majority rebuffed attacks on this concept by holding that its constitutionality had been settled in United States v. Darby, 312 U.S. 100 (1941), which dealt with federal regulations of private industry.

42. This justification was also used in United States v. Darby, 312 U.S. 100 (1941). It provides that interstate commerce shall not be the medium through which goods produced under substandard labor conditions may compete unfairly with those having higher prices because of greater costs

trols in private business. Both of these tests employ the burden standard. Labor strife may interrupt the free flow of goods among the states; unfair competition detracts from the goal of a national free market. The Court used the discrimination standard to justify subjecting state activities to the same analysis as private activities.[43]

Recent cases reflect a growing consideration for claims of state sovereignty. Although the initial application of FLSA to state employees was upheld in *Wirtz*, the Court subsequently recognized the special character of state employers and refused to allow employee suits for breach of these standards.[44] In an apparent attempt to reconcile this decision with prior case law, the Court held that in the interests of "harmonious federalism" states would not be open to suits in the absence of clear congressional intent.[45] Apparently the burden on state autonomy was so great that merely establishing nondiscriminatory treatment of state and private employers was insufficient to justify this regulation.

In 1975, the Court upheld wage and price controls passed under the commerce power as they applied to state employees.[46] Using the burden standard, the majority held that the exclusion of state employees would impair the effectiveness of the federal program. However, the holding was narrow, stressing the temporary use of controls as an emergency measure. The majority opinion emphasized the continued validity of the tenth amendment as a federalism check, stating that "it is not without significance."[47]

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incurred in providing adequate working conditions. Justice Frankfurter may have foreseen the applicability of these rationales to state activities. In upholding a federal tax on a state activity, he stated: "[New York] is engaged in an enterprise in which the State sells mineral waters in competition with private waters . . . ." New York v. United States, 326 U.S. 572, 581 (1946).

43. Maryland v. Wirtz, 392 U.S. 183, 197 (1968).

44. In Employees v. Department of Public Health & Welfare, 411 U.S. 279 (1973), the Court was faced with the attempt of state employees to sue for violations of the FLSA amendments. An additional consideration was the immunity from suit granted to the States in the eleventh amendment. Although this immunity was deemed inadequate to bar an employee action in *Parden* (*see* note 38 *supra*) the Court in *Employees v. Department of Public Health & Welfare* "decline[d] to extend *Parden* to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States . . . is not clear." *Id.* at 286-87.

45. *Id.* at 286.

46. Fry v. United States, 421 U.S. 542, 548 (1975).

47. Justice Marshall wrote: "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' [citation omitted] it is not without significance. The Amendment expressly declares the constitutional policy that Congress may

Early decisions used the discrimination standard and the burden standard to focus on federal goals or programs in assessing commerce-based regulations. Recent cases may indicate a shift in the burden standard to include consideration of interference with state autonomy.

State Regulation of Federal Government Functions

This section will examine state attempts to tax federal government agents or agencies. Claims of immunity have been raised against state levies, whether exacted in the form of income, property, sales, or excise tax. The initial assertions of federal immunity were resolved in *M'Culloch v. Maryland.*[48] Chief Justice Marshall easily disposed of a tenth amendment argument[49] by holding that a state could not tax operations of the national bank, for such a tax would burden the federal government in carrying out its enumerated powers.[50]

In subsequent cases, the Court carefully employed the burden standard, elaborating on the fact that certain state taxes interfered with the effectuation of a delegated power of the federal government.[51] This emphasis on the limited nature of the federal government has led the Court to conclude that because "government de-

not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* at 547 n.7.

Justice Rehnquist, in dissent, attacked the decision as being one in a line of cases undermining state autonomy. He criticized federal regulation of state activities under the aegis of the commerce power and called for *Maryland v. Wirtz* to be overruled. *Id.* at 558-59. This dissent was handed down the same day that *National League of Cities v. Usery* was scheduled for reargument. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 126 (1975).

48. 17 U.S. (4 Wheat.) 316 (1819).

49. Chief Justice Marshall, a Federalist, seized this opportunity to state his adherence to the Hamiltonian view of the balance of power. He emphasized the omission of "expressly" in drafting the amendment and stated that it "was framed for the purpose of quieting excessive jealousies which had been excited." *Id.* at 406. He added that "the government of the Union, though limited in its powers, is supreme within its sphere of action." *Id.* at 405. *See also* Gillmore, *Governor Meldrum Thompson and the Tenth Amendment*, 16 N.H.B.J. 246, 251 (1975).

50. 17 U.S. (4 Wheat.) 316, 436-37 (1819).

51. *E.g.*, Wisconsin Cent'l R.R. v. Price County, 133 U.S. 496, 504 (1890) (the property power); Van Brocklin v. Tennessee, 117 U.S. 151, 179-80 (1886) (the taxing and spending powers).

rives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action. . . ."[52] By giving every act the imprimatur of a governmental act, the Court avoided the definitional difficulties of the governmental-proprietary distinction encountered with state taxation immunities. State taxation of any federal act is, therefore, a tax on a governmental act and thus an impermissible burden on federal autonomy.

This blanket immunity was originally enjoyed by federal employees[53] and third parties having business dealings with the federal government.[54] During the 1930's, the Court radically curtailed the policy of granting private individuals immunities from state taxation.[55] Many earlier decisions were overturned[56] when the Court began allowing exemptions only if taxation would be a substantial burden on the federal government.[57] In recent years the discrimination standard has also been applied. State taxation of individual citizens must be neither burdensome on the federal government nor discriminatory on the basis of relationship with government.[58]

Today state taxes are evaluated by the Court using discrimination and burden standards to grant absolute immunity to federal gov-

52. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 477 (1939).

53. New York *ex rel.* Rogers v. Graves, 299 U.S. 401 (1937).

54. Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928) (sales made to federal government not subject to state sales tax); Long v. Rockwood, 277 U.S. 142 (1928) (income from royalties derived from patents granted by the United States not taxable); Gillespie v. Oklahoma, 257 U.S. 501 (1922) (income derived from lease of federal land not taxable). *But cf.* Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) (net income received for engineering work for the federal government taxable by the state). The opinion reveals no discernible basis for this aberrant result.

55. Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633 (1945).

56. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 486 (1939), subjected the income of an employee of a federal government agency to state taxation and specifically overruled New York *ex rel.* Rogers v. Graves, 299 U.S. 401 (1937), on this point. State taxation of income from copyright royalties was allowed in Fox Film Corp. v. Doyal, 286 U.S. 123 (1932), which overruled Long v. Rockwood, 277 U.S. 142 (1928).

57. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 480, 487 (1939).

58. United States v. City of Detroit, 355 U.S. 466 (1958) (state tax may not discriminate against the federal government or those with whom it deals). In recent years the burden standard has been applied unevenly—at times rewarding the clever contract draftsman. *Compare* Alabama v. King & Boozer, 314 U.S. 1 (1941), which upheld state sales taxation paid by a contractor who was working on a "cost plus" arrangement for the federal government, *with* Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), which invalidated a similar tax in a similar situation, in which the contractor was specifically authorized to act as purchasing agent for the government which was directly responsible to the seller.

ernment agencies[59] and select immunities to private individuals dealing with the federal government.[60]

REGULATION OF PRIVATE ENTITIES

Federal Government Regulations

Federalism conflicts have occurred most frequently in actions challenging congressional regulation of intrastate activities through the exercise of the commerce power. This section will focus on those decisions.

Large-scale regulatory action inaugurated by Congress at the turn of the twentieth century touched off extensive litigation on the right of the federal government to control local activities.[61] The Court resisted initial federal attempts to regulate intrastate acts which had only an indirect effect on commerce.[62] Unless the activities either interfered with channels of interstate commerce or impaired federal regulatory measures, they were beyond the reach of the commerce power. The Court was again applying the burden standard. In addition these early cases employed another criterion —establishing a distinction between police power and commerce power. Federal provisions which were seen as attempts to exercise police power were struck down. Reservation of police power to the states was regarded as "essential to the preservation of the autonomy of the States as required by our dual form of government."[63]

Until the mid-1940's, cases determining the validity of congressional regulation often used the direct-indirect effect criterion[64] and police power-commerce power distinction.[65] Although a number of

59. First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339 (1968) (immunity of national banks); Department of Employment v. United States, 385 U.S. 355 (1966) (immunity of American National Red Cross).

60. *See* United States v. Boyd, 378 U.S. 39 (1964).

61. E. CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS 152 (1936).

62. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

63. *Id.* at 13. The Court's reference to "our dual form of government" is an allusion to the theory of "dual sovereignty," which was popular at the time. *See* note 28 *supra.*

64. Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

65. Hammer v. Dagenhart, 247 U.S. 251 (1918). This appears to be the final use of the police power-commerce power distinction, one which had little basis in either law or logic.

other characterizations were employed during this period, they are variations on the burden standard. Goods or activities were subject to federal rules if they were in the "stream of commerce,"[66] harmed interstate commerce,[67] bore a "close and substantial relation to interstate commerce,"[68] or were harmful per se and thus "polluted" commerce.[69]

In 1941, *United States v. Darby*[70] introduced the test still used today for evaluating exercises of the commerce power. Although the federal statute extends to intrastate activities, it will be upheld if it is an "appropriate means" to reach the "legitimate end"[71] of the regulation of interstate commerce. Any limitation which might have been found in the tenth amendment was dismissed, for "[t]he amendment states but a truism that all is retained which has not been surrendered."[72] The means-end test is a combination of the burden and discrimination standards. A valid objective for Congress in exercising the commerce power is to protect interstate commerce from being impaired or burdened. The means used to accomplish this end must not discriminate against intrastate activities.

Throughout the years the Court has employed this malleable test to sanction increasingly intrusive actions by the federal government.[73] The concern for state autonomy evidenced in the discarded

66. Swift & Co. v. United States, 196 U.S. 375 (1905).

67. Stafford v. Wallace, 258 U.S. 495 (1922); Houston E. & W. Texas Ry. v. United States (Shreveport Rate Case), 234 U.S. 342 (1914). This conception of the commerce power as a protective device may be in greater harmony with the framers' view of the power as chiefly "a negative and preventive provision." Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 475 (1941).

68. Wickard v. Fillburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Houston E. & W. Texas Ry. v. United States, 234 U.S. 342 (1914).

69. Champion v. Ames (The Lottery Case), 188 U.S. 321, 356 (1903). This test encompassed federal regulation of harmful acts committed in interstate commerce as well as of things harmful per se. *E.g.*, Kentucky Whip & Collar Co. v. Illinois Cent. R.R., 299 U.S. 334 (1937) (convict-made goods); Hoke v. United States, 227 U.S. 308 (1913) (transporting women for immoral purposes).

70. 312 U.S. 100 (1941).

71. *Id.* at 118.

72. *Id.* at 124.

73. From 1936 to 1970, no federal law has been invalidated by the Supreme Court on the basis that Congress had exercised a power which belonged solely to the states. Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975). In 1970, the Court by a bare majority with no shared rationale found federal voting age standards inapplicable to state elections. Oregon v. Mitchell, 400 U.S. 112 (1970). This case must be distinguished from those decisions examined in this article. The Voting Rights Acts Amendments of 1970, which usurped the right *explicitly* given to states by art. I, § 4 of the Constitution to determine voter qualifications, was dealt with in *Oregon*.

police power distinction has waned under the means-end test with its decreasing scrutiny of the appropriateness of the means. The efficacy of this analysis as a federalism check was vitiated when the Court agreed to defer to congressional determination that a means-end relationship existed if the justices could perceive "a rational basis" for such a finding.[74]

State Government Regulations

State laws may coincide with federal regulations enacted under an enumerated power. Alternatively, state laws may deal with a matter potentially subject to federal control but as yet unregulated. The validity of state enactments is determined differently if they are in actual, as opposed to possible, conflict with federal law. In this section state statutes which might infringe on the commerce power will be considered.

1. Negative Implications

The grant of certain powers to the United States carries with it the negative implication that states may not exercise the same powers.[75] Although early cases recognized a state's right to exer-

Intrusive federal measures authorized using the means-end test were severely criticized by dissenting Justices as violating state autonomy. *See, e.g.*, Daniel v. Paul, 395 U.S. 298 (1969) (Black, J., dissenting); United States v. Oregon, 366 U.S. 643 (1961) (Douglas, J., dissenting).

74. The court in Katzenbach v. McClung, 379 U.S. 294 (1964), stated: "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Id.* at 303-04.

The Burger Court may be constricting the broad application of the means-end test in regard to commerce. In Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974), the Court rejected an analysis of conduct regarding a highway construction ingredient as being per se in commerce because highways are the instrumentalities of interstate commerce, for the analysis rested "on a purely formal 'nexus' to commerce." *Id.* at 198. The Court further stated:

> The justification for an expansive interpretation of the "in commerce" language . . . would require courts to look to practical consequences, not to apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets. *Id.* at 198-99.

75. *See* D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE 260-316 (1974) [hereinafter cited as ENGDAHL]. Negative implications should be distinguished from the explicit prohibition of state action on some matters by art. I, § 10 of the Constitution. One of these areas forbidden is state duties on imports which had traditionally been banned as long as the goods

cise its police power in regulating activities, subject to the dormant federal commerce power,[76] they did not resolve the question of whether the commerce power itself was an exclusive grant to the national government.[77]

A compromise position was reached in *Cooley v. Board of Wardens of the Port of Philadelphia.*[78] Although the decision purported to distinguish state regulations on the basis of their subject matter,[79] it has come to stand for a broader set of criteria which determine when the potential power of the commerce clause bars state regulations. State enactments were not invalidated by the latent commerce power if they were justifiable in relation to local needs and peculiarities, but they would be banned if disruptive of the uniformity necessary for a viable national free market.[80]

The original *Cooley* test, using the burden standard, focused on the possible impairment of interstate commerce and was employed for many years. Subsequently the Court supplemented *Cooley* by considering whether the statute in question placed a direct or indirect burden on interstate commerce.[81] However, this additional test was rejected when the Court realized that a mechanical analysis of the burdensome effect produced inequitable results.[82] The

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retained their original character as imports—"the original package doctrine." Low v. Austin, 80 U.S. (13 Wall.) 29 (1871). This ban was recently lifted when a nondiscriminatory ad valorem state tax was upheld. Michelin Tire Corp. v. Wages, 44 U.S.L.W. 4070 (U.S. Jan. 14, 1976).

76. New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).

77. Chief Justice Marshall indicated he found the arguments for exclusive federal powers convincing in dictum in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The Supreme Court reached conflicting results when confronted with the issue of exclusivity in Thurlow v. Massachusetts (the License Cases), 46 U.S. (5 How.) 504 (1847), and Smith v. Turner (the Passenger Cases), 48 U.S. (7 How.) 28 (1849). The former held that in the absence of national legislation no limits on state regulations exist and the latter, that states lack all power to act in an area that has been delegated to Congress.

78. 53 U.S. (12 How.) 299 (1851).

79. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. . . . The nature of this subject [port pilotage] is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national, that it is likely to be best provided for, not by one system . . . but by . . . many . . . . *Id.* at 319.

80. ENGDAHL, *supra* note 75, at 266.

81. Di Santo v. Pennsylvania, 273 U.S. 34 (1927) (Note Justice Stone's dissent criticizing the direct-indirect approach, *id.* at 43-45.); Port Richmond & Bergen Point Ferry Co. v. Hudson County, 234 U.S. 317 (1914); Smith v. Alabama, 124 U.S. 465 (1888).

82. California v. Thompson, 313 U.S. 109 (1941).

Court also developed a policy of examining the purposes of the statutes. Those which were found discriminatory were invalidated;[83] those which protected the public health or safety were upheld.[84] Apparently, judicial scrutiny of the purpose of state regulations is also an application of the discrimination standard.

The *Cooley* approach has been supplanted in modern decisions by a process of balancing the burden on interstate commerce against the benefit accruing to the state.[85] In using this analysis, the Court has again considered such factors as the legitimacy of the state purpose.[86] This "new" analysis represents a similar emphasis on the burden standard, with the discrimination standard presenting supplemental concerns.

2. Preemption

Preemption and negative implications are companion federalism doctrines. Preemption arises when a state regulation and an existing federal law conflict.[87] Because of the supremacy clause,[88] the federal law, as an exercise of a delegated power, overrides the state regulation.[89] Preemption will be examined in the context of the commerce clause.

83. H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

84. Bradley v. Public Utilities Comm'n, 289 U.S. 92 (1933).

85. "The decisive question is whether in the circumstances the total effect of the law as a safety measure . . . is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it." Southern Pacific Co. v. Arizona, 325 U.S. 761, 775-76 (1945); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

86. Regulations discriminating against out-of-state interests or unduly favoring local producers have been invalidated. *E.g.*, Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951). Regulations which were potentially quite burdensome were upheld if necessary for public health or safety. *E.g.*, Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960). A criterion which has been employed in conjunction with both the traditional and modern tests has been the presence of conflicting state regulations. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Hall v. DeCuir, 95 U.S. 485 (1878).

87. Conflict may be found in contradictory, complementary, and even corresponding state and federal legislation. ENGDAHL, *supra* note 75, at 320-21.

88. U.S. CONST. art. VI, § 2.

89. Hirsch, *Towards a New View of Federal Preemption*, 1972 U. ILL. L. FOR. 515.

For many years the test used by the Court in resolving preemption conflicts was that once federal power had been exercised, it was inherently exclusive of state power over the same subject.[90] This congressional exercise of power has been described as "tak-[ing] the particular subject-matter in hand"[91] and "occupy[ing] the field."[92]

In the late 1930's this absolute bar to state action was gradually eroded. The modern test is the intent of Congress: An exclusionary intent must be evident before a state regulation will be preempted.[93] In the absence of clear congressional intent, the Court looks to a number of indicia to determine the exclusivity of federal legislation.[94] State regulations will be barred: if their method of enforcement would interfere with the methods used by the federal regulations;[95] if they would "disturb and disarrange the statutory plan Congress set up";[96] or if diverse state laws would produce confusion impairing congressional goals.[97] Exclusionary intent may also be found if the subject matter of federal legislation requires national uniformity.[98] Apparently, both the early and modern preemption tests use the burden standard with federal policy or programs as their focus. Because of the supremacy clause congressional intent, if present, is controlling.

Although the Court has continued to use the same test and indicia, recent decisions have reflected greater deference to state policies and legislation. These cases may either entail sweeping discus-

90. This view was voiced by Justice Story in his dissent in New York v. Miln, 36 U.S. (11 Pet.) 102, 159 (1837).

91. Charleston & W. Ca. R.R. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915).

92. Southern Ry. v. Railroad Comm'n, 236 U.S. 439, 447 (1915).

93. Mintz v. Baldwin, 289 U.S. 346, 351-52 (1933).

94. Criteria not based on burden or discrimination standards have been applied inconsistently. The existence of a comprehensive federal program has been seen as an indication of exclusionary intent. *E.g.*, Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Hines v. Davidowitz, 312 U.S. 52 (1941). In upholding a state regulation in conflict with those promulgated by the federal government in its Aid to Families with Dependent Children program, the Court refused to infer an exclusionary intent from the complexity of the federal regulations. New York Dep't of Social Serv. v. Dublino, 413 U.S. 405 (1973).

95. Perez v. Campbell, 402 U.S. 637 (1971); Nash v. Florida Indust. Comm'n, 389 U.S. 235 (1967).

96. Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965).

97. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962).

98. Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

sions of "Our Federalism,"[99] or simply a call for state laws to be "accommodated."[100] Although the Court has not come full circle from its early position of absolute exclusivity, a greater awareness of states' rights and interests now exists.

NEW CRITERIA FOR FEDERALISM DECISIONS

In the past, federalism conflicts have been frequently resolved using tests based on burden and discrimination standards. These standards are applied to various activities, described here as federalism factors, to determine the legitimacy of state and federal regulations. Usually, tests based on the discrimination standard are applied strictly, barring any discrimination. Tests based on the burden standard may be applied absolutely, barring any burden, or quantitatively, barring substantial burdens. In determining how the test is to be applied, a standard of review is developed.

Federal regulation of state government presents the sharpest conflict between the competing concerns of federalism.[101] Possible tests to resolve competing federal and state claims will be examined. These tests will be applied by using a hypothetical situation involving a federal regulation under the commerce clause which, as part of an energy saving program, would require the spotlights on the statehouse's dome to be shut off.

As a first model for decisionmaking, it has been suggested that the former distinction of governmental versus proprietary functions

99. [A] recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," . . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future. Younger v. Harris, 401 U.S. 37, 44-45 (1971).

100. Wheeler v. Barrera, 417 U.S. 402, 419 (1974). *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973).

101. National League of Cities v. Usery, No. 74-878 (U.S., filed Jan. 17, 1975). *See* note 2 *supra*.

be revived.[102] In the past this test had been used to distinguish such diverse state activities as managing liquor stores[103] and administering the capitol building.[104] However, well-drawn lines are not always possible, and Justice Rehnquist proposes that the test be modified to distinguish between those activities "traditionally undertaken by the State and other activities."[105]

This approach presents several problems. For example, "traditionally" must be defined. Does it require state action from the time of the Revolution or from the time this function became feasible or common? Other questions are whether the activity must be a traditional function of this state, all states, or states to the exclusion of private individuals. When the definitional problem is resolved, a standard of review must be determined. An absolute ban on federal regulation of an activity recognized as a traditional governmental function would allow the statehouse dome to remain illuminated despite the national energy saving plan.

Flexibility could be gained and deference to state autonomy preserved if the federal government were forced to prove a compelling interest in order to regulate a traditional government function.[106] This position is modeled upon Justice Stone's theory posed in *United States v. Carolene Products*[107] that greater judicial scrutiny is called for when a fundamental right protected by the first ten amendments is threatened.[108] Applying strict scrutiny to the "traditional" distinction would ameliorate the harshness of a complete ban approach and force the hypothetical statehouse lights to be dimmed during an energy crisis.

Another possible standard of review using Justice Rehnquist's traditional function approach is that of balancing the extent of interference with the traditional activity against the effect of being exempt from federal regulation. This test would make a blackout of the statehouse lights possible, but it would also allow more in-

102. Fry v. United States, 421 U.S. 542, 558 n.2 (1975) (Rehnquist, J., dissenting).

103. Ohio v. Helvering, 292 U.S. 360 (1934).

104. New York v. United States, 326 U.S. 572, 582 (1946).

105. Justice Rehnquist characterized the tenth amendment as "an affirmative constitutional right." Fry v. United States, 421 U.S. 542, 553 (1975). If this view is accepted, infringements on tenth amendment "rights" might be subjected to strict scrutiny and forced to meet the compelling interest test suggested by Justice Stone in United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938).

106. Charles Rhyne, attorney for the National League of Cities, argues that a "higher-than-rational" basis test should be applied to the 1974 amendments to FLSA. Brief for Appellant at 46, National League of Cities v. Dunlop, No. 74-878 (U.S., filed Jan. 17, 1975).

107. United States v. Carolene Products, 304 U.S. 144 (1938).

108. *Id.* at 152 n.4.

trusive federal regulations and be less protective of state sovereignty than a strict scrutiny standard.

This balancing approach to federalism problems was first suggested in conjunction with a different federalism factor—an "indispensable" government function. In *Maryland v. Wirtz*,[109] Chief Judge Thompson employed such a test to determine whether state school and hospital employees were subject to federal wage and hour regulations. The distinguishing factor—indispensable—goes beyond essential and includes only those state activities which "cannot reasonably be supplied to the general public unless the state undertakes them."[110] Balancing is accomplished by weighing interference with the indispensable function against the effect of immunizing it from the proposed regulation. If the indispensable factor is used, the state's traditional role of lighting its capitol building does not even tip the scales, and the federal regulation would be allowed.

When, as in *Wirtz*, a truly indispensable function is found, the results may be unsatisfactory if the goal is protection of state sovereignty. In *Wirtz*, the federal wage and hour provisions were allowed to stand despite their serious impact on budgetary determinations in operating state schools and hospitals.

States could be afforded greater protection if either a strict scrutiny or a total ban approach were used in conjunction with the indispensable function factor. Neither approach would require that any consideration be given to regulating the lighting of the state capitol building, for its illumination is not an indispensable function.

The more limited coverage afforded state functions if the discriminant *indispensable* is used emphasizes the inadequacies of using either this term or *traditional* as the federalism factor. By qualifying which state government function is protected from federal intervention, regulations on a small group of state activities will undergo the chosen standard of review. All other federal laws will presumably be upheld automatically if they apply equally to private and state actions.[111] Litigants will be forced to focus on proving that a certain state activity falls within the protected class.

109. 18 WH CASES 62, 80 (1967).
110. Comment, *Maryland v. Wirtz*, 66 MICH. L. REV. 750, 769 n.74 (1968).
111. *See* text accompanying notes 39-43 *supra*.

An alternative to this constrictive situation would be a return to the governmental, as opposed to the proprietary, function as a federalism factor. A substantial body of case law defining these terms already exists.[112] Admittedly, not all governmental functions merit the same degree of protection: Maintaining the capitol building ranks far below budgeting funds. A gradient system should be used to determine how extensively this activity should be shielded from federal intervention. This analysis avoids the harsh in-or-out of the protected class effect which resulted above.

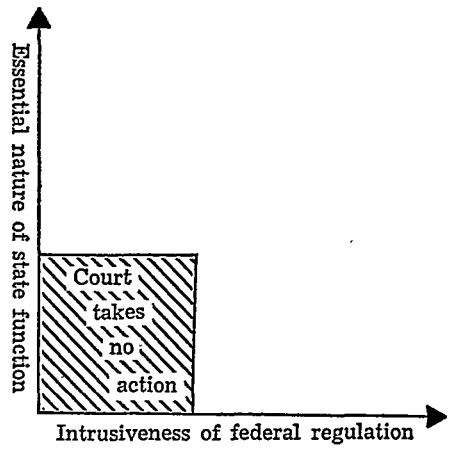
Moreover, the standard of review used to determine whether a federal enactment will be applied to a particular government function should be on a variable basis as well; *i.e.* the more a proposed measure interferes with the function, the greater scrutiny it will undergo. In order to survive strict scrutiny, an extremely intrusive regulation would have to be based on a compelling interest. Thus this model is a sliding scale.[113] Critical government functions could

112. *E.g.*, Ohio v. Helvering, 292 U.S. 360, 368 (1934).

113. Justice Marshall suggested this standard of review for equal protection in his dissents in San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 98-110 (1973), and Dandridge v. Williams, 397 U.S. 471, 519-20 (1970). He stated:

> A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. San Antonio Independent School Dist. v. Rodriquez, *supra* at 98-99.

As applied to federalism conflicts concerning federal regulation of state government functions, a sliding scale would have this appearance.



be subjected to only minimal regulation unless a compelling federal interest is demonstrated. Less significant functions could be regulated more extensively. The model would require judges to make a two-step determination: first, the significance of the state government function involved; second, the degree of the federal interference with that function.[114]

When this test is applied to the statehouse dome hypothetical, the determination of lighting for a capitol building emerges as an insignificant state function. Although the interference with state prerogatives is great, the federal interest is high, and thus the legislation would be upheld.

Whether either this sliding scale model or another test is used to resolve federalism dilemmas, the Court can no longer avoid adopting a definite test for evaluating federal regulations of state functions. The increasing complexities of modern society encourage federal intrusion in areas as diverse as chartering private corporations[115] and regulating landing rights at locally operated airports.[116]

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114. A sliding scale would not be foreign to Supreme Court adjudication. The Justices in effect used this standard of review in a number of fourteenth amendment cases involving deprivation of individual liberties through state action. The Court apparently considers both the significance of the liberty which was being invaded (*e.g.*, trespass, Bell v. Maryland, 378 U.S. 226 (1964), or home ownership, Shelly v. Kramer, 334 U.S. 1 (1948)) and the extent of state involvement (*e.g.*, state court decree, Evans v. Abney, 396 U.S. 435 (1970), or amendment to the state constitution, Reitman v. Mulkey, 387 U.S. 369 (1967)) in reaching a result. As the right being denied became more important, less state action was needed to bring the situation under the fourteenth amendment and *vice versa*. If the case presented neither the deprivation of a fundamental right nor extensive state action, it was found to be outside the fourteenth amendment. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

Commentators have noted a relationship similar to a sliding scale between the factors of fundamental interest and suspect classification in equal protection. The interplay of these elements has been described as that of intersecting variables." Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 35-36 (1969), or as related "gradients." Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1120 (1969).

115. Current proposals in this field vary from a Federal Corporate Uniform Standards Act—Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974)—to actual federal chartering of corporations. Schwartz, *A Case for Federal Chartering of Corporations*, 31 BUS. LAW. 1125 (1976).

116. Although the federal Department of Transportation authorized landing of the Concorde Supersonic Transport at John F. Kennedy Airport, offi-

In the future the Court will repeatedly confront the "fundamental constitutional question"[117] of allocation of federal and state authority. The Court should be prepared for these controversies by formulating a viable test to evaluate conflicting federal and state claims.

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cials of the Port Authority of New York and New Jersey, which controls that airport, have refused to sanction such landings. *See* Fairfax Co. v. McLucas, 44 U.S.L.W. 2431 (U.S. Mar. 24, 1976).

117. Fry v. United States, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting).