APPLYING THE EQUAL PAY ACT TO STATE
AND LOCAL GOVERNMENTS: THE EFFECT
OF NATIONAL LEAGUE OF CITIES v. USERY

I. Introduction

The Fair Labor Standards Act of 1938\(^1\) (FLSA) establishes a
minimum wage that employers are required to pay their emp-
loees “who . . . [are] engaged in commerce or in the production
of goods for commerce, or [are] employed in an enterprise en-
gaged in commerce or in the production of goods for commerce . . . .”\(^2\) The FLSA also provides that any employee who works
more than a specified maximum number of hours per week
must be compensated at a rate at least one and one-half times his
regular rate for hours worked in excess of the maximum.\(^3\)

As originally enacted, the FLSA did not define “employer”
to include a “State or political subdivision of a State”;\(^4\) state and
local governments thus were exempted from the wage and hour
requirements of the Act. In 1966, however, Congress removed
this exemption with regard to employees of state and local
government hospitals, schools, institutions for the sick, aged,
or mentally ill, and public transportation if the rates and ser-
vices of such transportation are regulated by a state or local
government agency.\(^5\) The Supreme Court subsequently upheld
the application of the FLSA to state and local government hospi-
tals and schools in Maryland v. Wirtz.\(^6\) In 1974, Congress further
reduced exemption from coverage under the FLSA\(^7\) to public
officeholders and their staffs and advisors.\(^8\) Thus, for most of
their employees, public employers were subject to wage and

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3 Id. § 207(a)(1).
(current version at 29 U.S.C. §§ 203(d), 203(x) (Supp. IV 1974)).
6 392 U.S. 183 (1968), overruled, National League of Cities v. Usery, 96 S. Ct. 2465
(1976).
8 29 U.S.C. § 203(e)(2)(C) (Supp. IV 1974). The FLSA also contains a general ex-
emption for executive, administrative, and professional personnel. 29 U.S.C. § 213(a)(1)
hour requirements under the amended FLSA that were the same as those to which private employers had been subject previously.

Following the passage of the 1974 amendments, the National League of Cities, the National Governors' Conference, and several state and local governments sought to enjoin the enforcement of the FLSA against police and fire departments. A three-judge district court, relying on Wirtz, dismissed the complaint. The Supreme Court, in National League of Cities v. Usery, reversed, holding that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the commerce clause]."

Mr. Justice Rehnquist delivered the opinion of the Court. Relying on the tenth amendment's reservation to the states of powers not delegated to the federal government and "the essential role of the States in [the] federal system," he reasoned that the Constitution contains affirmative limitations upon Congress' power to override state sovereignty. Therefore, legislation admittedly within the scope of the commerce clause nonetheless exceeds Congress' power if it infringes on the sovereign powers reserved to the states. Discussing state sovereignty, he stated:

One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.

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9 State governments of Arizona, California, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington; local governments of Nashville and Davidson County, Tenn., Cape Girardeau, Mo., Lompoc, Cal., and Salt Lake City, Utah. National League of Cities v. Usery, 96 S. Ct. 2465, 2467 n.7 (1976).
12 96 S. Ct. 2465 (1976).
13 Id. at 2474.
14 Burger, C.J. and Powell, Stewart, and Blackmun, JJ. joined in the opinion. Justice Blackmun also filed a concurring opinion. See note 20 infra.
15 96 S. Ct. at 2470. The tenth amendment reads: "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.
16 96 S. Ct. at 2471.
Justice Rehnquist concluded that although congressional regulation of employees' wages and hours is within the scope of the commerce power,\(^\text{17}\) when applied to state employees engaged in "traditional governmental functions"\(^\text{18}\) it infringes upon state sovereignty and is unconstitutional. *Maryland v. Wirtz*, which held that the wage and hour provisions of the FLSA could constitutionally be applied to state and local government schools and hospitals,\(^\text{19}\) was overruled.\(^\text{20}\)

The Court in *National League of Cities* considered the application to state and local government employees of only the wage and hour provisions of the FLSA. The practical effect of the decision, however, may not be so narrow; in 1963 the FLSA was amended by the Equal Pay Act,\(^\text{21}\) which bars an employer from discriminating

between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .\(^\text{22}\)

As part of the FLSA, the application of the Equal Pay Act underwent the same evolution as the FLSA's wage and hour provisions: when enacted in 1963 the Equal Pay Act was inapplicable to state and local governments;\(^\text{23}\) in 1966 the existing exemption


\(^{18}\) 96 S. Ct. at 2474.

\(^{19}\) See text accompanying note 6 *supra*.

\(^{20}\) 96 S. Ct. at 2468.

Justice Blackmun concurred in a brief opinion, *id.* at 2476, (Blackmun, J., concurring), interpreting the Court's opinion as adopting a balancing approach that would not bar the application of federal power "in areas where the federal interest is demonstrably greater" than that of the states. *Id.* In a vigorous dissent, Justice Brennan, joined by Justices Marshall and White, *id.* at 2476-88, (Brennan, J., dissenting) argued that there is no restraint on Congress' commerce power based on state sovereignty anywhere in the Constitution and that "decisions over the last century and a half have explicitly rejected the existence of any such restraint . . . ." *Id.* at 2477 (footnote omitted). He accused the majority of "discard[ing] roughshod" the reasoning of prior decisions, *id.* at 2483, overruling *Wirtz* through an "exercise of raw judicial power," *id.* at 2487, and striking "a catastrophic judicial body blow at Congress' power under the Commerce Clause." *Id.* Justice Stevens also dissented, finding the "principle on which the holding rests . . . difficult to perceive." *Id.* at 2488 (Stevens, J., dissenting).


\(^{23}\) See text accompanying note 4 *supra*. 
for public employees was removed as to employees of state and local hospitals, institutions, schools, and public transportation;\(^{24}\) in 1974 the exemption was further reduced to cover only public officeholders and their staffs and advisors.\(^{25}\)

This Comment seeks to determine whether the Equal Pay Act is constitutional under *National League of Cities*.\(^{26}\) The Comment first examines the constitutionality of the Act as an exercise of Congress' commerce power,\(^{27}\) and concludes that it suffers from the same infirmities that led the Court to invalidate the FLSA's wage and hour provisions when applied to employees engaged in "traditional governmental functions." Thus, after *National League of Cities*, the Equal Pay Act, when applied to public employment relationships in such functions, is an unconstitutional exercise of congressional commerce power. Because *National League of Cities*, however, preserves the constitutionality of Congress' exercise of the commerce power in state and local government employment relationships in nontraditional governmental functions,\(^{28}\) the Equal Pay Act is constitutional when applied to public employees engaged in such functions. The Comment, therefore, seeks to discover which governmental functions the Court deems "traditional," but concludes that aside from examples of "traditional governmental functions" provided by the Court\(^{29}\) and an emphasis on certain factors about the nature of a "traditional governmental function,"\(^{30}\) no clear guide emerges from *National League of Cities* by which one can determine whether a governmental function is nontraditional and therefore a permissible area for the exercise of Congress' commerce power. Finally, the Comment examines the constitutionality of the Equal Pay Act as an exercise of Congress' power under the enforcement clause of the fourteenth amendment and concludes that application of the Act to public employees in both

\(^{24}\) See text accompanying notes 5-6 *supra*.

\(^{25}\) See text accompanying notes 7-8 *supra*.


\(^{27}\) See Equal Pay Act of 1963, Pub. L. No. 88-38, § 2(b), 77 Stat. 56 (codified at 29 U.S.C. § 202(b) (1970)) (the policy of the Act is to be pursued "through the exercise by Congress of its power to regulate commerce among the several States").

\(^{28}\) See notes 55-57 *infra* & accompanying text.

\(^{29}\) See note 69 *infra* & accompanying text.

\(^{30}\) See notes 58-77 *infra* & accompanying text.
traditional and nontraditional governmental functions is a constitutional exercise of that congressional power.

II. The Equal Pay Act as an Exercise of Congressional Commerce Power

Although the Court did not consider the equal pay provisions of the FLSA in National League of Cities, its analysis is important for a determination of the constitutionality of those provisions; Congress based the validity of both the equal pay and the wage and hour provisions on the same grounds: the commerce power. If the equal pay provisions of the FLSA do not "operate to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions"—a displacement that led the Court to invalidate the wage and hour provisions in such areas—then the Equal Pay Act is a valid exercise of Congress' commerce power and may be applied in traditional as well as nontraditional governmental functions. It is necessary, then, to determine what kind of interference in the conduct of "traditional government functions" is impermissible after National League of Cities and then to determine whether the Act constitutes such an impermissible interference.

The Court indicated that the effects of the imposition of federal wage and hour standards on traditional state operations together with the existence of legitimate state purposes in failing to meet those standards in public employment resulted in an impermissible interference with state sovereignty. The effects of the wage and hour provisions the Court focused on were the increased cost of providing services at existing levels due to increased state payrolls and the resulting reduction in both the quality and quantity of services provided. The states' legitimate purposes in employing people without complying with the

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31 96 S. Ct. at 2468, 2471-74.
32 See note 27 supra & accompanying text.
33 96 S. Ct. at 2474 (emphasis supplied).
34 The FLSA contains a separability of provisions clause: "If any provision of this Chapter or the application of such provision to any person or circumstance is held invalid,! the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby," 29 U.S.C. § 219 (1970). When a court rules on a section of a statute containing such a clause, it is to consider only the section before it. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938).
35 96 S. Ct. at 2471-74.
36 Id. at 2471-72.
37 Id.; see text accompanying notes 62-64 infra.
FLSA's wage and hour requirements included employment of untrained or unskilled workers,\textsuperscript{38} part-time workers,\textsuperscript{39} or teenagers in the summer;\textsuperscript{40} by employing such people at less than the minimum wage, a state could provide them with valuable job experiences while reducing welfare and unemployment rolls. To the extent a state is precluded or hindered in the pursuit of these purposes, "the [wage and hour provisions of the FLSA] displace state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require."\textsuperscript{41} Because of the effects of the imposition of federal wage and hour standards on state operations and the existence of legitimate state purposes in failing to meet those standards, interference with "the states' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime"\textsuperscript{42} is impermissible in the area of "traditional governmental functions."\textsuperscript{43}

The equal pay provisions, in contrast to the FLSA's wage and hour provisions, neither set wage and hour standards nor interfere with the states' ability to "structure employer-employee relationships."\textsuperscript{44} They require only that the states' pay scales be applied equally to men and women who perform equal work. Also unlike the wage and hour provisions, the Equal Pay Act sets no substantive terms of employment. The states remain free to set wages, hours, days of work, and all other terms and conditions of employment as they see fit, as long as they do not do so in a discriminatory fashion. Moreover, in contrast with setting wages, hours, and rates of overtime compensation, sex discrimination in employment is neither an exercise of discretion essential to state sovereignty nor an undoubted attribute of such sovereignty.\textsuperscript{45} Engaging in sex discrimination in wages serves no legitimate state purpose, and the Court has in recent years subjected such discrimination to increasingly strict scrutiny.\textsuperscript{46}

\textsuperscript{38} 96 S. Ct. at 2472.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 2471.
\textsuperscript{43} Id. at 2474.
\textsuperscript{44} Id.
\textsuperscript{45} Usery v. Bettendorf Community School Dist., Civ. No. 76-6-D, slip op. at 2 (D. Iowa Sept. 1, 1976); Christensen v. Iowa, 13 FEP Cases 161, 163 (D. Iowa 1976).
\textsuperscript{46} See Frontiero v. Richardson, 411 U.S. 677 (1973) (statutory classification of spouses of male members of uniformed services as "dependent" for purposes of in-
The equal pay provisions, then, insofar as they require only equal pay for equal work, do not infringe upon state sovereignty in a manner that the Court found impermissible in *National League of Cities*. A federal requirement of equal pay for equal work displaces no legitimate state options, nor does it interfere with the states' discretion in structuring employment relationships.

The Equal Pay Act provides, however, that "an employer who is paying a wage differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage of any employee."\(^\text{47}\) A state or local government, then, must raise the wages of any employee underpaid in violation of the Act. This requirement increases the cost of dispensing state services and places the states in the same dilemma that they were placed in by the FLSA's wage and hour requirements;\(^\text{48}\) they must either reduce important services or raise additional revenue to meet the higher payroll the Equal Pay Act requires them to pay. Thus, the Equal Pay Act, as an exercise of the power to regulate commerce, suffers from the same constitutional infirmity that the FLSA's wage and hour provisions\(^\text{49}\) suffered from and may not be applied to employees


\(^{48}\) See text accompanying notes 36 & 37 supra.

\(^{49}\) It might be argued that the Equal Pay Act is a valid exercise of congressional commerce power under *Fry v. United States*, 421 U.S. 542 (1975), which the Court in *National League of Cities* said was unaffected by the *National League of Cities* holding. 96 S. Ct. at 2474. In *Fry*, the Court upheld the constitutionality of a temporary wage freeze on state and local government employees pursuant to the Economic Stabilization Act of 1970. The wage freeze that *Fry* held valid, however, "displaced no state choices as to how governmental operations should be structured . . . [but] merely required that the wage scales and employment relationships which the States themselves had chosen be maintained . . . ." Id. at 2474-75. Similarly, the state and local governments set their own wage rates under the Equal Pay Act. Unlike the situation in *Fry*, however, where the states' wage scales were frozen and the financial burden on the states therefore not affected, the Equal Pay Act requires the public employers to raise some employees' increased benefits, where spouses of female members are so classified only if they are in fact dependent for over one-half of their support, violative of equal protection clause); cf. *Stanton v. Stanton*, 421 U.S. 7 (1975) (age of majority of 18 for women and 21 for men for purposes of required child support violative of equal protection clause); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (survivor's benefits paid to widow and minor children of deceased husband but only to minor children of deceased wife, and not to widower, violative of equal protection clause); *Reed v. Reed*, 404 U.S. 71 (1971) (statutory preference of men over women for appointment as administrator of a decedent's estate violative of equal protection clause). *But cf.* *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (legislation establishing different tenure rules for male and female military officers found to have a rational basis); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (exclusion of normal pregnancy from compensable employee disability benefits upheld); *Kahn v. Shevin*, 416 U.S. 351 (1974) (tax benefits for widows but not widowers upheld as having a rational basis).
in "traditional governmental functions." 50

The Court's opinion in National League of Cities, however, did not invalidate the exercise of Congress' commerce power in areas of nontraditional governmental functions, 51 whether or not that exercise "displace[s] the States' freedom to structure integral operations" 52 in those areas. This Comment now attempts to discern which governmental activities the Court deems "traditional"; outside of such activities, the equal pay provisions (as well as the wage and hour provisions) are a valid exercise of the commerce power.

III. The "Traditional Governmental Function" Test

National League of Cities holds that Congress' power under the commerce clause is insufficient to permit Congress to impose the FLSA's wage and hour requirements on the states for their employees engaged in areas of "traditional governmental functions"; the commerce power may not be exercised in a manner that so substantially interferes with "traditional aspects of state sovereignty." 53 The Court emphasized that the decision does not prohibit Congress from exercising its commerce power over public employment relationships in areas of state and local governmental activities not considered to be "traditional governmental wages and thus increases the financial burden on them. The Court in National League of Cities found that an increase of the financial burden on the state and local governments interfered with states' sovereignty. See text accompanying notes 36 & 37 supra. Moreover, the wage freeze was temporary and in effect for a limited, specific period of time, whereas the Equal Pay Act is permanent in effect. 96 S. Ct. at 2474-75.

A number of courts, however, have ruled, in light of National League of Cities, that the Equal Pay Act is a valid exercise of Congress' commerce power. Usery v. Dallas Independent School Dist., 421 F. Supp. 111, 116 (N.D. Tex. 1976); Usery v. Kent State Univ., No. C 75-550, slip op. at 4, 5 (D. Ohio Oct. 7, 1976); Usery v. Bettendorf Community School Dist., Civ. No. 76-6-D, slip op. at 2, 3 (D. Iowa Sept. 1, 1976); Christensen v. Iowa, 13 FEP Cases 161 (D. Iowa 1976). These cases involved suits against local and state government employers for violations of the Equal Pay Act. Following National League of Cities, the defendant governments filed motions either to dismiss or for summary judgment on the grounds that National League of Cities precludes application of the Equal Pay Act to state and local governments. In rejecting such motions, these courts either engaged in minimal analysis that neglected to consider the Equal Pay Act's requirement that no employees' wages be lowered to conform to the Act's dictate, e.g., Christensen v. Iowa, 13 FEP Cases 161 (D. Iowa 1976), or erroneously assumed that a state may reduce an employee's wages in order to comply with the EPA, "thus imposing no burden whatsoever on the States." Usery v. Dallas Independent School Dist., 421 F. Supp. 111, 116 (N.D. Tex. 1976).

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51 See text accompanying notes 53-57 infra.

52 96 S. Ct. at 2474; see text accompanying note 33 infra.

53 96 S. Ct. at 2473.
functions” by expressly declining to overrule54 United States v. California55 and other cases56 holding that Congress may subject state owned and operated railroads to its commerce power. Thus, the Equal Pay Act, like the wage and hour provisions of the FLSA, remains valid when applied to state employees not engaged in “traditional governmental functions.”

The National League of Cities opinion, however, neither defines nor establishes a test for determining a “traditional governmental function.” This lack of precision prompted Justice Brennan to criticize the Court for creating a “conceptually unworkable essential function test; and that the test is unworkable is demonstrated by my Brethren’s inability to articulate any meaningful distinctions among state-operated railroads, . . . state-operated schools and hospitals, and state-operated police and fire departments.”87 Despite this failure to “articulate any meaningful distinctions,” two guides as to what constitutes a “traditional governmental function” may be found in the Court’s opinion. The first factor the Court focused on in National League of Cities was the importance of the governmental activity.58 The impact of the FLSA’s wage and hour requirements on state and local governments was illustrated first by reference to police and fire services.59 The Court expressed its concern over the increased costs of maintaining present levels of such services,60 and was troubled particularly by reductions in quality and scope of those services as a result of the imposition of the FLSA’s wage and hour provisions.61 It cited as examples “of forced relinquishment of important governmental activities” the curtailment of the California Highway Patrol training program62 and of Inglewood, California’s affirmative action program for training men and women for law enforcement careers.63 Further, if courts construing the wage and hour provisions determine that volunteer firemen are subject to them, communities unable to bear the cost would be compelled to reduce their fire protection.64

54 Id. at 2475 n.18.
55 297 U.S. 175 (1936).
57 96 S. Ct. at 2487 (Brennan, J., dissenting); see note 20 supra.
58 96 S. Ct. at 2471-72.
59 Id.
60 Id. at 2471.
61 Id. at 2471-72.
62 Id. at 2472.
63 Id.
64 Id. at 2473.
Police and fire services, however, are not necessarily the only important activities falling within the scope of the Court's notion of "traditional governmental functions." The opinion notes that "[t]he State of Arizona alleged that the annual additional expenditures which will be required if it is to continue to provide essential state services may total $2 1/2 million dollars [sic]," but does not indicate to which essential services it was referring. The references to police and fire services may indicate that all public safety-related government services are sufficiently important to be labeled "traditional governmental functions." Similarly, the overruling of Wirtz suggests that school and hospital services are "important" governmental activities, and the suggestion may extend to all health—and education—related services. National League of Cities, however, provides no clue as to what further services are important enough to be considered "traditional governmental functions."

The second factor relied on in National League of Cities in formulating a concept of "traditional governmental functions" is whether the service is one that "states have traditionally afforded their citizens"—that is, whether the service is one that the government has historically provided. The opinion contains examples of such services—"fire prevention, police protection, sanitation, public health, and parks and recreation"—and notes that "[t]hese examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local government." This language suggests that the concept of "traditional governmental functions" is a broad one, encompassing most governmental activities.

The Court attempted to refine its concept of "traditional governmental functions" by characterizing the examples it listed as "activities [that] are typical of those performed by state and local governments in discharging their dual functions of ad-

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65 Id. at 2471 (emphasis supplied).
66 See text accompanying notes 19-20 supra.
67 See 96 S. Ct. at 2476. The Court may have been relying on the longtime governmental provision of these services to bring them within the rubric of "traditional governmental services." Id. For a discussion of tradition as a factor in the court's formulation of the "traditional governmental function," see text accompanying notes 69-77 infra.
68 Indeed, the Court cites "public health" services as an example of a "traditional governmental function." 96 S. Ct. at 2474.
69 Id.
70 Id.
71 Id. at 2474 n.16.
ministering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide . . . ." It observed that operation of a common carrier railroad in interstate commerce does not meet the National League of Cities criteria of a "traditional governmental function"; apparently operation of a railroad is neither adequately grounded in history nor sufficiently important as a state function. Private interstate common carrier rail service is generally available; the characterization of such service when provided by the state as a nontraditional governmental function thus may suggest that whether the state is the sole or primary provider of the service is critical to a determination of whether providing that service is a "traditional governmental function." If the state is not the primary provider of the service, it is unlikely that the service is one that a state ordinarily is "created to provide"; in short, it is not likely to be "in an area that the States have regarded as integral parts of their governmental activities." State and local governments, for example, provide office space and parking lots and garages for private use. The substantial provision of such services by the private sector of the economy, however, might suggest to the Court that such activities are not "traditional governmental functions." Whether this would in fact be the case, however, is not clear from National League of Cities itself.

Although a governmental activity may be both "important" and "traditionally provided by the state," it is unclear whether both factors are necessary conditions to qualifying a governmental activity as a "traditional governmental function." Nor is it clear how these factors are to be applied in determining whether an activity is such a function. On what basis, for example, is providing parks a "traditional governmental function" while providing interstate common carrier rail service is not? Other
than the examples of traditional and nontraditional governmental functions referred to in the opinion itself, the Court gives little guidance for determining whether a particular activity is a "traditional governmental function."

IV. THE EQUAL PAY ACT AS AN EXERCISE OF THE ENFORCEMENT CLAUSE OF THE FOURTEENTH AMENDMENT

The fourteenth amendment prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." The fifth section of the amendment empowers Congress "to enforce this article by appropriate legislation." This Comment contends that the Equal Pay Act is appropriate legislation to enforce the fourteenth amendment's equality guarantee and is thus a valid exercise of congressional power under section five of the amendment. National League of Cities does not foreclose such an argument; the plurality opinion "express[es] no view as to whether different results [than those reached in National League of Cities] might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution [than the commerce clause] such as . . . § 5 of the Fourteenth Amendment."

A. The Extent of Congressional Power Under Section Five of the Fourteenth Amendment

Ex parte Virginia outlined the extent of Congress' power to enforce the equal protection guarantee in this way:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the en-

80 Id.; see text accompanying note 70 supra.
81 For a discussion of the Court's failure to make itself clear on this point, see Note, Municipal Bankruptcy, the Tenth Amendment and the New Federalism, 89 HARV. L. REV. 1871, 1878-84 (1976).
82 U.S. CONST. amend. XIV, § 1.
83 Id. § 5.
84 The Department of Labor adopts this view when opposing motions to dismiss filed by public employers in pending Equal Pay Act cases. Following National League of Cities, such employers have argued that the Equal Pay Act is unconstitutional as applied against them. See, e.g., Plaintiff's Memorandum of Law Contra Defendant's Motion to Dismiss And/Or Motion for Summary Judgment at 8, Usery v. Board of Ed., Civ. No. K-76-672 (D. Md. 1976).
85 96 S. Ct. at 2474 n.1. The Court also disclaimed any opinion on the validity of the provision's applicability to public employees on the basis of any other congressional power. Id.
86 100 U.S. 339 (1879).
joyment of perfect equality of civil rights and equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.\textsuperscript{87}

Recent cases have reaffirmed \textit{Ex parte Virginia}'s test of the scope of Congress' fourteenth amendment enforcement power.\textsuperscript{88} For example, in \textit{Katzenbach v. Morgan},\textsuperscript{89} citing the test enunciated in \textit{Ex parte Virginia} approvingly,\textsuperscript{90} the Court upheld a congressional ban on state literacy tests as a requirement of achieving the right to vote. The Court in \textit{Morgan} further noted that congressional power to restrict state action under the enforcement clause extends even beyond the power of the Court to invalidate state action on the basis of the equal protection clause itself.\textsuperscript{91}

The equal protection clause prohibits sex discrimination that does not survive the increasingly strict scrutiny the Court applies to such discrimination.\textsuperscript{92} Equal pay legislation applied to the states is, therefore, appropriate legislation "to carry out the objects" of the fourteenth amendment and "tends to enforce submission to the prohibitions [it] contain[s]."\textsuperscript{93}

\begin{itemize}
\item \textsuperscript{87}Id. at 345-46.
\item \textsuperscript{89}384 U.S. 641 (1966).
\item \textsuperscript{90}Id. at 650.
\item \textsuperscript{91}Id. at 649. The Court said, "[T]he question before us here [is]: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?" Id. The Court answered this question in the affirmative. Id. at 651-59. That the courts will not always go as far under the equal protection clause as Congress is permitted to go under the enforcement clause is illustrated, when compared with the foregoing, by Lassiter v. Northampton Election Bd., 360 U.S. 45 (1959), which upheld North Carolina's literacy test as not in all circumstances violative of the equal protection clause of the fourteenth amendment.

It might be argued that the prohibition against wage discrimination based on sex, contained in the Equal Pay Act, is constitutionally mandated by the fourteenth amendment's equal protection clause. See cases cited note 46 supra. Such a constitutional argument obviates an aggrieved employee's need for a statutory claim such as one founded upon the Equal Pay Act. Even if wage discrimination based on sex violates the equal protection clause, however, the Equal Pay Act adds substance to the prohibition. Under the Act, courts have developed the doctrine of substantial equality, by which, for the purposes of the Act, jobs need only be substantially equal and not identical to require equal pay. Hodgson v. Brookhaven General Hosp., 436 F.2d 719 (5th Cir. 1970); Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970). This standard would not necessarily prevail under the equal protection clause alone. Moreover, the Equal Pay Act's remedy of requiring employers to raise the lower wage to the level of the higher, see text accompanying note 47 supra, is not necessarily mandated by the equal protection clause.

\item \textsuperscript{92}See note 46 supra & accompanying text.
\item \textsuperscript{93}\textit{Ex parte} Virginia, 100 U.S. 339, 345-46 (1879).
Moreover, in *Fitzpatrick v. Bitzer*, decided four days after *National League of Cities*, a unanimous Court held that a state that violated the provisions of Title VII of the Civil Rights Act of 1964—prohibiting, *inter alia*, sex discrimination by employers—was liable to its affected employees for backpay and attorneys' fees; the Court made no distinction between employees engaged in "traditional governmental functions" and those not so engaged. Congress extended coverage of Title VII to the states on the basis of section five of the fourteenth amendment. By upholding the award of backpay and attorneys' fees, the Court implicitly found that basis sufficient to support the application of Title VII to the states. The Equal Pay Act complements the prohibitions against sex discrimination in employment contained in Title VII by forbidding discrimination in wage payments. If the enactment of Title VII is within the power of Congress under the fourteenth amendment's enforcement clause, then the enactment of the Equal Pay Act is similarly within Congress' power.

Legislation enacted pursuant to section five of the fourteenth amendment does not infringe impermissibly upon state sovereignty. The Court in *Ex parte Virginia* pointed out that "[t]he prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce . . . . Such enforcement is no invasion of State sovereignty." The Court reaffirmed this principle in *Bitzer*, saying that the expansion of congressional power under the enforcement clauses of the thirteenth, fourteenth and fifteenth amendments resulted in a "corresponding diminution of state sovereignty." The Court added,

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94 96 S. Ct. 2666 (1976).
95 42 U.S.C. § 2000e (1970 & Supp. IV 1974). Title VII prohibits an employer from, *inter alia*, failing to hire an individual because of the individual's race, color, religion, sex, or national origin and similarly prohibits an employer from discharging an individual for any of these same reasons. 42 U.S.C. § 2000e-2(a)(1) (1970). Indeed, Title VII also prohibits such discrimination "with respect to [an individual's] compensation, terms, conditions or privileges of employment . . . ." *Id.* The Equal Pay Act gives greater content and precision to, as well as an independent basis for, the prohibition of wage discrimination. See text accompanying notes 22 *supra* & 98 *infra*.
97 See 96 S. Ct. at 2671 & n.11.
99 100 U.S. at 346.
100 96 S. Ct. at 2671.
When Congress acts pursuant to § 5 of the fourteenth amendment not only is it exercising legislative authority plenary within the terms of the grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority.  

The Equal Pay Act, therefore, as legislation that enforces the fourteenth amendment's prohibition against discrimination, is a valid exercise of congressional power.

B. Upholding the Constitutionality of Congressional Legislation on Other Than Its Stated Constitutional Basis

Congress enacted the Equal Pay Act as an exercise of its commerce power. This Comment has concluded, however, that although the Act as applied to public employees engaged in "traditional governmental functions" is an unconstitutional exercise of such power, it may be applied constitutionally to all public employees as an exercise of congressional power to enforce the fourteenth amendment. This conclusion is not jeopardized by Congress' failure to articulate a constitutionally adequate basis for the legislation.

Griffin v. Brechinridge presented the Court with a statute based on the fourteenth amendment's enforcement clause, providing a civil cause of action for private conspiracies. The Court declined to consider whether the statute was constitutional

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1 Id. Indeed, the Court again cited approvingly Ex parte Virginia, id. at 2670-71, as it had in Morgan. See text accompanying note 90 supra.

2 It is worth noting that the aspect of state sovereignty at issue in Bitzer was the states' immunity from suit under the 11th amendment. Therefore, the aspects of sovereignty discussed in this Comment—which may be said generally to be the unarticulated areas of state prerogative reserved to the states by the 10th amendment, see text accompanying note 15, and, more particularly, the power of the states to conduct integral "traditional governmental functions" without federal interference—are not identical to those addressed by the Bitzer Court. The 5th section of the 14th amendment, however, does not on its face circumscribe Congress' enforcement power to impositions on only some areas of state sovereignty. Although the narrow holding of Bitzer may be limited to the 14th amendment's effect on 11th amendment sovereign immunity from suit, there is no reason to limit the case's implications in this way.


4 See text accompanying note 32 supra.

5 See text accompanying notes 31-50 supra.

6 See text accompanying notes 82-101 supra.

7 403 U.S. 88 (1971).

8 42 U.S.C. § 1985(3) (1970) (a citizen deprived of his civil rights or injured in his person or property by two or more persons conspiring or going in disguise on a highway or premises of another has a civil cause of action against any conspirator).
under the provision explicitly relied on, and instead upheld the constitutionality of the statute on two other grounds: (1) as a permissible exercise of congressional power under the thirteenth amendment's enforcement clause, and (2) as a protection of the constitutionally protected right of interstate travel.

The Griffin decision is a logical extension of established principles of statutory construction. The courts presume that Congress acts within its constitutional powers, and construe congressional actions so as to hold them constitutional whenever possible. It follows from these basic principles that a court should uphold the constitutionality of legislation on any legitimate constitutional ground, whether or not that ground was the stated basis of the legislation.

Consistently with this analysis, two courts have recently stated that Congress' failure to pass the Equal Pay Act as an exercise of its power to enforce the fourteenth amendment does

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108 403 U.S. at 107.
109 Id. at 104-05.
110 Id. at 105-06.
112 E.g., Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 571 (1973); United States v. Vultch, 402 U.S. 62, 70 (1971); NLRB v. Jones & Laughlin Steel Co., 310 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy.").
113 The Civil Rights Cases do not require a contrary result. There, the Court considered the constitutionality of legislation enacted to enforce the fourteenth amendment. 109 U.S. 3 (1883). The Court declared that the legislation was an unconstitutional exercise of the enforcement clause of the fourteenth amendment because the legislation prohibited certain private action whereas the fourteenth amendment only prohibits state action. Id. at 11-19. The Court added that, "whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is . . . a question which is not now before us, as the sections in question are not conceived in any such view." Id. at 19. Thus, the Court seemed to suggest that it would not seek a constitutional basis for the legislation, such as the commerce clause, beyond that expressly stated by Congress. The government, however, had not argued the commerce clause as a basis for the legislation. Id. at 5-7. As the Court would later point out in a discussion of the Civil Rights Cases: "Since the commerce power was not relied on by the Government and was without support in the record it is understandable that the Court . . . excluded the Commerce Clause as a possible source of power." Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252 (1964). Indeed, the Court in the Civil Rights Cases itself noted: "[N]o countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment . . . and no other ground of authority for its passage being suggested, it must necessarily be declared void . . . ." 109 U.S. at 25 (emphasis supplied). The failure of the Court to consider the commerce clause in the Civil Rights Cases, therefore, is support only for the proposition that the Court will not consider constitutional authority for legislation if that authority is not argued before it.
not preclude a court from upholding the legislation on the basis of such power.\textsuperscript{114}

V. Conclusion

The Equal Pay Act is an unconstitutional exercise of Congress' commerce power when applied to public employees in traditional governmental functions following \textit{National League of Cities}. The Act, like the FLSA's wage and hour provisions, is a valid exercise of Congress' commerce power when applied to public employees in nontraditional governmental functions. The Court in \textit{National League of Cities} listed several governmental activities it deemed traditional governmental functions and one it deemed a nontraditional governmental function. It failed, however, to provide any guidelines from which one can determine, with certainty, that a governmental activity is a nontraditional governmental function. Nonetheless, the Equal Pay Act, as applied to all public employees, is a constitutional exercise of Congress' power under section five of the fourteenth amendment to enforce that amendment's substantive provisions. Courts may uphold legislation, such as the Equal Pay Act, on a constitutional basis other than that upon which Congress explicitly rested it. The Equal Pay Act, therefore, may stand—\textit{National League of Cities} notwithstanding.

\textsuperscript{114} Usery \textit{v. Allegheny Co. Inst. Dist.}, Civ. No. 74-1153, slip op. at 13-15 (3d Cir. Oct. 28, 1976) (although Congress did not explicitly rely upon its power to enforce the fourteenth amendment in enacting the Equal Pay Act, the Court's concern is "with the actual powers of the national government"); Usery \textit{v. Dallas Independent School Dist.}, 421 F. Supp. 111, 114 & n.3 (N.D. Tex. 1976) \textit{(dictum)}.\textsuperscript{1977}