NOTE

Defining the "State as State": Is a Nonprofit Corporation Under Contract with a State to Perform an Integral Government Function Entitled to Immunity from the Fair Labor Standards Act Under *National League of Cities*?

*By Steven K. Derian**

Introduction

In 1974 Congress amended the Fair Labor Standards Act (FLSA), extending the Act's minimum wage and maximum hour provisions to include most state and local government employees.[1] In *National League of Cities v. Usery*,[2] the Supreme Court, per Justice Rehnquist, found these amendments unconstitutional insofar as they operated to displace directly the states' freedom to structure integral operations in areas of traditional governmental functions.[3] The Court relied upon the Tenth Amendment[4] and, analogizing to the doctrine of intergovernmental immunity from taxation,[5] stated that there are "attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Con-

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1. Fair Labor Standards Amendment of 1974, Pub. L. No. 93-259 § 6, 88 Stat. 55, 58-59 (amending 29 U.S.C. § 203 (1970)).

2. 426 U.S. 833 (1976) (5-4 decision).

3. *Id.* at 852.

4. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. CONST. amend. X.

5. 426 U.S. at 843 n.14.

stitution prohibits it from exercising the authority in that manner."[6]

In the course of its opinion, the Court declared that the "States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce."[7] Three recent cases have examined the precise meaning of this pronouncement: *Richland County Association for Retarded Citizens v. Marshall;*[8] *Williams v. Eastside Mental Health Center, Inc.*[9] and *Skills Development Services, Inc. v. Donovan*.[10] Each case involves the applicability of the principles articulated in *National League of Cities* to a nonprofit corporation under contract with a state to provide a traditional government service.

This Note explores the issues raised by the facts of these cases and concludes that the decisional trend—that such nonprofit corporations are private entities not entitled to sovereign immunity from federal regulation—is proper in light of the language and logic of *National League of Cities* and its progeny.

I. Background: *National League of Cities v. Usery* and *Hodel v. Virginia Mining and Reclamation Association, Inc.*

By finding that the Tenth Amendment embodies a concept of state sovereignty that acts as an affirmative limitation upon the federal commerce power, *National League of Cities* clearly breaks with recent constitutional jurisprudence. The opinion overruled one case and distinguished several others in which the Court, over a period of more than thirty years, had held consistently that the authority of Congress under the Commerce Clause is not limited by the Tenth Amendment.[11]

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6. *Id.* at 845.
7. *Id.* at 854.
8. 660 F.2d 388 (9th Cir. 1981), *vacated*, 454 U.S. 389 (1982) (*per curiam*).
9. 669 F.2d 671 (11th Cir. 1982) *cert. denied*, 459 U.S. 976 (1982).
10. 558 F. Supp. 164 (M.D. Tenn. 1982), *aff'd*, 728 F.2d 294 (6th Cir. 1984).
11. The amendment simply states that those powers not delegated are reserved to the states. *See supra* note 4. It does not purport to be a limitation on the powers that are delegated. The view that the Tenth Amendment is an affirmative limitation upon the enumerated powers of Congress was rejected by Chief Justice John Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Marshall's interpretation is bolstered by evidence that the Senate originally refused to use the term "expressly delegated" because its use would unduly confine the national government. 1 ANNALS OF CONG. 1790 (1971). Nevertheless, the Supreme Court, particularly between 1890 and 1937—a period that one scholar has termed the era of "dual federalism," Corwin, *The Passing of Dual Federalism*, in ESSAYS IN CONSTITUTIONAL LAW (R. McCloskey ed. 1962)—struck down a number of federal statutes as violative of those powers which the Tenth Amendment reserved to the states. *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918).

In United States v. California, 297 U.S. 175 (1936), which unanimously upheld application of the Federal Safety Applicance Act to the operation of a state owned railroad, the Court rejected the notion that the Tenth Amendment limits the authority of Congress to

The decision elicited a blistering dissent from Justice Brennan,[12] a

impose regulations upon the states, asserting that "[t]he analogy of the constitutional immunity of state instrumentalities from federal taxation, on which [California] relies, is not illuminating. That immunity is implied from the nature of our federal system . . . and is equally a restriction on taxation by either of the instrumentalities of the other. . . . But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual." *Id.* at 184-85.

In United States v. Darby, 312 U.S. 100 (1941), a unanimous Court found the original FLSA to be a constitutional exercise of congressional power under the Commerce Clause. Averring that an exercise of the commerce power of Congress was unaffected by any possible impact upon the powers reserved to the states, the Court declared: "[T]he Tenth Amendment . . . states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment . . . ." *Id.* at 124.

This view of the authority of Congress to regulate the states under the Commerce Clause commanded a majority of the Court in both Maryland v. Wirtz, 392 U.S. 183 (1968) (upholding the constitutionality of the 1966 amendments to the FLSA, which extended the Act's coverage to employees of state schools and hospitals), *overruled*, 426 U.S. 833 (1976) and Fry v. United States, 421 U.S. 542 (1975) (upholding the authority of Congress to freeze temporarily the wages of state employees). Despite the holdings in *Wirtz* and *Fry*, there were indications that some members of the Court were reconsidering the scope of the commerce power vis-a-vis the states. Dissenting in *Wirtz*, Justice Douglas wrote that the application of the FLSA to employees of state hospitals and schools represented "such a serious invasion of state sovereignty protected by the Tenth Amendment . . . [that it was] not consistent with our constitutional federalism." 392 U.S. at 201 (Douglas, J., dissenting).

Although writing for the majority in *Fry*, Justice Marshall qualified the dicta in *Darby*, conceding that "[w]hile the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 421 U.S. at 547 n.7. Justice Rehnquist, dissenting in *Fry*, argued that the concept of state sovereignty implicated by the Tenth Amendment had been violated by application of the wage freeze to state employees. 421 U.S. at 549 (Rehnquist, J., dissenting). In an argument similar to the one made by Douglas in his *Wirtz* dissent, Rehnquist analogized to the area of federal taxation where federalism limits the power of the national government to tax the states. Criticizing the Court's rejection of this analogy in *United States v. California*, Rehnquist asserted, "a line will have to be drawn somewhere." *Id.* at 558 n.2. In *National League of Cities*, decided just a little more than a year after *Fry*, a majority of the Court was persuaded that the line had finally been crossed. The majority overruled *Wirtz*, but distinguished *California* and *Fry*. *California* was distinguished as not involving an integral government function. 426 U.S. at 853. *Fry* was distinguished because, according to the majority, the wage freeze involved there did not impermissibly infringe upon an integral state function. *Id.* at 853. Justice Brennan found the majority's attempt to distinguish *Fry* particularly unconvincing. *See infra* note 18.

12. 426 U.S. at 856 (Brennan, J., dissenting). Among the adjectives used by Justice Brennan to describe the majority's decision are "mischievous," *id.* at 880, "ominous," *id.* at 875, and "alarming," *id.* at 875. Brennan pointed out that the decision ran counter to the Court's recent interpretation of the Commerce Clause vis-a-vis the states and criticized the analogy to intergovernmental immunity from taxation. Brennan's dissent was joined by Justices White and Marshall.

more temperate dissent from Justice Stevens,[13] and a great deal of scholarly criticism.[14]

A principal criticism is that the opinion is ambiguous.[15] The Court rested its holding on a concept of state sovereignty it claimed was implicit in the Tenth Amendment and insisted that

> [o]ne 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.[16]

Although contending that the resolution of the factual disputes over the effects of the FLSA amendments was "not critical" to the case's disposition,[17] the Court nevertheless entered into a rather detailed analysis of the amendments' potential impact upon the states.[18] Thus, it was unclear to what extent the decision reflected a weighing of the nature and extent of the federal interest in the regulated activity against the regulation's actual impact on the states' ability to structure, and pay

13. 426 U.S. at 880 (Stevens, J., dissenting). Justice Stevens expressed "respect and a great deal of sympathy for the views expressed by the Court" but was "unable to identify" a limitation on the commerce power that would invalidate the 1974 amendments to the FLSA. *Id.* at 881.

14. *See, e.g.*, Barber, National League of Cities v. Usery: *New Meaning for the Tenth Amendment*? 1976 SUP. CT. REV. 161; Matsumoto, National League of Cities—*From Footnote to Holding—State Immunity From Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35; Schwartz, National League of Cities v. Usery—*The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115 (1978).

15. The most obvious problem not resolved by the opinion was the precise definition of traditional integral governmental functions. The Court cited fire prevention, police protection, sanitation, public health, and parks and recreation as examples of protected activities, but asserted there were "numerous" other activities that would qualify for exemption from federal regulation. 426 U.S. at 851 n.16. Lower courts have attempted to determine the scope of the exemption on a case by case basis. *Compare* Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979) (operating a municipal airport an integral governmental function) *and* United States v. Best, 573 F.2d 1095 (9th Cir. 1978) (licensing of automobile drivers an integral governmental function) *with* Alewine v. City Council of Augusta, 699 F.2d 1060 (11th Cir. 1983) (local transit system not an integral governmental function) *and* Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977) (air pollution plans related to highway and bridge regulation not an integral governmental function).

16. 426 U.S. at 845.

17. *Id.* at 846.

18. *Id.* at 846-48. In addition, the Court distinguished *Fry* on the grounds that the 1970 wage freeze was temporary, tailored to combat a national emergency, displaced no state choices about how governmental operations should be structured, and operated to reduce, rather than increase, the pressures upon state governments. 426 U.S. at 853. Justice Brennan's dissent criticized this distinction, arguing that it was "sophistry" to assert that the wage freeze displaced no state choices and "absurd to suggest that there is a constitutionally significant distinction between curbs against increasing wages and curbs against paying wages lower than the federal minimum." *Id.* at 872. (Brennan, J., dissenting).

for, their traditional governmental functions. This ambiguity was exacerbated by Justice Blackmun's concurring opinion in which he admitted, "I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[19]

Another area of ambiguity is the precise meaning of the Court's pronouncement that the "States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce."[20] The meaning of this statement, and indeed of *National League of Cities* generally, was clarified by the Supreme Court's decision in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*[21]

In *Hodel*, mine operators brought a pre-enforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act,[22] claiming that the Act displaced state regulation in an area of integral state functions—land use regulation—and thus violated the Tenth Amendment under *National League of Cities*. A unanimous Court, per Justice Marshall, rejected the operators' Tenth Amendment claim after a "careful review of the actual basis and import" of the decision in *National League of Cities*.[23] The Court in *Hodel* ruled that

> in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First there must be a showing that the challenged statute regulates the 'States as States.'[24] Second, the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.'[25] And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'[26]

The opinion incorporated Justice Blackmun's balancing test as a further limitation on this analytical framework by providing in a footnote: "[d]emonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the

19. 426 U.S. at 856 (Blackmun, J., concurring).

20. 426 U.S. at 854. The contrary dicta in United States v. California, 297 U.S. at 184-85, was dismissed as "simply wrong." 426 U.S. at 855.

21. 452 U.S. 264 (1981).

22. Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1976 & Supp. V 1981).

23. 452 U.S. at 286.

24. *Id.* at 287 (quoting *National League of Cities*, 426 U.S. at 854).

25. *Id.* at 288 (quoting *National League of Cities*, 426 U.S. at 845).

26. *Id.* (quoting *National League of Cities*,. 426 U.S. at 852).

nature of the federal interest advanced may be such that it justifies State submission."[27]

The Court held that the mine operators' Tenth Amendment claim failed because the first of the three requirements—that the challenged statute regulate the states as states—was not satisfied.[28] The provisions of the Surface Mining Act governed only the activities of the coal mine operators. The state was not compelled to enforce the Act, expend any state funds, or participate in the federal regulatory program in any manner. The Court refused to look "beyond the activities actually regulated by the Act to its conceivable effects on the States' freedom to make decisions in areas of 'integral governmental functions.' "[29] While conceding that congressional enactments preempting or displacing state regulations of private activities affecting interstate commerce "obviously curtail or prohibit the States prerogatives to make legislative choices respecting subjects the States may consider important," the Court found that "the Supremacy Clause permits no other result."[30] The Court concluded that the Tenth Amendment challenge to the Surface Mining Act could not succeed because "in contrast to the situation in *National League of Cities*, the statute at issue regulates only 'individual businesses necessarily subject to the dual sovereignty of the government of the Nation and State in which they reside.' "[31]

The *Hodel* decision dispelled some of the ambiguity of *National League of Cities* by making it clear that the Tenth Amendment does not diminish the power of Congress to preempt state regulation of matters affecting interstate commerce, even when the activity is one that traditionally has been regulated by the states.[32] The mine operators at whom the federal regulation was directed were not performing an integral government function, however, and could in no way be characterized as the alter-ego of the state. Thus, *Hodel* does not necessarily answer the question raised in *Richland Association for Retarded Citizens v. Marshall*,[33] *Williams v. Eastside Mental Health Center, Inc.*[34] and

27. *Id.* at 288 n.29. This balancing test was later expressly approved in both United Transp. Workers Union v. Long Island R.R. Co., 455 U.S. 678, 684 n.9 (1982), and EEOC v. Wyoming, 460 U.S. 226, 237-38 (1983).

28. 452 U.S. at 288.

29. *Id.* at 289.

30. *Id.* at 290.

31. *Id.* at 293 (quoting *National League of Cities*, 426 U.S. at 845).

32. In Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982), a sharply divided Court arguably went even further, holding that Congress may require the states' regulatory agencies to take certain prescribed actions where the required actions were less intrusive than federal preemption. The Court reasoned that where Congress could entirely preempt State regulations, it is not unconstitutional for Congress to do something less. *Id.* at 765.

33. *See supra* note 8.

34. *See supra* note 9.

Skills Development Services, Inc. v. Donovan:[35] whether, and under what circumstances, an ostensibly private, nonprofit corporation under contract with a state to perform an integral governmental function might be considered sufficiently allied with that state to warrant exemption from the FLSA under *National League of Cities*.

II. The Relevant Cases

A. The Strange Tale of *Richland County Association for Retarded Citizens v. Marshall*

1. The Facts

In 1973 the Montana Legislature passed an act designed to remove developmentally disabled adults from large state operated institutions by providing training and treatment for them in family oriented residences in local communities.[36] The statute authorized the Development Disabilities Division of the Montana Department of Social and Rehabilitation Services (DDD) either to operate such community based homes directly or to contract with local nonprofit corporations to establish and operate them.[37] The Richland County Association for Retarded Citizens (Association) was formed in 1975 with the encouragement and assistance of the DDD, which recruited Richland County community members to establish a local facility. The Association then contracted with the DDD to provide residential care and training for eight mentally retarded adults at its Sydney Group Home (Home) in Sydney, Montana.[38]

The state plays a significant role in the supervision and funding of the Home. The DDD provided $9,000 to enable the Association to make a downpayment on the Home and to furnish it.[39] The Home is required to make monthly reports to the DDD on the progress of each client. The regional staff of the DDD advises the Association's board of directors and its employees to make sure the contract is being performed.[40] Funding to operate the Home comes primarily from the state and federal governments.[41] Each retarded citizen receives a

35. *See supra* note 10.

36. MONT. CODE ANN. § 71-2001-07 (1973). The facts of this case were gleaned from the district court opinion in Richland County Ass'n for Retarded Citizens v. Donovon, No. 77-56 (slip op.) (D. Mont.) (on file HASTINGS CONST. L.Q.) and from Richland County Ass'n for Retarded Citizens v. Marshall, 660 F.2d 388, (9th Cir. 1981), *vacated*, 454 U.S. 389 (1982).

37. Mont. Code Ann. § 2002 (1973).

38. 660 F.2d at 389.

39. *Id.*

40. *Id.*

41. In *National League of Cities*, the Court did not specifically address the question of whether federal money granted a state to assist it in providing an integral governmental service should have an impact on the state's immunity from Commerce Clause regulation.

monthly Supplemental Security Income payment of $271.80, of which $167.80 is federal and $104.00 is state money.[42] The State provides the Home with an additional $150.00 monthly per resident, this payment being contingent upon the availability of federal matching funds.[43] The Home also receives donations from the private sector.[44]

The Association, however, has control over most of the Home's daily operation. Its contract with the DDD allows the Association to maintain local control over "the methods, time, means and personnel for furnishing purchased services" to the Home residents.[45] This control is exercised by the Association's board of directors, which is elected by the members of the Association.[46] Among the responsibilities of the board are hiring and paying the group home parents.[47]

The group home parents are solely responsible for the care and supervision of the eight retarded clients during all hours that the clients are in the Home. The purpose of having live-in parents is to maintain a consistent, family like environment. The parents participate with the clients in preparing the meals and maintaining the home. The contract between the Association and the DDD classifies the home parents as "professional" and provides that they be paid a monthly salary rather than an hourly wage. It was pursuant to this contract that the Association hired Bruce and Virginia Harmelink at a combined salary of $650 per month.[48]

2. *The District Court's Decision*

Eight months after their employment began, the Harmelinks asked the Wage and Hour Division of the United States Department of Labor whether the FLSA was applicable to their employment. The Department determined that the terms of the Harmelinks' employment violated the FLSA. The Association then brought suit against the

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Two lower courts that have addressed the issue reached different conclusions. *Compare* Alewine v. City Council of Augusta, 505 F. Supp. 880, 890 (S.D. Ga. 1981), *modified*, 699 F.2d 1060 (11th Cir. 1983) (since the Court's opinion in *National League of Cities* did not mention the federal assistance programs that give financial aid to state and local governments providing integral governmental services, the existence of such aid must be irrelevant in determining the scope of the opinion) *with* Bonnette v. California Health and Welfare Agency, 525 F. Supp. 128, 138 (N.D. Cal. 1981) *aff'd*, 704 F.2d 1465 (9th Cir. 1983) (balancing the federal and state interests requires consideration of the existence and extent of federal aid and regulation).

42. 660 F.2d at 389 n.4. The Home retains $245.20 for its operation and maintenance; the remaining $26.60 is allocated to the individual resident for personal needs.

43. *Id.*

44. *Id.*

45. 660 F.2d at 389.

46. *Id.*

47. *Id.*

48. This amount was raised to $800 and later to $900 per month.

Secretary of Labor seeking a declaratory judgment that it was exempt from the Act's provisions. The Secretary counterclaimed to enjoin the Association from violating the Act. The district court, relying on *National League of Cities*, held that application of the FLSA to employees of the Home would violate the Tenth Amendment.[49] In a decision reached two years before the Supreme Court decided *Hodel*, the district court reasoned that "application of the requirements of the Act would inevitably result in displacement of one or more of the State of Montana's considered policy choices in carrying out its traditional functions of caring for the mentally handicapped."[50] In addition, the court asserted that "the financial burdens required by the minimum wage provisions of the Act would severely affect the State's fiscal decision-making in the area of services to the mentally handicapped."[51] The court conceded that the DDD could "circumvent the provisions of the Fair Labor Standards Act by terminating all contracts with nonprofit homes and having the Department itself establish group homes," thereby making the home parents state employees. The evil in this approach, as viewed by the district court, was that it would "require at least a partial abandonment of Montana's policy of semi-autonomous, locally controlled facilities."[52] The court concluded that although the Association was "unquestionably" an entity distinct from the State of Montana, the Home was the "alter-ego" of the State and so was entitled to immunity from the FLSA.[53]

3. The Ninth Circuit's Opinions

The Ninth Circuit, in an opinion which also antedated *Hodel*, agreed that the Home was Montana's "alter-ego" and affirmed the district court's decision.[54] Judge Frye's majority opinion concluded that although *National League of Cities* "applies to the States as States . . . [it] does not require direct state involvement."[55] "The key issue," according to Judge Frye, is "whether the operation of the Home is an 'integral government function' within the scope of *National League of Cities*."[56] Using a test developed by the Sixth Circuit in *Amersbach v. City of Cleveland*,[57] the majority concluded that operation of the Home

49. Richland County Ass'n for Retarded Citizens v. Donovan, No. 77-56, slip op. at 12 (D. Mont. 1977).

50. *Id.* at 4.

51. *Id.*

52. *Id.* at 11-12.

53. *Id.* at 12.

54. Richland County Ass'n for Retarded Citizens v. Donovan, 91 Lab. Cas. (CCH) ¶ 34,018, *withdrawn*, (Aug. 21, 1981).

55. 91 Lab. Cas. (CCH) ¶ 34,018 at 49,682.

56. *Id.*

57. 598 F.2d 1033 (6th Cir. 1979). The test consists of four elements: "(1) the governmental service or activity benefits the community as a whole and is available to the public at

was such an integral government function. Implicit in this analysis was the notion that, under *National League of Cities*, states have the sovereign right to contract out to the private sector for performance of a service qualifying as an integral governmental function because the performance of such a function would "insure the presence of traditional and substantial state involvement."[58]

Judge Frye, joined in her opinion by Judge Wright, wrote over the vigorous dissent of Judge Alarcon. Alarcon believed *National League of Cities* principles were not implicated by these facts. "Under *Usery*," argued Alarcon, "it is *unnecessary* to determine whether the service performed is a traditional governmental function if the employer is in a private sector . . . ."[59] Alarcon found "troubling" the majority's assertion that federal minimum wage and hour laws interfere with state sovereignty by increasing the cost of contracting out to private business.[60] He contended that states have no inherent Tenth Amendment right to demand that contracts with private business always be cheaper or more desirable than providing the services themselves. Alarcon acknowledged that the majority's position had a "superficial attraction in this case, where the state's decision to use a private corporation to implement a most laudable program may have made that program prohibitively expensive," but concluded that since "[v]irtually every other 'integral' state function—including police, fire, education, health services, refuse collection—could conceivably be contracted out to private businesses," the attraction must be resisted.[61] Alarcon characterized the majority's decision as "an open invitation to states and municipalities to solve their fiscal problems by contracting out their services to private companies which would then be freed from any legal obligation to pay decent wages or set reasonable working hours," and argued that "[s]uch a result cannot be required by the Tenth Amendment."[62]

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little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) the government is the principal provider of the service or activity; and (4) the government is particulary suited to provide the service or perform the activity because of a community wide need." *Id.* at 1037. The court in *Amersbach* used this test in determining that the operation of a municipal airport is an integral governmental function. This test also has been applied by a number of other courts to determine whether an activity is an integral government function. *See, e.g.*, Alewine v. City Council of Augusta, 505 F. Supp. 880, 888 (S.D. Ga. 1981), *modified*, 699 F.2d 1060 (11th Cir. 1983); Woods v. Homes & Structures of Pittsburgh, Kan., Inc., 489 F. Supp. 1270, 1296 (D. Kan. 1980). The test, however, is designed to help determine whether a particular activity is an integral governmental function. It is not necessarily relevant when the question is whether an entity is the "state as state."

58. 91 Lab. Cas. (CCH) ¶ 34,018 at 49,683.

59. *Id.* (Alarcon, J., dissenting) (emphasis in original).

60. *Id.* at 49,684.

61. *Id.*

62. *Id.*

On August 21, 1981, apparently in response to the Supreme Court's pronouncement in *Hodel* that federal legislation enacted pursuant to the commerce power must regulate the "States as States" before the Tenth Amendment is implicated, the Ninth Circuit withdrew its first *Richland* opinion (*Richland I*), and on October 9, 1981 issued *Richland County Association for Retarded Citizens v. Marshall*[63] (*Richland II*). The new majority, consisting of Judges Alarcon and Wright, held, per Alarcon,

> Richland is in the same position as the private entities in *Hodel*. The FLSA operates directly on Richland, a private corporation. Thus the requirement that the regulation operate on a state as a state is not met. Consistent with *Hodel*, we must hold that the FLSA is constitutionally applicable to Richland.[64]

Judge Frye, dissenting in *Richland II*, reiterated her earlier argument that "[b]ecause [the Association] essentially stands in the position of the State of Montana in providing an integral government service, and because the minimum wage/maximum hour requirements of the FLSA as applied to . . . [the Association] constitute direct interference with Montana's exercise of its sovereignty" the majority's decision violated the principles of *National League of Cities*.[65]

4. The Supreme Court's Decision

On appeal, the Supreme Court disposed of the case without reaching the merits.[66] The Court found that it was without jurisdiction to decide the case which, because it had been decided against a department of the federal government on constitutional grounds, should have come directly to the Supreme Court from the district court.[67] The per curiam opinion also found that the Ninth Circuit had been without jurisdiction and ordered that both *Richland I* and *Richland II* be vacated.[68] This disposition of the case let stand the decision of the district

63. 660 F.2d 388 (9th Cir. 1981), *vacated*, 454 U.S. 389 (1982) *(per curiam).*

64. *Id.* at 391. Judge Alarcon reiterated the arguments he made in his *Richland I* dissent, emphasizing that in *National League of Cities* the Court considered Congress' authority to apply minimum wage and maximum hour regulations to the states "in their capacities as sovereign governments." *Id.* at 390 (quoting 426 U.S. at 837).

65. 660 F.2d at 392 (Frye, J., dissenting). Judge Frye stated that "[t]his [dissent] is based on these facts and does not mean that states will have the right to haphazardly contract all services to the private sector at a labor rate cheaper than that for equivalent services provided by the private sector exclusively." *Id.*

66. Richland County Ass'n for Retarded Citizens v. Marshall, 454 U.S. 389 (1982).

67. *Id.* The Court based its ruling on 28 U.S.C. § 1252, which states: "any party may appeal to the Supreme Court from an interlocutory or final judgment . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States . . . or any officer or employee thereof . . . is a party."

68. 454 U.S. at 389. In disposing of the appeal, the Court made reference to three statutes which together worked to deprive the government of its right of appeal. Under 28 U.S.C. § 1252, an appeal should have been taken directly to the Supreme Court from the

court and provided the government with no avenue of appeal.

B. *Williams v. Eastside Mental Health Center, Inc.*

1. The Facts

The case of *Williams v. Eastside Mental Health Center, Inc.*[69] is more complex than *Richland*. Eastside is one of twenty-five mental health centers in Alabama. Two are operated by governmental agencies, twenty are incorporated as public corporations[70] and three, including Eastside, are incorporated under the Alabama nonprofit corporations statute.[71]

Before being established as a nonprofit corporation in 1975, Eastside was part of the Jefferson-Blount-St. Clair Mental Health Authority (Authority), a public corporation that coordinates mental health care in a three county region.[72] Eastside was established as a separate entity when the Authority, which disburses state funds to all mental health centers within its region, faced conflict of interest charges by other centers competing with Eastside for funds.[73] Eastside was incorporated as a nonprofit corporation because the community health center statute allows only one facility per county to be incorporated as a public corporation.[74]

Eastside's general purpose is to provide comprehensive mental health services to a prescribed geographic area.[75] Eastside provides

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district court. Because the government failed to file an appeal or request an extension within thirty days after the district court's decision, its right of appeal was extinguished by 28 U.S.C. § 2101(a). The Ninth Circuit had been without jurisdiction because of 28 U.S.C. § 1281, which provides the circuit courts of appeals with jurisdiction over all final decisions of district courts except when direct review may be had in the Supreme Court.

The *Richland* case presented the Supreme Court with its first opportunity to interpret § 1252 under these circumstances. Justices Powell and Blackmun dissented, arguing that the Court's action was at cross purposes with 28 U.S.C. § 1252, which was "designed to expedite [review by the Supreme Court] not defeat it." 454 U.S. at 392. (Powell, J., dissenting).

The Department of Labor discovered its error while preparing its appeal from *Richland 1*. Because this appeal contended, *inter alia*, that the Ninth Circuit had been without jurisdiction to decide *Richland 1*, the Department continued to press its appeal even after the Ninth Circuit had reversed itself.

69. 669 F.2d 671 (11th Cir. 1982) *cert. denied* 459 U.S. 976 (1982).

70. The public corporations are incorporated under ALA. CODE § 22-51-2 (1967).

71. ALA. CODE § 10-3-1-172 (1955).

72. 669 F.2d at 673.

73. *Id.*

74. The district court in *Eastside* determined that § 22-51-2 allows for the incorporation of only one public community health center per county. 509 F. Supp. 579, 581 (N.D. Ala. 1980). This limitation does not appear on the face of the statute. *See* ALA. CODE § 22-51-2 (1967). The Eleventh Circuit apparently was confused by the district court's finding but did not challenge it. 669 F.2d at 674 n.3.

75. Alabama first begin treating mental patients in its state hospitals in 1861. Until the 1960's, Alabama provided the bulk of its mental health services through large state mental

these services through contracts with schools, hospitals, nursing homes and other state agencies.[76] One of the services Eastside provides is the Transitional Home Program. This program operates as a "halfway house," providing psychological rehabilitation services for individuals recently released from state mental hospitals and for persons who might otherwise be committed to a state mental hospital.

David Williams is a former Eastside employee who worked in Eastside's Transitional Home Program from February, 1977 until May, 1979. William's job was to supervise and assist in training residents in basic socialization skills. His work schedule routinely required him to be on call for ninety-six hour shifts. During these shifts he was required to be at the center between 5 P.M. and 8 A.M.; otherwise, he was permitted to leave if he was not needed. Eastside paid Williams a fixed salary, which, during the course of his employment, was approximately $27,000 short of the minimum required under the FLSA.[77]

2. Eastside's Corporate Structure

Eastside's corporate structure differs significantly from that of the Richland Association for Retarded Citizens. Eastside's board of directors is not internally elected; it is appointed by various community agencies, with the majority of the board being appointed by public agencies.[78] Eastside's budget is subject to ratification by the Authority, which also must ratify the appointment of all board members, including those appointed by private organizations. Eastside's articles of incorporation provide that, upon dissolution, all of Eastside's assets will vest in the Authority.[79]

Eastside is also somewhat different from the mental health centers established as public corporations by the State of Alabama. All members of the boards of directors of the public corporations are appointed by elected county or municipal officials;[80] furthermore, the public corporations have the power of eminent domain.[81] Asserting that the differences between Eastside and the public corporations are of

institutions. In 1965 the Alabama Department of Public Health completed a two year, federally financed study to plan for statewide provision of mental health services. This study recommended the establishment of a network of smaller mental health centers throughout the state. *Id.* at 673.

76. The center provides both inpatient and outpatient care, consultation and educational services, as well as specialized services for children, elderly persons, mentally retarded persons, and persons with alcohol or drug related problems. *Id.* at 675.

77. *Id.* at 673.

78. Ten of the eighteen members of the Eastside board of directors are appointed by agencies that both parties stipulated to be "public." *Id.* at 674.

79. *Id.* Federal regulations prescribe certain of Eastside's activities, as Eastside receives about 38% of its funds from the federal government. *Id.*

80. ALA. CODE § 22-51-8 (1967).

81. *Id.* at § 22-51-11 (1967).

constitutional dimension, Williams brought an action in federal district court demanding compensation allegedly due him under the overtime provisions of the FLSA.

3. The District Court's Decisions

The district court, in a pre-*Hodel* decision, granted Eastside's motion for summary judgment and declared the corporation exempt from the FLSA under *National League of Cities*.[82] The issue, according to the court, was not merely whether Eastside was a public corporation but whether it was performing a traditional governmental function. To answer this question the court in *Eastside*, as had the Ninth Circuit in *Richland I*, applied the test articulated by the Sixth Circuit in *Amersbach v. City of Cleveland*.[83] Finding that Eastside satisfied the *Amersbach* test, the district court declared Eastside a "public corporation."[84]

Williams petitioned for reconsideration on the ground that Eastside was not shown to be a political subdivision of the state as required by *National League of Cities*. The district court granted the motion but, in an opinion that also antedated *Hodel*, again found for Eastside, emphasizing that the "main issue" was whether Eastside provided a traditional governmental service.[85] Citing *National League of Cities*, which was characterized as standing for the proposition that "the FLSA may not be applied 'to directly displace the States' freedom to *structure integral operations* in areas of traditional governmental functions,' "[86] the court declared it "apparent that [Eastside] is part of the 'structure' that the State of Alabama set up to provide mental health care services."[87]

Despite its characterization of the "main issue," the district court did address Williams' contention that an entity must first qualify as a state or political subdivision in order to be entitled to immunity under *National League of Cities*. Williams argued that the appropriate standard was the test used by the National Labor Relations Board (NLRB) to determine whether an entity is a political subdivision and therefore exempt from the provisions of the National Labor Relations Act (NLRA).[88] To satisfy this test, an entity must be either: "(1) created directly by the state so as to constitute departments or administrative arms of the government or (2) administered by individuals who are

82. 509 F. Supp. 579 (N.D. Ala. 1980), *rev'd*, 669 F.2d 671 (11th Cir. 1982).

83. 598 F.2d 1033 (6th Cir. 1979). For a description of this test see *supra* note 57.

84. 509 F. Supp. at 581.

85. *Id.* at 583.

86. *Id.* (quoting *National League of Cities*, 426 U.S. at 852 (emphasis in original)).

87. *Id.* at 583.

88. 29 U.S.C. § 152(2) (1976).

responsible to public officials or to the general electorate."[89]

In response to this argument, the court in *Eastside* determined that Eastside met step two of the test because "in this case Eastside's board of directors is not elected but externally appointed by agencies ranging from public or governmental to private organizations, the majority of which come from the public or governmental sector."[90] Additional factors the court deemed worthy of consideration were that Eastside must: submit copies of the minutes of its board meetings to the State Department of Mental Health and to the Authority; submit to an audit and review by the state and periodic visitation and review by the State Department of Mental Health; and conform to the state standards for mental health centers and the state competitive bid laws.[91] The court also noted that Eastside is exempt from payment of the state sales tax, is a member of the state retirement and pension system, and is prohibited from owning any real property.[92]

4. The Eleventh Circuit's Opinion

Plaintiff Williams, supported by a United States Department of Labor amicus brief, appealed to the Court of Appeals for the Eleventh Circuit.[93] That court, focusing on the question of Eastside's sovereign status, reversed the district court decision and ruled that the mental health center was not entitled to an exemption from the FLSA under *National League of Cities*.

The Court of Appeals began by noting: "[t]he overriding constitutional concern faced by the Court in *Usery*, and thus by this Court in the present case, is the problem of affixing a clear and workable boundary between the two sovereignties in our federal system."[94] The problem, observed the court, is that "there is no formula by which the line may be plotted with precision in advance."[95]

After pointing out that in *National League of Cities* the Supreme Court granted sovereign immunity from the FLSA to the "states and their political subdivisions," the Eleventh Circuit found: "[t]he determinative fact in this case simply is that the entity with which we are

89. 669 F.2d at 677. The Supreme Court has endorsed the NLRB test as used to determine whether a particular entity is entitled to an exemption from the NLRA. NLRB v. Natural Gas Util. Dist. of Hawkins County, 402 U.S. 600, 604-05 (1971); *see infra* note 102.

90. 509 F. Supp. at 584.

91. *Id.*

92. *Id.*

93. Williams v. Eastside Mental Health Center, Inc., 669 F.2d 671 (11th Cir. 1982).

94. *Id.* at 675.

95. *Id.* at 676 (quoting Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926)). The Court added: "Precise legal guidelines easily applicable to particular fact situations do not exist in cases such as this involving broad constitutional concepts such as that of sovereignty. . . . [O]ur job is compounded in this case by the borderline nature of the facts before us." 669 F.2d at 678.

dealing is not a state or a political subdivision of a state as defined by the Court in *Usery* and in other cases involving similar issues."[96] In reaching this conclusion, the Court relied heavily upon the fact that Eastside is a nonprofit rather than a public corporation.[97] In essence, the court concluded—as had the Ninth Circuit in *Richland II*—that a state waives its sovereign immunity from the FLSA by contracting with a private, nonprofit corporation for the performance of a traditional governmental function.[98]

The court did not, however, base its decision solely upon Eastside's status as a nonprofit corporation. In determining that Eastside was not a "political subdivision" of Alabama, the court applied the NLRB test,[99] based on "the simple fact that the precise term 'political subdivision' is used in both the *Usery* case and the NLRB cases."[100] Applying this test to Eastside, the court concluded,

> With respect to the board of directors, not only does the State of Alabama not have control over the appointment of nearly one-half of the board membership, in addition it has no power whatsoever to dismiss any of the board appointments. Members of the board do not serve as representatives of the state or any of its agencies. For this latter reason it is clear that no member of the administrative board is directly responsible to a public official or to the general electorate. Under the test set out in *NLRB v. Natural Gas Utility Dist.*, this factor indicates that Eastside is not a political subdivision of the State of Alabama. The other controls, while perhaps uncommon in the context of normal private corporations contracting with the states, must be viewed simply as stringent licensing standards necessary to the effective implemen-

96. *Id.* at 678. The court observed that "[t]he Court in neither the *Usery* nor the *Hodel* case had to face this precise issue, as the nature of the regulated entities was not disputed in either case." *Id.* at 677 n.6. The court also noted that "the determination that a regulation affects a state or its political subdivisions is not always a simple one to make. There exist many public or quasi-public agencies the status of which, for purposes of determining a state sovereignty question, is not easy to characterize." *Id.* at 676-77.

97. The court found that Eastside's incorporation as a nonprofit corporation under ALA. CODE § 10.3-1, rather than as a public corporation under § 22-51-2, rendered it "distinct from many of the other community mental health centers operating in the state of Alabama . . . ." 669 F.2d at 678.

98. The court stated, "For whatever reason, Alabama did not elect to operate Eastside as a state institution with state employees; instead it set up a not for profit corporation with a separate, independent board of directors to administer it. Whatever may have been the state's reason for doing it this way, it must live with the consequences. It cannot claim an immunity based on a condition which it itself sought to avoid." 669 F.2d at 678.

99. *See supra* note 89 and accompanying text.

100. 669 F.2d at 677 n.8. The court explained that "[a]lthough these cases turn on the construction of the Labor Relations Act and not on constitutional considerations of state sovereignty, we find them helpful in our inquiry, and until the Court holds otherwise we will adopt this approach." *Id.* at 677.

tation of the state's police power in the mental health arena.[101]

By borrowing principles from the NLRB cases, the Eleventh Circuit presumed that it is appropriate to determine the scope of the federal commerce power vis-a-vis the states by virtue of a test developed by the NLRB to determine its jurisdiction under the National Labor Relations Act. Despite the fact that the Supreme Court has approved the test for application to the NLRA,[102] it seems incongruous that the

101. *Id.* at 679 (citation omitted). The court concluded its discussion of this issue by rejecting Eastside's contention that its exemption from the state sales tax and its employees participation in the state retirement system demonstrated Eastside's entitlement to sovereign immunity. The court observed that Alabama grants sales tax exemption to many private businesses, *id.* at 679 n.9 (citing ALA. CODE § 40-23-4 (1975)), and that membership in the state retirement system is not limited to state agencies but is also available to employees of "public or quasi-public organizations." *Id.* (citing ALA. CODE § 36-27-6 (1975)). The court reasoned that "assuming Eastside is considered a quasi-public organization, it may participate in the retirement system and yet still not be a state or public agency within the meaning of the term as used in the *Usery* case." *Id.* at 679. In dicta, the court concluded that the furnishing of mental health services is not a traditional government function. *Id.* at 679-80. This conclusion, although beyond the scope of this Note, seems erroneous in light of Alabama's long history of providing such services, see *supra* note 75, and the Court's express designation in *National League of Cities* of the provision of public health services as an integral government function. 426 U.S. at 851. For further criticism of this dicta see Note, *Quasi-Public Institution Not Protected From Fair Labor Standards Acts By State Sovereignty Claim*—Williams v. Eastside Mental Health Center, Inc., 8 U. DAYTON L. REV. 199, 210-12 (1983). *See also* United Transp. Workers Union v. Long Island R.R. Co., 455 U.S. 678, 686 (1982). (*National League of Cities* Court's emphasis on traditional aspects of state sovereignty not intended to impose a static historical view of state functions generally immune from federal regulation). *But see* Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983) (state "chore workers" assisting aged, blind and disabled public assistance recipients in their homes were performing services traditionally performed by domestic employees in the private sector and were therefore not performing in an integral government function).

102. NLRB v. Natural Gas Util. Dist. of Hawkins County, 402 U.S. 600 (1971). In *Hawkins County*, the Supreme Court held that a Tennessee gas utility was a political subdivision under the second prong of the test despite a NLRB determination to the contrary. The Court acknowledged that the Board's construction of the broad statutory term was entitled to "great respect," *id.* at 605, but asserted that the NLRB had misapplied its own criteria. *Id.*

The Hawkins County Utility District was administered by a board of commissioners appointed by an elected county judge, and subject to removal proceedings at the instance of the Tennessee Governor, the county prosecutor or private citizens. *Id.* The Utility District had the powers of eminent domain and subpoena, was required to maintain public records, had an automatic right to a public hearing, and was exempt from state and federal taxes. The Court reasoned: "[r]espondent is therefore an entity 'administered by individuals [the commissioners] who are responsible to public officials [an elected county judge]' and this together with the other factors mentioned satisfies us that its relationship to the State is such that respondent is a 'political subdivision' . . . ." *Id.* at 609.

In adopting the Board's test the Court failed to delineate what weight it had given to the "other factors" in reaching its conclusion. This fact, as well as the ambiguity inherent in the second prong of the test, has created difficulties for other courts attempting to apply the criteria. *See infra* note 201. Moreover, it is not at all clear that the NLRB's test marks an

NLRB criteria should acquire constitutional stature absent a principled basis for their application. The problem of developing proper criteria for determining when a corporate entity performing a traditional governmental service should be considered a "political subdivision" for purposes of the Tenth Amendment is addressed[103] following a discussion of the third case in this trilogy, *Skills Development Services, Inc. v. Donovan*.[104]

C. *Skills Development Services, Inc. v. Donovan*

1. The Facts

Skills Development Services, Inc. is one of almost ninety nonprofit corporations providing residential and rehabilitative services to mentally retarded and developmentally disabled residents in Tennessee,[105] pursuant to contracts with the Tennessee Department of Mental Health and Mental Retardation.[106]

The State of Tennessee has exhibited official concern for the mentally retarded for more than sixty years. In 1919, the legislature appropriated funds for the construction of the Tennessee Home for the Feeble Minded, which opened in 1923 and was operated by the Tennessee Department of Institutions.[107] In 1953, the legislature created

outer limit on the NLRA's exemption for "political subdivisions." The Court in *Hawkins County* noted, "This case does not. . . . require that we decide whether the 'actual operations and characteristics' of an entity must necessarily feature one or the other of the Board's limitations to qualify an entity for the exemption." 402 U.S. at 605. In dissent, Justice Stewart argued, *inter alia*: "The Court points to provisions that the records of the District be available for public inspection, and that the commissioners of the District hold hearings and make written findings. These factors are said to 'betoken a state, rather than a private, instrumentality.' The question, however, is not whether the District is a state instrumentality, but whether it is a 'political subdivision' of the State. And the provisions in question hardly go to that issue." *Id.* at 610 (Stewart, J., dissenting).

103. *See infra* notes 173-204 and accompanying text.

104. 558 F. Supp. 164 (M.D. Tenn. 1982), *aff'd*, 728 F.2d 294 (6th Cir. 1984).

105. Brief for Appellants at 30, Skills Development Services, Inc. v. Donovan, 728 F.2d 294 (6th Cir. 1984).

106. Skills Development, Hardeman County Developmental Service Center, Inc. and Michael Dunn Center, Inc. brought a class action for declaratory judgment against the Secretary of Labor. The representative corporations sought a judgment declaring that all nonprofit corporations which contract with Tennessee to provide residential or rehabilitative services to developmentally disabled state residents be entitled to sovereign immunity from the provisions of the FLSA. Hardeman and Michael Dunn have operated pursuant to contracts with the state since each was incorporated in 1970 and 1971 respectively. Skills Development was incorporated in 1979; it is the product of the merger of two preexisting nonprofit corporations, the first of which began operating as the Jay Cee Community Home for Special Education in 1962. Joint stipulation of facts at 3-7, Skills Development Services, Inc. v. Donovan, 558 F. Supp. 164 (M.D. Tenn. 1982). For convenience, the class of corporate plaintiffs is referred to as "Skills Development."

107. *Id.* at 7. The Tennessee Department of Institutions was also the agency responsible for operation of the state's prison system.

what is now known as the Department of Mental Health and Retardation (Department); in 1965, the legislature authorized the Department to enter into contractual agreements with private individuals and institutions to facilitate its function of treating and educating the mentally ill and mentally retarded. In 1969, employees of the Department assisted local citizens groups throughout the state in organizing local, nonprofit corporations and developing programs for retarded children. Two years later, Department employees helped develop similar programs for adults. In 1972, pursuant to the recommendations of a special committee appointed by the legislature, the adult program was expanded. A Developmental Center Office was established in every major region of Tennessee to stimulate the development of community based services in each geographic area.[108]

Skills Development operates in Tullahoma, Tennessee. Like the other community centers operating under contract with the state, Skills Development's board of directors is self appointed and consists of private citizens who serve without remuneration. Although Skills Development's contract with the state expressly provides that the corporation is an independent contractor and not a state agency, the state retains, by the terms of the contract, significant control over the corporation's activities.[109] The contract also allows the state to exert significant influence upon the relationship between the corporation and its employees. The Department must review and approve any person hired as program director at the facility; for all other staff positions, Skills Development may hire only persons whose qualifications equal or exceed the minimum standards established for comparable positions in governmental facilities.[110] The state, which reimburses Skills Development for the costs of paying its employees, influences—and, in practical effect, controls—the amounts that these employees are paid by providing maximum reimbursement rates.[111] Moreover, the contract requires

108. *Id.* at 9-13.

109. The corporation: (1) may not, without prior written approval of the state, assign the contract or subcontract for any of the services it is to perform; (2) must submit to audits by the state and have its budget approved by the state; (3) must comply with the state's competitive bid law; (4) must notify the state in writing at least one month in advance of discharging a person from the program; (5) may not enroll a person in a program without the state's consent; (6) must establish a system through which recipients of services may present grievances about the operation of the program; (7) must provide services funded by the contract only to persons who meet the state's eligibility requirements; and (8) must not collect fees from persons serviced under the contract without the state's authorization. Plaintiffs' Motion for Summary Judgment at 17-19, Skills Development Services Corp. v. Donovan, 558 F. Supp. 164 (M.D. Tenn. 1982).

110. Brief for Appellants *supra* note 105, at 39.

111. The contract provides, for example, that Skills Development's three highest paid staff positions must be funded in accordance with the state employee compensation plan; the positions are classified using state job titles and descriptions, and receive the equivalent state salary. The contract also provides, however, that "this in no way represents either the mini-

that Skills Development's employees work at least thirty-seven and one-half hours per week, the same number as state employees. The contract forbids the corporation to allow its hourly employees to work overtime without prior state approval, and mandates that the corporation pay one and one-half times the employees' normal hourly salary for overtime worked.[112] Finally, the contract requires that Skills Development be open and available to provide services regardless of weather conditions, unless the local offices of the Department of Mental Health and Mental Retardation and the Department of Human Services are closed.[113]

2. *The District Court's Opinion*

In a very brief opinion, the district court in *Skills Development Services, Inc. v. Donovan*[114] denied Skills Development's request for a declaration that it is entitled to sovereign immunity from the FLSA. Expressly adopting the reasoning of the Eleventh Circuit in *Eastside*,[115] the court stated, "[w]hatever nuances might be superimposed upon the relationship between these plaintiffs and the state, application of the Act to them does not represent regulation by federal authorities of the 'States as States.' "[116] In addressing the question whether the state had "conferred" sovereignty upon the corporations, the Court observed,

> [e]ven assuming arguendo that sovereign rights can be meted out in this fashion, the contracts themselves disclose that the state did not intend such a result here. Plaintiffs clearly were not to be designated by contract as state agencies, but rather were recognized as independent contractors. As such . . . they are entitled to no deference that might be accorded the states under the Tenth Amendment.[117]

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mum or maximum salaries that a community agency's board of directors can elect to pay its staff. It does represent the maximum that the Department of Mental Health and Mental Retardation will participate toward reimbursement of the salaries." Reply Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment at 7 n.3, Skills Development Services, Inc. v. Donovan, 558 F. Supp. 164 (M.D. Tenn. 1982).

112. The corporation may not pay its salaried employees time and a half for overtime; instead, it must grant them compensatory time off on an hour for hour basis after receiving approval for the overtime work from the state. The hour and one-half ratio corresponds to the benefits received by state employees. Plaintiffs' Motion for Summary Judgment at 20, Skills Development Services, Inc. v. Donovan, 558 F. Supp. 164 (M.D. Tenn. 1982).

113. The contract also prescribes the number of paid holidays the employees may have and puts restrictions on their sick leave and vacation benefits. *Id.* at 19-20.

114. 558 F. Supp. 164 (M.D. Tenn.), *aff'd*, 728 F.2d 294 (6th Cir. 1984).

115. 558 F. Supp. at 164.

116. *Id.*

117. *Id.* at 165.

The district court's decision currently is on appeal to the Sixth Circuit.[118]

III. Analysis of the Problem

Skills Development, like *Richland* and *Eastside*, presents an issue that was not directly before the Supreme Court in *National League of Cities*. As the Eleventh Circuit observed in *Eastside*, the Court in *National League of Cities* was concerned with the payment of wages by states or subordinate political bodies; the nature of those entities was not in dispute.[119] There are at least three distinct methods of analysis applicable to the problem of determining whether a nominally private entity under the contract with the state to perform an integral government function should be entitled to sovereign immunity under the Tenth Amendment. Each of these methods of analysis—the "instrumentality" approach, the "retention by contract" approach and the "political subdivision exemption"—will be discussed in turn.

A. The Instrumentality Approach

The Eleventh Circuit described Eastside as being "analogous to a private business doing contracting work for the state."[120] It is indisputable that a corporate entity does not acquire sovereign status simply by entering into a contract with the government.[121] One might distinguish, however, between a corporation under contract to provide a service *to* the state and one under contract to perform a traditional government service *on behalf of* the state. Given the extensive state control over their activities, Richland, Eastside and Skills Development could fairly be viewed as agents or instrumentalities of their respective states. It remains arguable, even after *Hodel*, that each such instrumentality should be held to share in the Tenth Amendment protection of the state with which it contracts.

In *National League of Cities*, the majority noted that "[q]uite apart from the substantial costs imposed upon the States and their political subdivisions, the [1974 amendments to the FLSA] displaced state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require."[122] Application of

118. Late in the publication process of this Note, the Sixth Circuit affirmed the district court's decision that Skills Development Services, Inc. is not entitled to immunity from the FLSA. *Skills Development Services, Inc. v. Donovan*, 728 F.2d 294 (6th Cir. 1984). A summary and analysis of the Sixth Circuit's opinion appears *infra* at note 212.

119. *See supra* note 96.

120. 669 F.2d at 679.

121. *See, e.g.*, United States v. New Mexico, 455 U.S. 720, (1982); United States v. Township of Muskegon, 355 U.S. 484 (1958). *See also* Blum v. Yaretsky, 452 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

122. 426 U.S. at 847.

the FLSA to Richland, Eastside and Skills Services could substantially increase costs to their respective states or, if the states are unable to supply the additional funds, may displace the states' policy decision to structure the delivery of mental health services through local nonprofit corporations.[123] Moreover, all of these corporations are dependent upon state funding. Although established as distinct entities outside the governmental structure, they have received significant governmental encouragement and might well disappear without state support.

The view that such corporations are state instrumentalities entitled to sovereign immunity can be supported by precedent from the area of intergovernmental immunity from taxation. The history of intergovernmental immunity from taxation dates back to *McCulloch v. Maryland*.[124] The immunity from state taxation granted federal instrumentalities in *McCulloch* was made reciprocal in *Collecter v. Day*.[125] Although the scope of the states' immunity from federal taxation has decreased dramatically in recent years[126] and is currently unclear,[127] it remains a significant consideration because of the majority's explicit reliance upon it in fashioning the doctrine of state immunity from federal regulation in *National League of Cities*.[128]

Cases involving state immunity from federal taxation have addressed the question of whether a particular *activity* of a state can be taxed, not whether the entity carrying on that activity should be considered "the state."[129] Many cases, however, have considered whether a particular entity is a *federal instrumentality* entitled to immunity from state taxation.[130] Less than twenty years ago, in *Department of Employment v. United States*,[131] the Supreme Court decided that a private entity was a federal instrumentality and exempt from state taxation. In

123. Part of the Court's rationale for granting the states immunity from the FLSA in *National League of Cities* was the Act's potentially detrimental impact upon "traditional volunteer assistance which has been in the past drawn on to compliment the operation of many local governmental functions." 426 U.S. at 851-52. In the trilogy of cases discussed in this Note, the directors of the nonprofit corporations are essentially volunteers whose efforts to assist their states may be impaired by application of the FLSA to their corporations.

124. 17 U.S. (4 Wheat.) 316 (1819).

125. 78 U.S. (11 Wall.) 113 (1871).

126. *See, e.g.*, Massachusetts v. United States, 435 U.S. 444 (1978). *See generally*, Note, *Federal Immunity From State Taxation: A Reassessment*, 45 U. CHI. L. REV. 695, 708-13 (1980).

127. The Court has been unable to issue a majority opinion in its last two attempts to define the scope of the states' immunity from federal taxation. *See* cases cited *supra* note 126.

128. *See* 426 U.S. at 843 n.14.

129. *See* cases cited *supra* note 126.

130. *See, e.g.*, United States v. New Mexico, 455 U.S. 720 (1982); United States v. Boyd, 378 U.S. 39 (1964); James v. Dravo Contracting Co., 302 U.S. 134 (1937); McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

131. 385 U.S. 355 (1966).

Department of Employment, Colorado had sought to impose an unemployment compensation tax upon the Red Cross. The Court stated,

> [a]lthough there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality. . . . Congress chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense, then War, Department. . . . Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors. . . . By statute and Executive Order there devolved upon the Red Cross the right and obligation to meet this Nation's commitments under varying Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government. In those respects in which the Red Cross differs from the usual government agency—e.g., in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—e.g., national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute.[132]

The analogy to Richland, Eastside and Skills Development is readily apparent. Each corporation is subject to regular governmental supervision and audit, and receives substantial assistance from its respective state. Each is a nonprofit organization, which the Supreme Court has indicated may be a factor in tax immunity cases.[133] Al-

132. *Id.* at 358-60. *Department of Employment* was recently cited with approval in United States v. New Mexico, 455 U.S. 720, 736-37 (1982) in which the Court attempted to clarify the "seemingly intractable problems posed by state taxation of federal contractors." 455 U.S. at 730. In *New Mexico*, contractors providing management and construction services to the government pusuant to cost-plus contracts with the Department of Energy were declared not entitled to sovereign immunity from state taxation because they were not "federal instrumentalities." The Court's opinion described a federal instrumentality as an entity which, although nominally private, is "virtually . . . an arm of the Government," *id.* at 735-37 (citing Department of Employment v. United States, 385 U.S. at 358-60), and " 'so intimately connected with the exercise of a power or the performance of a duty' by the Government that taxation of it would be 'a direct interference with the functions of government itself.' " *Id.* at 736 (quoting James v. Dravo Contracting Co., 302 U.S. 134, 157 (1937) (quoting Metcalf & Eddy v. Mitchell, 269 U.S. 514, 524 (1926))).

133. *See* United States v. Township of Muskegon, 355 U.S. 484 (1958). In *Muskegon*, the Court refused to permit a private corporation under contract with the federal govern-

though the scope of state immunity from federal taxation is narrower than the scope of federal immunity from state taxation,[134] *Department of Employment* clearly indicates that an entity need not be "governmental" in order to be entitled to some form of governmental immunity. Thus, *Department of Employment* might be used to support a holding that a nonprofit corporation performing an integral government function under strict state supervision is a state instrumentality entitled to immunity from the FLSA.[135]

Nevertheless, it seems appropriate that lower courts have refused to extend Tenth Amendment immunity to such corporations. By its terms, *National League of Cities* grants sovereign immunity only to the states as employers.[136] In addition, the opinion states that the "un-

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ment to escape state tax liability on the use of federal property within the state. The situation "might well be different if the Government had reserved such control over the activities and financial gain of [the company] that it could properly be called a 'servant' of the United States in agency terms." 355 U.S. at 486.

134. *See* Massachusetts v. United States, 435 U.S. 444, 455 (1978) in which the Court stated, "[t]he immunity of the Federal Government from state taxation is bottomed on the Supremacy Clause, but the States' immunity from federal taxes was judicially implied from the States' role in the constitutional scheme." *Id.* at 455. *See also* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 477 (1939) ("As [the federal] government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation."); New York v. United States, 326 U.S. 572, 576-77 (1946) (Frankfurter, J.,) (criticizing the reciprocity argument for ignoring that the states, due to their representation in Congress, have less need than the federal government for the protections of tax immunity). *But see* United States v. California, 297 U.S. 175, 184-85 (1936) (intergovernmental tax immunity is "equally a restriction on taxation by either of the instrumentalities of the other").

135. As in the area of federal immunity from state taxation, there would be no precise test to determine whether an ostensibly private entity performing a traditional governmental function is so intimately connected with a state or local government that the entity should be granted sovereign status. Among the factors a court should consider are: (1) the degree and nature of governmental supervision and control; (2) the extent to which the entity is financed by the government; (3) whether the entity is exempt from state and local taxes; (4) whether the entity has been granted any sovereign powers, such as the power of eminent domain. In determining whether a particular entity should be exempt from the FLSA, a court might also consider whether the state has retained control over that entity's employee wages and work schedules. *See infra* note 163.

136. The Court stated: "[T]he federal requirement directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in *state employment.*" 426 U.S. at 848 (emphasis added). "[T]he vice of the Act as sought to be applied here is that it *directly* penalizes the States for choosing to hire *governmental employees* on terms different from those which Congress has sought to impose." *Id.* at 849 (emphasis added). "We hold that insofar as the challenged amendments operate to *directly* displace the States' freedom to structure integral operations in areas of traditional governmental functions they are not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.* at 852 (emphasis added).

doubted attribute of state sovereignty" affected by application of the FLSA to the states 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 those employees may be called upon to work overtime."[137] When a state, by contracting with a nonprofit corporation, leaves these decisions to private individuals, that state is no longer exercising this "attribute of sovereignty." Despite the existence of extensive state regulation, the corporation should not be deemed to be a sovereign entity.

Support for this view can be found in the Supreme Court's recent decisions regarding "state action" under the Fourteenth Amendment. In *Rendell-Baker v. Kohn*,[138] the plaintiffs, five teachers and a vocational counselor, brought an action against their employer-school claiming they were fired in violation of the First and Fourteenth Amendment rights.[139] The school, although ostensibly private, was subject to extensive state regulation and dependent upon the state for its funding.[140] The Court found no state action. In discussing the school's dependence on state funds, the Court noted,

> The school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.[141]

The Court also reasoned that state regulation, even if extensive and detailed, does not convert a private entity's actions into "state action."[142] The majority deemed the crucial factor in *Rendell-Baker* to be that the "decisions to discharge the petitioners were not compelled or even influenced by any state regulation."[143] To the extent they are rele-

137. *Id.* at 845.

138. 457 U.S. 830 (1982).

139. Plaintiffs brought their action under 42 U.S.C. § 1983, which provides a private cause of action to any person whose constitutional rights are violated under color of a state statute, ordinance, regulation, custom, or usage. *See generally Symposium: Recent Developments in Reconstruction Era Civil Rights Acts Litigation*, 9 HASTINGS CONST. L.Q. 457 (1982).

140. The state of Massachusetts provides up to 99% of the school's funds. 457 U.S. at 846 (Marshall, J., dissenting).

141. 457 U.S. 840-41.

142. *Id.* (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)).

143. 457 U.S. at 841. *See also* 457 U.S. at 843-44 (White, J., concurring). In addition, the Supreme Court dismissed plaintiffs' claim that state action was established by virtue of the school's performing a "public function." The Court observed that education is not " 'traditionally the exclusive perogative of the State.' " *Id.* at 842 (quoting Jackson v. Metropolitan Edison, 419 U.S. 345, 353 (1974)). The majority stated "[t]hat a private entity performs a function which serves the public does not make its acts state action." *Id.*

vant to the question of sovereign immunity under the Tenth Amendment,[144] *Rendell-Baker* and its companion case, *Blum v. Yaretsky*,[145] would seem to require at least that there be direct state involvement in the decisions regarding the wages and hours of quasi-public employees before a state could claim that those employees are not entitled to the protections of the FLSA.

Moreover, the principle of immunity espoused by the Court in *National League of Cities* is apparently more narrow than either the concept of state action or intergovernmental immunity from taxation. The majority was very consistent in noting that the unconstitutionality of the 1974 amendments to the FLSA was due to their *direct* effect on state governments as *employers.*[146] It must be acknowledged, of course, that the specific issue of quasi-public employees was not directly before the Court. Nevertheless, the Court has thus far refused to expand the principles of *National League of Cities* beyond the facts of that case.

Recently, in *EEOC v. Wyoming*,[147] the Court held that application of the Age Discrimination Act[148] to the states does not violate the principles enunciated in *National League of Cities.*[149] Justice Brennan, writing for the majority, explained the limited nature of the Tenth Amendment immunity granted the states in *National League of Cities*. Brennan reemphasized that, in order to give rise to a claim of immunity, the challenged regulation must directly regulate the "States as States."[150] He observed, however, that "not . . . every state employment decision aimed simply at advancing a generalized interest in efficient management—even the efficient management of traditional state functions—should be considered to be an exercise of an 'undoubted attribute of state sovereignty.' "[151] Finally, Justice Brennan noted that whether a particular federal regulation impermissibly interferes with traditional governmental functions does not depend on " 'particularized assessments of actual impact,' which may vary from State to State and time to time, but on a more generalized inquiry, essentially legal rather than factual, into the direct and obvious effect of the federal

144. Logic dictates that there can be no sovereign immunity where there is no state action.

145. 457 U.S. 991 (1982). For a discussion of *Blum*, see *infra* notes 165-67 and accompanying text.

146. *See supra* note 136.

147. 460 U.S. 226 (1983) (5-4 decision).

148. 29 U.S.C. § 621 *et. seq.* (1976 & Supp. V 1981).

149. The majority based its decision upon its determination that the Act "does not 'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions.' " 460 U.S. at 239.

150. *Id.* at 237.

151. *Id.* at 238. The Justice admitted, however, that "[p]recisely what it meant by an 'undoubted attribute of state sovereignty' is somewhat unclear . . . ." *Id.*

legislation on the ability of the states to allocate their resources."[152]

In *Richland*, *Eastside*, and *Skills Development*, the states' decision to contract with nonprofit corporations to provide mental health services can be characterized as merely an employment decision aimed at advancing a generalized interest in efficient management. Application of the FLSA to these corporations would not necessarily—although it might in these particular cases—have a direct and obvious effect on the ability of the states to allocate their resources. The states have the option of avoiding the strictures of the FLSA by providing the services themselves through governmental agencies.

The existence of this option is significant in light of Justice Brennan's statement in *EEOC* that that case is distinguishable from *National League of Cities* in part because in *EEOC* "even the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard."[153] Similarly, application of the FLSA to these nonprofit corporations would not prevent the states from contracting out their traditional functions; it would merely require the states to comply with a reasonable federal standard.[154] As Justice Alarcon observed in his *Richland I* dissent:

> [T]he states have no inherent [T]enth [A]mendment right to *demand* that contracts with private businesses [must] always be cheaper or more desirable than providing the services themselves. The state must come to the private sector as it is, evaluating whether the private sector, subject as it is to minimum wage laws, . . . can still provide equivalent services at a lower cost.[155]

Several factors—the limited nature of the Court's holding in *National League of Cities*,[156] the recent cases limiting the scope of "state action" under the Fourteenth Amendment,[157] the apparently nonreciprocal nature of intergovernmental tax immunity,[158] and the Court's reluctance to extend the principles espoused in *National League*

152. *Id.* at 240 (quoting *National League of Cities*, 426 U.S. at 851-52).

153. 460 U.S. at 240 (emphasis in original).

154. On the other hand, it might be argued that the "direct and obvious impact" of requiring these corporations to comply with the FLSA will be to force the states to operate these establishments themselves and thereby interfere with the states' ability to allocate their resources to a traditional government service in the manner the states consider to be the most effective. Such an argument, however, depends upon a "particularized assessment of actual impact," which, contrary to Justice Brennan's assertion in EEOC, is essentially factual rather than legal. *See supra* note 152 and accompanying text.

155. Richland County Ass'n for Retarded Citizens v. Donovan, 91 Lab. Cas. (CCH) ¶ 34,018, at 49,685 (Alarcon, C.J., dissenting), *withdrawn*, Aug. 21, 1981.

156. *See supra* note 136 and accompanying text.

157. *See supra* notes 138-145 and accompanying text.

158. *See supra* note 134 and accompanying text.

of Cities beyond the facts of that case[159]—indicate that a nonprofit corporation, whose private directors control the hours and wages of the corporation's employees, should not be viewed as a state instrumentality entitled to share its state's Tenth Amendment immunity from federal regulation. It remains arguable, however, that requiring such a nonprofit corporation—one performing an integral governmental function under state supervision—to comply with the terms of the FLSA constitutes unconstitutional interference with that state's sovereign right to determine the best method of providing a traditional governmental service. Until the Supreme Court settles this question, lower courts should consider the instrumentality approach carefully; if the instrumentality approach is rejected, the reasons for its rejection should be clearly articulated.[160]

B. Retaining Sovereign Rights by Contract

In *Skills Development*, the district court entertained the possibility that sovereign rights might be "meted out" by a state to a private corporation on the basis of the parties' contractual relationship.[161] The court, however, did not identify how this result might be accomplished. For purposes of conferring immunity from the FLSA, it seems that the most appropriate method would be for the state to retain—and to exercise—control over the hours and wages of the corporation's employees. In *National League of Cities*, the Court identified the state's ability to set the wages and hours of governmental employees engaged in the performance of traditional governmental functions as an "undoubted attribute of sovereignty."[162] Where the state retains, by virtue of its contract with a nonprofit corporation, the decisionmaking power over

159. Several Supreme Court opinions issued after *National League of Cities* contain language narrowing the potential scope of the states' Tenth Amendment immunity from federal regulation. *See* EEOC v. Wyoming, 460 U.S. 226 (1983); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981). *See also supra* notes 32, 147-154 and accompanying text. It should be remembered, however, that *Hodel* was written by Justice Marshall, that *Federal Energy Regulatory Comm'n* and *EEOC* were written by Justice Brennan, and that both Justices Marshall and Brennan dissented in *National League of Cities*. Moreover, both *Federal Energy Regulatory Comm'n* and *EEOC*, like *National League of Cities*, were decided by bare 5-4 majorities. A slight change in the Court's personnel or a change of mind by one of the Justices might lead to a renewed expansion of the Tenth Amendment principles articulated in *National League of Cities*.

160. As indicated *supra* at note 118, late in the publication process of this Note, the Sixth Circuit affirmed the district court's decision that Skills Development Services, Inc. is not entitled to immunity from the FLSA. The Sixth Circuit rejected the instrumentality approach, reasoning that, because intergovernmental immunity from taxation is nonreciprocal, "cases based on federal immunity to state regulation are irrelevant to the present case." 728 F.2d at 300. For a summary and analysis of the Sixth Circuit's opinion, see *infra* note 212.

161. *See supra* note 117 and accompanying text.

162. *See supra* note 137 and accompanying text.

the wages and hours of that corporation's employees, the state might be said to have retained its sovereign power. Arguably, application of the FLSA to the corporation's employees in these circumstances would constitute a direct application of the Act to the state itself, depriving the state of its contractual and sovereign right to determine the wages of the corporation's employees.[163]

The Supreme Court's recent state action decisions lend support to this approach. As discussed in the previous section, the Court in *Rendell-Baker* based its finding of no state action primarily on the fact that the decisions to discharge plaintiffs were not compelled or even influenced by the state.[164] In *Blum v. Yaretsky*,[165] the companion case to *Rendell-Baker*, the plaintiffs were residents of a nursing home who claimed that the home's unilateral decision to transfer them to a facility where they would receive a lower level of care violated their due process rights. Plaintiffs contended that the action of the home was converted into state action by, *inter alia*, the state's subsidizing the facilities' operating and capital costs, licensing of the facilities, and payment of medical expenses of more than ninety percent of the patients.[166] The Court held that there was no state action, and thus no violation of the Fourteenth Amendment, because the decision to transfer the plaintiffs was not made by the state but by a private doctor exercising independent medical judgment.[167]

Blum and *Rendell-Baker* indicate that although a combination of state funding and state regulation will not convert all actions of an otherwise private entity into state action, if the facts establish that the particular action complained of is an exercise of state power, state action may be found. Similarly, a private entity under contract with a state to perform an integral governmental function, although not "the state" for all purposes, might be entitled to sovereign immunity from the FLSA where the state has retained and is exercising control over the hours and wages of that corporation's employees.[168]

163. The instrumentality approach and the retention by contract approach are not necessarily mutually exclusive. In applying the instrumentality approach, one factor a court might consider is whether the state retains significant control over the particular attribute of sovereignty impacted by the challenged federal regulation. *See supra* note 135.

164. *See supra* notes 138-143 and accompanying text.

165. 457 U.S. 991 (1982).

166. *Id.* at 993.

167. *Id.* at 1009. Plaintiffs also argued that the state commands the summary discharge or transfer of patients who are thought to be inappropriately placed in their nursing facilities. The Court responded, "[w]ere this characterization accurate, we would have a different question before us." *Id.* at 1005.

168. The concept is similar to one employed by the NLRB in determining whether a concededly private entity might, by virtue of its relationship with a local government, be entitled to immunity from the NLRA under the statutory exemption for political subdivisions. Where a private employer who contracts to provide services to an exempt political

The arguments against adoption of such an approach are similar to those advanced against adoption of the instrumentality approach. *National League of Cities* expressly grants sovereign immunity only to the *states as employers*.[169] When a state makes a decision to contract with a private entity, it has, by its own choice, ceased to be the employer of the persons providing the traditional governmental service. Application of the FLSA in these circumstances falls directly upon the corporate entity as employer and only indirectly on the state as contractor.

Moreover, even if retention of the power to determine wages and hours was held to constitute state action under the Fourteenth Amendment, such a finding would not be conclusive of the existence of sovereign immunity.[170] Where a state decides to contract with a nonprofit corporation for the provision of a traditional governmental function, it is *that decision—i.e.*, the state's decision not to perform the particular function—which should be the focus of a court's inquiry into the existence of sovereign immunity under the Tenth Amendment. The terms of the contract should not be controlling.

This view is supported by the following crucial language in EEOC:

> The principle of immunity articulated in *National League of Cities* is a functional doctrine . . . *whose ultimate purpose is not to create a sacred province of state autonomy*, but to ensure that the unique benefits of a federal system in which the States enjoy a 'separate and independent existence' . . . not to be lost through undue federal interference in certain core state functions.[171]

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subdivision does not retain sufficient control over the employment relationship to engage in meaningful collective bargaining, the exempt subdivision is deemed the true employer. *See* Board of Trustees of Memorial Hosp. v. NLRB, 624 F.2d 177, 181 (10th Cir. 1980); NLRB v. Austin Developmental Center, 606 F.2d 785, 789 (7th Cir. 1979).

The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d) (1976). Where a group of workers is "jointly" employed by two or more entities that each qualify as a statutory "employer," each is held to be "responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions." 29 C.F.R. § 791.2(a) (1983). Although the joint employer concept typically is used to increase the coverage of the FLSA, *see, e.g.*, Bonnette v. California Health & Welfare Agency, 525 F. Supp. 128, 135-36 (N.D. Cal. 1981), *aff'd*, 704 F.2d 1465 (9th Cir. 1983), arguably, where a state is deemed to be a joint employer under the Act, *National League of Cities* should apply.

169. *See supra* note 136 and accompanying text.

170. In United Transp. Workers Union v. Long Island R.R. Co., 455 U.S. 678 (1982) the Supreme Court reaffirmed its position that a state's operation of a railroad does not make that railroad immune from federal regulation. Similarly, in New York v. United States, 326 U.S. 572 (1946), the Court held that a state's decision to bottle and market mineral water does not entitle it to sovereign immunity from federal taxation. In both *Long Island R.R.* and *New York v. United States*, there was clearly "state action," but the nature of the state action precluded a finding of sovereign immunity.

171. 460 U.S. 226, 236 (1983) (quoting *National League of Cities*, 426 U.S. at 845) (emphasis added) (citations omitted).

Applying Brennan's reasoning, it seems improper to view *National League of Cities* as having a sacred province of state autonomy over the wages and hours of all persons performing integral state functions. The "attribute of sovereignty" identified in *National League of Cities* should not be extended beyond the situation in which the government is itself providing the service. Only in that situation might the state's "independent existence" be threatened by application of the FLSA directly to state employees. Where a state has contracted with a private entity—even if it retains control over the wages and hours of the employees—the state retains the option of providing those services itself. The existence of this option would seem to preclude a finding of Tenth Amendment immunity.[172]

C. The Political Subdivision Exemption

1. The Term In Other Contexts

Even if the "instrumentality" and "retention by contract" approaches are, as has been argued here, inappropriate methods of determining whether a corporate entity is entitled to sovereign immunity from the FLSA, in *National League of Cities* the Supreme Court expressly extended the immunity to states and their "political subdivisions."[173] The only courts to address the political subdivision exemption in this context have been the district court and the Eleventh Circuit in *Eastside*.[174] The Eleventh Circuit expressly adopted the test used by the NLRB to determine whether a particular entity is a political subdivision entitled to the statutory exemption from the NLRA.[175] The term "political subdivision," however, is far from precise, and is generally construed according to the particular setting in which it is used.

172. *See supra* notes 153-55 and accompanying text. Indeed, given the Court's refusal to expand the concept of immunity created in *National League of Cities* beyond the facts of that case, the most appropriate question to be asked in this area might not be whether the state is entitled to immunity from federal regulation, but whether the situation is one in which the application of a particular federal regulation would be so unavoidably detrimental to the state's existence that Congress must be estopped from applying its otherwise plenary power to regulate under the Commerce Clause.

173. 426 U.S. at 855-56 n.20.

174. As indicated *supra*, at note 118, late in the publication process of this Note, the Sixth Circuit affirmed the district court's decision that Skills Development Services, Inc. is not entitled to immunity from the FLSA. The Sixth Circuit, like the Eleventh Circuit in *Eastside*, expressly adopted the NLRB criteria. For a summary and analysis of the Sixth Circuit's opinon see *infra* note 212.

175. 669 F.2d at 677. For a discussion of the Eleventh's Circuit's treatment of this issue, see *supra* notes 98-103 and accompanying text.

The district court did not adopt the NLRB test but merely incorporated it into its alternative holding. 509 F. Supp. at 584. *See supra* notes 88-93 and accompanying text.

Preliminarily, it should be noted that the term "political subdivision" has arisen in another constitutional context. Courts have developed criteria to determine whether an entity is the "alter-ego" of a state and thus entitled to sovereign immunity from suit under the Eleventh Amendment.[176] The purpose in that situation, however, is to *distinguish* nonimmune "political subdivisions" from immune "alter-egos." Because *National League of Cities* extended Tenth Amendment immunity from federal regulation to states *and* their political subdivisions, the criteria used in the Eleventh Amendment cases should not be adaptable to Tenth Amendment jurisprudence.

There is a plethora of decisions in which state courts have attempted to give definition to the term "political subdivision."[177] The decisions are inconsistent, partially because the courts were attempting to define the term in the context of a particular statute or state constitutional provision.[178]

Attempts by federal courts to define the term "political subdivision" have also generally been within the context of a particular statute. In *NLRB v. Natural Gas Utility District of Hawkins County*,[179] the

176. *See, e.g.*, Blake v. Kline, 462 F. Supp. 825 (E.D. Pa. 1978), *vacated on other grounds*, 612 F.2d 718 (3rd Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). These factors include: (1) whether any judgment would be payable from the state treasury; (2) whether the entity is performing a governmental or proprietary function; (3) whether it is separately incorporated; (4) the degree of autonomy it has over its operations; (5) whether it has the power to sue and be sued and to enter into contracts; (6) whether its property is immune from state taxation; and (7) whether the sovereign has immunized itself from responsibility for the entity's operations. 462 F. Supp. at 826. The first of these factors is the most important. *See* Obenshain v. Halliday, 504 F. Supp. 946, 952 (E.D. Va. 1980); Miller-Davis Co. v. Illinois State Toll Highway Auth., 567 F.2d 323, 327 (7th Cir. 1977).

177. *See, e.g.*, Adamson Co., v. R.E. Benson & Sons, Inc., 40 Pa. Commw. 14, 396 A.2d 907 (1979) *per curiam*; French v. Board of Educ., 99 Misc. 2d 882 (1979) 417 N.Y.S.2d 389, *aff'd*, 72 A.D.2d 16, 424 N.Y.S.2d 235 (1980); Tymcio v. State, 52 Ohio App. 2d 298, 369 N.E.2d 1063, (1977); Lane Council of Gov'ts v. Lane Council of Gov'ts Employee Ass'n, 26 Or. App. 119, 552 P.2d 600 (1976) *rev'd on other grounds*, 277 Or. 631, 561 P.2d 1012 (1977); Commonwealth v. Philadelphia Gas Works, 25 Pa. Commw. 66, 358 A.2d 750 (1976). *See also* Alabama Hosp. Ass'n v. Dillard, 388 So. 2d 903 (1980), in which the Alabama Supreme Court held that even the hospitals created as public corporations by the State of Alabama were not political subdivisions under the relevant provision of the Alabama Constitution.

178. *Compare* Schaefer v. Hilton, 473 Pa. 237, 373 A.2d 1350 (1977) (school district a "political subdivision" under statutory provision permitting political subdivisions to participate in or purchase of purchase contracts for equipment, materials, and supplies entered into by Department of Property and Supplies); Muse v. Prescott School Dist., 233 Ark. 789, 349 S.W.2d 329 (1961) (school district a political subdivision within meaning of provision of Workmen's Compensation Act) *with* Ray v. Cobb County Bd. of Educ., 110 Ga. App. 258, 138 S.E.2d 392 (1964) (school board not a political subdivision within Insurance Code provisions) *and* Cardwell v. Howard, 345 Mo. 215, 132 S.W.2d 960 (1939) (school district not a political subdivision within constitutional provision for appeal to state Supreme Court in a case where county or other political subdivision of the state is a party).

179. 402 U.S. 600 (1971).

Supreme Court based its decision on statutory grounds.[180] In *United States v. Board of Commissioners of Sheffield*,[181] the Court relied upon legislative history and congressional intent in defining the term "political subdivision" within the context of Voting Rights Act of 1965.[182] In a more recent case, *Philadelphia National Bank v. United States*,[183] the Third Circuit discussed the necessity of developing specific criteria applicable to a particular statute in order to determine whether an entity falls within the statutory definition of the term "political subdivision."[184] In finding that Temple University was not a "political subdivision" under the Internal Revenue Code, section 103(a)(1),[185] the Third Circuit relied upon cases decided under that section[186] and expressly dismissed the relevance of any analogy to either the doctrine of state action[187] or the NLRB cases.[188]

180. The Court found that Congress enacted the political subdivision exemption "to except from Board cognizance the labor relations of federal, state, and municipal government employees, since governmental employees did not usually enjoy the right to strike." *Id.* at 604. In construing the NLRA, neither the NLRB nor the courts are bound by the fact that other federal agencies treat an entity as a "political subdivision." *See* Truman Medical Center, Inc. v. NLRB, 641 F.2d 570, 572-73 (8th Cir. 1981).

181. 435 U.S. 110 (1978).

182. 435 U.S. at 117-35 (interpreting 42 U.S.C. § 1973 (Supp. V 1970)). The Court found that the term "political subdivision," as used in the Act, included "all entities having power over any aspect of the electoral process within designated jurisdictions," and not simply counties or other units of state government that perform the function of registering voters. *Id.* at 118.

183. 666 F.2d 834 (3d Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982).

184. The circuit court addressed the question whether Temple University was a political subdivision of the State of Pennsylvania so that interest paid to holders of the University's bonds could be excluded from the bondholders' gross income. 666 F.2d at 835-37. The court stated, "[W]e must resolve the question in the context of the Internal Revenue Code itself . . . ." *Id.* at 839.

185. 26 U.S.C. § 103(a)(1)(1976).

186. 666 F.2d at 839-42. The court reviewed the only two cases to discuss the term "political subdivision" within the meaning of § 103: Commissioner v. Shamberg's Estate, 144 F.2d 998 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945) (Port of New York Authority—a public corporation created by a compact between New Jersey and New York, granted the power of eminent domain and limited police power, and governed by a board of commissioners whose members are appointed by the two states—determined to be a political subdivision under the Internal Revenue Code); and Commissioner v. White's Estate, 144 F.2d 1019 (2d Cir. 1944) *cert. denied* 323 U.S. 792 (1945) (New York's Triborough Bridge Authority, whose commissioners are appointed by government officials and which had been granted the power of eminent domain and limited police power, determined to be a political subdivision under the Code). The court found that *Shamberg* and *White* were consistent with the appropriate Treasury regulation, which is concerned primarily with the "three sovereign attributes": the power to tax, the power of eminent domain, and the police power. 666 F.2d at 839. Temple University was without any of these three attributes, and therefore was found not to be a "political subdivision." *Id.* at 839-41. The court expressly based its decision on statutory and not constitutional grounds. *Id.* at 839.

187. The court asserted, "A finding of joint activity that may constitute state action does not . . . make a private party a state 'agency' or political subdivision." 666 F.2d at 839.

As demonstrated by state and federal precedents, the particular definitions of "political subdivision" are not readily transferable from one context to another. The statute that has been the focus of the trilogy of cases examined in this Note is the FLSA. The only cases in which courts construed the term "political subdivision" as used in the pre-1974 FLSA are *Creekmore v. Public Belt Railroad Commission*[189] and *Abad v. Puerto Rico Communications Authority*.[190] Although the focus of this Note is the constitutional limitation upon Congress' commerce power and not the construction of the FLSA, these two cases are nevertheless relevant to the present inquiry into the variety of constructions given to the term "political subdivision." In neither case did the court attempt to set forth specific criteria for determining what constitutes a political subdivision; both relied upon an essentially ad hoc inquiry.

In *Creekmore*, the Fifth Circuit affirmed the district court's finding that the Public Belt Railroad in New Orleans came within the statutory exemption. The court observed:

> The City of New Orleans being a political subdivision of the State of Louisiana, and the Public Belt Railroad Commission being one of its duly authorized, functioning departments, we think it clear that the employer-employee relationship between these employees and the City and its Commission falls squarely within the language of [the FLSA] which in defining 'employer' excludes 'any State or political subdivision of a State'.[191]

In *Abad*, a public corporation authorized by statute to control telephone and telegraph service was declared exempt from the FLSA as a political subdivision of Puerto Rico. The corporation's directors were appointed by government officials.[192] In addition, the corporation had limited powers of eminent domain and was exempt from taxation of its property and bonds.[193] In holding the Puerto Rico Communications Authority (Authority) to be a political subdivision under the Act, the Court relied upon the following factors: (1) the Authority was statutorily designated as a public corporation; (2) the Authority had always been owned and operated as an integral part of the government; (3) the Authority performed a governmental function; (4) the Department of

188. The Third Circuit reasoned: "That an entity may have some governmental characteristics for certain purposes does not necessarily control its status under a different statutory scheme." *Id.*

189. 134 F.2d 576 (5th Cir. 1943), *cert. denied*, 320 U.S. 742 (1943).

190. 88 F. Supp. 34 (D. P.R. 1950).

191. 134 F.2d at 577-78. The court relied in part upon a letter to the railroad in which the Wage and Hour Division of the Department of Labor opined that "[i]f the Public Belt Railroad System is wholly owned and controlled by the City of New Orleans . . . the employees of the Public Belt Railroad System are not subject to the Act." *Id.* at 578.

192. 88 F. Supp. at 35.

193. *Id.* at 36.

Labor had earlier issued an administrative ruling that the Water Resource Authority, whose charter provisions were almost identical to the Authority's, was a political subdivision under the Act.[194]

2. "Political Subdivision" As Used In National League of Cities

Creekmore and *Abad*, of course, cannot be considered authoritative regarding the meaning of the term "political subdivision" as used in *National League of Cities*. The Court in *National League of Cities* prescribed a *constitutional* limitation upon the commerce power. Although the Court declared the extension of the FLSA to the states' political subdivisions to be unconstitutional insofar as that extension impaired the states' ability to structure integral operations in areas of traditional government functions, it cannot safely be assumed that the Court was simply grafting previous judicial declarations regarding the statutory definition of the term "political subdivision" onto this constitutional limitation. A court attempting to construe the "constitutional exemption" from the FLSA created for states and their political subdivisions must at least begin its efforts by looking to the language and logic of *National League of Cities* and its progeny.

The only clue to the meaning of the term "political subdivision" as used in *National League of Cities* appears in a footnote:

> As the denomination 'political subdivision' implies, the local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services are provided by the State itself.[195]

The Court's reference to "local governmental units" indicates that the term "political subdivision" was meant to include city and county governmental agencies. States, cities and counties, however, do not always neatly designate their "subordinate arms" as "government agencies." As the cases discussed above indicate,[196] determining an entity's governmental status is particularly difficult when the entity is separately incorporated.

In *National League of Cities*, Justice Rehnquist stated that in relation to Congress' commerce power, "States as States stand on a quite different footing from an individual or a corporation . . . ."[197] Arguably, this language evinces the Court's intention to distinguish the states and their political subdivisions from all corporate entities. The Court

194. *Id.* at 42. The court also relied upon, *inter alia*, *Creekmore*, *Shamberg's Estate*, and *White's Estate*. *Id.* at 39-41.

195. 426 U.S. at 855 n.20.

196. *See supra* notes 179-94 and accompanying text.

197. 426 U.S. at 854.

did not distinguish between public and private corporate entities.[198] Strictly speaking, even the employees of public corporations are employees of that corporation and not of a state, city or county government.

Such a rigid reading of *National League of Cities* is inappropriate. The opinion should not be interpreted to exclude all corporate entities from the scope of a state's sovereign immunity. State and local governments have long used corporate entities to perform a variety of governmental functions. To distinguish between state agencies and corporate entities performing governmental functions purely on the basis of the latter's corporate structure would be elevating form over substance. Given the clear distinction made in both *National League of Cities* and *Hodel* between state and local governments on the one hand and private individuals on the other, however, the relationship between any corporate entity and the government must be examined carefully. Sovereign status should be granted to a corporation only where that corporation is so closely linked with a state or local government that the corporation cannot fairly be distinguished from a governmental agency.

Measuring the nature of the relationship between a corporation and the government is unavoidably a question of degree. Certain parameters can be identified, however. An entity organized as a private, nonprofit corporation whose board of directors is self-appointed and exercises no governmental power, probably should be considered a private entity for the purpose of applying the Tenth Amendment principles set forth in *National League of Cities*.[199] On the other hand, a statutorily designated public corporation owned and operated by the government, endowed by the legislature with appropriate sovereign

198. As used in this Note, the term "public corporation" refers to an entity statutorily designated as a "public" or "public benefit" corporation whose assets are owned by a state or local government. In United Transp. Workers Union v. Long Island R.R. Co., 455 U.S. 678, 684 (1982), the Supreme Court impliedly conceded that such a government owned corporation was "the state" by not addressing the first prong of the *Hodel* test. The Second Circuit granted sovereign status to the Long Island Railroad, which recently had been converted from a private stock corporation to a "public benefit" corporation wholly owned by the government. *See* 634 F.2d 19 (2d Cir. 1980). *See also* Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841, 845 (1st Cir. 1982)) (state owned public corporation attached to Puerto Rico's Department of Transportation and Public Works "an integral part of the Commonwealth government" and entitled to immunity from the FLSA); Alamo v. Autoridad de Comunicaciones De Puerto Rico, 569 F. Supp. 1434 (D. P.R. 1983) (Puerto Rico Communications Authority, a state owned public corporation performing an integral government function, entitled to exemption from FLSA).

State courts attempting to distinguish between "public" and "private" corporations often rely on the fact that public corporations are owned by the government. *See, e.g.*, York County Fair Ass'n v. South Carolina Tax Comm'n 249 S.C. 337, 154 S.E.2d 361 (1967); Sharon Realty Co. v. Westlake, 25 Ohio Op. 2d 322, 188 N.E.2d 318 (Ohio Com. Pl. 1961).

199. *See supra* notes 136-57 and accompanying text.

powers, and managed without a profit motive by public officials surely would be indistinguishable from any other governmental agency for the purpose of applying *National League of Cities*.

The problem, of course, is determining the sovereign status of an entity that falls somewhere between these two poles. In *Eastside*, the Eleventh Circuit's examination of the nature of the relationship between Eastside and the State of Alabama was appropriate and necessary to a determination of Eastside's sovereign status. The Court's express adoption of the NLRB test, however, was inappropriate for two reasons. First, courts have found the test difficult to apply; consequently, the results in cases under the NLRA have been somewhat inconsistent.[200] Second, to the extent that courts adopting the test in sovereign immunity cases look to NLRB precedent to determine how the test should be applied, the scope of Congress' power to regulate under the Commerce Clause will be determined by cases in which a particular statutory exemption, rather than a constitutional principle, was at issue.[201] The following criteria, similar to but somewhat more restrictive than the NLRB test, would be easier to apply and would avoid reliance upon the NLRB cases.

Simply stated, an entity which is government owned, managed by directors appointed by government officials, and statutorily designated as a public corporation[202] should be presumed to be governmental. A corporation organized as a private, nonprofit corporation should be presumed to be a private business. Although these presumptions should be rebuttable, an examination of a corporation's statutory designation, the manner in which its directors are selected, and the

200. *See generally* Kiss, *The Effect of* National League of Cities *on the Political Subdivision Exemption of the NLRA*, 32 LAB. L.J. 786 (1981); Note, *The "Political Subdivision" Exemption of the National Labor Relations Act*, 13 COLUM. J.L. & SOC. PROBS. 183 (1977). Even the NLRB has not been entirely consistent in its decisions concerning the scope of the "political subdivision" exemption. The Board formerly exempted private employees performing "essential" government functions, *see, e.g.*, Rural Fire Protection Co., 216 NLRB 584 (1975) (volunteer fire department exempt from the Act) but has apparently repudiated that position, *see* National Transportation Service, Inc., 240 NLRB 565 (1979).

201. Moreover, courts reviewing NLRB's decisions treat the Board's "construction of the broad statutory term" with "great respect." NLRB v. Natural Gas Util. Dist. of Hawkins County, 402 U.S. 600, 605 (1971). Although application of the NLRA to the states and their political subdivisions might violate the Tenth Amendment, *see generally* Kiss, *supra* note 200, this issue has not been decided. In any event, it does not seem appropriate that the NLRB's and the court's attempts to construe the NLRA should now take on constitutional status. *But see* Crestline Memorial Hosp. Ass'n, Inc. v. NLRB, 668 F.2d 243, 245 n.1 (6th Cir. 1982) ("As we understand it, the rationale for the 'political subdivision' exemption has its ultimate basis in the Tenth Amendment considerations of state Sovereignty and the Eleventh Amendment grant of judicial immunity to the states.").

202. For an explanation of the manner in which the term "public corporation" is used in this Note, see *supra* note 198.

ownership of its assets provides a useful starting point for determining the nature of that corporation's relationship to the state.

Where a state or local government has made the decision to create a public corporation under government ownership to perform an integral government function, this may be indicative of the government's intent to retain governmental control over all decisions made by that entity. At the very least, a state's decision to establish a public corporation is more likely to evince such an intent than the decision to contract with a nonprofit corporation. In addition, government ownership of the corporation and its assets makes the entity more closely analogous to a governmental agency than a private business. Because the inquiry into sovereign status is, in part, a question as to whether the state has waived its sovereign immunity, factors indicating an intent to retain governmental control over the corporation support the initial application of the presumption of sovereign status.

Even a statutorily designated public corporation under government ownership might not be entitled to the presumption of sovereign status under all circumstances. In order to be entitled to the presumption of sovereign status the corporation should, at a minimum, be managed by directors who are appointed by government officials.[203] Where a government owned public corporation's directors are self-appointed or appointed by private agencies, that corporation is not necessarily "governmental" despite its other attributes. The waiver of government control over the entity's administration represented by the private appointment of its directors, puts the entity's sovereign status at risk and no presumption should be applied. A court attempting to determine the Tenth Amendment status of a government owned public corporation under private administration can only examine carefully all of the facts and circumstances of the entity's relationship to the state to determine whether the entity is more closely analogous to a government agency or to a government regulated private corporation. The corporation's possession of such attributes as the power of eminent domain or the police power, however, should weigh in favor of the corporation's sovereign status.

When a public corporation is managed by government officials or government appointees and the presumption of sovereign status is applied, that presumption might be rebutted by such factors as the failure to grant the corporation appropriate sovereign powers, a lack of control exercised over the corporation by government officials, or any other

203. Substantially all of the corporation's directors should be appointed by government officials. If, because of unusual circumstances, a board retains one member who is the representative of a private agency, the corporation should still be entitled to the presumption of governmental status. It should not be required that the appointing government officials be *elected* officials. The focus of a court's inquiry should be the entity's relationship to the government rather than to the electorate.

factors evincing a governmental intent to waive control over the administration of the entity. The precise nature of the facts necessary to rebut the presumption will vary from case to case; it would be impossible to devise a precise formula. A government owned public corporation managed by government appointed directors, however, will typically be virtually indistinguishable from any other government agency. The presumption of sovereign status running in favor of such an entity should be deemed rebutted only where the facts clearly indicate that the entity was intended to be nongovernmental.

The initial presumption that an ostensibly private, nonprofit corporation does not have sovereign status could also be rebutted. For example, a state might provide that an entity incorporated under the state's nonprofit corporations statute have its directorships filled by government officials or by persons appointed by government officials. If such a corporation has been given sovereign powers[204] and there are other circumstances indicating that it is, in substance, a government agency, a court might find the presumption of nongovernmental status overcome and deem the corporation a sovereign entity. The presumption, however, should not be rebutted easily. Although a precise formula is neither possible nor desirable, much more than a showing of government funding and regulation should be required. At a minimum, the directors should be government appointees.

In sum, a public corporation managed by government officials or government appointees should be presumed to have sovereign status. In the unusual event that a public corporation is managed by self-appointed or privately appointed directors, no presumption should apply; a court should look to all of the facts and circumstances of the entity's relationship with the state to determine whether the entity is more closely analogous to a government agency or to a government regulated private corporation. An entity organized as a private, nonprofit corporation should be presumed to be nongovernmental.

204. If a governmental body intends to confer governmental status upon an ostensibly private corporate entity, it should be willing to grant that entity certain important governmental powers. Among the most important of these sovereign powers are the power of eminent domain, the power to tax, and the police power. While it should not be necessary for a corporate entity to possess all of these powers in order to acquire governmental status, the possession of appropriate governmental powers would be strong indicators of such status. The withholding from a corporate entity of so fundamental a governmental power as the power of eminent domain would indicate that the corporation was not intended to possess full governmental status. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974) (actions of a privately owned utility company did not amount to "state action" under the Fourteenth Amendment; the Court observed, "[i]f we were dealing with the exercise by [the utility] of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one.").

Conclusion

In *EEOC v. Wyoming*, Justice Brennan pointed out that proper application of the principles articulated in *National League of Cities* depends upon "considerations of degree."[205] Such considerations have long been present in cases in which courts were forced to determine whether a particular quasi-governmental entity is "the state" or a "political subdivision" for purposes of a particular constitutional or statutory provision.[206] It remains arguable that quasi-public state instrumentalities are entitled to sovereign status under the Tenth Amendment.[207] It also remains arguable, particularly in light of recent Supreme Court decisions dealing with the concept of state action under the Fourteenth Amendment, that a state might be able to retain its immunity from the FLSA in contracting with an ostensibly private entity by retaining control over the particular attribute of sovereignty regulated by that Act.[208] By its terms, however, *National League of Cities* applies only to government employees.[209] Given the Court's refusal to expand the scope of the states' immunity from federal regulation beyond the facts of that case, it seems that neither the instrumentality approach nor the retention by contract approach is a proper method of determining whether a corporate entity is entitled to sovereign immunity from federal regulation.

Immunity from federal regulation, however, does extend to the states' "political subdivisions." Although the Court in *National League of Cities* did not explicitly define what it meant by "political subdivisions," the brief explanation provided, as well as the context in which the term was used, indicates that it was meant to include only governmental entities.[210] A public corporation under government ownership whose directors are appointed by government officials should be presumed to have governmental status. This presumption could be rebutted by such factors as a showing that the government has failed to retain sufficient control over the corporation's directors and/or has failed to delegate to the corporation appropriate governmental powers. Nonprofit corporations should be presumed to be private businesses. Although this presumption might be rebutted in very narrow circumstances,[211] neither *Richland*, *Eastside*, nor *Skills Development* is sufficiently controlled by its respective state nor possesses sufficient governmental power to be entitled to sovereign status under the Tenth

205. 460 U.S. 226, 239.
206. *See supra* notes 177-201 and accompanying text.
207. *See supra* notes 120-35 and accompaning text.
208. *See supra* notes 161-68 and accompanying text.
209. *See supra* note 136.
210. *See supra* notes 195-99 and accompanying text.
211. *See supra* note 204 and accompanying text.

Amendment.[212]

212. As indicated *supra*, at note 118, late in the publication process of this Note the Sixth Circuit affirmed the district court's decision that Skills Development Services, Inc. is not entitled to immunity from the FLSA. The circuit court rejected the argument that Skills Development is entitled to immunity as a state instrumentality, citing a portion of Justice Frankfurter's opinion in *New York v. United States* in which the Justice declared that " '[t]he considerations bearing upon taxation by the States of activities or agencies of the federal government are not correlative with the considerations bearing upon federal taxation of State agencies or activities.' " 728 F.2d at 300 (quoting 326 U.S. at 577). Justice Frankfurter's observation regarding the nonreciprocal nature of intergovernmental immunity was certainly relevant to the Sixth Circuit's inquiry into the applicability of the instrumentality approach in *Skills Development*. The fact that the doctrine of intergovernmental immunity from taxation is not precisely reciprocal, however, does not *necessarily* dictate that the instrumentality approach has no relevance to the concept of state immunity from federal regulation. *See supra* notes 120-35 and accompanying text.

The Sixth Circuit did not discuss the "retention by contract" approach. As noted above, the contract between Skills Development and the State of Tennessee does not give Tennessee direct control over the wages of the corporation's employees; it provides for maximum reimbursal rates and puts certain restrictions on both overtime work and the compensation paid for such work. *See supra* note 111 and accompanying text. Thus, the "retention by contract" situation was not truly before the court. The Sixth Circuit did address Skills Development's contention that under the FLSA the corporation and the State of Tennessee are "joint employers." *See supra* note 168. The court found that because Tennessee had not been joined as a party to the action, the "joint employer" rule was irrelevant to the disposition of the case. 728 F.2d at 300-01. Thus, the relevance of this statutory concept when the contracting state *has* been joined as a party remains unclear.

The Sixth Circuit also rejected Skills Development's argument that it is an immune "political subdivision." The court adopted the NLRB criteria and, relying upon precedent decided under the NLRA, found that Skills Development did not meet either prong of the NLRB test. 728 F.2d at 299-300. As its rationale for adopting the NLRB criteria in this circumstance, the court cited *Crestline Memorial Hospital Ass'n, Inc. v. NLRB*, 728 F.2d at 199 n.5 (citing 668 F.2d 243, 245 n.1 (6th Cir. 1982)). In *Crestline* the court found that the NLRA's political subdivision exemption is based upon Tenth and Eleventh Amendment considerations of state sovereignty. *See supra* note 201.

The propriety of the Sixth Circuit's use of the NLRB criteria and NLRA precedent remains suspect. First, in *Crestline* the court cited no authority for its "understanding" that the NLRA's political subdivision exemption had its "ultimate basis in Tenth and Eleventh Amendment considerations." *See* 668 F.2d at 245 n.1. That "understanding" is at odds with the conclusion reached by the Supreme Court in *NLRB v. Natural Gas Utility of Hawkins County* that the NLRA political subdivision exemption is based upon considerations peculiarly applicable to that statute. *See* supra note 180 and accompanying text. Moreover, the Sixth Circuit's reliance upon the precedent decided under the NLRA ignores the fact that in deciding NLRA cases, courts properly treat with "great respect" the NLRB's determination as to the applicability of the statutory exemption. *See supra* note 201. Thus, the use by courts of the NLRB criteria in determining the nature and extent of the Tenth Amendment limitations upon Congress' regulatory power remains arguably inappropriate. The use of the criteria proposed in this Note—which have as their conceptual basis the attempt to distinguish between those entities which are virtually indistinguishable from other government agencies and those entities which are not—has a sounder conceptual foundation than does the use of the NLRB criteria.