Annmarie:

Note 7 makes some excellent points, but perhaps it could be reframed along the following lines:

Late in its opinion, the Court suggests that after all there may be some "affirmative limits the constitutional structure might impose on federal action affecting the states under the Commerce Clause". Ante, at 27. The opinion then hastens to say that "in the factual setting of [some identified] cases the internal safeguards of the political process have performed as intended." Id. But the Court identifies no standards as to when and under what circumstances the "political process" may have failed
and "affirmative limits" are to be imposed. Presumably, such limits are to be determined by the Judicial Branch even if it is "unelected". But today's opinion has rejected the balancing standard approved in the several cases it has overruled, and now suggests no other standard that would enable a court to determine that there has been a malfunction of the "political process". The Court's unwillingness or inability to specify the "affirmative limits" on federal power that it mentions, are when and how these limits are to be determined, may well be explained by the transparent fact that any such attempted would be subject to precisely the same objections it relies on today to overrule National League of Cities.
The "structure" relied upon, as today's decision itself reflects, is not the authority of the Judicial Branch unquestioned since Marbury v. Madison to determine the allocations of powers within the federal system. Rather, the "structure" said to "ensure the role of the states in the federal system is their function in "the selection of both the Executive and Legislative Branches of the federal government". Id., at 27. To ensure no doubt about its intention, the Court renounces its decision in National League of Cities because it "inevitably invites an unelected federal judicial to make decisions about which state policies its favors and which ones it dislikes". Ante, at 17. In other words, the extent to which the states may exercise their authority now is to be determined from time to time by political decisions of the Congress and the
President, decisions the Court said should not be subject to judicial review. *Id.* I note in passing, it does not seem to have occurred to the Court that it - and unelected majority of five Justices - today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only the barest mention of the Tenth Amendment. Nor is so much as a dictum from any Court cited in support of the view that the role of the states in the federal system properly depends upon the grace of elected federal officials rather than the Constitution itself.

The foregoing, a rough draft, might with some editing be a substitute from the part marked B at the bottom of page 7 to the pointed marked End at the top of page 9. This may not be an improvement, but I would like to see how it looks.
Subpart B (p. 16) commences with the statement that the Court holds that the "fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the states as states is one of process rather than on of result".

HAB's opinion does say this. But is this a different protection of the states from HAB's reliance on the "structure" of the Constitution that vests the electoral power in the states. It seems to me that without some elaborate explanation of why the two "protections" are consistent, it may be better simply to
omit from the beginning of the paragraph on p. 15 to the point marked end near the bottom of page 16.

In others words, Subpart B could begin with the sentence that commences: "Today's opinion does not explain . . .".
The Court's decision reverses the purpose and meaning of the Tenth Amendment. Rather than guaranteeing that all powers not expressly granted to the federal government are reserved to the states, today's decision in effect says that all powers not express guaranteed to the states (e.g., electoral rights and guaranteed borders), are vested in the federal government. At least this is true with respect to the Commerce Clause - a provision expanded to encompass an undreamed of array of activities.
Until today, the restraint against the ultimate encroachment upon state authority under that clause had been the power of judicial review - a power the Court also apparently would nullify by today's decision.
In emphasizing the need to protect traditional governmental functions, we identified the kinds of activities engaged in by state and local governments that affect the daily lives of people. These are services that people have the ability to understand and evaluate as well as the right, in a democracy, to participate and oversee.\textsuperscript{10} We recognized that "it is functions such as these which governments are created to provide . . .," and that the states and local governments are better able to perform than the national government.
This a rough redraft of Part IV, the purpose being to make somewhat clearer the broad scope of the Court's decision.

The question presented in this case is the applicability of the Fair Labor Standards Act to the wages and hours of employees of a city-owned bus system. The effect of the Court's decision and holding is far broader. In National League of Cities, the power to regulate the wages and hours of employees of fire and police departments was at issue. the overruling of that decision and the broad sweep of today's opinion apparently authorizes federal control by virtue of the Commerce
Clause over the terms and conditions of employment of all state and local employees. It no longer is questioned that the provisions of the Act apply to private employers engaged in commerce. Obliterating the distinction between the authority of the federal government over state conduct and private conduct reflects a misunderstanding if not indeed a rejection of the history of our country and the intention of the Framers of the Constitution.¹

No state action with respect to employment is subject to federal control. Here I return to the view expressly recognized in National League of Cities, Hodel,

¹See the opinion of the Court in National League of Cities that makes clear that the very essence of a federal system of government is to impose "definite limits upon the authority of Congress to regulate the activities of the states as states by means of the commerce power. See also in this connection the Court's opinion in Fry, supra, at 547, n. 7.
Long Island R. Co., and FERC v. Mississippi: that the service or activity at issue is one that "the states and their political subdivisions have traditionally afforded their citizens". National League of Cities, supra, at 855. The application of this test requires a balancing approach. As Justice Blackmun observed in agreeing that the "result" in National League of Cities:

"[I]t seems to me that [the Court's opinion] 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 the state facility compliance with imposed federal standards would be essential." Id., at 856.

There is no holding in this case that the "federal interest is demonstrably greater" than the clearly traditional state interest in controlling the terms and conditions of its own employees. Indeed, it fairly can be said that the state interest is compelling.
The financial impact on a state or its localities of displacing their control over wages, ours, overtime regulations, pensions, labor relations and the like, can have a serious - and sometimes unanticipated - effect on state and local budgeting and taxes. Moreover, as was said in National League of Cities, federal control "displaces state policies regarding the manner in which they will structure delivery of those governmental services that citizens require". Id., at 847. While it is true that municipal operation of an intra-city mass transit system is relatively new in the life of our country. It nevertheless is a classic example of local self government. Providing this modern means for citizens to go to and from their work and for inner-urban transportation for all of the familiar purposes, is
indistinguishable in principle from the acknowledged traditional services of providing and maintaining streets, public lighting, traffic control, water, and sewerage systems. It is precisely services of this kind "with which citizens are more 'familiar[] and minutely conversant.'" The Federalist, No. 46, at 316. State and local elected officials, in their respective communities, also are intimately familiar with these governmental activities, and they are not unaware that their constituents and the press are responsive both to the adequacy, fairness and cost of these services. It is this kind of state and local control and accountability that the Framers understood would insure the vitality and preservation of the federal system that the Constitution
explicitly requires. See National League of Cities, supra, at 847-852.

V

Although the Court's opinion purports to recognize that the states retain some sovereign power, it has failed to identify even a single aspect of state authority that would remain after the Commerce Clause is invoked to support federal regulation.²

In Maryland v. Wirtz, supra, overruled by National League of Cities and today reaffirmed, in a

²The Court's one effort to reassure the states was to identify major statutes that not yet have been made applicable to state governments as distinguished from the private sector: (Annmarie, list the statutes with the reference to HAB's opinion). The Court does not suggest that this restraint will continue after its decision is understood, or that special interest groups will not accept the now open invitation to urge Congress to extend these and other statutes to states and their local subdivisions.
comparatively narrow opinion the Court's sustained an extension of the FLSA to certain hospitals, institutions and schools. Justice Douglas, in a dissent joined by Justice Stewart, made the relevant point that this extension of that Act could "disrupt the fiscal policy of the states and threaten their autonomy in the regulation of health and education". Id., at 203. Indeed, Justice Douglas wrote presciently that this reading of the Commerce Clause could enable "the National Government [to] devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment". Id., at 205.
Annmarie: Note 7 is excellent. In an effort to make it somewhat stronger, I have reframed it along the following lines. Feel free to edit, or I could go back to your draft.

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Late in its opinion, the Court suggests that after all there may be some "affirmative limits the constitutional structure might impose on federal action affecting the states under the Commerce Clause". Ante, at 27. The opinion then states that "in the factual setting of [some identified] cases the internal safeguards of the political process have performed as intended." Id. But the Court identifies no standards as to when and under
what circumstances the "political process" may have failed and "affirmative limits" are to be imposed. Presumably, such limits are to be determined by the Judicial Branch even if it is "unelected". But today's opinion has rejected the balancing standard approved in the several cases it has overruled, and suggests no other standard that would enable a court to determine when there has been a malfunction of the "political process". The Court's unwillingness or inability to specify the "affirmative limits" on federal power that it vaguely mentions, or when and how these limits are to be determined, may well be explained by the transparent fact that any such attempted would be subject to precisely the same objections it relies on today to overrule National League of Cities.
In the opinion that follows, I will address in Part II its criticism of the rationale of National League of Cities and the standard it applied. Part III will review briefly the understanding at the time of the ratification of the Constitution and the extent to which this Court, until today, has recognized that we have a federal system in which the states retain a significant measure of sovereignty. Part IV will consider the applicability of the FLSA to the indisputable local service provided by an urban transit system.
The "structure" said to "ensure the role of the states in the federal system is their function in "the selection of both the Executive and Legislative Branches of the federal government". Id., at 27. To leave no doubt about its intention, the Court renounces its decision in National League of Cities because it "inevitably invites an unelected federal judicial to make decisions about which state policies its favors and which ones it dislikes". Ante, at 17. In other words, the extent to which the states may exercise their authority, where Congress purports to act under the Commerce Clause, now is to be determined from time to time by political decisions made in Washington, decisions the Court says
will not be subject to judicial review. Id. I note in passing, it does not seem to have occurred to the Court that it - and unelected majority of five Justices - today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only the barest mention of the Tenth Amendment. Nor is so much as a dictum from any court cited in support of the view that the role and authority of the states in the federal system depend upon the grace of elected federal officials rather than the Constitution itself.
Note to Annmarie: Again, I admire your note 9 with the excellent cites to secondary authority. Your quote from Kaden is on target. What would you think of adding, following that quote or perhaps at some other place, a more specific reference to the innumerable special groups with powerful lobbies that also make generous campaign contributions to selected members of Congress. These groups now have a far greater influence on the voting of many members of Congress than unorganized individual opinions in their districts or states. Indeed, the average individual often feels incompetent to understand the complex legislation that may, when it is applied,
diminish the opportunity for democracy to work at the local level.