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The Re-Emergence of State Sovereignty as a Limit on Congressional Power under the Commerce Clause

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Erratum

Page 169, line 9. For "Jones v. Laughlin" read "Jones & Laughlin". Page 176, line 21. For "Jones v. Laughlin" read "Jones & Laughlin".

THE RE-EMERGENCE OF STATE SOVEREIGNTY AS A LIMIT ON CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE

The Supreme Court has recently held that principles of intergovernmental immunity, as reflected in the tenth amendment, prohibit Congress from exercising commerce power authority to extend federal minimum wage and maximum hour laws to state employees. The author traces the relationship of the doctrine of intergovernmental immunity and the commerce power through four significant decisions: United States v. California, Maryland v. Wirtz, Fry v. United States, *and* National League of Cities v. Usery. *He concludes that the application of the immunity doctrine to the commerce power is reasonable, and perhaps compelled by earlier interpretation, but criticizes the Court for its failure to recognize the narrow limits placed on that doctrine by earlier case law.*

I. INTRODUCTION

THE TENSIONS ARISING out of the competition for power between the states and the federal government have many dimensions, often grouped together under the rubric of federalism. In recent years one of the recurrent problems of federalism has been defining the limits of federal power where it operates directly on state-conducted activities.[1] At one time courts espoused the doctrine that states should be treated no differently from private actors in the economic arena;[2] however, the Supreme Court has recently held otherwise. The existence of states as indestructible sovereign units now requires that they have at least a limited immunity from federal economic regulation.[3]

Historically, the tenth amendment has been the constitutional protector of state sovereignty interests.[4] However, by framing arguments in terms of this rather ambiguous amendment, judicial opinions have sometimes obscured the underlying questions concerning the definition of state sovereignty and how that sovereignty is protected under the Constitution. While much judicial discussion has centered on attempts to define and characterize the tenth amendment, the results have been

1. *See* National League of Cities v. Usery, 426 U.S. 833 (1976); Fry v. United States, 421 U.S. 542 (1975); Maryland v. Wirtz, 392 U.S. 183 (1968). *See also* District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated and remanded*, 97 S. Ct. 1635 (1977); EPA v. Brown, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded*, 97 S. Ct. 1635 (1977).

2. Maryland v. Wirtz, 392 U.S. 183 (1968); United States v. California, 297 U.S. 175 (1936).

3. National League of Cities v. Usery, 426 U.S. 833 (1976).

4. U.S. CONST. amend. X. The broad language of the amendment proclaims that: "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."

far from uniform,[5] and recent Supreme Court decisions have apparently given the amendment yet another meaning.[6]

It is the purpose of this Note to appraise the Court's rearticulation of state sovereignty as a basis for immunity from congressional power under the commerce clause.[7] Accordingly, the analysis will begin with *United States v. California*,[8] where this issue was initially considered. Attention will then be directed to *Maryland v. Wirtz*,[9] *Fry v. United States*,[10] and *National League of Cities v. Usery*.[11] In order to fully appreciate recent developments, however, two series of cases must be reviewed. The first line of cases involves the regulation of private activities pursuant to the commerce clause. The second line of cases deals with the development of intergovernmental tax immunities. In *National League of Cities v. Usery*,[12] these two lines converged. The repercussions of this development may well be profound. While it is too early to understand all of the effects of *Usery*, certain landmarks have already appeared,[13] and a preliminary appraisal is in order.

II. SOURCES OF CURRENT DEVELOPMENTS

A. *Commerce Clause Cases*

The first judicial statement on the scope of the commerce clause was a broad one:

> We are now arrived at the inquiry—What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . [T]he power over commerce with foreign nations, and among the several states, *is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States*. The wisdom and the discretion of

5. *Compare, e.g.*, United States v. Darby, 312 U.S. 100 (1941) *with* Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

6. *See* National League of Cities v. Usery, 426 U.S. 833 (1976); Fry v. United States, 421 U.S. 542 (1975).

7. U.S. CONST. art. I, § 8.

8. 297 U.S. 175 (1936).

9. 392 U.S. 183 (1968).

10. 421 U.S. 542 (1975).

11. 426 U.S. 833 (1976).

12. *Id.*

13. Consider in this regard the government's change of position which led to the remand in EPA v. Brown, 97 S. Ct. 1635 (1977). *See* 42 Fed. Reg. 7957 (1977).

> Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, on declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.[14]

According to this interpretation, the Supreme Court would seem to have abjured reading state sovereignty limitations into Congress' power over interstate commerce. This was not to be, however, for over the years the commerce power has proven to be the most prolific source of litigation of all federalism issues. For example, Congress' initial attempts at broad economic regulation of private activity were blocked by state autonomy limits embodied in the tenth amendment, except where the regulation was clearly aimed at the "intercourse and traffic" of commerce.[15] This approach was followed in *Schecter Poultry Corp. v. United States*,[16] where the tenth amendment was held to be an "explicit" limit on congressional power under the commerce clause.[17]

In 1937, faced with President Franklin D. Roosevelt's court-packing plan, the Court abruptly changed course.[18] Without altogether abandoning the interstate-local dichotomy, the Court, in *NLRB v. Jones & Laughlin Steel Corp.*,[19] embraced a practical approach—looking to the actual effects of the local activity on interstate commerce to determine the limits of congressional power.[20] As a result, the force of state sovereignty arguments was greatly diminished:

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14. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196–97 (1824) (emphasis added).

15. The Court struck down Congress' enactment of a federal child labor law under the commerce clause because the production by children of goods for commerce was a local activity, an activity whose regulation was considered to be reserved to the states under the tenth amendment and beyond the "intercourse and traffic" which formed the substance of the commerce power. Hammer v. Dagenhart, 247 U.S. 251 (1917). *See also* Delaware Lackawana & W. R.R. Co. v. Yurkonis, 238 U.S. 439 (1915); United States v. E.C. Knight Co., 156 U.S. 1 (1895). On the other hand, the Court had previously held that activities relating to the transport and distribution of goods were clearly regulable. Stafford v. Wallace, 258 U.S. 495 (1922) (transport of livestock to and from Chicago Stockyards); Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914) (Shreveport Rate Case) (intrastate rail transport in competition with an interstate network); Swift & Co. v. United States, 196 U.S. 375 (1905) (transport of livestock to and from stockyards).

16. 295 U.S. 495 (1935).

17. *Id.* at 529.

18. *See* Stern, *The Commerce Clause and the National Economy 1933–46* (pts. 1 & 2), 59 HARV. L. REV. 645, 883 (1946).

19. 301 U.S. 1 (1937).

20. *Id.* at 41–42. The Court in *Jones & Laughlin* adopted the language of Justice Cardozo's concurrence in *Schecter* and used this "effects" approach to harmonize the two cases. *Id.* at 40–41.

> Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government . . . . The question is necessarily one of degree.[21]

Four years after *Jones v. Laughlin*, the Court's perception of state sovereignty barriers, based on the tenth amendment, had diminished to the point that Justice Stone could state with apparent impunity that "the tenth amendment states but a truism that all is retained which has not been surrendered."[22] By 1946, the judicial conception of commerce had been sufficiently liberated from an earlier era's strict bifurcated approach to permit Justice Murphy, speaking for the Court in *North American Co. v. SEC*,[23] to state:

> This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. . . . To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority to so act.[24]

The result of this more expansive doctrine was that the tenth amendment and state sovereignty no longer played a role in the definition of the subject matter of commerce. Indeed, the net effect of this entire line of cases was that the court deferred to congressional judgment concerning what is, or what affects, commerce. By permitting Congress to define commerce as a broad, national, economic power, and by endorsing the technique of aggregating many small, individually insignificant activities to find a substantial effect on commerce,[25] there was little basis upon which the Court could find an improper regulation of *private* activity. So long as some national

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21. *Id.* at 37.

22. United States v. Darby, 312 U.S. 100, 124 (1941). *See also* Wickard v. Filburn, 317 U.S. 111 (1942).

23. 327 U.S. 686 (1946).

24. *Id.* at 705 (citations omitted).

25. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

economic connective could be found, or arguably found, Congress could regulate.[26]

B. *Intergovernmental Immunity Cases*

While state sovereignty concerns all but disappeared in the area of federal regulation of private activities under the commerce clause, they remained alive where the federal government sought to act directly upon state and local governments through taxation. Intergovernmental immunity began, however, as a device to protect the federal government. Justice Marshall, writing for the Court in *McCulloch v. Maryland*,[27] declared that the states cannot exercise their taxing power where to do so would create the potential to destroy the federal instrumentality.[28] What troubled Justice Marshall most was the possibility that a state might harm the national government by taxing federally-created institutions without federal interests being represented in the state legislature that imposed the tax. As he explained, "[W]hen a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control."[29]

The logical implication of this argument would seem to be that reciprocal state immunity should not obtain, since states, through their citizens' representatives, are represented in Congress and are not politically vulnerable.[30] Nevertheless, such reciprocal immunities were recognized in *Collector v. Day*,[31] where the expressed rationale was the need to protect the states' reserved powers under the tenth amendment.[32] Later cases expanded this doctrine to include derivative

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26. This restriction may account for the Court's deference in cases such as Katzenbach v. McClung, 379 U.S. 294 (1964), where a "rational basis" standard for review was adopted. *Id.* at 303–04. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). In Perez v. United States, 402 U.S. 146 (1971), Justice Douglas' majority opinion found a sufficient nexus with interstate commerce where the regulated activity "*may*" affect interstate commerce, even when Congress has not expressly found such impact. *Id.* at 154 (emphasis added).

27. 17 U.S. (4 Wheat.) 316 (1819).

28. *Id.* at 431.

29. *Id.* at 435.

30. *See* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

31. 78 U.S. (11 Wall.) 113 (1870), *overruled in* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).

32. *Id. Day* held that the salary of a state judge was immune from federal tax. Instead of considering the question of political restraints, which had been important to

immunities for private individuals transacting with the states[33] or the federal government.[34] Derivative immunities were soon abandoned, however, pursuant to judicial recognition of the "expanding needs of state and nation,"[35] and primary intergovernmental immunity was correspondingly re-examined and narrowed. These developments paralleled the rise and decline of state sovereignty concerns under the commerce clause.

In *Helvering v. Gerhardt*,[36] employees of the Port of New York Authority, a bi-state corporation, unsuccessfully challenged a federal tax on their salaries. The Court recognized that intergovernmental immunities originated as a device to protect the federal nature of the Constitution, and used Justice Marshall's "part-acting-on-the-whole" analysis to limit state immunities.[37] Without specifically examining the basis for reciprocal state immunity from federal taxes, the Court presented two guiding principles for state immunity. First, the activity must be essential to the preservation of state governments, and second, the benefit to the state, as in the case of a derivative immunity, must

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the Court's analysis in *McCulloch*, the *Day* Court stated that federal immunity is based on the need to protect federal sovereignty within its delegated powers. *Id.* at 124. The tenth amendment attests to state sovereignty within the area of reserved powers: "[T]he States within the limits of their powers . . . [which are] 'reserved,' are as independent of the general government as that government within its sphere is independent of the States." *Id.* Viewing the maintenance of a state judiciary as "one of the sovereign powers vested in the states by their constitutions, which remained unaltered and unimpaired . . . ," *id.* at 125, the Court held that the free exercise of sovereign powers required reciprocal tax immunity. *Id.* at 127 (citing Dobbins v. Commissioners of Erie County, 41 U.S. (16 Pet.) 435 (1842) (holding a federal revenue officer immune from state taxation)).

33. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932), *overruled in* Helvering v. Mountain Producers Corp., 303 U.S. 376, 384 (1938); Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931).

34. Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928); Gillespie v. Oklahoma, 257 U.S. 501 (1922), *overruled in* Helvering v. Mountain Producers Corp., 303 U.S. 376, 384 (1938).

35. Graves v. New York *ex rel* O'Keefe, 306 U.S. 405 (1938), *overruling* Collector v. Day, 78 U.S. (11 Wall.) 113 (1871); Helvering v. Mountain Producers Corp., 303 U.S. 376, 384 (1938), *overruling* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) and Gillespie v. Oklahoma, 157 U.S. 501 (1922); James v. Dravo Contracting Co., 302 U.S. 134 (1937) (limiting *Panhandle Oil* and *Indian Motocycle* to their facts and subjecting persons contracting with the federal government to a state gross receipts tax).

36. 304 U.S. 405 (1938).

37. *Id.* at 416. The Court elaborated:

> Once impaired by the recognition of a state immunity found to be excessive, restoration of [the national taxing] power is not likely to be secured through the action of state legislatures; for they are without the inducements to act which have often persuaded Congress to waive immunities thought to be excessive.

Id. at 417.

not be so speculative as to visit a burden on the federal government disproportionate to the benefit enjoyed by the state.[38]

Perhaps the leading case on state immunity is *New York v. United States*,[39] in which New York State unsuccessfully claimed immunity from federal taxes assessed against its mineral water bottling operation. No opinion garnered a majority of the Court, but Justices Frankfurter and Stone agreed (in separate opinions) that the principal reason for intergovernmental immunity is to prevent the crippling obstruction of one government by another[40] or, as Justice Stone explained, "[to prevent undue interference] with the . . . performance of its sovereign functions of government."[41] The Justices concurred that no clear distinctions could be drawn between governmental and proprietary,[42] or governmental and trading,[43] activities of a state. Thus, a majority of the Court refused to concede that state immunity from federal taxes exists in more than a limited area.[44]

The net effect of cases such as *New York v. United States* and *Helvering v. Gerhardt* in the tax immunity area, and of *Jones & Laughlin* and its progeny in the commerce power area, was that state sovereignty restrictions on congressional power to tax and to regulate economic activities was minimal when the focus of congressional action was private parties. This was true regardless of the effect of such national policy decisions on the states. The result was apparently the same when states engaged in economic activities in competition with the private sector.[45] It was in this last area, however, that initial

38. *Id.* at 419–20.

39. 326 U.S. 572 (1946).

40. *Id.* at 576, 589–90.

41. *Id.* at 587. The Justices disagreed, however, about the validity of a non-discriminatory tax applied to both states and private individuals. *Id.* at 588. The focus of the Frankfurter-Stone debate in *New York* was on the extent of the tax immunity. Justice Frankfurter argued that inquiring beyond whether the tax discriminates against the states would raise a hornets' nest of fiscal and political factors unsuitable for judicial resolution. *Id.* at 581–82. Justice Stone and the dissenters, on the other hand, asserted that the Court must go further and examine the peculiar effects of even a non-discriminatory tax on a state's sovereign functions. *Id.* at 587, 591–92.

42. *Id.* at 586.

43. *Id.* at 580.

44. Justices Douglas and Black dissented. They asserted that *any* activity carried on by a state that was legitimately within its police power was immune from federal taxes under principles of federalism embodied in the tenth amendment. *Id.* at 594–95.

45. *E.g.*, California v. Taylor, 353 U.S. 553 (1957) (subjecting the State of California to the provisions of the National Railway Labor Act when operating a railroad); New York v. United States, 326 U.S. 572 (1946). *Cf.* Parden v. Terminal Ry., 377 U.S. 184 (1964) (subjecting the state of Alabama to suit under the F.E.L.A. when operating a railroad, despite its claim of sovereign immunity).

resolution of the conflict between state and federal power was found inadequate, and further refinement was necessary.

III. DEATH AND REVIVAL: STATE SOVEREIGNTY UNDER THE TENTH AMENDMENT

A. *Initial Resolution of State Immunities Under the Commerce Clause*

Ten years prior to *New York v. United States*,[46] the Supreme Court sought to explain the relationship between the commerce power and intergovernmental immunities in *United States v. California*.[47] *California* involved the application of the Federal Safety Appliance Act,[48] to a state-owned railroad. *California* differed from other commerce clause cases in that the regulation fell upon a state rather than a private party. Justice Stone, speaking for a unanimous Court, rejected any application of principles drawn from intergovernmental tax immunity:

> The analogy of the constitutional immunity of state instrumentalities from federal taxation . . . is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power . . . which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it . . . . Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. *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.[49]

Rather than examine closely why the "nature of our federal system" required special limitations on the taxing power but not on the commerce power,[50] the *California* Court focused on the activity being regulated and found that "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power . . . ."[51]

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46. 326 U.S. 572 (1946).

47. 297 U.S. 175 (1936).

48. 45 U.S.C. §§ 2, 6 (1970).

49. 297 U.S. at 184–85 (emphasis added).

50. *Id.* at 184.

51. *Id.* at 185.

The Court expressly rejected any attempt to distinguish between "sovereign" and "private" activities of a state,[52] and held simply that whenever a state engages in an activity validly regulable under the commerce power, it too will be subject to federal regulation.[53]

This broad approach was followed as recently as 1968, in *Maryland v. Wirtz*,[54] where the Court again considered the problem of federal regulation of state activity, this time in the context of amendments to the Fair Labor Standards Act.[55] Two features of the amendments were especially significant. First, coverage was extended to all employees of "an *enterprise* engaged in commerce or in the production of goods for commerce."[56] Formerly the act had covered only "*employees* engaged in commerce or the production of goods for commerce."[57] The change to an enterprise concept expanded the class of covered employees, but not the class of covered employers, and the *Wirtz* Court had little difficulty finding the extension valid under the commerce clause.[58] The second, and doctrinally more difficult aspect of the amendments, was the extension of coverage to hourly employees working for state schools and hospitals. In approving that extension of the Act, the majority held that "[i]f a State is engaging in economic activities that are validly regulated by the federal government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."[59]

From the point of view of the majority, the amendments did not "tell the States how to perform medical and educational functions . . . . Congress has 'interfered with' these State functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce. . . ."[60] Because the majority interpreted the amendments as having only a minimal

52. *Id.* at 183.

53. *Id.* at 183–84. With hindsight it is apparent that the *California* Court need not have stated its holding so broadly. Subsequent interpretation has made it clear that the *operation* of a railroad is not subject to protection even if intergovernmental immunity principles are applied. National League of Cities v. Usery, 426 U.S. at 854–55.

54. 392 U.S. 183 (1968).

55. 29 U.S.C. §§ 301–09 (1970).

56. 29 U.S.C. §§ 206(a), 207(a) (1970) (emphasis added).

57. Pub. L. No. 718, ch. 676, 52 Stat. 1060, 1062, 1063 (emphasis added).

58. The Court found this result consistent with both United States v. Darby, 312 U.S. 100 (1941), and NLRB v Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). 392 U.S. at 190–92.

59. 392 U.S. at 197.

60. *Id.* at 193–94.

effect on the states, the Court could have avoided the issue of whether there are any limits on the commerce power, and still have reached the same result, by holding that such intrusions do not materially impair state sovereignty. Instead, the *Wirtz* majority followed the lead of the *California* Court by denying the existence of any special state sovereignty limits on the commerce power. The majority reasoned that whenever Congress acts within the scope of a delegated power, it may "override countervailing state interests."[61] The Court described as "simply not tenable" the argument that because of state sovereignty the Act could not be constitutionally applied to state-operated schools and hospitals.[62] So long as there is a rational basis upon which Congress can find that a given economic activity affects commerce, the Court held that Congress has the power to regulate anyone, including a state, who engages in that activity.[63]

Justice Douglas, joined by Justice Stewart, dissented. Although the dissenters acknowledged the validity of the enterprise concept,[64] they balked at applying the amendments to states, arguing that principles of intergovernmental immunity should apply to protect "that sovereignty . . . attested [to] by the Tenth Amendment."[65] Relying upon Justice Marshall's assertion in *McCulloch v. Maryland* that the power to tax is the power to destroy,[66] Justice Douglas asserted that restraints based upon state sovereignty should apply to both the taxing power and the commerce power,[67] since the exercise of the latter may also prove destructive to the states.[68] The crux of the problem for Justice Douglas was the broad scope of the "interstate commerce" concept. He felt that unchecked congressional exercise of the commerce power might "snuff out state sovereignty."[69] Claiming that the use of the enterprise approach, although valid as applied to private employers, would necessarily lead to the conclusion that the state itself was such an "enterprise," Justice Douglas envisioned pervasive federal regulation of state policy choices resulting from the regulation of the economic activities which manifest those choices.[70]

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61. *Id.* at 195.
62. *Id.*
63. *Id.* at 194–97.
64. *Id.* at 197.
65. *Id.* at 205.
66. 17 U.S. (4 Wheat.) 316, 431 (1824).
67. 392 U.S. at 205.
68. *Id.* at 204.
69. *Id.*
70. *Id.*

The majority's response to this argument was not compelling. As stated above, the activity was found to be regulable under the commerce clause because the majority focused on the economic activity involved, rather than the nature of the actor. But the majority failed to address the real thrust of Justice Douglas' argument that since a state was the actor the tenth amendment required a different result. The majority's answer was a finding that there was only a limited intrusion[71] upon the states which could not cause the result Justice Douglas predicted, and a remark in a footnote that if such a problem actually arose, notions of "what is commerce" would eliminate the problem.[72] Although no such definitional lines were actually drawn, the majority was apparently willing to define "economic activities" so as to leave to the states choices about the character of services to be provided. It is unclear how this could be accomplished, however, without either adopting the position of the dissent or narrowing the definition of "interstate commerce."[73] If the majority were to treat states differently than other actors under the commerce clause, this would amount to adopting the position of the dissent. If instead, certain types of activities were deemed not to affect interstate commerce, regardless of their *actual* economic effects, this would be a retreat from the "practical effects" approach endorsed in *Jones v. Laughlin*.

Any doubts about the majority's view of the relationship of the commerce power and state sovereignty were resolved, however, when the *Wirtz* majority expressly approved the statement in *California* that principles of intergovernmental immunity are irrelevant to commerce power regulation of state activities.[74] They concluded that

> [the] Court . . . will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private business, simply because those enterprises happen to be run by the States for the benefit of their citizens.[75]

Even though the majority focused on the enterprise involved rather than its component parts, it is important to recognize that the amend-

71. *See* notes 60–61 *supra* and accompanying text.

72. 392 U.S. at 196–97 n.27.

73. *Id*. For a circuit court opinion attempting to apply this "economic activity" test, see Brown v. EPA, 521 F.2d 827, 838–39 (1975), *vacated and remanded*, 97 S. Ct. 1635 (1977). The problem of applying this test has been rendered moot, however, by subsequent case law. *See* National League of Cities v. Usery, 426 U.S. 833 (1976). *See also* part IV–C *infra*.

74. 392 U.S. at 198–99. *See* notes 46–49 *supra* and accompanying text.

75. 392 U.S. at 198–99.

ments to the Fair Labor Standards Act considered in *Wirtz* involved the state in its capacity as an employer, not simply as an operator of hospitals and schools. The Court reasoned that once an economic activity is found to be within the commerce power, all aspects of that activity are regulable to the same extent they would be if undertaken in the private sector. Thus, under *Wirtz*, the only issue is whether a course of conduct amounts to an economic activity which affects commerce. Given the expansive approach to that question adopted in *Jones & Laughlin* and its progeny,[76] it would seem to be a short, logical step from regulating the state as an employer when operating a hospital or a school to regulating all the employment activities of the states.

B. *The Revival of State Sovereignty*: Fry v. United States

When the Court was next faced with interpreting a potentially far reaching federal regulatory statute in *Fry v. United States*,[77] it was not prepared to go as far as the *Wirtz* majority in rejecting federalism as a constraint on power. The Court was able to avoid a direct confrontation with *Wirtz*, however, by distinguishing the two cases on their facts.[78] In *Fry*, the Court had to decide whether the Economic Stabilization Act,[79] which authorized the President to issue wage and price restraints, was intended to reach states and their employees. If so, the issue became whether Congress had the power under the commerce clause to authorize such restraints.[80]

The Court had little trouble finding a congressional intent to cover state employees. The legislative history showed that Congress had specifically rejected an amendment exempting such employees.[81] Accordingly, the Court directed most of its attention to the issue of

76. *See* notes 18–26 *supra* and accompanying text.

77. 421 U.S. 542 (1975).

78. *See* text accompanying note 95 *infra*.

79. Pub. L. No. 91–382, 84 Stat. 799, Pub. L. No. 92–210, 85 Stat. 744, Pub. L. No. 93–27, 87 Stat. 27.

80. As the Court indicated, this issue was not raised below nor in petitioner's brief. Only in the briefs amici curiae was an issue of statutory interpretation raised. 421 U.S. at 545 n.5.

81. 117 CONG. REC. 43673–77 (1971). In addition the Court cited several earlier cases for support. 421 U.S. at 546. Case v. Bowles, 327 U.S. 92 (1946), cited by the Court, involved the application of the World War II Emergency Price Control Act to timber sold by the state of Washington. In contrast to the Economic Stabilization Act of 1970, the Statute at issue in *Case* expressly included the United States "or any other government, or any of its political subdivisions . . . ." 327 U.S. at 99. The 1970 statute was not as clear. 421 U.S. at 546. United States v. California, 297 U.S. 175, 186 (1936), also cited by the Court, more closely resembles *Fry* with respect to the statutory interpretation issue.

congressional power under the commerce clause. The majority held that a short-term wage freeze directed at state employees as well as those in the private sector was permissible under the Constitution despite the potential for displacing state policy choices. The Court found that this regulation was a lesser intrusion upon the sovereign status of the states than the amendments to the FLSA upheld in *Wirtz*,[82] and noted that "the effectiveness of federal action would have been drastically impaired if wage increases to [state] employees were left outside the reach of these emergency federal wage controls."[83]

The effect on commerce of wages paid to state employees was not disputed.[84] Instead, it was argued that a limitation on the commerce clause arises when the actors are the states: "[Petitioners] contend that applying the Economic Stabilization Act to state employees interferes with sovereign state functions . . . ."[85] The Court did not reject the argument; in a footnote, the majority appeared to endorse this approach of defining the limits of the commerce power in terms of state sovereignty limitations.[86] In addition although the focus in *Wirtz* was on the economic activities involved,[87] and not on the actor,[88] the *Fry* Court cited *Wirtz* for a somewhat different proposition: "*Wirtz* reiterated the principle that States are not immune from *all* federal regulation under the Commerce Clause merely because of their sovereign status."[89] The *Fry* Court thus implied that States may be immune from *some* federal regulation *precisely because* of their sovereign status. That conclusion is reinforced when the above quoted passage is taken together with the express rejection of the "tenth amendment as a truism" language[90] contained in *United States v. Darby*.[91] In recognizing that there may be restaints of this type, the *Fry* Court differed markedly with *Wirtz*, where such arguments were considered "simply . . . not tenable."[92] In *Wirtz*, "the Court put to rest the contention that state concerns might constitutionally 'out-

82. 421 U.S. at 548.

83. *Id.*

84. *Id.* at 547. *See also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255 (1964); Wickard v. Filburn, 317 U.S. 111, 127–28 (1942).

85. 421 U.S. at 547.

86. *Id.* at 547–48 n.7.

87. 392 U.S. at 197.

88. *Id.* at 197–98 (quoting United States v. California, 297 U.S. at 183–85).

89. 421 U.S. at 548 (emphasis added) (citations omitted).

90. *Id.* at 347–48 n.8.

91. 312 U.S. 100, 124 (1941).

92. 392 U.S. at 195.

weigh' the importance of an otherwise valid federal statute regulating commerce."[93]

In light of how the analysis in *Fry* differed from that in *Wirtz* on whether challenges to commerce power enactments may be presented on the basis of state sovereignty limitations, it was somewhat disingenuous for the *Fry* Court to find *Wirtz* conclusive in resolving whether a wage freeze runs afoul of such a limitation.[94] Despite the marked change in the Court's analysis, however, it avoided a direct confrontation with the holding in *Wirtz* by finding the Economic Stabilization Act "less intrusive" than the extension of the FLSA to certain employees in state-operated schools and hospitals, which was at issue in *Wirtz*.[95] The limited duration and emergency character of the Economic Stabilization Act made it less intrusive. Yet the Court distinguished the legislation at issue in *Wirtz* without reference to the fact that the FLSA amendments were far more narrow in scope than the Economic Stabilization Act which covered all state employees, not just those in a given economic activity.[96] Seizing on the emergency and short-term character of the Act, the Court found a compelling national need, and balanced it against a minimal intrusion on state interests. As a result, the Court approved the use of power in a national economic emergency, without sanctioning the total federal regulation of the states forecast by Douglas in *Wirtz*.[97] At the same time, the Court was able to dispose of the constitutional power question on a broad basis because it was not forced to decide which state employees may permissibly be covered by the Act and which may not.

Unlike the majority, the dissent in *Fry* directly attacked the reasoning and the holding of *Wirtz*. In a carefully articulated opinion, Justice Rehnquist explicated principles later adopted by a majority of the Court in *National League of Cities v. Usery*.[98] His basic contention was in accord with the dissent in *Wirtz*:[99] when the federal government seeks to regulate state-conducted activity, principles governing federal regulation of private activity ought not necessarily be controlling. Rather, principles and limits drawn from intergovernmental immunities should direct the Court because they represent a means to resolve the tension that results when one sovereign acts upon

93. Id. at 195–96.
94. 421 U.S. at 548.
95. *Id.*
96. *Id.* In contrast, the unlimited scope of the Act was of critical importance to the dissent. *Id.* at 558.
97. 392 U.S. at 204–05 (Douglas, J., dissenting).
98. 426 U.S. 833 (1976).
99. 392 U.S. at 201 (Douglas, J., dissenting).

another.[100] Justice Rehnquist further contended that a non-discriminatory regulation may be more burdensome to a state than a non-discriminatory tax because the former disrupts state policy choices to a far greater extent than the latter. While taxes seek only money, regulations may directly affect much more.[101]

Justice Rehnquist recognized *United States v. California*,[102] which had expressly rejected any application of intergovernmental immunity principles to commerce power cases, as the major obstacle to his analysis.[103] He asserted that the treatment of intergovernmental immunities in *California* was wrong,[104] that governmental immunity is an affirmative right of the states not unlike the first or fifth amendment rights of individuals, except that it has no explicit constitutional source beyond the concept of federalism.[105] He argued that the immunity should apply equally to regulations as well as taxes.[106] Justice Rehnquist's view of the role of state sovereignty restraints was perhaps best

100. 421 U.S. at 552–54 (Rehnquist, J., dissenting).

101. Where the Federal Government seeks only revenue from the State, the State may provide the revenue and make up the difference where it chooses . . . . But where the Federal Government seeks not merely to collect revenue as such, but to require the State to pay out its moneys to individuals at particular rates, not merely state revenue, but also state policy choices suffer.

Id. at 554 (Rehnquist, J., dissenting).

102. 297 U.S. 175 (1936).

103. Justice Rehnquist's suppositions about the Court's motivation in *California* appear questionable. He suggested that the Court might not have been sensitive to claims of states' rights brought by the states themselves since *California* was decided at a time when the Court had begun to discard federalism limitations, and when limits were typically urged by private parties seeking to avoid federal regulation. 421 U.S. at 551. This premise is not totally accurate. *California* was decided after *Schecter Poultry*, but before Carter v. Carter Coal Co., 298 U.S. 238 (1936), the latter being one of the most "anachronistic and doctrinally unsound" cases ever decided. 421 U.S. at 551 (Rehnquist, J., dissenting). *See also* 426 U.S. at 867–68 (Brennan, J., dissenting). *California* antedated the inception of the commerce clause revolution. More importantly, state sovereignty interests, as embodied in intergovernmental immunities, still represented a formidable barrier to congressional exercise of the taxing power. Cases such as Helvering v. Gerhardt, 304 U.S. 405 (1938), Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939), and New York v. United States, 326 U.S. 572 (1946), had yet to limit and reformulate the doctrine. *See* notes 27–44 *supra* and accompanying text. Even if it had recognized the "different tenor" of a claim of state sovereignty raised by the state, the *California* court was faced with an attempt to regulate a railroad, the quintessential example of interstate commerce. Had the Court borrowed from intergovernmental immunity doctrine, the affirmative limitation on the commerce power thus created would have been far-reaching. This is because the scope of intergovernmental immunities in 1936 included derivative immunities for individuals. *See* notes 31–35 *supra* and accompanying text. Such a ruling could have led to a major reduction in federal power over railroads, an area previously considered basic to federal control over interstate commerce. *See* notes 46–53 *supra* and accompanying text.

104. 421 U.S. at 552 (Rehnquist, J., dissenting). Justice Rehnquist also noted that the *Fry* majority questioned the reasoning of *California*. *Id.*

105. *Id.* at 553–54.

106. *Id.*

illustrated when he compared his analysis in *Fry* to *Hans v. Louisiana*,[107] a case extending state immunity from suit in federal court to claims brought by its own citizens:

> As it was not the Eleventh Amendment by its terms which justified the result in *Hans*, it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.[108]

Simply stated, Justice Rehnquist was concerned with what he perceived as the majority's failure to properly acknowledge the structural limitations on the exercise of power under a federal system.

Notwithstanding the careful analysis of the relationship of the commerce clause to federalism restraints manifested in intergovernmental immunities, Justice Rehnquist's opinion contains three significant flaws. First, it failed to identify or to balance the competing interests implicated when a claim is made under this "affirmative constitutional defense."[109] Instead, Justice Rehnquist offered only his conclusions.[110] It is necessary to know *why* state-operated railroads are not "traditional," while "the operation of schools, hospitals and like facilities . . . is an activity sufficiently closely allied with traditional state functions that the wages paid by the State . . . should be beyond Congress' commerce authority."[111] What is needed is an operational definition of a traditional state function. None is offered. Equally important is the fact that Justice Rehnquist failed to explain why the balance struck by the majority between national needs and state interests was improper.

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107. 134 U.S. 1 (1890).

108. 421 U.S. at 557 (Rehnquist, J., dissenting). It is regrettable that the majority opinion in *Usery* did not make this point clear.

109. *Id.* at 553.

110. [T]he activity of the State of California in operating a railroad was so unlike the traditional governmental activities of a State that Congress could subject it to the Federal Safety Appliance Act. But the operation of schools, hospitals, and like facilities involved in *Maryland v. Wirtz* is an activity sufficiently closely allied with traditional state functions that the wages paid by the State to employees of such facilities should be beyond Congress' commerce authority. Such a distinction would undoubtedly present gray areas . . . . But today's case, in which across-the-board wage . . . ceilings are sustained with respect to virtually all state employees, is clearly on the forbidden side of that line.

Id. at 557–58 (footnote omitted).

111. *Id.* at 558.

The second major flaw in Justice Rehnquist's analysis is his failure to address the fundamental separation of powers issue which pervades the judicial resolution of federalism disputes. That issue was the focus of the Frankfurter-Stone debate in *New York v. United States*,[112] and it is the basis of Justice Brennan's dissent in *National League of Cities v. Usery*.[113] Even if it is proper to recognize restraints on the commerce power which arise out of the need to protect state sovereignty, it does not necessarily follow that the Court, rather than Congress, is best equipped to resolve them. *Fry* may show that Justice Frankfurter was substantially correct when, in the context of tax immunities, he asserted that judicial decisions regarding the limits of power based solely on sovereignty principles bring difficult fiscal and political factors into play. He claimed that those factors may not be appropriate for judicial resolution because, "the problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges."[114] In *Fry*, a majority of the Court found itself unable to choose among the various fiscal and political interests and deferred to Congressional judgment.[115]

The third flaw is Justice Rehnquist's failure to adequately consider the implications of his analysis for other congressional powers. The opinion made passing reference to the comparative reach of congressional authority under the war power and under the fourteenth and fifteenth amendments.[116] While the nature and limits of congressional power under the Civil War amendments may involve somewhat separate issues,[117] an analysis of the limits on the war power is relevant to the problem faced by this Court. If, as Justice Rehnquist suggests, the taxing power and the commerce power should both be subject to federalism restraints because each may be used to destroy the states,[118] should all article I powers, including the war power, be so limited because each may be used to impair state sovereignty? If logic compels an affirmative answer, then the differing results which Justice Rehnquist would urge with regard to wage and price restraints under the war and commerce powers respectively,[119] can only be achieved by recog-

112. 326 U.S. 572 (1946). *See* note 41 *supra*.

113. 421 U.S. at 559.

114. 326 U.S. at 581 *See* note 41 *supra*. After *Usery* it is apparent that the present Court has concluded otherwise.

115. 421 U.S. at 548.

116. *Id.* at 559 (Rehnquist, J., dissenting).

117. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

118. 421 U.S. at 553–54 (Rehnquist, J., dissenting).

119. *Id.*

nizing the different balance struck when the various interests—federal and state—are measured against one another, and not because the war power is inherently different.[120] This third flaw, not critically evident in the *Fry* dissent, becomes apparent when one examines the Court's attempt to draw workable distinctions arising out of the affirmative federalism limits recognized in *Usery*.

C. *Re-examination of State Sovereignty and the Tenth Amendment*: National League of Cities v. Usery

National League of Cities v. Usery[121] involved the 1974 amendments to the Fair Labor Standards Act, extending coverage of the Act's minimum wage and maximum hour provisions to virtually all state employees falling within the general statutory guidelines,[122] regardless of the economic activity involved. The argument posed by appellants and adopted by the Court was essentially that articulated in the *Fry* dissent.[123] The Court acknowledged that the employment activities of a state fall within the broad definition of commerce,[124] but determined that state sovereignty constraints were viewed to be "an affirmative limitation on the exercise of its power . . . ."[125] *Usery* posited that the important inquiry is whether a given set of state determinations "are 'functions essential to separate and independent existence' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them."[126] The Court in *Usery* found that the amendments in question would

> significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments . . . . Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens.[127]

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120. *Id.* at 558.

121. 426 U.S. 833 (1976).

122. *Id.* at 838–39. The general statutory exception exempted executive, administrative, professional, and elected officials regardless of economic activity. 29 U.S.C. § 213 (a)(1) (1970), 29 U.S.C. § 203e2(c) (Supp. V 1975) (declared unconstitutional in part in National League of Cities v. Usery, 426 U.S. 833 (1976)).

123. *See* notes 98–120 *supra* and accompanying text.

124. 426 U.S. at 840–41.

125. *Id.* at 841.

126. *Id.* at 845–46 (citations omitted) (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).

127. 426 U.S. at 851 (footnote omitted).

As a result, the 1974 amendments were held to be outside the scope of congressional power. To the extent that *Maryland v. Wirtz*[128] had relied on the language in *United States v. California*,[129] rejecting the application of tax immunity principles to the commerce power, it was overruled.[130] *California* was accordingly modified but held to be distinguishable on its facts.[131] *Fry v. United States*[132] was distinguished, largely on the basis of its emergency, short-term character.[133]

Justice Brennan, joined by Justices Marshall and White, dissented, arguing that there is no role for the judiciary in the accommodation of state sovereignty interests under the commerce clause.[134] Such functions were seen as exclusively reserved to the political process.[135] Tax immunity cases were inapposite because the power to tax and the power to regulate commerce are delegated separately under article I, section 8 of the Constitution.[136]

Justice Stevens, dissenting separately, refused to embrace Justice Brennan's extreme position with regard to the judicial role in commerce power issues. Instead, he saw the problem as one of line-drawing, and could not see why the line should be drawn where the majority placed it.[137] He recognized that the judiciary has no power to resolve certain questions of policy, something he considered the majority to have done.[138]

Justice Blackmun joined in the majority opinion, but wrote a brief, yet significant concurrence as well. He stated that the only acceptable way for the Court to manage a state sovereignty limitation on the commerce power was to adopt a balancing approach. Reading the majority as following that approach, he joined it.[139]

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128. 392 U.S. 183 (1968).
129. 297 U.S. 175 (1936).
130. 426 U.S. at 853–54.
131. *Id.* at 854–55.
132. 421 U.S. 542 (1975).
133. 426 U.S. at 852–53. The *Usery* majority also found that the Economic Stabilization Act of 1970 was constitutionally more acceptable than the 1974 amendments to the FLSA because "[the] Act operates to reduce the pressures on state budgets rather than increase them." *Id.* But, state policy choices suffer under both statutes. As Justice Brennan pointed out, "it is 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.
134. 426 U.S. at 858 (Brennan, J., dissenting).
135. *Id.*
136. *Id.* at 863–64.
137. *Id.* at 880–81 (Stevens, J., dissenting).
138. *Id.*
139. *Id.* at 856 (Blackmun, J., concurring).

The majority in *Usery*, in pursuit of an affirmative restraint on the commerce power, found primary support in the intergovernmental tax immunity cases.[140] Additional support was also sought from other sources. First the Court looked to the statement in *Fry* that the tenth amendment was "not without significance."[141] *Fry*, however, affirmed the use of the commerce power, and was not direct support. The second source was the language in *Wirtz* that "[t]he Court has ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity.' "[142] But, as the *Usery* dissent noted, *Wirtz* was a pure power case—one in which the only relevant question was whether the economic activities affected commerce.[143] Finally, the majority pointed to a series of nineteenth century cases. Only in one of the three cases, *Coyle v. Smith*,[144] was the scope of congressional power at issue.[145] The *Coyle* Court held that the power to admit states was only the power to admit equal states, but did not find that state sovereignty stood as an affirmative limitation, or in any way affected that congressional power.[146]

Thus, notwithstanding the Court's reliance on other sources, the key to the majority's analysis in *Usery* remains the intergovernmental tax immunity cases. They represent the Court's only articulation of state sovereignty as a limitation upon an otherwise plenary congressional power.[147] For the majority, it was enough to recognize that both the taxing power and the commerce power "find their genesis in Art. I, § 8"[148] and therefore to conclude that similar state sovereignty limits should attach to both.[149]

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140. *Id.* at 843–44 (citing New York v. United States, 326 U.S. 572 (1946)); Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926)).

141. 426 U.S. at 842–43. Reliance on *Fry* is understandable, given the rejection of the "tenth amendment as a truism" language contained therein. *See* section III–B *supra*.

142. 392 U.S. at 196 (footnote omitted).

143. Justice Brennan pointed out that the " 'ample power' . . . was not found . . . to result from some affirmative limit on the exercise of the commerce power but rather in the Court's function of limiting the congressional exercise of its power to regulation of 'commerce.' " 426 U.S. at 860 n.3. *See* section III–B *supra*.

144. 221 U.S. 559 (1911).

145. The other two cases were Texas v. White, 74 U.S. (7 Wall.) 700 (1869), involving the effect of Texas' secession on several United States bonds it held, and Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1869), considering the ability of the states to prescribe the mode of payment for taxes state citizens owed their state.

146. 221 U.S. at 567, 580. The *Usery* dissent further distinguished these cases. 426 U.S. at 867–68 n.8 (Brennan, J., dissenting).

147. *See* note 140 *supra* and accompanying text.

148. 426 U.S. at 843–44 n.14.

149. The majority summarily rejected the argument, raised by Justice Brennan's dissent, that the sole federalism restraints on congressional exercise of the commerce

The first of four significant problems with the majority's approach in *National League of Cities v. Usery* is the Court's failure to furnish an adequate, constitutionally significant reason for applying tax immunity principles to the commerce power. As noted above, the only reason offered by the majority is that both the tax and the commerce power are found in article I, section 8;[150] no analysis was offered to explain why textual position alone mandated equal treatment. Justice

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power are political. *Id.* at 841–42 n.12. (Justice Brennan's argument found support in Justice Marshall's opinion in Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 197 (1824).) The majority explained that, even where the party whose constitutional power is impaired participates in the legislative process (*i.e.* the states through their representatives), such participation does not validate the legislative act. 426 U.S. at 841–42 n.12. The majority supported this proposition with cases in which congressional enactments were held unconstitutional because they usurped the presidential power over appointments. *Id. See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976).

The two crucial differences between the separation of powers problem in *Buckley* and the federalism dispute in *Usery* are, first, that in *Buckley* the Court is acting to protect an express constitutional power, the power of appointments under article II, § 2, clause 2, whereas in *Usery* there is no express constitutional protection for state control over its employment relationships. Rather, there is only the ambiguous notion of reserved power under the tenth amendment. Second, and perhaps more important, the majority was either unwilling or unable to recognize the distinction between "vertical" constitutional disputes (conflicts between the states and the federal government) and "horizontal" disputes (conflicts between the three branches of the federal government).

The Constitution is fundamentally the enumeration of federal powers. Commentators largely agree that the role of judicial review in vertical disputes is primarily to protect the federal powers from encroachment by the states. Freund, *Umpiring the Federal System*, 54 COLUM. L. REV. 561, 567 (1954); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–52 (1954). The Court is on "weaker ground," as described by Professor Wechsler and by Justice Brennan, when it decides a vertical dispute against the exercise of federal power and in favor of the states which participated in the federal action through representation in Congress. Wechsler, *supra* at 559; 426 U.S. at 857–59 (Brennan, J., dissenting). In a horizontal dispute, on the other hand, the Court's role in resolving conflicts between the executive and the legislature is not protector of one party against the encroachments of the other; rather the Court's role in a balance of powers dispute is to protect the tripartite structure of the federal government as provided in the Constitution—even in the face of voluntary relinquishments of that power. Chief Justice Taft observed that: "it is a breach of National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power." Hampton & Co. v. U.S., 276 U.S. 394, 406 (1928). Therefore, the Court is properly zealous when it halts the attempts of the other two branches to alter the constitutional structure; but in federalism disputes, its proper role is more limited.

150. Perhaps significant to the outcome of the case, as the majority noted, is the fact that the appellee (the government) acknowledged the existence of judicially cognizable state sovereignty limits. 426 at 842. In effect, the government abandoned the basic separation of powers argument offered by the dissent, and argued that the state sovereignty tensions were of sufficient magnitude in *Usery* to require the use of a balancing of interests approach to resolve the issue. Brief for Appellee at 36–41, National League of Cities v. Usery, 426 U.S. 833 (1976).

Brennan's dissent was of no assistance in this regard. He was content to maintain that commerce was not tax and to inquire no further.[151] The result was that both the majority and the dissent could each parade a number of taxing,[152] commerce,[153] and war[154] power cases for each opposing position.

The debate would have been more edifying had the majority referred to the dissent in *Fry*. There, Justice Rehnquist did address this issue, noting that tax immunities were based on the proposition that the power to tax is the power to destroy. He reasoned further that the power to regulate could be equally destructive and should therefore be subject to the same restraint.[155] Perhaps the majority was trying to make this same point when, after a lengthy discussion of the asserted fiscal effects of the amendments and how they might alter state policy choices,[156] it spoke of "displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions . . . ."[157] Unfortunately, by phrasing the issue in terms of "whether these determinations [wages and hours of state employees] are 'functions essential to separate and independent existence' ",[158] the Court

151. 426 U.S. at 863–64 (Brennan, J., dissenting).

152. New York v. United States, 326 U.S. 572 (1946); Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926).

153. Fry v. United States, 421 U.S. 542 (1975); Maryland v. Wirtz, 392 U.S. 183 (1968); North American Co. v. SEC, 327 U.S. 686 (1946); United States v. Darby, 312 U.S. 100 (1941); Santa Cruz Packing Co. v. NLRB, 303 U.S. 453 (1938); United States v. California, 297 U.S. 175 (1936); Sanitary Dist. v. United States, 266 U.S. 405 (1925); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

154. Case v. Bowles, 327 U.S. 92 (1946).

155. 421 U.S. at 554 (Rehnquist, J., dissenting).

156. 426 U.S. at 846–52. The majority failed to consider a leading tax immunity case which dealt with the contention that it is an essential state function to pay substandard wages. In Helvering v. Gerhardt, 304 U.S. 405 (1938), the Court observed that:

> even though, to some unascertainable extent, the tax deprives the states of the advantage of paying less than the standard rate for the services for which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states. At most it may be said to increase somewhat the cost of state governments . . . .

Id. at 420. If principles of tax immunity are relevant to commerce power enactments, it is difficult to see why a tax that hinders the payment of substandard wages is constitutionally less intrusive of state sovereignty (measured by its "essential functions") than a regulation which has the same effect. This is particularly the case where, as the *Usery* majority notes, the factual issues relating to the exact degree of intrusion are not resolved. 426 U.S. at 846. Perhaps the regulations at issue pose a threat sufficiently different in kind from those in *Helvering v. Gerhardt* that "resolution of the factual issues as to the effect of the amendments is not critical to our disposition of the case." *Id.* Such a difference is not apparent.

157. 426 U.S. at 852.

158. *Id.* at 845 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).

did not address the underlying policy question of whether the effects of burdensome regulation are similar to burdensome taxes. Instead, the inquiry was limited to whether these choices are important to the state.

This weakness in the majority's analysis of the relationship of intergovernmental immunity principles to the commerce clause is further evidenced by the Court's handling of *Case v. Bowles*.[159] Reiterating that "the Tenth Amendment 'does not operate as a limitation upon the powers, express or implied, delegated to the national government,' "[160] the *Case* Court upheld the validity of certain price restraints as applied to timber sold by the state of Washington. The statute at issue in *Case*[161] was not unlike the price component of the Act considered in *Fry*,[162] save that it was enacted under the congressional war power, rather than the commerce power. If one were to follow the *Usery* Court's logic, the war power, like the commerce and taxing powers, "finds its genesis in Art. I, § 8"[163] of the Constitution and thus should be subject to similar affirmative limitations. At this point, noting the similarity between *Fry* and *Case*, the majority in *Usery* could have distinguished the war power price controls on the same basis as they distinguished *Fry*—by referring to their emergency and short-term nature.[164] The Court did not. Instead, it simply found that *Case* involved the war power and as a result "has no direct application to the questions we consider today at all."[165] The Court left the impression that, with regard to the war power, no affirmative limitations exist.[166] In this way, the majority drew back from its apparent position that all article I section 8 powers should be treated alike,[167] without offering any sound approach to that issue.

The second significant problem in *Usery* is the Court's method of resolving the state sovereignty issue once it was conceded to exist. By inquiring only about the importance of the power to the states, the Court did not permit itself to measure countervailing federal interests. This is demonstrated by the Court's statement of the critical question as ". . . whether [the state's determinations of the wages it pays to its

159. 327 U.S. 92 (1946).

160. *Id.* at 102 (quoting Fernandez v. Weiner, 326 U.S. 340, 362 (1945)).

161. Emergency Price Control Act of 1942, Pub. L. No. 421, ch. 26, 56 Stat. 23, Pub. L. No. 383, ch. 325, 58 Stat. 640, Pub. L. No. 108, ch. 214, 59 Stat. 306.

162. *See* section III–B *supra*.

163. 426 U.S. at 843–44 n.14.

164. *Id.* at 853.

165. *Id.* at 854–55 n.18. The dissent, however, saw the implications of the majority's analysis of *Case*. *Id.* at 871 (Brennan, J., dissenting).

166. *Id.* at 854–55 n.18.

167. The Court reserved decision on the effects of state sovereignty on the spending power. *Id.* at 852 n.17.

employees] are 'functions essential to separate and independent existence.' "[168] Similarly, the majority concluded "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."[169] Neither of these statements allows a balancing of federal and state interests. Indeed, nowhere does the majority even mention any federal interest regarding the challenged amendments.

The only hint of balancing in the opinion is when the majority distinguished *Fry*:

> The enactment at issue there was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall. The means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specified period of time. The effect of the across-the-board freeze authorized by that Act, moreover, displaced no state choices as to how governmental operations should be structured, nor did it force States to remake such choices themselves.[170]

Even here, despite the attention to "an extremely serious problem" which could only be solved by the "National Government," it could be argued that the critical fact was that the Act "displaced no state choices," and therefore the statute would pass muster even under the majority's one-dimensional importance-to-the-state test. Still, this reference to countervailing national interests is, perhaps, the thread of balancing which allowed Justice Blackmun to concur.[171]

The result of the majority's approach was that they arrived at a rule but failed to give an adequate reason:

> [T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments.[172]

The difficulty is that the term "sovereign capacity" is too vague. Why the state, as an employer, is acting in its "sovereign capacity" any more in *Usery* than in *Fry* or by running a railroad as in *United States*

168. *Id.* at 845 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).

169. 426 U.S. at 852 (emphasis added) (footnote omitted).

170. *Id.* at 853.

171. *Id.* at 856 (Blackmun, J., concurring). The dissenters had trouble being as generous as Justice Blackmun. They could not find any balancing by the Court. *Id.* at 873–74, 876 (Brennan, J., dissenting).

172. *Id.* at 852.

v. California,[173] *California v. Taylor*,[174] or *Parden v. Terminal Railway*,[175] is not explained. Perhaps the majority felt that certain state activities may be more in need of protection than others, and therefore meant to resurrect the governmental function-proprietary function dichotomy discarded in *New York v. United States*.[176] Justice Rehnquist said earlier that such an approach "might in some form prove useful;" still, there was no suggestion that it would prove dispositive.[177]

The third serious problem with *Usery* is the "essential function test" adopted by the majority. This problem is closely related to the second because the unworkable test adopted by the Court in large measure caused its failure to balance. The test[178] was explained in three different ways. First, the Court suggested that state policy choices with respect to the structuring of its employment relationships are "essential."[179] Alternatively, the Court suggested that "state policies regarding the manner in which [the state] will structure delivery of those governmental services which their citizens require,"[180] form the nexus of state sovereignty. Finally, the Court proposed that the service provided is the key, that police and fire protection, as well as health care and education, are the "integral . . . governmental services"[181] which must be protected so that policy choices regarding them are immune from federal regulation.[182]

In regard to the first formulation, to say that the state must be free to structure its employment relationships as it sees fit proves too much. Justice Stevens' dissent pointed out several aspects of the "employment relationship" which, in his view, are clearly regulable:

> The Federal Government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, observe safety regulations when he is performing his job, to forbid him from burning too much

173. 297 U.S. 175 (1936) (subjecting the State of California to the Federal Safety Appliance Act).

174. 353 U.S. 553 (1957) (subjecting the State of California, as an employer, to the Railway Labor Act).

175. 377 U.S. 184 (1964) (subjecting the State of Alabama, as an employer, to the F.E.L.A.).

176. 326 U.S. 572, 580 (1946). *See* section II-B *supra*.

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

178. The Court was not altogether sure whether it was concerned with "essential" functions or "traditional" functions. 426 U.S. at 845, 852.

179. *Id.* at 851.

180. *Id.* at 847.

181. *Id.* at 855. In fact, the Court used this test to distinguish *California* on the basis of the activity involved therein. *Id.* at 854 n.18.

182. *Id.* at 855.

> soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the governor's limousine over 55 miles an hour.[183]

The Court had previously recognized the federal government's power over employment relationships in *Parden v. Terminal Railway*[184] (giving state railroad employees the right to sue their state under the Federal Employers Liability Act in federal court) and *California v. Taylor*[185] (holding the State of California subject to the Railway Labor Act rather than its own civil service laws with respect to state employees engaged in the operation of a railroad).

The second formulation offered by the Court, requiring protection of all state policy choices in the delivery of services,[186] is likewise overly broad. That formulation would also result in the exemption of clearly regulable activities such as those mentioned above. The most that can be argued is that when the federal government seeks to impose direct and permanent regulations on state fiscal choices, and those regulations compel the expenditures of state money without any other valid purpose such as health or safety, then the federal government has crossed into an area of state sovereignty and may be precluded from exercising its power.[187]

The third suggested test for essential functions—whether the particular state activity is an integral government service[188]—is probably more workable than the other two but, in light of *Usery* itself, is both too narrow and too broad. It is more workable because it looks to a particular, discrete state activity. Such activities are more observable and therefore more easily defined than the other two formulations of essential state functions. It is too narrow, however, because *Usery* invalidated the application of the Fair Labor Standards Act to *all* state employees, not merely those engaged in police, fire, education, and

183. *Id.* at 880–81. Some of these regulations, such as the 55 mile per hour speed limit, fall within the spending power, not the commerce power, which, as the Court noted, may be subject to different limitations. *Id.* at 852 n.17.

184. 377 U.S. 184 (1964).

185. 353 U.S. 553 (1957).

186. 426 U.S. at 847.

187. Avoiding a conflict, the *Usery* Court found *Fry* distinguishable on two grounds. First, *Fry* involved a *temporary* regulation to counter a *national emergency*. 426 U.S. at 853. Second, *Fry* involved the forbidding of an expenditure, not the compulsion of one. *Id.* So construed, *Usery* is but one of a series of recent cases in which the Court has acted to protect the state treasury. *See* Durchslag, *Welfare Litigation, the Eleventh Amendment and State Sovereignty: Some Reflections on* Dandridge v. Williams, 26 CASE W. RES. L. REV. 60 (1975).

188. 426 U.S. at 855.

health services. Accordingly, the Court's purported distinction of *United States v. California* on the basis of the state's activity (operating a railroad) is inadequate.[189] Indeed, the Court viewed the question in *California* solely in terms of the state's interest: "California's activity . . . was not in an area that *the States have regarded* as integral parts of their governmental activities."[190] To assert that federal power must give way whenever the states (by majority vote?) decide to "regard an area as essential" is clearly unworkable. The formulation is too broad because certain aspects of the delivery of *all* services are regulable.[191]

Ultimately, the problem with the concept of "essentiality" is that to describe one state function as "essential" is no more than to express a preference for one type of activity over another. The Constitution expresses no such preferences.[192] To go further and declare that such "essential functions" shall be immune from all federal regulation is to impose a degree of rigidity on the commerce clause reminiscent of the early commerce clause cases, which lacked the flexibility to deal with changing national needs.[193] Even Justice Rehnquist has declared these early cases to be "anachronistic and doctrinally unsound."[194]

The fourth, and perhaps the most fundamental problem with the approach taken by the Court in *National League of Cities v. Usery* was that the crucial issue was phrased in terms of the tenth amendment[195] and state sovereignty: "Whether these determinations are 'functions essential to separate and independent existence.' "[196] The Court's analysis could have been more thorough, and it could have arrived at a more workable standard, if it had considered the problem in terms of the doctrine of separation of powers. If the majority had considered the question whether, and to what degree, the judiciary is the proper branch for resolution of federalism issues, then the Court would have

189. *Id.* at 854 n.18.

190. *Id.* (emphasis added).

191. Justice Blackmun made clear in his concurrence that he would find federal environmental regulations applicable to states as polluters. *Id.* at 856. Thus, Justice Blackmun and the dissenters in *Usery* form a majority on that issue. *See* District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *vacated and remanded*, 97 S. Ct. 1635 (1977).

192. *See* the dissent of Justice Stevens, 426 U.S. at 880–81. *See also* note 183 *supra* and accompanying text.

193. *See* section II–A *supra*.

194. Fry v. United States, 421 U.S. at 551 (Rehnquist, J., dissenting).

195. "This Court has never doubted that there are limits upon the power of Congress to override State sovereignty . . . . In *Fry* the Court recognized that an express declaration of this limitation is found in the Tenth Amendment." 426 U.S. at 842 (citation omitted).

196. *Id.* at 845 (citation omitted).

confronted more directly the difficulties of defining the constitutionally recognizable state interests which require judicial protection.

The separation of powers question was central to Justice Brennan's dissent.[197] Justice Brennan recalled the language of Chief Justice Marshall in *Gibbons v. Ogden*,[198] reaffirmed in *Wickard v. Filburn*,[199] that the sole restraints on the commerce power arise from the political process.[200] However, he did not investigate the reasons for these statements, nor did he acknowledge that both cases involved federal regulation of private activity, not state activity. As a result, Justice Brennan did not inquire whether a distinction between state and private activity has constitutional significance.[201] Still, Justice Brennan never suggested that state sovereignty is not *relevant* to the commerce power; rather his focus was on the judicial role.[202] He found that the only proper inquiry for the Court was the subject matter of regulation; that is, whether the economic activity is or affects interstate commerce.[203] Any further inquiry is, according to Justice Brennan, "a thinly veiled rationalization for judicial supervision of a policy judgment that our system of government reserves to Congress."[204] More pointedly, he characterized the result in *Usery* as "a transparent cover for invalidating a congressional judgment with which [the majority] disagree."[205]

Justice Brennan argued that the structure of Congress creates implicit controls in favor of the states[206] and for that reason judicially imposed restraints in the area of taxation are to be construed narrowly.[207] The weakness of Justice Brennan's position is that the recogni-

197. *Id.* at 856–80.

198. 22 U.S. (9 Wheat.) 1, 197 (1824).

199. 317 U.S. 111, 120 (1942).

200. 426 U.S. at 857–58, 875–76.

201. The only cases cited by the dissent which involved federal regulation of state activity and thus constitute direct authority are Case v. Bowles, 327 U.S. 92 (1946) (concerning the war power), and, more directly, United States v. California, 297 U.S. 175 (1936), and Maryland v. Wirtz, 392 U.S. 183 (1968) (both concerning the commerce power). The dissent also sought to distinguish *Fry* in order to buttress its position. 426 U.S. at 801 n.4.

202. *Id.* at 858, 861, 875–78. *See* notes 134–36 *supra* and accompanying text.

203. *Id.* at 876.

204. *Id.*

205. *Id.* at 867 (footnotes omitted). Justice Stevens, while unwilling to find that there is no judicially cognizable federalism limit, largely concurred in Justice Brennan's characterization of the result in *Usery*. *Id.* at 880–81. Justice Frankfurter foresaw a similar problem in the tax immunity area if any restraints beyond "discrimination against the state" were imposed. New York v. United States, 326 U.S. 571, 581 (1946). *See* note 41 *supra* and accompanying text.

206. 426 U.S. at 876–77 (Brennan, J., dissenting).

207. *Id.* at 833 (quoting Helvering v. Gerhardt, 304 U.S. 405, 416 (1938)).

tion of such implicit controls does not necessarily lead to the conclusion that *no* judicially imposed state sovereignty restraint ought to be applied to the commerce power. Indeed, unless the taxing power can be persuasively distinguished from the commerce power, the tax immunity cases would seem to require, at a minimum, the recognition of judicially imposed restraints upon congressional regulation that *discriminates* against the states.[208]

For this reason, the major flaw in the *Usery* decision is not the Court's usurpation of a task wholly given over to the legislature, because the allocation of some power in this area to the judiciary is at least arguably permissible. The crucial problem is the majority's disregard for the text and the structure of the Constitution in reaching a result which expands the judicial role. The text of the Constitution provides only the ambiguous notion of reserved power, defined simply as the residue after federal power is delegated.[209] Further, the structure created by the Constitution expressly designates a separate body, the Senate, to represent state interests equally. Since the principles adopted in *Usery* can only be tied to the vague terms of the tenth amendment, the danger of the *Usery* analysis is that it can be used to invalidate any federal regulation directly affecting the states that a majority of the court finds personally distasteful.

D. *The Aftermath: Cases Since* Usery

Since the *Usery* decision, the Supreme Court has decided one important case affecting the reach of *Usery's* holding.[210] In *Fitzpatrick v. Bitzer*,[211] decided just four days after *Usery*, the Court allowed state employees to recover money damages from their state when they proved a claim of sex discrimination under Title VII.[212] The Court held that the fourteenth amendment allows Congress to override a claim of sovereign immunity under the eleventh amendment.[213]

Justice Rehnquist, again writing for the majority, was careful to distinguish between congressional power under the commerce clause, and congressional power under section five of the fourteenth amend-

208. This was as far as Justices Stone and Frankfurter were able to agree in New York v. United States, 326 U.S. 572 (1946). *See* Helvering v. Gerhardt, 304 U.S. 405 (1938). *See also* section II–B *supra*.

209. U.S. CONST. amend. X.

210. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). It has avoided deciding another. *See* EPA v. Brown, 521 F.2d 827 (1975), *vacated and remanded*, 97 S. Ct. 1635 (1977).

211. 427 U.S. 445 (1976).

212. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e–2000e–2(a) (1970 & Supp. V 1975).

213. 427 U.S. at 456.

ment. He observed that "the congressional authorization involved in *Parden* [*v. Terminal Railway Co.*,[214] an earlier eleventh amendment case] was based on the power of Congress under the commerce clause; here, however, the Eleventh Amendment defense is asserted in the context of legislation passed pursuant to Congress' authority under § 5 of the Fourteenth Amendment."[215] After describing the fourteenth amendment as "carv[ing] out" power for the federal government from that of the states,[216] the Court sought to explain the nature of that power:

> When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. . . . Congress may, . . . for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.[217]

It would appear that in *Fitzpatrick*, the Court recognized a textual difference between the commerce clause and the fourteenth amendment, exempting the fourteenth amendment from state sovereignty restraints otherwise applicable to federal power. Under the Court's analysis, the commerce clause speaks to the subject matter of power—commerce—but not to the actor. Therefore, restraints running in favor of a particular class of actors, the states, remain, despite the "plenary" nature of congressional power over the subject matter. The fourteenth amendment, however, speaks to both the subject matter and to the states as a specialized class of actors. It declares that the states are prohibited from a particular set of activities,[218] and that Congress may exercise plenary power to enforce that prohibition.[219] Consequently, while state sovereignty limits may affect the commerce power, they

214. 377 U.S. 184 (1964).

215. 427 U.S. at 452–53.

216. *Id.* at 456 (quoting *Ex parte* State of Virginia, 100 U.S. 339, 346 (1880)).

217. 427 U.S. at 456. Seven members of the Court joined the majority opinion. Justices Brennan and Stevens, concurring in the result, wrote separate opinions, each finding the commerce power to be a separate, adequate basis for the enactment of the 1972 amendments to Title VII. *Id.* at 458. Justice Stevens differed from Justice Brennan in that he questioned the fourteenth amendment basis of the claim, and found the eleventh amendment defense to be inapplicable for other reasons. *Id.* at 459–60.

218. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

219. "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

are expressly prevented from restraining congressional power under the fourteenth amendment by the text of that amendment.[220]

Following *Usery* and *Fitzpatrick* there has been much litigation in the lower federal courts concerning the effect of *Usery* on sections of the 1974 amendments to the Fair Labor Standards Act other than the minimum wage and maximum hour provisions invalidated by the Court in *Usery*. In particular, this litigation has mainly concerned the extension of the equal pay[221] and age discrimination[222] provisions of

220. The pleasing simplicity of this analysis conceals two important problems. The *Fitzpatrick* Court held that when Congress acts under the fourteenth amendment, the protections of state sovereignty reflected in the eleventh amendment are a nullity. 427 U.S. at 456. At the same time, in both *Fitzpatrick* and *Usery*, the Court posited that affirmative restraints inherent in the federal structure (created by the Constitution) are not disarmed by the text of the commerce clause. *See* text accompanying notes 209, 210 *supra*. Yet in Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973), the Court acknowledged that the eleventh amendment *could* be *overcome*, under certain circumstances, by congressional action. *Id.* at 284. *Accord*, Eldeman v. Jordan, 415 U.S. 651 (1974); Parden v. Terminal Ry. Co., 377 U.S. 184 (1964). Apparently, the fact that states can waive their eleventh amendment immunity is critical under the spending (*Eldeman*) and commerce (*Employees, Parden*) powers, so that the only issue under those article I, § 8 powers is whether Congress, by inviting or permitting state activity in a given area, has required a waiver of eleventh amendment sovereign immunity. If that is so, however, it remains an anomaly why state sovereignty limitations reflected in the tenth amendment (which cannot be overriden by congressional action) form a more rigid barrier than those reflected in the eleventh amendment.

The second problem concealed in *Fitzpatrick* is the Court's apparent assumption, without expressly deciding the issue, that sex is a "suspect classification" under the fourteenth amendment requiring "strict scrutiny." The Court found the 1972 amendments to the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(a)–(g) (1970 & Supp. V 1975), to have been a valid exercise of congressional power under section five of the fourteenth amendment. 427 U.S. at 453 n.9. Presumably, this is because Congress could reasonably find that sex discrimination exists, and is proscribed by section one of the fourteenth amendment as defined by the judiciary. *Cf.* Oregon v. Mitchell, 400 U.S. 112 (1970) (recognizing Congress' section five power to alter local voting requirements). The problem is that, prior to *Fitzpatrick*, no majority of the Court had ever expressly found that discrimination on the basis of sex required "strict scrutiny." *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). Yet, the statute at issue went beyond proscribing sex discrimination *unless* there is a rational basis therefor; it proscribed *all* sex-based discrimination. An alternative explanation for this result is equally disquieting. Recognizing that sex had never before been held to be a suspect classification, the Court may have recognized congressional power under section five to define, as well as to enforce, the rights declared under section one of the fourteenth amendment. This argument has been suggested before as an alternative theory for the holding in Katzenbach v. Morgan, 384 U.S. 641 (1966). *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1016–17 (1975); Burt, Miranda *and Title II: A Morganic Marriage*, 1969 SUP. CT. REV. 81. It had been viewed as being put to rest in Oregon v. Mitchell, 400 U.S. 112 (1970). *See* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975). But perhaps that theory has been given new vitality by *Fitzpatrick*.

221. *See, e.g.*, Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976); Usery v. Dallas Indep. School Dist., 421 F. Supp. 111 (N.D. Tex. 1976); Usery v.

the FLSA to state employers. Although enacted under the commerce power and inserted into the machinery of the FLSA, the Equal Pay Act[223] appears to have the same effect on state employers as the sex discrimination provisions of Title VII.[224] As a result, most courts have found the application of the analogous Equal Pay Act provisions valid against the states on the basis of the fourteenth amendment as interpreted in *Fitzpatrick*.[225] Still, nearly every court that considered the issue also found the Equal Pay Act valid against the states under the commerce clause, adopting to a greater or lesser extent the balancing approach called for by Justice Blackmun in *Usery*.[226]

These decisions manifest lower courts' reluctance to adopt the principles announced in *Usery*. They purport to balance the interests involved, but have usually failed to adequately consider the state interests. Often, courts have found the putative state interest to be in sex discrimination, or have found a "minimal intrusion" without a great deal of analysis.[227] While these results may be explained in part by the existence of an alternative rationale in section five of the fourteenth amendment, they also demonstrate the problem of attempting to balance under *Usery*. Defining the state interest to be the harm which the federal law seeks to avoid (sex discrimination in employment) is not what is required. Rather, *Usery* announced that certain

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Washoe County School Dist., 79 Lab. Cas. (CCH) ¶ 33,438 (D. Nev. 1976); Usery v. University of Texas, 79 Lab. Cas. (CCH) ¶ 33,448 (W.D. Tex. 1976); Usery v. Bettendorf Community School Dist., 423 F. Supp. 637 (S.D. Iowa 1976); Christensen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976); Howard v. Ward County, 418 F. Supp. 494 (D.N.D. 1976).

222. Usery v. Board of Educ., 12 Empl. Prac. Dec. (CCH) ¶ 11, 184 (D. Utah 1976).

223. 29 U.S.C. § 206 (1970), Pub. L. No. 88-38, 77 Stat. 56.

224. 42 U.S.C. §§ 2000e–2000e-2(j) (1970 & Supp. V 1975).

225. *See, e.g.*, Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976).

226. *See* Usery v. Dallas Indep. School Dist., 421 F. Supp. 111 (N.D. Tex. 1976); Usery v. Bettendorf Community School Dist., 423 F. Supp. 637 (S.D. Iowa 1976); Usery v. Fort Madison Community School Dist., 79 Lab. Cas. (CCH) ¶ 33,419 (S.D. Iowa 1976); Christensen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976). Even the one case that held the Equal Pay Act inapplicable to the states allowed recovery, but only under Title VII. Howard v. Ward County, 418 F. Supp. 494 (D.N.D. 1976). Significantly, the *Howard* Court ignored the advice of Justice Blackmun and applied *Usery* in an astonishingly mechanical manner. It is, perhaps, noteworthy that *Howard* was the first reported case applying *Usery* to the Equal Pay Act.

227. *See* Usery v. Dallas Indep. School Dist., 421 F. Supp. 111 (N.D. Tex. 1976); Christensen v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976); Usery v. Kent State Univ., 13 Empl. Prac. Dec. ¶ 11,374 (N.D. Ohio 1976); Usery v. Salt Lake City Bd. of Educ., 12 Empl. Prac. Dec. ¶ 11,184 (D. Utah 1976); Usery v. Univ. of Texas, 79 Lab. Cas. ¶ 33,448 (W.D. Tex. 1976); Usery v. Fort Madison Community School Dist., 79 Lab. Cas. ¶ 33,419 (S.D. Iowa 1976); Usery v. Kenosha Unified School Dist. No. 1, 79 Lab. Cas. ¶ 33,462 (E.D. Wisc. 1976); Usery v. Charleston County School Dist., Civil No. C 76-248 (D.S.C. 1976).

areas of state choices, particularly fiscal choices relating to employment, cannot be emasculated by broad federal regulation. Under *Usery* the state's concern is its financial ability to structure employment relationships in order to deliver services it considers essential. So construed, the use of a true balancing approach would still likely result in holding the equal pay provisions to be valid when applied to the states—although the balance would be close. The provisions do not emasculate state choices to the same degree as the minimum wage-maximum hour provisions. All the provisions reach the same range of employment relationships, but the equal pay provisions are less intrusive because they do not prescribe levels of state expenditure; instead, they only require that states act impartially when compensating their employees. The states are still free to set the level of compensation.[228] This lesser harm to the states must be balanced against the harm to the federal objective which would result from the invalidation of the provisions. If the provisions were invalidated, a substantial segment of the work force would be outside federal protection. As to those people, the federal policy against sex discrimination in employment would be totally frustrated. This harm to the federal interest is similar, if not the same, as that which existed in *Usery*, but given the lesser intrusion upon the states, the balance would tend to favor the federal interests. While the result is not totally free from doubt, under Justice Blackmun's balancing test in *Usery* the extension of the Equal Pay Act to the states should be valid.

The majority opinion in *Usery* left open several important issues concerning the reach of the principles announced therein.[229] *Fitzpatrick v. Bitzer*[230] indicated the Court's resolution of the fourteenth amendment issue. While the war power issue may not soon be resolved,[231] the spending power may provide an interesting problem for the Court.

Several courts have already found unpersuasive *Usery*-based, tenth amendment challenges to spending power regulation of state and local government activity.[232] In one case the court found that since the state had the option of not participating in the spending program, and thus

228. Admittedly, the statute precludes leveling down as a remedy for violative conduct. 29 U.S.C. § 206(d)(1) (1970). However, when states establish programs and pay scales they are still free to set the level of compensation so long as it is impartial.

229. 426 U.S. at 852 n.17, 854–55 n.18.

230. 427 U.S. 445 (1976).

231. It may never become an issue for want of a war to generate legislation under that power.

232. *See* County of Los Angeles v. Coleman, 423 F. Supp. 496 (D.D.C. 1976); Dupler v. City of Portland, 421 F. Supp. 1314 (D. Me. 1976).

avoiding the regulation, the state's sovereignty was not impermissibly violated.[233] Another court simply stated that the spending power is not the commerce power, holding the regulation reasonably related to the federal statutory purpose, and therefore valid.[234] Neither of these cases goes beyond the traditional view of the spending power.[235]

So long as the Supreme Court accepts the proposition that states are not coerced when they are able to opt out of a program to avoid regulation,[236] *Usery* will have no effect on the spending power. Under a balancing approach, the states' ability to avoid coerced regulation will mean that the claimed harm to state interests, however defined, will be less than the harm which would have existed if the regulation had been imposed under the commerce clause. Unless the Court attempts to evaluate the amount of actual coercion resulting from the potential loss of federal monies, regulations reasonably related to a valid federal interest will be sustained. The federal purpose will be furthered by states participating in the program, while state interests can still be protected by individual states opting out of the program. If the enactment is held invalid, however, the federal interest will be frustrated with no additional benefit to the states. Thus, balancing the harm would require sustaining the federal act.

IV. CONCLUSION

In formulating state sovereignty restraints on Congress' regulatory power under the commerce clause, it should be recognized that the type of restraint discussed in *Usery* is different from the issue of the proper subject matter for regulation.[237] The magnitude of the effect on interstate commerce caused by a given economic activity, involved in the early commerce clause cases, is not at issue. Rather, state sovereignty is called upon to protect a special class of actors, the states. The goal is to protect the states' freedom to engage in those activities which are "essential to [their] separate and independent existence."[238] The Constitution is silent on what constitutes such functions; there are no powers delegated to the states. The problem is to define reserved power as used in the tenth amendment with sufficient clarity and specificity to create an effective judicial tool, rather

233. County of Los Angeles v. Coleman, 423 F. Supp. 496, 502 n.27 (D.D.C. 1976).

234. Dupler v. City of Portland, 421 F. Supp. 1314 (D. Me. 1976).

235. The traditional tests were developed in Steward Mach. Co. v. Davis, 301 U.S. 548 (1937), and Oklahoma v. United States Civil Serv. Comm'n., 330 U.S. 127 (1947).

236. *E.g.*, Oklahoma v. United States Civil Serv. Comm'n., 330 U.S. 127 (1947); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

237. *See* section II-A *supra*.

238. 426 U.S. at 845 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).

than a talisman. Since a state can be defined only in terms of the activities in which it engages, the judiciary is on weak constitutional ground when it selects any particular activity for protection because the Constitution makes no such choices. The most that can be said with any assurance is that the Court has the power to save the tenth amendment from becoming a nullity since, by the terms of the tenth amendment, *some* power is reserved. In contrast, when the Court acts to protect *federal* power over interstate commerce from state interference, it is acting under two express constitutional provisions, the commerce clause and the supremacy clause.[239] As a result, the Court stands on much firmer constitutional ground.

In seeking to define and protect state interests in the performance of their "essential functions," it must be recognized that over the years government at all levels has taken on the task of providing services previously supplied by the private sector.[240] Most of these activities can be said to affect interstate commerce to a degree sufficient to bring them within the purview of Congress' commerce power.[241] The displacement of the private sector by expanding state services adds to the operational definition of the state. If a state can be heard to claim that these activities are (or become) "essential," then, in effect, the states have been given the power to define and enlarge an affirmative constitutional right, and, correspondingly, to reduce federal power. Such a result is clearly undesirable.[242]

One final point needs to be made. In the areas of due process and equal protection under the fourteenth amendment, the level of judicial scrutiny has been said to vary, depending upon how well the political process can work to adequately balance and protect the conflicting interests involved.[243] Similarly, in the tax immunity area, Justice Stone described state immunity as more limited than federal immunity because of the ability of the political system to operate as an effective control.[244] While federal interests are not represented in state legisla-

239. U.S. CONST. art. VI.

240. Examples include water and sewer services, electric power, mass transit, and health care.

241. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); United States v. Darby, 312 U.S. 100 (1941).

242. Justice Stone recognized the same problem in the area of tax immunity: "[T]he national taxing power would be unduly curtailed if the state, by extending its activities could withdraw from it subjects of taxation traditionally within it." New York v. United States, 326 U.S. 572, 589 (1946) (citations omitted) (Stone, J., concurring). *See* Helvering v. Powers, 293 U.S. 214, 225 (1934). *See also* text accompanying note 190 *supra*.

243. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (equal protection); United States v. Carolene Products, 304 U.S. 144, 152–53 n.4 (1938) (due process).

244. Helvering v. Gerhardt, 304 U.S. 405, 412 (1938).

tures, the states *are* represented in the federal Congress and their interests are thus protected from potentially harsh federal taxation.[245] The *Usery* majority expressly rejected this caveat,[246] but it is submitted that where political restraints operate, the Court should defer to the controls of the political process. This principle of judicial self-restraint should apply whenever state sovereignty is held to be an affirmative limit on congressional power. Stated more broadly, whenever the Court is acting as a constitutional arbitrator between competing political power centers, the judiciary must be sensitive to its own need for independence. It should exercise restraint, not only because the parties have an alternate means of dispute resolution, but also because judicial self-interest demands it. If the Court involves itself in political matters it invites political manipulation.

By rejecting the principle of judicial restraint, *Usery* stands as potentially one of the most activist decisions of this generation. Seizing the tenth amendment as an "affirmative limitation" on the power of Congress, the Court has fashioned a tool to reshape the political judgments of the legislative branch. Because the doctrine of "essential" or "traditional" functions is undefined by the text of the Constitution, the judiciary is bound to develop its own set of doctrines to implement this new limitation on federal power.

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245. *Id.*
246. 426 U.S. at 841–42 n.12. *See* note 149 *supra*.